SECOND EDITION

THE COMPLETE BILL OF RIGHTS

The Drafts, Debates, Sources, & Origins

Edited by

NEIL H. COGAN

OXFORD

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(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

This book is dedicated to
my late mother, Elizabeth Katz Cogan,
my late father, Jacob Cogan,
my mother-in-law, Anna Maud Morse Dodge,
and my late father-in-law, Don Arthur Dodge.

"And you shall impress them upon your children."
— Deuteronomy 6:7

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18.1.2.7New Jersey: Constitution, 1776
18.1.2.8New York: Constitution, 1777
18.1.2.9North Carolina
18.1.2.9.aCharter to Sir Walter Raleigh, 1584
18.1.2.9.bFirst Charter of Carolina, 1663
18.1.2.9.cSecond Charter of Carolina, 1665
18.1.2.9.dThe Fundamental Constitutions of Carolina, 1669
18.1.2.9.eConstitution, 1776

18.1.2.10Pennsylvania
18.1.2.10.aCharter for the Province of Pennsylvania, 1681
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18.1.2.10.dConstitution, 1776
18.1.2.11Rhode Island: Charter of Rhode Island and Providence Plantations, 1663
18.1.2.12South Carolina
18.1.2.12.aConstitution, 1776
18.1.2.12.bConstitution, 1778
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18.1.2.13.aConstitution, 1777
18.1.2.13.bConstitution, 1786
18.1.2.14Virginia
18.1.2.14.aThe Second Charter of Virginia, 1609
18.1.2.14.bThe Third Charter of Virginia, 1611–12
18.1.2.14.cBill of Rights, 1776

18.1.3Other Texts
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18.1.3.2Thomas Jefferson, A Bill Declaring Who Shall Be Deemed Citizens of the Commonwealth, 1779
18.1.3.3Patterson, New Jersey Plan, June 15, 1787
18.1.3.4Hamilton, June 18, 1787

18.2DISCUSSIONS OF DRAFTS AND PROPOSALS

18.2.1Philadelphia Convention
18.2.1.1June 19, 1787
18.2.1.2August 28, 1787
18.2.1.3September 15, 1787

18.2.3Newspapers and Pamphlets

18.2.3.1The Federal Farmer, No. 6, December 2, 1787
18.2.3.2Cassius, No. 6, December 21, 1787
18.2.3.3A Freeman, No. 1, January 23, 1788
18.2.3.4The Federal Farmer, No. 18, January 25, 1788
18.2.3.5A Native of Virginia, April 2, 1788
18.2.3.6The Federalist, No. 80, Publius (Hamilton), May 28, 1788

18.2.4Letters and Diaries

18.3DISCUSSIONS OF RIGHTS

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18.3.2Case Law
18.3.2.1Bayard v. Singleton
18.3.2.2Apthorp v. Backus

AppendixBill of Rights

PREFACE TO SECOND EDITION

Seventeen years ago, I wrote in the preface *The Complete Bill of Rights* that my project is "to provide the most complete, accurate, and accessible set of texts" for interpreting the Bill of Rights. The texts to which I referred and had collected were those written or printed through 1791, the year that Virginia became the tenth of fourteen states to approve the third through twelfth proposed amendments to the Constitution, making the renumbered First through Tenth Amendments the "Bill of Rights" of the Constitution.

More than two centuries after ratification, when I decided to edit the project, there was no available single-volume edition providing for each of the Bill's clauses in a categorized, chronological, and unedited form its drafts, proposals, sources, debate, case law, and other background materials. As reviewers noted, there was and remains a masterful project collecting the documentary history of the Constitution and its Amendments.[1] But *The Complete Bill of Rights* satisfied a need for readily accessible texts, taken and reproduced from their originals and arranged in a useful and readable edition.[2] Moreover, as the work of a professionally trained historian and lawyer, the edition collected original legal texts important to understand the Bill of Rights and not found and collected in other collections.

The first edition apparently satisfied the needs of many. I was delighted, as any editor would be, with the many citations to the book by the United States Supreme Court and other federal and state courts, and by authors of articles and books. Memorably, I received a handwritten note from the late venerated scholar, Professor Gerald Gunther of Stanford Law School, who told me that he stayed up late at night when he received the volume to read history that he had not previously known. That kind of message, so seldom received, is a blessing and treasure for late nights and lonely editing and proofing.

This second edition expands the first in two respects. It adds two new chapters —chapter 17, the Writ of Habeas Corpus Clause in Article I, Section 9 of the Constitution; and chapter 18, the Privileges and Immunities Clause of Article IV, Section 2, Clause I. The protections in these two clauses of the 1789 Constitution were deemed essential to control federal and state power even *before* the proposals to add the amendments that became the Bill of Rights.

The second edition also expands the background material for the Bill by collecting substantial excerpts from dictionaries and treatises that were available to the Framers and were found in libraries in Massachusetts, New York, North Carolina, Pennsylvania, South Carolina, and Virginia. Frequently, the excerpts are taken from books held in the private library of John Adams and bear Mr. Adams' nameplate. These include, for example, Hawkins' *Pleas of the Crown*, books I and II (1762); and Burn, *Justice of the Peace*, volumes 1 through 4 (1766).

As the editor of a collection, what is otherwise the work of an archivist with the privilege of a publisher, I acknowledge that I am both expanding what is accessible and narrowing what might be accessible. The decisions about what document is in or not in the archive; how an archived document is replicated; and where an archived document is located, each and together inevitably narrow the archive. Nonetheless, I am confident that both the first and second editions have substantially expanded the accessibility of accurate original materials that will assist everyone wanting ready access to accurate and complete documents about our fundamental rights and liberties.

The archival plan for the editions was and remains to divide documents into three groups. For each clause of the Bill of Rights, the first section replicates each proposal, draft, and source. The second section replicates the discussion of the proposals and drafts. And the third section replicates the discussion within legal treatises and case decisions, the background for the proposals. This plan makes the documents easy to locate from the table of contents, without an index search.

In addition to accessibility, the implementation of the plan assures accuracy. For each document in the first section, in both the first and second editions, the collection replicates the original, whether it exists in printed or handwritten form, and does so from the original copy or printing, and not from subsequent printings. That is, the original is replicated either from a handwritten original or a pre-1789 printed document or book. Further, the document in this collection duplicates the spelling, punctuation, capitalization, and underlining, of each document. The two changes made in this second edition from the first, in order to enable digital search, are that titles and captions do not necessarily reflect their original placement in a line of text, their font size and italicization, and paragraphs do not necessarily reflect their original indentation.

The second edition, like the first, has the word "complete" in its title. As noted above, the editor does not intend and never intended to to convey a message that a one-volume collection has every text that a user might possibly wish in order to understand American fundamental rights and liberties. The documents in each

first and third section of a clause's history are, within their contexts, whole and unedited documents. Moreover, in mimicking other "compleat" books, both editions collect and locate documents in a manner that trained researchers are likely to pursue in achieving understanding and at least the beginning of expertise. To reduce the subjectivity of a socially constructed archive, the editor replicated the texts as he found them in the originals, no editorial ellipses or other changes. And in the first section of each chapter—the sources for the rights—, the editor included every proposal and every published source with which a proponent and participant would have been familiar.

It is in the second and third sections of each chapter where the editor truly edited. In the second section—the discussion of a proposal—, the editor included discussion about each proposal, but he erred on the side of including more rather than less discussion. Nonetheless, admittedly, the editor unavoidably removed the discussion from the entirety of the context. In the third section—the legal treatise and decisional law context—, the editor in the first edition relied principally upon Blackstone's *Commentaries* for the background of the Bill. The second edition corrects that deficit, if it was one. The second edition includes the leading dictionaries and treatises, including their margin notes (inserted as numbered footnotes), which were in the libraries in the 1780's and with which the Framers would have been familiar. With these changes, the editor believes that this second edition is more complete that the first.

There is no political agenda in publishing the first and second editions of *The Complete Bill of Rights*. The renewed interest, beginning with Attorney General Edwin Meese's urging in the 1980's, to locate the original meaning, intention, and understanding of the Constitution and its Amendments, may have had a political motivation, but it was also an important call to everyone to pay closer attention to our founding texts, principles, and discussions. While the editor believes that constitutionalism takes into account the history and traditions of text, principles, structures, practices, and precedents, at the same time he believes that the starting place and sometimes the ending place are the text and related materials such as those in these editions. This belief, the editor respectfully submits, fits one aspect of Mr. Chief Justice Marshall's instruction that it is, after all, "a constitution we are expounding."

This second edition would not be possible without the assistance of many kind persons: First, I thank student research assistants at Whittier College School of Law, Heather Gutterud, Brian Pelanda, Nancy Strogoff (Class of 2012), Stacey Kim-Jackson, Anastasia Goncharko, and Ivan Krimker (Class of 2013), Lance Hobbie, Erin McCusker, Jami Perez, Mark Sanchez, and Jay Schrecengost (Class of 2014), and Diego Brito, Hannah Chandoo, Aaron Cohen, and Nicholas

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I acknowledge the special debt I owe to the outstanding editors at Oxford University Press, Alex Flach, Commissioning Editor, and Jennifer Gong, former Associate Editor. Without their enthusiastic support and encouragement and their untiring patience, this edition would not have emerged. I will always be grateful to them. I also owe a special debt also to Mr. Balamurugan Rajendran, Project Manager, Newgen Knowledge Works Pvt. Ltd, and to Bala's staff, who brought their professional expertise and abundant care to the difficult tasks presented by old and worn manuscripts. They were patient with me, and I apologize for my sometimes impatience.

As always, I am indebted beyond measure to my spouse, Mannette Antill, for her unwavering love for our family and me, and her continuing devotion to someone with what might be deemed a happily undiagnosed obsession with completeness. She has my eternal love.

In addition to my late parents, Elizabeth and Jacob Cogan, to whom the first edition was dedicated, I am privileged to add a dedication to my mother-in-law and late father-in-law, Anna Maud and Don Arthur Dodge, all of whom taught their children the promise of this Land of Liberty.

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1 The project began and continues as a project based at the University of Wisconsin and led initially by Merrill Jensen and, as of this writing, John P. Kaminski. Still uncompleted in 26 volumes, *The Documentary History of the Ratification of the Constitution* (Madison, Wisconsin, 1976 to present), provides many but not all the texts in this volume. It does not provide, and is not intended to provide, the sources of the Bill's clauses in state constitutions and laws and colonial charters and laws. Nor does it provide the background of the Bill's clauses in the treatises and case law of the prior two centuries. And, the texts in *The Documentary History* are not organized clause by clause, so that drafts, proposals, sources, etc., pertinent to each clause are available in a single chapter.

2 The texts in the first and third parts of each chapter are collected from their originals; however, many of the texts in the second part of each chapter (texts about discussion of the drafts and proposals) are taken from reliable collections.

PREFACE

THIS BOOK'S AIM IS TO PROVIDE THE MOST COMPLETE, ACCURATE, and accessible set of texts available for interpreting the Bill of Rights, the first ten amendments to the United States Constitution. Well into the third century since its ratification, the importance of and necessity for a collection such as this are as great as ever; indeed, because of the Bill's continually increasing significance, perhaps the need for this book is greater than ever.

Significance of the Bill of Rights

Interpreting the Bill of Rights, which represented for Madison "the great rights of mankind," is of surpassing importance. Originally intended to limit the power of the federal government, most provisions of the bill now limit the power of *all* government within the United States—federal, state, and local. Put somewhat more didactically, the bill's limit upon power arises from the Constitution's principle of constitutional supremacy. By that principle, when a provision of federal, state, or local law—be it statute, rule, order, or other exercise of legal authority—conflicts with an applicable provision of the Bill of Rights, the latter deprives the former of some or all of its effect and thereby limits the power of government.

In the United States, at the turn of the twenty-first century, Americans file thousands of lawsuits each year in federal and state courts, asking judges to interpret the Bill of Rights in order to decide whether government has exceeded its power. In innumerable instances each day, Americans of all kinds—governors and legislators, school teachers and school children, police officers and motorists—ponder whether government, by the exercise of its authority, is violating the Bill of Rights and is, accordingly, acting beyond its constitutional powers. And they ponder how a judge, if presented with the question, would interpret the Bill and decide the question.

The Inevitability of Interpretation and the Inevitability of Disagreement

Whether there is a conflict between a provision of federal, state, or local law and the Bill of Rights inevitably depends upon interpretation, including an interpretation of the applicable provision of the Bill of Rights. “Tis funny about th’ constitution,” Finley Peter Dunne’s Mr. Dooley said, “It reads plain, but no wan can undherstant it without an interpreter.”

Not everyone agrees with Mr. Dooley. There are those who believe that judges do not interpret or, perhaps better, should not interpret. They should simply apply the applicable provision. But inevitably, even persons who agree that the task is simply to apply a provision engage in interpretation by their selection process, that is, by the dictionaries or treatises or cases they choose to read in order to learn the meaning of a provision, not to mention the personal experiences they bring to the reading process.

But even if we lay aside the controversy concerning the inevitability of interpretation, it is noteworthy and surprising that in the third century after the proposal and ratification of the Constitution and the Bill of Rights, significant controversy persists about such matters as whether there is an ultimate interpreter of the Constitution and Bill of Rights, and, if so, who that interpreter is. Related controversies concern the processes of constitutional interpretation and the proper texts to be used in constitutional interpretation.

The Importance of Originalism, More or Less

Regardless of whether the Supreme Court of the United States is the ultimate interpreter of the Constitution and Bill of Rights, as the Court itself has said, or whether each official sworn to uphold the Constitution is an interpreter of authority and competence equal to the Supreme Court, as several presidents and governors have said, most (but not all) interpreters agree that some form of originalism is the beginning, if not also the end, of interpretation. That is, most interpreters have said that one or more of the following conditions must be met in order to interpret a provision of the Constitution or Bill of Rights, with the important caveat that many would impose further conditions.

For some interpreters, originalism requires that one discern the original meaning of the applicable provision. This might require learning the meaning of words from contemporaneous dictionaries, examining the meaning of words in other constitutional and colonial provisions, provisions that were or might have been the source of the applicable provision or that simply show contemporaneous usage. And it might entail a study of words in caselaw and

treatises, again in order to show contemporaneous usage.

For some interpreters, originalism requires that one seek the original intention of the drafters of the applicable provision, an intention that might differ from the meaning of the words. This inquiry might require, as above, reading the sources of the applicable provision. It might also involve reading the proposals for the provision and the provision's drafts as they made their way through the legislative process. And it might necessitate reading the discussion of the provision both by those engaged in the legislative process and by those outside the process who sought to influence the discussion or, at least, to comment on the discussion.

For some interpreters, originalism requires that one determine the original understanding of the ratifiers, an understanding that might differ from the original meaning of the words and the original intentions of the drafters of the provision. This might require reading many of the same materials described above. Unfortunately, in the case of the Bill of Rights, there is no record of the discussion by the ratifiers in the legislative chambers.

In addition, many interpreters, though holding to originalism in one or more of its senses, emphasize more strongly the principles of a particular provision and related provisions. Of course, to learn what those principles are one must read the materials described above. Some of these interpreters emphasize the meaning and understanding of the text and its principles over the centuries in the minds and lives of the people of the United States. Such a historical understanding can be gained through studying caselaw, legislation, and customs and their attendant applications, refinements, and discussions. And for some interpreters, the emphasis is some part or some variation of all of these.

The Need for a Set of Originalist Texts

However an interpreter approaches her or his task, whether as an originalist exclusively or partially, some set of complete, accurate, and accessible texts is necessary. But, once again, more than two hundred years after the proposal and ratification of the Bill of Rights, it is surprising—especially in light of the historic references to and reliance on originalism in some sense—that there is no satisfactory set of texts for these purposes.

While there have been authoritative sets of texts arranged in chronological order, the published materials do not provide all the texts that many interpreters would choose to read. For example, there is no place where one can read all the drafts of the provisions of the Bill of Rights. One must piece the drafts together from journals, newspaper reports, and manuscripts.

Moreover, even if one can gain access to a complete set of printed materials, they often do not provide accurate versions of what many interpreters would want. For example, there is no single source that provides all the pertinent constitutional and statutory sources for the Bill of Rights. One must seek out each state's legislative texts. And even if there are libraries where one can gather all the sources from each state's legislative texts, it is unlikely that, with the exception of a few libraries, one will find the sources in a form that would have been available to the framers of the Bill of Rights. Rather, the form of these texts that one finds reprinted in state legislative materials or in secondary sources often differs in grammar, wording, punctuation, and capitalization from pre-1791 versions.

Plainly, from what I have noted, there are significant problems of completeness, accuracy, and accessibility. When representing a client in my role as an advocate, both in district courts and courts of appeals, I have often wished that I could, within a reasonably brief period of time, have access to all the pertinent materials to assist me in illuminating for a court the bearing of a constitutional amendment upon the issue before the court. But that has not existed, leaving me dissatisfied that I had done all I could to represent my client well.

The Methodology of the Collection

To remedy these problems and to assist lawyers, judges, scholars, and lay persons, I have compiled and edited the materials in this book. While many interpreters—whether lawyers, judges, historians, political scientists, or scholars in other fields—use and value materials that appeared after the ratification of the Bill of Rights, I decided to limit these materials to those that are of significant use and value to originalists and the many non-originalists who include originalist texts in their interpretations and other work. Like any edition, there have been choices and difficulties.

To compile a reasonably complete set of relevant texts up to the point of ratification, I sought out those materials that were produced by members of the First Congress—the Congress that considered, passed, and sent to the state legislatures the proposed amendments to the Constitution. These materials consist of journals and manuscripts held by the National Archives in Washington, D.C., and pamphlets and manuscripts held by the Library of Congress. I also located the proposals for constitutional amendments submitted by the state conventions that considered ratification of the Constitution, also held by the National Archives.

Readers will note that I have included texts from three versions of the Senate Journals, which were written out by hand from notes and later printed. The first handwritten Senate Journal for the First Session of the First Congress, the session during which the amendments were considered, was damaged by water and was replaced by a second handwritten version. Because there are some differences between these handwritten versions, I have included both the first, designated the Rough Journal, and the second, designated the Smooth Journal, as well as the printed version.

For source texts, I sought out materials that would have been available to the members of the First Congress or with which they would have been familiar. With just a few exceptions, these consist of collections of constitutions, statutes, laws, and charters published before 1789 and available in libraries in New York and other important cities. In addition, these materials include such widely known and widely held texts as the basic English constitutional materials, Blackstone's *Commentaries on the Laws of England*, and American and English caselaw.

For the debate in the Congress, I sought out the four contemporaneous newspaper reports, not the report from the *Annals*, a frequent reference in interpretative decisions despite its later compilation. The newspaper reports are

available on microfilm. For the debate in the ratifying conventions and in the press and pamphlets, I relied upon the excellent published collections now available. For letters and diaries, I did the same.

To compile an accurate set of texts, I examined the original documents myself, including the materials in the vaults of the National Archives and Library of Congress. Of course, the able staff of these institutions handled the documents with protective gear, but I was privileged to see the materials and compare them to my own texts. Despite these efforts, the reader should realize that seeing and comparing does not assure absolute accuracy or, better, agreed accuracy. Besides the errors to which we are all prone, differences of opinion inevitably arise regarding orthography. For example, it may sometimes be virtually impossible to distinguish whether a handwritten letter is capitalized or whether an aging mark is a semicolon, a comma, or a random mark or spot. I have used my best judgment. Others may disagree.

To limit this collection to a single volume, I have had to make some choices. While every draft, proposal, and congressional discussion is included, there may be some sources and some ratification and pamphlet debate that readers would have preferred that I include. Moreover, I have limited treatise discussion to Blackstone's *Commentaries*, with an occasional additional reference, and I have limited caselaw discussion to the most prominent cases. With a few exceptions, I have not included philosophical, political, or religious tracts. I apologize to those who would have preferred that I include Hale or Locke or another writer or yet another opinion. Perhaps, if this book proves useful, there may be an opportunity for an expanded edition.

How to Use this Book

A book claiming accessibility should be easy to use, and I have made every effort to ensure that this volume is user-friendly. I have assigned a chapter for each clause of the Bill of Rights, with the exception of the criminal clauses of the Sixth Amendment, which are found together in Chapter 12. I have divided the materials relating to each clause into three sections: texts, that is, the texts of the drafts, proposals, and sources of the clause; discussion of the clause's drafts and proposals; and discussion of the rights that are protected by the clause.

Thus, in Chapter 1, all of the drafts, proposals, and sources for the Establishment and Free Exercise Clauses are found in the first section, designated 1.1. All discussion of these drafts and proposals are found in the second section, designated 1.2. All discussion of the rights protected by the clauses, for example in Blackstone or pertinent caselaw, were there such, would be found in a third section, designated 1.3. Within each section the reader will find subsections for drafts of the clauses, designated 1.1.1, proposals for the clauses, designated 1.1.2, state and Colonial sources for the clauses, designated 1.1.3, and so on. Numbering continues within each subsection; thus, Madison's proposal for the clauses is designated 1.1.1.1, Sherman's proposal to the House Committee of Eleven is designated 1.1.1.2, and so on. The full structure of the volume can be seen by consulting the table of contents, which begins on page ix.

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I owe thanks also to Roy Mersky, librarian of the Tarlton Law Library of the University of Texas; Gail Daly, librarian of the Underwood Law Library of Southern Methodist University; and Bruce Muck, assistant librarian of Underwood.

In addition, I thank the typists and proofreaders, Pam Castellano, Susan M. Coassin, Jody DeStafanis, Rosanne Ferraro, Rosemary T. Golia, Shaun Jensen, Les Lane, Eileen Lennox, Laurie Mentz, Dana Mariano, Gillian Moses, Sue Passander, June Stanton, Bonnie Trexler, Rita E. Watson, and Teresa Zajac. Ms. Watson is blessed with skill and good humor, as is Ms. Stanton, who is assisting with the preparation of my book collecting the drafts, debates, sources, and discussion of the amendments to the United States Constitution ratified during Reconstruction, as well as related statutes.

I thank the outstanding professionals of the Quinnipiac College School of Law Library, Ann Deveaux, director, Michael Hughes, associate director, and Christina DeLucia and Larry Raftery, reference librarians. Ms. DeLucia was especially helpful in locating rare materials, as were my colleague Stanton Krauss, and my son (and future professor), Jacob K. Cogan.

Two archivists at the National Archives, Charles E. Schamel and John Van

Derweedt, gave me more time and attention than the equitable division of services should allow. They gave me the special privilege of reading original materials, including the amendment proposals and the Senate journals. They work under difficult conditions in a time of significant underfunding for the preservation of our nation's history.

Phil Lapsansky of the Library Company of Philadelphia was also more than generous with his time and attention. He allowed me the privilege of reading the Library Company's superb collection of pre-nineteenth-century American law books, including the special privilege of reading several books from the library of President Washington.

None of this work would have been possible without the support of two colleagues, President John L. Lahey and Provost John B. Bennett of Quinnipiac College. They have supported all of my efforts above and beyond any reasonable expectation. They have a profound understanding of the importance of scholarship, including scholarship by their deans.

I stand in the long line of persons who are indebted to Stanley N. Katz, professor in the Woodrow Wilson School, Princeton University, and president of the American Council of Learned Societies, who provided his very special encouragement and support for this project. We reconstruct the world by our own works and by the works we assist. Dr. Katz merits a special place on both grounds.

None of this work would have been possible, either, without the support, encouragement, and love of my spouse, Mannette Antill Dodge. She understands my drive to learn what is true and what is just.

Neil H. Cogan
Hamden, Connecticut
July 1997

ABBREVIATIONS OF SOURCES

Original Documents

An Additional Number of Letters from the Federal Farmer	(Thomas Greenleaf, 1788).
Bacon Abridgment	Matthew Bacon, *A New Abridgment of the Law* . (London (Savoy): E. and R. Nutt & R. Gosling, 1736 (vols. I–II), 1740 (vol. III), Catherine Lintot, 1759 (vols. IV), His Majesty's Law-Printers, 1760 (vol. V)) (Adams Library).
Blackstone Commentaries	William Blackstone. *Commentaries on the Laws of England* . 4 vols. Oxford, 1765.
Bond Justice of the Peace	J. Bond, *A Compleat Guide for Justices of the Peace* … , 3rd ed. (London: Richard and Edward Atkins, 1707) (Adams Library).
Burn Justice of the Peace	Richard Burn, *Justice of the Peace, and Parish Officer* , 10th ed., vols. 1–4. (London: Ho. Woodfall and W.Strahan, 1766).
Care English Liberties	Henry Care and William Nelson, eds. English Liberties, or the FreeBorn Subject's Inheritance; Containing Magna Charta, … , 5th ed., vol. 1 (Boston: J. Franklin, 1721)
Carpenter	A. H. Carpenter, "Habeas Corpus in the Colonies," *American Historical Review* (1902–03), vol. 3, pp. 18–27.
Coke Second Institutes	Edwardo Coke, *The Second Part of the Institutes of the Lawes of England* … (London: M. Flesher & R. Young, 1642).

Congressional Register	Thomas Lloyd, ed. *The Congressional Register* . 2 vols. New York, 1789.
Connecticut Acts	*Acts and Laws of the State of Connecticut in America* . New London, 1784.
Connecticut Acts, 1786	*Acts and Laws of the State of Connecticut in America* . (Hartford: Elisha Babcock, 1786).
Connecticut Charter	*The Charter Granted by His Majesty King Charles II to the Governour & Company of the English Colony of Connecticut in New-England in America* . New London, 1718.
Connecticut Code	*Code of 1650 … Commonly Called Blue Laws*. Hartford, 1822.
Constitutions	*The Constitutions of the Several Independent States …* (Philadelphia: Frances Bailey, 1781).
Continental Congress Papers	*Records of the Continental and Confederation Congresses and the Constitutional Convention, Miscellaneous Records of the Continental and Confederation Congresses* . Record Group 360, National Archives.
Cowel Interpreter	Dr. Cowel, *Nomothetis The Interpreter* , Thomas Manley ed. (London: J. Strater, 1672).
Cunningham Law Dictionary	T. Cunningham, *A New and Complete Law-Dictionary …* , vols. 1 and 2. (London: Law Printers to the King, 1764, 1765) (Adams Library).
Daily Advertiser	*Daily Advertiser* . New York, 1789.
Dall.	*Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania* , vol. 1, A. J. Dallas, ed. Philadelphia, 1790.
Dallas' Notes	Pennsylvania Herald, and General Advertiser, Pennsylvania Historical Society, Philadelphia, PA.
Delaware Laws	*Laws of the State of Delaware. …* New-Castle, 1797.
Ellsworth MS	*Senator Oliver Ellsworth's Handwritten Notes of the Senate Amendments to the Proposed Bill of Rights* . Record Group 46, National Archives.
Eng. Rep.	*The English Reports* . Vols. 1–176. London, 1900–1930.

First Congress Journal	*Journal of the First Congress of the American Colonies.* … New York, 1845.
Gazette of the U.S.	*Gazette of the United States* . Philadelphia, 1789.
Georgia Laws	*A Digest of the Laws of the State of Georgia* , Robert Watkins and George Watkins, eds. Philadelphia, 1800.
Hale Pleas of the Crown	Matthew Hale, *Historum Placitorum Coronae, The History of the Pleas of the Crown* , 2 vols. (London (Savoy): E. and R. Nutt and R. Gosling, 1736).
Hawkins Pleas of the Crown	William Hawkins, *A Treatise of the Pleas of the Crown* … , books I and II. (London: E. Richardson and C. Lintot, 1762) (Adams Library).
HJ	*Journal of the House of Representatives* . New York, 1789.
How. St. Tr.	Thomas Bayly Howell, ed. *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors.* … London, 1814–1826.
Jacob New-Law Dictionary	Giles Jacob, *The New Law-Dictionary* … , (London (Savoy): Henry Lintot, 1743) (Adams Library).
Journals of the American Congress	*Journals of the American Congress: From 1774 to 1788, Volume I: From September 5, 1774, to December 31, 1776, inclusive* (Washington: Way and Gideon, 1823).
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Documentary Locations

CtY Sterling Library, Yale University, New Haven, Connecticut.

DLC Library of Congress, Washington, D.C.

DNA National Archives, Washington, D.C.

DNDAR Daughters of the American Revolution, National Headquarters, Washington, D.C.

PHSP The Historical Society of Pennsylvania, Philadelphia, Pennsylvania.

PLC The Library Company of Philadelphia, Philadelphia, Pennsylvania.

CHAPTER 1

AMENDMENT I

ESTABLISHMENT AND FREE EXERCISE CLAUSES

1.1TEXTS

1.1.1DRAFTS IN FIRST CONGRESS

1.1.1.1Proposal by Madison in House, June 8, 1789

1.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.

Congressional Register, June 8, 1789, vol. 1, p. 427.

1.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

1.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of

conscience be in any manner, or on any pretext infringed.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

1.1.1.2Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 2 The people have certain natural rights which are retained by them when they enter into society, Such are the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness & safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably Assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the government of the united States.

Madison Papers, DLC.

1.1.1.3Report of House Committee of Eleven, July 28, 1789

Art. I, Sec. 9 — Between Par. 2 and 3 insert, “No religion shall be established by law, nor shall the equal rights of conscience be infringed.”

Broadside Collection, DLC.

1.1.1.4Motion by Madison in House, August 15, 1789

Mr. Madison

Thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed the people feared one sect might obtain a preeminence, or two combine together and establish a religion to which they would compel others to conform; he thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

Congressional Register, August 15, 1789, vol. 2, p. 196 (motion made and withdrawn).

1.1.1.5Motion by Livermore in House, August 15, 1789

1.1.1.5.a *Mr. Livermore*

Was not satisfied with that amendment, but he did not wish them to dwell long on the subject; he thought it would be better if it [the amendment] was altered, and made to read in this manner, that congress shall make no laws touching religion, or infringing the rights of conscience.

Congressional Register, August 15, 1789, vol. 2, p. 196 (motion made and "passed in the affirmative, 31 for, 20 against").

1.1.1.5.b "The Congress shall make no laws touching religion or the rights of conscience."

Daily Advertiser, August 17, 1789, p. 2, col. 1 ("The question on this motion was carried.").

1.1.1.5.c "The Congress shall make no laws touching religion or the rights of conscience."

New-York Daily Gazette, August 18, 1789, p. 798, col. 4 ("The question on this motion was carried.").

1.1.1.5.d "*Congress shall make no laws touching religion or the rights of conscience*.

Gazette of the U.S., August 19, 1789, p. 147, col. 1 ("The question on this motion was carried.").

1.1.1.6Motion by Ames in House, August 20, 1789

1.1.1.6.a "[C]ongress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."

Congressional Register, August 20, 1789, vol. 2, p. 242, col. 2 ("This being adopted.").

1.1.1.6.b "Congress shall make no law establishing religion, or to prevent the free exercise thereof; or to infringe the rights of conscience."

Gazette of the U.S., August 22, 1789, p. 150. ("This was adopted.").

1.1.1.7Further House Consideration, August 21, 1789

Third. Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

HJ, p. 107 ("read and debated. . . agreed to by the House, . . . two-thirds of the members present concurring").[1]

1.1.1.8House Resolution, August 24, 1789

ARTICLE THE THIRD.

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

House Pamphlet, RG 46, DNA.

1.1.1.9Senate Consideration, August 25, 1789

1.1.1.9.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth:

. . .

Article the third

> Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.
>
> Rough SJ, p. 215.

1.1.1.9.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

. . .

"*Article the Third*.

> "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.
>
> Smooth SJ, p. 194.

1.1.1.9.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

. . .

"*ARTICLE* THE *THIRD*.

> "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.
>
> Printed SJ, p. 104.

1.1.1.10Further Senate Consideration, September 3, 1789

1.1.1.10.a On Motion to amend Article third and to strike out these words, "Religion or prohibiting the free exercise thereof," and insert,

"One Religious Sect or Society in preference to others,"

Rough SJ, pp. 243–44 ("It passed in the negative.").

1.1.1.10.b On motion, To amend Article third, and to strike out these words, "Religion or prohibiting the free Exercise thereof," and insert, "One Religious Sect or Society in preference to others,"

Smooth SJ, p. 217 ("It passed in the Negative.").

1.1.1.10.c On motion, To amend Article third, and to strike out these words, "Religion or prohibiting the free Exercise thereof," and insert, "One Religious Sect or Society in preference to others,"

Printed SJ, p. 116 ("It passed in the Negative.").

1.1.1.11Further Senate Consideration, September 3, 1789

1.1.1.11.a On Motion that the Article third be stricken out

Rough SJ, p. 244 ("It passed in the negative.").

1.1.1.11.b On motion, That Article the third be stricken out,

Smooth SJ, p. 218 ("It passed in the Negative.").

1.1.1.11.c On motion, That Article the third be stricken out,

Printed SJ, p. 116 ("It passed in the Negative.").

1.1.1.12Further Senate Consideration, September 3, 1789

1.1.1.12.a On Motion to adopt the following, in lieu of the third Article

"Congress shall not make any law infringing the rights of conscience, or establishing any Religious Sect or Society,"

Rough SJ, p. 244 ("It passed in the negative.").

1.1.1.12.b On motion, to adopt the following, in lieu of the third Article,

"Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society,"

Smooth SJ, p. 218 ("It passed in the Negative.").

1.1.1.12.c On motion, To adopt the following, in lieu of the third Article,

"Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society,"

Printed SJ, p. 116 ("It passed in the Negative.").

1.1.1.13Further Senate Consideration, September 3, 1789

1.1.1.13.a On Motion to amend the third Article to read thus —

"Congress shall make no law establishing any particular denomination of religion in preference to another or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed."

Rough SJ, p. 244 ("It passed in the negative.").

1.1.1.13.b On motion, To amend the third Article, to read thus —

"Congress shall make no law establishing any particular denomination of Religion in preference to

another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed” — . . . .

Smooth SJ, p. 218 (“It passed in the Negative.”).

1.1.1.13.c On motion, To amend the third Article, to read thus —

“Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed” —

Printed SJ, p. 117 (“It passed in the Negative.”).

1.1.1.14Further Senate Consideration, September 3, 1789

1.1.1.14.a On the question upon the third Article as it came from the House of Representatives.

Rough SJ, p. 244 (“It passed in the negative.”).

1.1.1.14.b On the question upon the third Article as it came from the House of Representatives — . . . .

Smooth SJ, p. 218 (“It passed in the Negative.”).

1.1.1.14.c On the question upon the third Article as it came from the House of Representatives — . . . .

Printed SJ, p. 117 (“It passed in the Negative.”).

1.1.1.15Further Senate Consideration, September 3, 1789

1.1.1.15.a On Motion to adopt the third Article proposed in the Resolve of the House of Representatives amended by striking out these words.

“Nor shall the rights of conscience be infringed”

Rough SJ, p. 245 (“It passed in the affirmative.”).

1.1.1.15.b On motion, To adopt the third Article proposed in the Resolve of the House of Representatives, amended by striking out these words —

“Nor shall the rights of conscience be infringed” —

Smooth SJ, p. 218 (“It passed in the Affirmative.”).

1.1.1.15.c On motion, To adopt the third Article proposed in the Resolve of the House of Representatives, amended by striking out these words —

“Nor shall the rights of conscience be infringed” —

Printed SJ, p. 117 (“It passed in the Affirmative.”).

1.1.1.15.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in Article Third, by striking out these words “Nor shall the rights of conscience be infringed.”

Senate MS, RG 46, p. 2.

1.1.1.16 Further Senate Consideration, September 9, 1789

1.1.1.16.a And on Motion to amend article the third to read as follows:

“Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of Religion; or abridging the freedom of Speech, or the press, or the right of the People peaceably to assemble, and petition to the government for the redress of grievances.” —

. . .

On motion, To strike out the fourth article,

Rough SJ, p. 274 (As to each motion, “It passed in the Affirmative.”).

1.1.1.16.b On motion, To amend article the third, to read as follows:

“Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the Government for the redress of grievances” —

. . .

On motion, To strike out the fourth article, ...

Smooth SJ, p. 243 (As to each motion, “It passed in the Affirmative.”).

1.1.1.16.c On motion, To amend Article the third, to read as follows:

“Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the Government for the redress of grievances” —

. . .

On motion, To strike out the fourth Article,

Printed SJ, p. 129 (As to each motion, “It passed in the Affirmative.”).

1.1.1.16.d On the question to concur with the House of Representatives on their resolution of the 24th of Augt. proposing amendments to the constitution of the United States, with the following amendments viz:

. . .

To erase from the 3d. Article the word “Religion” & insert — Articles of faith or a mode of Worship. —

And to erase from the same article the words “thereof, nor shall the rights of Conscience be infringed” & insert — of Religion; or abridging the freedom of speech, or of the press, or the right of

the people peaceably to assemble, & to petition to the government for a redress of grievances

To erase the 4th. article, & the words "Article the fourth."

Ellsworth MS, pp. 1–2, RG 46, DNA.

1.1.1.17 Senate Resolution, September 9, 1789

ARTICLE THE THIRD.

Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition to the government for a redress of grievances.

Senate Pamphlet, RG 46, DNA.

1.1.1.18 Further House Consideration, September 21, 1789

RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

RESOLVED, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

1.1.1.19 Further Senate Consideration, September 21, 1789

1.1.1.19.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th,

15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

1.1.1.19.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

1.1.1.20Further Senate Consideration, September 21, 1789

1.1.1.20.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

1.1.1.20.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a

conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

1.1.1.21 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

1.1.1.22 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Article the eighth. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence.”

HJ, p. 152 (“On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14”).

1.1.1.23 Senate Consideration of Conference Committee Report, September 24, 1789

1.1.1.23.a Mr. Ellsworth, on behalf of the managers of the conference on “articles to be proposed to the several States as Amendments to the Constitution of the United States,” reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Smooth SJ, pp. 272–73.

1.1.1.23.b Mr. Ellsworth, on behalf of the managers of the conference on “Articles to be proposed to the several States as Amendments to the Constitution of the United States,” reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by

the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no Law RESPECTING AN ESTABLISHMENT OF RELIGION, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial BY AN IMPARTIAL JURY OF THE DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, AS THE DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Printed SJ, p. 145.

1.1.1.24 Further Senate Consideration of Conference Committee Report, September 24, 1789

1.1.1.24.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Smooth SJ, pp. 278–79.

1.1.1.24.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or

prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p. 148.

1.1.1.25 Further Senate Consideration of Conference Committee Report, September 25, 1789

1.1.1.25.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

RESOLVED, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

1.1.1.25.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

RESOLVED, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

1.1.1.26 Agreed Resolution, September 25, 1789

1.1.1.26.a Article the Third.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Smooth SJ, Appendix, p. 292.

1.1.1.26.b ARTICLE THE THIRD.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Printed SJ, Appendix, p. 163.

1.1.1.27Enrolled Resolution, September 28, 1789

Article the third. . . Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Enrolled Resolutions, RG 11, DNA.

1.1.1.28Printed Versions

1.1.1.28.a ART. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutes at Large, vol. 1, p. 21.

1.1.1.28.b ART. III. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutes at Large, vol. 1, p. 97.

1.1.2PROPOSALS FROM THE STATE CONVENTIONS

1.1.2.1Maryland Minority, April 26, 1788

12. That there be no national religion established by law, but that all persons be equally entitled to protection in their religious liberty.

Maryland Gazette, May 1, 1788 (committee minority).

1.1.2.2Massachusetts Minority, February 6, 1788

[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

Massachusetts Convention, pp. 86–87.

1.1.2.3New Hampshire, June 21, 1788

Eleventh

Congress shall make no Laws touching Religion, or to infringe the rights of Conscience —

State Ratifications, RG 11, DNA.

1.1.2.4New York, July 26, 1788

That the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others.

State Ratifications, RG 11, DNA.

1.1.2.5North Carolina, August 1, 1788

19th. That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.

10. [20th.] That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right, to the free exercise of religion according to the dictates of

conscience, and that no particular religious sect or society ought to be favoured or established by law in preference to others.

State Ratifications, RG 11, DNA.

1.1.2.6Pennsylvania Minority, December 12, 1787

1. The rights of conscience shall be held inviolable, and neither the legislative, executive, nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitutions of the several states, which provide for the preservation of liberty in matters of religion.

Pennsylvania Packet, December 18, 1787.

1.1.2.7Rhode Island, May 29, 1790

4th. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence, and therefore all men, have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favoured, or established by law in preference to others.

State Ratifications, RG 11, DNA.

1.1.2.8Virginia, June 27, 1788

That there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People in some such manner as the following:

. . .

Twentieth, That religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.

State Ratifications, RG 11, DNA.

1.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

1.1.3.1Connecticut

1.1.3.1.aFundamental Orders of Connecticut, 1638–39

> FORASMUCH as it hath pleased the Almighty God, by the wise disposition of his divine providence, so to order and dispose of things, that we the Inhabitants and residents of Windsor, Hartford and Weathersfield, are now cohabiting, and dwelling in and uppon the river of Connecticutt, and the lands thereunto adjoining, and well knowing when a people are gathered together, the word of God requires, that to meinteine the peace and union of such a people, there should bee an orderly and decent government established according to God, to order and dispose of the affaires of the people at all seasons, as occasion shall require; doe therefore associate and conjoine ourselves to bee as one publique STATE or COMMONWEALTH; and doe for ourselves and our successors, and such as shall bee adjoined to us at any time hereafter, enter into combination, and confederation together, to meinteine and preserve the libberty and purity of the Gospell of our Lord Jesus, which we now profess, as also the discipline of the churches, which, according to the truth of the said Gospell, is now practised amongst us; as allso in our civill affaires to be guided and governed according to such lawes, rules, orders, and decrees as shall bee made, ordered, and decreed. . . .
>
> Connecticut Code, pp. 13–14.

1.1.3.1.bNew Haven Code, 1655

> That none shall be admitted Freemen, or free Burgesses within this Jurisdiction, or any part of it, but such Planters as are Members of some one, or other of the approved Churches of *New-England*; nor shall any but such be chosen to Magistracy, or to carry on any part of Civil Judicature, or as Deputies or Assistants to have power, or Vote in establishing Lawes, or in making or repealing Orders, or to any chief Military Office, or trust, nor shall any others, but such Church Members, have any Vote in any such Elections. Though all others admitted to be Planters, have right to their proper Inheritances, and doe and shall enjoy all other Civil liberties and priviledges, according to all Lawes, Orders, or grants, which are, or hereafter shall be made for this Colony.
>
> New Haven's Lawes, pp. 9–10.

1.1.3.1.cCharter of Connecticut, 1662

CHARLES the Second, by the Grace of GOD, KING OF *England, Scotland, France* and *Ireland*, Defender of the Faith &c., . . . And We do further of Our especial Grace, certain Knowledge, and meer Motion, Give, and Grant unto the said Governour and Company of the English Colony of *Connecticut*, in *New-England* in *America*, and their Successors, That it shall and may be Lawful to and for the Governour, or Deputy-Governour, . . . to Erect and Make such Judicatories, for the Hearing and Determining of all Actions, Causes, Matters and Things happening within the said Colony or Plantation, and which shall be in Dispute and Depending there, as they shall think Fit and Convenient, and also from Time to Time to Make, Ordain, and Establish all manner of Wholesome and Reasonable Laws, Statutes, Ordinances, Directions and Instructions, not Contrary to the Laws of this Realm of *England*, as well for Settling the Forms, and Ceremonies of Government and Magistracy, Fit and Necessary for the said Plantation and the Inhabitants there, as for Naming and Stiling all Sorts of Officers, both Superiour and Inferiour, which they shall Find Needful for the Government and Plantation of the said Colony, and the Distinguishing and settling forth of the several Duties, Powers and Limits of every such Office and Place, and the Forms of such Oaths, not being Contrary to the Laws and Statutes of this Our Realm of *England*, to be Administered for the Execution of the said several Offices and Places, as also for the Disposing and Ordering of the Election of such of the said Officers as are to be Annually Chosen, and of such others as shall Succeed in case of Death or Removal, and Administring the said Oath to the New-Elected Officers, and Granting Necessary Commissions, and for Imposition of Lawful Fines, Mulcts, Imprisonment or other Punishment upon Offenders and Delinquents according to the Course of other Corporations within this Our Kingdom of *England*, and the same Laws, Fines, Mulcts and Executions, to Alter, Change, Revoke, Annul, Release, or Pardon under their Common Seal, as by the said General Assembly, or the major Part of them shall be thought Fit, and for the Directing, Ruling and Disposing of all other Matters and Things, whereby Our said People Inhabitants there, may be so Religiously, Peaceably and Civilly Governed, as their Good Life and Orderly Conversation, may Win and Invite the Natives of the Country, to the Knowledge and Obedience of the Only True God, and the Saviour of Mankind and the Christian Faith, which in Our Royal Intentions, and the Adventurers Free Profession is the Only and Principal End of this Plantation. . . .

Connecticut Charter, pp. 1, 4–5.

1.1.3.2Delaware

1.1.3.2.aCharter of Delaware, 1701

WILLIAM PENN, Proprietary and Governor of the province of Pennsylvania and territories thereunto belonging, to all whom these presents shall come, sendeth greeting. . . .

. . .

I. *Because* no people can be truly happy, though under the greatest enjoyment of civil liberties, if abridged of the freedom of their consciences, as to their religious profession and worship: And Almighty God being the only Lord of conscience, Father of lights and spirits; and the Author as well as Object of all divine knowledge, faith and worship, who only doth enlighten the minds, and persuade and convince the understandings of people, I do hereby grant and declare, That no person or persons, inhabiting in this province or territories, who shall confess and acknowledge One Almighty God, the Creator, Upholder and Ruler of the world; and professes him or themselves obliged to live quietly under the civil government, shall be in any case molested or prejudiced, in his or their person or estate, because of his or their consciencious persuasion or practice, nor be compelled to frequent or maintain any religious worship, place or ministry, contrary to his or their mind, or to do or suffer any other act or thing, contrary to their religious persuasion.

And that all persons who also profess to believe in Jesus Christ, the Saviour of the world, shall be capable (notwithstanding their other persuasions and practices in point of conscience and religion) to serve this government in any capacity, both Legislatively and Executively, he or they solemnly promising, when lawfully required, allegiance to the King as Sovereign, and fidelity to the Proprietary and Governor. . . .

. . .

But, because the happiness of mankind depends so much upon the enjoying of liberty of their consciences, as aforesaid, I do hereby solemnly declare, promise and grant, for me, my heirs and assigns, That the first article of this charter relating to liberty of conscience, and every part and clause therein, according to the true intent and meaning thereof, shall be kept and remain, without any alteration, inviolably for ever.

Delaware Laws, vol. 1, App., pp. 37, 39, 42.

Delaware Laws, vol. 1, App., pp. 37, 38, 42.

1.1.3.2.bDeclaration of Rights, 1776

SECT. 2. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship.

SECT. 3. That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man disturb the peace, the happiness or safety of society.

Delaware Laws, vol. 1, App., p. 79.

1.1.3.2.cConstitution, 1776

ART. 29. There shall be no establishment of any one religious sect in this state in preference to another; and no Clergyman or Preacher of the Gospel of any denomination shall be capable of holding any civil office in this state, or of being a Member of either of the branches of the Legislature while they continue in the exercise of the pastoral function.

Delaware Laws, vol. 1, App., pp. 90–91.

1.1.3.3Georgia

1.1.3.3.aConstitution, 1777

LVI. All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher, or teachers, except those of their own profession.

. . .

LXII. No clergyman, of any denomination, shall be allowed a seat in the legislature.

Georgia Laws, pp. 15–16.

1.1.3.3.bConstitution, 1789

ARTICLE I.

. . .

Sect. 18. No clergyman of any denomination shall be a member of the general assembly.

. . .

ARTICLE IV.

. . .

Sect. 5. All persons shall have the free exercise of religion; without being obliged to contribute to the support of any religious profession but their own.

Georgia Laws, pp. 27, 29.

1.1.3.4Maine: Grant of the Province of Maine, 1639

CHARLES by the grace of God King of England Scotland Fraunce and Ireland Defender of the faith, &c. . . . And for the better government of such our Subjectes and others as at any tyme shall happen to dwell or reside within the said Province and premisses or passe to or from the same, Our Will and pleasure is That the Religion nowe professed in the Church of England and Ecclesiasticall Governement nowe used in the same shalbee forever hereafter professed and with asmuch convenient speede as may bee setled and established in and throughout the said Province and premisses and every of them. . . .

Maine Historical Society.

1.1.3.5Maryland

1.1.3.5.aCharter of Maryland, 1632

CHARLES By the Grace of God, King of *England*, *Scotland*, *France and Ireland*, Defender of the Faith, &c. . . .

We do also grant and confirm. . . the Patronages and Advowsons of all Churches, which (as Christian Religion shall encrease within the Countrey, Isles, Ilets, and limits aforesaid) shall happen hereafter to be erected: together with license and power to build & found Churches, Chappels, &

Oratories, in convenient & fit places within the premises, and to cause them to be dedicated, and consecrated according to the Ecclesiastical Laws of our Kingdom of *England*. . . .

Maryland Charter, pp. 1, 3–4.

1.1.3.5.bAct Concerning Religion, 1649

Be it Therefore also by the Lo: Proprietary. . . that noe person or psons whatsoever within this Province, . . . professing to beleive in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof within this Province or the Islands thereunto belonging nor any way compelled to the beleife or exercise of any other Religion against his or her consent, soe as they be not unfaithfull to the Lord Proprietary, or molest or conspire against the civill Governemt, established or to bee established in this Province vnder him or his heires. . . .

Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland (Baltimore: Maryland Historical Society, 1883), vol. 1, pp. 246–47.

1.1.3.5.cDeclaration of Rights, 1776

33. That as it is the duty of every man to worship God in such manner as he thinks most acceptable to him, all persons professing the christian religion are equally entitled to protection in their religious liberty, wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless under colour of religion any man shall disturb the good order, peace or safety of the state, or shall infringe the laws of morality, or injure others, in their natural, civil or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain, any particular place of worship, or any particular ministry; yet the legislature may, in their discretion, lay a general and equal tax for the support of the christian religion, leaving to each individual the power of appointing the payment over of the money collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county; but the churches, chapels, glebes, and all other property now belonging to the church of England, ought to remain to the church of England for ever. . . .

34. That every gift, sale, or devise of lands, to any minister, public

teacher, or preacher of the gospel, as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of, or in trust for, any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order or denomination; and also every devise of goods or chattels to, or to or for the support, use or benefit of any minister, public teacher, or preacher of the gospel, as such, or any religious sect, order or denomination, without the leave of the legislature, shall be void; except always any sale, gift, lease or devise of any quantity of land not exceeding two acres, for a church, meeting, or other house of worship, and for a burying ground, which shall be improved, enjoyed or used only for such purpose, or such sale, gift, lease or devise, shall be void.

35. That no other test or qualification ought to be required on admission to any office of trust or profit, than such oath of support and fidelity to this state, and such oath of office, as shall be directed by this convention, or the legislature of this state, and a declaration of a belief in the christian religion.

36. That the manner of administering an oath to any person ought to be such as those of the religious persuasion, profession or denomination of which such person is one, generally esteem the most effectual confirmation, by the attestation of the Divine Being. And that the people called quakers, those called dunkers, and those called menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation in the manner that quakers have been heretofore allowed to affirm, and to be of the same avail as an oath, in all such cases as the affirmation of quakers hath been allowed and accepted within this state instead of an oath. And further, on such affirmation warrants to search for stolen goods, or the apprehension or commitment of offenders, ought to be granted, or security for the peace awarded; and quakers, dunkers, or menonists ought also, on their solemn affirmation as aforesaid, to be admitted as witnesses in all criminal cases not capital.

Maryland Laws, November 3, 1776.

1.1.3.5.dConstitution, 1776

55. That every person appointed to any office of profit or trust shall, before he enters on the execution thereof, take the following oath; to wit: “I, A.B. do swear, that I do not hold myself bound in allegiance to the king of Great-Britain, and that I will be faithful and bear true allegiance to the state of Maryland.” And shall also subscribe a declaration of his belief in the christian religion.

1.1.3.6Massachusetts

1.1.3.6.aCharter of New England, 1620

JAMES, by the Grace of God, King of *England*, *Scotland*, *France*, and *Ireland*, Defender of the Faith, &c. to all whom these Presents shall come, *Greeting*, Whereas, upon the humble Petition of divers of our well disposed Subjects, that intended to make several Plantations in the Parts of *America*, between the Degrees of thirty-ffoure and ffourty-five; We according to our princely Inclination, favouring much their worthy Disposition, in Hope thereby to advance the in Largement of Christian Religion, to the Glory of God Almighty, as also by that Meanes to streatch out the Bounds of our Dominions, and to replenish those Deserts with People governed by Lawes and Magistrates, for the peaceable Commerce of all, . . . Now forasmuch as We have been in like Manner humbly petitioned unto by our trusty and well beloved Servant, Sir *fferdinando Gorges*, Knight, Captain of our ffort and Island by Plymouth, and by certain the principal Knights and Gentleman Adventurers of the said Second Collonye, and by divers other Persons of Quality, who now intend to be their Associates, divers of which have been at great and extraordinary Charge, and sustained many Losses in seeking and discovering a Place fitt and convenient to lay the Foundation of a hopeful Plantation, and have divers Years past by God's Assistance, and their own endeavours, taken actual Possession of the Continent hereafter mentioned, in our Name and to our Use, as Sovereign Lord thereof, and have settled already some of our People in Places agreeable to their Desires in those Parts, and in Confidence of prosperous Success therein, by the Continuance of God's Devine Blessing, and our Royall Permission, have resolved in a more plentifull and effectual Manner to prosecute the same, and to that Purpose and Intent have desired of Us, for their better Encouragement and Satisfaction herein, and that they may avoide all Confusion, Questions, or Differences between themselves, and those of the said first Collonye, . . . And also for that We have been further given certainly to knowe, that within these late Years there hath been by God's Visitation raigned a wonderfull Plague, together with many horrible Slaugthers, and Murthers, committed amoungst the Sauages and brutish People there, heertofore inhabiting, in a Manner to the utter Destruction, Deuastacion, and Depopulacion of that whole Territorye, so that there is not

left for many Leagues together in a Manner, any that doe claime or challenge any Kind of Interests therein, nor any other Superiour Lord or Souveraigne to make Claime thereunto, whereby We in our Judgment are persuaded and satisfied that the appointed Time is come in which Almighty God in his great Goodness and Bountie towards Us and our People hath thought fitt and determined, that those large and goodly Territoryes, deserted as it were by their naturall Inhabitants, should be possessed and enjoyed by such of our Subjects and People as heertofore have and hereafter shall by his Mercie and Favour, and by his Powerfull Arme, be directed and conducted thither. In Contemplacion and serious Consideracion whereof, Wee have thougt it fitt according to our Kingly Duty, soe much as in Us lyeth, to second and followe God's sacred Will, rendering reverend Thanks to his Divine Majestie for his gracious favour in laying open and revealing the same unto us, before any other Christian Prince or State, by which Meanes without Offence, and as We trust to his Glory, Wee may with Boldness goe on to the settling of soe hopefull a Work, which tendeth to the reducing and Conversion of such Sauages as remaine wandering in Desolacion and Distress, to Civil Societie and Christian Religion, to the Inlargement of our own Dominions, and the Aduancement of the Fortunes of such of our good Subjects as shall willingly intresse themselves in the said Imployment, to whom We cannot but give singular Commendations for their soe worthy Intention and Enterprize. . . . And lastly, because the principall Effect which we can desire to expect of this Action, is the Conversion and Reduction of the People in those Parts unto the true Worship of God and Christian Religion, in which Respect, Wee would be loath that any person should be permitted to pass that Wee suspected to affect the Superstition of the Chh of Rome, Wee do hereby declare that it is our Will and Pleasure that noe be permitted to pass, in any Voyage from time to time to be made in the said Country, but such as shall first have taken the Oathe of Supremacy. . . .

New Plymouth Laws, pp. 1, 3, 17.

1.1.3.6.bWarwicke Patent (Charter of New Plymouth)

. . . And for as much as they have noe conveniente place either of tradinge or ffishinge within their own precints whereby (after soe longe travell and great paines,) so hopefull a plantacon may subsiste, as alsoe that they may bee incouraged the better to proceed in soe pious a worke which may especially tend to the propagation of religion and the great increase of trade

to his Ma[ts] realme. . . .

New Plymouth Laws, p. 23.

1.1.3.6.cCharter of Massachusetts Bay, 1628

. . . And, wee do of our further grace, certaine knowledge and meere motion give and grant to the said Governor and Companie, and their successors, that it shall and may be lawfull to and for the Governor or deputy Governor and such of the Assistants and Freemen of the said Company. . . to make, ordaine and establish all manner of wholesome and reasonable orders, lawes, statutes, and ordinances, directions, and instructions. . . for the directing, ruleing, and disposeing of all other matters and things whereby our said people inhabiting there may be so religiously, peaceably and civilly governed, as theire good life and orderly conversation, may winne and invite the natives of that country to the knowledge and obedience of the onely true God and saviour of mankind, and the christian faith, which in our royall intention, and the adventurers free profession is the principal end of this plantation. . . .

Massachusetts Bay First Charter, pp. 26–27.

1.1.3.6.dBody of Liberties, 1641

[58] Civill Authoritie hath power and libertie to see the peace, ordinances and Rules of Christ observed in every church according to his word. so it be done in a Civill and not in an Ecclesiastical way.

[59] Civill Authoritie hath power and libertie to deale with any Church member in a way of Civill Justice, notwithstanding any Church relation, office or interest.

Massachusetts Colonial Laws, p. 47.

1.1.3.6.eCharter of Massachusetts Bay, 1692

. . . And for the greater Ease and Encouragement of Our loving Subjects, inhabiting Our said Province or Territory of the *Massachusetts-Bay*, and of such as shall come to inhabit there, We do by these Presents, for Us, our Heirs and Successors, grant, establish and ordain, that for ever hereafter there shall be a Liberty of Conscience allowed in the Worship of G[od] to all Christians (except Papists) inhabiting or which shall inhabit or be resident within Our said Province or Territory. . . .

Massachusetts Bay Charter, p. 9.

1.1.3.6.fConstitution, 1780

PART I.

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ARTICLE

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II. It is the right as well as the duty of all men in society, publickly, and at stated seasons, to worship the **SUPREME BEING,** the Great Creator and Preserver of the Universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping **GOD** in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the publick peace, or obstruct others in their religious worship.

III. As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality, and as these cannot be generally diffused through a community, but by the institution of the publick worship of **GOD,** and of publick instructions in piety, religion and morality: Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this Commonwealth, have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politick, or religious societies, to make suitable provision, at their own expence, for the institution of the publick worship of **GOD,** and for the support and maintenance of publick protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.

And the people of this commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects, an attendance upon the instructions of the publick teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided notwithstanding, that the several towns, parishes, precincts, and other bodies politick, or religious societies, shall, at all times, have the exclusive right of electing their publick teachers, and of contracting with them for their support and maintenance.

And all monies paid by the subject to the support of publick worship, and of the publick teachers aforesaid, shall, if he require it, be uniformly applied

to the support of the publick teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said monies are raised.

And every denomination of christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law: And no subordination of any one sect or denomination to another shall ever be established by law.

PART II.

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CHAPTER VI.

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[ARTICLE] I. ANY person chosen Governour, Lieutenant Governour, Counsellor, Senator, or Representative, and accepting the trust, shall, before he proceed to execute the duties of his place or office, make and subscribe the following declaration, viz.:

"I, A.B., do declare, that I believe the christian religion, and have a firm persuasion of its truth; and that I am seized and possessed, in my own right, of the property required by the Constitution, as one qualification for the office or place to which I am elected."

. . .

Provided always, that when any person chosen or appointed as aforesaid, shall be of the denomination of the people called Quakers, and shall decline taking the said oaths, he shall make his affirmation in the foregoing form, and subscribe the same, omitting the words *"I do swear," "and abjure," "oath or," "and abjuration,"* in the first oath; and in the second oath, the words *"swear and;"* and in each of them the words *"So help me*, GOD;" subjoining instead thereof, *"This I do under the pains and penalties of perjury."*

Massachusetts Perpetual Laws, pp. 5–6, 18.

1.1.3.7New Hampshire

1.1.3.7.aAgreement of Settlers at Exeter, 1639

whereas it hath pleased the lord to moue the heart of our Dread Soveraigne Charles by the grace of god, king of England, Scotland, France & Ireland,

to grant license and liberty to sundry of his subjects to plant them selves in the westerne partes of America; Wee, his loyall subjects, brethern of the church of Exeter, situate & lying upon the river Pascataquacke wth other inhabitants there, considering wth our selves the holy will of god and our owne necessity, that we should not live wthout wholesome lawes and civil governement amongst us, of wch we are altogether destitute; doe in the name of christ & in the sight of god, combine our selves together, to erect & set up among us such governement, as shall be to our best discerning agreeable to the will of god: professing our selves subjects to our Soveraigne Lord King Charles according to the libertys of our English Colony of Massachusets & binding of our selves solemnely by the grace & helpe of christ & in his name, & fear to submit our selves to such godly & christian laws as are established in the Realme of England to our best knowledge; & to all other such Laws wch shall upon good grounds, be made & enacted amongst us according to god, yt we may live quietly and peaceablely together in all godlyness & honesty.

New Hampshire Division of Records Management and Archives, Old Town Papers, Exeter, 876161.

1.1.3.7.bConstitution, 1783

. . .

[Part I, Article] IV. Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.

V. Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others in their religious worship.

VI. As morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection; and as the knowledge of these, is most likely to be propagated through a society by the institution of the public worship of the DEITY, and of public instruction in morality and religion; therefore, to promote those important purposes, the people of this State have a right to empower, and do hereby fully empower

the legislature to authorize from time to time, the several towns, parishes, bodies-corporate, or religious societies within this State, to make adequate provision at their own expence, for the support and maintenance of public protestant teachers of piety, religion and morality:

Provided notwithstanding, That the several towns, parishes, bodies-corporate, or religious societies, shall at all times have the exclusive right of electing their own public teachers, and of contracting with them for their support and maintenance. And no portion of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination.

And every denomination of christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law: and no subordination of any one sect or denomination to another, shall ever be established by law.

And nothing herein shall be understood to affect any former contracts made for the support of the ministry; but all such contracts shall remain, and be in the same state as if this constitution had not been made.

New Hampshire Laws, p. 23.

1.1.3.8New Jersey

1.1.3.8.aConcession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New-Jersey, 1664

Item. That no Person qualified as aforesaid within the said Province, at any Time shall be any ways molested, punished, disquieted or called in question for any Difference in Opinion or Practice in matter of Religious Concernments, who do not actually disturb the civil Peace of the said Province; but that all and every such Person and Persons may from Time to Time, and at all Times, freely and fully have and enjoy his and their Judgments and Consciences in matters of Religion throughout the said Province, they behaving themselves peaceably and quietly, and not using this Liberty to Licentiousness, nor to the civil Injury or outward disturbance of others; any Law, Statute or Clause contained, or to be contained, usage or custom of this Realm of *England*, to the contrary thereof in any wise notwithstanding.

Item. That no pretence may be taken by our Heirs or Assigns for or by

reason of our right of Patronage and Power of Advouson, granted by his Majesty's Letter's Patents, unto his Royal Highness James Duke of *York*, and by his said Royal Highness unto us, thereby to Infringe the general Clause of Liberty of Conscience, aforementioned: WE do hereby grant unto the General Assembly of the said Province, Power by Act to constitute and appoint such and so many Ministers or Preachers as they shall think fit, and to establish their Maintenance, giving liberty beside to any Person or Persons to keep and maintain what Preachers or Ministers they please.

New Jersey Grants, p. 14.

1.1.3.8.bConcessions and Agreements of West New-Jersey, 1676

CHAPTER XVI

That no Men, nor number of Men upon Earth, hath Power or Authority to rule over Men's Consciences in religious Matters, therefore it is consented, agreed and ordained, that no Person or Persons whatsoever within the said Province, at any Time or Times hereafter, shall be any ways upon any pretence whatsoever, called in Question, or in the least punished or hurt, either in Person, Estate, or Priviledge, for the sake of his Opinion, Judgment, Faith or Worship towards God in Matters of Religion. But that all and every such Person, and Persons, may from Time to Time, and at all Times, freely and fully have, and enjoy his and their Judgments, and the exercise of their Consciences in Matters of religious Worship throughout all the said Province.

New Jersey Grants, p. 394.

1.1.3.8.cLaws of West New-Jersey, 1681

X. That Liberty of Conscience in Matters of Faith and Worship towards God, shall be granted to all People within the Province aforesaid; who shall live peaceably and quietly therein; and that none of the free People of the said Province, shall be rendered uncapable of Office in respect of their Faith and Worship.

New Jersey Grants, p. 425.

1.1.3.8.dFundamental Constitutions for East New-Jersey, 1683

XVI. All Persons living in the Province who confess and acknowledge the one Almighty and Eternal God, and holds themselves obliged in Conscience to live peaceably and quietly in a civil Society, shall in no way be molested or prejudged for their Religious Perswasions and Exercise in matters of Faith and Worship; nor shall they be compelled to frequent and maintain any Religious Worship, Place or Ministry whatsoever: Yet it is also hereby provided, that no Man shall be admitted a member of the Great or Common Council, or any other Place of publick Trust, who shall not profess Faith in *Christ-Jesus*, and solemnly declare that he doth no ways hold himself obliged in Conscience to endeavour alteration in the Government, or seeks the turning out of any in it or their ruin or prejudice, either in Person or Estate, because they are in his Opinion Hereticks, or differ in their Judgment from him: Nor by this Article is it intended, that any under the Notion of the Liberty shall allow themselves to avow Atheism, Irreligiousness, or to practice Cursing, Swearing, Drunkenness, Prophaness, Whoring, Adultery, Murdering or any kind of violence, or indulging themselves in Stage Plays, Masks, Revells or such like abuses;

for restraining such and preserving of the People in Deligence and in good Order, the great Council is to make more particular Laws, which are punctually to be put in Execution.

. . .

XX. That all Marriages not forbidden in the Law of God, shall be esteemed lawful, where the Parents or Guardians being first acquainted, the Marriage is publickly intimated in such Places and Manner as is agreeable to Mens different Perswasions in Religion, being afterwards still solemnized before creditable Witnesses, by taking one another as Husband and Wife, and a certificate of the whole, under the Parties and Witnesses Hands, being brought to the proper Register for that End, under a Penalty if neglected.

New Jersey Grants, pp. 162, 164.

1.1.3.8.eConstitution, 1776

XVIII. That no Person shall ever within this Colony be deprived of the inestimable Privilege of worshipping Almighty God in a Manner agreeable to the Dictates of his own Conscience; nor under any Pretence whatsoever compelled to attend any Place of Worship contrary to his own Faith and Judgment; nor shall any Person within this Colony ever be obliged to pay Tithes, Taxes or any other Rates, for the Purpose of building or repairing any Church or Churches, Place or Places of Worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes to be Right, or has deliberately or voluntarily engaged himself to perform.

XIX. That there shall be no Establishment of any one religious Sect in this Province in Preference to another; and that no Protestant Inhabitant of this Colony shall be denied the Enjoyment of any civil Right merely on Account of his religious Principles; but that all Persons, professing a Belief in the Faith of any Protestant Sect, who shall demean themselves peaceably under the Government as hereby established, shall be capable of being elected into any Office of Profit or Trust, or being a Member of either Branch of the Legislature, and shall fully and freely enjoy every Privilege and Immunity enjoyed by others their Fellow-Subjects.

New Jersey Acts, p. viii.

1.1.3.9New York, 1691

1.1.3.9.aAct Declaring. . . Rights & Priviledges, 1691

That no Person or Persons which profess Faith in God by Jesus Christ his only Son, shall at any time be any way molested, punished, disturbed, disquieted or called in question for any Difference in Opinion, or matter of Religious Concernment, who do not under that pretence disturb the Civil Peace of the Province, &c. And that all and every such Person and Persons may from time to time and at all times hereafter, freely have and fully enjoy his or their Opinion, Perswasions and Judgments in matters of Conscience and Religion, throughout all this Province; and freely meet at convenient Places within this Province, and there Worship according to their respective Perswasions, without being hindered or molested, they behaving themselves peaceably, quietly, modestly and Religiously, and not using this Liberty to Licentiousness, nor to the civil Injury or outward Disturbance of others. Alwayes provided, That nothing herein mentoined [*sic*] or contained shall extend to give Liberty to any Persons of the *Romish Religion* to exercise their manner of Worship, contrary to the Laws and Statutes of their Majesties Kingdom of *England*.

New York Acts, p. 19.

1.1.3.9.bConstitution, 1777

XXXVIII. AND WHEREAS we are required, by the benevolent Principles of rational Liberty, not only to expel civil Tyranny, but also to guard against that spiritual Oppression and Intolerance, wherewith the Bigotry and Ambition of weak and wicked Priests and Princes have scourged Mankind: This Convention doth further, in the Name and by the Authority of the good People of this State, ORDAIN, DETERMINE, AND DECLARE, That the free Exercise and Enjoyment of religious Profession and Worship, without Discrimination or Preference, shall forever hereafter be allowed within this State to all Mankind. *Provided*, That the Liberty of Conscience hereby granted, shall not be so construed, as to excuse Acts of Licentiousness, or justify Practices inconsistent with the Peace or Safety of this State.

XXXIX. AND WHEREAS the Ministers of the Gospel are, by their Profession, dedicated to the Service of God and the Cure of Souls, and ought not be diverted from the great Duties of their Function; therefore no Minister of the Gospel, or Priest of any Denomination whatsoever, shall at any Time hereafter, under any Pretence or Description whatever, be eligible to, or capable of holding any civil or military Office or Place, within this

State.

New York Laws, vol. 1, p. 13.

1.1.3.10North Carolina

1.1.3.10.aFirst Charter of Carolina, 1663

I. Whereas our right trusty and right well beloved Cousins and Counsellors. . . being excited with a laudable and pious Zeal for the Propagation of the Christian Faith, and the Enlargement of our Empire and Dominions, have humbly besought leave of us, by their Industry and Charge, to transport and make an ample Colony of our Subjects, Natives of our Kingdom of *England*, and elsewhere within our Dominions, unto a certain Country hereafter described, in the Parts of *America*, not yet cultivated or planted, and only inhabited by some barbarous People who have no Knowledge of Almighty God.

. . .

III. And furthermore, the Patronage and Avowsons of all the Churches and Chappels, which as Christian Religion shall increase within the Country, Isles, Islets and Limits aforesaid, shall happen hereafter to be erected, together with License and Power to build and found Churches, Chappels and Oratories, in convenient and fit Places, within the said Bounds and Limits, and to cause them to be dedicated and consecrated according to the Ecclesiastical Laws of our Kingdom of *England*, together with all and singular the like, and as ample Rights, Jurisdictions, Priviledges, Prerogatives, Royalties, Liberties, Immunities and Franchises of what kind soever, within the Countries, Isles, Islets and Limits aforesaid.

. . .

XVIII. AND because it may happen, that some of the People and Inhabitants of the said *Province*, cannot in their private Opinions conform to the publick Exercise of *Religion*, according to the Liturgy, Form and Ceremonies of the Church of *England*, or take and subscribe the Oaths and Articles made and established in that behalf, and for that the same, by reason of the remote Distances of these Places, will, we hope, be no Breach of the Unity and Uniformity establish'd in this Nation, Our Will and Pleasure therefore is, and we do by these Presents, for us, our Heirs and Successors, give and grant unto the said *Edward* Earl of *Clarendon, George*

Duke of *Albemarle*, *William* Lord *Craven*, *John* Lord *Berkley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *William Berkley*, and Sir *John Colleton*, their Heirs and Assigns, full and free Licence, Liberty and Authority, by such legal Ways and Means as they shall think fit, to give and grant unto such person and persons inhabiting and being within the said Province, or any part thereof, who really in their Judgments, and for Conscience sake, cannot or shall not conform to the said Liturgy and Ceremonies, and take and subscribe the Oaths and Articles aforesaid, or any of them, such Indulgencies and Dispensations in that behalf, for and during such Time and Times, and with such Limitations and Restrictions, as they the said *Edward* Earl of *Clarendon*, *George* Duke of *Albemarle*, *William* Lord *Craven*, *John* Lord *Berkley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *William Berkley*, and Sir *John Colleton*, their Heirs or Assigns shall in their Discretion think fit and reasonable; and with this express *Proviso* and *Limitation* also, That such person and persons, to whom such Indulgences and Dispensations shall be granted as aforesaid, do and shall, from Time to Time, declare and continue all Fidelity, Loyalty and Obedience to us, our Heirs and Successors, and be subject and obedient to all other the Laws, Ordinances and Constitutions of the said *Province*, in all Matters whatsoever, as well Ecclesiastical as Civil, and do not in any wise disturb the Peace and Safety thereof, or scandalize or reproach the said Liturgy, Forms and Ceremonies, or any thing relating thereunto, or any person or persons whatsoever, for or in respect of his or their Use or Exercise thereof, or his or their Obedience or Conformity thereunto.

South Carolina Provincial Laws, pp. xxi–xxii, xxxi–xxxii.

1.1.3.10.bDeclaration and Proposals of Lord Proprietor of Carolina, 1663

His majesty having been graciously pleased, by his charter bearing date the 24th of March, in the 15th year of his reign, out of a pious and good intention for the propagation of the Christian faith amongst the barbarous and ignorant Indians, the enlargement of his empire and dominions, and enriching of his subjects, to grant and confirm to us. . . we do hereby declare and propose to all his majesty's loving subjects wheresoever abiding or residing, and do hereby engage inviolably to perform and make good those ensuing proposals in such manner as the first undertakers of the first settlement shall reasonable desire.

. . .

5. We will grant, in as ample manner as the undertakers shall desire, freedom and liberty of

conscience in all religious or spiritual things, and to be kept inviolably with them, we having power in our charter so to do.

Colonial Records of North Carolina, William L. Saunders, ed. (Raleigh: P. M. Hale, 1886), vol. 1, pp. 43, 45.

1.1.3.10.cSecond Charter of Carolina, 1665

. . .

NOW Know ye, That We, at the humble Request of the said Grantees, in the aforesaid Letters Patents named, and as a further Mark of our especial Favour to them, we are graciously pleased to enlarge our said Grant unto them, according to the Bounds and Limits hereafter specified, and in Favour to the pious and noble Purpose of the said *Edward* Earl of *Clarendon*, *George* Duke of *Albemarle*, *William* Earl of *Craven*, *John* Lord *Berkeley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *John Colleton*, and Sir *William Berkeley*, their Heirs and Assigns, all that Province, Territory, or Tract of Land, situate, lying and being within our Dominions of *America* aforesaid. . . . And further more, the Patronage and Advowsons of all the Churches and Chapels, which, as Christian Religion shall increase within the Province, Territory, Isles, and Limits aforesaid, shall happen hereafter to be erected; together with License and Power to build and found Churches, Chapels, and Oratories, in convenient and fit Places, within the said Bounds and Limits; and to cause them to be dedicated and consecrated, according to the Ecclesiastical Laws of our Kingdom of *England;* together with all and singular the like and as ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and Franchises, of what Kind soever, within the Territory, Isles, Islets, and Limits aforesaid: To have, hold, use, exercise, and enjoy the same, as amply, fully, and in as ample Manner, as any Bishop of *Durham*, in our Kingdom of *England*, ever heretofore, had, held, used, or enjoyed, or of Right ought or could have, use, or enjoy. . . .

. . .

AND because it may happen that some of the People and Inhabitants of the said Province, cannot, in their private Opinions, conform to the Public Exercise of Religion, according to the Liturgy, Forms, and Ceremonies of the Church of *England*, or take and subscribe the Oaths and Articles made and Established in that Behalf; and for that the same, by Reason of the remote Distances of those Places, will, as we hope, be no Breach of the Unity and Conformity established in this Nation; our Will and Pleasure

therefore is, and we do, by these Presents, for us, our Heirs and Successors, give and grant unto the said *Edward* Earl of *Clarendon*, *George* Duke of *Albemarle*, *William* Earl of *Craven*, *John* Lord *Berkeley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *John Colleton*, and Sir *William Berkeley*, their Heirs and Assigns, full and free Licence, Liberty, and Authority, by such Ways and Means as they shall think fit, to give and grant unto such Person or Persons, inhabiting and being within the said Province or Territory, hereby, or by the said recited Letters Patents mentioned to be granted as aforesaid, or any Part thereof, such Indulgences and Dispensations, in that Behalf, for and during such Time and Times, and with such Limitations and Restrictions, as they. . . shall, in their Discretion, think fit and reasonable: And that no Person or Persons unto whom such Liberty shall be given, shall be in any way molested, punished, disquieted, or called in Question, for any Differences in Opinion, or Practice in Matters of religious Concernments, who do not actually disturb the Civil Peace of the Province, County or Colony, that they shall make their Abode in: But all and every such Person and Persons may, from Time to Time, and at all Times, freely and quietly have and enjoy his and their Judgments and Consciences, in Matters of Religion, throughout all the said Province or Colony, they behaving themselves peaceably, and not using this Liberty to Licentiousness, nor to the Civil Injury, or outward Disturbance of others: Any Law, Statute, or Clause, contained or to be contained, Usage or Custom of our Realm of *England*, to the contrray [*sic*] hereof, in anywise, notwithstanding.

North Carolina Acts, p. i–ii, xi.

1.1.3.10.dFundamental Constitutions of Carolina, 1669

95th. No man shall be permitted to be a freeman of Carolina, or to have any estate or habitation within it, that doth not acknowledge a God, and that God is publicly and solemnly to be worshipped.

96th. (As the country comes to be sufficiently planted, and distributed in fit divisions, it shall belong to the Parliament to take care for the building of churches and the public maintenance of divines, to be employed in the exercise of religion, according to the Church of England; which being the only true and orthodox, and the national religion of all the king’s dominions, is so also of Carolina, and therefore it alone shall be allowed to receive public maintenance by grant of parliament.)

97th. But since the natives of that place, who will be concerned in our

plantation, are utterly strangers to Christianity, whose idolatry, ignorance or mistake gives us no right to expell or treat them ill, and those who remove from other parts to plant there will unavoidably be of different opinions, concerning matters of religion, the liberty whereof they will expect to have allowed them, and it will not be reasonable for us on this account to keep them out; that civil peace may be obtained amidst diversity of opinions, and our agreement and compact with all men, may be duly and faithfully observed, the violation whereof, upon what pretence soever, cannot be without offence to Almighty God, and great scandal to the true religion which we profess; and also that Jews, Heathens and other dissenters from the purity of the Christian religion, may not be scared and kept at a distance from it, but by having an opportunity of acquainting themselves with the truth and reasonableness of its doctrines, and the peaceableness and inoffensiveness of its professors, may be good usage and persuasion, and all those convincing methods of gentleness and meekness, suitable to the rules and design of the gospel, be won over to embrace and unfeignedly receive the truth; therefore any seven or more persons agreeing in any religion, shall constitute a church or profession, to which they shall give some name, to distinguish it from others.

98th. The terms of admittance and communion with any church or profession shall be written in a book, and therein be subscribed by all the members of the said church or profession; which book shall be kept by the public Register of the Precinct wherein they reside.

99th. The time of every one, subscription admittance, shall be dated in the said book or religious record.

100th. In the terms of communion of every church or profession, these following shall be three, without which no agreement or assembly of men upon pretence of religion, shall be accounted a church or profession within these rules:

1st. “That there is a God.”

2nd. “That God is publickly to be worshipped.”

3rd. “That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to truth; and that every church or profession shall in their terms of communion, set down the eternal way whereby they witness a truth as in the presence of God whether it be by laying hands on or kissing the Bible, as in the Church of England, or by holding up the hand, or any other sensible way.”

101st. No person above seventeen years of age, shall have any benefit or

protection of the law, or be capable of any place of profit or honor who is not a member of some church or profession, having his name recorded in some one, and but one religious record at once.

102nd. No person of any other church or profession shall disturb or molest any religious assembly.

103rd. No person whatsoever, shall speak anything in their religious assembly irreverently or seditiously of the government or governors, or of state matters.

104th. Any person subscribing the terms of communion, in the record of the said church or profession, before the precinct register and any five members of the said church or profession, shall be thereby made a member of the said church or profession.

105th. Any person striking out his own name out of any religious record, or his name being struck out by any officer thereunto authorized by such church or profession respectively, shall cease to be a member of that church or profession.

106th. No man shall use any reproachful, reviling, or abusive language against any religion of any church or profession; that being the certain way of disturbing the peace, and of hindering the conversion of any to the truth, by engaging them in quarrels and animosities, to the hatred of the professors and that profession which otherwise they might be brought to assent.

107th. Since charity obliges us to wish well to the souls of all men, and religion ought to alter nothing in any man’s civil estate or right, it shall be lawful for slaves as well as others, to enter themselves and be of what church or profession any of them shall think best, and thereof be as fully members as any freemen. But yet no slave shall hereby be exempted from that civil dominion his master hath over him, but be in all things in the same state and condition he was in before.

108th. Assemblies upon what pretence soever of religion, not observing and performing the above said rules, shall not be esteemed as churches, but unlawful meetings, and be punished as riots.

109th. No person whatsoever shall disturb, molest, or persecute another, for his speculative opinions in religion, or his way of worship.

110th. Every freeman of Carolina, shall have absolute power and authority over his negro slaves, of what opinion or religion soever.

North Carolina State Records, pp. 147–49 (John Locke).

1.1.3.10.eDeclaration of Rights, 1776

Sect. XIX. That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Conscience.

North Carolina Laws, p. 276.

1.1.3.10.fConstitution, 1776

Sect. XXXIV. That there shall be no Establishment of any one Religious Church in this State in Preference to any other; neither shall any Person, on any Pretence whatsoever, be compelled to attend any Place of Worship, contrary to his own Faith or Judgment; nor be obliged to pay for the purchase of any Glebe, or the building of any House of Worship, or for the Maintenance of any building of any house of worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform; but all Persons shall be at Liberty to exercise their own Mode of Worship. *Provided*, That nothing herein contained, shall be construed to exempt Preachers of treasonable or seditious Discourses from legal Trial and Punishment.

North Carolina Laws, p. 280.

1.1.3.11Pennsylvania

1.1.3.11.a Charter of Province of Pennsylvania, 1682

SECT. XXII.

AND Our farther Pleasure is, And We do hereby, for Us, our Heirs and Successors, charge and require, That if any of the Inhabitants of the said Province, to the Number of Twenty, shall at any Time hereafter be desirous, and shall by any Writing or by any Person deputed for them, signify such their Desire to the Bishop of *London* for the Time being, That any Preacher or Preachers, to be approved of by the said Bishop, may be sent unto them for their Instruction; that then such Preacher or Preachers shall and may reside within the said Province, without any Denial or Molestation whatsoever.

Pennsylvania Charters, pp. 12–13.

1.1.3.11.bLaws Agreed Upon in England, 1682

LAWS AGREED UPON IN ENGLAND.

XXXV. That all Persons living in this Province, who confess and acknowledge the One Almighty and Eternal God, to be the Creator, Upholder and Ruler of the World and that hold themselves obliged in Conscience to live peaceably and justly in *Civil Society*, shall, in no wayes be molested or

prejudiced for their Religious Perswasion or Practice in matters of *Faith* and *Worship*, nor shall they be compelled, at any time, to frequent or maintain any Religious **Worship,** Place or **Ministry** whatever.

XXXVI. That according to the good Example of the Primitive Christians, and for the ease of the Creation, every *First Day* of the Week, called the *Lords Day*, People shall abstain from their common daily Labour, that they may the better dispose themselves to Worship God according to their Understandings.

Pennsylvania Frame, p. 11.

1.1.3.11.cCharter of Privileges Granted by William Penn, 1701

FIRST.

BECAUSE no People can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship: And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Person or Persons, inhabiting in this Province or Territories, who shall confess and acknowledge *One* almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their consciencious [*sic*] Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Persuasion.

AND that all Persons who also profess to believe in *Jesus Christ*, the Saviour of the World, shall be capable (notwithstanding their other Persuasions and Practices in Point of Conscience and Religion) to serve this Government in any Capacity, both legislatively and executively, he or they solemnly promising, when lawfully required, Allegiance to the King as Sovereign, and Fidelity to the Proprietary and Governor, and taking the Attests as now established by the Law made at *New-Castle*, in the Year *One Thousand and Seven Hundred*, entitled, *An Act directing the Attests of several Officers and Ministers*, as now amended and confirmed this present Assembly.

. . .

VIII.

. . .

BUT because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences as aforesaid, I do hereby solemnly declare, promise and grant, for me, my Heirs and Assigns, That the *First* Article of this Charter relating to Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without any Alteration, inviolably for ever.

Penn Charter, pp. 4, 7.

1.1.3.11.dConstitution, 1776

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

. . .

II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.

CHAPTER II.

PLAN OR *FRAME* OF *GOVERNMENT.*

. . .

Sect. 10. . . .

. . .

And each member, before he takes his seat, shall make and subscribe the following declaration, *viz.*

I do believe in one God, the Creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.

And no further or other religious test shall ever hereafter be required of

any civil officer of magistrate in this state.

. . .

Sect. 45. Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution: And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed under the laws and former constitution of this state.

Pennsylvania Acts, M'Kean, pp. ix, xii, xx.

1.1.3.11.eConstitution, 1790

ARTICLE IX.

. . .

SECT. III. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can, of right, be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; that no human authority can, in any case whatever, controul or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.

SECT. IV. That no person, who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.

Pennsylvania Acts, Dallas, p. xxxiii.

1.1.3.12Rhode Island

1.1.3.12.aPlantation Agreement at Providence, 1640

2. . . .

Wee agree, as formerly hath bin the liberties of the town, so still, to hould forth liberty of Conscience.

Rhode Island Records, vol. 1, p. 28.

1.1.3.12.bCharter of Rhode Island and Providence Plantations, 1663

CHARLES THE SECOND, . . . Whereas We have been informed by the Humble Petition of our Trusty and well-beloved Subject[s]. . . That they pursuing with Peaceable and Loyal Minds, their Sober, Serious and Religious intentions, of Godly edifying themselves, and one another in the Holy Christian Faith and Worship, as they were perswaded. . . AND Whereas in their Humble Address, They have Freely Declared, that it is much on their Heart, if they my be permitted to Hold forth a Lively Experiment, That a most Flourishing Civil State, may stand and best be Maintained, and that amongst our English Subjects, With a full Liberty in Religious Concernements; and that true Piety, Rightly Grounded upon Gospel Principles, will Give the Best and Greatest Security to soveraignty; And will lay in the Hearts of Men the Strongest Obligations to true Loyalty. NOW KNOW YEE, That we being Willing to Encourage the Hopeful Undertakings of our said Loyal and Loving Subjects, And to Secure them in the Free Exercise and Enjoyment of all their Civil and Religious Rights Appertaining to them, as our Loving Subjects; and to Preserve unto them that Liberty in the true Christian Faith and Worship of GOD, Which They have sought with so much Travel, And with Peaceable Minds and Loyal Subjection to Our Royal Progenitors and Our Selves to Enjoy. AND because some of the People and Inhabitants of the same Colony, cannot in their private Opinions, Conform to the publick Exercise of Religion, according to the Liturgy, Forms and Ceremonies of the *Church of England*, or take or Subscribe the Oathes and Articles made and Established in that behalfe. AND for that the same by reason of the Remote Distances of those Places will (as we Hope) be no Breach of the Unity and Uniformity Established in this Nation. HAVE THEREFORE Thought fit, AND DO HEREBY Publish, Grant, Ordain, and Declare. That Our Royal Will and Pleasure is, That no Person within the said *Colony*, at any Time hereafter, shall be any ways Molested, Punished, Disquieted, or called in Question for any Differences in Opinion, in matters of Religion, And do not Actually disturb the Civil Peace of Our said *Colony*. But that all and Every Person and Persons, may from time to time, and at all times hereafter, Freely, and Fully Have and Enjoy, His and Their own Judgments, and Conscience in matters of Religious Concernments, Throughout the Tract of Land hereafter Mentioned; They Behaving themselves Peaceably and Quietly, *And not Using This Liberty to Licentiousness and Prophaneness;* nor to the Civil Injury, or outward Disturbance of others. Any *Law, Statute, or Clause,*

therein contained, or to be Contained; Any Usage or Custome of this Realm to the Contrary thereof in any wise notwithstanding. And that they may be in the better Capacity to Defend themselves in their Just Rights and Liberties, against all the Enemys of the Christian Faith, and others in all Respects. WEE Have further thought Fit; And at the Humble Petition of the Persons aforesaid, Are Graciously pleased to Declare, That they shall Have, an Enjoy, the Benefit of Our Late Act of Indemnity, and Free Pardon, as the rest of our Subjects in other Our Dominions and Territorys have. AND TO CREATE, and make Them a Body Politick and Corporate, with the Powers, and Priviledges herein after-mentioned.

Rhode Island Acts, pp. 1–2.

1.1.3.13South Carolina

1.1.3.13.aFirst Charter of Carolina, 1663

I. Whereas our right trusty and right well beloved Cousins and Counsellors. . . being excited with a laudable and pious Zeal for the Propagation of the Christian Faith, and the Enlargement of our Empire and Dominions, have humbly besought leave of us, by their Industry and Charge, to transport and make an ample Colony of our Subjects, Natives of our Kingdom of *England*, and elsewhere within our Dominions, unto a certain Country hereafter described, in the Parts of *America*, not yet cultivated or planted, and only inhabited by some barbarous People who have no Knowledge of Almighty God.

. . .

III. And furthermore, the Patronage and Avowsons of all the Churches and Chappels, which as Christian Religion shall increase within the Country, Isles, Islets and Limits aforesaid, shall happen hereafter to be erected, together with License and Power to build and found Churches, Chappels and Oratories, in convenient and fit Places, within the said Bounds and Limits, and to cause them to be dedicated and consecrated according to the Ecclesiastical Laws of our Kingdom of *England*, together with all and singular the like, and as ample Rights, Jurisdictions, Priviledges, Prerogatives, Royalties, Liberties, Immunities and Franchises of what kind soever, within the Countries, Isles, Islets and Limits aforesaid.

. . .

XVIII. AND because it may happen, that some of the People and Inhabitants of the said *Province*, cannot in their private Opinions conform to the publick Exercise of *Religion*, according to the Liturgy, Form and Ceremonies of the Church of *England*, or take and subscribe the Oaths and Articles made and established in that behalf, and for that the same, by reason of the remote Distances of these Places, will, we hope, be no Breach of the Unity and Uniformity establish'd in this Nation, Our Will and Pleasure therefore is, and we do by these Presents, for us, our Heirs and Successors, give and grant unto the said *Edward* Earl of *Clarendon*, *George* Duke of *Albemarle*, *William* Lord *Craven*, *John* Lord *Berkley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *William Berkley*, and Sir *John Colleton*, their Heirs and Assigns, full and free Licence, Liberty and Authority, by such legal Ways and Means as they shall think fit, to give and grant unto such person and persons inhabiting and being within the said Province, or any part thereof, who really in their Judgments, and for Conscience sake, cannot or shall not conform to the said Liturgy and Ceremonies, and take and subscribe the Oaths and Articles aforesaid, or any of them, such Indulgencies and Dispensations in that behalf, for and during such Time and Times, and with such Limitations and Restrictions, as they the said *Edward* Earl of *Clarendon*, *George* Duke of *Albemarle*, *William* Lord *Craven*, *John* Lord *Berkley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *William Berkley*, and Sir *John Colleton*, their Heirs or Assigns shall in their Discretion think fit and reasonable; and with this express *Proviso* and *Limitation* also, That such person and persons, to whom such Indulgences and Dispensations shall be granted as aforesaid, do and shall, from Time to Time, declare and continue all Fidelity, Loyalty and Obedience to us, our Heirs and Successors, and be subject and obedient to all other the Laws, Ordinances and Constitutions of the said *Province*, in all Matters whatsoever, as well Ecclesiastical as Civil, and do not in any wise disturb the Peace and Safety thereof, or scandalize or reproach the said Liturgy, Forms and Ceremonies, or any thing relating thereunto, or any person or persons whatsoever, for or in respect of his or their Use or Exercise thereof, or his or their Obedience or Conformity thereunto.

South Carolina Provincial Laws, pp. xxi–xxii, xxxi–xxxii.

1.1.3.13.bDeclaration and Proposals of Lord Proprietor of Carolina, 1663

His majesty having been graciously pleased, by his charter bearing date the 24th of March, in the 15th year of his reign, out of a pious and good

intention for the propagation of the Christian faith amongst the barbarous and ignorant Indians, the enlargement of his empire and dominions, and enriching of his subjects, to grant and confirm to us. . . we do hereby declare and propose to all his majesty's loving subjects wheresoever abiding or residing, and do hereby engage inviolably to perform and make good those ensuing proposals in such manner as the first undertakers of the first settlement shall reasonable desire.

. . .

5. We grant, in as ample manner as the undertakers shall desire, freedom and liberty of conscience in all religious or spiritual things, and to be kept inviolably with them, we having power in our charter so to do.

Colonial Records of North Carolina, William L. Saunders, ed. (Raleigh: P. M. Hale, 1886), vol. 1, pp. 43, 45.

1.1.3.13.cSecond Charter of Carolina, 1665[2]

. . .

NOW KNOW YE, That We, at the humble Request of the said *Grantees* in the aforesaid Letters Patents named, and as a further Mark of our especial Favour towards them, we are graciously pleased to enlarge our said Grant unto them, according to the Bounds and Limits hereafter specified, and in Favour to the pious and noble Purpose of the said *Edward* Earl of *Clarendon*, *George* Duke of *Albemarle*, *William* Earl of *Craven*, *John* Lord *Berkley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *John Colleton*, and Sir *William Berkley*, their Heirs and Assigns, all that Province, Territory or Tract of Ground, scituate [*sic*], lying and being within our Dominions of *America* aforesaid. . . .

III. AND furthermore the Patronage and Avowsons of all the Churches and Chappels, which, as Christian Religion shall increase within the Province, Territory, Isles, and Limits aforesaid, shall happen hereafter to be erected; together with License and Power to build and found Churches, Chappels, and Oratories in convenient and fit Places, within the said Bounds and Limits; and to cause them to be dedicated and consecrated, according to the Ecclesiastical Laws of our Kingdom of *England;* together with all and singular the like, and as ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities and Franchises of what kind soever, within the Territory, Isles, Islets, and Limits aforesaid: **To have,** hold, use, exercise and enjoy the same, as amply, fully, and in as ample Manner as any Bishop of *Durham* in our Kingdom of *England*, ever

heretofore had, held, used or enjoyed, or of Right ought or could have, use, or enjoy. . . .

. . .

XVIII. AND because it may happen, that some of the People and Inhabitants of the said *Province*, cannot in their private Opinions conform to the publick Exercise of *Religion*, according to the Liturgy, Form and Ceremonies of the Church of *England*, or take and subscribe the Oaths and Articles made and established in that behalf, and for that the same, by reason of the remote Distances of those Places, will, as we hope, be no Breach of the Unity and Conformity established in this Nation, Our Will and Pleasure therefore is, and we do by these Presents, for us, our Heirs and Successors, give and grant unto the said *Edward* Earl of *Clarendon*, *George* Duke of *Albemarle*, *William* Earl of *Craven*, *John* Lord *Berkley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *John Colleton*, and Sir *William Berkley*, their Heirs and Assigns, full and free Licence, Liberty and Authority, by such Ways and Means as they shall think fit, to give and grant unto such Person and Persons, inhabiting and being within the said *Province* or *Territory*, hereby, or by the said recited Letters Patents, mentioned to be granted as aforesaid, or any Part thereof, such *Indulgencies* and *Dispensations*, in that behalf, for and during such *Time* and *Times*, and with such *Limitations* and *Restrictions* as the said *Edward* Earl of *Clarendon*, *George* Duke of *Albemarle*, *William* Earl of *Craven*, *John* Lord *Berkley*, *Anthony* Lord *Ashley*, Sir *George Carteret*, Sir *John Colleton*, and Sir *William Berkley*, their Heirs or Assigns, shall in their Discretion think fit and reasonable, and that no Person or Persons unto whom such Liberty shall be given, shall be any way molested, punished, disquieted, or called in question, for any difference in Opinion or Practice, in Matters of religious Concernment, who do not actually disturb the civil Peace of the Province, County or Colony that they shall make their abode in; but all and every such Person and Persons, may from Time to Time, and at all Times, freely and quietly have and enjoy his or their Judgments and Consciences in Matters of Religion, throughout all the said *Province* or Colony, they behaving peaceably, and not using this Liberty to Licentiousness, nor to the civil Injury or outward Disturbance of others; any Law, Statute or Clause, contained or to be contained, Usage or Customs of our Realm of *England*, to the contrary hereof, in in [*sic*] any wise notwithstanding.

South Carolina Provincial Laws, pp. xxiii–xv, xliii–xliv.

1.1.3.13.dFundamental Constitutions of Carolina, 1669

95th. No man shall be permitted to be a freeman of Carolina, or to have any estate or habitation within it, that doth not acknowledge a God, and that God is publicly and solemnly to be worshipped.

96th. (As the country comes to be sufficiently planted, and distributed in fit divisions, it shall belong to the Parliament to take care for the building of churches and the public maintenance of divines, to be employed in the exercise of religion, according to the Church of England; which being the only true and orthodox, and the national religion of all the king's dominions, is so also of Carolina, and therefore it alone shall be allowed to receive public maintenance by grant of parliament.)

97th. But since the natives of that place, who will be concerned in our plantation, are utterly strangers to Christianity, whose idolatry, ignorance or mistake gives us no right to expell or treat them ill, and those who remove from other parts to plant there will unavoidably be of different opinions, concerning matters of religion, the liberty whereof they will expect to have allowed them, and it will not be reasonable for us on this account to keep them out; that civil peace may be obtained amidst diversity of opinions, and our agreement and compact with all men, may be duly and faithfully observed, the violation whereof, upon what pretence soever, cannot be without offence to Almighty God, and great scandal to the true religion which we profess; and also that Jews, Heathens and other dissenters from the purity of the Christian religion, may not be scared and kept at a distance from it, but by having an opportunity of acquainting themselves with the truth and reasonableness of its doctrines, and the peaceableness and inoffensiveness of its professors, may be good usage and persuasion, and all those convincing methods of gentleness and meekness, suitable to the rules and design of the gospel, be won over to embrace and unfeignedly receive the truth; therefore any seven or more persons agreeing in any religion, shall constitute a church or profession, to which they shall give some name, to distinguish it from others.

98th. The terms of admittance and communion with any church or profession shall be written in a book, and therein be subscribed by all the members of the said church or profession; which book shall be kept by the public Register of the Precinct wherein they reside.

99th. The time of every one, subscription admittance, shall be dated in the said book or religious record.

100th. In the terms of communion of every church or profession, these

following shall be three, without which no agreement or assembly of men upon pretence of religion, shall be accounted a church or profession within these rules:

1st. “That there is a God.”

2nd. “That God is publickly to be worshipped.”

3rd. “That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to truth; and that every church or profession shall in their terms of communion, set down the eternal way whereby they witness a truth as in the presence of God whether it be by laying hands on or kissing the Bible, as in the Church of England, or by holding up the hand, or any other sensible way.”

101st. No person above seventeen years of age, shall have any benefit or protection of the law, or be capable of any place of profit or honor who is not a member of some church or profession, having his name recorded in some one, and but one religious record at once.

102nd. No person of any other church or profession shall disturb or molest any religious assembly.

103rd. No person whatsoever, shall speak anything in their religious assembly irreverently or seditiously of the government or governors, or of state matters.

104th. Any person subscribing the terms of communion, in the record of the said church or profession, before the precinct register and any five members of the said church or profession, shall be thereby made a member of the said church or profession.

105th. Any person striking out his own name out of any religious record, or his name being struck out by any officer thereunto authorized by such church or profession respectively, shall cease to be a member of that church or profession.

106th. No man shall use any reproachful, reviling, or abusive language against any religion of any church or profession; that being the certain way of disturbing the peace, and of hindering the conversion of any to the truth, by engaging them in quarrels and animosities, to the hatred of the professors and that profession which otherwise they might be brought to assent.

107th. Since charity obliges us to wish well to the souls of all men, and religion ought to alter nothing in any man’s civil estate or right, it shall be lawful for slaves as well as others, to enter themselves and be of what church or profession any of them shall think best, and thereof be as fully

members as any freemen. But yet no slave shall hereby be exempted from that civil dominion his master hath over him, but be in all things in the same state and condition he was in before.

108th. Assemblies upon what pretence soever of religion, not observing and performing the above said rules, shall not be esteemed as churches, but unlawful meetings, and be punished as riots.

109th. No person whatsoever shall disturb, molest, or persecute another, for his speculative opinions in religion, or his way of worship.

110th. Every freeman of Carolina, shall have absolute power and authority over his negro slaves, of what opinion or religion soever.

North Carolina State Records, pp. 147–49 (John Locke).

1.1.3.13.eConstitution, 1778

XXI. And whereas the Ministers of the Gospel are, by their Profession, dedicated to the Service of God, and the Cure of Souls, and ought not to be diverted from the great Duties of their Function; therefore, no Minister of the Gospel, or public Preacher, of any religious Persuasion, while he continues in the Exercise of his pastoral Function, and for *two* Years after, shall be eligible either as Governor, Lieutenant Governor, a Member of the Senate, House of Representatives, or Privy Council in this State.

. . .

XXXVIII. That all Persons and religious Societies, who acknowledge that there is one God, and a future state of Rewards and Punishments, and that God is publickly to be worshipped, shall be freely tolerated. The Christian Protestant Religion, shall be deemed, and is hereby constituted and declared to be, the established Religion of this State. That all Denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil Privileges. To accomplish this desirable Purpose, without injury to the religious Property of those Societies of Christians, which are by Law already incorporated for the Purpose of religious Worship; and to put it fully into the Power of every other Society of Christian Protestants, either already formed or hereafter to be formed, to obtain the like Incorporation, *It is hereby constituted, appointed, and declared*, That the respective Societies of the Church of England, that are already formed in this State for the Purposes of religious Worship, shall still continue incorporate, and hold the religious Property now in their Possession. And that, whenever *fifteen* or more male Persons, not under *twenty-one* Years of Age, professing the Christian Protestant

Religion, and agreeing to unite themselves in a Society, for the Purposes of religious Worship, they shall, (on complying with the Terms hereinafter mentioned,) be, and be constituted, a Church, and be esteemed and regarded in Law as of the established Religion of the State, and on a Petition to the Legislature, shall be intitled to be incorporated, and to enjoy equal Privileges. That every Society of Christians, so formed, shall give themselves a Name or Denomination, by which they shall be called and known in Law; and all that associate with them for the Purposes of Worship, shall be esteemed as belonging to the Society so called: But that, previous to the Establishment and Incorporation of the respective Societies of every Denomination as aforesaid, and in order to intitle them thereto, each Society so petitioning, shall have agreed to, and subscribed, in a Book, the following *Five* Articles, without which, no Agreement or Union of Men, upon Pretence of Religion, shall intitle them to be incorporated, and esteemed as a Church of the established Religion of this State:

First, *That there is one eternal God, and a future State of Rewards and Punishments.*

Second, *That God is publickly to be worshipped.*

Third, *That the Christian Religion is the true Religion.*

Fourth, *That the Holy Scriptures of the Old and New Testaments are of Divine Inspiration, and are of the Rule of Faith and Practice.*

Fifth, *That it is lawful, and the Duty of every Man, being thereunto called by those that govern, to bear witness to the Truth.*

And that every Inhabitant of this State, when called to make an Appeal to God, as a Witness to Truth, shall be permitted to do it in that Way which is most agreeable to the Dictates of his own Conscience. And, that the People of this State may forever enjoy the Right of electing their own Pastors or Clergy; and, at the same Time, that the State may have sufficient Security, for the due Discharge of the Pastoral Office, by those who shall be admitted to be Clergymen; no Person shall officiate as Minister of any established Church, who shall not have been chosen by a Majority of the Society to which he shall minister, or by Persons appointed by the said Majority to chuse and procure a Minister for them, nor until the Minister so chosen and appointed, shall have made and subscribed to the following Declaration, over and above the aforesaid *five* Articles, *viz.*

That he is determined, by God's Grace, out of the Holy Scriptures, to instruct the People committed to his Charge, and to teach nothing (as required of Necessity to Eternal Salvation) but that which he shall be

persuaded may be concluded and proved from the Scripture; that he will use both public and private Admonitions, as well to the Sick as to the Whole, within his Cure, as Need shall require and Occasion shall be given; and that he will be diligent in Prayers, and in reading of the Holy Scriptures, and in such Studies as help to the Knowledge of the same; that he will be diligent to frame and fashion his own self, and his Family, according to the Doctrine of Christ, and to make both himself and them, as much as in him lieth, wholesome Examples and Patterns to the Flock of Christ; that he will maintain and set forwards, as much as he can, Quietness, Peace, and Love, among all People; and especially among those that are or shall be committed to his Charge.

No Person shall disturb or molest any religious Assembly, nor shall use any reproachful, reviling, or abusive Language, against any Church; that being the certain Way of disturbing the Peace, and of hindering the Conversion of any to the Truth, by engaging them in Quarrels and Animosities, to the Hatred of the Professors, and that Profession which otherwise they might be brought to assent to. No Person whatsoever shall speak any Thing, in their religious Assembly, irreverently, or seditiously, of the Government of this State. No Person shall, by Law, be obliged to pay towards the Maintenance and Support of a religious Worship that he does not freely join in, or has not voluntarily engaged to support: But, the Churches, Chapels, Parsonages, Glebes, and all other Property, now belonging to any Societies of the Church of England, or any other religious Societies, shall remain, and be secured, to them for ever. The Poor shall be supported, and Elections managed, in the accustomed Manner, until Laws shall be provided, to adjust those Matters in the most equitable Way.

South Carolina Constitution, pp. 10, 12–14.

1.1.3.13.fConstitution, 1790

ARTICLE VIII.

Section 1. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall, forever hereafter, be allowed within this state to all mankind; provided that the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

Section 2. The rights, privileges, immunities and estates of both civil and

religious societies, and of corporate bodies, shall remain as if the constitution of this state had not been altered or amended.

South Carolina Laws, App., p. 41.

1.1.3.14Vermont: Constitution, 1777

CHAPTER I.

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3. That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Consciences and Understanding, regulated by the Word of God; and that no Man ought or of Right can be compelled to attend any religious Worship, or erect, or support any Place of Worship, or maintain any Minister contrary to the Dictates of his Conscience; nor can any Man who professes the Protestant Religion, be justly deprived or abridged of any civil Right, as a Citizen, on Account of his religious Sentiment, or peculiar Mode of religious Worship, and that no Authority can, or ought to be vested in, or assumed by any Power whatsoever, that shall in any Case interfere with, or in any Manner control the Rights of Conscience, in the free Exercise of religious Worship; nevertheless, every Sect or Denomination of People ought to observe the Sabbath, or Lord's Day, and keep up and support some Sort of religious Worship, which to them shall seem most agreeable to the revealed Will of God.

CHAPTER II.

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SECTION VI.

Every Man, of the full Age of twenty-one Years, having resided in this State for the Space of one whole Year next before the Election of Representatives, and is of a quiet and peaceable Behaviour, and will take the following Oath (or Affirmation) shall be entitled to all the Privileges of a Freeman of this State.

I — — — — solemnly swear, by the ever-living God, (*or affirm, in Presence of Almighty God,*) *that whenever I am called to give my Vote or Suffrage, touching any Matter that concerns the State of* Vermont, *I will do it so, as in my Conscience I shall judge will most conduce to the best Good of the same, as established by the Constitution, without Fear or Favor of any Man.*

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SECTION IX.

A QUORUM of the House of Representatives shall consist of Two-thirds of the whole Number of Members elected; and having met and chosen their Speaker, shall each of them, before they proceed to Business, take and subscribe as well the Oath of Fidelity and Allegiance, herein after directed, as the following Oath or Affirmation, *viz.*

I — — — — do solemnly swear by the ever-living God, (*or I do solemnly affirm in the Presence of Almighty God*) *that as a Member of this Assembly, I will not propose or assent to any Bill, Vote, or Resolution, which shall appear to me injurious to the People; nor do or consent to any Act or Thing whatever, that shall have a Tendency to lessen or abridge their Rights and Privileges, as declared in the Constitution of this State; but will in all Things, conduct myself as a faithful, honest Representative and Guardian of the People, according to the best of my Judgment and Abilities,*

And each Member, before he takes his Seat, shall make and subscribe the following Declaration, *viz.*

I do believe in one God, the Creator and Governor of the Universe, the Rewarder of the good, and Punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament, to be given by Divine Inspiration, and own and profess the Protestant Religion.

And no further or other religious Test shall ever hereafter, be required of any civil Officer or Magistrate of this State.

. . .

SECTION XXXVI.

EVERY Officer, whether judicial, executive, or military, in Authority under this State, shall take the following Oath or Affirmation of Allegiance, and general Oath of Office, before he enter on the Execution of his Office.

THE OATH OR AFFIRMATION OF ALLEGIANCE.

"I — — — — do solemnly swear by the ever-living God, (*or affirm in the presence of Almighty God*) *that I will be true and faithful to the State of Vermont; and that I will not, directly or indirectly, do any Act or Thing prejudicial or injurious, to the Constitution or Government thereof, as established by Convention."*

THE OATH OR AFFIRMATION OF OFFICE

"I — — — — do solemnly swear by the ever-living God, (*or affirm in the presence of Almighty God*) *that I will faithfully execute the Office of for the of and will do equal Right and Justice to all Men, to the best of my Judgment and Abilities, according to Law."*

Vermont Acts, pp. 3, 5, 6, 10.

1.1.3.15Virginia

1.1.3.15.aFirst Charter of Virginia, 1606

. . .

III. We greatly commending, and graciously accepting of, their desires for the furtherance of so noble a work, which may, by the providence of Almighty God, hereafter tend to the glory of his divine Majesty, in propagating of Christian religion to such people, as yet live in Darkness and miserable ignorance of the true knowledge and worship of God, and may in time bring the infidels and savages, living in those parts, to human civility, and to a settled and quiet government: Do, by theses our letters Pattents, graciously accept of, and agree to, their humble and well-intended desires. . . .

Virginia Laws, p. 58.

1.1.3.15.bSecond Charter of Virginia, 1609

XXIII. And forasmuch, as it shall be necessary for all such our loving subjects, as shall inhabit within the said precincts of Virginia, aforesaid, to determine to live together, in the fear and true worship of Almighty God, Christian peace, and civil quietness, each with other, whereby every one may, with more safety, pleasure, and profit, enjoy that, whereunto they shall attain with great pain, and peril; we, for us, our heirs, and successors, are likewise pleased and contented, and by these presents, do give and grant unto the said treasurer and company, and their successors, and to such governors, officers, and ministers, as shall be, by our said council, constituted and appointed, according to the natures and limits of their offices and places respectively, that they shall and may, from time to time forever hereafter, within the said precincts, of Virginia, or in the way by sea thither and from thence, have full and absolute power and authority, to correct, punish, pardon, govern and rule, all such the subjects of us, our heirs and successors, as shall, from time to time, adventure themselves in any voyage thither, or that shall, at any hereafter, inhabit in the precincts and territories of the said colony, as aforesaid, according to such orders, ordinances, constitutions, directions, and instructions, as by our said council, as aforesaid, shall be established; and in defect thereof, in case of

necessity, according to the good discretions of the said governor and officers, respectively, as well in cases capital and Criminal as civil, both marine and other; So always, as the said statutes, ordinances and proceedings, as near as conveniently may be, be agreeable to the laws, statutes, government, and policy of our realm of this England.

Virginia Laws, pp. 95–96 (footnotes omitted).

1.1.3.15.cDeclaration of Rights, 1776

XVI. THAT religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.

Virginia Acts, p. 33.

1.1.3.15.d An Act, October 7, 1776

CHAP. II

An act for exempting the different societies of Dissenters from contributing to the support and maintenance of the Church as by law established, and its Ministers, and for other purposes therein mentioned.

I. WHEREAS several oppressive acts of Parliament respecting religion have been formerly enacted, and doubts have arisen, and may hereafter arise, whether the same are in force within this commonwealth or not: For prevention whereof, *Be it enacted by the General Assembly of the commonwealth of* Virginia, *and it is hereby enacted by the authority of the same*, that all and every act of Parliament, by whatever title known or distinguished, which renders criminal the maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever, or which prescribes punishments for the same, shall henceforth be of no validity or force within this commonwealth.

II. AND whereas there are within this commonwealth great numbers of dissenters from the church established by law who have been heretofore taxed for its support, and it is contrary to the principles of reason and justice that any should be compelled to contribute to the maintenance of a church with which their consciences will not permit them to join, and from which they can therefore receive no benefit: For remedy whereof, and that equal liberty, as well religious as civil, may be universally extended to all the

good people of this commonwealth, *Be it enacted by the General Assembly of the commonwealth of* Virginia, *and it is hereby enacted by the authority of the same*, that all dissenters, of whatever denomination, from the said church, shall, from and after the passing this act, be totally free and exempt from all levies, taxes, and impositions whatever, towards supporting and maintaining the said church, as it now is or hereafter may be established, and its ministers.

III. *PROVIDED nevertheless, and it is further enacted, by the authority aforesaid*, that the vestries of the several parishes, where the same hath not been already done, shall and may, and they are hereby authorized and required, at such time as they shall appoint, to levy and assess on all tithables within their respective parishes, as well as dissenters as others, all such salaries and arrears of salaries as are or may be due to the ministers or incumbents of their parishes for services to the first day of *January* next; moreover to make such assessments on all tithables as will enable the said vestries to comply with their legal parochial engagements already entered into; and lastly, to continue such future provision for the poor in their respective parishes as they have hitherto by law been accustomed to make.

IV. *AND be it further enacted, by the authority aforesaid*, that there shall in all time coming be saved and reserved to the use of the church by law established the several tracts of glebe land already purchased, the churches and chapels already built, and such as were begun or contracted for before the passing of this act for the use of the parishes, all books, plate, and ornaments, belonging or appropriated to the use of the said church, and all arrears of money or tobacco arising from former assessments or otherwise; and that there shall moreover be saved and reserved to the use of such parishes as may have received private donations, for the better support of the said church and its ministers, the perpetual benefit and enjoyment of all such donations.

V. AND whereas great variety of opinions hath arisen, touching the propriety of a general assessment, or whether every religious society should be left to voluntary contributions for the support and maintenance of the several ministers and teachers of the Gospel who are of different persuasions and denominations, and this difference of sentiments cannot now be well accommodated, so that it is thought most prudent to defer this matter to the discussion and final determination of a future Assembly, when the opinions of the country in general may be better known: To the end, therefore, that so important a subject may in no sort be prejudged, *Be it*

enacted, by the authority aforesaid, that nothing in this act contained shall be construed to affect or influence the said question of a general assessment, or voluntary contribution, in any respect whatever.

VI. AND whereas, by the exemptions allowed dissenters, it may be too burthensome in some parishes to the members of the established church if they are still compelled to support the clergy by certain fixed salaries, and it is judged best that this should be done for the present by voluntary contributions: *Be it therefore enacted, by the authority aforesaid*, that so much of an act of the General Assembly made in the twenty-second year of the reign of King *George* the Second, entitled *An act for the support of the clergy, and for the regular collecting and paying the parish levies*, or any other act as provides salaries for the ministers, and authorizes the vestries to levy the same, except in the cases before directed, shall be, and the same is hereby suspended, until the end of the next session of Assembly.

VII. AND whereas it is represented that in some counties lists of tithables have been omitted to be taken: For remedy whereof, and for the regular listing all tithable persons, *Be it further enacted*, that the court of every county where lists of the tithables, agreeable to the directions of the laws now in force, are not already taken, it shall and may be lawful for the courts of such counties, and they are hereby required, at the first or second court after the end of this session of Assembly, to divide their counties into convenient precincts, and appoint one of the Justices for each precinct to take a list of all the tithables therein; and every such Justice so to be appointed, shall give public notice of his being so appointed, and at what place or places he intends to receive the lists, by advertisements thereof affixed to the doors of churches and meeting-houses in the parish where the precinct lies, and shall accordingly attend on the said day by him to be appointed and at the second court next following shall deliver a fair list of the names and number of the tithables by him taken, to the clerk of the court who on the next court day shall set up fair copies of such lists in his courthouse, there to remain during the sitting of that court, for the better discovery of such as shall be concealed.

VIII. AND if the Justices of any county, where lists of tithables have not been already taken, shall fail to appoint some of their members to take the list of tithables in the manner directed by this act, every such Justice so failing shall forfeit and pay ten pounds; to be recovered in the General Court with costs, by action of debt or information against such Justices jointly. And if any Justice so appointed shall refuse or fail to give notice as

aforesaid, and to take and return such list as aforesaid, he shall forfeit and pay two thousand pounds of tobacco, or ten pounds; to be recovered with costs, in any court of record in this commonwealth. And every master or owner of a family, or in his absence or non-residence at the plantation, his or her agent, attorney, or overseer, shall, on the said time appointed by the Justice for taking in the lists, deliver, or cause to be delivered, under his or her hand, to the Justice appointed for that precinct, a list of the names and number of all tithable persons who were abiding in or belonging to his or her family on the ninth day of *June* last. Every master or owner, or in his or her absence or non-residence, every overseer, failing herein, shall be adjudged a concealer of such and so many tithables as shall not be listed and given in, and for every tithable person so concealed shall forfeit and pay five hundred pounds of tobacco, or fifty shillings; to be recovered by action of debt or information, in any court of record. And when any overseer shall fail to list the tithables upon the plantation whereof he is overseer, the master or owner shall be subject to the payment of his levies, in the same manner as he would have been if they had been listed. Every person, at the time of giving in lists of tithables, shall also give in a list of his or her wheel carriages subject to a tax, to the several Justices appointed to take the list of tithables, under the like penalty for each failure, and to be recovered in the same manner as herein directed for concealing tithables. All the penalties hereby imposed shall be, one moiety to the informer, and the other moiety to the use of the county where the offence shall be committed, towards lessening the county levy.

Virginia Acts, pp. 39–40.

1.1.3.15.eMemorial and Remonstrance Against Religious Assessments, 1786

We, the subscribers, citizens of the said Commonwealth, having taken into serious consideration, a bill printed by order of the last session of General Assembly, entitled “A Bill establishing a Provision for Teachers of the Christian Religion,” and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound as faithful members of a free state, to remonstrate against it; and to declare the reasons by which we are determined. We remonstrate against the said Bill,

BECAUSE, We hold it for a fundamental and undeniable truth, “That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The religion then of every man must be left to the conviction

and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him; this duty is precedent, both in order of time, and degree of obligation, to the claims of civil society. Before any man can be considered as a member of civil society, he must be considered as a subject of the Governour of the Universe: And if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular civil society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore, that in matters of religion, no man's right is abridged by the institution of civil society; and that religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

Because, If religion be exempt from the authority of the society at large, still less can it be subject to that of the legislative body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily is it limited with regard to the constituents. The preservation of a free government requires, not merely that the metes and bounds which separate each department of power may be invariably maintained, but more especially, that neither of them be suffered to overleap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

Because, It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristicks of the late revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the

principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three-pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.

Because, The bill violates that equality which ought to be the basis of every law; and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If "all men are by nature equally free and independent," all men are to be considered as entering into society on equal conditions, as relinquishing no more, and therefore retaining no less, one than another, of their rights. Above all are they to be considered as retaining an "*equal* title to the free exercise of religion according to the dictates of conscience." Whilst we assert for ourselves a freedom to embrace, to profess and to observe the religion which we believe to be of divine origin, we cannot deny an equal freedom to those, whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered. As the bill violates equality by subjecting some to peculiar burdens, so it violates the same principle, by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think a compulsive support of their religions unnecessary and unwarrantable? Can their piety alone be intrusted with the care of publick worship? Ought their religions to be endowed, above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favourably of the justice and good sense of these denominations, to believe, that they either covet preeminencies over their fellow citizens, or that they will be seduced by them, from the common opposition to the measure.

Because, The bill implies, either that the civil magistrate is a competent judge of religious truth; or that he may employ religion as an engine of civil policy. The first is an arrogant pretension, falsified by the contradictory opinions of rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation.

Because, The establishment proposed by the bill is not requisite for the support of the Christian religion. To say that it is, is a contradiction to the

Christian religion itself; for every page of it disavows a dependence on the powers of this world: It is a contradiction to fact; for it is known that this religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence: Nay, it is a contradiction in terms; for a religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy. It is moreover to weaken in those who profess this religion, a pious confidence in its innate excellence, and the patronage of its author; and to foster in those who still reject it, a suspicion, that its friends are too conscious of its fallacies, to trust it to its own merits.

Because, Experience witnesseth, that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Inquire of the teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect point to the ages prior to its incorporation with civil policy. Propose a restoration of this primitive state, in which its teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have greatest weight, when for, or when against their interest?

Because, The establishment in question is not necessary for the support of civil government. If it be urged as necessary for the support of civil government, only as it is a means of supporting religion; and it be not necessary for the latter purpose, it cannot be necessary for the former. If religion be not within the cognizance of civil government, how can its legal establishment be said to be necessary to civil government? What influence, in fact [*sic*] have ecclesiastical establishments had on civil society? In some instances they have been seen to erect a spiritual tyranny on the ruins of civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the publick liberty, may have found an established clergy, convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not. Such a government will be best supported by protecting every

citizen in the enjoyment of his religion, with the same equal hand, which protects his person, and his property; by neither invading the equal rights by any sect; nor suffering any sect to invade those of another.

Because, The proposed establishment is a departure from that generous policy; which, offering an asylum to the persecuted and oppressed of every nation and religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of citizens all those whose opinions in religion do not bend to those of the Legislative Authority. Distant as it may be, in its present form, from the Inquisition, it differs from it only in degree. The one is the first step, the other the last, in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign regions, must view the Bill as a beacon on our coast, warning him to seek some other haven, where liberty and philanthropy, in their due extent, may offer a more certain repose from his troubles.

Because, It will have a like tendency to banish our citizens. The allurements presented by other situations are every day thinning their number. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly, which has dishonoured and depopulated flourishing kingdoms.

Because, It will destroy that moderation and harmony which the forbearance of our laws to intermeddle with religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish religious discord, by proscribing all differences in religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the State. If, with the salutary effects of this system under our own eyes, we begin to contract the bounds of religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruit of the threatened innovation. The very appearance of the Bill has transformed that “Christian forbearance, love and charity,” which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the publick quiet be armed with the force of a law?

Because, The policy of the Bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift, ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it, with the number still remaining under the dominion of false religions; and how small is the former? Does the policy of the Bill tend to lessen the disproportion? No: It at once discourages those, who are strangers to the light of revelation from coming into the region of it; and countenances, by example, the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling as far as possible, every obstacle to the victorious progress of truth, the Bill, with an ignoble and unchristian timidity, would circumscribe it, with a wall of defence, against the encroachments of errour.

Because, Attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of citizens, tend to enervate the laws in general, and to slacken the bands of society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case, where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the government, on its general authority?

Because, A measure of such singular magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: And no satisfactory method is yet proposed, by which the voice of the majority in this case may be determined, or its influence secured. “The people of the respective counties are indeed requested to signify their opinion respecting the adoption of the Bill to the next session of Assembly.” But the representation must be made equal, before the voice either of the Representatives, or of the counties, will be that of the people. Our hope is that neither of the former will, after due consideration, espouse the dangerous principle of the Bill. Should the event disappoint us, it will still leave us in full confidence, that a fair appeal to the latter will reverse the sentence against our liberties.

Because, Finally, “The equal right of every citizen to the free exercise of his religion according to the dictates of conscience,” is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the “declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of government,” it is enumerated with equal solemnity, or rather studied emphasis. Either then we must say, that the will of the Legislature is the only measure of their authority, and that in

the plenitude of this authority, they may sweep away all our fundamental rights; or that they are bound to leave this particular right untouched and sacred: Either we must say, that they may controul the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay, that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary Assembly: or we must say, that they have no authority to enact into law the Bill under consideration. We the subscribers say, that the General Assembly of this Commonwealth have no such Authority: And that no effort may be omitted on our part against so dangerous an usurpation, we oppose to it, this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their councils from every act which would affront his holy prerogative, or violate the trust committed to them: And on the other, guide them into every measure which may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties, the prosperity and the happiness of the Commonwealth.

Virginia Memorial & Remonstrance, pp. 3–12.

1.1.3.15.fBill for Religious Freedom, 1786

Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporal

rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind; that our civil rights have no dependence on our religious opinions, more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to the offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it intends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government for its offices to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.

Be it therefore enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities.

And though we well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable, would be of no effect in law,

yet we are free to declare, and do declare, that the rights hereby asserted are the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right.

Virginia Religious Freedom Art, pp. 3, 5, 7.

1.1.4OTHER TEXTS

1.1.4.1Mayflower Compact, 1620

. . . Having undertaken for the glory of God, and advancement of the christian faith, and the honour of our King and country, a voyage to plant the first colony in the northern parts of Virginia. . . .

New Plymouth Laws, p. 19.

1.1.4.2English Bill of Rights, 1689

. . . That the commission for erecting the late court of commissioners of ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious.

1 Will. & Mar. sess. 2, c. 2.

1.1.4.3Northwest Territory Ordinance, 1787

Article the First. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory.

Continental Congress Papers, DNA.

1.1.4.4Richard Henry Lee to Edmund Randolph, Proposed

Amendments, October 16, 1787

. . . That the rights of conscience in matters of religion shall not be violated. . . .

Virginia Gazette, December 22, 1787.

1.2DISCUSSION OF DRAFTS AND PROPOSALS

1.2.1THE FIRST CONGRESS

1.2.1.1June 8, 1789

1.2.1.1.a Mr. Madison.

. . .

. . . The first of these amendments, relates to what may be called a bill of rights; I will own that I never considered this provision so essential to the federal constitution, as to make it improper to ratify it, until such an amendment was added; at the same time, I always conceived, that in a certain form and to a certain extent, such a provision was neither improper nor altogether useless. I am aware, that a great number of the most respectable friends to the government and champions for republican liberty, have thought such a provision, not only unneccessary, but even improper, nay, I believe some have gone so far as to think it even dangerous. Some policy has been made use of perhaps by gentlemen on both sides of the question: I acknowledge the ingenuity of those arguments which were drawn against the constitution, by a comparison with the policy of Great Britain, in establishing a declaration of rights; but there is too great a difference in the case to warrant the comparison: therefore the arguments drawn from that source, were in a great measure inapplicable. In the declaration of rights which that country has established, the truth is, they have gone no farther, than to raise a barrier against the power of the Crown, the power of the legislature is left altogether indefinite. Altho' I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, came in question in that body [Great Britain], the invasion of

them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which, the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British constitution.

But altho' the case may be widely different, and it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states, have thought it necessary to raise barriers against power in all forms and departments of government, and I am inclined to believe, if once bills of rights are established in all the states as well as the federal constitution, we shall find that altho' some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency.

It may be said, in some instances they do no more than state the perfect equality of mankind, this to be sure is an absolute truth, yet it is not absolutely necessary to be inserted at the head of a constitution.

In some instances they assert those rights which are exercised by the people in forming and establishing a plan of government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the legislature. In other instances, they specify positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as natural right, but a right resulting from the social compact which regulates the action of the community, but is essential to secure the liberty of the people as any one of the pre-existent rights of nature. In other instances they lay down dogmatic maxims with respect to the construction of the government; declaring that the legislative, executive, and judicial branches shall be kept separate and distinct: Perhaps the best way of securing this in practice is to provide such checks, as will prevent the encroachment of the one upon the another.

But whatever may be form which the several states have adopted in making declaration in favor of particular rights, the great object in view is to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode. They point these exceptions sometimes against the abuse of the executive power, sometimes against the legislative, and in some cases, against the community itself; or, in other words, against the majority in favor of the minority.

In our government it is, perhaps, less necessary to guard against the

abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker: It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least controul; hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper. But I confess that I do conceive, that in a government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body. The prescriptions in favor of liberty, ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest perogative [*sic*] of power: But this not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.

It may be thought all paper barriers against the power of the community, are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every descripton who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one mean to controul the majority from those acts to which they might be otherwise inclined.

It has been said by way of objection to a bill of rights, by many respectable gentlemen out of doors, and I find opposition on the same principles likely to be made by gentlemen on this floor, that they are unnecessary articles of a republican government, upon the presumption that the people have those rights in their own hands, and that is the proper place for them to rest. It would be a sufficient answer to say that this objection lies against such provisions under the state governments as well as under the general government; and there are, I believe, but few gentlemen who are inclined to push their theory so far as to say that a declaration of rights in those cases is either ineffectual or improper. It has been said that in the federal government they are unnecessary, because the powers are enumerated, and it follows that all that are not granted by the constitution are retained: that the constitution is a bill or powers, the great residuum being the rights of the people; and therefore a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the government. I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. It is true the powers

of the general government are circumscribed, they are directed to particular objects; but even if government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, in the same manner as the powers of the state governments under their constitutions may to an indefinite extent; because in the constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested in the government of the United States, or in any department or officer thereof; this enables them to fulfil every purpose for which the government was established. Now, may not laws be considered necessary and proper by Congress, for it is them who are to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary or proper; as well as improper laws could be enacted by the state legislatures, for fulfilling the more extended objects of those governments. I will state an instance which I think in point, and proves that this might be the case. The general government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the legislature: may not general warrants be considered necessary for this purpose, as well as for some purposes which it was supposed at the framing of their constitutions the state governments had in view. If there was reason for restraining the state governments from exercising this power, there is like reason for restraining the federal government.

It may be said, because it has been said, that a bill of rights is not necessary, because the establishment of this government has not repealed those declarations of rights which are added to the several state constitutions; that those rights of the people, which had been established by the most solemn act, could not be annihilated by a subsequent act of that people, who meant, and declared at the head of the instrument, that they ordained and established a new system, for the express purpose of securing to themselves and posterity the liberties they had gained by an arduous conflict.

I admit the force of this observation, but I do not look upon it to be conclusive. In the first place, it is too uncertain ground to leave this provision upon, if a provision is at all necessary to secure rights so important as many of those I have mentioned are conceived to be, by the public in general, as well as those in particular who opposed the adoption of

this constitution. Beside some states have no bills of rights, there are others provided with very defective ones, and there are others whose bills of rights are not only defective, but absolutely improper; instead of securing some in the full extent which republican principles would require, they limit them too much to agree with the common ideas of liberty.

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the 4th resolution.

It has been said, that it is unnecessary to load the constitution with this provision, because it was not found effectual in the constitution of the particular states. It is true, there are a few particular states in which some of the most valuable articles have not, at one time or other, been violated, but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights. Beside this security, there is a great probability that such a declaration in the federal system would be inforced; because the state legislatures will jealously and closely watch the operations of this government, and be able to resist with more effect every assumption of power than any other power on earth can do; and the greatest opponents to a federal government admit the state legislatures to be sure guardians of the people’s liberty. I conclude from this view of the subject, that it will be proper in itself, and highly politic, for the tranquility of the public mind, and the stability of the government, that we should offer something, in the form I have proposed, to be incorporated in the system of government, as a declaration of the rights of the people.

. . .

I wish also, in revising the constitution, we may throw into the section, which interdicts the abuse of certain powers in the state legislatures, some

other provisions of equal if not greater importance than those already made. The words, “No state shall pass any bill of attainder, ex post facto law, &c.” were wise and proper restrictions in the constitution. I think there is more danger of those powers being abused by the state governments than by the government of the United States. The same may be said of other powers which they possess, if not controuled by the general principle, that laws are unconstitutional which infringe the rights of the community. I should therefore wish to extend this interdiction, and add, as I have stated in the 5th resolution, that no state shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases; because it is proper that every government should be disarmed of powers which trench upon those particular rights. I know in some of the state constitutions the power of the government is controuled by such a declaration, but others are not. I cannot see any reason against obtaining even a double security on those points; and nothing can give a more sincere proof of the atachment [*sic*] of those who opposed this constitution to those great and important rights, than to see them join in obtaining the security I have now proposed; because it must be admitted, on all hands, that the state governments are as liable to attack those invaluable privileges as the general government is, and therefore ought to be as cautiously guarded against.

I think it will be proper, with respect to the judiciary powers, to satisfy the public mind on those points which I have mentioned. Great inconvenience has been apprehended to suitors from the distance they would be dragged to obtain justice in the supreme court of the United States, upon an appeal on an action for a final debt. To remedy this, declare, that no appeal shall be made unless the matter in controversy amounts to a particular sum: This, with the regulations respecting jury trials in criminal cases, and suits at common law, it is to be hoped will quiet and reconcile the minds of the people to that part of the constitution.

I find, from looking into the amendments proposed by the state conventions, that several are particularly anxious that it should be declared in the constitution, that the powers not therein delegated, should be reserved to the several states. Perhaps words which may define this more precisely, than the whole of the instrument now does, may be considered as superfluous. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated, I am sure I understand it so, and do therefore propose it.

These are the points on which I wish to see a revision of the constitution

take place. How far they will accord with the sense of this body, I cannot take upon me absolutely to determine; but I believe every gentleman will readily admit that nothing is in contemplation, so far as I have mentioned, that can endanger the beauty of government in any one important feature, even in the eyes of its most sanguine admirers. I have proposed nothing that does not appear to me as proper in itself, or eligible as patronised by a respectable number of our fellow citizens; and if we can make the constitution better in the opinion of those who are opposed to it, without weakening its frame, or abridging its usefulness, in the judgment of those who are attached to it, we act the part of wise and liberal men to make such alterations as shall produce that effect.

Congressional Register, June 8, 1789, vol. 1, pp. 429–36.

1.2.1.1.b Mr. MADISON replied in a long and able speech, in which he enforced the propriety of entering, at an early period, into the subject of amendments. He had no design to propose any alterations which in the view of the most sanguine friends to the constitution could affect its main structure or principles, or do it any possible injury — His object was to quiet the mind of the people by giving them some early assurance of a disposition in the house to provide expressly against all encroachments on their liberties, and against the abuses to which the principles of the constitution were liable.

He then stated a number of amendments which he thought should be incorporated in the constitution, and enforced the propriety of each by various explanations and arguments.

The opposition the original motion received, induced him at last to withdraw it in order to propose, that a special committee should be appointed to consider and report what amendments it would be proper to adopt.

He afterwards waved this proposition; and offered to the house a resolution comprehending the amendments at large, together with a bill of rights, which he moved might be referred to the committee of the whole, when fitting on the state of the Union. This was carried.

Daily Advertiser, June 9, 1789, p. 2.

1.2.1.1.c . . . He then observed, That he thought it would be attended with salutary effects, should Congress devote, at the present time, so much at least as one day to this business, to convince the world, that the friends of the Constitution were as firm friends to liberty as those who had opposed it:

The advocates for amendments are numerous and respectable — some alteration of the Constitution lays with great weight upon their minds — they merit consideration. — He urged the expediency of the measure, from the situation of Rhode-Island and North-Carolina — He had no doubt that it would conciliate them towards the Union, and induce them to unite, and again become branches of the great American Family. — He was, he observed, in favour of sundry alterations, or amendments, to the Constitution — he supposed that they could be made without injury to the system — He did not wish a reconsideration of the whole — but supposed that alterations might be made, without effecting the essential principles of the Constitution, which would meet with universal approbation; — those he would propose should be incorporated in the body of the Constitution. — He then mentioned the several objections which had been made by several of the States, and by people at large: — A bill of rights has been the great object contended for — but this was one of those amendments which he had not supposed very essential. — The freedom of the press, and the rights of conscience, those choicest flowers in the prerogative of the people, are not guarded by the British Constitution: — With respect to these, apprehensions had been entertained of their insecurity under the new Constitution; a bill of rights, therefore, to quiet the minds of people upon these points, may be salutary. — He then adverted to the several bills of rights, which were annexed to the Constitutions of individual States; — the great object of these was, to limit and qualify the powers of Government — to guard against the encroachments of the Executive. — In the Federal Government, the Executive is the weakest — the great danger lies not in the Executive, but in the great body of the people — in the disposition which the majority always discovers, to bear down, and depress the minority.

In stating objections which had been made to affixing a bill of rights to the constitution, Mr. MADISON observed, that objections to a continental bill of rights applied equally to their adoption by the States — The objection to a bill of rights, from the powers delegated by the Constitution, being defined and limited, has weight, while the Government confines itself to those specified limits; but instances may occur, in which those limits may be exceeded, by virtue of a construction of that clause empowering Congress to make all necessary laws to carry the Constitution into execution — The article of general warrants may be instanced. — It has been observed, that the Constitution does not repeal the State bills of rights; — to this it may be replied, that some of the States are without any — and that articles contained in those that have them, are very improper, and infringe upon the

rights of human nature, in several respects. — It has been said, that bills of rights have been violated — but does it follow from thence that they do not produce salutary effects: This objection may be urged against every regulation whatever. — From these, and other considerations, Mr. Madison inferred the expediency of a declaration of rights, to be incorporated in the Constitution.

Mr. Madison further observed, That the proportion of Representatives had been objected to — and particularly the discretionary power of diminishing the number. — There is an impropriety in the Legislatures' determining their own compensation, with a power to vary its amount. — The rights of conscience; liberty of the press; and trial by jury, should be so secured, as to put it out of the power of the Legislature to infringe them. — Fears respecting the judiciary system, should be entirely done away — and an express declaration made, that all rights not expressly given up, are retained. — He wished, that a declaration upon these points might be attended to — and if the Constitution can be made better in the view of its most sanguine supporters, by making some alterations in it, we shall not act the part of wise men not to do it — He therefore moved for the appointment of a committee to propose amendments, which should be laid before the Legislatures of the several States, agreeably to the 5th article of the Constitution.

Gazette of the U.S., June 10, 1789, p. 67, cols. 2–3.

1.2.1.2 August 15, 1789

1.2.1.2.a The house resolved itself into a committee of the whole, and resumed the consideration of the report of the committee on the subject of amendments.

Mr. Boudinot in the chair.

The fourth proposition under consideration being as follows:

Article 1. Sect. 9. Between paragraph 2 and 3 insert "no religion shall be established by law, nor shall the equal rights of conscience be infringed."

Mr. Sylvester

Had some doubts of the propriety of the mode of expression used in this paragraph; he apprehended that it was liable to a construction different from

what had been made by the committee, he feared it might be thought to have a tendency to abolish religion altogether.

Mr. Vining

Suggested the propriety of transposing the two members of the sentence.

Mr. Gerry

Said it would read better if it was, that no religious doctrine shall be established by law.

Mr. Sherman

Thought the amendment altogether unnecessary, inasmuch as congress had no authority whatever delegated to them by the constitution, to make religious establishments, he would therefore move to have it struck out.

Mr. Carroll

As the rights of conscience are in their nature of peculiar delicacy, and will little bear the gentlest touch of the governmental hand; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words; he thought it would tend more toward conciliating the minds of the people to the government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.

Mr. Madison

Said, he apprehended the meaning of the words to be, that congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience; whether the words are necessary or not he did not mean to say, but they had been required by some of the state conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, or establish a national religion, to prevent these effects he presumed the amendment was

intended, and he thought it as well expressed as the nature of the language would admit.

Mr. Huntington

Said that he feared with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion: He understood the amendment to mean what had been expressed by the gentleman from Virginia but others might find it convenient to put another construction upon it. The ministers of their congregations to the eastward, were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner, these things were regulated by bye laws: If an action was brought before a federal court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building places of worship might be construed into a religious establishment.

By the charter of Rhode-Island, no religion could be established by law, he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it: He hoped therefore the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.

Mr. Madison

Thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform; he thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

Mr. Livermore

Was not satisfied with that amendment, but he did not wish them to dwell long on the subject; he thought it would be better if it was altered, and made to read in this manner, that congress shall make no laws touching religion, or infringing the rights of conscience.

Mr. Gerry

Did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the house. It brought to his mind some observations that had taken place in the conventions at the time they were considering the present constitution; it had been insisted upon by those who were called antifederalists, that this form of government consolidated the union; the honorable gentleman's motion shews that he considers it in the same light; those who were called antifederalists at that time complained that they had injustice done them by the title, because they were in favor of a federal government, and the others were in favor of a national one; the federalists were for ratifying the constitution as it stood, and the others not until amendments were made. Their names then ought not to have been distinguished by federalists and antifederalists, but rats and antirats.

Mr. Madison

Withdrew his motion, but observed that the words "no national religion shall be established by law," did not imply that the government was a national one; the question was then taken on Mr. Livermore's motion, and passed in the affirmative, 31 for, 20 against it.

Congressional Register, August 15, 1789, vol. 2, pp. 194–97.

1.2.1.2.b The House went into a committee on the amendments to the Constitution.

Mr. Boudinot in the chair.

The committee took up the fourth amendment. — "Art. I. Sec. 9. Between par. 2 and 3 insert, "no religion shall be established by law, nor shall the equal rights of conscience be infringed."

Mr. Livermore moved to strike out this clause and to substitute one to the following effect — "The Congress shall make no laws touching religion or the rights of conscience." He observed that tho' the sense of both provisions was the same, yet the former might seem to wear an ill face and was subject to misconstruction.

Daily Advertiser, August 17, 1789, p. 2, col. 1. ("The question on this motion was carried.").

1.2.1.2.c The House went into a committee on the amendments to the Constitution.

Mr. Boudinot in the chair.

The committee took up the fourth amendment. —

"Art. I. Sec. 9. Between par. 2 and 3 insert, no religion shall be established by law, nor shall the equal rights of conscience be infringed."

Mr. Livermore moved to strike out this clause and to substitute one to the following effect — "The Congress shall make no laws touching religion or the rights of conscience." He observed tho' the sense of both provisions was the same, yet the former might seem to wear an ill face and was subject to misconstruction.

New-York Daily Gazette, August 18, 1789, p. 798, col. 4. ("The question on this motion was carried.").

1.2.1.2.d In committee of the whole, on amendments to the constitution — the fourth amendment under consideration; *viz.* Art. I. Sec. 9, between Par. 2 and 3 insert *"no religion shall be established by law, nor shall the equal rights of conscience be infringed."*

Mr. Sylvester said he doubted the propriety of the mode of expression used in this paragraph; he thought it was liable to a construction different from what was intended by the committee.

Mr. Sherman. It appears to me best that this article should be omitted intirely: Congress has no power to make any religious establishments, it is therefore unnecessary.

Mr. Carroll, Mr. Huntington, Mr. Madison, and Mr. Livermore made some observations: The last proposed that the words should be struck out to substitute these words, "*Congress shall make no laws touching religion or the rights of conscience.*"

Gazette of the U.S., August 19, 1789, p. 147, col. 1. ("The question on this motion was carried.").

1.2.1.3August 20, 1789

On motion of Mr. Ames, the fourth amendment was altered so as to read "congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." This being adopted.

Congressional Register, August 20, 1789, vol. 2, p. 242.

1.2.2STATE CONVENTIONS

1.2.2.1Connecticut, January 9, 1788

Hon. OLIVER WOLCOTT. . . .

. . . Knowledge and liberty are so prevalent in this country, that I do not believe that the United States would ever be disposed to establish one religious sect, and lay all others under legal disabilities.

Elliot, vol. 2, p. 202.

1.2.2.2New York, July 2, 1788

Mr. TREDWELL. . . .

. . . I could have wished also that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment — a tyranny of all others most dreadful, and which will assuredly be exercised whenever it shall be thought necessary for the promotion and support of their political measures.

Elliot, vol. 2, p. 399.

1.2.2.3North Carolina, July 30, 1788

The last clause of the 6th article read.

Mr. HENRY ABBOT, after a short exordium, which was not distinctly heard, proceeded thus: Some are afraid, Mr. Chairman, that, should the Constitution be received, they would be deprived of the privilege of worshipping God according to their consciences, which would be taking from them a benefit they enjoy under the present constitution. They wish to know if their religious and civil liberties be secured under this system, or whether the general government may not make laws infringing their religious liberties. The worthy member from Edenton mentioned sundry political reasons why treaties should be the supreme law of the land. It is feared, by some people, that, by the power of making treaties, they might make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States, which would prevent the people from worshipping God according to their own consciences. The worthy member

from Halifax has in some measure satisfied my mind on this subject. But others may be dissatisfied. Many wish to know what *religion* shall be established. I believe a majority of the community are Presbyterians. I am, for my part, against any exclusive establishment; but if there were any, I would prefer the Episcopal. The exclusion of religious tests is by many thought dangerous and impolitic. They suppose that if there be no religious test required, pagans, deists, and Mahometans might obtain offices among us, and that the senators and representatives might all be pagans. Every person employed by the general and state governments is to take an oath to support the former. Some are desirous to know how and by whom they are to swear, since no religious tests are required — whether they are to swear by Jupiter, Juno, Minerva, Proserpine, or Pluto. We ought to be suspicious of our liberties. We have felt the effects of oppressive measures, and know the happy consequences of being jealous of our rights. I would be glad some gentleman would endeavor to obviate these objections, in order to satisfy the religious part of the society. Could I be convinced that the objections were well founded, I would then declare my opinion against the Constitution. [Mr. Abbot added several other observations, but spoke too low to be heard.]

Mr. IREDELL. Mr. Chairman, nothing is more desirable than to remove the scruples of any gentleman on this interesting subject. Those concerning religion are entitled to particular respect. I did not expect any objection to this particular regulation, which, in my opinion, is calculated to prevent evils of the most pernicious consequences to society. Every person in the least conversant in the history of mankind, knows what dreadful mischiefs have been committed by religious persecutions. Under the color of religious tests, the utmost cruelties have been exercised. Those in power have generally considered all wisdom centred in themselves; that they alone had a right to dictate to the rest of mankind; and that all opposition to their tenets was profane and impious. The consequence of this intolerant spirit had been, that each church has in turn set itself up against every other; and persecutions and wars of the most implacable and bloody nature have taken place in every part of the world. America has set an example to mankind to think more modestly and reasonably — that a man may be of different religious sentiments from our own, without being a bad member of society. The principles of toleration, to the honor of this age, are doing away those errors and prejudices which have so long prevailed, even in the most intolerant countries. In the Roman Catholic countries, principles of moderation are adopted which would have been spurned at a century or two

ago. I should be sorry to find, when examples of toleration are set even by arbitrary governments, that this country, so impressed with the highest sense of liberty, should adopt principles on this subject that were narrow and illiberal.

I consider the clause under consideration as one of the strongest proofs that could be adduced, that it was the intention of those who formed this system to establish a general religious liberty in America. Were we to judge from the examples of religious tests in other countries, we should be persuaded that they do not answer the purpose for which they are intended. What is the consequence of such in England? In that country no man can be a member in the House of Commons, or hold any office under the crown, without taking the sacrament according to the rites of the Church. This, in the first instance, must degrade and profane a rite which never ought to be taken but from a sincere principle of devotion. To a man of base principles, it is made a mere instrument of civil policy. The intention was, to exclude all persons from offices but the members of the Church of England. Yet it is notorious that dissenters qualify themselves for offices in this manner, though they never conform to the Church on any other occasion; and men of no religion at all have no scruple to make use of this qualification. It never was known that a man who had no principles of religion hesitated to perform any rite when it was convenient for his private interest. No test can bind such a one. I am therefore clearly of opinion that such a discrimination would neither be effectual for its own purposes, nor, if it could, ought it by any means to be made. Upon the principles I have stated, I confess the restriction on the power of Congress, in this particular, has my hearty approbation. They certainly have no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentlemen should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm. If they could, sir, no man would have more horror against it than myself. Happily, no sect here is superior to another. As long as this is the case, we shall be free from those persecutions and distractions with which other countries have been torn. If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey. Every one would ask, “Who authorized the government to pass such an act? It is not warranted by the Constitution, and is barefaced usurpation.” The power to make treaties can never be supposed to include a right to establish a foreign religion

among ourselves, though it might authorize a toleration of others.

But it is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for? This is the foundation on which persecution has been raised in every part of the world. The people in power were always right, and every body else wrong. If you admit the least difference, the door to persecution is opened. Nor would it answer the purpose, for the worst part of the excluded sects would comply with the test, and the best men only be kept out of our counsels. But it is never to be supposed that the people of America will trust their dearest rights to persons who have no religion at all, or a religion materially different from their own. I would be happy for mankind if religion was permitted to take its own course, and maintain itself by the excellence of its own doctrines. The divine Author of our religion never wished for its support by worldly authority. Has he not said that the gates of hell shall not prevail against it? It made much greater progress for itself, than when supported by the greatest authority upon earth.

It has been asked by that respectable gentleman (Mr. Abbot) what is the meaning of that part, where it is said that the United States shall *guaranty* to every state in the Union a republican form of government, and why a *guaranty* of religious freedom was not included. The meaning of the guaranty provided was this: There being thirteen governments confederated upon a republican principle, it was essential to the existence and harmony of the confederacy that each should be a republican government, and that no state should have a right to establish an aristocracy or monarchy. That clause was therefore inserted to prevent any state from establishing any government but a republican one. Every one must be convinced of the mischief that would ensue, if any state had a right to change its government to a monarchy. If a monarchy was established in any one state, it would endeavor to subvert the freedom of the others, and would, probably, by degrees succeed in it. This must strike the mind of every person here, who recollects the history of Greece, when she had confederated governments. The king of Macedon, by his arts and intrigues, got himself admitted a member of the Amphictyonic council, which was the superintending government of the Grecian republics; and in a short time he became master of them all. It is, then, necessary that the members of a confederacy should

have similar governments. But consistently with this restriction, the states may make what change in their own governments they think proper. Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.

There is a degree of jealousy which it is impossible to satisfy. Jealousy in a free government ought to be respected; but it may be carried to too great an extent. It is impracticable to guard against all possible danger of people's choosing their officers indiscreetly. If they have a right to choose, they may make a bad choice.

I met, by accident, with a pamphlet, this morning, in which the author states, as a very serious danger, that the pope of Rome might be elected President. I confess this never struck me before; and if the author had read all the qualifications of a President, perhaps his fears might have been quieted. No man but a native, or who has resided fourteen years in America, can be chosen President. I know not all the qualifications for pope, but I believe he must be taken from the college of cardinals; and probably there are many previous steps necessary before he arrives at this dignity. A native of America must have very singular good fortune, who, after residing fourteen years in his own country, should go to Europe, enter into Romish orders, obtain the promotion of cardinal, afterwards that of pope, and at length be so much in the confidence of his own country as to be elected President. It would be still more extraordinary if he should give up his popedom for our presidency. Sir, it is impossible to treat such idle fears with any degree of gravity. Why is it not objected, that there is no provision in the Constitution against electing one of the kings of Europe President? It would be a clause equally rational and judicious.

I hope that I have in some degree satisfied the doubts of the gentleman. This article is calculated to secure universal religious liberty, by putting all sects on a level — the only way to prevent persecution. I thought nobody would have objected to this clause, which deserves, in my opinion, the highest approbation. This country has already had the honor of setting an example of civil freedom, and I trust it will likewise have the honor of teaching the rest of the world the way to religious freedom also. God grant both may be perpetuated to the end of time!

Mr. ABBOT, after expressing his obligations for the explanation which had been given, observed that no answer had been given to the question he

put concerning the form of an *oath*.

Mr. IREDELL. Mr. Chairman, I beg pardon for having omitted to take notice of that part which the worthy gentleman has mentioned. It was by no means from design, but from its having escaped my memory, as I have not the conveniency of taking notes. I shall now satisfy him in that particular in the best manner in my power.

According to the modern definition of an oath, it is considered a "solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments, according to that form which will bind his conscience most." It was long held that no oath could be administered but upon the New Testament, except to a Jew, who was allowed to swear upon the Old. According to this notion, none but Jews and Christians could take an oath; and heathens were altogether excluded. At length, by the operation of principles of toleration, these narrow notions were done away. Men at length considered that there were many virtuous men in the world who had not had an opportunity of being instructed either in the Old or New Testament, who yet very sincerely believed in a Supreme Being, and in a future state of rewards and punishments. It is well known that many nations entertain this belief who do not believe either in the Jewish or Christian religion. Indeed, there are few people so grossly ignorant or barbarous as to have no religion at all. And if none but Christians or Jews could be examined upon oath, many innocent persons might suffer for want of the testimony of others. In regard to the form of an oath, that ought to be governed by the religion of the person taking it. I remember to have read an instance which happened in England, I believe in the time of Charles II. A man who was a material witness in a cause, refused to swear upon the book, and was admitted to swear with his uplifted hand. The jury had a difficulty in crediting him; but the chief justice told them, he had, in his opinion, taken as strong an oath as any of the other witnesses, though, had he been to swear himself, he should have kissed the book. A very remarkable instance also happened in England, about forty years ago, of a person who was admitted to take an oath according to the rites of his own country, though he was a heathen. He was an East Indian, who had a great suit in chancery, and his answer upon oath to a bill filed against him was absolutely necessary. Not believing either in the Old or New Testament, he could not be sworn in the accustomed manner, but was sworn according to the form of the Gentoo religion, which he professed, by touching the foot of a priest.

It appeared that, according to the tenets of this religion, its members believed in a Supreme Being, and in a future state of rewards and punishments. It was accordingly held by the judges, upon great consideration, that the oath ought to be received; they considering that it was probable those of that religion were equally bound in conscience by an oath according to their form of swearing, as they themselves were by one of theirs; and that it would be a reproach to the justice of the country, if a man, merely because he was of a different religion from their own, should be denied redress of an injury he had sustained. Ever since this great case, it has been universally considered that, in administering an oath, it is only necessary to inquire if the person who is to take it, believes in a Supreme Being, and in a future state of rewards and punishments. If he does, the oath is to be administered according to that form which it is supposed will bind his conscience most. It is, however, necessary that such a belief should be entertained, because otherwise there would be nothing to bind his conscience that could be relied on; since there are many cases where the terror of punishment in this world for perjury could not be dreaded. I have endeavored to satisfy the committee. We may, I think, very safely leave religion to itself; and as to the form of the oath, I think this may well be trusted to the general government, to be applied on the principles I have mentioned.

Gov. JOHNSTON expressed great astonishment that the people were alarmed on the subject of religion. This, he said, must have arisen from the great pains which had been taken to prejudice men’s minds against the Constitution. He begged leave to add the following few observations to what had been so ably said by the gentleman last up.

I read the Constitution over and over, but could not see one cause of apprehension or jealousy on this subject. When I heard there were apprehensions that the pope of Rome could be the President of the United States, I was greatly astonished. It might as well be said that the king of England or France, or the Grand Turk, could be chosen to that office. It would have been as good an argument. It appears to me that it would have been dangerous, if Congress could intermeddle with the subject of religion. True religion is derived from a much higher source than human laws. When any attempt is made, by any government, to restrain men’s consciences, no good consequence can possibly follow. It is apprehended that Jews, Mahometans, pagans, &c., may be elected to high offices under the government of the United States. Those who are Mahometans, or any others

who are not professors of the Christian religion, can never be elected to the office of President, or other high office, but in one of two cases. First, if the people of America lay aside the Christian religion altogether, it may happen. Should this unfortunately take place, the people will choose such men as think as they do themselves. Another case is, if any persons of such descriptions should, notwithstanding their religion, acquire the confidence and esteem of the people of America by their good conduct and practice of virtue, they may be chosen. I leave it to gentlemen's candor to judge what probability there is of the people's choosing men of different sentiments from themselves.

But great apprehensions have been raised as to the influence of the Eastern States. When you attend to circumstances, this will have no weight. I know but two or three states where there is the least chance of establishing any particular religion. The people of Massachusetts and Connecticut are mostly Presbyterians. In every other state, the people are divided into a great number of sects. In Rhode Island, the tenets of the Baptists, I believe, prevail. In New York, they are divided very much: the most numerous are the Episcopalians and the Baptists. In New Jersey, they are as much divided as we are. In Pennsylvania, if any sect prevails more than others, it is that of the Quakers. In Maryland, the Episcopalians are most numerous, though there are other sects. In Virginia, there are many sects; you all know what their religious sentiments are. So in all the Southern States they differ; as also in New Hampshire. I hope, therefore, that gentlemen will see there is no cause of fear that any one religion shall be exclusively established.

Mr. CALDWELL thought that some danger might arise. He imagined it might be objected to in a political as well as in a religious view. In the first place, he said, there was an invitation for Jews and pagans of every kind to come among us. At some future period, said he, this might endanger the character of the United States. Moreover, even those who do not regard religion, acknowledge that the Christian religion is best calculated, of all religions, to make good members of society, on account of its morality. I think, then, added he, that, in a political view, those gentlemen who formed this Constitution should not have given this invitation to Jews and heathens. All those who have any religion are against the emigration of those people from the eastern hemisphere.

Mr. SPENCER was an advocate for securing every unalienable right, and that of worshipping God according to the dictates of conscience in particular. He therefore thought that no one particular religion should be

established. Religious tests, said he, have been the foundation of persecutions in all countries. Persons who are conscientious will not take the oath required by religious tests, and will therefore be excluded from offices, though equally capable of discharging them as any member of the society. It is feared, continued he, that persons of bad principles, deists, atheists, &c., may come into this country; and there is nothing to restrain them from being eligible to offices. He asked if it was reasonable to suppose that the people would choose men without regarding their characters. Mr. Spencer then continued thus: Gentlemen urge that the want of a test admits the most vicious characters to offices. I desire to know what test could bind them. If they were of such principles, it would not keep them from enjoying those offices. On the other hand, it would exclude from offices conscientious and truly religious people, though equally capable as others. Conscientious persons would not take such an oath, and would be therefore excluded. This would be a great cause of objection to a religious test. But in this case, as there is not a religious test required, it leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority; and no kind of oppression can take place. I confess it strikes me so. I am sorry to differ from the worthy gentleman. I cannot object to this part of the Constitution. I wish every other part was as good and proper.

Gov. JOHNSTON approved of the worthy member's candor. He admitted a possibility of Jews, pagans, &c., emigrating to the United States; yet, he said, they could not be in proportion to the emigration of Christians who should come from other countries; that, in all probability, the children even of such people would be Christians; and that this, with the rapid population of the United States, their zeal for religion, and love of liberty, would, he trusted, add to the progress of the Christian religion among us.

Elliot, vol. 4, pp. 191–200.

1.2.2.4South Carolina, January 18, 1788

Hon. PATRICK CALHOUN, of *Ninety-six*, made some observations on the too great latitude allowed in religion.

Elliot, vol. 4, p. 312.

1.2.2.5Virginia

1.2.2.5.aJune 4, 1788

Gov. RANDOLPH. Mr. Chairman, had the most enlightened statesman whom America has yet seen, foretold, but a year ago, the crisis which has now called us together, he would have been confronted by the universal testimony of history; for never was it yet known, that, in so short a space, by the peaceable working of events, without a war, or even the menace of the smallest force, a nation has been brought to agitate a question, an error in the issue of which may blast their happiness. It is, therefore, to be feared, lest to this trying exigency the best wisdom should be unequal; and here (if it were allowable to lament any ordinance of nature) might it be deplored that, in proportion to the magnitude of a subject, is the mind intemperate. Religion, the dearest of all interests, has too often sought proselytes by fire rather than by reason; and politics, the next in rank, is too often nourished by passion, at the expense of the understanding. Pardon me, however, for expecting one exception to the tendency of mankind from the dignity of this Convention — a mutual toleration, and a persuasion that no man has a right to impose his opinions on others. . . .

Elliot, vol. 3, pp. 23–24.

1.2.2.5.bJune 6, 1788

Mr. MADISON. . . .

I confess to you, sir, were uniformity of religion to be introduced by this system, it would, in my opinion, be ineligible; but I have no reason to conclude that uniformity of government will produce that of religion. This subject is, for the honor of America, perfectly free and unshackled. The government has no jurisdiction over it: the least reflection will convince us there is no danger to be feared on this ground.

Elliot, vol. 3, p. 93.

1.2.2.5.cJune 10, 1788

Gov. RANDOLPH. . . .

Freedom of religion is said to be in danger. I will candidly say, I once thought that it was, and felt great repugnance to the Constitution for that reason. I am willing to acknowledge my apprehensions removed; and I will inform you by what process of reasoning I did remove them. The Constitution provides that “the senators and representatives before

mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States." It has been said that, if the exclusion of the religious test were an exception from the general power of Congress, the power over religion would remain. I inform those who are of this opinion, that no power is given expressly to Congress over religion. The senators and representatives, members of the state legislatures, and executive and judicial officers, are bound, by oath or affirmation, to support this Constitution. This only binds them to support it in the exercise of the powers constitutionally given it. The exclusion of religious tests is an exception from this general provision, with respect to oaths or affirmations. Although officers, &c., are to swear that they will support this Constitution, yet they are not bound to support one mode of worship, or to adhere to one particular sect. It puts all sects on the same footing. A man of abilities and character, of any sect whatever, may be admitted to any office or public trust under the United States. I am a friend to a variety of sects, because they keep one another in order. How many different sects are we composed of throughout the United States! How many different sects will be in Congress! We cannot enumerate the sects that may be in Congress! And there are now so many in the United States, that they will prevent the establishment of any one sect, in prejudice to the rest, and will forever oppose all attempts to infringe religious liberty. If such an attempt be made, will not the alarm be sounded throughout America? If Congress should be as wicked as we are foretold they will be, they would not run the risk of exciting the resentment of all, or most, of the religious sects in America.

Elliot, vol. 3, pp. 204–05.

1.2.2.5.dJune 12, 1788

Mr. HENRY. . . .

. . . His amendments go to that despised thing, called *a bill of rights*, and all the rights which are dear to human nature — trial by jury, the liberty of religion and the press, &c. Do not gentlemen see that, if we adopt, under the idea of following Mr. Jefferson's opinion, we amuse ourselves with the shadow, while the substance is given away?. . .

. . .

. . . Even the advocates for the plan do not all concur in the certainty of

its security. Wherefore is religious liberty not secured? One honorable gentleman, who favors adoption, said that he had his fears on the subject. If I can well recollect, he informed us that he was perfectly satisfied, by the powers of reasoning, (with which he is so happily endowed,) that those fears were not well grounded. There is many a religious man who knows nothing of argumentative reasoning; there are many of our most worthy citizens who cannot go through all the labyrinths of syllogistic, argumentative deductions, when they think that the rights of conscience are invaded. This sacred right ought not to depend on constructive, logical reasoning.

When we see men of such talents and learning compelled to use their utmost abilities to convince themselves that there is no danger, is it not sufficient to make us tremble? Is it not sufficient to fill the minds of the ignorant part of men with fear? If gentlemen believe that the apprehensions of men will be quieted, they are mistaken, since our best-informed men are in doubt with respect to the security of our rights. Those who are not so well informed will spurn at the government. When our common citizens, who are not possessed with such extensive knowledge and abilities, are called upon to change their bill of rights (which, in plain, unequivocal terms, secures their most valuable rights and privileges) for construction and implication, will they implicitly acquiesce? Our declaration of rights tells us that “all men are by nature free and independent,” &c. [Here Mr. Henry read the declaration of rights.] Will they exchange these rights for logical reasons? If you had a thousand acres of land dependent on this, would you be satisfied with logical construction? Would you depend upon a title of so disputable a nature? The present opinions of individuals will be buried in entire oblivion when those rights will be thought of. That sacred and lovely thing, religion, ought not to rest on the ingenuity of logical deduction. Holy religion, sir, will be prostituted to the lowest purposes of human policy. What has been more productive of mischief among mankind than religious disputes? Then here, sir, is a foundation for such disputes, when it requires learning and logical deduction to perceive that religious liberty is secure.

. . .

Mr. MADISON. . . .

The honorable member has introduced the subject of religion. Religion is not guarded; there is no bill of rights declaring that religion should be secure. Is a bill of rights a security for religion? Would the bill of rights, in

this state, exempt the people from paying for the support of one particular sect, if such sect were exclusively established by law? If there were a majority of one sect, a bill of rights would be a poor protection for liberty. Happily for the states, they enjoy the upmost [*sic*] freedom of religion. This freedom arises from that multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society; for where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest. Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment. I believe it to be so in the other states. There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation. I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom. It is better that this security should be depended upon from the general legislature, than from one particular state. A particular state might concur in one religious project. But the United States abound in such a variety of sects, that it is a strong security against religious persecution; and it is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest.

Elliot, vol. 3, pp. 314, 317–18, 330.

1.2.2.5.eJune 15, 1788

Gov. RANDOLPH. . . .

He has added religion to the objects endangered, in his conception. Is there any power given over it? Let it be pointed out. Will he not be contented with the answer that has been frequently given to that objection? The variety of sects which abounds in the United States is the best security for the freedom of religion. No part of the Constitution, even if strictly construed, will justify a conclusion that the general government can take away or impair the freedom of religion.

The gentleman asks, with triumph, Shall we be deprived of these valuable rights? Had there been an exception, or an express infringement of those rights, he might object; but I conceive every fair reasoner will agree that there is no just cause to suspect that they will be violated.

But he objects that the common law is not established by the Constitution. The wisdom of the Convention is displayed by its omission, because the common law ought not to be immutably fixed. Is it established in our own Constitution, or the bill of rights, which has been resounded

through the house? It is established only by an act of the legislature, and can therefore be changed as circumstances may require it. Let the honorable gentleman consider what would be the destructive consequences of its establishment in the Constitution. Even in England, where the firmest opposition has been made to encroachments upon it, it has been frequently changed. What would have been our dilemma if it had been established? Virginia has declared that children shall have equal portions of the real estate of their intestate parents, and it is consistent with the principles of a republican government.

Elliot, vol. 3, p. 469.

1.2.3PHILADELPHIA CONVENTION

1.2.3.1Proposal by Pinckney, May 29, 1787

"ART. VI.. . . The legislature of the United States shall pass no law on the subject of religion; nor touching or abridging the liberty of the press; [n]or shall the privilege of the writ of habeas corpus ever be suspended, except in case of rebellion or invasion.

Elliot, vol. 5, p. 131–32.

1.2.4NEWSPAPERS AND PAMPHLETS

1.2.4.1An American Citizen, No. 1, September 26, 1787

It is impossible for an honest and feeling mind, of any nation or country whatever, to be insensible to the present circumstances of America. Were I an East Indian, or a Turk, I should consider this singular situation of a part of my fellow creatures, as most curious and interesting. Intimately connected with the country, as a citizen of the union, I confess it entirely engrosses my mind and feelings.

To take a proper view of the ground on which we stand, it may be

necessary to recollect the manner in which the United States were originally settled and established. — Want of charity in the religious systems of Europe and of justice in their political governments were the principal moving causes, which drove the emigrants of various countries to the American continent. The Congregationalists, Quakers, Presbyterians, and other British dissenters, the Catholics of England and Ireland, the Hugonots of France, the German Lutherans, Calvinists, and Moravians, with several other societies, established themselves in the different colonies, thereby laying the ground of that catholicism in ecclesiastical affairs, which has been observable since the late revolution: Religious liberty naturally promotes corresponding dispositions in matters of government. The Constitution of England, as it stood on paper, was one of the freest at that time existing in the world, and the American colonies considered themselves as entitled to the fullest enjoyment of it. . . .

. . .

In America our President will not only be *without* these influencing advantages, *but they will be in the possession of the people at large, to strengthen their hands in the event of a contest with him*. All religious funds, honors and powers, are in the gift of numberless, unconnected, disunited, and contending corporations, wherein the principle of perfect equality universally prevails. In short, danger from ecclesiastical tyranny, that long standing and still remaining curse of the people — that sacrilegious engine of royal power in some countries, can be feared by no man in the United States. . . .

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, pp. 247–49.

1.2.4.2A Meeting of Philadelphia Association of Baptist Churches, October 12, 1787

Last week the BAPTIST Churches belonging to the middle States, convened in association in this city. After finishing the particular business on which they met as a *religious* body, it was agreed to incorporate with their general circular letter, the following recommendation to their people of the proposed plan of the *Foederal Government* — which has been handed to the Printers by a correspondent, and redounds much to their honor as a society.

After congratulating their brethren on the great increase of their churches the year past — they proceed, "we also congratulate you on the kind interposition of Divine Providence visible in that happy unanimity which obtained among the members of the late Foederal Convention, to agree upon, and report to the States in this union, a form of Foederal Government, which promises, on its adoption, to rescue our dear country from that national dishonor, injustice, anarchy, confusion and bloodshed, which have already resulted from the weakness and inefficiency of the *present* form, and which we have the greatest reason to fear is but the beginning of sorrows, unless the people lay hold on this favourable opportunity offered to establish an EFFICIENT government; which, we hope may, under God, secure our invaluable rights, both civil and religious, and which it will be in the power of the great body of the people, if hereafter found necessary, to controul and amend."

New York Packet, Kaminski & Saladino, vol. 13, pp. 374–75.

1.2.4.3An Old Whig, No. 1, October 12, 1787

. . . Should the freedom of the press be restrained on the subject of politics, there is no doubt it will soon after be restrained on all other subjects, religious as civil. . . .

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 378.

1.2.4.4An American Citizen, No. 4, October 21, 1787

. . .

No *religious* test is ever to be required of any officer or servant of the United States. The people may employ *any wise and good citizen* in the execution of the various duties of the government. In Italy, Spain and Portugal, *no protestant* can hold a public trust. In England, *every presbyterian, and other person not of their established church*, is incapable of holding an office. No such *impious* deprivation of the rights of men can take place under the new foederal constitution. The convention has the honor of proposing the *first public act*, by which any nation has ever *divested itself* of a power, every exercise of which is a *trespass on the Majesty of Heaven*.

Pennsylvania Gazette, Kaminski & Saladino, vol. 13, p. 432.

1.2.4.5Centinel, No. 2, October 24, 1787

. . .

The new plan, it is true, does propose to secure the people of the benefit of personal liberty by the *habeas corpus*; and trial by jury for all crimes, except in case of impeachment: but there is no declaration, that all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding; and that no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against his own free will and consent; and that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship:. . . .

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 13, p. 466.

1.2.4.6Timoleon, November 1, 1787

. . .

After some judicious reflections on this subject, which tended to shew the necessity of the most plain and unequivocal language in the all important business of constituting government, which necessarily conveying great powers, is always liable (from the natural tendency of power to corrupt the human heart and deprave the head) to great abuse; by perverse and subtle arguments calculated to extend dominion over all things and all men. One of the club supposed the following case: — A gentleman, *in the line of his profession* is appointed a *judge* of the supreme court under the new Constitution, and the *rulers*, finding that the rights of conscience and the freedom of the press were exercised in such a manner, by *preaching* and *printing* as to be troublesome to the new government — which event would probably happen, if the rulers finding themselves possessed of great power, should so use it as to oppress and injure the community. — In this state of things the *judge* is called upon, *in the line of his profession*, to give his opinion — whether the *new Constitution* admitted of a legislative act to

suppress the rights of conscience, and *violate the liberty of the press?* The answer of the learned *judge* is conceived in didactic mode, and expressed in learned phrase; thus, — In the 8th section of the first article of the *new Constitution*, the Congress have power given to *lay and collect taxes for the general welfare of the United States*. By this power, the right of taxing is co-extensive with the *general welfare*, and the *general welfare* is as unlimitted as actions and things are that may disturb or benefit that general welfare. A right being given to *tax* for the general welfare, necessarily includes the right of judging what is for the general welfare, and a right of judging what is for the general welfare, as *necessarily* includes a power of protecting, defending, and promoting it by all such laws and means as are fitted to that end; for, qui dat finem dat media ad finem necessaria, who gives the end gives the means necessary to obtain the end. The Constitution must be so construed as not to involve an absurdity, which would clearly follow from allowing the end and denying the means. A right of *taxing* for the general welfare being the highest and most important mode of providing for it, cannot be supposed to exclude inferior modes of effecting the same purpose, because the rule of law is, that, omne majus continct in se minus.

From hence it clearly results, that, if *preachers* and *printers* are troublesome to the new government; and that in the opinion of its rulers, it shall be for the general welfare to restrain or suppress both the one and the other, it may be done consistently with the new Constitution. And that this was the opinion of the community when they consented to it, is evident from this consideration; that although the all comprehending power of the new legislature is fixed, by its acts being made the *supreme law* of the land, any thing in the *Constitutions* or laws of any state to the contrary notwithstanding: Yet no *express* declaration in favor of the *rights of conscience* or *liberty* of the *press* is to be found in the new Constitution, as we see was carefully done in the Constitutions of the states composing this union — Shewing clearly, that what was *then* thought necessary to be specially reserved from the pleasure of power, is *now* designed to be yielded to its will.

A grave old gentleman of the club, who had sat with his head reclined on his hand, listening in pensive mood to the argument of the *judge*, said, “I verily believe, that neither the logic or the law of that opinion will be hereafter doubted by the professors of power, who, through the history of human nature, have been for enlarging the sphere of their authority. And thus the dearest rights of men and the best security of civil liberty may be

sacrificed by the sophism of a lawyer, who, Carneades like, can to day shew that to be necessary, before the people, which tomorrow he can likewise shew to be unnecessary and useless — For which reason the sagacious Cato advised, that such a man should immediately be sent from the city, as a person dangerous to the morals of the people and to society." The old gentleman continued, "I now plainly see the necessity of express declarations and reservations in favor of the great, unalienable rights of mankind, to prevent the oppressive and wicked extention of power to the ruin of human liberty. For the opinion above stated, absolutely refutes the sophistry of "that being retained which is not given," where the words conveying power admit of the most extensive construction that language can reach to, or the mind conceive, as is the case in this new Constitution. By which we have already seen how logically it may be proved, that both *religion* and the *press* can be made to bend before the views of power. . . ."

New York Journal, Kaminski & Saladino, vol. 13, pp. 535–36.

1.2.4.7An Old Whig, No. 5, November 1, 1787

MR. PRINTER, In order that people may be sufficiently impressed, with the necessity of establishing a BILL OF RIGHTS in the forming of a new constitution, it is very proper to take a short view of some of those liberties, which it is of the greatest importance for Freemen to retain to themselves, when they surrender up a part of their natural rights for the good of society.

The first of these, which it is of the utmost importance for the people to retain to themselves, which indeed they have not even the right to surrender, and which at the same time it is of no kind of advantages to government to strip them of, is the LIBERTY OF CONSCIENCE. I know that a ready answer is at hand, to any objections upon this head. We shall be told that in this enlightened age, the rights of conscience are perfectly secure: There is no necessity of guarding them; for no man has the remotest thoughts of invading them. If this be the case, I beg leave to reply that now is the very time to secure them. — Wise and prudent men always take care to guard against danger beforehand, and to make themselves safe whilst it is yet in their power to do it without inconvenience or risk. — who shall answer for the ebbings and flowings of opinion, or be able to say what will be the fashionable frenzy of the next generation? It would have been treated as a very ridiculous supposition, a year ago, that the charge of witchcraft would

cost a person her life in the city of Philadelphia; yet the fate of the unhappy old woman called *Corbmaker*, who was beaten — repeatedly wounded with knives — mangled and at last killed in our streets, in obedience to the commandment which requires "that we shall not suffer a witch to live," without a possibility of punishing or even of detecting the authors of this inhuman folly, should be an example to warn us how little we ought to trust to the unrestrained discretion of human nature.

Uniformity of opinion in science, morality, politics or religion, is undoubtedly a very great happiness to mankind; and there have not been wanting zealous champions in every age, to promote the means of securing so invaluable a blessing. If in America we have not lighted up fires to consume Heretics in religion, if we have not persecuted unbelievers to promote the unity of the faith, in matters which pertain to our final salvation in a future world, I think we have all of us been witness to something very like the same spirit, in matters which are supposed to regard our political salvation in this world. In Boston it seems at this very moment, that no man is permitted to publish a doubt of the infalibility [*sic*] of the late convention, without giving up his name to the people, that he may be delivered over to speedy destruction; and it is but a short time since the case was little better in this city. Now this is a portion of the very same spirit, which has so often kindled the fires of the inquisition: and the same Zealot who would hunt a man down for a difference of opinion upon a political question which is the subject of public enquiry, if he should happen to be fired with zeal for a particular species of religion, would be equally intolerant. The fact is, that human nature is still the same that ever it was: the fashion indeed changes; but the seeds of superstition, bigotry and enthusiasm, are too deeply implanted in our minds, ever to be eradicated; and fifty years hence, the French may renew the persecution of the Huguenots, whilst the Spaniards in their turn may become indifferent to their forms of religion. They are idiots who trust their future security to the whim of the present hour. One extreme is always apt to produce the contrary, and these countries, which are now the most lax in their religious notions, may in a few years become the most rigid, just as the people of this country from not being able to bear any continental government at all, are now flying into the opposite extreme of surrendering up all the powers of the different states, to one continental government.

The more I reflect upon the history of mankind, the more I am disposed to think that it is our duty to secure the essential rights of the people, by

every precaution; for not an avenue has been left unguarded, through which oppression could possibly enter in any government; without some enemy of the public peace and happiness improving the opportunity to break in upon the liberties of the people; and none have been more frequently successful in the attempt, than those who have covered their ambitious designs under the garb of a fiery zeal for religious orthodoxy. What has happened in other countries and in other ages, may very possibly happen again in our own country, and for aught we know, before the present generation quits the stage of life. We ought therefore in a *bill of rights* to secure, in the first place, by the most express stipulations, the sacred rights of conscience. Has this been done in the constitution, which is now proposed for the consideration of the people of the country? — Not a word on this subject has been mentioned in any part of it; but we are left in this important article, as well as many others, entirely to the mercy of our future rulers.

But supposing our future rulers to be wicked enough to attempt to invade the rights of conscience; I may be asked how will they be able to effect so horrible a design? I will tell you my friends — *The unlimited power of taxation* will give them the command of all the treasures of the continent; *a standing army* will be wholly at their devotion, and the authority which is given them over the *militia*, by virtue of which they may, if they please, change all the officers of the militia on the continent in one day, and put in new officers whom they can better trust; by which they can subject all the militia to strict military laws, and punish the disobedient with death, or otherwise, as they shall think right; by which they can march the militia back and forward from one end of the continent to the other, at their discretion; these powers, if they should ever fall into bad hands, may be abused to the worst of purposes. Let us instance one thing arising from this right of organizing and governing the militia. Suppose a man alledges that he is conscientiously scrupulous of bearing Arms. — By the bill of rights of Pennsylvania he is bound only to pay an equivalent for this personal service. — What is there in the new proposed constitution to prevent his being dragged like a Prussian soldier to the camp and there compelled to bear arms? — This will depend wholly upon the wisdom and discretion of the future legislature of the continent in the framing their militia laws; and I have lived long enough to hear the practice *of commuting personal service for a paltry fine* in time of war and foreign invasion most severely reprobated by some persons who ought to have judged more rightly on the subject — Such flagrant oppressions as these I dare say will not happen at the beginning of the new government; probably not till the powers of

government shall be firmly fixed; but it is a duty we owe to ourselves and our posterity if possible to prevent their ever happening. I hope and trust that there are few persons at present hardy enough to entertain thoughts of creating any religious establishment for this country; although I have lately read a piece in the newspaper, which speaks of *religious* as well as civil and military *offices*, as being hereafter to be disposed of by the new government; but if a majority of the continental legislature should at any time think fit to establish a form of religion, for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church, what is there in the proposed constitution to hinder their doing so? Nothing; for we have no bill of rights, and every thing therefore is in their power and at their discretion. And at whose discretion? We know not any more than we know the fates of those generations which are yet unborn.

It is needless to repeat the necessity of securing other personal rights in the forming a new government. The same argument which proves the necessity of securing one of them shews also the necessity of securing others. Without a bill of rights we are totally insecure in all of them; and no man can promise himself with any degree of certainty that his posterity will enjoy the inestimable blessings of liberty of conscience, of freedom of speech and of writing and publishing their thoughts on public matters, of trial by jury, of holding themselves, their houses and papers free from seizure and search upon general suspicion or general warrants; or in short, that they will be secured in the enjoyment of life, liberty and property without depending on the will and pleasure of their rulers.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, pp. 538–41.

1.2.4.8A Landholder, No. 7, December 17, 1787

But while I assert the right of religious liberty; I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and public detriment. For this reason, I heartily approve of our laws against drunkenness, profane swearing, blasphemy, and professed atheism. But in this state, we have never thought it expedient to adopt a test-law; and yet I sincerely believe

we have as great a proportion of religion and morality, as they have in England, where every person who holds a public office, must be either a saint by law, or a hypocrite by practice. A test-law is the parent of hypocrisy, and the offspring of error and the spirit of persecution. Legislatures have no right to set up an inquisition, and examine into the private opinions of men. Test-laws are useless and ineffectual, unjust and tyrannical; therefore the Convention have done wisely in excluding this engine of persecution, and providing that no religious test shall ever be required.

Connecticut Courant, Kaminski & Saladino, vol. 14, pp. 451–52.

1.2.5LETTERS AND DIARIES

1.2.5.1James Madison to Thomas Jefferson, October 4, 1787

. . . 3. Religion. The inefficacy of this restraint on individuals is well known. The conduct of every popular Assembly, acting on oath, the strongest of religious ties, shews that individuals join without remorse in acts agst. which their consciences would revolt, if proposed to them separately in their closets. When Indeed [*sic*] Religion is kindled into enthusiasm, its force like that of other passions is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of Religion, and whilst it lasts will hardly be seen with pleasure at the helm. Even in its coolest state, it has been much oftener a motive to oppression than a restraint from it. If then there must be different interests and parties in Society; and a majority when united by a common interest or passion can not be restrained from oppressing the minority, what remedy can be found in a republican Government, where the majority must ultimately decide, but that of giving such an extent to its sphere, that no common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit. In a large Society, the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole. The same security seems requisite for the civil as for the religious rights of individuals. If the same sect form a majority and have the power, other

sects will be sure to be depressed. Divide et impera, the reprobated axiom of tyranny, is under certain qualifications, the only policy, by which a republic can be administered on just principles. It must be observed however that this doctrine can only hold within a sphere of a mean extent. As in too small a sphere oppressive combinations may be too easily formed agst. the weaker party; so in too extensive a one, a defensive concert may be rendered too difficult against the oppression of those entrusted with the administration. The great desideratum in Government is, so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society to controul one part from invading the rights of another, and at the same time sufficiently controulled itself, from setting up an interest adverse to that of the entire Society. In absolute monarchies, the Prince may be tolerably neutral towards different classes of his subjects; but may sacrifice the happiness of all to his personal ambition or avarice. In small republics, the sovereign will is controuled from such a sacrifice of the entire Society, but is not sufficiently neutral towards the parts composing it. In the extended Republic of the United States, The General Government would hold a pretty even balance between the parties of particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests.

Kaminski & Saladino, vol. 13, pp. 448–49.

1.2.5.2Thomas Jefferson to James Madison, December 20, 1787

. . . There are other good things of less moment. I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations.

Boyd, vol. 12, p. 440.

1.2.5.3Thomas Jefferson to William Stephens Smith, February 2, 1788

. . . But I own it astonishes me to find such a change wrought in the

opinions of our countrymen since I left them, as that threefourths of them should be contented to live under a system which leaves to their governors the power of taking from them the trial by jury in civil cases, freedom of religion, freedom of the press, freedom of commerce, the habeas corpus laws, and of yoking them with a standing army. This is a degeneracy in the principles of liberty to which I had given four centuries instead of four years.

Boyd, vol. 12, p. 558.

1.2.5.4Thomas Jefferson to Alexander Donald, February 7, 1788

. . . By a declaration of rights I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by juries in all cases, no suspensions of the habeas corpus, no standing armies. These are fetters against doing evil which no honest government should decline.

Boyd, vol. 12, p. 571.

1.2.5.5Tench Coxe to George Thatcher, March 12, 1789

If due attention be paid to removing the jealousies & fears of the honest part of the Opposition we may gain strength & respectability without impairing one essential power of the constitution. Some declaration concerning the liberty of the press, of conscience &ca. ought perhaps to be frankly made parts of the constitution.

Veit, pp. 217–18.

1.2.5.6Thomas Jefferson to Francis Hopkinson, March 13, 1789

. . . What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury in all cases

determinable by the laws of the land.

Boyd, vol. 14, p. 650.

1.2.5.7Jeremy Belknap to Paine Wingate, May 29, 1789

. . . You will see in the speech wh. our *new* Lieut. Governor [*Samuel Adams*] made at his investiture that he has not thrown off the old idea of *"independence"* as an attribute of each individual State in the "confederated Republic" — & you will know in what light to regard his "devout & fervent wish" that the "people may enjoy well grounded confidence that their *personal & domestic* rights are *secure."* This is the same Language or nearly the same which he used in the Convention when he moved for an addition to the proposed Amendments — by inserting a clause to provide for the Liberty of the press — the right to keep arms — Protection from seizure of person & property & the *Rights of Conscience*. By which motion he gave an alarm to both sides of the house & had nearly overset the whole business which the Friends of the Constitution had been labouring for several Weeks to obtain. . . .

Veit, p. 241.

1.2.5.8George Clymer to Richard Peters, June 8, 1789

Madison this morning is to make an essay towards amendments — but whether he means merely a tub to the whale, or declarations about the press liberty of conscience &c. or will suffer himself to be so far frightened with the antifederalism of his own state as to attempt to lop off essentials I do not know — I hope however we shall be strong enough to postpone. . . .

Afternoon — Madison's has proved a tub on a number of Ad. but Gerry is not content with them alone, and proposes to treat us with all the amendments of all the antifederalists in America.

Veit, p. 245.

1.2.5.9William R. Davie to James Madison, June 10, 1789

You are well acquainted with the political situation of this State [*North Carolina*], . . . that wild scepticism which has prevailed in it since the publication of the Constitution. It has been the uniform cant of the enemies of the Government, that Congress would exert all their influence to prevent the calling of a Convention, and would never propose an amendment themselves, or consent to an alteration that would in any manner diminish their powers. The people whose fears had been already alarmed, have received this opinion as fact, and become confirmed in their opposition; your notification however of the 4th. of May has dispersed almost universal pleasure, we hold it up as a refutation of the gloomy profecies of the leaders of the opposition, and the honest part of our antifederalists have publickly expressed great satisfaction on this event. . . .

That farago of Amendments borrowed from Virginia is by no means to be considered as the sense of this Country; they were proposed amidst the violence and confusion of party heat, at a critical moment in our convention, and adopted by the opposition without one moment's consideration. I have collected with some attention the objections of the honest and serious — they are but few & perhaps necessary — They require some explanations rather than alteration of power of Congress over elections — an abridgment of the Jurisdiction of the federal Court in a few instances, and some fixed regulations respecting appeals — They also insist on the trial by jury being expressly secured to them in all cases — and a constitutional guarantee for the free exercise of their religious rights and priveledges. . . .

Veit, pp. 245–46.

1.2.5.10Fisher Ames to Thomas Dwight, June 11, 1789

Mr. Madison has introduced his long expected Amendments. They are the fruit of much labour and research. He has hunted up all the grievances and complaints of newspapers — all the articles of Conventions — and the small talk of their debates. It contains a Bill of Rights — the right of enjoying property — of changing the govt. at pleasure — freedom of the press — of conscience — of juries — exemption from general Warrants gradual increase of representatives till the whole number at the rate of one to every 30,000 shall amount to and allowing two to every State, at least this is the substance. There is too much of it — O. I had forgot the right of the people to bear Arms.

Risum teneatis amici —

Upon the whole, it may do good towards quieting men who attend to sounds only, and may get the mover some popularity — which he wishes.

1.2.5.11Fisher Ames to George R. Minot, June 12, 1789

. . . The civil departments will employ us next, and the judiciary the Senate. They will finish their stint, as the boys say, before the House has done. Their number is less, and they have matured the business in committee. Yet Mr. Madison has inserted, in his amendments, the increase of representatives, each State having two at least. The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people. Freedom of the press, too. There is a prodigious great dose for a medicine. But it will stimulate the stomach as little as hasty-pudding. It is rather food than physic. An immense mass of sweet and other herbs and roots for a diet drink.

Veit, p. 247.

1.2.5.12Tench Coxe to James Madison, June 18, 1789

I observe you have brought forward the amendments you proposed to the federal Constitution. I have given them a very careful perusal, and have attended particularly to their reception by the public. The most decided friends of the constitution admit (generally) that they will meliorate the government by removing some points of litigation and jealousy, and by heightening and strengthening the barriers between necessary power and indispensible liberty. . . . Those who are honest are well pleased at the footing on which the press, liberty of conscience, original right & power, trial by jury &ca. are rested. . . .

Veit, p. 252.

1.2.5.13Henry Gibbs to Roger Sherman, July 16, 1789

. . . All Ambiguity of Expression certainly ought to be remov'd; Liberty of Conscience in religious matters, right of trial by Jury, Liberty of the Press &c. may perhaps be more explicitly secur'd to the Subject & a general reservation made to the States respectively of all the powers not expressly

delegated to the general Government. . . .

Veit, p. 263.

1.2.5.14Pierce Butler to James Iredell, August 11, 1789

. . . If you wait for substantial amendments, you will wait longer than I wish you to do, speaking *interestedly*. A few *milk-and-water* amendments have been proposed by Mr. M[*adison*]., such as liberty of conscience, a free press, and one or two general things already well secured. I suppose it was done to keep his promise with his constituents, to move for alterations; but, if I am not greatly mistaken, he is not hearty in the cause of amendments.

Veit, p. 274.

1.2.5.15Richard Henry Lee to Samuel Adams, October 27, 1789

. . . Because Independent States are in the same relation to each other as Individuals are with respect to uncreated government. So that if reservations were necessary in one case, they are equally necessary in the other. But the futility of this distinction appears from the conduct of the Convention itself, for they have made several reservations — every one of which proves the Rule in Conventional ideas to be, that what was not reserved was given — for example, they have reserved from their Legislature a power to prevent the importation of Slaves for 20 years, and also from Creating Titles. But they have no reservation in favor of the Press, Rights of Conscience, Trial by Jury in Civil Cases or Common Law securities.

As if these were of less importance to the happiness of Mankind than the making of Lords, or the importations of Slaves!. . .

Kaminski & Saladino, vol. 13, pp. 484–85.

1.3.1TREATISES

1.3.1.1Nelson, 1729

Sabbath.

THE Observation of this Day is not only a Divine Command, but a very wise and politick Constitution; for it gives a Countenance to Christianity, and keeps bad Men from growing worse.

The Prophanation of this Day doth generally arise from,

1. Covetousness:
Or,

2. Licentiousness.

First, From a covetous Desire of Gain, as *per* Stat. 1 *Jac*. 1. *cap*. 11. Shoemaker putting Boots or Shoes to Sale, forfeits 3 *s*. 4 *d*. and the Goods: Then by the Statute 3 *Car*. 1. *cap*. 1. Carriers, Drovers, Waggoners travelling on that Day, such are prohibited under the Penalty of 20 *s*. for every Offence.

Butchers killing or selling, or causing to be kill'd or sold, or privy or consenting to kill or sell Meat on that Day, forfeit 6 *s*. 8 *d*. for every Offence. 3 *Car*. 1. *cap*. 1.

The Proof must be before one Justice by two Witnesses upon Oath, or by Confession of the Party, unless the Fact was done in View of the Justice.

Prosecution within six Months after the Offence.

These Forfeitures are recoverable by Distress on a Warrant, or by Bill or Information in Sessions, to the Use of the Poor where taken.

But tho' the Driving is through several Parishes, yet there shall be but one Forfeiture for one Day.

By 29 *Car*. 2. *cap*. 7. the Conviction is made more easy, and by this Statute, publick and private Duties of Piety are injoined, all worldly Business is prohibited, and all above the Age of fourteen Years offending in the Premisses, forfeit 5 *l*. to the Use of the Poor; but the Justice may reward the Informer out of the Penalties, so that it doth not exceed the third Part.

Drovers, or their Servants, coming to their Inns on that Day, forfeit 20 *s*. for every Offence.

The Prosecution must be within ten Days after the Offence.

The Proof by one Witness upon Oath before one Justice; and if the Offender is not able to pay the Forfeiture, he must be put in the Stocks for two Hours.

Secondly, Irreligious Licentiousness. *Per* 1 *Car*. 1. *cap*. 1.

Meeting together out of their own Parish for any Sports or Pastimes, they forfeit 3 *s*. 4 *d*. each.

Prosecution must be within a Month, *&c*.

Proof by one Witness before one Justice, or Confession of the Party.

Forfeiture is for the Poor of the Parish where the Offence is committed, and to be levied by Distress on a Warrant, *&c*. and in Default thereof, the Offender is to be put in the Stocks for three Hours.

Any Process served on this Day, except for Breach of the Peace, Felony, or Treason, is void; and the Person serving the same, must answer Damages as if he had done it without a Warrant. 29 *Car*. 2. *cap*. 7.

But this Statute doth not extend to dressing of Meat in Inns, Cooks Shops, or Victualling Houses.

All the Laws for frequenting of Divine Service on this Day, are still in Force, notwithstanding the Statute of 1 *W. & M. cap*. 18. unless Persons go to some Congregations tolerated by that Act.

Nelson Justice of Peace, pp. 609–10.

1.3.1.2Bacon, 1740

(A) OF HERESY: *AND HEREIN,*

1. WHAT IT IS.

HERESY *(a)* among Protestants is said to be a false Opinion repugnant to some Point of Doctrine clearly revealed in Scripture, and either absolutely essential to the Christian Faith, or at least of most high Importance.[1]

It seems *(b)* difficult precisely to determine what Errors shall amount to Heresy, and what not; but the Statute 1 *Eliz. cap*. 1. which erected the High Commission Court, having restrained it to such as are either determined by Scripture, or by one of the four first General Councils, or by some other Council, by express Words of Scripture, or by Parliament, with the Assent of the Convocation; these Rules are at present generally thought the best Directions concerning this Matter.[2]

2 BY WHOM IT IS COGNIZABLE.

According to the Common and Imperial Law, and generally by other Laws in Kingdoms and States where the Canon Law obtained, the Ecclesiastical Judge was the Judge of Heresies, and hereby they obtained a large

Jurisdiction touching them.[3]

Hence it is, that by the Common Law with us, the Convocation of the Clergy, or Provincial Synod, might and frequently did proceed to the Sentencing of Hereticks, and when convicted, left them to the Secular Power, whereupon the Writ of *Haeretico comburendo* might issue.[4]

Also it is agreed, that every Bishop may convict Persons of Heresy within his own Diocese, and proceed by Church Censures against those who shall be convicted; but it is said, that no Spiritual Judge, who is not a Bishop, hath this Power; and it has been (*c*) questioned, whether a Conviction before the Ordinary were a sufficient Foundation whereon to ground the Writ *de Haeretico comburendo*, as it is agreed that a Conviction before the Convocation was.[5]

But it seems agreed, that regularly the Temporal Courts have no Conuzance of Heresy, either to determine what it is, or to punish the Heretick as such, but only as a Disturber of the Publick Peace; and that therefore, if a Man be proceeded against as an Heretick in the Spiritual Court, *pro salute animae*, and think himself aggrieved, his proper Remedy is to bring his Appeal to a higher Ecclesiastical Court, and not to move for a Prohibition from a Temporal one.[6]

Yet a Temporal Judge may incidentally take Knowledge, whether a Tenet be heretical or not; as where one was committed by Force of 2 *H*. 4. *cap*. 5. for saying, that he was not bound by the Law of God to pay Tithes to the Curate; another for saying, that tho' he was excommunicate before Men, yet he was not so before God; the Temporal Courts on an *Habeas Corpus* in the first Case, and an Action of false Imprisonment in the other, adjudged neither of the Points to be Heresy within that Statute, for the King's Courts will examine all Things which are ordained by Statute.[7]

Also in a *Quare Impedit*, if the Bishop plead that refused the Clerk for Heresy, it seems that he must set forth the particular Point, that it may appear to be heretical to the Court wherein the Action is brought, which having Conuzance of the original Cause, must by Consequence have a Power to all incidental Matters necessary for the Determination of it, and without knowing the very Point alledged against the Clerk, will not be able to give Directions concerning it to the Jury, who (if the Party be dead) are to try the Truth of the Allegation.[8]

3. HOW PUNISHED.

By the Common Law, one convicted of Heresy, and refusing to abjure it, or

falling into it again after he had abjured it, might be burnt by Force of the Writ *de haeritico comburendo*, which issued out of Chancery upon a Certificate of such Conviction; but he forfeited neither Lands nor Goods, because the Proceedings against him were only *pro salute animae*.[9]

But at this Day the said Writ *de haeretico comburendo* is abolished by 29 *Car*. 2. *cap*. 9. and all the old Statutes, that gave a Power to arrest or imprison Persons for Heresy, or introduced any Forfeiture on that Account, are repealed; yet by the Common Law, an obstinate Heretick being excommunicate is still liable to be imprisoned by Force of the Writ *de exommunicato capiendo*, till he make Satisfaction to the Church.[10]

Also by the 9 & 10 *W*. 3. *cap*. 32. it is enacted, 'That if any Person having been educated in, or having made Profession of the Christian Religion within this Realm, shall be convicted in any of the Courts of *Westminster*, or at the Assises, of denying any of the Persons in the Holy Trinity to be God, or Maintaining that there are more Gods than one, or of Denying the Truth of the Christian Religion, or the Divine Authority of the Holy Scriptures, he shall for the first Offence be adjudged uncapable of any Office, and for the second shall be disabled to sue any Action, or to be a Guardian, Executor or Administrator, or to take by any Legacy or Deed of Gift, or to bear any Office Civil or Military, or Benefice Ecclesiastical for ever, and shall also suffer Imprisonment for three Years, without Bail or Mainprize, from the Time of such Conviction.

(B) OF WITCHCRAFT, AND HOW PUNISHED.

Witchcraft, or *Sortilegium*, was by the ancient Laws of *England* of [(a)] Ecclesiastical Conuzance, and upon Conviction thereof without Abjuration, or Relapse after Abjuration, was punishable with Death by Writ *de haeretico comburendo*.[11]

Also by an Act of Parliament 1 *Jac*. 1. *cap*. 12. it was made Felony, without Benefit of Clergy, to Use any Invocation or Conjuration of any evil Spirit, or to consult or covenant with any evil Spirit, or to exercise any Witchcraft, Inchantment, Charm, or Sorcery, whereby any Person shall be killed, destroyed, consumed or lamed in his Body, *&c*.

But by the 9 *Georg*. 2. *cap*. 5. the abovementioned Statute is repealed; and it is thereby enacted, 'That no Prosecution, Suit, or Proceeding, shall be commenced or carried on against any Person or Persons for Witchcraft, Sorcery, Inchantment or Conjuration, or for charging another with any such Offence in any Court whatsoever in *Great Britain*.'

But for the more effectual preventing and punishing of any Pretences to such Arts or Powers as are before mentioned, whereby ignorant Persons are frequently deluded and defrauded, it is enacted by the said Statute, 9 *Geor*. [*sic*] 2. 'That if any Person shall pretend to Exercise or Use any Kind of Witchcraft, Sorcery, Inchantment or Conjuration, or undertake to tell Fortunes, or pretend from his or her Skill, or Knowledge, in any occult or crafty Science, to discover where or in what Manner any Goods or Chattels, supposed to have been stolen or lost, may be found; every Person so offending, being thereof lawfully convicted on Indictment or Information in that Part of *Great Britain* called *England*, or on an Indictment or Libel in that Part of *Great Britain* called *Scotland*, shall for every such Offence suffer Imprisonment by the Space of one whole Year, without Bail or Mainprize; and once in every Quarter of the said Year, in some Market-Town of the proper County, upon the Market-Day, there stand openly on the Pillory by the Space of one Hour, and also shall (if the Court, by which such Judgment shall be given, shall think fit) be obliged to give Sureties for his or her good Behaviour, in such Sum, and for such Time, as the said Court shall judge proper, according to the Circumstances of the Offence; and in such Case shall be further imprisoned until such Sureties be given.'

(C) OF OFFENCES AGAINST RELIGION AS PUNISHABLE BY THE COMMON LAW. THE COMMON LAW.

Although Offences against Religion are, strictly speaking, of Ecclesiastical Conusance, yet where a Person, in Maintenance of his Errors, sets up Conventicles, or raises Factions, which may tend to the Disturbance of the publick Peace, or where the Errors are of such a Nature as subvert all Religion or Morality, which are the Foundation of Government, they are punishable by the Temporal Judges with Fine and Imprisonment, and also such corporal infamous Punishment, as to the Court in Discretion shall seem meet, according to the Heinousness of the Crime, *ne quid detrimenti res Publica capiat*.[12]

Such as all Blasphemies against God, as denying his Being or Providence, and all contumelious Reproaches of Jesus Christ.[13]

Also all prophane Scoffing at the Holy Scriptures, or exposing any Part thereof to Contempt or Ridicule.[14]

Impostors in Religion, as falsely pretending to extraordinary Commissions from God, and terrifying or abusing the People with false Denunciations of Judgments, *&c*.[15]

All open Leudness grossly scandalous, such as was that of those Persons

who exposed themselves naked to the People in a Balcony in *Covent-Garden*, with most abominable Circumstances.[16]

Seditious Words in Derogation of the Established Religion are (*a*) indictable, as tending to a Breach of the Peace; as these, your Religion is a new Religion, and Preaching is but Pratling, and Prayer once a Day is more edifying.[17]

(D) OF OFFENCES BY STATUTE AGAINST RELIGION:

And herein,

1. OF THE OFFENCE OF PROPHANING THE LORD'S DAY.

BY the 1 *Car*. 1. *cap*. 1. it is enacted, 'That there shall be no Assembly of People out of their own Parishes on the Lord's Day for any Sport whatsoever, nor any Bull-baiting, or Bear-baiting, Interludes, common Plays, or other unlawful Exercises and Pastimes used by any Persons in their own Parishes, on Pain that every Offender shall forfeit 3 *s*. 4 *d*. to the Use of the Poor, *&c*.

By the 29 *Car*. 2. *cap*. 7. it is enacted, 'That all Persons shall every Lord's Day apply themselves to the Observation of the same, by exercising themselves in Duties of Piety and true Religion publickly and privately, and that no Tradesman, Artificer, Workman, Labourer, or other Person whatsoever, shall do or exercise any worldly Labour, Business, or Work of their ordinary Callings, upon the Lord's Day, or any Part thereof; (Works of Necessity and Charity only excepted) and that every Person being of the Age of fourteen Years, or upwards, offending in the Premisses, shall for every such Offence forfeit the Sum of 5 *s*. and that no Person shall publickly cry, shew forth, or expose to Sale any Wares, Merchandizes, Fruit, Herbs, Goods or Chattels whatsoever, upon the Lord's Day, or any Part thereof, upon Pain that every Person so offending shall forfeit the same Goods so cryed, or shewed forth, or exposed to Sale.'

And it is further enacted, *par*. 2. 'That no Drover, Horse-Courser, Waggoner, Butcher, Higler, their or any of their Servants, shall come into his or their Inn or Lodging upon the Lord's Day, or any Part thereof, upon Pain that each and every such Offender shall forfeit 20 *s*. for every such Offence; and that no Person or Persons shall Use, Employ, or Travel upon the Lord's Day with any Boat, Wherry, Lighter or Barge, except it be upon extraordinary Occasion, to be allowed by some Justice of Peace of the County, or Head Officer, or some Justice of the Peace of the City, Borough, or Town Corporate where the Fact shall be committed, upon Pain that every

Person so offending shall forfeit and lose the Sum of five Shillings for every such Offence; and that if any Person offending in any of the Premisses shall be thereof convicted before any Justice of Peace of the County, or the chief Officer or Officers, or any Justice of the Peace of or within any City, Borough, or Town Corporate, where the said Offence shall be committed, upon his or their View, or Confession of the Party, or Proof of any one or more Witnesses by Oath, (which the said Justices, chief Officer, or Officers, is by this Act authorised to administer,) the said Justice or chief Officer or Officers shall give Warrant under his or their Hand and Seal to the Constable or Churchwardens of the Parish or Parishes, where such Offence shall be committed, to seise the said Goods cried, shewed forth, or put to Sale as aforesaid, and to sell the same, and to levy the said other Forfeitures or Penalties by way of Distress and Sale of the Goods of every such Offender distreined, rendering to the said Offenders the Overplus of the Monies raised thereby; and in Default of such Distress, or in case of Insufficiency or Inability of the said Offender to pay the said Forfeitures or Penalties, that then the Party offending to be set publickly in the Stocks by the Space of two Hours: And all and singular the Forfeitures or Penalties aforesaid shall be employed and converted to the Use of the Poor of the Parish where the said Offences shall be committed; saving only that it shall and may be lawful to and for any such Justice, Mayor, or Head Officer or Officers, out of the said Forfeitures or Penalties, to reward any Person or Persons, that shall inform of any Offence against this Act, according to their Discretions, so as such Reward exceed not the third Part of the Forfeitures or Penalties.'[18]

'Provided, That this Act shall not extend to the Prohibiting of dressing of Meat in Families, or dressing or selling of Meat in Inns, Cooks Shops, or Victualling Houses, for such as otherwise cannot be provided, nor to the Crying or Selling of Milk before Nine of the Clock in the Morning, or after Four of the Clock in the Afternoon.'

'Provided also, That no Person shall be impeached, prosecuted, or molested for any Offence before mentioned in this Act, unless he or they be prosecuted for the same within ten Days after the Offence committed.'

Also it is enacted by the said Statute, *par*. 6. 'That no Person upon the Lord's Day shall serve or execute, or cause to be served or executed (*a*) any Writ, Process, Warrant, Order, Judgment, or Decree, (except in Cases of Treason, Felony, or Breach of the Peace,) but that the Service of every such Writ, Process, Warrant, Order, Judgment, or Decree shall be (*b*) void to all

Intents and Purposes whatsoever, and the Person or Persons so serving or executing the same shall be as liable to the Suit of the Party grieved, and to answer Damages to him for doing thereof, as if he or they had done the same without any Writ, Process, Warrant, Order, Judgment, or Decree at all.’[19]

2. OF THE OFFENCE OF SWEARING.

By the 21 *Jac*. 1. *cap*. 10. and 6 & 7 *W*. 3. *cap*. 11. every Servant, Day-Labourer, Seaman, or Soldier convicted of profane Cursing or Swearing forfeits one Shilling, and every other Person two Shillings, to the Use of the Poor, to be levied by Distress; and in case the Party is unable to pay, to be set in the Stocks for the Space of an Hour for every single Offence, and for any Number of Offences two Hours; but Persons under the Age of Sixteen, unable to pay, to be whipt. The Justice neglecting his Duty in executing the Act forfeits five Pounds. The Prosecution to be within ten Days next after the Offence committed.

And by the 13 *Car*. 2. *cap*. 9. all Persons in the King’s Pay at Sea for profane Oaths, *&c*. shall be punished by Fine and Imprisonment, as the Court Martial shall think fit.

3. OF THE OFFENCE OF DRUNKENNESS.

By the Statutes 4 *Jac*. 1. *cap*. 5. and 21 *Jac*. 1. *cap*. 7. all Persons whatsoever convicted of Drunkenness by the View of a Justice, Oath of one Witness, or Party’s Confession, shall forfeit five Shillings to the Use of the Poor, to be levied by Distress and Sale of Goods; and for Want of a Distress, Party to be set in the Stocks six Hours.

By the 13 *Car*. 2. *cap*. 9. Seamen are to be punished by Fine, *&c*. as the Court Martial shall think fit.

4. OF THE OFFENCE OF REVILING THE SACRAMENT.

By the 1 *E*. 6. *cap*. 1. Reviling the Sacrament is an Offence for which the Party shall be imprisoned, fined, and ransomed; and this Statute, which was repealed 1 *Mar*. *cap*. 2. is again revived by 1 *Eliz*. *cap*. 1. and is now in Force.

5. OF OFFENCES AGAINST THE COMMON PRAYER.

By the 2 & 3 *E*. 6. *cap*. 1. and 6 *E*. 6. *cap*. 1. (which were repealed by 1 *M*. *cap*. — and revived by 1 *Eliz*. *cap*. 2.) the Common Prayer Book was first established, under severe Penalties; but the same Penalties being repealed and enlarged by 1 *Eliz*. *cap*. 2. and 13 & 14 *Car*. 2. *cap*. 4. which enacts the Use of the same Common Prayer, with some Alterations, those Statutes of *Ed*. 6. seem at this Day to be of little Use.

By the 1 *Eliz. cap*. 2. *par*. 4. ‘If any Parson, Vicar, or other whatsoever Minister, that ought to say the said Common Prayer, *&c*. shall refuse to use it in such Church, *&c*. or other Place where he should use to minister the same, or wilfully or obstinately standing in the same, use any other Form, or speak any thing in Derogation of the said Book, or any thing therein contained, he forfeits for the first Offence one Year’s Profit of all his spiritual Promotions, and shall suffer six Months Imprisonment, and for the second Offence shall be deprived.’

In the Construction hereof it hath been resolved,

That under the Words Parson, Vicar, or other whatsoever Minister that ought or should say the said Common Prayer, &*c* those Clergymen, who have no Cure, are included as much as those who have one, and that they are punishable for using any other Form, *&c*. inasmuch as by their Ordination they are obliged to officiate in the Offices of the Church, *&c*. and it is said that they are sufficiently shewn to be in Holy Orders by the Word *Clericus* in an Indictment.[20]

That this Statute being not only in the Affirmative, but also expresly saving the Jurisdiction of the Ecclesiastical Courts, does not restrain them from proceeding against those Offenders in their own Methods as Disturbers of the Unity and Peace of the Church, and consequently that such Persons may be deprived by the said Court, according to the Ecclesiastical Law, for the first Offence.[21]

And it is further enacted by 1 *Eliz. cap*. 2. *par*. 9. ‘That if any Person shall in Plays, Songs, or other open Words speak any thing in Derogation, Depraving, or Despising of the said Book, *&c*. or by open Fact compel, or otherwise procure or maintain any Minister to say any Common Prayer openly, *&c*. in other Form, or shall by any of the said Means let any Minister to say the said Common Prayer, *&c*. he shall forfeit one hundred Marks for the first Offence, and four hundred for the second, *&c*. (which if he pay not *(a)* within six Weeks after Conviction, he shall suffer six Months Imprisonment for the first Offence, and twelve for the second,) and for the third Offence shall forfeit all his Goods and Chattels, and shall suffer Imprisonment for Life.’[22]

6. OF THE OFFENCE OF TEACHING SCHOOL WITHOUT CONFORMING TO THE CHURCH.

By the 23 *Eliz. cap*. 1. *par*. 6 & 7. it is Enacted, ‘That if any Person or Persons, Body Politick or Corporate, shall keep or maintain any Schoolmaster who shall not repair to Church according to the Form of the said Statute, or be allowed by the Bishop or Ordinary of the Diocese, (who

shall not take any thing for the said Allowance,) they shall forfeit for every Month ten Pounds; and such Schoolmaster presuming to teach contrary to the said Act, and being thereof convict, shall be disabled to be Teacher of Youth, and shall suffer Imprisonment without Bail or Mainprize for one Year.'

And by the 1 *Jac*. 1. *cap*. 4. *par*. 9. it is Enacted, 'That no Person shall keep any School or be a Schoolmaster out of the Universities or Colleges of this Realm, except it be in some publick or free Grammar School, or in some such Nobleman's or Noblewoman's, or Gentleman's or Gentlewoman's House, as are not Recusants, or where the same Schoolmaster shall be specially licensed thereunto by the Archbishop, Bishop, or Guardian of the Spiritualities of that Diocese, upon Pain that as well the Schoolmaster, as also the Party that shall retain or maintain any such Schoolmaster contrary to the Meaning of the said Statute; shall forfeit each of them, for every Day so wittingly offending, forty Shillings.'

And *note*; These Statutes are still in Force as to Persons not within the Benefit of the Toleration Act; but as to such Persons they seem to be impliedly repealed by that Act, and 12 *Ann. cap*. 7. which obliged Schoolmasters to subscribe the Declaration concerning the Liturgy, and to have a Licence from the Bishop, is repealed by 5 *Georg*. 1. *cap*. 4.[23]

7. OF THE OFFENCE IN NOT COMING TO CHURCH: AND HEREIN,

1. WHAT FORFEITURES OF MONEY, LANDS, OR GOODS SUCH OFFENDERS INCUR.

By the 1 *Eliz*. *cap*. 2. it is Enacted, 'That all Persons inhabiting in any of the (*a*) King's Dominions, having no reasonable Excuse to be absent, shall endeavour to resort to their Parish Church, *&c*. or on Let thereof to some usual Place where Common Prayer, *&c*. shall be used, upon every *Sunday* and Holiday, and then and there orderly abide (*b*) during the Service, on Pain of Punishment by the (*c*) Censures of the Church, and Twelvepence for every Offence.'[24]

By the 23 *Eliz*. *cap*. 1. *par*. 5. it is Enacted, 'That every Person above the Age of sixteen Years, who shall not repair to some Church, Chapel, or usual Place of Common Prayer, but forbear the same contrary to the Tenor of the said Statute of 1 *Eliz*. and being thereof lawfully (*d*) convicted, shall forfeit to the King, for every (*e*) Month which he or she shall (*f*) so forbear, (*g*) twenty Pounds.'[25]

By the (*h*) 28 *Eliz*. *cap*. 6. and 3 *Jac*. *cap*. 4. it is Enacted, 'That every Offender being convicted of not coming to Church, contrary to the Purport

of the Statutes abovementioned, shall pay twenty Pounds for every Month after such Conviction, until he shall conform himself, and come to Church; and that if the Offender shall have made Default of Payment of the twenty Pounds both for every Month contained in the Conviction, and also for every Month subsequent during which he shall not conform himself to the Church, the King shall seise, take, and enjoy all his Goods, and two Parts of his Hereditaments, Leases, and Farms, leaving the third Part only of the same Hereditaments, Leases, and Farms to and for the Maintenance and Relief of the same Offender, his Wife, Children, and Family, notwithstanding any prior Conveyance thereof made by such Offender, with Power of Revocation, or to the Use of himself or his Family: Also by the said Statute of 3 *Jac*. 1. the King may refuse the Penalty of twenty Pounds a Month, tho' it be tendered according to Law, and thereupon seise two Parts of all the Hereditaments, Leases, and Farms which at the Time of such Seizure shall be, or afterwards shall come to any such Offender, or to any other to his Use, or in Trust for him, or at his Disposition, or whereby or in Consideration whereof he or his Family shall be relieved, maintained, or kept, leaving unto him his chief Mansion-House as Part of his third Part.'[26]

In the Construction of these Statutes it hath been holden,

1. That the King by making his Election given him by 3 *Jac*. 1. to seise the Offender's Hereditaments, *&c*. waves the Benefit of the twenty Pounds a Month, and the Power of seising the Offender's Goods.[27]
2. That Bonds, Recognizances, *&c*. taken in the Offender's own Name, or in the Names of others to his Use, come within the Words *all his Goods, &c*.[28]
3. That no Copyhold Lands are within either of the Statutes, by reason of the Prejudice that would accrue thereby to the Lord of the Manor.[29]
4. That tho' it may be doubtful on the Statute 28 *Eliz*. whether Lands conveyed in Trust by some Friend for the Recusant may be seised, yet it is clear that such Lands may be seized by 3 *Jac*. 1. which expresly provides, that the King upon his waving the Forfeiture of twenty Pounds a Month may seise two Parts of all the Hereditaments, *&c*. which shall come to any such Offenders, or to others, to their Use or in Trust for them.[30]
5. But that the King cannot seise Lands of which the Offender is seised in Trust for another, altho' the Statute hath made no express Provision for *Cestui que Trust*.[31]
6. That the Profits of the Lands seised by the King by Force of 29 *Eliz*. for the Nonpayment of the twenty Pounds a Month, ought not to be applied to the Satisfaction thereof, but that the Lands ought to remain in the King's

Hands by way of Pledge, till the whole Forfeiture be paid some other Way: But this Construction of the Statute seeming over severe, it was provided by 3 *Jac*. 1. that the Profits of the said Lands should go towards the Satisfaction of the twenty Pounds.[32]

2. IN WHAT MANNER THEY ARE TO BE PROCEEDED AGAINST FOR THOSE FORFEITURES.

As to the Forfeiture of Twelvepence, it is by the 1 *Eliz. cap*. 2. and 3 *Jac*. 1. *cap*. 4. Enacted, 'That the said Forfeiture of Twelvepence for the Absence of a *Sunday* or Holiday may, on the Confession of the Party, or Oath of one Witness, *&c*. be levied on the Goods of the Offender, *&c*. by the Warrant of a Justice of Peace to the Churchwarden of the Parish where the Party dwells, and employed to the Use of the Poor.'

As to the Forfeiture of twenty Pounds for a Month's Absence by the 23 *Eliz*. *cap*. 1. 28 *Eliz*. and 3 *Jac*. 1. *cap*. 4. The same may be recovered by Indictment not only in the Court of King's Bench, but also before Justices of Oyer, Assise, Gaol-Delivery, and Quarter-Sessions of the Peace: And by the 3 *Jac*. 1. *cap*. 4. *par*. 7. it is Enacted, That upon an Indictment at the Assises, Gaol-Delivery, or General Sessions of the Peace, Proclamation shall be made, that the Offender render himself to the Sheriff before the next Assises, Gaol-Delivery, or Sessions; and that if he shall not then appear, of Record upon such Default recorded, the same shall be a Conviction in Law, as if a Trial by Verdict on the Indictment had been recorded: And by the said Statute every such Conviction shall be certified into the Exchequer.'[33]

By the 35 *Eliz. cap*. 1. *par*. 10. it is Enacted, 'That all and every the said Pains, Duties, Forfeitures, and Payments shall and may be recovered and levied to her Majesty's Use, by Action of Debt, Bill, Plaint, Information, or otherwise, in any of the Courts commonly called the King's Bench, Common Pleas, or Exchequer, in such sort and in all respects, as by the ordinary Course of the Common Laws of this Realm any other Debt due by any such Person in any other Case should or may be recovered, or levied, wherein no Essoin, Protection, or Wager of Law shall be admitted or allowed.'

By the 20 *Eliz. cap*. 6. and 3 *Jac*. 'Every such Offender, being once convicted, shall for every Month after such Conviction, without any other Indictment or Conviction, pay into the Exchequer twice in the Year, *viz*. in every *Easter* and *Michaelmas* Term, as much as shall then remain unpaid, after the Rate of Twenty Pounds for every Month after a Conviction; and that for a Default herein, the King may seise all the Goods and two Parts of

the Hereditaments of such an Offender, *&c*.’

3. **WHAT OTHER INCONVENIENCIES THEY ARE SUBJECT TO.**

By the 1 *Jac*. 1. *cap*. 4. *par*. 8. it is enacted, ‘That no Recusant convict shall practise either the Common or Civil Law, or Physick, or use the Trade of an Apothecary, or be Judge or Minister of any Court, or bear any Office in Camp, Troop, or Company of Soldiers, or in any Ship or Fortress, but shall be utterly disabled for the same, and forfeit for every such Offence 100 *l*.’

‘And it is further enacted, *par*. 22. ‘That such Recusants as shall be convicted at the Time of the Death of the Testator, or at the Time of granting of any Administration, shall be disabled to be Executors or Administrators, and that no such Persons shall be Guardians to any Child.’

And by the 23 *Eliz. cap*. 1. it is enacted, ‘That every Person, forbearing the Church twelve Months, shall on Certificate thereof into the King’s Bench, by the Ordinary, a Justice of Assise and Gaol-Delivery, or a Justice of Peace of the County where such Offender shall dwell or be, be bound with two sufficient Sureties in the Sum of Two Hundred Pounds, at the least, to the good Behaviour, and so continue bound until such Offender shall conform himself, *&c*.’

4. **BY WHAT MEANS THEY MAY BE DISCHARGED.**

By the 23 *Eliz. par*. 10. it is enacted, ‘That every Person guilty of the abovementioned Offences, who shall, before he be thereof indicted, or at his Arraignment or Trial before Judgment, submit and conform himself before the Bishop of the Diocese where he shall be resident, or before the Justices where he shall be indicted, arraigned or tried, (having not before made like Submission at any his Trial, being indicted for his first like Offence) shall, upon his Recognition of such Submission, in open Assises or Sessions of the County where such Person shall be resident, be discharged of all and every the said Offences against the said Statute, *&c*.’

And by the 29 *Eliz. cap*. 6. *par*. 6. ‘That whensoever any such Offender shall make Submission, and become conformable according to the Form limited by the abovementioned Statute of 23 *Eliz. cap*. — or shall fortune to die, that then no Forfeiture of 20 *l*. for any Month, or Seisure of the Lands of the same Offender, from and after such Submission and Conformity, or Death, and full Satisfaction of all the Arrearages of twenty Pounds Monthly, before such Seisure due or payable, shall ensue, or be continued against such Offender, so long as the same Person shall continue in coming to Divine Service, according to the Intent of the said Statute.’

By the 1 *Jac*. 1. *cap*. 4. it is enacted, ‘That Recusant conforming himself according to the Meaning of the abovementioned Statutes, &*c*. shall, during such Conformity, be (*a*) discharged of all Penalties which he might otherwise sustain by reason of his Recusancy.’[34]

If the Heir of a Recusant be a Conformist, he is discharged by 1 *Jac*. 1. *cap*. 4. as to all Penalties happening by reason of his Ancestor’s Recusancy, unless two Parts of his Lands were seised by the King in his Ancestor’s Life, in which case they shall continue in the King’s Hands till the whole Debt be levied.

5. HOW FAR A PERSON IS PUNISHABLE FOR SUFFERING SUCH ABSENCE IN OTHERS.

By the 1 *Jac*. 1. *cap*. 4. ‘Whoever shall keep in his Service, Fee or Livery, or willingly maintain, &*c*. in his House any Servant, Sojourner or Stranger, (except a Parent, wanting, without Fraud, other Habitation or Maintenance, and except a Ward, &*c*.) who shall forbear going to Church, &*c*. for a Month, shall for every such Month forfeit 10 *l*.’

8 [*SIC*]. OF OFFENCES AGAINST THE ESTABLISHED CHURCH BY PROTESTANT DISSENTERS.

By 31 *Eliz. cap*. 1. ‘Obstinate Nonconformists were compellable to abjure the Realm, and were also subject to other Penalties; and Dissenters were farther restrained by 17 *Car*. 2. *cap*. — & 22 *Car*. 2. *cap*. 1. but at this Day by 1 *W. & M. cap*. 18. all Persons dissenting from the Church, (except Papists, and those who shall in Preaching or Writing deny the Doctrine of the Trinity) are exempted from all Penal Laws relating to Religion, except 25 *Car*. 2. *cap*. 2. (by which all Officers of Trust are bound to receive the Sacrament according to the Usage of the Church of *England*, and also to take the Oaths of Allegiance and Supremacy, and the Test;) and also, except 30 *Car*. 2. *cap*. 1. (by which the Members of both Houses of Parliament, and all the King’s sworn Servants, are bound to make a Declaration against Transubstantiation, and the Invocation of Saints, and the Sacrifice of the Mass) provided such Dissenters take the Oaths of Allegiance and Supremacy, and make the said Declaration against Transubstantiation, &*c*. and come to some Congregation for Religious Worship in some Place Registered, either in the Bishop’s Court, or at Sessions, the Doors where of shall neither be locked, barred nor bolted.’

Also by the said Statute 1 *W. & M*. ‘Dissenting Teachers are tolerated, if they take the said Oaths, &*c*. at the General or Quarter-Sessions, to be held for the Place where such Persons live, and subscribe the Thirty-nine Articles of the Church of *England*, except those few scrupled ones

concerning Church Government and Infant Baptism; and by 10 *Ann. cap*. 2. they may qualify themselves as well during a Prosecution upon any Penal Statute as before, and being qualified in one County may officiate in another, upon producing a Certificate, and taking the said Oaths, &*c*. if required.'[35]

And by the Statute 1 *W. & M*. 'Those who scruple the taking of any Oath are within the like Indulgence, provided they subscribe the aforesaid Declaration, and also a Declaration of Fidelity to the King, and against the deposing Doctrine and Papal Supremacy, and also profess their Faith in God the Father, and Jesus Christ his eternal Son, the true God and the Holy Spirit, one God for evermore; and acknowledge the Holy Scriptures of the Old and New Testament to be given by Divine Inspiration.

It has been holden, since this Statute, a Prohibition lies to the Spiritual Court proceeding against Persons for Incontinency who have been married in a licensed Conventicle.[36]

By the 5 *Geor*. 1. *cap*. 4. it is enacted, 'That if any Magistrate shall be knowingly present at any publick Meeting for Religious Worship, other than the Church of *England*, in the peculiar Habit of, or attended with, the Ensigns belonging to his Office, he shall be disabled to hold such Office, and adjudged incapable to bear any publick Office or Employment whatsoever.'

Bacon Abridgement, vol. III, pp. 35–46.

1.3.1.3Viner, 1742

(A) HERETICK AND HERESY.

1. By *the* 1 *Eliz*. 1. which elected the High Commission Court, having *restrained* the *same from adjudging any Points to be Heretical, which have not been determined to be such, either by Scripture, or by some one of the four first General Councils, or by some other Council, by express Words of Scripture, or by the Parliament, with the Assent of the Convocation*, it has been since generally holden, that these Rules will be good Directions to Ecclesiastical Courts in Relation to Heresy. Hawk. Pl. C. 4. cap. 2. S. 2.

2. At this Day the *Diocesan hath Jurisdiction* of Heresy, and so it hath been put in Use in all Queen Elizabeth's Reign; but without the Aid of the Act of 2 *H*. 4. 15. the Diocesan could *imprison* no Person accused of Heresy but was to proceed against them by the *Censure of the Church*, for

the Bishop of every Diocess might convict any for Heresy before the Stat. 2 H. 4. as appears by the Preamble of it, but could not imprison, &c. and now, seeing that not only the said Act of 2 H. 4 but 25 *H*. 8. 14. are *repealed*, the Diocesan cannot imprison any Man accused of Heresy, but must proceed against him as he might have done before those Statutes by the Censures of the Church, as it appears by the said Act of 2 H. 4. 15. likewise the supposed Stat. of 5 Rich. 2. 5. and the Statutes of 2 H. cap. 7. 25 H. 8. 14. 1 & 2 P. and M. 6. are all repealed, so as no Statute made against Hereticks stands now in Force, and at this Day no Person can be indicted or impeached for Heresy before any temporal Judge, or other that has temporal Jurisdiction, as upon perusal of the said Statute appears. 12 Rep. 56. 43 Eliz. Case of Heresy.

3. By 29 *Car*. 2. 9. the *Writ de Haeretico Comburendo* is taken away.[1]

4. *Stat*. 9 *and* 10 *W*. 3. *cap*. 32. *S*. 1. *If any* Person *having been educated in*, *or* having made Profession of the Christian Religion *within this Realm*, *shall by writing*, *printing*, *teaching*, *or advised speaking*, deny any one of the Persons in the Holy Trinity to be God, or shall assert *or maintain* that there are more Gods than one, or *shall* deny *the Christian Religion to be true*, *or* the Holy Scriptures *of the Old and New Testament* to be of divine Authority, *and shall upon Indictment or Information be thereof lawfully Convicted upon the Oath of two Witnesses*, *such Person shall for the first Offence be* incapable to have *or enjoy* any Office *or Employment* Ecclesiatical, Civil, or Military, or Profit by them; *and the Offices*, *Places and Imployments*, *enjoy'd by such Persons at their Conviction*, *shall be void; and being a* second Time convicted *of any of the aforesaid Crimes*, *shall be* disabled to sue, prosecute, plead, or use any Action or Information in Law or Equity, or be Guardian of any Child, or Executor, or Administrator *of any Person*, or capable of any Legacy, or Deed of Gift, or *to bear any* Office, civil or military, or *Benefice* ecclesiastical, *and shall suffer* three Years imprisonment, *from the Time of such Conviction*, *without Bail*.[2]

5. Among Protestants Heresy is taken to be *a false Opinion repugnant to some Point of Doctrine clearly revealed in Scripture*, *and either absolutely essential to the Christian Faith*, *or at least of most high Importance*. Hawk. Pl. C. 3. cap. 2. S. 1.[3]

Viner Abridgment, vol. 14, pp. 293–94.

1.3.1.4Jacob, 1750

Religion, (*Religio, à religando*) Signifieth Piety, Devotion, and the Worship of God: And there are many Temporal Laws, made for the Support of *Religion*. The Law hath so tender a Regard for the Interests of the King and of *Religion*, that an Indictment will lie for doing any Thing which plainly appears immediately to tend to the Prejudice of either of them; and be good, though it do not expresly complain of it as a common Grievance. 1 *Hawk. P. C.* 198. Offences tending to subvert all *Religion* and Morality, which are the Foundation of Government, are punishable by the temporal Judges by Fine and Imprisonment, and also such corporal Punishment as the Court in Discretion shall think fit; and seditious Words, in Derogation of the established *Religion*, are indictable, as tending to a Breach of the Peace. *Ibid*. 7. So also prophane Scoffing of the Scripture; Impostures in Religion, *&c*. By Statute, no Person in Authority to execute Spiritual Jurisdiction, has Power to adjudge any Matters of *Religion* to be Heresy, but such as have been so adjudged by Canonical Scripture, by one or more of the General Councils, or shall be adjudged by the Parliament with the Assent of the Convocation. 1 *Eliz cap*. 1. The 13 *Eliz*. establishes the Thirty-nine *Articles of Religion*, to be subscribed by the Clergy, *&c*. But Protestant Dissenters are exempted from subscribing the 34, 35 and 36th Articles, by 1 *W. & M. cap*. 18. Persons educated in the Christian *Religion*, who by Writing or Speaking, deny any one of the Persons in the Holy Trinity, to be God; or asserting there are more Gods than one; or who shall deny the Christian *Religion* to be true; or the *Old* and *New Testament* to be writ by Divine Authority, are rendered incapable to hold any Office or Imployment; and being convicted of a second Offence, are disabled to prosecute any Action, to be Executor, Guardian, *&c*. and subject to Imprisonment for three Years: But for the first Offence, the Offender shall be discharged from Penalties, on renouncing his Errors in open Court. 9 & 10 *W*. 3. *cap*. 32. If any Person shall come into a Church, Chapel, or Congregation for *Religion*, and disturb the same, or misuse the Teacher, he shall forfeit 20 *l*. 1 *W. & M*.

Jacob New-Law Dictionary, unpaginated.

1.3.1.5Hawkins, 1762

CHAP. II
Of Heresy.

OFFENCES considered in relation to the Persons against whom they are committed, are either,

1. Such as are more immediately against God; or,
2. Such as are more immediately against Man.

Offences more immediately against God, are either by Common Law or by Statute.

Those at Common Law are either capital or not capital. The capital Offences of this Nature are of three Kinds:

1. Heresy.
2. Witchcraft.
3. Sodomy.

Concerning Heresy I shall consider,[1]

1. What it is;
2. By whom it is cognizable;
3. How it is punishable.

Sect. 1. As to the first Point, it seems, That among Protestants Heresy is taken to be a false Opinion, repugnant to some Point of Doctrine clearly revealed in Scripture, and either absolutely essential to the Christian Faith, or as least of most high Importance.

Sect. 2. But it is impossible to set down all the particular Errors which may properly be called Heretical, concerning which there are and always have been so many intricate Disputes: However, the 1 *El*. 1. which erected the High-Commission-Court, having restrained the same from adjudging any Points to be Heretical, which have not been determined to be such either by Scripture or by some one of the four first General Councils, or by some other Council, by express Words of Scripture, or by the Parliament with the Assent of the Convocation, it his been since generally holden, that these Rules will be good Directions to Ecclesiastical Courts in Relation to Heresy.[2]

Sect. 3. As to the second Point, *viz*. By whom Heresy is cognizable, it is certain, That the Convocation may declare what Opinions are Heretical: But it hath been questioned of late, whether they have Power at this Day to convene and convict the Heretick.[3]

Sect.4. However it is agreed, that every Bishop may convict Persons of Heresy within his own Diocese, and proceed by Church-Censures against those who shall be convicted; but it is said, That no Spiritual Judge, who is not a Bishop, hath this Power; and it has been questioned, Whether a Conviction before the Ordinary were a sufficient Foundation whereon to ground the Writ *de Haeretico comburendo*, as it is agreed that a Conviction before the Convocation was.[4]

Sect. 5. By 24 *H*. 8. 9. the Archbishop of either Province may cite any Person before him for Heresy, if the immediate Ordinary either consent thereto, or do not his Duty in punishing the same.

Sect. 6. But it is certain, that a Man cannot be proceeded against at the Common Law in a Temporal Court merely for Heresy; yet if in Maintenance of his Errors he set up Conventicles and raise Factions, which may tend to the Disturbance of the public Peace, it seemeth that he may in this Respect be fined and imprisoned, upon an Indictment, *&c*. at the Common Law.[5]

Sect. 7. Also a Temporal Judge may incidently take Knowledge whether a Tenet be Heretical or not; as where one was committed by Force of 2 *H*. 4. 5. for saying, That he was not bound by the Law of God to pay Tithes to the Curate; and another for saying, That though he was excommunicate before Men, yet he was not so before God. The Temporal Courts, on an *Habeas Corpus* in the first Case, and an Action of false Imprisonment in the other, adjudged neither of the Points to be Heresy within that Statute; for the King's Courts will examine all Things which are ordained by Statute.[6]

Sect. 8. Also in a *Quare impedit*, if the Bishop plead that he refused the Clerk for Heresy, it seems that he must set forth the particular Point, that it may appear to be Heretical, to the Court wherein the Action is brought, which having Conusance of the original Cause, must by Consequence have a Power as to all incidental Matters necessary for the Determination of it; and, without knowing the very Point alledged against the Clerk, will not be able to give Directions concerning it to the Jury, who (if the Party be dead) are to try the Truth of the Allegation.[7]

Sect. 9. But if a Man be proceeded against as an Heretick in the Spiritual Court *pro Salute Animae*, and think himself aggrieved, his proper Remedy seems to be to bring his Appeal to a higher Ecclesiastical Court, and not to move for a Prohibition from a Temporal one, which, as it seems to be agreed, cannot regularly determine or discuss what shall be called Heresy.[8]

Sect. 10. As to the third Point, *viz*. How Heresy is punishable, there is no Doubt but that at Common Law one convicted thereof, and refusing to abjure it, or falling into it again after he had abjured it, might be burnt by Force of the Writ *de Haeretico comburendo*, which was grantable out of Chancery upon a Certificate of such Conviction; but it is said, That be forfeited neither Lands nor Goods, because the Proceedings against him were only *pro Salute Animae*.[9]

Sect. 11. But at this Day the said Writ *de Haeretico comburendo* is abolished by 29 *Car*. 2. 9. And all the old Statutes which give a Power to arrest or imprison Persons for Heresy, or introduced any Forfeiture on the Account, are repealed; yet by the Common Law an obstinate Heretick being excommunicate, is still liable to be imprisoned by Force of the Write *de Excommunicato capiendo*, till he make Satisfaction to the Church. And by 9 & 10 *Will*. 3. 32. *If any Person having been educated in, or having made Profession of the Christian Religion within this Realm shall be convicted in any of the Courts of* Westminster, *or at the Assizes, of denying any one of the Persons in the Holy Trinity to be God, or of maintaining that there are*

more Gods than one, or of denying the Truth of the Christian Religion, or the Divine Authority of the Holy Scriptures, he shall for the first Offence be adjudged uncapable of any Office, and for the second, shall be disabled to sue any Action, or to be a Guardian, Executor or Administrator; or to take by any Legacy or Deed of Gift, or to bear any Office Civil or Military, or Benefice Ecclesiastical, for ever, and shall also suffer Imprisonment for three Years, without Bail or Mainprize, from the Time of such Conviction.[10]

CHAP. III.
Of Witchcraft.

Sect. 1. OF Offenders of this Nature there are said to be three Kinds,[11]
1. Conjurors, who by Force of certain Magick Words endeavour to raise the Devil, and compel him to execute their Commands.
2. Witches, who by way of friendly Conference are said to bargain with an evil Spirit to do what they desire of him.
3. Sorcerers or Charmers, who by the Use of certain superstitious Forms of Words, or by Means of Images, or other odd Representations of Persons or Things, *&c.* are said to produce strange Effects above the ordinary Course of Nature.

Sect. 2. All these were anciently punished in the same Manner as Hereticks, by the Writ *de Haeretico comburendo* after a Sentence in the Ecclesiastical Court, and a Relapse. And it is said also, That they might be condemned to the Pillory, *&c.* upon an Indictment at Common Law.[12]

Sect. 3. In the Time of King *Edward* the third, one taken with the Head and Face of a dead Man, and a Book of Sorcery, was brought into the King's Bench: But there being no Indictment against him, he was sworn that from thenceforth he would not be a Sorcerer, and then delivered from Prison, and the Head was burnt at his Charge: But this Method seems to be obsolete at this Day.[13]

Sect. 4. By 1 *Jac.* 1. *cap.* 12. the only Law now in Force against these Offenders, they are divided into two Degrees; and those in the first Degree, and their Accessories before, shall suffer as Felons without Clergy; and of these there are the four following Species.[14]
1. *Such as shall use any Invocation or Conjuration of any evil Spirit:* And such seem clearly to be within the Law, tho' no Spirit do actually appear.[15]
2. *Such as consult, covenant with, entertain, employ, feed, or reward any evil Spirit to any Intent:* And these are agreed to be within the Statute, though nothing farther be done upon such Consultation, *&c.*[16]

3. *Such as take up any dead Person's Body, or any Part thereof, to be used in any Manner of Witchcraft*: And these are also clearly within the Statute, though they do not actually so use it.[17]
4. *Such as exercise any Witchcraft, Inchantment, Charm or Sorcery, whereby any Person shall be killed, destroyed, consumed, or lamed in his or her Body, or any Part thereof*: But none are within this Branch who do not actually effect such Mischief.[18]

Sect. 5. Those in the second Degree shall for the first Offence suffer a Year's Imprisonment, and the Pillory; and for the second, as Felons without Clergy, and these by the manifest Purport of the Words of the Act, which is very obscurely penned, seem to be divided into the two following Species.
1. *Such as take upon them by Witchcraft, Inchantment, Charm or Sorcery to tell where Treasure is to be found, or where Things lost or stolen may be found, or to do any Thing to the Intent to provoke any Person to unlawful Love, or to hurt or destroy any Person in his or her Body, though the same be not effected*.
2. *Such as shall use any Witchcraft*, &c. *whereby any Cattle or Goods of any Person shall be destroyed, wasted or impaired*: But those, who take upon them to do this, are not within the Act unless they actually do it.[19]

CHAP. IV.
Of Sodomy.

Sect. 1. ALL unnatural Carnal Copulations, whether with Man or Beast, seem to come under the Notion of Sodomy, which was Felony by the antient Common Law, and punish'd, according to some Authors, with Burning; according to others, with Burying alive: But at this Day by Force of 25 *H*. 8. 6. & 5 *El*. 17. is punished in the same Manner as other Felonies, which are excluded from Clergy.[20]

Sect. 2. In every Indictment for this Offence, there must be the Words *Rem habuit veneream, & carnaliter cognovit*; and consequently some Kind of Penetration, and also of Emission, must be proved; but any the least Degree is sufficient, and Emission is *prima facie* an Evidence of Penetration.[21]

CHAP V.
Of Offences against God not Capital at Common Law.

OFFENCES more immediately against God not Capital, are either by the Common Law or Statute.

Those by the Common Law are,

Sect. 1. I. All Blasphemies against God, as denying his Being or Providence, and all contumelious Reproaches of Jesus Christ.[22]

Sect. 2. II. All profane Scoffing at the Holy Scripture, or exposing any Part thereof to Contempt or Ridicule.[23]

Sect. 3. III. Impostures in Religion, as falsely pretending to extraordinary Commissions from God, and terrifying or abusing the People with false Denunciations of Judgments, *&c.*

Sect. 4. IV. All open Lewdness grosly scandalous, such as was that of those Persons, who exposed themselves naked to the People in a Balcony in *Covent-Garden* with most abominable Circumstances.

Sect. 5. Offences of this Nature, because they tend to subvert all Religion or Morality, which are the Foundation of Government, are punishable by the Temporal Judges with Fine and Imprisonment, and also such corporal infamous punishment as to the Court in Discretion shall seem meet, according to the Heinousness of the Crime.[24]

Sect. 6. V. Seditious Words in Derogation of the Established Religion are indictable, as tending to a Breach of the Peace; as these, Your Religion is a new Religion, and Preaching is but Prattling, and Prayer Once a Day is more edifying.[25]

CHAP. VI.
Of Offences by Statute against Religion in general.

OFFENCES by Statute not Capital more immediately against God, are either,

1. Such as are against Religion in general; or,
2. Such as are against the Established Church.

Those against Religion in general are of several Kinds; as

Sect. 1. I. All Profanation of the Lord's Day; for by 1 *Car.* 1. 1. *There shall be no Assembly of People, out of their own Parishes, on this Day, for any Sport whatsoever; nor any Bull-baiting or Bear-baiting, Interludes, common Plays, or other unlawful Exercises and Pastimes, used by any Persons in their own Parishes, on Pain that every Offender shall forfeit* 3 s. *and* d. *to the Use of the Poor,* &c.

Sect. 2. By 29 *Car.* 2. 7. *No Persons whatsoever, above fourteen years old, shall exercise any worldly Labour, Business, or Work of their ordinary Calling on the Lord's Day, (except Works of Necessity and Charity, and the Dressing and Selling of Meat in an Inn and Victualling House, for those who cannot otherwise be provided) on Pain of forfeiting* 5s. *And no Person shall publickly cry, or expose to Sale, any Goods whatsoever on this Day,*

(except Milk, which may be sold before Nine in the Morning, and after Four in the Afternoon) on Pain of forfeiting the same.[26]

Sect. 3. *Also no Drover, Horse-Courser, Waggoner, Butcher or Higgler, shall travel, or come to their Inn on this Day, on Pain of twenty Shillings. And no Person shall use, employ, or travel with any Boat or Barge, without the Allowance of some Justice of Peace,* &c. *on Pain of five Shillings*. But by 11 and 12 Gul. 21. *Forty Watermen may be appointed by the Company of Watermen to ply on the* Thames, *&c*. And by 9 *Ann*. 23. *Hackney Coach-Men are permitted to work within the Bills of Mortality on Sunday*.

Sect. 4. II. All profane Swearing and Cursing; for by 21 *Jac*. 1. 20. and 6 & 7 Gul. 11. *Every Servant, Day-Labourer, Seaman or Soldier, convicted of profane Cursing or Swearing, forfeits one Shilling, and every other Person two Shillings, and shall be registred at Sessions*; and by 13 Car. 2. cap. 9. Artic. 2. *All Persons in the King's Pay at Sea, for profane Oaths,* &c. *shall be punished by Fine and Imprisonment, as the Court Martial shall think fit*.

Sect. 5. III. Drunkenness, for which by 1 *Jac*. 1. 5. all Persons whatsoever forfeit five Shillings to the Poor; and for which Seamen may by 13 *Car*. 2. 9. be punished by Fine, *&c*. as the Court Martial shall think fit.

Sect. 6. IV. Reviling the Sacrament of the Lord's Supper with Contemptuous Words, *&c*. for which (by 1 *Ed*. 6. 1. which was repealed by 1 *Mar*. 2. and revived by 1 *El*. 1.) the Offender shall be imprisoned, fined, and ransomed.

Sect. 7. I shall not mention the Offences against 2 & 3 *Ed*. 6. 19. and 5 *El*. 5. relating to Fasts and Fish-days, because it is expresly [*sic*] declared, That those Statutes are enacted merely on a political Account, and it is made penal to affirm that any eating of Fish, or forbearing of Flesh mentioned therein, is necessary to Salvation, or that it is Service of God.

CHAP. VII.
Of Offences against the Common Prayer.

OFFENCES against the Established Church are,

1. Such as concern all Persons in general;
2. Such as more immediately relate to these of the Popish Religion;
3. Such as more immediately regard Protestant Dissenters.

Those which concern all Persons in general are,

1. Against the Common Prayer.
2. In accepting or holding an Office without due Conformity to the Church.

3. In teaching School without Conforming to the Church.
4. In not coming to Church.

Sect. 1. And first of Offences against the common Prayer, as to which it is to be observed, That by 2 & 3 *Ed.* 6. 1. (which were repealed by 1 *Mar.* 2. and revived by 1 *Ed.* 2.) the Common Prayer Book was first established under severe Penalties, but the same Penalties being repeated and enlarged by 1 *El.* 2. and 13 & 14 *Car.* 2. 4. which enacts the Use of the same Common Prayer with some Alterations; those Statutes of *Ed.* 6. seem at this Day to be of little Use.

Sect. 2. By 1 *El.* 2. Par. 4, 5 & 6. *If any Parson, Vicar, or other whatsoever Minister, that ought to say the said Com. Prayer,* &c. *shall refuse to use it in such Church,* &c. *or other Place where he should use to minister the same, or willfully or obstinately standing in the same, use any Form, or speak any Thing in Derogation of the said Book, or any Thing therein contain'd, he forfeits for the first Offense one Year's Profit of all his Spiritual Promotions, and shall suffer six Months Imprisonment; and for the second Offense shall be deprived,* &c.[27]

In the Construction of this Act it has been resolved,

Sect. 3. I. That under the Words, *Parson, Vicar, or other whatsoever Minister that ought or should say the said Common Prayer, &c.* those Clergymen who have no Cure are included, as much as those who have, one, and that they have are punishable for using any other Form, *&c.* inasmuch by their Ordination they are obliged to officiate in the Offices of the Church, *&c.* and it is said, that they are sufficiently shewn to be in Holy Orders by the Word *Clericus* in the Indictment.[28]

Sect. 4. II. That this Statute being not only in the Affirmative, but also expresly saving the Jurisdiction of Ecclesiastical Courts, does not restrain them from proceeding against these Offenders in their own Methods, as Disturbers of the Unity and Peace of the Church, and Consequently that such Persons may be deprived by the said Court according to the Course of the Spiritual Law, for the first Offence.[29]

Sect. 5. Also it is further enacted, by 1 *El.* 2. Par. 9. *That if any Person shall in Plays, Songs, or other open Words, speak any Thing in Derogation, Depraving or Despising of the said Book,* &c. *Or by open Fact compel, or otherwise procure or maintain any Minister to say any Common Prayer openly,* &c. *in other Form: Or shall by any of the said Means let any Minister to say the said Common Prayer,* &c. *he shall forfeit one hundred Marks for the first Offence, and four hundred for the Second,* &c. *(which if*

he pay not within six Weeks after Conviction, he shall suffer six Months Imprisonment for the first Offence, and twelve for the second) and for the third Offence shall forfeit all his Goods and Chattels, and shall suffer Imprisonment for Life.

Sect. 6. It has been made a Question in the Construction of this Clause, Whether if the Party die within six Weeks, the said Forfeiture be not discharged, since by the Act of God the Election of paying it, or suffering Imprisonment in lieu of it, is taken away.[30]

CHAP. VIII.

Of Offences in accepting or holding an Office without due Conformity to the Church.

OFFENCES in accepting or holding an Office, without due Conformity to the Church, are of two Kinds,

1. In not receiving the Sacrament both before and after the Acceptance of an Office.
2. In going to any other Place for Religious Worship, than the Church, during the Continuance in an Office.

Sect. 1. As to the first of these Offences, it is enacted by 13 *Car.* 2. Stat. 2 *Cap.* 1. Par. 10, 12. *That no Person shall be placed, elected or chosen, to any Office or Place of Mayor, Alderman, Recorder, Bailiff, Town-Clerk, Common-Council-Man, or other Office of Magistracy, Place or Trust, or other Imployment relating to the Government of any City, Corporation, Borough, Cinque-Port, or other Port Town, who shall not have received the Sacrament, according to the Rites of the Church of* England, *within one Year next before such Election; and that every Person, so placed or elected, shall take the Oaths of Allegiance and Supremacy, at the same Time when the Oath for the due Execution of the said Office,* &c. *shall be administred; and that the said Oaths shall be administred and tendered by those who administer the Oath of Office, and in Default of such, by two Justices of Peace of the Corporation,* &c. (which makes [a] it necessary in a Return to *Mandamus,* setting forth that the Party did not take the Oaths before the Mayor, *&c.* to add, that he did not take them before two Justices of Peace, *&c.* and it is further enacted, *That, on Default hereof, every such Election, Placing and Choice shall be void. And* [b] *it hath been adjudged to be no Excuse, that the Oaths were not tendered.*[31]

Sect. 2. Also it is enacted by 25 *Car.* 2. *That all Officers Civil and Military, (except those of Inheritance, appointing sufficient Deputies) and*

all who have any Fee, &c. *by Patent from the King, (except such as shall be granted for valuable Consideration for Life or Years, and not relate to any Office or Place of Trust) and also all who have any Place of Trust, or any Employment in the King's Houshold, shall take the Oaths of Allegiance and Supremacy, and Test, the next Term, (in the King's Bench or Chancery, or Quarter-Sessions) and receive the Sacrament within three Months, and give in a Certificate thereof, proved by two Witness, to the Court wherein they take the said Oaths. And in case of Neglect, shall be disabled to hold the said Offices*, &c. *and forfeit five hundred Pounds, except Femes Covert*, &c. But [c] it hath been adjudged, that the Persons so disabled lose only their Right to the Profits of their Offices from the Time of such Disability, but that they lose nothing vested in them before. Also [d] it hath been adjudged to be no Excuse, for a Person bound by Law to accept a Corporation Office, that he is disabled to receive the Sacrament, by having been excommunicated; and [e] *Quaere*, if it be any Excuse, that his Conscience will not suffer him to take it, being a Protestant Dissenter, *&c*.[32]

Sect. 3. Notwithstanding the Words of the first of these Acts are so very strong as to make such Election, *&c*. void, and those of the second to make such Persons disabled in Law to all Intents and Purpose whatsoever, to have, occupy, or enjoy the said Offices; [f] yet it hath been strongly holden, that the Acts of one under such a Disability, being instated in such an Office, and executing the same without any Objection to his Authority, may be valid as to Strangers; for otherwise not only those who no Way infringe this Law, but even those whose Benefit is intended to be advanced by it, might be Sufferers for another's Fault, to which they are no Way privy; and one Chasm in a Corporation happening thro' the Default of one Head Officer would Perpetually vacate the Acts of all others, whose Authority, in respect of their Admission into their Offices, or otherwise, may depend on his.[33]

Sect. 4. By 25 *Car*. 2. Parag. 17. it is expresly provided, *That the said Act shall not extend to Constables or Churchwardens, or such like inferior Civil Officers or to a Bailiff of a Manor or Lands, or such like private Officers*.[34]

But it hath been questioned, whether it extends to the Censor of the College of Physicians.

Sect. 5. As to the second Offence of this Kind, *viz*. that of going to any other Place for Religious Worship than the Church, during the Continuance of an Office, it was enacted by 10 *Ann*. 2. *That if any Person, having any Office, Civil or Military, or receiving any Pay, Salary, Fee or Wages, by*

reason of any Grant from the Crown, or having any Command or Place of Trust from the Crown, or admitted into any Service or Employment in the King's Houshold or Family, or bearing any Office of Magistracy, or Place of Trust, or other Employment relating to the Government of any City, Corporation, Borough, or Cinque-Port, and obliged by 13 *Car*. 2. Stat. 2. Cap. 1. *or* 25 *Car*. 2. 21. *to receive the Sacrament, according to the Usage of the Church of* England, *should at any Time after Admission into any such Office*, &c. *and during the Continuance in the same, knowingly or willingly be present at any Assembly in* England, Wales, *or* Berwick on Tweed, *for the Exercise of Religion, in other Manner than according to the Church of* England, *at which Assembly there shall be ten Persons besides those of the Family, or at any such Meeting where such Liturgy is used, and the King, and such others as shall be lawfully appointed to be prayed for, should not be prayed for in express Words*, &c. *he should forfeit forty Pound; and be disabled to hold any Office or Employment whatsoever in* England, &c. But this Statute, so far as it relates to this Matter, is repealed by 5 *Geo*. 1. *c. 4*

CHAP. IX.

Of Offences in teaching School without conforming to the Church.

Sect. 9. As to the Offence of teaching School without conforming to the Church, so for as it concerns all Persons in general, it is enacted by 23 *El*. 1. Par. 6 *&* 7. *That if any Person or Persons, Body Politick or Corporate, shall keep or maintain any Schoolmaster, who shall not repair to Church according to the Form of the said Statute, or be allowed by the Bishop or Ordinary of the Diocese, (who shall not take any thing for the said Allowance) they shall forfeit for every Month ten Pounds; and such Schoolmaster presuming to teach contrary to the said Act, and being thereof convict, shall be disabled to be a Teacher of Youth, and shall suffer Imprisonment, without Bail or Mainprize, for one Year.*

Sect. 2. And it is further enacted by 1 *Jac*. 1. 4. Par. 9 *That no Person shall keep any School, or be a Schoolmaster, out of the Universities or Colleges of this Realm, except it be in some publick or free Grammar-School, or in some such Nobleman's or Noblewoman's, or Gentleman's or Gentlewoman's House, as are not Recusants, or where the same Schoolmaster shall be specially licensed thereunto by the Archbishop, Bishop, or Guardian of the Spiritualities of that Diocese, upon Pain, that as well the Schoolmaster, as also the Party that shall retain or maintain any such Schoolmaster, contrary to the Meaning of the said Statute, shall forfeit*

each of them, for every Day so wittingly offending, forty Shillings.[35]

Sect. 3. But it having been doubted whether such Persons as are within the Benefit of 1 *Gul. & Mar*. 18. commonly called *The Toleration Act*, are not exempted from the Penalties of the above mentioned Statutes, it was further enacted by 12 *Ann*. 7. *That whoever shall keep any publick or private School or Seminary, or teach any Youth as Tutor or Schoolmaster, (unless he instruct them only in Reading, or Writing, Arithmetick, or such mathematical Learning as relates to Navigation, or some mechanical Art, and that in the* English *Tongue, or unless he shall be a Foreigner of a foreign reformed Church, and teach the Children of such Foreigners only) without having first subscribed that Part of the Declaration in 13 & 14 Car. 2. which relates to Conformity to the Liturgy of the Church of* England, *and also having obtained a Licence from the Bishop,* &c. *and shall be thereof convicted in any of the Courts at* Westminster, *or at the Assizes, or before Justices of Oyer and Terminer, shall be committed to the Common Gaol for three Months,* &c. But this Statute, so far as it relates to this Matter, is repealed by 5 *Geo*. 1. *c*. 4.

As to Popish Schoolmaster in particular, see *Chap*. 15. *Sect*. 3.

CHAP. X.
Of Offences in not coming to Church.

FOR the better Understanding of the Offences of not coming to Church, so far as the same relate to all persons in general, except such as are within the Indulgence of 1 *Will. & Mar*. 18. which is commonly called *The Toleration Act*, I shall consider:

1. How far Persons are punishable for their own absence from the Church.
How far they are punishable for suffering such Absence in others.

And first, In Order to shew how far Persons are punishable for their own Absence, I shall Consider the following Particulars:

1. What Forfeiture of Money, Lands or Goods, such Offenders incur.
2. In what Manner they are to be proceeded against for those Forfeitures.
3. What other Inconveniencies they are subject unto.
4. By what Means they may be discharged.

As to the first Point, I shall consider,

1. What Forfeitures of Money; and,
2. What Forfeitures of Lands and Goods such Offenders are liable unto.

And first, The Forfeitures of Money, to which they are liable, are threefold;

1. That of twelve Pence for the Absence of one *Sunday*, or other Holy Day.
2. That of twenty Pounds for the Absence of every Month contained in a Conviction.
3. That of twenty Pounds for the Absence of every Month after a Conviction.

Sect. 1 And first, the Forfeiture of twelve Pence for the Absence of one *Sunday*, or other Holy Day, depends upon 1 *El.* 2. by which it is enacted, *That all Persons inhabiting within this Realm, or any other the King's Dominions, shall diligently and faithfully, having no lawful or reasonable Excuse to be absent, endeavour to resort to their Parish Church or Chapel accustomed, or upon reasonable Let thereof, to some usual Place, where Common Prayer and such Service of God shall be used, in such Time of Let, upon every Sunday, and other Days ordained and used to be kept as Holy Days, and then and there to abide orderly and soberly, during the Time of the Common Prayer, Preaching, or other Service of God, there to be used and ministered, upon Pain of Punishment by the Censures of the Church, and also upon Pain that every Person so offending shall forfeit for every such Offence twelve Pence.*

In the Exposition of this Statute, the following Opinions have been holden.

Sect. 2. I. That the Indictment needs not shew that the Party had no reasonable Excuse for his Absence, or that he is an Inhabitant within this Realm, *&c.* But that the Defendant, if he have any Matter of this Kind in his Favour, ought to shew it.[36]

Sect. 3. II. That if the Spiritual Court, proceeding upon this Statute, refuse to allow a reasonable Excuse, they may be prohibited; but that if they proceed wholly on their own Canons, they shall not be at all comptrolled by the Common Law, (unless they act in Derogation from it as by questioning a Matter not triable by them, as the Bounds of a Parish, *&c.*), for they shall be presumed to be the best Judges of their own Laws.[37]

Sect. 4. III. That he who misbehaves himself in the Church, or misses either Morning or Evening Prayer, or goes away before the whole Service is over, is as much within the Statute as he who is wholly absent; and that he who is absent from his own Parish Church, shall be put to prove where he went to Church.[38]

Sect. 5. IV. That the Offence in not coming to Church consisting wholly in a Non-feasance, and not supposing any Fact done, but barely the Omission of what ought to be done, needs not be alledged in any certain

Place; for, properly speaking, it is not committed any where.[39]

Sect. 6. Secondly, The Forfeiture of twenty Pounds for the Absence of a whole Month contained in a Conviction, depends upon 23 *El*. 1. Par. 5. by which it is enacted, *That every Person, above the Age of sixteen Years, who shall not repair to some Church, Chapel, or usual Place of Common Prayer, but forbear the same, contrary to the Tenor of the said Statute of* 1 El. 2. *and being thereof lawfully convicted, shall forfeit to the King, for every Month which he or she shall so forbear, twenty Pounds*.[40]

In the Exposition hereof it hath been resolved,

Sect. 7. I. That this Statute, by inflicting twenty Pounds for a Month's Absence, dispenses not with the Forfeiture of twelve Pence, given by 1 *El*. 2. for the Absence of one *Sunday*, for both may well stand together, and the twelve Pence is immediately forfeited upon the Absence of each particular Day.[41]

Sect. 8. II. That these Words, *being thereof lawfully convicted*, are no more than the Law would have implied, if they had not been expressed, and therefore operate nothing; from whence it follows, That they neither cause the Party to Forfeit any Thing by a Conviction, unless Judgment be given thereon, nor restrain the Forfeiture to such Offences only, as are committed after a previous Conviction, inasmuch as they mean no more than what the Law provides of Common Right in every Case, *viz*. That the Party shall forfeit nothing till he be convicted.[42]

Sect. 9. III. That he who is condemned on Demurrer, or *Nihil dicit*, is sufficiently convicted within the Act; for whoever is adjudged, is convict, though it follow not that every one, who is convict, is adjudged, &*c*.[43]

Sect. 10. IV. That one, who was sick for Part of the Time contained in an Information upon this Statute, shall not be at all excused by reason of such Sickness, if it be proved that he was a Recusant, both before and after; for it shall be intended that he obstinately forbore during that Time.

Sect. 11. V. That the Time of a Month, intended by the Statute, shall be computed not by the Kalendar, but by the Number of Days, allowing 28 Days to each, according to the common Rule of expounding Statutes, which speak generally of a Month.[44]

Sect. 12. Thirdly, The Forfeiture of twenty Pounds for the Absence of every Month after a Conviction, depends upon 28 (commonly called a 29) *El*. 6. Par. 4. and 3 *Jac*. 1. 4. Par. 8. 3. by which it is enacted. *That every Offender being convicted of not coming to Church, contrary to the Purport of the Statutes above mentioned, shall pay twenty Pounds for every Month*

after such Conviction, until he shall conform himself, and come to Church.[45]

Sect. 13. As to the second Branch of this Head, *viz.* What Forfeiture of Lands and Goods such Offenders are liable to, the same depends also upon 29 *El.* 6. Par. 4. and 3 *Jac.* 1. 4. Par. 8, 9. by which it is enacted. *That if the Offender shall make Default of Payment of the twenty Pounds, both for every Month contained in the Conviction, and also for every Month subsequent, during which he shall not conform himself to the Church, the King shall take, seize and enjoy all his Goods, and two Parts of his Hereditaments, Leases and Farms, to and for the Maintenance and Relief of the same Offender, his Wife, Children, and Family, notwithstanding any prior Conveyance thereof made by such Offender, with Power of Revocation, or to the Use of himself or his Family. Also by the said Statute of* 3 Jac. 1. 4. Par. 11. *the King may refuse the Penalty of twenty Pounds a Month, though it be tendered according to Law, and thereupon seize two Parts of all the Hereditaments, Leases and Farms, which at the Time of such Seizure shall be, or afterwards shall come to any such Offender, or to any other to his Use, or in Trust for him, or at his Disposition, or whereby or in Consideration whereof he or his Family shall be relieved, maintained or kept, leaving unto him his chief Mansion-House, as Part of his third Part.*[46]

In the Construction of these Statutes the following Points have been resolved,

Sect. 14. I. That the King by making his Election given him by 3 *Jac.* 1. to seize the Offender's Hereditaments, *&c.* waves the Benefit of the twenty Pounds a Month, and the Power of seizing the Offender's Goods.[47]

Sect. 15. II. That a Recognizance or Bond taken by such Offenders, either in their own Names or in the Names of others to their Use, are within the Statute 29 *El.* for the Words thereof to this Purpose are, *That the King shall take, seize, and enjoy all the Goods, &c.* which in a Act of Parliament will include the whole personal Estate; and though a Chose in Action cannot properly be said to be taken or seized, yet may it properly enough be said to be enjoyed.

Sect. 16. III. That no Copyhold Lands are within 29 *El.* (and by the same Reason it seemeth that they are not within 3 *Jac.* 1.) in respect of the Prejudice, which accrue to the Lord by the Loss of his Services, *&c.*[48]

Sect. 17. IV. That the Profits of the land seized by the King by Force of 29 *El.* for the Nonpayment of the twenty Pounds a Month, ought not to be

applied to the Satisfaction thereof, but that the Lands ought to remain in the King's Hands by Way of Pledge, till the whole Forfeiture be paid some other Way; but this Construction of the Statute seeming over severe, it was provided by 3 *Jac*. 1. 4. Par 5. *That the Profits of the said Lands should go towards the Satisfaction of the twenty Pounds*.[49]

Sect. 18. It hath been questioned, Whether an Estate conveyed by another in Trust for a Recusant, be liable to be seized by Force of the said Statute of 29 *El*. because it expresly avoids such Conveyances only as are made by the Recusant himself *to his own Use*. &c. And perhaps if it shall plainly appear, That an Estate is settled *bona fide* in Trust for a Recusant, by some Friend of his, upon some other View, and not meerly with an Intent to evade the Statute, it may be reasonable to exempt such a Conveyance out of the Meaning of it; however it is clear from the express Words of 3 *Jac*. 1. 4. Par. 11. *That the King, upon his waving the Forfeiture of the twenty Pounds a Month, may seize two Parts of all the Hereditaments*, &c. *which shall come to any such Offenders, or to others to their Use, or in Trust for them:* Also it is said, that the King may seize an Estate, which is granted to a Recusant in Trust for another; and it is certain that the Statute has made no express Provision for the *Cestui que Trust*.[50]

As to the second general Head of this Chapter, *viz*. In what Manner Offenders of this Nature are to be proceeded against for the Forfeitures above mentioned, I shall consider,

1. How they are to be proceeded against for the said Forfeitures of Money, and
2. In what Manner for the said Forfeiture of Lands and Goods.

As to the Prosecution for the said Forfeitures of Money, I shall shew,

1. How they are to be proceeded against for the said Forfeiture of twelve Pence for the Absence of the every *Sunday, &c*. and
2. In what Manner for the said forfeiture [*sic*] of twenty Pounds for the Absence of every Month after a Conviction, and
3. In what Manner for the said Forfeiture of twenty Pounds for the Absence of every Month after a Conviction.

Sect. 19. And first, as to that Recovery of the said Forfeiture of twelve Pence for the Absence of every *Sunday*, it was enacted by 1 *El*. 2. *That the same should be levied by the Churchwardens of the Parish where such Offence should be done, to the Use of the Poor of the same Parish, of the Goods, Lands, and Tenements of such Offenders, by Way of Distress*: But this being defective in not showing by whom, or in what Manner such

Offenders should be convicted, or by whom the Warrant for levying the said Forfeiture should be granted, it was farther enacted by 3. *Jac*. 1. 4. Par. 27 *That it should be lawful for any one Justice of the Peace of the Limit, Division or Liberty, wherein the said party shall dwell, upon the Confession of the Party, or the Oath of one Witness, to call the said Party before him, and if be shall not make a sufficient Excuse, and due Proof thereof, to the Satisfaction of the said Justice of Peace, that it shall be lawful for the said Justice of Peace to make a Warrant to the Churchwarden of the said Parish, where the said Party shall dwell, to levy* 12 *Pence for every such Default, by Distress and Sale of the Offender's Goods, rendering the Overplus to the said Offender; and that in Default of such Distress, it shall be lawful for the said Justice of Peace to commit every such Offender to Prison, until the said Forfeiture shall be paid, which shall be employed to the Use of the Poor of the Parish, wherein the Offender shall be resident or abiding at the Time of the Offence*.

Sect. 20. As to the second Point, *viz*. In what Manner the said offenders are to be proceeded against for the said Forfeiture of twenty Pounds for the Absence of every Month contained in a Conviction, I shall consider,

1. In what Manner the same may be recovered at the Suit of the King, and
2. In what Manner at the Suit of an Informer.

And first, as to the Recovery hereof at the King's Suit, I shall consider,

1. In what Manner it may be recovered at the King's Suit by Way of Indictment.
2. In what Manner by Way of Action of Information.

Sect. 21. And first, as to the Recovery hereof at the Suit of the King by Way of Indictment, it was enacted by 23 *El*. 1. Par. 9. *That the Justices of Oyer, Assize, Gaol-Delivery, and Quarter Sessions of the Peace, might enquire of and determine these Offences, within one Year and a Day*: But by 29 *El*. 6, Par. 2. *It was ordained, That all such Convictions should be in the King's Bench, or at the Assizes, or General Gaol-Delivery, and not elsewhere*: However by 3 *Jac*. 1. 4. Par. 7. The Jurisdiction of the Sessions is revived.[51]

Sect. 22. Also it is farther enacted by 29 *El*. 6. Par. 5. and 3 *Jac*. 1. 4. Par. 7. *That upon an Indictment at the Assizes, Gaol-Delivery or General Sessions of the Peace, Proclamation shall be made that the Offender render himself to the Sheriff before the next Assizes, Gaol-Delivery or Sessions; and that if the shall not then appear of Record, upon such Default recorded, the same shall be a Conviction in Law, as if a Trial by Verdict on the*

Indictment had been recorded. And by Par. 9. *Every such Conviction shall be certified into the Exchequer*, &c.[52]

Sect. 23. In the Construction hereof it hath been resolved. I. That such a Conviction shall not be look'd on as a Judgment; for the Words are, *It shall be a Conviction in Law, as if a Trial,&c. had been recorded*: And consequently that it cannot be reversed by Writ of Error, which cannot be brought on any Record, which is not a Judgment, and therefore that the Party has no other Remedy against an insufficient Conviction, but to remove it into the Exchequer, and quash it there. Also upon the same Ground it has been holden, That a Forfeiture due to the King, by Force of such a Conviction, shall not be taken to be within the Exception of a general Pardon, which excepts all Forfeitures, *&c*. converted to a Debt by Judgment.[53]

Sect. 24. II. That if the Proclamation do not pursue the Statute, as if it appoint that the Body shall be rendered at next Sessions, *&c*. whereas by the Statute it ought to order a Render to the Sheriff, and that before the next Sessions, the Conviction is insufficient.[54]

Sect. 25. III. That an actual personal Appearance of the Defendant at the next Sessions, *&c*. will no Way avail him, unless the same be entered of Record.[55]

Sect. 26. It hath been holden, That a Man cannot be convicted by Force of this Statute upon a Default on a Proclamation, *&c*. in the King's Bench, because this Court is not mentioned in the Statute: But perhaps this Opinion may justly be questioned, because the Court of King's Bench being the supreme Court of Assize, and Gaol-Delivery, *&c*. in the County where it sits, it seems that a statute, by giving any Power to the Courts of Assize or Gaol-Delivery, does impliedly give the same to the Court of King's Bench, unless it have some restrictive Words to the contrary.[56]

Sect. 27. If the Defendant do appear, there is no Doubt but that the Proceedings ought to be according to the common Course of Law upon other Indictments in all Respects, except those which are within the Restraint of 3 *Jac*. 1. 4. Par. 16, 17. by which it is enacted, *That no such Indictment, nor any Proclamation, Outlawry or other Proceeding thereupon, shall at any Time hereafter be avoided, discharged or reversed, by reason of any Default in Form or Lack of Form, or other Defect whatsoever, (other than by direct Traverse to the Point of not coming to Church, &c.) but the same Indictment shall stand in Force and be proceeded upon; any such Default of Form, or other Defect whatsoever*

notwithstanding, unless the party so indicted shall conform, &c.[57]

Sect. 28. However it hath been resolved,[58]

I. That the Party is only restrained from taking Advantage of Defects in the Record itself, and that he may plead any collateral Matter, as a Pardon, or *Autrefoits convict*, &c.

Sect. 29. II. That he may even reverse a Judgment after Verdict for any such Defect in the Record itself, as tends to the King's Prejudice, as the Omission of a *Capiatur, &c*. And that he may reverse an Outlawry for any Common Defect, upon putting in Bail, and traversing the Indictment as to the Point of not coming to Church, which is very agreeable to the Purport of the whole Clause, the latter Part whereof seems manifestly to qualify the Generality of the former.[59]

Sect. 30. Secondly, As to the Recovery of the said Forfeiture by way of Action of Information at the King's Suit, it was enacted by 35 *El*. 1. Par. 10. *That all and every the said Pains, Duties, Forfeitures, and Payments, shall and may be recovered and levied to her Majesty's Use, by Action of Debt, Bill, Plaint, Information or otherwise, in any of the Courts commonly called the King's Bench, Common Pleas, or Exchequer, in such Sort and in all Respects, as by the ordinary Course of the common Laws of this Realm, any other Debt due by any such Person in any other Case should or may be recovered or levied, wherein no Essoin, Protection or Wager of Law shall be admitted or allowed*.

Sect. 31. It is said, That the principal End of making this Clause, was to enable the Queen to proceed against the Husband for the Recusancy of his Wife, which she could not do by Virtue of any of the former Statutes, by which she had no other Way of proceeding but by Indictment, and consequently could not charge the Husband for the Forfeiture of the Wife, because she could not make him a Party to the Suit, as she may by Force of this Statute; However, it is said, That on a Conviction of the Wife upon an Indictment, the Lands and Leases, which the Husband has in her Right, may be seized by the Exchequer-Process.[60]

Sect. 32. As to the second Particular, *viz*. In what Manner an Informer may proceed for the Forfeitures aforesaid, it is enacted by 23 *El*. 1. Par. 11. *That all Forfeitures of any Sums of Money limited by that Act, shall be divided into three equal Parts, whereof one Third shall be to the Queen, to her own Use, one other Third to the Queen, for the Relief of the Poor in the Parish where the Offence shall be committed, to be delivered by the Warrant of the principal Officers in the Receipt of the Exchequer, without*

further Warrant from her Majesty; and the other Third to such Person as will sue for the same, in any Court of Record, by Action of Debt, Bill, Plaint, or Information, in which Suit no Essoin, &c. *shall be allowed: And that every Person which shall forfeit any Sums of Money by Virtue of that Act, and shall not be able, or shall fail to pay the same within three Months after Judgment thereof given, shall be committed to Prison, there to remain until he have paid the same Sums, or conform himself to go to Church, and there do as is aforesaid*.[61]

Sect. 33. It has been objected, that this Clause shall not extend to the said Forfeiture of twenty Pounds a Month for not coming to Church, because the same is by the former Part of this Statute given expresly to the Queen, whereas the Forfeitures for saying or hearing Mass, and keeping an unlicensed Schoolmaster, are inflicted by the same Statute indefinitely, and not expresly given to any one; from which it is argued, That this latter Clause of Distribution ought only to be applied to the said indefinite Clauses, and not to take from a Queen any Part of that, which was expresly given her before; yet it has been answered and resolved, That it shall equally extend to all; for the Limitation of the Forfeiture to the Queen is more Surplus, and no more than the Law would have implied, *& expressio eorum, quae tacite insunt, nihil operator*.[62]

Sect. 34. Also it has been resolved, That an Informer may sue, not only for the third Part which belongs to him, but for the whole Penalty in the Behalf of himself and the King, and that the Judgment shall be that they shall recover *&c*.[63]

Sect. 35. Also it has been adjudged, that neither the above mentioned Clause of 29 *El*. 6. Which orders, That all Convictions upon 23 *El*. shall be certified into the Exchequer, and also that the Offender shall pay to Queen twenty Pounds for every Month contained in the Indictment, *&c*. nor the said Clause in the 35 *El*. 1 by which it is enacted, That all the said Pains, *&c*. shall be recovered to the Queen's Use, do take away the Suit of the Informer, against one not proceeded against by the King, or the third Part of the Penalty given him by 23 *Eliz*. For the plain Purport of both these Acts is to further the Punishment of Recusants, and therefore, inasmuch as they are in the Affirmative, and consistent with 23 *El*. they shall not be construed to abrogate any Part of it.[64]

Sect. 36. Moreover it is manifest, that 29 *El*. 6. Extends only to the King's Suit by Indictment, for the Word Indictment is mentioned almost in every Clause.

Sect. 37. And it also follows from hence, That the second Paragraph of the said Statute of 29 *El*. which enacts, That Convictions for this Offence shall be only at Assizes, Gaol-Delivery, or the King's Bench, restrains only Convictions upon Indictments, and consequently does not any Way impeach the Jurisdiction of the Common Pleas or Exchequer, as to Informations, *&c*.[65]

Sect. 38. It seems that better Opinion (upon comparing all the Books together, which differ much from one another both in stating the Cases, and giving the Reasons of the Judgments relating to this Matter,) that a Conviction at the King's Suit, whether strictly regular or erroneous, may be pleaded to a Suit by an Informer, because, while it stands in Force, it makes the Party liable to the Forfeiture of twenty Pounds a Month, and no one ought to be punished twice for the same Offence: But it hath been resolved, that an erroneous, and strongly holden that a regular, Conviction by Proclamation cannot be pleaded to a new Suit by the King, because such a Conviction is of no greater Effect than a Conviction by Verdict, and consequently the King may wave it and begin anew.[66]

Sect. 39. But it seems very doubtful, whether the Conviction of a Feme Covert upon an Indictment can be pleaded to an Information against her and her Husband, because the Husband is not liable to pay the Forfeiture recovered upon an Indictment.

Sect. 40. It seems that the ordinary Method of recovering the said Forfeiture of twenty Pounds for every Month contained in a Conviction, either at the Suit of the King, or of an Informer, may sufficiently appear from what has been already said; but there is an extraordinary Remedy provided by the same Statute of 29 *El*. 6. to enforce the Party to take Care of the Payment of the Forfeiture of the twenty Pounds for every Month contained in an Indictment, whereon he shall be convicted, by making his Lands and Goods liable to be seized by the King for the Nonpayment thereof into the Exchequer, upon such of the Terms of *Easter* or *Michaelmas*, as shall be next after his Conviction; but this extends not to a Conviction by Way of Action, or Information, as more fully appears from the two next Sections.

Sect. 41. As to the third Point, *viz*. In what Manner the Forfeiture of twenty Pounds for the Absence of every Month after a Conviction is to be recovered, it seems needless to enquire how far it may be recovered by an Action or Information for it at the King's Suit, inasmuch as the said Statutes of 29 *El*. 6. *&* 3 *Jac*. 1. have made a most effectual Provision for the

Payment of it, by expresly enacting, *That every such Offender, being once convicted, shall for every Month after such Conviction, without any other Indictment or Conviction, pay into the Exchequer twice in the Year*, viz, *in every* Easter *and* Michaelmas *Term, as much at shall then remain unpaid, after the Rate of twenty Pounds for every Month after a Conviction, and that for a Default herein the King may seize all the Goods, and two Parts of the Hereditaments of such an Offender*, &c.

Sect. 42. But it seemeth that these Clauses extend not to any Conviction upon an Information, or Action, &*c*. but only to a Conviction upon an Indictment, for there is no other Suit referred to besides that of Indictment; also it is said, that the said Clauses extend to no Convictions by Verdict or otherwise, unless Judgment be given thereon; because, till then nothing is forfeited. And from the same Ground it seems to follow, That they would not have extended to a Conviction by Default upon Proclamation, if there had been no other Words in the Statute to this Purpose, than those by which it is enacted, *That such a Default recorded shall be as sufficient a Conviction in Law of the said Offence, whereof the Party standeth indicted, as if upon the same Indictment a Trial by Verdict thereupon had proceeded and been recorded*, which Words of themselves can by no Means make such a Conviction amount to a Judgment after Verdict, without which there can be no Forfeiture upon any other Conviction; and therefore it seemeth that the Forfeiture caused by such a Conviction must depend upon the other Clauses of the said Statutes, and the constant Tenor of our Law Books, which seem to suppose that a Person so convicted shall be liable to the said Forfeitures, as much as one, against whom a Judgment is expresly given.[67]

Sect. 43. As to the second general Branch of this Head, *viz*. In what Manner Offenders of this Nature are to be prosecuted for the Forfeiture of Lands or Goods, it appeareth from the 13th, 14th, 15th, 17th, 18th, 40th and 41st Sections of this Chapter, that the King hath his Election either to seize all the Goods and two Parts of the Hereditaments and Leases of the Offender, upon his making Default in the Payment of twenty Pounds, both for every Month contained in an Indictment, whereon he shall be convicted, and also for every Month subsequent, or else to refuse the said Penalty of twenty Pounds a Month, and thereupon to seize two Parts of the Hereditaments and Leases of the Offender.

Sect. 44. It also appeareth from what hath been said in the forty-second Section of this Chapter, that the King hath this Advantage of seizing the Lands and Goods of the Offender upon no other Conviction, but such as

followeth an Indictment, nor even upon such a Conviction without a Judgment, unless it be caused by a Default upon a Proclamation; therefore I shall add no more to this Head, except these two following Observations:

Sect. 45. I. That the King cannot seize the Lands, till it appears by the Return of an Inquisition to that Purpose to be awarded, of what Lands, *&c*. the Offender was seized, because the King's Title to Lands ought always to appear of Record.[68]

Sect. 46. II. That the King, according to the better Opinion, may seize the Goods, but not grant them over, without such an Inquisition.[69]

Sect. 47. As to the third general Head of this Chapter, *viz*. What Disabilities, and other Inconveniences, Offenders of this Kind are liable unto, it is enacted by 3 *Jac*. 1. 5. Par. 8. *That no Recusant convict shall practice either the Common or Civil Law, or Physick, or use the Trade of an Apothecary, or be judge or Minister of any Court, or bear any Office in Camp, Troop, or Company of Soldiers, or in any Ship, or Fortress, but shall be utterly disabled for the same, and forfeit for every such Offence one hundred Pounds*.

Sect. 48. Also it is farther enacted by the said Statue of 3 *Jac*. 1. 5. Par. 22. *That such Recusants, as shall be convicted at the Time of the Death of any Testator, or at the Time of the Granting of any Administration, shall be disabled to be Executors or Administrators; and that no such Persons shall be Guardians to any Child*, &c.

Sect. 49. And it is enacted by 23 *El*. 1. *That every Person forbearing the Church twelve Months, shall on Certificate thereof into the King's Bench by the Ordinary, a Justice of Assize and Gaol-Delivery, or a Justice of Peace of the County where such Offender shall dwell or be, be bound with two sufficient Sureties in the Sum of two hundred Pounds at the least to the Good Behaviour, and so continue bound until such Offender shall conform himself*, &c.

Sect. 50. As to the fourth general Head of this Chapter, *viz*. By what Means Offenders of this Nature may be discharged from the said Forfeitures, *&c*. it is enacted by 23 *El*. 1. Par. 10. *That every Person guilty of the abovementioned Offences, who shall before he be thereof indicted, or at his Arraignment or Trial before Judgment, submit and conform himself before the Bishop of the Diocese where he shall be resident, or before the Justices where he shall be indicted, arraigned, or tried*, (*having not before made like Submission at any his Trial, being indicted for his first like Offence*,) *shall upon his Recognition of such Submission in open Assizes, or*

Sessions of the County where such Person shall be resident, be discharged of all and every the said Offences against the said Statute, &c.

Sect. 51. Also it is enacted by 29 *El*. 6. Par. 6. *That whensoever any such Offender shall make Submission, and become conformable, according to the Form limited by the above mentioned Statue of* 23 El. 1. *or shall fortune to die, that then no Forfeiture of twenty Pounds for any Month, or Seizure of the Lands of the same Offender, from and after such Submission and Conformity, or Death, and full Satisfaction of all the Arrearages of twenty Pounds Monthly, before such Seizure due or payable, shall ensue, or be continued against such Offender, so long as the same Person shall continue in coming to Divine Service, according to the Intent of the said Statute*.

Sect. 52. But this Statute being thought not to give sufficient Encouragement to such Persons to conform to the Church, because, by the most favourable Construction that could be made, it still obliged them to pay such Debts as were due to the King by Force of a Judgment, it was enacted by 1 *Jac*. 1. 4. Par. 2. *That a Recusant, conforming himself according to the Meaning of the above mentioned Statutes*, &c. *shall, during such Conformity, be discharged of all Penalties, which he might otherwise sustain by reason of his Recusancy*.[70]

Sect. 53. And it hath been resolved, that such Conformity may, by Force of this Statute, be pleaded, as well to the Suit of an Informer as to that of the King; and that after Judgment it will be a good Ground for an *Audita Querela* against an Informer, and also may be pleaded against the King before Execution awarded.[71]

Sect. 54. However, there seems to be no Remedy for such a Person to get a Restitution of such of the Profits of his Lands, as have been actually taken by the King.[72]

Sect. 55. It seemed very doubtful, before 1 *Jac*. 1. 4. how far the Lands of a Heir were chargeable with the Forfeitures incurred by his Ancestor in respect of his Recusancy, but this seems to be for the most part cleared by the 3d, 4th and 5th Paragraphs of that Statute, by which it is enacted, *That the Heir, if be he no Recusant, or were such, and conform, shall be freed from all Penalties happening upon him by reason of his Ancestor's Recusancy, unless the two parts of the Lands were seized by the King in the Ancestor's Life, in which Case they shall continue in the King's Hands till the whole Debt shall be levied. But it is farther enacted, that the King shall not extend the other third Part of the Lands for the said Penalty*.[73]

Sect. 56. It seems by the manifest Purport of this Statute, that the Heir of

a Recusant, being also a Recusant himself, has no Remedy, but by conforming, to free his Fee-Simple Lands from any of the Forfeitures incurred by the Conviction of his Ancestor, whether the Lands were seized in the Ancestor's Life of not: However, it is said, that the Land in Fee-Tail, which he claims from such Ancestor, is no Way chargeable after the Death of the Ancestor, with any Forfeitures upon a Conviction by Proclamation (which has no greater Effect than a Verdict recorded) but only with such, as are due upon a Judgment; which, as it is agreed, charge an Heir in Tail by Force of 33 *H*. 8. 39. Par. 29. which makes an Heir chargeable with the Debts of his Ancestor by Judgment, Recognizance, Obligation, or other Specialty; but perhaps the Authority of those Opinions may justly be questioned: For tho' a Conviction by Proclamation amount not to a Judgment, yet surely it cannot be inferior to an Obligation: And therefore perhaps the Books cited in the Margin are misreported in this Particular, and the more proper Distinction may be this: That an Heir in Tail is chargeable only with the Forfeitures for those Months, which are contained in the Indictment itself, on which a Judgment is afterwards given, or a Conviction by Proclamation recorded, and not for the Months subsequent to such Conviction, or Proclamation, inasmuch as the first seem to be Debts appearing of Record, the latter not; and the same Distinction seems applicable to such Lands in Tail of an Heir who conforms, as were seized in the Ancestor's Life; but it is clear, that such only of his Lands as were so seized are in any Case liable, whether he claim them in Fee-Simple or Tail.[74]

CHAP. XI.

Of the Offences of suffering others to be absent from Church.

HAVING shewn how far all Persons in general are punishable for their own Absence from the Church, I am now to shew how far they may be punished for the Absence of others; as to which it is enacted by 3 *Jac*. 1. 4. Par. 32, 33, 34. *That whosoever shall retain or keep in his Service, Fee, or Livery, or shall willingly maintain, retain, relieve, keep, or harbour, in his House, any Servant, Sojourner, or Stranger, (except a Father, or Mother wanting without Fraud or Covin, other Habitation, or sufficient Maintenance, and also except a Ward, or person committed to the Custody of another by Authority) who shall not go to some Church or Chapel or usual Place of Common Prayer, to hear Divine Service, but shall forbear the same for the Space of one Month, &c. shall for every Month, that he shall keep such Servant, &c. forfeit ten Pounds.*

CHAP. XII.
Of Popish Recusancy.

AND now we are come to Offence against the Established Church, more immediately relating to those of the Popish Religion, for the better understanding whereof I shall consider:

1. The above mentioned Offence of not coming to Church, so far as it particularly concerns those of this Persuasion.
2. The Offence of saying or hearing Mass, or other Popish Service.
3. The Offence of not making a Declaration against Popery.
4. The Offence of promoting or encouraging the Popish Religion.

And first as to the said Offence of not coming to Church, so far as it particularly concerns those of the Popish Religion, who in respect hereof are commonly called Popish Recusants, I shall consider,

1. How far such Recusants are punishable in their own Persons.
2. How far they make others liable to be punished.

As to the first of these Points, *viz*. How far such Recusants are punishable in their own Persons, it is to be observed, that they are not only liable to all the Forfeitures and Disabilities, and other Inconveniences mentioned in Chap. 10. but also to many particular Disabilities, Restraints and Forfeitures, and other Inconveniences to which no others are liable.

And first they are put under the following Disabilities,

1. That of bringing an Action.
2. That of presenting to a Church.
3. That of bearing any public Office, or Charge.
4. That of claiming any Part of a Husband’s personal Estate.
5. That of claiming an Estate by Courtesy, or by Way of Dower, after a Marriage against Law.

Secondly they are put under the following Restraints,

1. From going above five Miles from Home.
2. From coming to Court.
3. From keeping Arms.
4. From coming within ten Miles of *London*.

Thirdly, They are liable to the following Forfeitures,

1. That of two Parts of a Jointure or Dower.
2. That of twenty Pounds for not receiving the Sacrament yearly after Conformity.
3. That of one Hundred Pounds for an unlawful Marriage.

4. That of one hundred Pounds for an Omission of lawful Baptism.
5. That of twenty Pounds for an unlawful Burial.

Lastly, They are subject to the following Inconveniences,

1. That their Houses may be searched for Reliques, whether they be Men or Women.
2. If they be Women and married, that they may be committed, *&c*.

Sect. 1. As to the first of the said Disabilities, *viz*. That of bringing an Action, it is enacted by 3 *Jac*. 1. 5. Par. 11, 12. *That every Popish Recusant convict shall stand to all Intents and Purposes disabled, as a Person lawfully excommunicated, and as if such Person had been so denounced and excommunicated according to the Laws of this Realm until he or she shall conform*, &c. *And that every Person, sued by such Person so disabled, may plead the same in disabling of such Plaintiff, as if he or she were excommunicated by Sentence in the Ecclesiastical Court. Except the action of such Recusant do concern some Hereditament or Lease, which is not to be seized into the King's Hands by Force of some Law concerning Recusancy*.

In the Exposition hereof it hath been resolved,

Sect. 2. I. That the Plea of such a Conviction, like all other Pleas in Disability, ought to be pleaded before Imparlance, and also to conclude with a Demand if the Plaintiff shall be answered.[75]

Sect. 3. II. That such Plea ought also to shew before what Justices the Conviction was, that the Court may know where to send for a Certificate thereof, if it be denied; and also that the Record itself, or at least a Certificate thereof, ought to be immediately produced, according to the general Rule of the Law, as to all dilatory Pleas grounded upon Records.[76]

Sect. 4. III. That if after such a Plea it be certified that the Plaintiff hath conformed, and thereupon the Defendant be ordered to plead in chief, and then the Plaintiff relapse and be convict again, the Defendant cannot plead the same in Disability a second Time.[77]

Sect. 5. IV. That it must appear either from the Conviction itself, or by proper Averments, that the Plaintiff is convicted of Popish Recusancy, because no Recusants, except Popish ones, are within the said Clause; however that this is sufficiently set forth, by alledging that the Plaintiff being *Papalis Recusance*, was indicted and convicted *secundum formam Statuti, &c*.[78]

Sect. 6. And some have gone so far as to hold, That all Popish Recusants

convict may be taken up by the Writ * *De Excommunicato capiendo*, and that they are not to be admitted as competent Witnesses in any Cause; but this seems to be a Construction over severe: For inasmuch as this, like all other Penal Statutes, ought to be construed strictly, and the Words thereof are no more than, That such Persons shall stand disabled, *&c*. as Persons lawfully excommunicate, *&c*. and the Purport thereof may be fully satisfied by the Disability to bring any Action, it seems to be too rigorous to carry them farther.[79]

Sect. 7. As to the second of the said Disabilities, *viz*. That of presenting to a Church, the same being at this Day extended by 12 *Ann*. 2. to all Persons making Profession of the Popish Religion, I shall refer the Reader, for the Matters relating to this Head, to Chap. 15, wherein is shewn how penal it is, barely to profess the said Religion; and I shall only take Notice in this Place, that by 1 *Gul. & Mar*. 26. Par. 4. *If the Trustee, Mortgagee, or Grantee of any Avoidance, whereof the Trust shall be for any Popish Recusant convict, shall present without giving Notice in Writing of the Avoidance, to the University, &c. within three Months after the Avoidance, he forfeits five hundred Pounds*.

Sect. 8. As to the third of the said Disabilities, *viz*. That of bearing any public Office or Charge, it is enacted by 3 *Jac*. 1. 5. Par. 9. *That no Popish Recusant convict shall exercise any publick Office, or Charge in the Commonwealth, but shall be utterly disabled to exercise the same, by himself or his Deputy*.

Sect. 9. It is observable, that this Clause is more strongly penned than that, which immediately precedes it, relating to all Recusants in general, as to the following Particulars:

1. That this extends to all public Offices and Charges in general, whereas the former extends only to those which are particularly enumerated.
2. That this expressly disables a Popish Recusant to exercise such an Office by himself or his Deputy, but the other says nothing at all of the Exercise of an Office by a Deputy.

Sect. 10. As to Fourth of the said Disabilities, *viz*. That of claiming any Part of the Husband's personal Estate, it is enacted by 3 *Jac*. 1. 5. Par. 10. *That every Woman, being a Popish Recusant convict (her Husband not standing convicted of Popish Recusancy) which shall not conform her self and remain conform'd, but shall forbear to repair to some Church or usual Place of Common Prayer, and there hear Divine Service and Sermon, if any then be, and receive the Sacrament of the Lord's Supper, according to the*

Laws of this Realm, by the Space of one whole Year next before the Death of her said Husband, shall not only be disabled to be Executrix or Administratix of her said Husband, but also to have or demand any Part of her said Husband's Goods or Chattels, by any Law, Custom or Usage whatsoever; and by 3 *Jac*. 1. 5. Par. 13. *Every Woman is put under the like Disability, being a Popish Recusant, who shall be married otherwise than according to the Church of* England.

Sect. 11. As to the fifth of the said Disabilities, *viz*. That of claiming an Estate by the Courtesy, or by Way of Dower, *&c*. it is enacted by 3 *Jac*. 1. 5. Par. 13. *That every Man who, being a Popish Recusant convict, shall be married otherwise that in some open Church or Chapel, and otherwise than according to the Orders of the Church of* England, *by a Minister lawfully authorized, shall be disabled to have any Estate, as Tenant by the Courtesy; and that every Woman, being a Popish Recusant convict, who shall be married in other Form than as aforesaid, shall be disabled to claim her Dower or Jointure, or Widow's Estate,* &c.

Sect. 12. As to the first of the above mentioned Restraints, *viz*. That from going above five Miles from Home, *&c*. it is enacted by 35 *El*. 2. and 3 *Jac*. 1. 5. Par. 6, 7. *That every Popish Recusant convict shall repair to his Place of Dwelling,* &c. *and not remove above five Miles from thence, unless he be urged by Process,* &c. *or have a Licence from the Privy Council,* &c. *or under the Hands and Seals of four Justices of Peace, with the Assent in Writing of the Lieutenant of the County, or of the Bishop* &c. *(every Licence of which Kind by Justices of Peace must express both the particular Cause and the Time for which it is given, and ought not to be granted without a previous Oath of some reasonable Cause,*) *under Pain of forfeiting all his Goods and Hereditaments, (whether Freehold or Copyhold,) for his Life, or of abjuring the Realm, if he be not worth twenty Marks a Year, or forty Pounds in Goods, unless he recant before Conviction, and also continue conformable*.[80]

Sect. 13. Note, That the Privy Council may grant such Licence without any Special Cause or Oath, *&c*. but that the Justices of Peace cannot: And it hath been resolved, That in Pleading a Licence of Justices and Peace, you must expresly shew, that it was made under their Hands and Seals, and also set forth the Cause in particular for which it was granted, and the Time for which it was limited, and that the Party was sworn to the Truth of such Cause, *&c*.[81]

Sect. 14. It is said, That if the same Person be both a Justice Peace and a

Lieutenant, he cannot both join in a Licence as Justice of Peace, and also give his Assent as Lieutenant, but can only act in one Capacity.[82]

Sect. 15. It seems that the Miles shall be computed according to the *English* Manner, allowing 5280 Foot, or 1760 Yards to each Mile, and that the same shall be reckoned not by strait Lines, as a Bird or Arrow may fly, but according to the nearest and most usual Way.[83]

Sect. 16. As to the second of the above mentioned Restraints, *viz*. That which relates to the coming to Court, it is enacted by 3 *Jac*. 1. 5 Par. 2. *That no Popish Recusant convict shall come into the Court or House where the King or his Heir apparent shall be, unless he be commanded so to do by the King, upon Pain of one hundred Pounds*, &c. And it is farther enacted by 30 *Car*. 2. St. 2. Par. 5, 6. *That every Popish Recusant convict, who shall come advisedly into, or remain in the Presence of the King and Queen, or shall come into the Court or House where they or any of them reside, shall be disabled to hold or execute any Office or Place of Trust Civil or Military, or to sue in Law or Equity, or to be an Executor*, &c. *or capable of any Legacy or Deed of Gift, and shall forfeit for every wilfull Offence five hundred Pounds, unless such Person do within the Term next after such his coming or remaining, take the Oaths of Allegiance and Supremacy, and make the Declaration against Transubstantiation and the Invocation of Saints*, &c. *in the Court of Chancery*.

Sect. 17. As to the Third of the above mentioned Restraints, *viz*. That which relates to the keeping of Arms, it is enacted by 3 *Jac*. 1. 5 Par. 27, 28, 29. *That all such Armour, Gun-powder, and Munition, of whatsoever Kinds, as any Popish Recusant convict shall have in his own House or elsewhere, or in the Possession of any other at his Disposition, shall he taken from him by Warrant of four Justices of Peace at their General or Quarter-Sessions, (except such necessary Weapons as shall be allowed him by the said four Justices, for the Defence of his Person or House) and that the said Armour*, &c. *so taken, shall be kept at the Cost of such Recusant, in such Place as the said four Justices at their said Sessions shall appoint: And that if any such Recusant having such Armour*, &c. *or if any other Person who shall have any such Armour*, &c. *to the Use of such Recusant, shall refuse to discover to the said Justices, or any of them, what Armour he hath, or shall let or hinder the Delivery thereof to any of the said Justices, or to any other Person authorized by their Warrant to take the same, that then every Person so offending shall forfeit his said Armour*, &c. *and also be imprisoned for three Months without Bail, by Warrant from any Justices*

of Peace of such County. And it is further enacted, *That notwithstanding the taking away such Armour*, &c. *yet such Recusant shall be charged with the maintaining of the same, and with the providing of a Horse*, &c. *in such Sort as others of his Majesty's Subjects*. Also it is farther enacted by 1 *Will. & Mar*. 15. *That no reputed Papist refusing to make the said Declaration against Popery, mentioned in* 30 Car. *shall keep Arms*; as it is set forth more at large *Chap*. 14. *Sect*. 4.

Sect. 18. As to the fourth of the above mentioned Restraints, *viz*. That which relates to the coming within ten Miles of *London*, it is enacted by 3 *Jac*. 1. 5 Par. 4, 5. *That no Popish Recusant, &c. shall remain within the Compass of ten Miles of* London *under Pain of one hundred Pounds, except such Persons as, at the Time of the said Act, did use some Trade, Mystery, or manual Occupation in* London, &c. *and such at shall have their only Dwelling in* London, *&c*. Also reputed Papists, refusing to make the Declaration mentioned in the precedent Sections, are to be removed from *London*, &c. by Force of 1 *Will. & Mar*. 9. which is set forth more at large in *Chap*. 14. *Sect*. 3.

Sect. 19. As to the first of the above mentioned Forfeitures, *viz*. That of two Parts of a Jointure or Dower, it is enacted by 3 *Jac*. 1. 5. Par. 10. *That every married Woman, being a Popish Recusant convict, (her Husband not standing convicted of Popish Recusancy) who shall not conform herself and remain conformed, but shall forbear to repair to some Church or usual Place of Common Prayer, and there to hear Divine Service and Sermon, if any then be, and receive the Sacrament of the Lord's Supper, according to the Laws of this Realm, within one Year next before the Death of her said Husband, shall forfeit to the King the Profits of two Parts of her Jointure and Dower of any Hereditaments of her said Husband*, &c.

Sect. 20. As to the second of the above mentioned Forfeitures, *viz*. That of twenty Pounds, *&c*. for not receiving the Sacrament yearly after Conformity, it is enacted by 3 *Jac*. 1. 4. Par. 2, 3. *That if any Popish Recusant convict, who hath conformed himself to the Church*, &c. *shall not receive the Sacrament in his own Parish Church*, &c. *within one Year after his Conformity, he shall forfeit twenty Pounds, and for the second Year forty Pounds, and for every Year after sixty Pounds*, &c.

Sect. 21. As to the third of the above mentioned Forfeitures, *viz*. That of one hundred Pounds for an unlawful Marriage, it is enacted by 3 *Jac*. 1. 5. Par. 13. *That every Popish Recusant convict, who shall be married to a Woman who is no Inheritrix, otherwise than according to the Church of*

England, *shall forfeit one hundred Pounds.*

Sect. 22. As to the fourth of the above mentioned forfeitures, *viz.* That of one hundred Pounds for the Omission of a lawful Baptism, it is enacted by 3 *Jac.* 1. 5. Par. 14. *That every Popish Recusant, who shall not cause his or her Child to be baptized, within one Month after its Birth, by a lawful Minister,* &c. *shall forfeit one hundred Pounds,* &c.

Sect. 23. As to the fifth of the above mentioned Forfeitures, *viz.* That of twenty Pounds for an unlawful Burial, it is enacted by 3 *Jac.* 1. 5. Par. 15. *That if any Popish Recusant, not being excommunicate, shall be buried in any other Place than in the Church or Churchyard, or not according to the Ecclesiastical Laws of this Realm, the Executors,* &c. *of such Recusant, knowing the same, or the Party that causeth him to be so buried, shall forfeit twenty Pounds,* &c.

Sect. 24. As to the Inconvenience to which all such Offenders are liable, *viz.* That of having their Houses searched for Reliques, *&c.* it is enacted by 3 *Jac.* 1. 5. Par. 26. *That any two Justices of Peace, and all Mayors, Bailiffs, and chief Officers of Cities and Towns Corporate, in their respective Jurisdictions, may search the House and Lodgings of every Popish Recusant convict for Popish Books and Reliques; and that if any Altar, Pix, Beads, Pictures, or such like Popish Relique, or any Popish Book, be found in the Custody of such Person, as, in the Opinion of the said Justices,* &c. *shall be unmeet for him or her to have or use, it shall be defaced and burnt, if it be meet to be burnt, and if it be a Crucifix, or other Relique of any Price, the same shall be defaced at the General Quarter-Sessions in the County where it shall be found, and then restored to the Owner.*

Sect. 25. As to the Inconvenience to which such Offenders being Femes-Covert are liable, *viz.* that of being committed, it is enacted by 7 *Jac.* 1. 6. Par. 28. *That if any married Woman, being a Popish Recusant convict, shall not, within three Months after her Conviction, conform herself, and repair to Church and receive the Sacrament,* &c. *she may be committed to Prison by one of the Privy Council, or by the Bishop, if she be a Baroness; or if under that Degree by two Justices of Peace, whereof one to be of the* Quorum, *there to remain till she perform,* &c. *unless the Husband will pay to the King ten Pounds a Month for her Offence, or else the third Part of all his Lands,* &c. *at the Choice of the Husband,* &c.

Sect. 26. And now I am to consider in the second Place, how far such Recusants make others liable to be punished; as to which it is to be

observed, That the Husband of a Popish Recusant convict is not only liable to the Forfeiture of ten Pounds a Month for the Absence of any of his Servants from Church, by Force of 1 *Jac*. 1. which is set forth more at large in the foregoing Chapter, *but is also utterly disabled, by the ninth Paragraph of the said Statute, to exercise any Publick Office or Charge in the Commonwealth by himself or by his Deputy; (except such Husband himself, and his Children, which shall be above the Age of nine Years abiding with him, and his Servants in the Houshold, shall once every Month at least, not having any reasonable Excuse to the contrary, repair to some Church or Chapel usual for Divine Service, and there hear Divine Service; and the said Husband, and such his Children and Servants, as are of meet Age, receive the Sacrament of the Lord's Supper, at such Times as are limited by the Laws of this Realm, and do bring up his said Children in the true Religion*.)

Sect. 27. Also it is farther exacted by the said Statute of 3 *Jac*. 1. 5. Par. 26. *That the House of one whose Wife is a Popish Recusant convict, may be searched by any two Justices of Peace,* &c. *for Popish Books,* &c.

CHAP. XIII.

Of Offences in saying or hearing Mass or other Popish Service.

Sect. 1. AS to the Offence in saying or hearing Mass, it is enacted by 23 *El*. 1. Par. 4. *That every Person, who shall say or sing Mass, being, therefore lawfully convict, shall forfeit two hundred Marks, and be committed to Prison in the next Gaol, there to remain by the Space of one Year, and from thenceforth till he have paid the said Sum of two hundred Marks; and that every Person, who shall willingly hear Mass, shall forfeit the Sum of one hundred Marks, and suffer a Year's Imprisonment.*

Sect. 2. And it is enacted by 11 & 12 *Will*. 3. 4. Par. 2, 3, 4, 5. *That every Person, who shall apprehend any Popish Bishop, Priest, or Jesuit, and prosecute him to Conviction for saying Mass, or exercising any other Part of the Function of a Popish Bishop or Priest, shall receive one hundred Pounds of the Sheriff, and that every such Popish Bishop,* &c. (*except, being a Foreigner, be he entered in the Secretary's Office, and officiate only in the House of a Foreign Minister,*) *shall be adjudged to perpetual Imprisonment.*

CHAP. XIV.

Of the Offence of not making a Declaration against Popery.

THE Offence of refusing to make a Declaration against some of the principal Doctrines of the Popish Religion puts all Persons under the following Restraints:

1. From sitting in Parliament.
2. From holding a Place at Court.
3. From living within ten Miles of *London*.
4. From keeping Arms.

Also it puts them under a Disability of presenting to a Church.

Sect. 1. As to the first of the above mentioned Restraints. *viz*. That which relates to the sitting in Parliament, it is enacted by 30 *Car*. 2. Stat. 2. Chap. 1. *That no Peer shall vote or make his Proxy in the House of Peers, or sit there during any Debate; and that no Member of the House of Commons shall vote or sit there during any Debate after the Speaker is chosen, until such Peer or Member shall take the Oaths of Allegiance and Supremacy, and make a Declaration of his Belief that there is no Transubstantiation in the Sacrament of the Lord's Supper; and that the Invocation or Adoration of the Virgin* Mary, *or any other Saint, and the Sacrifice of the Mass, as they are now used in the Church of* Rome, *are Superstitious and Idolatrous*, &c. *on Pain that every such Offender shall be adjudged a Popish Recusant convict, and disabled to hold or execute any Office*, &c. *or from thenceforth to sit or vote in either House of Parliament, to sue in Law or Equity, or to be Guardian, Executor or Administrator, or capable of any Legacy or Deed of Gift, and shall forfeit for every wilful Offence five hundred Pounds*.

Sect. 2. As to the second of the above mentioned Restraints, *viz*. That which relates to the holding a Place at Court, it is enacted by the said Statute of 30 *Car*. 2. Stat. 2. Par. 9, 12, 13. *That every Person who shall be a sworn Servant to the King, shall take the said Oaths, and make and subscribe the said Declaration in Chancery, the next Term after he shall be so sworn a Servant*, &c. *And that if any such Person, neglecting so to do, shall advisedly come into or remain in the Presence of the King or Queen, or shall come into the Court or House where they are or any of them reside, he shall suffer all the Penalties expressed in the forgoing Section, unless such Person so coming into the King's Presence*, &c. *shall first have Licence so to do, by Warrant under the Hands and Seals of six Privy Counsellors, by Order of the Privy Council, upon some urgent Occasion therein to be expressed, which Licence shall not exceed ten Days, and shall be first filed*, &c. *in the Petty-Bag Office, for any Body to view without Fee*, &c. *and no Person be licensed for above thirty Days in one Year*.

Sect. 3. As to the third of the above mentioned Restraints, *viz*. That which relates to the living within ten Miles of *London*, it is enacted by 1 *Will. & Mar*. 9. *That every Justice of Peace in* London *and* Westminster, *and within ten Miles thereof, shall cause to be arrested and brought before him all reputed Papists; (except Foreigners, being Merchants, or menial Servants to some Ambassador or publick Agent, and except all such as used some Trade, Mystery, or some manual Occupation at the time of the said Act, in* London, &c. *and also except all such Persons as had their Dwelling in* London, &c. *within six Months before the thirteenth of* February 1688, *and no Dwelling elsewhere, and certified their Names to the Sessions before the first of* August 1689) *and that every such Justice shall tender the said Declaration to every such Person, and that every such Person refusing the same, and afterwards remaining in* London, &c. *or within ten Miles thereof, or being certified to the King's Bench or Quarter-Sessions, at the next Term or Sessions, as having refused to make the said Declaration, and neglecting to make the same in such Court, shall suffer as a Popish Recusant convict*, &c.[84]

Sect. 4. As to the fourth of the above mentioned Restraints, *viz*. That which related to the keeping Arms, it is enacted by 1 *Will. & Mar*. 15. *That any two Justices of the Peace may and ought to tender the said Declaration to any Person whom they shall know or suspect, or have Information of, as being a Papist, or suspected to be such; and that no such Person so required, and not making and subscribing the said Declaration, or not appearing before the said Justices upon Notice to him given, or left at his usual Abode, by one authorized by Warrant under the Hands and Seals of the said Justices, shall keep any Arms or Ammunition, or Horse above the Value of five Pounds, in his own Possession, or in the Possession of any other Person to his Use (other that such necessary Weapons, as shall be allowed him by the Quarter-Sessions for the Defense of his House or Person) and that any two Justices of Peace, by Warrant under their Hands and Seals, may authorize any Person in the Day Time, with the Assistance of the Constable or his Deputy or the Tithingman, to search for all such Arms*, &c. *and Horses, and seize them to the King's Use; and that the said Justices shall deliver the said Arms and Ammunition at the next Quarter-Sessions in open Court, and that whoever shall conceal*, &c. *or shall be aiding to the concealing any such Arms or Horses, shall be committed to the common Gaol, by Warrant under the Hands and Seals of any two Justices of Peace, and also forfeit treble the Value; and that those who discover any such Arms or Ammunition, so as the same may be seized, shall*

have the full Value thereof, to be awarded to them by the Sessions, &c. *and that such Refusers of the said Declaration*, &c. *shall be discharged whenever they shall make the same*.[85]

Sect. 5. As to the above mentioned Disability of presenting to a Church, it is enacted by 1 *Will. & Mar*. 26. That whoever shall refuse to make the said Declaration upon such a Tender thereof as is prescribed by the said Act, shall be disabled to present to any Benefice, &c. But it seems needless to set forth the Clause of the said Statute relating to this Matter at large in this Place, inasmuch, as by 12 *Annae* 14. All Persons whatsoever making Profession of the Popish Religion are under the like Disability, as will appear from *Ch*. 15. *Sect*. 6, 7, *&c*.

CHAP. XV.

Of Offences in promoting or encouraging the Popish Religion.

OFFENCES in promoting or encouraging the Popish Religion seem to be reducible to the following Heads;

1. Giving or receiving Popish Education.
2. Professing the Popish Religion.
3. Buying or Selling Popish Books.

Sect. 1. The first Offence of this kind, *viz*. That of giving or receiving Popish Education depends upon several Statutes; and first it is enacted by 1 *Jac*. 1. 4. Par. 6. 7. *That if any Person or Persons under the King's Obedience shall go, or send, or cause to be sent, any Child or any other Person under their or any of their Government, beyond the Seas, out of the King's Obedience, to the Intent to enter into, or reside in, or repair to any College*, &c. *of any Popish Order, Profession or Calling, to be instructed, persuaded, or strengthned [sic] in the Popish Religion, or in any sort to profess the same, every such Person so sending such Child*, &c. *shall forfeit* 100 *l. And every such Person, so passing or being sent*, &c. *shall in respect of him or herself only, and not in respect of any of his Heirs or Posterity, be disabled to inherit, purchase, take, have or enjoy, any Profits, Hereditaments, Chattels, Debts, Legacies or Sums of Money*, &c. *whatsoever: And that all Estates, Terms, and other Interests whatsoever to be made, suffered or done, to the Use or Behoof of any such Person, or upon any Trust or Confidence, mediately or immediately to or for the Benefit or Relief of any such Person, shall be utterly void.*

Sect. 2. And it is farther enacted by 3 *Jac*. 1. 5. Par. 16. *That if the Children of any Subject within the Realm (the said Children not being*

Soldiers, Mariners, Merchants, or their Apprentices or Factors) shall be sent or go beyond Sea, to prevent their good Education in England, *or for any other Cause, without the Licence of the King or six of his Privy Council (whereof the Principal Secretary to be one) under their Hands and Seals, that then every such Child shall take no Benefit by any Gift, Conveyance, Descent, Devise or otherwise of or to any Hereditament or Chattel, till such Child being of the Age of eighteen Years or above, take the Oath of Obedience before some Justice of Peace of the County, Liberty, or Limit, where the Parent of such Child did and shall inhabit: And that in the mean Time the next of Kin to such Child, who shall be no Popish Recusant, shall have the said Hereditaments,* &c. *so given,* &c. *until such Child shall conform,* &c. *and take the said Oath and receive the Sacrament; and that after such Conformity,* &c. *he who hath received the profits of the said Hereditaments, &c. shall account for the same, and in reasonable Time make Payment thereof, and restore the Value of the said Goods,* &c. *And that whoever shall send such Child over Seas, shall forfeit one Hundred Pounds,* which by 11 & 12 *Will.* 3. 4. Par. 6. *shall be to the sole Use and Benefit of the Person who shall discover the Offence.*

Sect. 3. Also it is enacted by 3 *Car.* 1. 2. *That if any Person under the Obedience of the King shall go, or shall convey or send, or cause to be sent or conveyed, any Person out of the King's Dominions, into any Parts beyond the Seas, out of the King's Obedience, to the Intent to enter into, or be resident or trained up in, any Priory, Abbey, Nunnery, Popish University, College or School, or House of Jesuits, Priests, or to a private Popish Family, and shall be there by any Popish Person instructed, persuaded or strengthened in the Popish Religion in any Sort to profess the same, or shall convey or send, or cause to be conveyed or sent, any Thing towards the Maintenance of any Person so going or sent, and trained and instructed, as is aforesaid, or under the Colour of any Charity towards the Relief of any Priory,* &c. *or religious House whatsoever; every Person so sending,* &c. *any such Person or Thing, and every Person passing or sent, being thereof convicted,* &c. *shall be disabled to prosecute any Suit in Law or Equity, or to be Executor or Administrator to any Person, be capable of any Legacy or Deed of Gift, or to bear any Office within the Realm. And shall forfeit all his Goods and Chattels, and shall forfeit all his Hereditaments, Offices and Estates of Freehold, during his Life.*

The second Offence of this Kind, *viz.* That of professing the Popish Religion, is punished with the following Disabilities,

1. Of taking an Estate in Lands.
2. Of presenting to a Church.

Also it is punished with the following Restraints,

1. From keeping School.
2. From withholding a competent Maintenance from a Protestant Child.

Sect. 4. As to the first of the abovementioned Disabilities, *viz*. That of taking an Estate in Land, it is enacted by 11 & 12 *W*. 3. c. 4. *That every Person educated in or professing the Popish Religion, who shall not, within six Months after the Age of eighteen Years, take the Oaths of Allegiance and Supremacy, and subscribe the Declaration against Popery mentioned in* 30 Car. 2. *Stat*. 2. *Chap*. 1. *in the Chancery or King's Bench, or Quarter-Sessions of the County where such Person shall reside, shall in respect of himself of herself only, and not in respect of any of his or her Heirs or Posterity, be disabled to inherit or take by Descent, Devise or Limitation, in Possession, Reversion or Remainder, any Lands, Tenements or Hereditaments, in* England *or* Wales, &c. *And during the Life of such Person, and until he take the said Oaths*, &c. *his next of Kin being a Protestant, shall enjoy the same, without being accountable for the Profits, but shall not do wilful Waste under Pain of forfeiting treble Damages to the Party so disabled: And all Papists, or Persons making Profession of the Popish Religion, are disabled to purchase in their own Names, or the Names of others, to their Use or in Trust for them: And all Estates, Terms and other Interest and Profits whatsoever, out of Lands made to their Use, or on any Trust, mediately or immediately, for their Benefit, are void*.

Sect. 5. In the Construction hereof it was resolved by the House of Lords in *Roper's* Case, That the Devise of the Residue of Money arising from the Sale of an Estate appointed to be sold for Payment of Debts, *&c*. is within the Statute.

Sect. 6. As to the second of the above mentioned Disabilities, *viz*. That of presenting to a Church, which by 3 *Jac*. 1. 5. Par. 18, 19, 20, 21, and 1 *Will. & Mar*. 26, did extend only to Popish Recusants convict, and Persons refusing to make the Declaration against Popery, mentioned in 30 *Car*. 2. Stat. 2. it is enacted by 12 *Ann*. St. 2. c. 14 *That every Papist, or Person making Profession of the Popish Religion*, &c. *and every Mortgagee, Trustee, or Person any ways interested by or for such Papist*, &c. *with or without Writing, shall be disabled to present to any Benefice, School, or Hospital*, &c. *or to grant any Avoidance of any Benefice, Prebend or Ecclesiastical Living, and that in all Cases the Universities shall present*.[86]

Sect. 7. Also by Force of the said Statute, *The Ordinary may tender the Declaration against Transubstantiation to any reputed Papist making a Presentation, and upon a Refusal to take the same, the Presentation shall be void: Also the Ordinary may examine every Presentee upon Oath, whether the Person who presented him be the true Patron, or only a Trustee? And the Court wherein a* Quare Impedit *shall be brought, may in like Manner examine the Parties, and a Bill may be brought in any Court of Equity to discover such secret Trusts,* &c. *and the Answer of such Persons upon any such Examination or Bill shall be good Evidence against such Patron, in respect of such a Presentation, but not as to any other Purpose*.

Sect. 8. I do not know that any Resolution hath been given on either of the above mentioned Statutes of 1 *Will. & Mar*. or 12 *Ann*. However the Expositions which were made on 3 *Jac*. 1. seeming to be for the most part applicable to these latter Statutes also, I shall take Notice of the principal of them; as,

Sect. 9. I. That where a Presentment is *pro hac vice* vested in the University by reason of the Patron's being a Popish Recusant at the Time when the Church became void, it shall not be divested again by his conforming himself to the Church.[87]

Sect. 10. II. That such a Patron is only disabled to present, and that he continues Patron as to all other Purposes, and therefore that he shall confirm the Leases of the Incumbent, *&c*.[88]

Sect. 11. III. That such a Person by being disabled to grant an Avoidance, is no way hindered from granting the Advowson itself in Fee, or for Life or Years, *bona Fide*, and for good Consideration.[89]

Sect. 12. IV. That if an Advowson or Avoidance belonging to such a Person come into the King's Hands, by reason of an Outlawry, or Conviction of Recusancy, *&c*. the King, and not the University, shall present.[90]

Sect. 13. As to the first of the above mentioned Restraints, *viz*. that which relates to the keeping School, it is enacted by the said Statute of 11 & 12 *Will*. 3. 4. Par. 3. *That if any Papist, of Person making Profession of the Popish Religion, shall be convict of keeping School, or taking upon themselves the Education or Government, or Boarding of Youth in any Place within this Realm, or the Dominions thereunto belonging, they shall be adjudged to perpetual Imprisonment*.

Sect. 14. As to the second of the above mentioned Restraints, *viz*. that which relates to the Power of a Popish Parent over his Protestant Child, it is

enacted by the said Statute of 11 & 12 *Will*. 3. 4. *That if any Popish Parent, in order to compel a Protestant Child to a Change of Religion, shall refuse to allow such Child a sufficient Maintenance, suitable to the Degree and Ability of such Parent, and to the Age and Education of such Child, the Lord Chancellor upon Complaint may make such Order therein, as shall be agreeable to the Intent of the said Act*.

Sect. 15. The third Offence of this Kind, *viz*. that of selling or buying Popish Books, depends upon 3 *Jac*. 1. 5. Par 25. by which it is enacted, *That no Person shall bring from beyond the Seas, nor shall print, buy, or sell any Popish Primer, Ladies Psalters, Manuals, Rosaries, Popish Catechisms, Missals, Breviaries, Portals, Legends and Lives of Saints, containing superstitious Matter, printed or written in any Language whatsoever, nor any other superstitious Books, printed or written in the* English *Tongue; on pain of forfeiting forty Shillings for every Book,* &c. *and the Books to be burnt*.

CHAP. XVI.

Of Offences against the Established Church by Protestant Dissenters.

Sect. 1. BY 31 *El*. 1. *Obstinate Nonconformists were compellable to abjure the Realm, and were also subject to all the Penalties mentioned in the tenth and eleventh Chapters of this Book; and Dissenters were farther restrained by* 17 Car. 2. 2. & 22 Car. 2. 1. but at this Day by 1 *Will. & Mar*. 18. Par. 2. *All Persons dissenting from the Church, (except Papists, and those who shall in Preaching or Writing deny the Doctrine of the Trinity,) are exempted from all Penal Laws relating to Religion, except* 25 Car. 2 *Chap*. 2. (*by which all Officers of Trust are bound to receive the Sacrament according to the Usage of the Church of* England, *and also to take the Oaths of Allegiance and Supremacy, and the Test*;) *and also except* 30 Car. 2. *Stat*. 2. *Chap*. 1. (*by which the Members of both Houses of Parliament, and all the King's Sworn Servants are bound to make a Declaration against Transubstantiation and the Invocation of Saints, and the Sacrifice of the Mass*,) *provided such Dissenters take the Oath of Allegiance and Supremacy, and make the said Declaration against Transubstantiation,* &c. *and come to some Congregation for religious Worship, in some Place registred either in the Bishop's Court or at Sessions, the Doors whereof shall be neither locked, barred, nor bolted*.[91]

Sect. 2. Also by Par. 8, 9, 10, 11, 12. *Dissenting Teachers are tolerated, if they take the said Oaths,* &c. *at the General or Quarter-Sessions to be*

held for the Place where such Persons live, and subscribe the thirty-nine Articles of the Church of England, *except those few scrupled ones concerning Church-Government and Infant-Baptism*: And by 10 *Ann*. 2. Par. 7, 8, 9. *They may qualify themselves, as well during a Prosecution upon any Penal Statute, as before, and being qualified in one County may officiate in another, upon producing a Certificate, and taking the said Oaths*, &c. *if required*.[92]

Sect. 3. Also by the said Statute of 1 *Will. & Mar*. Par. 13, 14, 15. *Those who scruple the taking of any Oath, are within the like Indulgence, provided they subscribe the aforesaid Declaration, and also a Declaration of Fidelity to the King, and against the deposing Doctrine and Papal Supremacy; and also profess their Faith in God the Father, and Jesus Christ his eternal Son, the true God, and the Holy Spirit, one God for evermore; and acknowledge the Holy Scriptures of the Old and New Testament to be given by Divine Inspiration.*

Sect. 4. Since this Statute a Prohibition lies to the Spiritual Court proceeding against Persons for Incontinency, who have been married in a licensed Coventicle.[93]

Hawkins Pleas of the Crown, book I, pp. 3–33.

1.3.1.6Cunningham, 1765

1.3.1.6.aReligion

Religion (*Religio*) Is virtue, as founded upon reverence of God, and expectation of future rewards and punishments; a system of Divine faith and worship as opposite to others. *Johns*. That habit of reverence towards the Divine nature, whereby we are enabled and inclined to serve and worship him after such a manner as we conceive most acceptable to him, is called *religion. Wilkins.* All blasphemies against God, as denying his being or providence, all profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule, all impostures in religion, as falsly pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, *&c*. All open lewdness grossly scandalous, such as was that of those persons who exposed themselves naked to the people in a balcony in *Covent-garden*, with most abominable circumstances, offences of this nature, because they tend to subvert all religion or morality, which are the foundation of

government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime. 1 *Hawk. P. C.* 6, 7. Seditious words in derogation of the established religion are indictable, as tending to a breach of the peace. 1 *Hawk. P. C.* 7.

The six articles of religion established, 31 *Hen.* 8. *c.* 14. 35 *Hen.* 8. *c.* 5. Commissions to be granted concerning religion, 32 *Hen.* 8. *c.* 15. The authority of the King and the clergy in matters of faith. 32 *Hen.* 8. *c.* 26. 34 & 35 *Hen.* 8. *c.* 1. Repeal of the former acts relating to religion, 1 *Ed.* 6. *c.* 12. *Sect.* 3. Images in churches, *&c.* to be destroyed, 3 & 4 *Ed.* 6. *c.* 10. Repeal of the several acts of *Ed.* 6. 1 *Mar. st.* 2. *c.* 2. Preachers, *&c.* to subscribe the articles. 13 *El. c.* 12. Articles to be subscribed by protestant dissenting teachers, 1 *Will. & M. c.* 18. *sect.* 8, 10. Profession of Christian belief to be subscribed by Quakers, 1 *Will. & M. c.* 18. *sect.* 13. See Blasphemy, Heresy, Nonconformists, Papists, Quakers, Recusant, Service and Sacraments.

Cunningham Law Dictionary, vol. II, unpaginated.

1.3.1.6.bTithes

Tithes, (*Decimae*, from the Sax. *Teotha, i. e.* tenth,) In some of our law books are briefly defined to be an ecclesiastical inheritance, or property in the church, collateral to the estate of the lands thereof: But in others they are more fully defined to be a certain part of the fruit, or lawful increase of the earth, beasts, men's labours, which in most places, and of most things, is the tenth part, which by the law, hath been given to the ministers of the gospel, in recompence of their attending their office. 11 *Co. Rep.* 13. *Dyer* 84.

Bishop *Barlow*, *Selden*, father *Paul*, and others have observed, that neither tithes nor ecclesiastical benefices, (which are correlative in their nature) were ever heard of for many ages in the Christian church, or pretended to be due to the Christian priesthood; and, as that bishop affirms, no mention is made of tithes in the grand codex of canons, ending in the year 451, which, next to the bible, is the most authentick book in the world; and that it thereby appears, during all that time, both churches and churchmen were maintained by free gifts and oblations only. *Barlow's Remains, p.* 169. *Selden of Tithes* 82. See *Watson's Compleat Incumbent, p.* 3, 4, *&c.*

And Mr. *Selden* has shewn us, that tithes were not Introduced here in

England, till towards the end of the eighth Century, *i. e*. about the year 786, when parishes and ecclesiastical benefices came to be settled, for, as is said, tithes and ecclesiastical benefices being correlative the one could not exist without the other; for whenever any ecclesiastical person had any portion of tithes granted to him out of certain lands, this naturally constituted the benefice; the granting of the tithes of such a manor or parish, being in fact, a grant of the benefice; as a grant of the benefice did imply a grant of the tithes: And thus the relation between patrons and incumbents was analogous to that of lord and tenant by the feudal law. *Selden of Tithes* 86, *&c*.

About the year 794, *Offa*, King of *Mercia*, (the most potent of all the *Saxon* Kings of his time in this island,) made a law, whereby he gave unto the church the tithes of all his kingdom, which the historians tell us was done to expiate for the death of *Ethelbert*, King of the *East Angles*, who in the year preceding he had caused basely to be murdered. But that tithes were before paid in *England* by way of offerings, according to the ancient usage and decrees of the church, appears from the canons of *Egbert*, archbishop of *York*, about the year 750. And from an epistle of *Boniface*, archbishop of *Mentz*, which he wrote to *Cuthbert*, archbishop of *Canterbury* about the same time; and from the seventeenth canon of the general council held for the whole kingdom at *Chalcuth*, in the year 787. But this law of *Offa*, was that which first gave the church a civil right in them in this land, by way of property and inheritance, and enabled the clergy to gather and recover them as their legal due, by the coercion of the civil power. Yet this establishment of *Offa* reached no further than the kingdom of *Mercia*, over which *Offa* reigned, until *Ethelwulph*, about sixty years after, enlarged it for the whole realm of *England. Prideaux on Tithes* 166, 167.

1. *Of what tithes are in general due; and where personal tithes are due*.
2. *Of what predial tithes are due; and of the tithe of agistment, corn, bay, and wood*.
3. *Of what mixed tithes are due*.
4. *Of recovering small tithes in a summary way; and of recovering tithes due from quakers*.

1. OF WHAT TITHES ARE IN GENERAL DUE; AND WHERE PERSONAL TITHES ARE DUE.

Tithes are due either *de jure*, or by custom: All tithes, which are due *de jure*, arise from such fruits of the earth as renew annually; or from the profit that accrues from the labour of a man. Hence it follows, that such tithes can never be part of, but must always be collateral to, the land from which they

arise. 11 *Rep*. 13, 14. *Priddle* v. *Napier*.

Nay, tithes due *de jure* are so collateral to every kind of land, that if a lease is made of the glebe belonging to a rectory, with all the profits and advantages thereof; and there is besides a covenant, that the rent to be paid shall be in full satisfaction of every kind of exaction, and demand, belonging to the rectory; yet, as the glebe is not expresly discharged of tithe, the lessee shall be liable to the payment thereof. 11 *Rep*. 13, 14. *Priddle* v. *Napier*. 1 *Roll. Abr*. 655. *pl*. 1. *Cro. Eliz*. 261, 162. *Cro. Car*. 362.

No tithe is *de jure* of the produce of a mine or of a quarry; because this is not a fruit of the earth renewing annually, but is the substance of the earth, and has perhaps been so for a great number of years. *F. N. B*. 53. *Bro. Dism. pl*. 18. 2 *Inst*. 651. 1 *Roll. Abr*. 637. *Cro. Eliz*. 277.

But in some places tithes are due by custom of the produce of mines. 2 *Vern*. 46. *Buxton* v. *Hutchinson*.

No tithe is due *de jure* of lime: The chalk, of which this is made, being part of the soil. 1 *Roll. Abr*. 637. *pl*. 5.

Tithe is not due *de jure* of bricks; which are made from the earth itself. 2 *Mod*. 77. *Stoutfield*'s case.

Nor is tithe due *de jure* of turf, or of gravel: Because both these are part of the soil. 1 *Mod*. 35.

It has been held, that no tithe is due *de jure* of salt; because this does not renew annually. 1 *Roll. Abr*. 642. *S. pl*. 8.

But every one of these, and all things of the like kind, may by custom become tithable. 1 *Roll. Abr*. 642. *S. pl*. 7. *pl*. 8.

No tithes are due *de jure* of houses; for tithes are only due *de jure* of such things as renew from year to year. 11 *Rep*. 16. *Graunt*'s case.

But houses in *London* are, by decree, which was confirmed by an act of parliament, made liable to the payment of tithes, 2 *Inst*. 659. 37 *H*. 8. *c*. 2.

And before this decree, houses in *London* were by custom liable to pay tithes; the *quantum* to be paid being thereby only settled, as to such houses for which there was no customary payment. 2 *Inst*. 659. *Hard*. 116. *Gilb. Eq. Rep*. 193, 194.

There is likewise in most ancient cities, and boroughs, a custom to pay tithes for houses; without which there would be no maintenance in many parishes for clergy. 11 *Rep*. 16. *Graunt*'s case. *Bunb*. 102.

It was held by three barons of the Exchequer, *Price*, *Montague*, and

Page, contrary to the opinion of *Bury* Chief Baron, that two tithes may be due of the same thing, one *de jure*, the other by custom. *Bunb*. 43. *Earl of Scarborough* v. *Hunter*.

Tithes are of three kinds, personal, predial, and mixt. Such tithes as arise from the profit of the personal labour of a man, in the exercise of any art, trade or employment, are called personal tithes. 2 *Inst*. 649.

By the stat. 2 & 3 *Ed*. 6. *c*. 13. *par*. 7. Common day labourers are exempted from the payment of personal tithes.

No personal tithes are due from servants in husbandry; for by their labour the tithes of many other things are increased. 1 *Roll. Abr*. 646. *pl*. 1.

The better opinion always was, that a miller, except he occupied a corn mill, was only liable to the payment of personal tithe. 2 *Inst*. 621. 1 *Roll. Abr*. 641. *pl*. 19. *Cro. Jac*. 523.

But it seems to have been formerly held, that the occupier of a corn mill was liable to pay, as predial tithes, the tenth part of his toil. 2 *Roll. Rep*. 84. *Show*. 281. *Brownl*. 32.

It is however now settled, by a decree of the house of Lords, upon an appeal from a decree of the court of Exchequer, that only personal tithes are due from the occupier of a corn mill. 1 *Eq. Cas. Abr*. 366. *Newt* v. *Chamberlain*, 2 *Will. Rep*. 463.

The occupier of a new erected mill is liable to tithes, altho' such mill is erected upon land discharged of tithes, *Cro. Jac*. 429.

It is said in one book, that the occupier of an antient mill shall not pay tithes: But that the occupier of a new mill is, by the 9 *Ed*. 2. *st*. 1. *c*. 5. made liable to pay tithes. *Mar*. 15. *pl*. 36.

This seems to be a mistake; for that statute only provides, that new erected mills shall be liable to the payment of tithes: But, as nothing therein is said concerning ancient mills, there can be no doubt, that such antient mills, as before the making of this statute were liable to pay tithes, continued afterwards to be liable. 12 *Mod*. 243. *Hart* v. *Hale*. 3 *Bulst*. 212.

No personal tithe is due of the profit which a man receives without personal labour, or of the profit which one man receives from the labour of another. 1 *Roll. Abr*. 656. *pl*. 1. *pl*. 2. 2 *Inst*. 621, 649.

If a man lets a ship to a fisherman, no personal tithe is due of the money received for the use of such ship; because this is a profit without personal labour. 1 *Roll. Abr*. 656. *n. pl*. 2.

If a man purchases a house for 300 *l*. and afterwards sells it for 500 *l*. no

personal tithe is due; for the personal labour bears no proportion in this case to the profit. 1 *Roll. Abr*. 656. *n. pl*. 3.

If an inn-keeper has such a profit, out of his kitchen, cellar, and stables, as to make 200 *l*. of what cost him only 100 *l*. no personal tithe is due of this profit: Because the profit did not arise from personal labour alone, and so far as it did, it perhaps arose more from the personal labour of servants, than from that of the master of the inn. 2 *Bulst*. 141. *Dolley* v. *Davis*.

2. OF WHAT PREDIAL TITHES ARE DUE; AND OF THE TITHE OF AGISTMENT, CORN, HAY, AND WOOD.

Such tithes, as arise immediately from the fruits of the earth, as from corn, hay, hemp, hops; and all kinds of fruits, seeds and herbs, are called predial tithes. 2 *Inst*. 649.

They are so called, because they arise immediately from the fruits of the farm, or earth. 2 *Inst*. 647.

By the ecclesiastical law many things are liable to the payment of predial tithes, which by the Common law are not so. 2 *Inst*. 621. 4 *Mod*. 344.

The design under this head, is to shew what things are liable by the Common law to pay predial tithes.

In doing this, it will appear, that some things, which are in the general exempted therefrom, become by custom liable to the payment of predial tithes. 1 *Rol. Abr*. 637. *E. pl*. 2. 1 *Rol. Abr*. 642. *S. pl*. 7. *pl*. 8.

It will also appear, that divers things, which are in the general liable thereto, are under particular circumstances exempted from the payment of such tithes. 1 *Rol. Abr*. 645. *pl*. 11. *Cro. Eliz*. 475. *Freem*. 335. 12 *Mod*. 235.

But wherever any fraud is used, to bring a thing under those circumstances, by reason of which it would, if it had come fairly under them, have been exempted from the payment of predial tithes, it is by such fraud rendered liable thereto, *Cro. Eliz*. 475. *Freem*. 335.

As it would be tedious, to enumerate all the things which are liable to predial tithes, only those shall be mentioned, concerning the tithes of which some question has arisen; but, from such as will be mentioned, it may be easily collected of what other things predial tithes are due.

Agistment. Agisting, in the strict sense of the word, means the depasturing of a beast the property of a stranger: But this word is constantly used, in the books, for depasturing the beast of an occupier of land, as well as that of a stranger. 5 *Bac. Ab*. 53.

An occupier of land is not liable to pay tithe for the pasture of horses, or

other beasts, which are used in husbandry in the parish, in which they are depastured: Because the tithe of corn is by their labour increased. 1 *Rel. Abr*. 646. *pl*. 2. *pl*. 3. *pl*. 6. *pl*. 7. *Cro. Eliz*. 446. Ld. *Raym*. 130.

But if horses or other beasts are used in husbandry out of the parish, in which they are depastured, an agistment tithe is due for them. 7 *Mod*. 114. *Harrow'*s case. Ld *Raym*. 130.

It seems to be the better opinion, that no tithe is due for the pasture of a saddle horse, which an occupier of land keeps for himself or servants to ride upon. 1 *Rol. Abr*. 642. *pl*. 4. *Cro. Jac*. 430. *Bulst*. 171. *Bunb*. 3.

An occupier of land is liable to an agistment tithe, for all horses which he keeps for sale. *Cro. Jac*. 430. *Hampton* v. *Wild*. 1 *Rol. Abr*. 647. *pl*. 14.

No tithe is due for the pasture of milk cattle, which are milked in the parish, in which they are depastured; because tithe is paid of the milk of such cattle. 1 *Rol. Abr*. 646. *pl*. 2. Ld. *Raym*. 130. *Cro. Eliz*. 446.

Milch cattle, which are reserved for calving, shall pay no tithe for their pasture whilst they are dry: But, if they are afterwards sold, or milked in another parish, an agistment is due for the time they were dry. *Hetl*. 100. Ld. *Raym*. 130.

No tithe is due, from an occupier of land; for the pasture of young cattle, reared to be used in husbandry, or for the pail. *Cro. Eliz*. 476. *Sheringh* v. *Fleetwood*.

But, if such young beasts are sold, before they come to such perfection as to be fit for husbandry, or before they give milk, an agistment tithe must be paid for them, *Hetl*. 86. *Woolmerston's* case.

An occupier of land is liable to an agistment tithe, for all such cattle as he keeps for sale. *Cro. Eliz*. 446, 476. *Jenk*. 28. *pl*. 6. *Cro. Car*. 237. *Show. P. C*. 192.

But if any cattle, which have neither been used in husbandry, nor for the pail, are after being kept some time killed, to be spent in the family of the occupier of the land on which they were depastured, no tithe is due for their pasture. *Jenk*. 281. *pl*. 6. *Cro. Eliz*. 446, 476. *Cro. Car*. 237.

It is in general true, that an agistment tithe is due, for depasturing any sort of cattle the property of a stranger. *Cro. Eliz*. 276. *Cro. Jac*. 276. *Bunb*. 1. *Freem*. 329.

No tithe is due for the cattle, either of a stranger or an occupier, which are depastured in grounds, that have in the same year paid tithe of hay. *Bunb*. 10, 79. *Poph*. 142. 2 *Rol. Rep*. 191.

No agistment tithe is due for such beasts, either of a stranger or an occupier, as are depastured on the head lands of ploughed fields: Provided that these are not wider than is sufficient to turn the plough and horses upon. 1 *Rol. Abr*. 646. *pl*. 19.

No tithe is due for such cattle as are depastured upon land, that has the same year paid tithes of corn. *Bro. Dism*. 18. 1 *Mod*. 216.

If land, which has paid tithe of corn in one year, is left unsown the next year, no agistment is due for such land; because, by this lying fresh, the tithe of the next crop of corn is increased. 1 *Rol. Abr*. 642. *pl*. 9.

But if land, which has paid tithe of corn, is suffered to lie fallow longer than by the course of husbandry is usual, an agistment tithe is due for the beasts depastured upon such land. *Shep. Abr*. 1008.

As the question, whether an agistment tithe is due for sheep, does not seem to be quite settled, it will not be amiss to mention, the principal cases, in which this has been agitated.

It is laid down in one old case, that no tithe is due for the pasture of sheep, because they are *animalia fructuosa*. 1 *Rol. Rep*. 63. *pl*. 7. *Mascal [sic]* v. *Price [Mascall v Price]*, *Mich*. 12 *Jac*. 1.

But in another book of the same author's, where this very case is reported, there is a *dubitatur*. 1 *Rol. Abr*. 642. *pl*. 8.

In a case, not long after, it was held, that an agistment tithe should be paid for sheep, which, after having been depastured in one parish, from *Michaelmas* day to *Lady-day*, were removed into another; and by *Dodderidge*, justice, otherwise the parson of the parish might be defrauded of his tithe; for the sheep are now carried into a second parish, and they may not be brought back and sheered in the first. *Poph*. 197. *Mich*. 2 *Car*. 1.

It was however said, by *Whitelock*, justice, that *De animalibus inutilibus*, as horses, oxen, *&c*. the parson shall have agistment tithe: But that *De animalibus utilibus*, as cows, sheep, *&c*. he shall have *in specie*.

In another case, it is said to have been laid down, that no tithe shall be paid for the pasture of sheep eat in the house. *Cro. Car*. 207. *Facey* v. *Long*, *Mich*. 7 *Car*. 1.

But, in another report of the same case, it is said to have been held, that no tithe is due for the pasture of wethers; because they will yield a tithe of wool. 1 *Rol. Abr*. 647. *pl*. 13.

In a modern case, in the court of Exchequer, it is said that, it seemed to

be admitted, that tithe is due for the agistment of yearling sheep, because it is a new increase. *Bunb*. 90. *Baker* v. *Sweet, Mich*. 8 *Geo*. 1.

In another case shortly after, in the same court, it appeared, that sheep after paying tithe of wool, had been fed upon turnips not severed, by which they were bettered to the value of five shillings each; and were then sold. It also appeared, that the defendant had, before the next sheering time, bought in as many as were sold; and that of these tithe of wool was paid. It was insisted, that, if an agistment was to be paid for the sheep sold, this would be a double tithing: But the court held, that this was a new increase, and decreed the defendant to account for an agistment tithe. *Gibs. Rep. in Eq*. 231. *Coleman* v. *Baker, Pasch*. 12 *Geo*. 1.

In this last case no notice was taken of the case of *Baker* and *Sweet*: But the case of *Dummer* and *Wingfield*, *Hil*. 1 *W. & M*. was mentioned. In which it had been decreed, and the decree had been affirmed on a rehearing, that the tithe for depasturing sheep from the time of shearing till they were sold, should be accounted for.

But in a still later case, the court of Exchequer were of a quite different opinion. A bill was brought for the tithe of depasturing sheep four months in the parish after they had been shorn; it appeared also, that at the end of this time they were removed into another parish; and that they were shorn there at the next sheering time. In this case the cases of *Coleman* and *Baker*, and *Dummer* and *Wingfield* were cited by the plaintiff's counsel. But the court held, that no agistment tithe should be paid, because sheep are *animalia fructuosa. Bunb*. 313. *Poor* v. *Seymour, Hil*. 5 *Geo*. 2.

Corn. It is laid down in some books, that no tithe is due of the rakings of corn involuntarily scattered. 1 *Rol. Abr*. 645. *pl*. 11. *Cro. Eliz*. 278. *Freem*. 335. *Moor* 278.

But, if more of any sort of corn is fraudulently scattered, than, if proper care had been taken, would have been scattered, tithe is due of the rakings of such corn. *Cro. Eliz*. 475. *Freem*. 335.

And it has been said by *Holt*, Chief Justice, that tithe is due of the rakings of all corn, except such as is bound up in sheaves. 12 *Mod*. 235.

No tithes are due of the stubbles left in corn fields, after mowing or reaping the corn. 2 *Inst*. 621. 1 *Rol. Abr*. 640. *pl*. 14.

Hay. Tithe of hay is to be paid, although beasts of the plough or pail, or sheep are to be foddered with such hay. *Cro. Jac*. 47. *Webb* v. *Warner*. 1 *Rol. Abr*. 650. *pl*. 12. 12 *Mod*. 497.

But no tithe is due of hay grown upon the headlands of ploughed

grounds, provided that such headlands are not wider then [*sic*] is sufficient to turn the plough and horses upon. 1 *Rol. Abr*. 646. *pl*. 19.

It is laid down in one old case, that if a man cuts down grass, and, while it is in the swathes, carries it away and gives it to his plough cattle, not having sufficient sustenance for them otherwise, no tithe is due thereof. 1 *Rol. Abr*. 645. *Crawley* v. *Wells, Mich*. 9 *Car*. 1.

And in a modern case, the court of Exchequer seemed to be of opinion, that no tithe is due of vetches or clover, cut green, and given to cattle in husbandry. *Bunb*. 279. *Hayes* v. *Dowse, Hil*. 3 *Geo*. 2.

But in another case, some years before this last case, it was held, that the right to tithe of hay accrues upon mowing the grass, and that the subsequent application of this, while it is in grass, or when it is made into hay, shall not, although beasts of the plough or pail are fed with it, take away this right. 12 *Mod*. 498.

And the doctrine of this last case coincides with that of an old case; in which it was held, that tares cut green, and given to beasts of the plough, may by special custom be exempted from the payment of tithes; from whence it follows, that such tares are not exempted *de jure*. 12 *Mod*. 498. *Selby* v. *Bank, Pasch*. 13 *W*. 3.

It is laid down in some books, that no tithe is due of aftermowth hay; because tithe can only be due once in the same year from the same land. *F. N. B*. 53. *Bro. Dism. pl*. 16. 2 *Inst*. 652. 11 *Rep*. 16. *Cro. Jac*. 42. Ld *Raym*. 243.

But it is held in other books, that tithe is due of aftermowth hay. 1 *Rol. Abr*. 64. *pl*. 11. *Cro. Eliz*. 660. *Cro. Jac*. 116. *Cro. Car*. 403. 12 *Mod*. 498. *Bunb*. 10.

And the principle, upon which the doctrine that no tithe is due of aftermowth hay is founded, is denied in some modern cases.

In some of these it is laid down, that tithes shall be paid of divers crops grown upon the same land in the same year. *Bunb*. 19. *Benson* v. *Watkins, Hil*. 3 *Geo*. 1. *Bunb*. 314. *Swinfen* v. *Digby, Hil*. 5 *Geo*. 2.

In others it is held, wherever there is in the same year a new increase from the same thing, tithe is due. *Bunb*. 9. *Baker* v. *Sweet, Mich*. 8 *Geo*. 1. *Gilb. Rep. in Eq*. 231. *Coleman* v. *Baker, Pasch*. 12 *Geo*. 1.

Wood. Title of wood is not due of common right, because wood does not renew annually: But it was, in very antient times, paid in many places by custom. 2 *Inst*. 642. 12 *Mod*. 111. *Salk*. 656. *Comb*. 404. *Bunb*. 61.

A constitution was made, in the seventeenth year of the reign of *Edward* the Third, by *John Stratford*, archbishop of *Canterbury*, that tithes shall be paid, within this province, of *silva caedua*. 2 *Inst*. 642. *Palm*. 37, 38.

In the same year, the commons petitioned the King, that no man be impleaded in court Christian for tithes of wood or underwood, unless in such places where such tithes have been used to be paid. *Inst*. 642.

The answer was, let it be done of this, as it hath heretofore been used to be done. *Ibid*.

In the next year, the commons complained to the King of this constitution, for taking tithes of all manner of wood, as an unprecedented thing, and petitioned that the people might remain in the same state, as they had been under his royal progenitors; and that a prohibition might be granted to all, who should be impleaded in court Christian for tithe of wood. *Ibid*.

The answer was, the King willeth that law and reason be done. *Ibid*.

In another petition presented in the twenty-first year of the same reign, the commons complained, that the clergy, by virtue of the constitution made by the archbishop of *Canterbury*, demanded and took tithe both of gross wood and underwood, whether this last was sold or not. *Ibid*.

To this the King answered, that the archbishop of *Canterbury* and other bishops have answered, that no tithe is demanded, by virtue of the constitution, but of underwood. *Ibid*.

After some other petitions had been presented by the commons, without effect, the great men of the realm in the forty-fifth year of the reign of this prince, joined with them in one. 2 *Inst*. 652.

In consequence of this, a statute was made in these words: ‘At the complaint of the Great men and Commons, shewing by their petition, that when they sell their gross wood, of the age of 20 or 40 years, and of a greater age, to merchants, to their own profit, and to the aid of the King in his wars, the parsons and vicars of Holy church do implead and trouble the said merchants, in court christian, for the tithe of the said wood, under the denomination of *silva caedua*, by the reason of which they cannot sell their wood for the real value, to the great damage of themselves and the realm; it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath hitherto been.’ 45 *Ed*. 3. *c*. 3.

From these petitions and answers, from this statute, and from books of the best authority, it appears plainly that no tithe of gross wood was due *de jure* at the Common law; and that the demand thereof as such by virtue of

the constitution made by the archbishop, was an encroachment. 2 *Inst*. 642. 45 *Ed*. 3. *c*. 3. *Plowd*. 470. *Bro. Paroch. pl*. 1. *Cro. Jac*. 100.

After the making of this statute, prohibitions were constantly granted to suits instituted in spiritual courts for tithes of gross wood. But two questions often arose, What is gross wood? And of what age gross wood must be before it is exempted from the payment of tithe? 2 *Inst*. 643, 644, 645.

For the putting an end to these, it hath been long settled, that by gross wood is not meant small wood, nor large wood, but such wood as is generally, or by the custom of a particular part of the country, used as timber; and that all such wood, if of the age of 20 years, is exempt from the payment of tithe. 2 *Inst*. 642, 643. *Cro. Eliz*. 1. 12 *Mod*. 524. *Bunb*. 127.

Oaks, ashes, and elms, being universally used as timber, it has been always held, that such trees, if of the age of 20 years, are gross wood. 2 *Inst*. 642.

It hath been held upon great deliberation, notwithstanding what is laid down to the contrary in *Plowd*. 470. that a horn-beam tree, if of the age of 20 years, is gross wood; because this is used in building and repairing. 2 *Inst*. 643.

It has for the same reason been held, that an aspen tree, of the age of 20 years, is gross wood. *Ibid*.

Tithes are not in the general due of beach, birch, hazel, willow, fallow, alder, maple or white-thorn trees, or of any fruit trees, of whatsoever age they are: Because these are not timber. *Plowd*. 470. *Cro. Eliz*. 1 *Cro. Jac*. 190. 1 *Roll. Abr*. 640. *pl*. 5. *pl*. 6. *Brownl*. 94.

But, if the wood of any of these trees is used in a particular part of the country, where timber is scarce, in building and repairing, no tithe is due of such wood, if of the age of 20 years, in that part of the country. *Hob*. 219. *Brownl*. 94.

It is laid down in several old books, that, if a timber tree, after it is of the age of 20 years, decays so as to be unfit to be used in building, no tithe is due of the wood of this tree; because it was once privileged. 11 *Rep*. 48. *Cro. Eliz*. 477. *Cro. Jac*. 100. 1 *Roll. Abr*. 640. *pl*. 2.

But the contrary is laid down in some other books.

In two of these it is laid down, that, if the wood of a coppice has been usually felled for firing, such wood shall pay tithe, altho’ it stand till it be 40 years of age. *Sid*. 300. 1 *Lev*. 189.

And in another it is laid down, that, if the wood of a timber-tree is sold for firing, it is, altho' the tree was of the age of 20 years, liable to pay tithe. *Bunb*. 99. *Greenaway* v. *The Earl of Kent*.

The reporter of this last case mentions four others, in which the same had been held; and says, that it was in one of them laid down, that the wood of timber-trees is only exempted from the payment of tithe, on the account of its being used in building. *Buckle* v. *Vanacre*.

The doctrine, however, of the old books is confirmed by a very late case in the court of Chancery.

A bill being brought for tithe of the loppings of timber-trees, which had been sold for firing, it was insisted that this wood, which would otherwise have been exempted from the payment of tithes, was liable thereto, because it was sold to be used for firing; and the cases just now cited were relied upon: But the bill was dismissed; and by *Hardwicke* Chancellor, in the case in 1 *Lev*. 189. and *Sid*. 300. the wood in question was coppice wood, which had been usually felled for firing; and such wood, of whatever age it is, is always titheable. The case of *Greenaway* and the earl of *Kent*, is quite a singular one, and is not law; for in the case of *Bibye* and *Huxley*, *Hil*. 11 *Geo*. 1. it was agreed, that no tithe is due of the wood of a timber tree, which has been once privileged from the payment of tithe, altho' such wood is sold to be used for firing. *MS. Rep. Walton* v. *Tryon*, *Mich*. 25 *Geo*. 2.

It is laid down in divers books that if a timber-tree of the age of 20 years is lopped, no tithe shall be paid of the loppings altho' they are not of 20 years growth, for that the tree, which is privileged, shall privilege the loppings. *Bro. Dism. pl*. 14. 11 *Rep*. 4. *Cro. Eliz*. 4. *Godb*. 175. 1 *Roll. Abr*. 640. *pl*. 3.

But the doctrine laid down in one old book, is, that such loppings of a timber-tree, as are of the age of 20 years, shall be exempted from the payment of tithe; and it is added as a reason, that branches of that age may be useful in building. *Plowd*. 470. *Soby* v. *Molins*.

The former, however, is the better opinion.

In the case just now cited, it appeared, that the loppings of the trees, for the tithe of which the bill was brought, were not of 20 years growth: But it also appeared, that the trees were of the age of 20 years, before they had ever been lopped. It was held by *Hardwicke*, Chancellor; that no tithe was due of these loppings; for that, if a tree is once privileged from paying tithe, the privilege extends to all future loppings, of whatsoever age they are. *MS. Rep. Walton* v. *Tryon*.

It has been said, that, altho' a tree has been once lopped before it was of the age of 20 years, the future loppings of such tree, provided these are of twenty years growth, are not titheable. 1 *Roll. Abr*. 640. *pl*. 1.

But in the case already cited, it was laid down by *Hardwicke* Chancellor, that wherever a tree has been lopped before it was of the age of 20 years, all future lopping, altho' ever so old, are liable, to pay tithe. *MS. Rep. Walton*. v. Tryon.

It has been laid down, that if a tree, which was once privileged from paying tithe, is felled, the germins that spring from the root of such tree, are also privileged. 11 *Rep*. 48. *Liford*'s case.

But, in the case already cited, it was said by *Hardwicke* Chancellor, that all germins, which spring from the roots of trees that have been felled, are titheable. *MS. Rep. Walton* v. *Tryon*.

The wood of a coppice, which has usually been felled for firing, is liable to pay tithe, altho' the same is of the age of 40 years. 1 *Lev*. 189. *Sid*. 300.

And in the case so often cited, it was said by *Hardwicke* Chancellor, if, when the wood of coppice is felled, some trees growing therein, which are of the age of 20 years, and have never been lopped, are lopped, and these loppings are promiscuously bound up in faggots with the coppice wood, tithe must be paid of the whole: because it would be very difficult, to separate the tithable wood from that which is not so; and the owner ought to suffer for his folly in mixing them. *MS. Rep. Walton* v. *Tryon*.

3. OF WHAT MIXED TITHES ARE DUE.

Such tithes as arise from beasts or fowls, which are fed with the fruits of the earth, are called mixed tithes. 2 *Inst*. 649. 1 *Roll. Abr*. 635.

Many things are by the ecclesiastical law liable to pay such tithes, which by the Common law they are not. 2 *Inst*. 621. 4 *Mod*. 344.

The design under this head is to shew, of what mixed tithes are due by the common law.

In doing this it will appear, that some things, which are in the general exempted therefrom, become by custom liable to the payment of mixed tithes. 1 *Roll. Abr*. 635. *c. pl*. 3. 636. *pl*. 7. *Cro. Car*. 339. 1 *Ventr*. 5.

It will also appear, that divers things, which are in the general liable thereto, are under particular circumstances exempted from the payment of mixed tithes. 1 *Roll. Abr*. 645. *pl*. 14. *pl*. 16.

But, wherever any fraud is used, to bring a thing under these circumstances, by reason of which, if it had come fairly under them, it

would have been exempted from the payment of a mixed tithe, it is by such fraud rendered liable thereto. 1 *Roll. Abr*. 645. *pl*. 15, 646. *pl*. 17.

As it would be tedious, to enumerate all the things, which are liable to pay mixed tithes, only those shall be mentioned concerning the tithe of which some question has arisen: But, from such as will be mentioned, it may be easily collected, of what other things mixed tithes are due.

Tithes are in the general due of the young of all beasts, except such as are *ferae naturae*.

But none are due of young hounds, apes, or the like, because such beasts are kept only for pleasure. *Bro. Dism. pl*. 20.

No tithe is due of the young of deer; for these are *ferae naturae*. 2 *Inst*. 651.

And for the same reason none is due, but by custom, of young conies. 1 *Roll. Abr*. 635. *C. pl*. 3. *Cro. Car*. 339. 1 *Ventr*. 5.

The young of all birds and fowls, except such as are *ferae naturae*, are in the general liable to pay tithes; unless the eggs of such birds or fowls have before paid tithes. 1 *Roll. Abr*. 642. *pl*. 6. 2 *Will. Rep*. 463.

But no tithes are due either of the eggs or young of any birds or fowls, which are kept only for pleasure. *Bro. Dism. pl*. 20.

No tithes are due of the eggs or young of partridges or pheasants, because these are *ferae naturae*. Moor 599. 2 Will. Rep. 463.

If a man keeps pheasants in an inclosed wood, whose wings are clipped, and from their eggs hatches and brings up young ones, no tithe is due of these young pheasants, altho’ none was paid for their eggs: Because the old ones are not reclaimed, and would go out of the inclosure, if their wings were not clipped. 1 *Roll. Abr*. 636. *pl*. 5.

It was heretofore held, that neither the eggs nor young of turkies are tithable; turkies being *ferae naturae*. Moor 599. Hughes v. Price.

But it has been held in a modern case, that, as turkies are now as tame as hens or other poultry, tithe is due of their eggs or young. 2 *Will. Rep*. 463: *Carleton* v. *Brightwell*.

No tithe is due of such young pigeons as are spent in the house of the person who breeds them. 1 *Roll. Abr*. 644. Z. *pl*. 4. *pl*. 6. 1 *Ventr*. 5. 12 *Mod*. 77. 12 *Mod*. 47.

But if any young pigeons are sold, tithe is due of them. 1 *Roll. Abr*. 644. Z. *pl*. 5. *pl*. 6.

If a man pays tithe of young lambs at Marks-tide, and at Midsummer

assizes shears the other nine parts of the lambs, tithe is due of the wool: For altho' there is but two months between the time of paying tithe lambs, which were not shorn, and the shearing of the residue, there is in this case a new increase. 1 *Roll. Abr*. 642. *R. pl*. 7. *Bunb*. 90.

If a man shears his sheep about their necks at Michaelmas time, to preserve their fleeces from the brambles, no tithe is due of this wool: for it appears, that this, which is done before their wool is much grown, can never be for the sake of the wool. 1 *Roll. Abr*. 645. *pl*. 16.

If a man, after their wool is well grown, shear his sheep about their necks, to preserve them from vermin, No [*sic*] tithe is due of the wool. 1 *Roll. Abr*. 645. *pl*. 14.

If a man, a little before shearing time, cuts dirty locks of wool from his sheep to preserve them from vermin, no tithe is due of such wool. 1 *Roll. Abr*. 646. *pl*. 17.

But in either of these cases, if more wool, than ought to have been cut off is fraudulently cut off, tithe must be paid of the wool. 1 *Roll. Abr*. 645. *pl*. 15. 646. *pl*. 17.

It is laid down in one case, that no tithe is due of the wool of sheep killed to be spent in the house, or of the wool of those which die of themselves. *Litt. Rep*. 31. *Civil* v. *Scot, Pasch*. 3 *Car*.

But in another case, a few years after, it is laid down, that tithe is due of the wool of such sheep as are killed to be spent in the house. 1 *Roll. Abr*. 646. *pl*. 18. *Dent*. v. *Salvin, Pasch*. 14 *Car*.

Fish taken in a pond, or in any inclosed river, are liable to pay tithe. 1 *Roll. Abr*. 636. *pl*. 4. *pl*. 6. *pl*. 7.

But no tithe is due, except by custom, of fish taken in the sea, or in any open river, altho' they are taken by a person who has a several fishery; because such fish are *ferae naturae*. Noy 108. 1 Roll. Abr. 636. pl. 4. pl. 6. pl. 7. Cro. Car. 332. 1 Lev. 179. Sid. 278.

Honey and bees-wax are both tithable. *Fitzh. N. B*. 51. 1 *Roll. Abr*. 635. *C. pl*. 1. *Cro. Car*. 559.

But, where the tithe of their honey and wax has been paid, no tithe is due of the bees. *Cro. Car*. 404. *Anon'*.

No tithe is due of the milk spent in the house of a farmer; provided such house stands in that parish in which the cows are milked. *L. Raym*. 129. *Scoles* v. *Lowther*.

4. OF RECOVERING SMALL TITHES IN A SUMMARY WAY; AND OF RECOVERING TITHES DUE FROM QUAKERS.

By the 7 & 8 *W*. 3. *cap*. 6. *s*. 1. It is, for the more easy recovery of small tithes, where the same do not amount to above the yearly value of forty shillings, from any one person, enacted, ‘That if any person shall subtract or withdraw, or fail in the payment of such small tithes, by the space of twenty days after demand thereof, that then it shall be lawful for the parson to whom the same shall be due, to make his complaint in writing to any two justices of the peace, within the county or place where the same shall grow due; neither of which justices is to be patron of the church whence the said tithes arise, or any ways interested in such tithes.’

But by *par*. 6. it is provided, ‘That no complaint shall be heard as aforesaid, unless it shall be made within two years after the same tithes become due.’

And by *par*. 10. it is provided, ‘That no person, who shall begin any suit, for the recovery of such small tithes, in the court of exchequer, or in any ecclesiastical court, shall have any benefit of this act for the same matter.’

By *par*. 2. it is enacted, ‘That the said justices shall summon, in writing under their hands and seals, by reasonble warning, every person against whom any complaint shall be made as aforesaid, and after his appearance, or upon default of appearance, the said writing being proved before them upon oath, the said justices shall proceed to hear and determine the said complaint, and shall in writing under their hands and seals adjudge the case, and give such reasonable allowance for such tithes as they shall judge to be just, and also such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just.’

And by *par*. 4. the justices are impowered to administer an oath to any witness produced.

But by *par*. 8. It is enacted, ‘That if any person complained against shall insist upon any prescription, composition, *modus decimandi*, or other title, whereby he ought to be freed from the payment of tithes; and shall deliver the same in writing to the said justices; and shall give to the party complaining sufficient security, to pay all such costs as shall be given against him, upon a trial at law, in case the said title shall not be allowed; that then the said justices shall forbear to give judgment.’

By *par*. 3. A distress is given, ‘In case of refusal or neglect, by the space of 10 days after notice given, to pay such sum as upon such complaint shall be adjudged as aforesaid.’

By *par*. 12. It is enacted, ‘That the said justices shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they find the

complaint false and vexatious.’

By *par*. 5. It is provided, That this act shall not extend ‘to tithes within the city of *London*, or in any other place, where the same are settled by any act of parliament.’

By *par*. 7. An appeal is given to the sessions, and it is enacted, ‘That if the justices there present, or the majority of them, shall confirm the judgment of the two justices, they shall decree the same by order of sessions, and proceed to give such costs as to them shall seem just and reasonable.’

By the same *par*. it is enacted, ‘That no proceedings, or judgments, had by virtue of this act, shall be removed, or superseded, by any writ of *certiorari*, or other writ whatsoever, unless the title of such tithes shall be in question.’

By the 7 & 8 *W*. 3. *c*. 34. *par*. 4. It is enacted, ‘That where any quaker shall refuse to pay, or compound, for his great or small tithes, it shall be lawful for the two next justices of the peace of the same county, other than such justice of the peace as is patron of the church, or chapel, to which the said tithes belong, or any ways interested in the said tithes, upon the complaint of the person who ought to have and receive the same, by warrant under their hands and seals to convene before them such quaker, and to examine upon oath, which oath the said justices are impowered to administer, or in such manner as by this act is provided, the truth and justice of the said complaint, and to ascertain what is due from such quaker to the party complaining, and by order under their hands and seals to direct the payment thereof, so as the sum ordered, as aforesaid, do not exceed ten pounds; and upon refusal by such quaker to pay according to such order, it shall be lawful for any one of the said justices, by warrant under his hand and seal, to levy the money, thereby ordered to be paid, by distress and sale of the goods of such offender.’

By the same *par*. it is enacted, ‘That any person finding himself aggrieved, by any judgment given by such two justices of the peace, may appeal to the next general quarter-sessions, and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter; and if the justices then present, or the major part of them, shall find cause to continue the said judgment, they shall then decree the same by order of sessions, and shall proceed to give such costs against the appellant, as to them shall seem just and reasonable.’

And by the same *par*. it is enacted, ‘That no proceedings, or judgment,

had by virtue of this act, shall be removed or superseded by any writ of *certiorari*, or other writ out of his majesty's courts of *Westminster*, or any other court whatsoever, unless the title to such tithes shall be in question.'

By the 1 *Geo*. 1. *st*. 2. *cap*. 6. *par*. 2. The like remedy is given for the recovery of all tithes and all other ecclesiastical dues from quakers, as by the 7 & 8 *W*. 3. *cap*. 34. is given for tithes to the value of ten pounds.

And it is thereby further enacted, 'That any two or more justices of the peace of the same county or place, other than such justice as is patron of the church, or chapel, to which the said tithes or dues belong, or any ways interested in the said tithes, upon complaint of any parson, vicar, curate, farmer or proprietor of such tithes, or other person, who ought to have, receive or collect, any such tithes or dues, are hereby required to summon, in writing under their hands and seals, by reasonable warning, such quaker or quakers, against whom such complaint shall be made; and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint, and to make such order therein as in the said act is limited or directed; and also to order such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just; which order shall and may be so executed, and on such appeal may be reversed or affirmed, by the general quarter-sessions of the county or place, with such costs and remedy for the same, and shall not be removed into any other court, unless the title to such tithes shall be in question, in like manner as in and by the same act is limited and provided.'

For more learning on this subject, see 5 *Bac. Abr*. tit, *Tithes*, 8 *Vin. Abr*. tit. *Dismes, and* a new treatise on the laws concerning Tithes.

Cunningham Law Dictionary, vol. III, unpaginated.

1.3.1.7Blackstone, 1765

Chapter the Fourth.

OF OFFENCES AGAINST GOD AND RELIGION.

IN the present chapter we are to enter upon the detail of the several species of crimes and misdemesnors, with the punishment annexed to each by the laws of England. It was observed, in the beginning of this book [a], that crimes and misdemesnors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in it's

social aggregate capacity. And in the very entrance of these commentaries[b] it was shewn, that human laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society[c]: and, of consequence, private vices, or the breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowlege and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, it's evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any shape is derogatory from sound morality, is not however taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompence is given. And yet drunkenness and lying are *in foro conscientiae* as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to the temporal punishments of human tribunals.

On the other hand, there are some misdemesnors, which are punished by the municipal law, that are in themselves nothing criminal, but are made so by the positive constitutions of the state for public convenience. Such as poaching, exportation of wool, and the like. These are naturally no offences at all; but their whole criminality consists in their disobedience to the supreme power, which has an undoubted right for the well-being and peace of the community to make some things unlawful, which were in themselves indifferent. Upon the whole therefore, though part of the offences to he enumerated in the following sheets are offences against the revealed law of God, others against the law of nature, and some are offences against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.

Having premised this caution, I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil

society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly infringe the rights of the public or common wealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

First then, of such crimes and misdemesnors, as more immediately offend Almighty God, by openly transgressing the precepts of religion either natural or revealed; and mediately, by their bad example and consequence, the law of society also; which constitutes that guilt in the action, which human tribunals are to censure.

I. Of this species the first is that of *apostacy*, or a total renunciation of christianity, by embracing either a false religion, or no religion at all. This offence can only take place in such as have once professed the true religion. The perversion of a christian to judaism, paganism, or other false religion, was punished by the emperors Constantius and Julian with confiscation of goods[d]; to which the emperors Theodosius and Valennian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity[e]. A punishment too severe for any temporal laws to inflict: and yet the zeal of our ancestors imported it into this country; for we find by Bracton[f], that in his time apostates were to be burnt to death. Doubtless the preservation of christianity, as a national religion, is, abstracted from it's own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the supreme being, and a firm persuasion that he superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our saviour Christ) these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting: all moral evidence therefore, all confidence in human veracity, must be weakened by irreligion, and overthrown by infidelity. Wherefore all affronts to christianity, or endeavours to depreciate it's efficacy, are highly deserving of human punishment. But yet the loss of life is a heavier penalty than the offence,

taken in a civil light, deserves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostacy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animae*. But about the close of the last century, the civil liberties to which we were then restored being used as a cloke of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was found necessary again for the civil power to interpose, by not admitting those miscreants[g] to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 W. III. c.32. that if any person educated in, or having made profession of, the christian religion, shall by writing, printing, teaching, or advised speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years imprisonment without bail. To give room however for repentance; if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A SECOND offence is that of *heresy*; which consists not in a total denial of christianity, but of some of it's essential doctrines, publicly and obstinately avowed; being defined, "*sententia rerum divinarum humano sensu excogitata, palam docta, et pertinaciter desensa*[h]." And here it must also be acknowleged that particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines shall therefore be adjudged heresy, was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewode[i], extends to the smallest deviations from the doctrines of holy church: "*haereticus est qui dubitat de fide catholica, et qui negligit servare ea, quae Romana ecclesia statuit, seu servare decreverat*." Or, as the statute 2 Hen. IV. c. 15. expresses it in English, "teachers of "erroneoús opinions, contrary to the faith and blessed determinations of the holy church." Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime,

seems to have enhanced it in those days of blind zeal and pious cruelty. It is true, that the sanctimonious hypocrisy of the canonists went at first no farther than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigotted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderetur*[k]: well knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichaeans by the emperors Theodosius and Justinian[l]: hence also the constitution of the emperor Frederic mentioned by Lyndewode[m], adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution[n], ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seise and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou[o].

Christianity being thus deformed by the daemon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our antient precedents[p] a writ *de haeretico comburendo*, which is thought by some to be as antient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power,

and might pardon the convict by issuing no process against him; the writ *de haeretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council[q].

But in the reign of Henry the fourth, when the eyes of the christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy[r]) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament[s], which sharpened the edge of persecution to it's utmost keenness. For, by that statute, the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. V. c. 7. lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

Afterwards, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated: for though what heresy *is*, was not then precisely defined, yet we are told in some points what it *is not*: the statute 25 Hen. VIII. c. 14. declaring, that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay chanel. For in six years afterwards, by statute 31 Hen. VIII. c. 14, the bloody law of the six articles was made, which established the six most contested points of popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved by the most godly study, pain, and travail of his majesty: for which his most humble and obedient subjects, the lords *spiritual* and temporal and the commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks," but did also enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the

supremacy of the bishops of Rome, and establishing all other their corruptions of the christian religion.

I SHALL not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of queen Elizabeth; when the reformation was finally established with temper and decency, unsullied with party rancour, or personal caprice and resentment. By statute 1 Eliz. c. 1. all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; *viz*. as to the infliction of common censures, in the ecclesiastical courts; and, in case of burning the heretic, in the provincial synod only[t]. Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also; though he agrees, that in either case the writ *de haeretico comburendo* was not demandable of common right, but grantable or otherwise merely at the king's discretion[u]. But the principal point now gained, was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined, but only such tenets, which have been heretofore so declared, 1. By the words of the canonical scriptures; 2. By the first four general councils, or such others as have only used the words of the holy scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular: as a man continued still liable to be burnt, for what perhaps he did not understand to be heresy, till the ecclesiastical judge so interpreted the words of the canonical scriptures.

FOR the writ *de haeretico comburendo* remained still in force; and we have instances of it's being put in execution upon two anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James the first. But it was totally abolished, and heresy again subjected only to ecclesiastical correction, *pro salute animae*, by virtue of the statute 29 Car. II. c. 9. For in one and the same reign, our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the *habeas corpus* act; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

IN what I have now said I would not be understood to derogate from the just rights of the national church, or to favour a loose latitude of propagating any crude undigested sentiments in religious matters. Of propagating, I say; for the bare entertaining them, without an endeavour to

diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every thing is now as it should be: unless perhaps that heresy ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics, but not to exterminate or destroy them. It has also been thought proper for the civil magistrate again to interpose, with regard to one species of heresy, very prevalent in modern times: for by statute 9 & 10 W. III. c. 32. if any person educated in the christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be God, or maintain that there are more Gods than one, he shall undergo the same penalties and incapacities, which were just now mentioned to be inflicted on apostacy by the same statute. And thus much for the crime of heresy.

III. ANOTHER species of offences against religion are those which affect the *established church*. And these are either positive, or negative. Positive, as by reviling it's ordinances: or negative, by non-conformity to it's worship. Of both of these in their order.

1. AND, first, of the offence of *reviling the ordinances* of the church. This is a crime of a much grosser nature than the other of mere non-conformity: since it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in opposition to public; arrogance, by treating with contempt and rudeness what has at least a better chance to be right, than the singular notions of any particular man; and ingratitude, by denying that indulgence and liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy. However it is provided by statutes 1 Edw. VI. c. 1. and 1 Eliz. c. 1. that whoever reviles the sacrament of the lord's supper shall be punished by fine and imprisonment: and by the statute 1 Eliz. c. 2. if any *minister* shall speak any thing in derogation of the book of common prayer, he shall be imprisoned six months, and forfeit a year's value of his benefice; and for the second offence he shall be deprived. And if *any person* whatsoever shall in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, he shall forfeit for the first offence an hundred marks; for the second four hundred; and for

the third shall forfeit all his goods and chattels, and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment; when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy: and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time be thought too severe and intolerant; when we consider, that they are levelled at an offence, to which men cannot now be prompted by any laudable motive; not even by a mistaken zeal for reformation : since from political reasons, sufficiently hinted at in a former volume[v], it would now be extremely unadvisable to make any alterations in the service of the church; unless it could be shewn that some manifest impiety or shocking absurdity would follow from continuing it in it's present form. And therefore the virulent declamations of peevish or opinionated men on topics so often refuted, and of which the preface to the liturgy is itself a perpetual refutation, can be calculated for no other purpose, than merely to disturb the consciences, and poison the minds of the people.

2. NONCONFORMITY to the worship of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a matter of private conscience, to the scruples of which our present laws have shewn a very just and christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or found religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church: there is always a difference to be made between toleration and establishment.

NONCONFORMISTS are of two sorts: first, such as absent themselves from the divine worship in the established church, through total irreligion, and attend the service of no other persuasion. These by the statutes of 1 Eliz. c. 2. 23 Eliz. c. 1. and 3 Jac. I. c. 4. forfeit one shilling to the poor every lord's day they so absent themselves, and 20 *l*. to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their houses, they forfeit 10 *l. per* month.

THE second species of non-conformists are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists and protestant dissenters: both of

which were supposed to be equally schismatics in departing from the national church; with this difference, that the papists divide from us upon material, though erroneous, reasons; but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. However the laws against the former are much more severe than against the latter; the principles of the papists being deservedly looked upon to be subversive of the civil government, but not those of the protestant dissenters. As to the papists, their tenets are undoubtedly calculated for the introduction of all slavery, both civil and religious: but it may with justice be questioned, whether the spirit, the doctrines, and the practice of the sectaries are better calculated to make men good subjects. One thing is obvious to observe, that these have once within the compass of the last century, effected the ruin of our church and monarchy; which the papists have attempted indeed, but have never yet been able to execute. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such as threaten ruin or disturbance to the state. He is bound indeed to protect the established church, by admitting none but it's genuine members to offices of trust and emolument: for, if every sect was to be indulged in a free communion of civil employments, the idea of a national establishment would at once be destroyed, and the episcopal church would be no longer the church of England. But, this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and colour of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

With regard therefore to *protestant dissenters*, although the experience of their turbulent disposition in former times occasioned several disabilities and restrictions (which I shall not undertake to justify) to be laid upon them by abundance of statutes[w], yet at length the legislature, with a spirit of true magnanimity, extended that indulgence to these sectaries, which they themselves, when in power, had held to be countenancing schism, and denied to the church of England. The penalties are all of them suspended by

the statute 1 W. & M. st. 2. c. 18. commonly called the toleration act; which exempts all dissenters (except papists, and such as deny the trinity) from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation registered in the bishop's court or at the sessions, the doors whereof must be always open: and dissenting teachers are also to subscribe the thirty nine articles, except those relating to church government and infant baptism. Thus are all persons, who will approve themselves no papists or oppugners of the trinity, left at full liberty to act as their conscience shall direct them, in the matter of religious worship. But by statute 5 Geo. I. c. 4. no mayor, or principal magistrate, must appear at any dissenting meeting with the ensigns of his office[x], on pain of disability to hold that or any other office: the legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, and humility.

As to *papists*, what has been said of the protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of reliques and images; nay even their transubstantiation. But while they acknowlege a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

Let us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. Persons professing the popish religion, besides the former penalties for not frequenting their parish church, are by several statutes, too numerous to be here recited[y], disabled from taking any lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance of the same, in prejudice of the two universities; they may not keep or teach any school under pain of perpetual imprisonment; they are liable also in some instances to pay

double taxes; and, if they willingly say or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons, who, from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish church from their infancy, and publicly profess it's errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes any thing to their maintenance when there; both the sender, the sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostacy, or perversion, where a person is reconciled to the see of Rome or procures others to be reconciled, the offence amounts to high treason. 2. Popish recusants, convicted in a court of law of not attending the service of the church of England, are subject to the following disabilities, penalties, and forfeitures, over and above those beforementioned. They can hold no office or employment; they must not keep arms in their houses, but the same may be seised by the justices of the peace; they may not come within ten miles of London, on pain of 100 *l*; they can bring no action at law, or suit in equity; they are not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they may not come to court, under pain of 100 *l*. No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, shall forfeit two thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10 *l*. a month, or the third part of all his lands. And, lastly, as a feme-covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's licence, they shall be guilty of felony, and suffer death as felons. There is also an inferior species of recusancy, (refusing to make the declaration against popery enjoined by statute 30 Car. II. st. 2. when tendered by the proper magistrate) which, if the party resides within ten miles of London, makes him an absolute recusant convict; or, if at a greater distance, suspends him

from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being, of a lay papist. But, 3. The remaining species or degree, *viz*. popish priests, are in a still more dangerous condition. By statute 11 & 12 W. III. c. 4. popish priests or bishops, celebrating mass or exercising any parts of their functions in England, except in the houses of embassadors, are liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2. any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, or shall be in England three days without conforming and taking the oaths, is guilty of high treason: and all persons harbouring him are guilty of felony without the benefit of clergy.

THIS is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes[z], that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed, (what foreigners who only judge from our statute book are not fully apprized of) that these laws are seldom exerted to their utmost rigor: and indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a panic into James I, which operated in different ways: it occasioned the enacting of new laws against the papists; but deterred him from putting them in execution. The intrigues of queen Henrietta in the reign of Charles I, the prospect of a popish successor in that of Charles II, the assassination-plot in the reign of king William, and the avowed claim of a popish pretender to the crown, will account for the extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England but in every kingdom of Europe; it probably would not then be amiss to review and soften these rigorous edicts; at least till the *civil* principles of the

roman-catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot, to drag down the vengeance of these occasional laws upon inoffensive, though mistaken, subjects; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

In order the better to secure the established church against perils from non-conformists of all denominations, infidels, turks, jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the *corporation* and *test* acts: by the former of which[a] no person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the lord's supper according to the rites of the church of England: and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office: or, in default of either of these requisites, such election shall be void. The other, called the test act[b], directs all officers civil and military to take the oaths and make the declaration against transubstantiation, in the court of king's bench or chancery, the next term, or at the next quarter sessions, or (by subsequent statutes) within six months, after their admission; and also within the same time to receive the sacrament of the lord's supper, according to the usage of the church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and churchwarden, and also to prove the same by two credible witnesses; upon forfeiture of 500 *l*, and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I. c. 2. which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favour of the Jews, was the next session of parliament restored again with some precipitation.

Thus much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, *pro salute animae*; while the temporal courts resent the public affront to religion and morality, on which all government must depend for support, and correct more for the sake of example than private

amendment.

IV. The fourth species of offences therefore, more immediately against God and religion, is that of *blasphemy* against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment[c]: for christianity is part of the laws of England[d].

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common *swearing* and *cursing*. By the last statute against which, 19 Geo. II. c. 21. which repeals all former ones, every labourer, sailor, or soldier shall forfeit 1 *s*. for every profane oath or curse, every other person under the degree of a gentleman 2 *s*. and every gentleman or person of superior rank 5 *s*. to the poor of the parish; and, on a second conviction, double; and, for every subsequent conviction, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness; and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him. If the justice omits his duty, he forfeits 5 *l*, and the constable 40 *s*. And the act is to be read in all parish churches, and public chapels, the sunday after every quarter day, on pain of 5 *l*. to be levied by warrant from any justice. Besides this punishment for taking God's name in vain in common discourse, it is enacted by statute 3 Jac. I. c. 21. that if in any stage play, interlude, or shew, the name of the holy trinity, or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10 *l*, one moiety to the king, and the other to the informer.

VI. A sixth species of offences against God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft, conjuration, inchantment*, or *sorcery*. To deny the possibility, nay, actual existence, of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the old and new testament: and the thing itself is a truth to which every nation in the world hath in it's turn borne testimony, by either examples seemingly well attested, or prohibitory laws, which at least suppose the possibility of a commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who

consult them[e]; imitating in the former the express law of God[f], "thou shalt not suffer a witch to live." And our own laws, both before and since the conquest, have been equally penal; ranking this crime in the same class with heresy, and condemning both to the flames[g]. The president Montesquieu[h] ranks them also both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own[i], that in general there has been such a thing as witchcraft; though one cannot give credit to any particular modern instance of it.

OUR forefathers were stronger believers, when they enacted by statute 33 Hen. VIII. c. 8. all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1 Jac. I. c. 12. that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or inchantment; or killing or otherwise hurting any person by such infernal arts; should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the second. These acts continued in force till lately, to the terror of all antient females in the kingdom: and many poor wretches were sacrificed thereby to the prejudice of their neighbours, and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wise example of Louis XIV in France, who thought proper by an edict to restrain the tribunals of justice from receiving informations of witchcraft[k]. And accordingly it is with us enacted by statute 9 Geo. II. c. 5. that no prosecution shall for the future be carried on against any person for conjuration, witchcraft, sorcery, or inchantment. But the misdemesnor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult

sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory.

VII. A SEVENTH species of offenders in this class are all *religious impostors*: such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment[l].

VIII. SIMONY, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion; as well by reason of the sacredness of the charge which is thus profanely bought and sold, as because it is always attended with perjury in the person presented[m]. The statute 31 Eliz. c. 6. (which, so far as it relates to the forfeiture of the right of presentation, was considered in a former book[n]) enacts, that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same. If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt consideration. And persons who shall corruptly ordain or licence any minister, or procure him to be ordained or licenced, (which is the true idea of simony) shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

IX. PROFANATION of the lord's day, or *sabbath-breaking*, is a ninth offence against God and religion, punished by the municipal laws of England. For, besides the notorious indecency and scandal, of permitting any secular business to be publicly transacted on that day, in a country professing christianity, and the corruption of morals which usually follows it's profanation, the keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of

conversation and society the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and chearfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their maker. And therefore the laws of king Athelstan[o] forbad all merchandizing on the lord's day, under very severe penalties. And by the statute 27 Hen. VI. c.5. no fair or market shall be held on the principal festivals, good friday, or any sunday (except the four sundays in harvest) on pain of forfeiting the goods exposed to sale. And, since, by the statute 1 Car. I. c. 1. no persons shall assemble, out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear baiting, interludes, plays, or other *unlawful* exercises, or pastimes; on pain that every offender shall pay 3 *s*. 4 *d*. to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the lord's day, after divine service is over. But by statute 29 Car. II. c. 7. no person is allowed to *work* on the lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5 *s*. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings.

X. Drunkenness is also punished by statute 4 Jac. I. c. 5. with the forfeiture of 5 *s*; or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours. And there are many wholsome statutes, by way of prevention, chiefly passed in the same reign of king James I, which regulate the licencing of alehouses, and punish persons found tippling therein; or the masters of such houses permitting them.

XI. The last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness*: either by frequenting houses of ill fame, which is an indictable offence[p]; or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment[q]. In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes; but also the repeated act of

keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy[r]. But at the restoration, when men from an abhorrence of the hypocrisy of the late times fell into a contrary extreme, of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the celibacy of it's first compilers. The temporal courts therefore take no cognizance of the crime of adultery, otherwise than as a private injury[s].

But, before we quit this subject, we must take notice of the temporal punishment for having *bastard children*, considered in a criminal light; for with regard to the maintenance of such illegitimate offspring, which is a civil concern, we have formerly spoken at large[t]. By the statute 18 Eliz. c. 3. two justices may take order for the punishment of the mother and reputed father; but what that punishment shall be, is not therein ascertained: though the contemporary exposition was, that a corporal punishment was intended[u]. By statute 7 Jac. I. c. 4. a specific punishment (*viz.* commitment to the house of correction) is inflicted on the woman only. But in both cases, it seems that the penalty can only be inflicted, if the bastard becomes chargeable to the parish: for otherwise the very maintenance of the child is considered as a degree of punishment. By the last mentioned statute the justices may commit the mother to the house of correction, there to be punished and set on work for one year; and, in case of a second offence, till she find sureties never to offend again.

Blackstone Commentaries, bk. 4, ch. 4; vol. 4, pp. 41–65.

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

2 This version of the charter, printed in South Carolina, differs in several instances from that in 1.1.3.10.c, printed in North Carolina.

1 1 *Hawk. P. C.* 3.

(*a*) That antiently under the general Name of Heresy there have been comprehended three Sorts of Crimes; 1. Apostacy, when a Christian did apostatize to Paganism or to Judaism. 2. Witchcraft. 3. Formal Heresy, which seems to be an Apostacy from the Established Religion; for which, and the several Ways of

determining, punishing, and the Difference between the Civil and Imperial Laws, Popish Canons, and the Laws of *England* concerning Heresy, *vide* a large Account in 1 *Hal. Hist. P. C.* 383 to 410.

2 1 *Hawk. P. C.* 3, 4.

(*b*) And it is said by my Lord *Hale*, that the Papal Canonists have by ample and general Terms extended Heresy so far, and left so much in the Discretion of the Ordinary to determine it, that there is scarce any the smallest Deviation from them but may be reduced to Heresy, according to the great Generality, Latitude and Extent of their Definitions and Descriptions; from whence he observes, how miserable the Servitude of Christians was under the Papal Hierarchy, who used so arbitrary and unlimited a Power to determine what they pleased to be Heresy, and then, *omni appellatione postpesita*, subjecting Mens Lives to their Sentence. 1 *Hal. Hist. P. C.* 383, 389.

3 1 *Hal. Hist. P. C.* 384.

4 *Bro.* Tit. *Heresy*. 2 *Rol. Abr.* 226.

5 *F. N. B.* 269. 12 *Co.* 56, 57. 3 *Inst.* 40. *Gibs. Codex* 401. 1 *Hawk. P. C.* 4. *State Trials, Vol* II. 275.

(*c*) Lord C. J. *Hale* seems to be of Opinion, that if the Diocesan convict a Man of Heresy, and either upon his Refusal to abjure, or upon a Relapse, decree him to be delivered over to the Secular Power; and this being signified under the Seal of the Ordinary into the Chancery, the King might thereupon by special Warrant command a Writ *de haeretico comburendo* to issue, tho' this were a Matter that lay in his Discretion to grant, suspend or refuse, as the Case might be circumstantiated. 1 *Hai. Hist. P. C.* 392.

6 27 *H.* 8. 14. b. 5 *Co.* 58. *Hob.* 236.

7 3 *Inst.* 42. 1 *Rol. Rep.* 110. 2 *Buls.* 300.

8 5 *Co.* 58. 1 *And.* 191. 3 *Leon.* 199. 3 *Lev.* 314.

9 *F. N. B.* 269. 3 *Inst.* 43. *Doctor and Student, lib.* 2. *cap.* 29. 1 *Hawk. P. C.* 4, 5.

10 12 *Co.* 44. 1 *Hawk. P. C.* 5.

11 3 *Inst.* 44. *Cro. Eliz.* 571. 1 *Hawk. P. C.* 5. 1 *Hal. Hist. P. C.* 383.

(a) Also it is said, that Offenders of this Kind may be condemned to the Pillory, *& c.* upon an Indictment at Common Law. 1 *Hawk. P.C. 5.*

12 1 *Hawk. P. C.* 6, 7.

13 1 *Vent.* 293. 3 *Keb.* 607, 621.

14 1 *Hawk. P. C.* 7.

15 1 *Hawk. P. C.* 7.

16 1 *Sid.* 168. 1 *Keb.* 620.

17 2 *Rol. Abr.* 187. 1 *Hawk. P. C.* 7.(a) But not before Justices of the Peace. *Cro. Jac.* 44.

18 But by 11 & 12 *W.* 3. *cap.* 21. forty Watermen may be appointed by the Company of Watermen to ply on the River *Thames*. — And by the 9 *Ann. cap.* 23. Hackney-Coachmen and Chairmen are permitted to work within the Bills of Mortality on *Sunday*.

19 (*a*) It hath been held, that notwithstanding this Statute, a Person may be taken upon a Judge's Warrant for escaping out of Prison on a *Sunday*. 5 *Mod.* 95. *Parker* ver. Sir *William Moor*. 2 *Salk.* 626. S. C. — So a Citation may be sued out of the Spiritual Court on a *Sunday*, notwithstanding this Act. *Carth.* 504. *Alonson* and *Brookbank*. 5 *Mod.* 449. S. C. But an Indictment cannot be taken on a *Sunday*. 2 *Keb.* 731. 1 *Vent.* 107.

2 *Sand*. 290.

(*b*) In *Salk*. 78, it is said, that the Arrest is void, so that the Party may have an Action of false Imprisonment for it. — And in 3 *Mod*. 95. it is said, that the Court would not discharge the Party on Motion, but directed him to bring an Action of false Imprisonment. — And in *6 Mod. 95*. it is said by *Holt* C. J. that if the Court will relieve from such an Arrest, it must be by *Audita Querela*; for it being on a *Sunday*, is a Fact traversable: But the other Judges held, that it could be done on Motion.

20 *Dyer* 203. *pl*. 73.

21 5 *Co*. 5. b. *Cawdry's* Case, *Poth*. 59. 2 *Rol. Abr*. 222.

22 (*a*) Whether if the Party die within six Weeks, the said Forfeiture be not discharged; since by the Act of God the Election of paying it, or suffering Imprisonment in lieu of it, is taken away; *quaere, & vide Dyer* 203, 231.

23 As for Popish Schoolmasters, *vide* Tit. *Popish Recusants*.

24 (*a*) An Indictment or Suit on this Stature need not shew that the Party was an Inhabitant of the King's Dominions, or that he had no reasonable Excuse to be absent; but the Defendant, if he hath any Matter of this kind in his Favour, must shew it himself. 2 *Leon*. 5. *Godb*. 14S. [*sic*]— Nor need the Offence be alledged in the County where the Party was in truth at the Time, because a meer Nonfeazance, and properly speaking not committed any where. 1 *And*. 139. *Hob*. 251. & *vide Leon*. 167.

(*b*) A Misbehaviour at Church, or Absence from Morning or Evening Service, is equally punishable with a total Absence; also he who is absent from his own Parish Church shall be obliged to prove where he went to Church. 1 *Rol. Rep*. 93 *Godbolt* 148. 1 *Sid*. 230.

(*c*) If the Spiritual Court ground its Proceedings on this Stature, and refuse to allow a reasonable Excuse, it shall be prohibited; but not where it proceeds meerly on the Canons of the Church. 2 *Rol. Rep*. 438, 455. 1 *Buls*. 159. *Gibs. Cod*. 358.

25 (d) This is no more than what the Law implies, and therefore there must be a Judgment on the Conviction to cause a Forfeiture. *Dyer* 160. *pl*. 40. 11 *Co*. 57. *b*. 59. *b*. 1 *Rol. Rep*. 89. 233. 3 *Buls*. 87. *Lutw*. 162. — A Condemnation by Demurrer or *Nil dicit* is as much within the Statute as a Conviction by Verdict. 11 *Co*. 58. 1 *Rol. Rep*. 89, 90.

(*e*) Which is to be understood a Lunar Month, or 28 Days, according to the common Rule of expounding Statutes which speak generally of a Month. *Yelv*. 100. *Cro. Eliz*. 835. 2 *Rol. Abr*. 521.

(*f*) One sick for Part of the Time shall not be excused, if it be proved that he was a Recusant before and after. *Cro. Jac*. 529.

(*g*) This Forfeiture of twenty Pounds dispenses not with that of Twelvepence given by 1 *Eliz*.

26 (*h*) That this Statute is the 28th, and not the 29th, as it is sometimes improperly called, 3 *Lev*. 333. *Lutw*. 203. 2 *Mod*. 240. 2 *And*. 294.

27 1 *Jones* 24. *Cawley* 171.

28 12 *Co*. 1, 2. 1 *Leon*. 93. 1 *Rol. Rep*. 7.

29 *Owen* 37. 1 *Leon*. 97.

30 *Lane* 105. *Cawley* 169. 12 *Co*. 1, 2.

31 *Lane* 39. *Hard*. 466.

32 *Cro. Eliz*. 845. 2 *Rol. Rep*. 25. *Palm*. 41. 1 *Jones* 24. 1 *Hawk. P. C*. 15.

33 For the Exposition of these Clauses of these Statutes, *vide* 1 *Hawk. P. C.* 16, 17.

34 (*a*) And may plead his Conformity to a Suit either by the Informer or King, and even after Judgment may have an *Audita Querela* against the Informer; also he may plead it after a Judgment for the King, before Execution awarded; but after Execution hath been awarded for the King, or the Profits of his Lands on a Seisure have been actually taken to the King's Use, he hath no other Remedy but by Petition to the King. *Raym*. 391. 2 *Jon*. 187. 1 *Mod*. 213.

35 *Vid. Salk*. 572

36 3 *Lev*. 376.

1 Yet by the Common Law an obstinate Heretick *being Excommunicate is still liable to be imprisoned* by force of the Writ de Excommunicato capiendo, till he make Satisfaction to the Church. Hawk. Pl. C. 4. cap. 2. S. 11.

2 As Serjeant Hawkins takes this Act under the Head of Heresy, I choose to follow so good a Guide, and considering the great Apostacy of too many among us who set up for Persons of uncommon Parts and Learning, by publickly asserting the Tenets herein Prohibited, and who perhaps have very little other Title to either but thinking their Wit must be looked upon as extensive as their Profaneness, they, with the most daring Impiety, ridicule all revealed Religion; it may not be an unfriendly Office to remember them of the Incapacities and Punishments Human Laws (which may more sensibly affect them at the Present) threaten them with, if by that Means they may be induced to act more Prudently at least in this Life, whatever their Notions are as to Another.

3 It is an Opinion repugnant to the orthodox Doctrine of the Christian Faith, *obstinately maintained and persisted in by such as profess the Name of Christ*. Godolph. Rep. 561. cap. 40. S. 4.

1 See 1 H. H. P. C. 383 to 410.

2 3 Inst. 40. H. P. C. 3.

3 See Bro. Heresy. 2 Roll. Ab. 226.

4 F. N. B. 269. 11 Co. 56, 57. 3 Inst. 40. H. P. C. 5. Gibson 401, 410. 12 Co. 56, 57, 93. 3 Inst. 40.

5 27 H. 8. 14. b. 5 Co. 58. a. H. P. C. 4. Hob. 236

6 H. P. C. 4. 2 H. H. P. C. 399, 400. 3 Inst. 42. 1 Ro. Re. 110. 2 Bulst. 300.

7 5 Co. 58. 1 And. 191. 2 Leon. 199. 3 Lev. 314. H. H. P. C. 407, 408.

8 5 Co. 58. a. 27. H. 8. 14. b.

9 F. N. B. 269. 3 Inst. 43. H. P. C. 5. Doctor and Student, lib. 3. ca. 29. H. P. C. 5.

10 H. P. C. 4. 5. 12 Co. 44.

11 3 Inst. 44. Dalt. ca. 107.

12 3 Inst. 44. F. N. B. 269. b. H. P. C. 6. S. P. C. 38. g. Cro. Eliz. 571. 1 H. H. P. C. 383. 45 Ed. 3. 17. b. Bro. Cor. 15.

13 2 Keb. 719.

14 3 Inst. 45.

15 H. P. C. 6. 3 Inst. 45 con.

16 H. P. C. 6.

17 H. P. C. 6. 3 Inst. 45.

18 H. P. C. 7. 3 Inst. 45. 1 Jon. 143.

19 H. P. C. 8. 3 Inst. 46.

20 12 Co. 36, 37. 3 Inst. 58.

21 12 Co. 36, 37. 3 Inst. 58. But *Quaere*, and See 1 H. H. P. C. 628, and Ld. Audley's Case in State Trials.

22 1 *Ven*. 293. 3 Keb. 607, 621.

23 See the Case of James Nailor, and of the French Prophets, &c. 1 Sid. 168. 1 Keb. 620.

24 1 Ven. 293. 3 Keb. 607, 621.

25 2 R. A. 187. Pl. 1 Cro. Ja. 423.

26 Par. 3.

27 See for the Form of the Indictment, 3 Mod. 78, 79.

28 Dyer 203. pl. 73, 74.

29 5 Co. Cawdry's Case, 5. b. 6. a. Poph. 59. 2 Roll. Abr. 222. 5.

30 Dyer 203. 74. 231. 4.

31 5 Mod. 431.

a 5 Mod. 317, 318. Salk. 428, 429.

b 5 Mod. 316, 317, 318. 2 Jon. 121. Salk. 428, 429.

32 c Lutw. 910.

d 2 Mod. 299.

e Vent. 248. King and Latwood. Sal. 167, 168. 2 Vent. 248. Skin. 574. to 577. Carth. 306, 307.

33 f Vide 3 Keb. 606, 665, 682, 721. 2 Jon. 81, 137. 2 Lev. 184, 242. 2 Mod. 193, 194.

34 5 Mod. 431, 432.

35 Carth. 464, 465.

36 2 Leon. 5. Godbolt 148. See 29 El. 6. Par. 5.

37 2 Rol. Rep. 438, 455. 1 Bulst. 159. See Gibs. 358.

38 1 Rol. Rep. 93. Godbolt 148. Dal. ca. 45. fol. 106. 1 Syd. 230.

39 1 And. 139. Hob. 251. See 2 Leon. 167.

40 Precedent of Declaration, Lutw. 201, 208.

41 11 Co. 63. b. 1 Rol. Rep. 94.

42 Lutw. 162, 163. 11 Co. 57. b. 59. b. 1 Rol. Rep. 89, 90, 233, 234. Dy. 160. pl. 40. 3 Bulst. 87.

43 11 Co. 58, a. b. 60. a. 1 Rol. Rep. 89, 90. Cro. Jac. 529.

44 Yel. 100. Cro. El. 835. 2 Rol. Abr. 521. c. Cawly 61 [sic; Cawley].

45 a 3 Lev. 333. Lut. 203. 1117. 2 Mod. 240, 241. 1 And. 294, 295.

46 See 29 El. 6. Par. 1, 8.

47 1 Jones 24, 25. Cawley 171, 172. 12 Co. 1, 2. 1 Leon. 98. 1 Rol. Rep. 7.

48 Owen 37. 1 Leon. 97. Cawley 107. a.

49 Cro. El. 845. 2 Rol. Rep. 25. Palm. 41. Sir W. Jones 14.

50 Lane 105, 106. Cawley 169. See 12 Co. 1, 2. Lane 39.

51 See 1 Rol. Rep. 94. 11 Co. 63. Cawly 66, 67, 82, 83 [*sic*; Cawley].

52 Precedent Lut. 203, 1101. Sal. 145.

53 1 Vent. 355. Raym. 434. Vide Sal. 145. pl. 5. 11. Co. 65.a. Vide infra Sect. 42.

54 Palm. 40, 41. Bridge. 123. 3 Lev. 333. Lut. 1117.

55 Cawley 164. Poph. 29. Kellw, 180. a.

56 Hob. 205. H. P. C. 156. Cro. Ca. 405. 2 Lev. 179. 2 Mod. 128, 129.

57 Cro. Ca. 504. Raym. 434.

58 11 Co. 59. b. 65. a. b. 1 Rol. Rep. 95. Cro. Jac. 480, 482.

59 Cro. Ca. 504, 505. Show. 309. 5 Mod. 141. 3 Keb. 591.

60 11 Co. 61. b. 62. a. Vide supra ca. 1. Sect. 13. Cro. Jac. 482. Bridgm. 122 seems cont.

61 2 Leon. 167. & 19 Eliz. 6. Par. 7.

62 11 Co. 58. a. See 3 & 6 Par. 1 Rol. Rep. 89. 11 Co. 58. a.

63 1 And. 139, 140. B. 2. Ch. 26. Sect. 76.

64 Supra Sect. 13. Supra Sect. 33. 11 Co. 61, 62. 1 Rol. Rep. 92, 93.

65 Hob. 205, Con. 11 Co. 61. a.

66 11 Co. 59. b. 65. a See B. 2. Ch. 26. Sect 63. Lutw. 208. 1 Rol. Rep. 93. Cro. Jac. 481, 482. Noy 117. Lane 60. Palm. 39, 40, 41. 2 Rol. Re. 108. Bridg. 122, 123. Cro. Jac. 481, 482. Bridg. 120, 121, 112. 2 Rol. Re. 108. Vide supra, cap. 1. Sect 13.

67 Cawley 102, 103. Vide supra, Sect. 8. Vide infra, Sect. 56. 29 El. 6. Par. 6. 3 Jac. 1. 4. Par. 7, 8, 9. Cawley 103, 104.

68 2 Inst. 573. 8 Co. 169. Plowd. 486.

69 Bro. Coro. 2, 14, 25, 45, 47, 55, 60. 1 Rol. Rep. 7. 2 Rol. Ab. 184. pl. 3.

70 1 Rol. Rep. 94.

71 Raym. 391, 465. 2 Jon. 187. 1 Mod. 213. 1 Rol. Rep. 95. 2 Bulst. 324, 325.

72 Savil 130.

73 Lane 92, 93, 106. Cawley 109, 110.

74 Moor 523. 1 Rol. Rep. 94. Cro. El. 846. Cawley 109, 110, 150, 151, 152. Vide supra Sect. 42.

75 Noy 89. Latch 176, 177. Hetl. 18.

76 Noy 89. Latch 176. 3 Lev. 333, 334.

77 Hetl. 176.

78 3 Lev. 333, 334, 11, 12.

* 2 Bul. 155, 156. The same Point seems admitted. State Trials Vol. 1. fol. 268. Vol. 3. f. 425.

79 Cawley 216.

80 See Cawley 128, 129, &c. 207, 208.

81 Cro. Jac. 352. 1 Rol. Rep. 108. Moor 836.

82 Cro. Jac. 352. 1 Rol. Rep. 108. Moor 836.

83 Cawley 130, 131. Cro. El. 212.

84 See Chap. 12. S. 18.

85 See Chap. 12. S. 17.

86 Precedent of a Title made under their Statutes; Lut. 1101. See 11 Geo. 2. c. 17.

87 10 Co. 57 b.

88 Cawley 230.

89 1 Jon. 19, 20.

90 1 Jon. 20, 21 &c. Hob. 126, 127. Mo. 872.

91 Vide 2 Jones 225, 226, 233, 234. Par. 17. Vide supra. Ch. 8. Salk. 572. Par. 16, 17, 19.

92 Vide Salk. 572.

93 3 Levinz 376.

a See pag. 5.

b See Vol. I. pag. 123, 124.

c Beccar. ch. 8.

d *Cod*. 1. 7. 1.

e *Ibid*. 6.

f *l*. 3. *c*. 9.

g *Mescroyantz* in our antient law-books is the name of unbelievers.

h 1 Hal. P. C. 384.

i *cap. de haereticis*.

k *Decretal. l*. 5. *t*. 40. *c*. 27.

l *Cod. l*. 1. *tit*. 5.

m *c. de haereticis*.

n *Cod*. 1. 5. 4.

o Baldus *in Cod*. 1. 5. 4.

p F. N. B. 269.

q 1 Hal. P. C. 395.

r So called not from *lolium*, or tares, (which was afterwards devised, in order to justify the burning of them from Matth. xiii. 30.) but from one Walter Lolhard, a German reformer. Mod. Un. Hist. xxvi. 13. Spelm. *Gloss*. 371.

s 2 Hen. IV. c. 15.

t 5 Rep. 23. 12 Rep. 56 92.

u 1 Hal. P. C. 405.

v Vol. I. pag. 98.

w 31 Eliz. c. 1. 17 Car. II. c. 2. 22 Car. II. c. 1.

x Sir Humphrey Edwin, a lord mayor of London, had the imprudence soon after the toleration-act to go to a presbyterian meeting-house in his formalities: which is alluded to by dean Swift, in his *tale of a tub*, under the allegory of *Jack* getting on a great horse, and eating custard.

y See Hawkins's pleas of the crown, and Burn's justice.

z Sp. L. b. 19. c. 27.

a Stat. 13 Car. II. St. 2. c. 1.

b Stat. 25 Car. II. c. 2.

c 1 Hawk. P. C. 7.

d 1 Ventr. 293. 2 Strange, 834.

e *Cod. l.* 9. *t.* 18.

f Exod. xxii. 18.

g 3 Inst. 44.

h Sp. L. b. 12. c 5.

i Mr Addison, Spect. No 117.

k Voltaire *Siecl. Louis xiv*. Mod. Univ. Hist. xxv. 215. Yet Vouglans, (*de droit criminel*, 353. 459.) still reckons up sorcery and witchcraft among the crimes punishable in France.

l 1 Hawk. P. C. 7.

m 3 Inst. 156.

n See Vol. II. pag. 279.

o *c*. 24.

p Poph. 208.

q 1 Siders. 168.

r Scobell. 121.

s See Vol. III. pag. 139.

t See Vol. I. pag. 458.

u Dalt. just. ch. 11.

CHAPTER 2

AMENDMENT I

FREE SPEECH AND FREE PRESS CLAUSES

2.1TEXTS

2.1.1DRAFTS IN FIRST CONGRESS

2.1.1.1Proposal by Madison in House, June 8, 1789

2.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

Congressional Register, June 8, 1789, vol. 1, p. 427.

2.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

2.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

2.1.1.2Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 2 The people have certain natural rights which are retained by them when they enter into society, Such are the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness & safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably Assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the government of the united States.

…

[Amendment] 8 Congress shall not have power to grant any monopoly or exclusive advantages of Commerce to any person or Company; nor to restrain the liberty of the Press.

Madison Papers, DLC.

2.1.1.3House Committee of Eleven Report, July 28, 1789

ART. I, SEC. 9—Between PAR. 2 and 3 insert, …

"The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."

Broadside Collection, DLC.

2.1.1.4House Consideration, August 15, 1789

2.1.1.4.a The next clause of the 4th proposition was taken into consideration, and was as follows: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed."

Congressional Register, August 15, 1789, vol. 2, p. 197 ("agreed to").

2.1.1.4.b Fifth amendment — "The freedom of speech, and of the press, and of the right of the people peaceably to assemble and consult for their

common good, and to apply to the government for redress of grievances, shall not be infringed."

Daily Advertiser, August 17, 1789, p. 2, col. 1 ("carried in the affirmative.").

2.1.1.4.c Fifth amendment — "The freedom of speech, and of the press, and of the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."

New-York Daily Gazette, August 18, 1789, p. 798, col. 3 ("carried in the affirmative").

2.1.1.4.d Fifth Amendment. *The freedom of speech, and of the press, and of the rights of the people peaceably to assemble and consult for their common good, and to apply to government for the redress of grievances shall not be infringed.*

Gazette of the U.S., August 19, 1789, p. 147, col. 1 ("agreed to").

2.1.1.5Further House Consideration, August 21, 1789

Fourth. The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.

HJ, p. 107 ("read and debated … agreed to by the House, … two-thirds of the members present concurring").[1]

2.1.1.6House Resolution, August 24, 1789

ARTICLE THE *FOURTH.*

The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for a redress of grievances, shall not be infringed.

House Pamphlet, RG 46, DNA.

2.1.1.7Senate Consideration, August 25, 1789

2.1.1.7.a The Resolve of the House of Representatives of the 24th of August, upon certain “Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States” was read as followeth:

Article the fourth

…

The freedom of speech, and of the press, and the right of the People peaceably to assemble and consult for their common good and to apply to the Government for redress of grievances shall not be infringed.

Rough SJ, p. 215.

2.1.1.7.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

Article the Fourth.

The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.

Smooth SJ, p. 194.

2.1.1.7.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*ARTICLE* *the* *FOURTH*.

"The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.

Printed SJ, p. 104.

2.1.1.8Further Senate Consideration, September 3, 1789

2.1.1.8.a On Motion to insert these words after "Press," "In as ample a manner as hath at any time been secured by the common law."

Rough SJ, p. 246 ("It passed in the negative.").

2.1.1.8.b On motion, To insert these words after "Press," — "In as ample a manner as hath at any time been secured by the common law" —

Smooth SJ, p. 219 ("It passed in the Negative.").

2.1.1.8.c On motion, To insert these words after "Press," — "In as ample a manner as hath at any time been secured by the common law" —

Printed SJ, p. 117 ("It passed in the Negative.").

Printed SJ, p. 117 ("It passed in the Negative.").

2.1.1.9Further Senate Consideration, September 4, 1789

2.1.1.9.a On Motion to adopt the fourth Article proposed by the House of Representatives to read as followeth,

"That Congress shall make no law, abridging the freedom of speech or of the press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances,"

Rough SJ, September 4, 1789, p. 247 ("It passed in the affirmative.").

2.1.1.9.b On motion, To adopt the fourth Article proposed by the Resolve of the House of Representatives, to read as followeth,

"That Congress shall make no law, abridging the freedom of Speech, or of the Press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances,"

Smooth SJ, September 4, 1789, pp. 220–21 ("It passed in the Affirmative.").

2.1.1.9.c On motion, To adopt the fourth Article proposed by the Resolve of the House of Representatives, to read as followeth,

"That Congress shall make no law, abridging the freedom of Speech, or of the Press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances,"

Printed SJ, September 4, 1789, p. 118 (" It passed in the Affirmative.").

2.1.1.9.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

Article fourth.

To read as follows, to wit:

"That Congress shall make no law, abridging the freedom of Speech or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances,"

Senate MS, RG 46, p. 2.

2.1.1.10Further Senate Consideration, September 9, 1789

2.1.1.10.a And on Motion to amend article the third to read as follows:

"Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of Religion; or abridging the freedom of Speech, or the press, or the right of the People peaceably to assemble, and petition to the government for the redress of grievances."

…

On motion, To strike out the fourth article,

Rough SJ, p. 274 (As to each motion, “It passed in the affirmative.”).

2.1.1.10.b On motion, To amend article the third, to read as follows:

“Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the Government for the redress of grievances” —

…

On motion, To strike out the fourth article,

Smooth SJ, p. 243 (As to each motion, “It passed in the Affirmative.”).

2.1.1.10.c On motion, To amend Article the third, to read as follows:

“Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the Government for the redress of grievances” —

On motion, To strike out the fourth Article,

Printed SJ, p. 129 (As to each motion, “It passed in the Affirmative.”).

2.1.1.10.d On the question to concur with the House of Representatives on their resolution of the 24th of Augt. proposing amendments to the constitution of the United States, with the following amendments viz:

…

To erase from the 3d. Article the word “Religion” & insert —Articles of faith or a mode of Worship. —

And to erase from the same article the words “thereof, nor shall the rights of Conscience be infringed” & insert — of Religion, or abridging the freedom of speech, or of the press, or ~~of~~ the right of the people peaceably to assemble, & to petition to the government for a redress of grievances

To erase the 4th. article, & the words “Article the fourth.”

Ellsworth MS, pp. 1–2, RG 46, DNA.

2.1.1.11Senate Resolution, September 9, 1789

ARTICLE THE THIRD.

Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition to the government for a redress of grievances.

Senate Pamphlet, RG 46, DNA.

2.1.1.12Further House Consideration, September 21, 1789

Resolved, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

2.1.1.13Further Senate Consideration, September 21, 1789

2.1.1.13.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

2.1.1.13.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

2.1.1.14Further Senate Consideration, September 21, 1789

2.1.1.14.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

2.1.1.14.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

2.1.1.15Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~

in his favour, & to have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

2.1.1.16 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

2.1.1.17 Senate Consideration of Conference Committee Report, September 24, 1789

2.1.1.17.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Smooth SJ, pp. 272–73.

2.1.1.17.b Mr. Ellsworth, on behalf of the managers of the conference on “Articles to be proposed to the several States as Amendments to the Constitution of the United States,” reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Printed SJ, p. 145.

2.1.1.18 Further Senate Consideration of Conference Committee Report, September 24, 1789

2.1.1.18.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Smooth SJ, pp. 278–79.

2.1.1.18.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Printed SJ, p.148.

2.1.1.19 Further Senate Consideration of Conference Committee Report, September 25, 1789

2.1.1.19.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States” — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

2.1.1.19.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States” — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

2.1.1.20 Agreed Resolution, September 25, 1789

2.1.1.20.a Article the Third.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Smooth SJ, Appendix, p. 292.

2.1.1.20.b ARTICLE the THIRD.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Printed SJ, Appendix, p. 163.

2.1.1.21 Enrolled Resolution, September 28, 1789

Article The Third… Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Enrolled Resolutions, RG 11, DNA.

2.1.1.22 Printed Versions

2.1.1.22.a Art. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutes at Large, vol. 1, p. 21.

2.1.1.22.b Art. III. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutes at Large, vol. 1, p. 97.

2.1.2PROPOSALS FROM THE STATE CONVENTIONS

2.1.2.1Maryland Minority, April 26, 1788

12. That the freedom of the press be inviolably preserved.

Maryland Gazette, May 1, 1788 (committee majority).

2.1.2.2Massachusetts Minority, February 6, 1788

[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

Massachusetts Convention, pp. 86–87.

2.1.2.3New York, July 26, 1788

That the people have a right peaceably to assemble together to consult for their common good, or to instruct their Representatives; and that every

person has a right to Petition or apply to the Legislature for redress of Grievances. — That the Freedom of the Press ought not to be violated or restrained.

State Ratifications, RG 11, DNA.

2.1.2.4North Carolina, August 1, 1788

16th. That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of Liberty, and ought not to be violated.

State Ratifications, RG 11, DNA.

2.1.2.5Pennsylvania Minority, December 12, 1787

6. That the people have a right to the freedom of speech, of writing, and of publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States.

Pennsylvania Packet, December 18, 1787.

2.1.2.6Rhode Island, May 29, 1790

16th. That the people have a right to freedom of speech and of writing and publishing their sentiments, that freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

State Ratifications, RG 11, DNA.

2.1.2.7Virginia, June 27, 1788

Sixteenth, That the people have a right to freedom of speech, and of writing and publishing their Sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated.

State Ratifications, RG 11, DNA.

2.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

2.1.3.1Delaware: Declaration of Rights, 1776

SECT. 23. That the liberty of the press ought to be inviolably preserved.

Delaware Laws, vol. 1, App., p. 81.

2.1.3.2Georgia

2.1.3.2.aConstitution, 1777

LXI. Freedom of the press, and trial by jury, to remain inviolate *forever*.

Georgia Laws, p. 16.

2.1.3.2.b Constitution, 1789

ARTICLE IV.

…

Sect. 3. Freedom of the press, and trial by jury, shall remain inviolate.

Georgia Laws, p. 29.

2.1.3.3Maryland: Declaration of Rights, 1776

38. That the liberty of the press ought to be inviolably preserved.

Maryland Laws, November 3, 1776.

2.1.3.4Massachusetts

2.1.3.4.aBody of Liberties, 1641

[12] Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall

question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.

Massachusetts Colonial Laws, p. 35.

2.1.3.4.b Constitution, 1780

PART I

…

ARTICLE

…

XVI. The Liberty of the Press is essential to the security of freedom in a State, it ought not, therefore, to be restrained in this Commonwealth.

Massachusetts Perpetual Laws, p. 7.

2.1.3.5New Hampshire: Constitution, 1783

[Part I, Article] XXII. The Liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved.

…

XXX. The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.

New Hampshire Laws, pp. 26, 27.

2.1.3.6North Carolina

2.1.3.6.aFundamental Constitutions of Carolina, 1669

80th. Since multiplicity of comments, as well as of laws, have great inconveniences, and serve only to obscure and perplex; all manner of comments or expositions, or [*sic;* on] any part of these Fundamental Constitutions, or on any part of the common or statute laws of Carolina are absolutely prohibited.

North Carolina State Records, p. 146.

2.1.3.6.bDeclaration of Rights, 1776

Sect. XV. That the Freedom of the Press is one of the great Bulwarks of Liberty, and therefore ought never to be restrained.

North Carolina Laws, p. 275.

2.1.3.7Pennsylvania

2.1.3.7.a Constitution, 1776

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

…

XII[.] That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.

Pennsylvania Acts, M'Kean, p. x.

2.1.3.7.b Constitution, 1790

ARTICLE IX.

…

SECT. VII. That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government: And no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence: And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.

Pennsylvania Acts, Dallas, p. xxxiv.

2.1.3.8South Carolina

2.1.3.8.aConstitution, 1778

XLIII. That the Liberty of the Press be inviolably preserved.

South Carolina Constitution, p. 15

South Carolina Constitution, p. 15.

2.1.3.8.b Constitution, 1790

ARTICLE IX.

…

Section 6. The trial by jury as heretofore used in this state, and the liberty of the press, shall be for ever inviolably preserved.

South Carolina Laws, App., p. 42.

2.1.3.9Vermont: Constitution, 1777

CHAPTER I.

…

14. That the People have a Right to Freedom of Speech, and of writing and publishing their Sentiments; therefore the Freedom of the Press ought not to be restrained.

Vermont Acts, p. 4.

2.1.3.10Virginia: Declaration of Rights, 1776

XII. THAT the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments.

Virginia Acts, p. 33.

2.1.4OTHER TEXTS

2.1.4.1English Bill of Rights, 1689

… That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

1 Will. & Mar. sess. 2, c. 2.

2.1.4.2Richard Henry Lee to Edmund Randolph, Proposed Amendments, October 16, 1787

… That the freedom of the press shall be secured. …

Virginia Gazette, December 22, 1787.

2.2 Discussion of Drafts and Proposals

2.2.1THE FIRST CONGRESS

2.2.1.1June 8, 17892

2.2.1.1.a Mr. Jackson

…

The gentleman endeavours to secure the liberty of the press; pray how is this in danger. There is no power given to congress to regulate this subject as they can commerce, or peace, or war. Has any transactions taken place to make us suppose such an amendment necessary? An honorable gentleman, a member of this house, has been attacked in the public newspapers, on account of sentiments delivered on this floor. Have congress taken any notice of it? Have they ordered the writer before them, even for a breach of privilege, altho' the constitution provides that a member shall not be questioned in any place for any speech or debate in the house? No, these things are suffered to public view, and held up to the inspection of the world. These are principles which will always prevail; I am not afraid, nor are other members I believe, our conduct should meet the severest scrutiny. Where then is the necessity of taking measures to secure what neither is nor can be in danger?

Congressional Register, June 8, 1789, vol. 1, pp. 437–38.

2.2.1.1.b The press, Mr. Jackson observed, is unboundedly free — a recent instance of which the House had witnessed in an attack upon one of its members — A bill of rights is a mere *ignis fatuus*, amusing by appearances, and leading often to dangerous conclusions. —

Gazette of the U.S., June 10, 1789, p. 67, col. 2.

2.2.1.2August 15, 17893

2.2.2STATE CONVENTIONS

2.2.2.1North Carolina, July 30, 1788

Mr. SPAIGHT. …

… The gentleman advises such amendments as would satisfy him, and proposes a mode of amending before ratifying. If we do not adopt first, we are no more a part of the Union than any foreign power. It will be also throwing away the influence of our state to propose amendments as the condition of our ratification. If we adopt first, our representatives will have a proportionable weight in bringing about amendments, which will not be the case if we do not adopt. It is adopted by ten states already. The question, then, is, not whether the Constitution be good, but whether we will or will not confederate with the other states. The gentleman supposes that the liberty of the press is not secured. The Constitution does not take it away. It says nothing of it, and can do nothing to injure it. But it is secured by the constitution of every state in the Union in the most ample manner.

He objects to giving the government exclusive legislation in a district not exceeding ten miles square, although the previous consent and cession of the state within which it may be, is required. Is it to be supposed that the representatives of the people will make regulations therein dangerous to liberty? Is there the least color or pretext for saying that the militia will be carried and kept there for life? Where is there any power to do this? The power of calling forth the militia is given for the common defence; and can we suppose that our own representatives, chosen for so short a period, will dare to pervert a power, given for the general protection, to an absolute oppression? But the gentleman has gone farther, and says, that any man who will complain of their oppressions, or write against their usurpation, may be deemed a traitor, and tried as such in the ten miles square, without a

jury. What an astonishing misrepresentation! Why did not the gentleman look at the Constitution, and see their powers? Treason is there defined. It says, expressly, that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. Complaining, therefore, or writing, cannot be treason. [Here Mr. Lenoir rose, and said he meant misprision of treason.] The same reasons hold against that too. The liberty of the press being secured, creates an additional security.

Elliot, vol. 4, pp. 208–09.

2.2.2.2South Carolina, January 18, 1788

Hon. JAMES LINCOLN. …

He would be glad to know why, in this Constitution, there is a total silence with regard to the liberty of the press. Was it forgotten? Impossible! Then it must have been purposely omitted; and with what design, good or bad, he left the world to judge. The liberty of the press was the tyrant's scourge — it was the true friend and firmest supporter of civil liberty; therefore why pass it by in silence? He perceived that not till almost the very end of the Constitution was there any provision made for the nature or form of government we were to live under: he contended it should have been the very first article; it should have been, as it were, the groundwork or foundation on which it should have been built. But how is it? At the very end of the Constitution, there is a clause which says,—"The Congress of the United States shall guaranty to each state a republican form of government." But pray, who are the United States? — A President and four or five senators? Pray, sir, what security have we for a republican form of government, when it depends on the mere will and pleasure of a few men, who, with an army, navy, and rich treasury at their back, may change and alter it as they please? It may be said they will be sworn. Sir, the king of Great Britain, at his coronation, swore to govern his subjects with justice and mercy. We were then his subjects, and continued so for a long time after. He would be glad to know how he observed his oath. If, then, the king of Great Britain forswore himself, what security have we that a future President and four or five senators — men like himself — will think more solemnly of so sacred an obligation than he did?

Why was not this Constitution ushered in with the bill of rights? Are the

people to have no rights? Perhaps this same President and Senate would, by and by, declare them. He much feared they would. He concluded by returning his hearty thanks to the gentleman who had so nobly opposed this Constitution: it was supporting the cause of the people; and if ever any one deserved the title of man of the people, he, on this occasion, most certainly did.

Gen. CHARLES COTESWORTH PINCKNEY answered Mr. Lincoln on his objections. … With regard to the liberty of the press, the discussion of that matter was not forgotten by the members of the Convention. It was fully debated, and the impropriety of saying any thing about it in the Constitution clearly evinced. The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing, which deserves all the encomiums the gentleman has justly bestowed upon it, is secured by all our state constitutions; and to have mentioned it in our general Constitution would perhaps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it. For the same reason, we had no bill of rights inserted in our Constitution; for, as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated; but by delegating express powers, we certainly reserve to ourselves every power and right not mentioned in the Constitution.

Elliot, vol. 4, pp. 314–16.

2.2.2.3Pennsylvania, December 1, 1787

Mr. WILSON. …

… In answer to the gentlemen from Fayette, (Mr. Smilie,) on the subject of the press, I beg leave to make an observation. It is very true, sir, that this Constitution says nothing with regard to that subject, nor was it necessary; because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty.

I heard the honorable gentleman make this general assertion, that the Congress was certainly vested with power to make such a law; but I would be glad to know by what part of this Constitution such a power is given?

Until that is done, I shall not enter into a minute investigation of the matter, but shall at present satisfy myself with giving an answer to a question that has been put. It has been asked, If a law should be made to punish libels, and the judges should proceed under that law, what chance would the printer have of an acquittal? And it has been said he would drop into a den of devouring monsters!

I presume it was not in the view of the honorable gentleman to say there is no such thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country. What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.

With regard to attacks upon the public, the mode of proceeding is by a prosecution. Now, if a libel is written, it must be within some one of the United States, or the district of Congress. With regard to that district, I hope it will take care to preserve this as well as the other rights of freemen; for, whatever district Congress may choose, the cession of it cannot be completed without the consent of its inhabitants. Now, sir, if this *libel* is to be tried, it must be tried where the offence was committed; for, under this Consititution, as declared in the 2d section of the 3d article, the trial must be held in the state; therefore, on this occasion, it must be tried where it was published, if the indictment is for publishing; and it must be tried likewise by a jury of that state. Now, I would ask, is the person prosecuted in a worse situation under the general government, even if it had the power to make laws on this subject, than he is at present under the state government? It is true, there is no particular regulation made, to have the jury come from the body of the county in which the offence was committed; but there are some states in which this mode of collecting juries is contrary to their established custom, and gentlemen ought to consider that this Constitution was not meant merely for Pennsylvania. In some states, the juries are not taken from a single county. In Virginia, the sheriff, I believe, is not confined even to the inhabitants of the state, but is at liberty to take any man he pleases, and put him on the jury. In Maryland, I think, a set of jurors serve for the whole western shore, and another for the eastern shore.

Elliot, vol. 2, pp. 449–50.

2.2.2.4Virginia

2.2.2.4.aJune 14, 1788

Mr. HENRY. …

A bill of rights may be summed up in a few words. What do they tell us? —That our rights are reserved. Why not say so? Is it because it will consume too much paper? Gentlemen's reasoning against a bill of rights does not satisfy me. Without saying which has the right side, it remains doubtful. A bill of rights is a favorite thing with the Virginians and the people of the other states likewise. It may be their prejudice, but the government ought to suit their geniuses; otherwise, its operation will be unhappy. A bill of rights, even if its necessity be doubtful, will exclude the possibility of dispute; and, with great submission, I think the best way is to have no dispute. In the present Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, &c. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds. With respect to the freedom of the press, I need say nothing; for it is hoped that the gentlemen who shall compose Congress will take care to infringe as little as possible the rights of human nature. This will result from their integrity. They should, from prudence, abstain from violating the rights of their constituents. They are not, however, expressly restrained. But whether they will intermeddle with that palladium of our liberties or not, I leave you to determine.

Elliot, vol. 3, pp. 448–49.

2.2.2.4.bJune 15, 1788

Gov. RANDOLPH. …

Then, sir, the freedom of the press is said to be insecure. God forbid that I should give my voice against the freedom of the press. But I ask, (and

with confidence that it cannot be answered,) Where is the page where it is restrained? If there had been any regulation about it, leaving it insecure, then there might have been reason for clamors. But this is not the case. If it be, I again ask for the particular clause which gives liberty to destroy the freedom of the press.

Elliot, vol. 3, p. 469.

2.2.2.4.cJune 24, 1788

Mr. DAWSON. …

That sacred palladium of liberty, the freedom of the press, (the influence of which is so great that it is the opinion of the ablest writers that no country can remain long in slavery where it is unrestrained,) has not been expressed; nor are the liberties of the people ascertained and protected by any declaration of rights; that inestimable privilege, (the most important which freemen can enjoy,) the trial by jury in all civil cases, has not been guarded by the system;—and while they have been inattentive to these all-important considerations, they have made provision for the introduction of standing armies in time of peace. These, sir, ever have been used as the grand machines to suppress the liberties of the people, and will ever awaken the jealousy of republicans, so long as liberty is dear, and tyranny odious, to mankind.

Elliot, vol. 3, pp. 610–11.

2.2.3PHILADELPHIA CONVENTION

2.2.3.1Proposal by Pinckney, May 29, 1787

"ART. VI. … The legislature of the United States shall pass no law on the subject of religion; nor touching or abridging the liberty of the press; [n]or shall the privilege of the writ of habeas corpus ever be suspended, except in case of rebellion or invasion.

Elliot, vol. 5, pp. 130–31.

2.2.3.2Proposal by Pinckney, August 20, 1787

In Convention.—Mr. PINCKNEY submitted to the House, in order to be referred to the committee of detail, the following propositions:—

…

"The liberty of the press shall be inviolably preserved.

Elliot, vol. 5, p. 445.

2.2.3.3Proposal by Pinckney & Gerry, September 14, 1787

Mr. PINCKNEY and Mr. GERRY moved to insert a declaration, "that the liberty of the press should be inviolably observed."

Mr. SHERMAN. It is unnecessary. The power of the Congress does not extend to the press.

On the question, it passed in the negative.

Elliot, vol. 5, p. 545.

2.2.4NEWSPAPERS AND PAMPHLETS

2.2.4.1A Citizen of New-York: An Address to the People of the State of New York, April 15, 1787

We are told, among other strange things, that the liberty of the press is left insecure by the proposed Constitution, and yet that Constitution says neither more nor less about it, than the Constitution of the State of New York does. We are told that it deprives us of trial by jury, whereas the fact is, that it expressly secures it in certain cases, and takes it away in none — it is absurd to construe the silence of this, or of our own Constitution, relative to a great number of our rights, into a total extinction of them — silence and blank paper neither grant nor take away anything. Complaints are also made that the proposed Constitution is not accompanied by a bill of rights; and yet they who would make these complaints, know and are content that no bill of rights accompanied the Constitution of this State. In days and countries, where Monarchs and their subjects were frequently

disputing about prerogative and privileges, the latter often found it necessary, as it were to run out the line between them, and oblige the former to admit by solemn acts, called bills of rights, that certain enumerated rights belonged to the people, and were not comprehended in the royal prerogative. But thank God we have no such disputes — we have no Monarchs to contend with, or demand admission from — the proposed Government is to be the government of the people — all its officers are to be their officers, and to exercise no rights but such as the people commit to them. The Constitution only serves to point out that part of the people's business, which they think proper by it to refer to the management of the persons therein designated — those persons are to receive that business to manage, not for themselves, and as their own, but as agents and overseers for the people to whom they are constantly responsible, and by whom only they are to be appointed.

Kaminski & Saladino, vol. 17, pp. 112–13.

2.2.4.2 George Mason, Objections to the Constitution, October 4, 1787

Under their own construction of the general Clause at the End of the enumerated powers, the Congress may grant Monopolies in Trade and Commerce, constitute new Crimes, inflict unusual and severe Punishments, and extend their power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights.

There is no declaration of any kind for preserving the Liberty of the Press, the Tryal by Jury in civil Causes; nor against the Danger of standing Armys in time of Peace.

Storing, vol. 2, p. 13.

2.2.4.3 James Wilson, Speech at a Meeting in Philadelphia, October 6, 1787

… This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution:

for it would have been superfluous and absurd, to have stipulated with a foederal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence. For instance, the liberty of the press, which has been a copious subject of declamation and opposition: what controul can proceed from the foederal government, to shackle or destroy that sacred palladium of national freedom? If, indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the impost should be general in its operation.

Kaminski & Saladino, vol. 13, pp. 339–40.

2.2.4.4The Federal Farmer, No. 4, October 12, 1787

I confess I do not see in what cases the congress can, with any pretence of right, make a law to suppress the freedom of the press; though I am not clear, that congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed, and perhaps congress may require large bonds for the payment of these duties. Should the printer say, the freedom of the press was secured by the constitution of the state in which he lived, congress might, and perhaps, with great propriety, answer, that the federal constitution is the only compact existing between them and the people; in this compact the people have named no others, and therefore congress, in exercising the powers assigned them, and in making laws to carry them into execution, are restrained by nothing beside the federal constitution, any more than a state legislature is restrained by a compact between the magistrates and people of a county, city, or town of which the people, in forming the state constitution, have taken no notice.

It is not my object to enumerate rights of inconsiderable importance; but there are others, no doubt, which ought to be established as a fundamental part of the national system.

Storing, vol. 2, p. 250.

2.2.4.5An Old Whig, No. 1, October 12, 1787

… Should the freedom of the press be restrained on the subject of politics, there is no doubt it will soon after be restrained on all other subjects, religious as well as civil. …

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 378.

2.2.4.6Centinel, No. 2, October 24, 1787

FRIENDS, COUNTRYMEN, *and* FELLOW-CITIZENS, As long as the liberty of the press continues unviolated, and the people have the right of expressing and publishing their sentiments upon every public measure, it is next to impossible to enslave a free nation. The state of society must be very corrupt and base indeed, when the people in possession of such a monitor as the press, can be induced to exchange the heavenborn blessings of liberty for the galling chains of despotism. — Men of an aspiring and tyrannical disposition, sensible of this truth, have ever been inimical to the press, and have considered the shackling of it, as the first step towards the accomplishment of their hateful dominaton, and the entire suppression of all liberty of public discussion, as necessary to its support. — For even a standing army, that grand engine of oppression, if it were as numerous as the abilities of any nation could maintain, would not be equal to the purposes of despotism over an enlightenend [*sic*] people.

The abolition of that grand palladium of freedom, the liberty of the press, in the proposed plan of government, and the conduct of its authors, and patrons, is a striking exemplification of these observations. The reason assigned for the omission of a *bill of rights*, securing the *liberty of the press*, and *other invaluable personal rights*, is an insult on the understanding of the people.

…

Mr. *Wilson* asks, "What controul can proceed from the federal government to shackle or destroy that *sacred palladium* of national freedom, the *liberty of the press?*" What! — Cannot Congress, when possessed of the immense authority proposed to be devolved, restrain the printers, and put them under regulation. — Recollect that the omnipotence of the federal legislature over the State establishments is recognized by a

special article, *viz.* — “that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law* of the land; and the judges in every State shall be bound thereby, any thing in the *Constitutions* or laws of any State to the contrary notwithstanding.” — After such a declaration, what security does the *Constitutions* of the several States afford for the *liberty of the press and other invaluable personal rights*, not provided for by the new plan? — Does not this sweeping clause subject every thing to the controul of Congress?

…

The new plan, it is true, does propose to secure the people of the benefit of personal liberty by the *habeas corpus*; and trial by jury for all crimes, except in case of impeachment: but there is no declaration, … that *the liberty of the press be held sacred; … .*

[Philadelphia] Freeman’s Journal, Kaminski & Saladino, vol. 13, pp. 457, 460, 466.

2.2.4.7Timoleon, November 1, 1787

…

After some judicious reflections on this subject, which tended to shew the necessity of the most plain and unequivocal language in the all important business of constituting government, which necessarily conveying great powers, is always liable (from the natural tendency of power to corrupt the human heart and deprave the head) to great abuse; by perverse and subtle arguments calculated to extend dominion over all things and all men. One of the club supposed the following case: — A gentleman, *in the line of his profession* is appointed a *judge* of the supreme court under the new Constitution, and the *rulers*, finding that the rights of conscience and the freedom of the press were exercised in such a manner, by *preaching* and *printing* as to be troublesome to the new government—which event would probably happen, if the rulers finding themselves possessed of great power, should so use it as to oppress and injure the community.—In this state of things the *judge* is called upon, *in the line of his profession*, to give his opinion—whether the *new Constitution* admitted of a legislative act to *suppress the rights of conscience*, and *violate the liberty of the press*? The

answer of the learned *judge* is conceived in didactic mode, and expressed in learned phrase; thus,—In the 8th section of the first article of the *new Constitution*, the Congress have power given *to lay and collect taxes for the general welfare of the United States*. By this power, the right of taxing is co-extensive with the *general welfare*, and the *general welfare* is as unlimitted as actions and things are that may disturb or benefit that general welfare. A right being given to *tax* for the general welfare, necessarily includes the right of judging what is for the general welfare, and a right of judging what is for the general welfare, as *necessarily* includes a power of protecting, defending, and promoting it by all such laws and means as are fitted to that end; for, qui dat finem dat media ad finem necessaria, who gives the end gives the means necessary to obtain the end. The Constitution must be so construed as not to involve an absurdity, which would clearly follow from allowing the end and denying the means. A right of *taxing* for the general welfare being the highest and most important mode of providing for it, cannot be supposed to exclude inferior modes of effecting the same purpose, because the rule of law is, that, omne majus continct in se minus.

From hence it clearly results, that, if *preachers* and *printers* are troublesome to the new government; and that in the opinion of its rulers, it shall be for the general welfare to restrain or suppress both the one and the other, it may be done consistently with the new Constitution. And that this was the opinion of the community when they consented to it, is evident from this consideration; that although the all comprehending power of the new legislature is fixed, by its acts being made the *supreme law* of the land, any thing in the *Constitutions* or laws of any state to the contrary notwithstanding: Yet no *express* declaration in favor of the *rights of conscience* or *liberty* of the *press* is to be found in the new Constitution, as we see was carefully done in the *Constitutions* of the states composing this union — Shewing clearly, that what was *then* thought necessary to be specially reserved from the pleasure of power, is *now* designed to be yielded to its will.

A grave old gentleman of the club, who had sat with his head reclined on his hand, listening in pensive mood to the argument of the *judge*, said, “I verily believe, that neither the logic or the law of that opinion will be hereafter doubted by the professors of power, who, through the history of human nature, have been for enlarging the sphere of their authority. And thus the dearest rights of men and the best security of civil liberty may be sacrificed by the sophism of a lawyer, who, Carneades like, can to day shew

that to be necessary, before the people, which tomorrow he can likewise shew to be unnecessary and useless — For which reason the sagacious Cato advised, that such a man should immediately be sent from the city, as a person dangerous to the morals of the people and to society." The old gentleman continued, "I now plainly see the necessity of express declarations and reservations in favor of the great, unalienable rights of mankind, to prevent the oppressive and wicked extention of power to the ruin of human liberty. For the opinion above stated, absolutely refutes the sophistry of 'that being retained which is not given,' where the words conveying power admit of the most extensive construction that language can reach to, or the mind conceive, as is the case in this new Constitution. By which we have already seen how logically it may be proved, that both *religion* and the *press* can be made to bend before the views of power. …

New York Journal, Kaminski & Saladino, vol. 13, pp. 534–36.

2.2.4.8An Old Whig, No. 5, November 1, 1787

It is needless to repeat the necessity of securing other personal rights in the forming a new government. The same argument which proves the necessity of securing one of them shews also the necessity of securing others. Without a bill of rights we are totally insecure in all of them; and no man can promise himself with any degree of certainty that his posterity will enjoy the inestimable blessings of liberty of conscience, of freedom of speech and of writing and publishing their thoughts on public matters, of trial by jury, of holding themselves, their houses and papers free from seizure and search upon general suspicion or general warrants; or in short that they will be secured in the enjoyment of life, liberty and property without depending on the will and pleasure of their rulers.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 541.

2.2.4.9Cincinnatus, No. 1, November 1, 1787

You instance, Sir, the liberty of the press; which you would persuade us, is in *no* danger, though not secured, because there is no express power granted to regulate literary publications. But you surely know, Sir, that where

general powers are expressly granted, the particular ones comprehended within them, must also be granted. For instance, the proposed Congress are empowered — to define and punish offences against the law of the nations — mark well, Sir, if you please — to *define* and punish. Will you, will any one say, can any one even think that does not comprehend a power to define and declare all publications from the press against the conduct of government, in making treaties, or in any other foreign transactions, an offence against the law of nations? If there should ever be an influential president, or arbitrary senate, who do not choose that their transactions with foreign powers should be discussed or examined in the public prints, they will easily find pretexts to prevail upon the other branch to concur with them, in restraining what it may please them to call — the licentiousness of the press. And this may be, even without the concurrence of the representative of the people; because the president and senate are empowered to make treaties, and these treaties are declared the supreme law of the land.

What use they will make of this power, is not now the question. Certain it is, that such power is given, and that power is not restrained by any declaration — that the liberty of the press, which even you term, the sacred palladium of national freedom, shall be forever free and inviolable. I have proved that the power of restraining the press, is necessarily involved in the unlimited power of defining offences, or of making treaties, which are to be the supreme law of the land. You acknowledge, that it is not expressly excepted, and consequently it is at the mercy of the powers to be created by this constitution.

New York Journal, Storing, vol. 6, pp. 8–9.

2.2.4.10Cincinnatus, No. 2, November 8, 1787

I have proved, sir, that not only some power is given in the constitution to restrain, and even to subject the press, but that it is a power totally unlimited; and may certainly annihilate the freedom of the press, and convert it from being the palladium of liberty to become an engine of imposition and tyranny. It is an easy step from restraining the press to making it place the worst actions of government in so favorable a light, that we may groan under tyranny and oppression without knowing from whence it comes.

But you comfort us, by saying, — “there is no reason to suspect so popular a privilege will be neglected.” The wolf, in the fable, said as much to the sheep, when he was persuading them to trust him as their protector, and to dismiss their guardian dogs. Do you indeed suppose, Mr. Wilson, that if the people give up their privileges to these new rulers they will render them back again to the people? Indeed, sir, you should not trifle upon a question so serious — You would not have us to suspect any ill. If we throw away suspicion — to be sure, the thing will go smoothly enough, and we shall deserve to continue a free, respectable, and happy people. Suspicion shackles rulers and prevents good government. All great and honest politicians, *like yourself*, have reprobated it. Lord Mansfield is a great authority against it, and has often treated it as the worst of libels. But such men as Milton, Sidney, Locke, Montesquieu, and Trenchard, have thought it essential to the preservation of liberty against the artful and persevering encroachments of those with whom power is trusted. You will pardon me, sir, if I pay some respect to these opinions, and wish that the freedom of the press may be *previously* secured as a *constitutional and unalienable right*, and not left to the precarious care of popular privileges which may or may not influence our new rulers. You are fond of, and happy at, quaint expressions of this kind in your observation — that a formal declaration would have done harm, by implying, that some degree of power was given when we undertook to define its extent. This thought has really a brilliancy in it of the first water. But permit me, sir, to ask, why any saving clause was admitted into this constitution, when you tell us, every thing is reserved that is not expressly given? Why is it said in sec. 9th, “The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by Congress, prior to the year, 1808.” There is no power expressly given to the Congress to prohibit migrations and importations. By your doctrine then they could have none, and it was, according to your own position, nugatory to declare they should not do it. Which are we to believe, sir, — you or the constitution? The text, or the comment. If the former, we must be persuaded, that in the contemplation of the framers of the constitution implied powers were given, otherwise the exception would have been an absurdity. If we listen to you we must affirm it to be a distinctive characteristic of the constitution, that — “what is not expressly given is reserved.” Such are the inconsistencies into which men over ingenuous, like yourself, are betrayed in advocating a bad cause. Perhaps four months more consideration of the subject, would have rendered you more guarded.

New York Journal, Storing, vol. 6, pp. 10–11.

2.2.4.11A Countryman, No. 2, November 22, 1787

Of a very different nature, tho' only one degree better than the other reasoning, is all that sublimity of *nonsense* and *alarm*, that has been thundered against it in every shape of *metaphoric terror*, on the subject of a *bill* of *rights*, the *liberty* of the *press, rights of conscience, rights of taxation and election, trials in the vicinity, freedom of speech, trial by jury*, and a *standing army*. These last are undoubtedly important points, much too important to depend on mere paper protection. For, guard such privileges by the strongest expressions, still if you leave the legislative and executive power in the hands of those who are or may be disposed to deprive you of them — you are but slaves. Make an absolute monarch — give him the supreme authority, and guard as much as you will by bills of rights, your liberty of the press, and trial by jury; — he will find means either to take them from you, or to render them useless.

…

On examining the new proposed constitution, there can not be a question, but that there is authority enough lodged in the proposed federal Congress, if abused, to do the greatest injury. And it is perfectly idle to object to it, that there is no bill of rights, or to propose to add to it a provision that a trial by jury shall in no case be omitted, or to patch it up by adding a stipulation in favor of the press, or to guard it by removing the paltry objection to the right of Congress to regulate the time and manner of elections.

New Haven Gazette, Kaminski & Saladino, vol. 14, pp. 172–74.

2.2.4.12Landholder, No. 6, December 10, 1787

There is no declaration of any kind to preserve the liberty of the press, &c. Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that congress have no power to prohibit either, and can have no temptation. This objection is answered in that the states have all the power originally, and congress have only what the states grant them.

Connecticut Courant, Kaminski & Saladino, vol. 14, p. 401.

2.2.4.13The Federal Farmer, No. 6, December 25, 1787

The following, I think, will be allowed to be unalienable or fundamental rights in the United States:—

No man, demeaning himself peaceably, shall be molested on account of his religion or mode of worship — The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it — Individual security consists in having free recourse to the laws — The people are subject to no laws or taxes not assented to by their representatives constitutionally assembled — They are at all times intitled to the benefits of the writ of habeas corpus, the trial by jury in criminal and civil causes — They have a right, when charged, to a speedy trial in the vicinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge — No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects — The people have a right to assemble in an orderly manner, and petition the government for a redress of wrongs — The freedom of the press ought not to be restrained — No emoluments, except for actual service — No hereditary honors, or orders of nobility, ought to be allowed — The military ought to be subordinate to the civil authority, and no soldier be quartered on the citizens without their consent — The militia ought always to be armed and disciplined, and the usual defence of the country — The supreme power is in the people, and power delegated ought to return to them at stated periods, and frequently — The legislative, executive, and judicial powers, ought always to be kept distinct — others perhaps might be added.

Storing, vol. 2, p. 262.

2.2.4.14The Federal Farmer, No. 16, January 20, 1788

All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever. Why should not the people, in adopting a federal constitution, declare this, even if there are only doubts about it. But, say the advocates, all powers not given are reserved: — true; but the great question is, are not powers given, in the exercise of which this right may be destroyed? The people’s or the printers claim to a free press, is founded on the fundamental laws, that is, compacts, and state constitutions, made by the people. The people, who can annihilate or alter those constitutions, can annihilate or limit this right. This may be done by giving general powers, as well as by using particular words. No right claimed under a state constitution, will avail against a law of the union, made in pursuance of the federal constitution: therefore the question is, what laws will congress have a right to make by the constitution of the union, and particularly touching the

press? By art. 1. sect. 8. congress will have power to lay and collect taxes, duties, imposts and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever — taxes on houses, lands, polls, industry, merchandize, &c. — taxes on deeds, bonds, and all written instruments — on writs, pleas, and all judicial proceedings, on licences, naval officers papers, &c. on newspapers, advertisements, &c. and to require bonds of the naval officers, clerks, printers, &c. to account for the taxes that may become due on papers that go through their hands. Printing, like all other business, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it. There may be other powers given, in the exercise of which this freedom may be effected; and certainly it is of too much importance to be left thus liable to be taxed, and constantly to constructions and inferences. A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each others sentiments; are enabled to unite, and become formidable to those rulers who adopt improper measures. Newspapers may sometimes be the vehicles of abuse, and of many things not true; but these are but small inconveniences, in my mind, among many advantages. A celebrated writer, I have several times quoted, speaking in high terms of the English liberties, says, “lastly the key stone was put to the arch, by the final establishment of the freedom of the press.”

Storing, vol. 2, pp. 329–30.

2.2.4.15Aristides’ Remarks on the Proposed Plan, January 31, 1788

By their scheme, however, thus deeply concerted, the house of representatives is to be chosen by the people once in two years; and if they have acted so as to warrant any reasonable apprehension of their designs, it will be easy, at any time, to prevent their election. The truth is, that very few of them either wish to be elected, or would consent to serve, either in that house, or in the senate. I have exercised my imagination to devise in what manner they, or any other men, supposing them to bear full sway in both houses, could erect this imaginary fabric of power. I request any person to point out any law, or system of laws, that could be possibly contrived for that purpose, obtain the final assent of each branch, and be

carried into effect, contrary to the interests and wishes of a free, intelligent, prying people, accustomed to the most unbounded freedom of inquiry. To begin by an attempt to restrain the press, instead of promoting their designs, would be the most effectual thing to prevent them.

…

Whilst mankind shall believe freedom to be better than slavery; whilst our lands shall be generally distributed, and not held by a few insolent barons, on the debasing terms of vassallage; whilst we shall teach our children to read and write; whilst the liberty of the press, that grand palladium, which tyrants are compelled to respect, shall remain; whilst a spark of public love shall animate even a small part of the people; whilst even self-love shall be the general ruling principle; so long will it be impossible for an aristocracy to arise from the proposed plan. — Should Heaven, in its wrath, inflict blindness on the people of America; should they reject this fair offer of permanent safety and happiness; — to predict, what species of government shall at last spring from disorder, is beyond the short reach of political foresight.

Kaminski & Saladino, vol. 15, pp. 522–23, 548.

2.2.4.16A Columbian Patriot, February 1788

2. There is no security in the profered system, either for the rights of conscience, or the liberty of the Press: Despotism usually while it is gaining ground, will suffer men to think, say, or write what they please; but when once established, if it is thought necessary to subserve the purposes of arbitrary power, the most unjust restrictions may take place in the first instance, and an *imprimator* [*sic*] on the Press in the next, may silence the complaints, and forbid the most decent remonstrances of an injured and oppressed people.

Kaminski & Saladino, vol. 16, p. 279.

2.2.4.17Hugh Williamson, February 25–27, 1788

We have been told that the Liberty of the Press is not secured by the New Constitution. Be pleased to examine the plan, and you will find that the

Liberty of the Press and the laws of Mahomet are equally affected by it. The New Government is to have the power of protecting literary property; the very power which you have by a special act delegated to the present Congress. There was a time in England, when neither book, pamphlet, nor paper could be published without a license from Government. That restraint was finally removed in the year 1694 and by such removal, their press became perfectly free, for it is not under the restraint of any license. Certainly the new Government can have no power to impose restraints. The citizens of the United States have no more occasion for a second Declaration of Rights, than they have for a section in favor of the press. Their rights, in the several States, have long since been explained and secured by particular declarations, which make a part of their several Constitutions. It is granted, and perfectly understood, that under the Government of the Assemblies of the States, and under the Government of the Congress, every right is reserved to the individual, which he has not expressly delegated to this, or that Legislature. …

[New York] Daily Advertiser, Kaminski & Saladino, vol. 16, p. 202.

2.2.4.18A Plebeian, Spring 1788

"We are told, (says he [John Jay]) among other strange things, that the liberty of the press is left insecure by the proposed constitution, and yet that constitution says neither more nor less about it, than the constitution of the state of New-York does. We are told it deprives us of trial by jury, whereas the fact is, that it expressly secures it in certain cases, and takes it away in none, &c. it is absurd to construe the silence of this, or of our own constitution relative to a great number of our rights into a total extinction of them; silence and a blank paper neither grant nor take away anything."

It may be a strange thing to this author to hear the people of America anxious for the preservation of their rights, but those who understand the true principles of liberty, are no strangers to their importance. The man who supposes the constitution, in any part of it, is like a blank piece of paper, has very erroneous ideas of it. He may be assured every clause has a meaning, and many of them such extensive meaning, as would take a volume to unfold. The suggestion, that the liberty of the press is secure, because it is not in express words spoken of in the constitution, and that the trial by jury is not taken away, because it is not said in so many words and

letters it is so, is puerile and unworthy of a man who pretends to reason. We contend, that by the indefinite powers granted to the general government, the liberty of the press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom. The trial by jury, in all civil cases is left at the discretion of the general government, except in the supreme court on the appellate jurisdiction, and in this I affirm it is taken away, not by express words, but by fair and legitimate construction and inference; for the supreme court have expressly given them an appellate jurisdiction, in every case to which their powers extend (with two or three exceptions) both as to *law and fact*. The court are the judges; every man in the country, who has served as a juror, knows, that there is a distinction between the court and the jury, and that the lawyers in their pleading, make the distinction. If the court, upon appeals, are to determine both the law and the fact, there is no room for a jury, and the right of trial in this mode is taken away.

The author manifests equal levity in referring to the constitution of this state, to shew that it was useless to stipulate for the liberty of the press, or to insert a bill of rights in the constitution. With regard to the first, it is perhaps an imperfection in our constitution that the liberty of the press is not expressly reserved; but still there was not equal necessity of making this reservation in our State as in the general Constitution, for the common and statute law of England, and the laws of the colony are established, in which this privilege is fully defined and secured. It is true, a bill of rights is not prefixed to our constitution, as it is in that of some of the states; but still this author knows, that many essential rights are reserved in the body of it; and I will promise, that every opposer of this system will be satisfied, if the stipulations that they contend for are agreed to, whether they are prefixed, affixed, or inserted in the body of the constitution, and that they will not contend which way this is done, if it be but done.

Storing, vol. 6, pp. 144–45.

2.2.4.19Marcus, No. 4, March 12, 1788

VIIIth Objection.

“Under their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments,

and extend their power as far as they shall think proper; so that the State Legislatures have no security for the powers now presumed to remain to them: or the people for their rights. There is no declaration of any kind for preserving the liberty of the press, the trial by jury in civil causes, nor against the danger of standing armies in time of peace."

…

Answer.

The Liberty of the Press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works. This authority has been long exercised in England, where the press is as free as among ourselves or in any country in the world, and surely such an encouragement to genius is no, restraint on the liberty of the press, since men are allowed to publish what they please of their own; and so far as this may be deemed a restraint upon others it is certainly a reasonable one, and can be attended with no danger of copies not being sufficiently multiplied, because the interest of the proprietor will always induce him to publish a quantity fully equal to the demand — besides that such encouragement may give birth to many excellent writings which would otherwise have never appeared. If the Congress should exercise any other power over the press than this, they will do it without any warrant from this Constitution, and must answer for it as for any other act of tyranny.

Norfolk and Portsmouth Journal, Kaminski & Saladino, vol. 16, pp. 379–82.

2.2.4.20Benjamin Franklin, An Account of the Supremest Court of Judicature in Pennsylvania, viz., the Court of the Press, September 12, 1789

POWER OF THIS COURT.

It may receive and promulgate accusations of all kinds, against all persons and characters among the citizens of the State, and even against all inferior courts; and may judge, sentence, and condemn to infamy, not only private individuals, but public bodies, &c., with or without inquiry or hearing, *at the court's discretion*.

in whose favour and for whose emolument this court is established.

In favour of about one citizen in five hundred, who, by education or practice in scribbling, has acquired a tolerable style as to grammar and construction, so as to bear printing; or who is possessed of a press and a few types. This five hundredth part of the citizens have the privilege of accusing and abusing the other four hundred and ninety-nine parts at their pleasure; or they may hire out their pens and press to others for that purpose.

PRACTICE OF THE COURT.

It is not governed by any of the rules of common courts of law. The accused is allowed no grand jury to judge of the truth of the accusation before it is publicly made, nor is the Name of the Accuser made known to him nor has he an Opportunity of confronting the Witnesses against him; for they are kept in the dark, as in the Spanish Court of Inquisition. Nor is there any petty Jury of his Peers, sworn to try the Truth of the Charges. The Proceedings are also sometimes so rapid, that an honest, good Citizen may find himself suddenly and unexpectedly accus'd, and in the same Morning judg'd and condemn'd, and sentence pronounc'd against him, that he is a *Rogue* and a *Villain*. Yet, if an officer of this court receives the slightest check for misconduct in this his office, he claims immediately the rights of a free citizen by the constitution, and demands to know his accuser, to confront the witnesses, and to have a fair trial of his peers.

THE FOUNDATION OF ITS AUTHORITY.

It is said to be founded on an Article of the Constitution of the State, which established *the Liberty of the Press*; a Liberty which every Pennsylvanian would fight and die for; tho' few of us, I believe, have distinct Ideas of its Nature and Extent. It seems indeed somewhat like the *Liberty of the Press* that Felons have, by the Common Law of England, before Conviction, that is, to be Press'd to death or hanged. If by the *Liberty of the Press* were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the *Privilege* of not being abus'd myself.

BY WHOM THIS COURT IS COMMISSIONED OR CONSTITUTED.

It is not by any Commission from the Supreme Executive Council, who

might previously judge of the Abilities, Integrity, Knowledge, &c. of the Persons to be appointed to this great Trust, of deciding upon the Characters and good Fame of the Citizens; for this Court is above that Council, and may *accuse*, *judge*, and *condemn* it, at pleasure. Nor is it hereditary, as in the Court of *Dernier Resort*, in the Peerage of England. But any Man who can procure Pen, Ink, and Paper, with a Press, and a huge pair of BLACKING BALLS, may commissionate himself; and his court is immediately established in the plenary Possession and exercise of its rights. For, if you make the least complaint of the *judge's* conduct, he daubs his blacking balls in your face wherever he meets you; and, besides tearing your private character to flitters, marks you out for the odium of the public, as an *enemy to the liberty of the press*.

OF THE NATURAL SUPPORT OF THESE COURTS.

Their support is founded in the depravity of such minds, as have not been mended by religion, nor improved by good education;

"There is a Lust in Man no Charm can tame,
Of loudly publishing his Neighbour's Shame."
Hence;
"On Eagle's Wings immortal Scandals fly,
While virtuous Actions are but born and die."

DRYDEN

Whoever feels pain in hearing a good character of his neighbour, will feel a pleasure in the reverse. And of those who, despairing to rise into distinction by their virtues, are happy if others can be depressed to a level with themselves, there are a number sufficient in every great town to maintain one of these courts by their subscriptions. A shrewd observer once said, that, in walking the streets in a slippery morning, one might see where the good-natured people lived by the ashes thrown on the ice before their doors; probably he would have formed a different conjecture of the temper of those whom he might find engaged in such a subscription.

OF THE CHECKS PROPER TO BE ESTABLISHED AGAINST THE ABUSE OF POWER IN THESE COURTS.

Hitherto there are none. But since so much has been written and published on the federal Constitution, and the necessity of checks in all other parts of good government has been so clearly and learnedly explained, I find myself so far enlightened as to suspect some check may be proper in this part also; but I have been at a loss to imagine any that may not be construed an

infringement of the sacred *liberty of the press*. At length, however, I think I have found one that, instead of diminishing general liberty, shall augment it; which is, by restoring to the people a species of liberty, of which they have been deprived by our laws, I mean the *liberty of cudgel*. In the rude state of society prior to the existence of laws, if one man gave another ill language, the affronted person would return it by a box on the ear, and, if repeated, by a good drubbing; and this without offending against any law. But now the right of making such returns is denied, and they are punished as breaches of the peace; while the right of abusing seems to remain in full force, the laws made against it being rendered ineffectual by the *liberty of the press*.

My proposal then is, to leave the liberty of the press untouched, to be exercised in its full extent, force, and vigor; but to permit the *liberty of the cudgel* to go with it *pari passu*. Thus, my fellow-citizens, if an impudent writer attacks your reputation, dearer to you perhaps than your life, and puts his name to the charge, you may go to him as openly and break his head. If he conceals himself behind the printer, and you can nevertheless discover who he is, you may in like manner waylay him in the night, attack him behind, and give him a good drubbing. Thus far goes my project as to *private* resentment and retribution. But if the public should ever happen to be affronted, *as it ought to be*, with the conduct of such writers, I would not advise proceeding immediately to these extremities; but that we should in moderation content ourselves with tarring and feathering, and tossing them in a blanket.

If, however, it should be thought that this proposal of mine may disturb the public peace, I would then humbly recommend to our legislators to take up the consideration of both liberties, that of the *press*, and that of the *cudgel*, and by an explicit law mark their extent and limits; and, at the same time that they secure the person of a citizen from *assaults*, they would likewise provide for the security of his *reputation*.

Writings of Benjamin Franklin, Albert Henry Smith, ed. (New York: Macmillan, 1907), vol. 10, pp. 36–40.

2.2.5LETTERS AND DIARIES

2.2.5.1Thomas Jefferson to Edward Carrington, January 16, 1787

The tumults in America, I expected would have produced in Europe an unfavorable opinion of our political state. But it has not. On the contrary, the small effect of those tumults seems to have given more confidence in the firmness of our governments. The interposition of the people themselves on the side of government has had a great effect on the opinion here. I am persuaded myself that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interpositions of the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive these papers and be capable of reading them. I am convinced that those societies (as the Indians) which live without government enjoy in their general mass an infinitely greater degree of happiness than those who live under European governments. Among the former, public opinion is in the place of law, and restrains morals as powerfully as laws ever did any where. Among the latter, under pretence of governing they have divided their nations into two classes, wolves and sheep. I do not exaggerate. This is a true picture of Europe. Cherish therefore the spirit of our people, and keep alive their attention. Do not be too severe upon their errors, but reclaim them by enlightening them. If once they become inattentive to the public affairs, you and I, and Congress, and Assemblies, judges and governors shall all become wolves. It seems to be the law of our general nature, in spite of individual exceptions; and experience declares that man is the only animal which devours his own kind, for I can apply no milder term to the governments of Europe, and to the general prey of the rich on the poor.

Boyd, vol. 11, pp. 48–49.

2.2.5.2Richard Henry Lee to Samuel Adams, October 27, 1787

… Because Independent States are in the same relation to each other as Individuals are with respect to uncreated government. So that if reservations were necessary in one case, they are equally necessary in the other. But the futility of this distinction appears from the conduct of the Convention itself, for they have made several reservations—every one of which proves the Rule in Conventional ideas to be, that what was not reserved was given — For example, they have reserved from their Legislature a power to prevent the importation of Slaves for 20 years, and also from Creating Titles. But they have no reservation in favor of the Press, Rights of Conscience, Trial by Jury in Civil Cases, or Common Law securities.

As if these were of less importance to the happiness of Mankind than the making of Lords, or the importations of Slaves!…

Kaminski & Saladino, vol. 13, pp. 484–85.

2.2.5.3Thomas Jefferson to James Madison, December 20, 1787

… There are other good things of less moment. I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations.

Boyd, vol. 12, p. 440.

2.2.5.4Thomas Jefferson to William Stephens Smith, February 2, 1788

… But I own it astonishes me to find such a change wrought in the opinions of our countrymen since I left them, as that threefourths of them should be contented to live under a system which leaves to their governors the power of taking from them the trial by jury in civil cases, freedom of religion, freedom of the press, freedom of commerce, the habeas corpus laws, and of yoking them with a standing army. This is a degeneracy in the principles of

liberty to which I had given four centuries instead of four years.

Boyd, vol. 12, p. 558.

2.2.5.5Thomas Jefferson to Alexander Donald, February 7, 1788

… By a declaration of rights I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by juries in all cases, no suspensions of the habeas corpus, no standing armies. These are fetters against doing evil which no honest government should decline.

Boyd, vol. 12, p. 571.

2.2.5.6Thomas Jefferson to C. W. F. Dumas, February 12, 1788

… Besides other objections of less moment, she will insist on annexing a bill of rights to the new constitution, *i.e.* a bill wherein the government shall declare that… 2. Printing presses free.

Boyd, vol. 12, p. 583.

2.2.5.7Thomas Jefferson to Francis Hopkinson, March 13, 1789

… What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury in all cases determinable by the laws of the land.

Boyd, vol. 14, p. 650.

2.2.5.8Edmund Randolph to James Madison, March 27, 1789

… The liberty of the press is indeed a blessing, which ought not to be surrendered but with blood; and yet it is not an illfounded expectation in

those, who deserve well of their country, that they should be assailed by an enemy in disguise, and have their characters deeply wounded, before they can prepare for defence. I apply not this to any particular person.

Veit, pp. 223–24.

2.2.5.9 Jeremy Belknap to Paine Wingate, May 29, 1789

… You will see in the speech wh. our *new* Lieut. Governor [*Samuel Adams*] made at his investiture that he has not thrown off the old idea of "*independence*" as an attribute of each individual State in the "confederated Republic" — & you will know in what light to regard his "devout & fervent wish" that the "people may enjoy well grounded confidence that their *personal & domestic* rights are *secure*." This is the same Language or nearly the same which he used in the Convention when he moved for an addition to the proposed Amendments — by inserting a clause to provide for the Liberty of the press — the right to keep arms — Protection from seizure of person & property & the *Rights of Conscience*. By which motion he gave an alarm to both sides of the house & had nearly overset the whole business which the Friends of the Constitution had been labouring for several Weeks to obtain. …

Veit, p. 241.

2.2.5.10 George Clymer to Richard Peters, June 8, 1789

Madison this morning is to make an essay towards amendments — but whether he means merely a tub to the whale, or declarations about the press liberty of conscience &c. or will suffer himself to be so far frightened with the antifederalism of his own state as to attempt to lop off essentials I do not know — I hope however we shall be strong enough to postpone. …

Afternoon — Madison's has proved a tub on a number of Ad. but Gerry is not content with them alone, and proposes to treat us with all the amendments of all the antifederalists in America.

Veit, p. 245.

2.2.5.11Fisher Ames to Thomas Dwight, June 11, 1789

Mr. Madison has introduced his long expected Amendments. They are the fruit of much labour and research. He has hunted up all the grievances and complaints of newspapers — all the articles of Conventions — and the small talk of their debates. It contains a Bill of Rights — the right of enjoying property — of changing the govt. at pleasure — freedom of the press — of conscience — of juries — exemption from general Warrants gradual increase of representatives till the whole number at the rate of one to every 30,000 shall amount to and allowing two to every State, at least this is the substance. There is too much of it — O. I had forgot the right of the people to bear Arms.

Risum teneatis amici —

Upon the whole, it may do good towards quieting men who attend to sounds only, and may get the mover some popularity — which he wishes.

Veit, p. 247.

2.2.5.12Fisher Ames to George R. Minot, June 12, 1789

… The civil departments will employ us next, and the judiciary the Senate. They will finish their stint, as the boys say, before the House has done. Their number is less, and they have matured the business in committee. Yet Mr. Madison has inserted, in his amendments, the increase of representatives, each State having two at least. The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people. Freedom of the press, too. There is a prodigious great dose for a medicine. But it will stimulate the stomach as little as hasty-pudding. It is rather food than physic. An immense mass of sweet and other herbs and roots for a diet drink.

Veit, pp. 247–48.

2.2.5.13Abraham Baldwin to Joel Barlow, June 14, 1789

A few days since, Madison brought before us propositions of amendment agreeable to his promise to his constituents. Such as he supposed would tranquillize the minds of honest opposers without injuring the system. *viz.*

"That what is not given is reserved, that liberty of the press & trial by jury shall remain *inviolable*. that the representation shall never be less than one for every 30,000 &c. ordered to lie on the table.["] We are too busy at present in cutting away at the whole cloth, to stop to do any body's patching. There is no such thing as antifederalism heard of. R[hode] I[sland] and N[orth] C[arolina] had local reasons for their conduct, and will come right before long.

Veit, p. 250.

2.2.5.14Henry Gibbs to Roger Sherman, July 17, 1789

… All Ambiguity of Expression certainly ought to be remov'd; Liberty of Conscience in religious matters, right of trial by Jury, Liberty of the Press &c. may perhaps be more explicitly secur'd to the Subject & a general reservation made to the States respectively of all the powers not expressly delegated to the general Government.

Veit, p. 263.

2.2.5.15Pierce Butler to James Iredell, August 11, 1789

… If you wait for substantial amendments, you will wait longer than I wish you to do, speaking *interestedly*. A few *milk-and-water* amendments have been proposed by Mr. M[*adison*]., such as liberty of conscience, a free press, and one or two general things already well secured. I suppose it was done to keep his promise with his constituents, to move for alterations; but, if I am not greatly mistaken, he is not hearty in the cause of amendments.

Veit, p. 274.

2.2.5.16Thomas Jefferson to James Madison, August 28, 1789

[T]he following alterations & additions would have pleased me. Art 4. "The people shall not be deprived or abridged of their right to speak to write or *otherwise* to publish any thing but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the

confederacy with foreign nations.

Hobson & Rutland, vol. 12, p. 363.

2.2.5.17Theodorick Bland Randolph to St. George Tucker, September 9, 1789

… The house of Representatives have been for some time past engaged on the subject of amendments to the constitution, though in my opinion they have not made one single material one. The senate are at present engaged on the subject; Mr. Richd. H. Lee told me that he proposed to strike out the standing army in time of peace but could not carry it. He also said that it has been proposed, and warmly favoured that, liberty of Speach [*sic*] and of the press may be stricken out, as they only tend to promote licenciousness. If this takes place god knows what will follow.

Veit, p. 293.

2.3Discussion of Rights

2.3.1TREATISES

2.3.1.1Bacon, 1740

Libel.

A Libel is (*a*) defined a malicious Defamation, expressed either in Printing or Writing, or by Signs, Pictures, &*c*. tending either to blacken the Memory of one who is dead, or the Reputation of one who is alive, and thereby exposing him to publick Hatred, Contempt and Ridicule.[1]

But for the better Understanding the Nature of this Offence, I shall consider,

(A) What shall be said a Libel: And herein,

1. How far it is necessary that it should be in Writing.
2. What Degree of Defamation will amount to a Libel.

3. What Certainty in the Matter and Application will make it a Libel.
4. Whether any Proceedings in a Court of Justice will amount to a Libel.
5. Whether any Thing of this Kind can be justified.

(B) Who shall be said a Libeller: And herein,

1. Who shall be said the Author or Composer of a Libel.
2. Who the Publisher.

(C) The Offenders how punished.

(A) WHAT SHALL BE SAID A LIBEL: AND HEREIN,

1. HOW FAR IT IS NECESSARY THAT IT SHOULD BE IN WRITING.

THIS Species of Defamation is usually termed *written Scandal*, and thereby receives an Aggravation, in that it is presumed to have been entered upon with Coolness and Deliberation, and to continue longer, and propagate wider and farther than any other Scandal.[2]

But it is clearly agreed, that not only written or printed Scandal come within the Notion of a Libel, but also may be applied to any Defamation whatsoever, expressed either by Signs or Pictures; as by fixing up a Gallows at a Man's Door, or elsewhere, or by Painting him in a shameful or ignominious Manner, as by exposing a Man and his Wife by a Skimmington or Riding, tho' a special Custom is alledged for such Practice.[3]

And since the chief Cause, for which the Law so severely punishes all Offences of this Nature, is a direct Tendency of them to a Breach of publick Peace, by provoking the Parties injured, and their Friends and Families, to Acts of Revenge, which it would be impossible to restrain by the severest Laws, were there no Redress from publick Justice for Injuries of this Kind, which, of all others, are most sensibly felt; and since the plain Meaning of such Scandal, as is expressed by Signs or Pictures, is as obvious to common Sense, and as easily understood by every common Capacity, and altogether as provoking as that which is expressed by Writing or Printing, why should it not be equally Criminal?[4]

2. WHAT DEGREE OF DEFAMATION WILL AMOUNT TO A LIBEL.

As every Person desires to appear agreeable in Life, and must be highly provoked by such ridiculous Representations of him, as tend to lessen him in the Esteem of the World, and take away his Reputation, which, to some Men, is more dear than Life itself : Hence it hath been held, that not only Charges of a flagrant Nature, and which reflect a Moral Turpitude on the

Party, are libellous, but also such as set him in a scurrilous ignominious Light; for these equally create ill Blood, and provoke the Parties to Acts of Revenge and Breaches of the Peace.[5]

Hence it hath been held, that Words, tho' not scandalous in themselves, yet if published in Writing, and tending in any Degree to the Discredit of a Man, are libellous, whether such Words defame private Persons only, or Persons employed in a publick Capacity; in which latter Case they are said to receive an Aggravation, as they tend to scandalize the Government, by reflecting on those who are intrusted with the Administration of publick Affairs, which doth not only endanger the publick Peace, as all other Libels do, by stirring up the Parties immediately concerned in it to Acts of Revenge, but also have a direct Tendency to breed in the People a Dislike of their Governors, and incline them to Faction and Sedition.[6]

As where a Person delivered a Ticket up to the Minister after Sermon, wherein he desired him to take Notice, that Offences passed now without Controul from the Civil Magistrate, and to quicken the Civil Magistrate to do his Duty, &*c*. and this was held to be a Libel, tho' no Magistrates in particular were mentioned, and tho' it was not averred that the Magistrates suffered those Vices knowingly.[7]

A. Gunsmith published an Advertisement in a common NewsPaper, that he had invented a short Kind of Gun that shot as far as others of a longer Size, and that he was made Gunsmith to the Prince of *Wales*; and *B*. another Gunsmith, counter-advertised, *That whereas*, &c. reciting the former Paragraph, *he desired all Gentlemen to be cautious, for that the said* A. *durst not engage with any Artist in Town, nor ever did make such an Experiment, except out of a Leather Gun, as any Gentleman might be satisfied at the* Cross Guns *in* Long-Acre, *the said* B.*'s House*. And the Court held, that tho' *B*. or any other of the Trade, might counter-advertise what was published of *A*. yet that that should have been done without any general Reflections on him in the Way of his Business; that the Advice to *all Gentlemen to be cautious*, was a Reflection on his Honesty, as if he would deceive the World by a fictitious Advertisement, and the Allegation, that he would not engage with an Artist, was setting him below the rest of his Trade, and calling him a Bungler in general Terms, and not relative to the precedent Matter, and that the Words *except out of a Leather Gun*, was charging him with a Lye, the Word *Gun* being vulgarly used for a Lye, and *Gunner* for a Lyar; and that therefore these Words were libellous, and gave Judgment accordingly; and herein the Court held, that Words, tho' not

scandalous in themselves, yet being published in Writing, and tending any way to the Party's Discredit, were actionable, and that all Words were to be construed *secundum Subjectam Materiam*, and to be understood by the Court in the same Sense that others do.[8]

But tho' every Species and Degree of Calumny and Detraction of this Kind are deemed odious in the Eye of the Law, and punishable either by Civil Action or Criminal Prosecution, in most Cases, at the Election of the Party injured; yet the Court of King's Bench, whose Jurisdiction herein is founded upon the Necessity of preventing Quarrels and ill Blood, and which deals with this Offence as of dangerous Consequence to, and destructive of the Peace of the Nation, always exercises a discretionary Power in granting an Information for an Offence of this Nature, and will, in many Cases, leave the Party to his ordinary Remedy; as where the Application is made (*a*) after a great Length of Time; so (*b*) where the Matter complained of as a Libel happens to be true; so (*c*) where the Granting the Information would be a Discouragement to learned Inquiries; or (*d*) where the Matter complained of was intended for Reformation, not Defamation.[9]

So where a Man advertised in a publick Newspaper, that his Wife had eloped from him, and cautioned all Persons from trusting her, and an Information for a Libel being moved for, it was denied, because it was the only Way the Husband could take to secure himself.[10]

So where it was advertised in one of the Daily Papers, that Lady *Mordington* kept an Assembly in *Moorfields*, and it being counter-advertised, by my Lord's Order, that the Person calling herself Lady *Mordington* was an Impostrix, and that there was no such Person except his Wife, who always lived with him; the Court refused to grant an Information; for tho' she be called an Impostrix, yet that relates to her as assuming the Title of Lady *Mordington*, and which she is alledged not to have any Right to; and therefore in this Respect may well be called an Impostrix.[11]

A Writing was directed to General *Wills*, and the four principal Officers of the Guards, to be presented to his Majesty for Redress; the Paper contained the Defendant's Case, that he furnished the Guard at *Whitehall* with Fire and Candle, for which the Government owed him 350 *l.* that he obtained a Warrant for his Money, and Captain *Carr* (the Prosecutor) told him, that if he would assign the Warrant, he would procure him the Money; the Warrant was assigned, and the Money paid to *Carr*, who refused paying

it to the Defendant; and the Question was, if an Information should be granted; and the Court held it no Libel, but a Representation of an Injury, drawn up in a proper Way for Redress, without any Intention to asperse the Prosecutor; and tho' there be a Suggestion of a Fraud, yet that is no more than what is in every Bill in Chancery, which was never held libellous, if relative to the Subject Matter.[12]

Here it may be proper to insert the remarkable Case of Parson *Prick*, who in a Sermon recited a Story out of *Fox*'s *Martyrology*, that one *Greenwood*, being a perjured Person, and a great Persecutor, had great Plagues inflicted on him, and was killed by the Hand of God; whereas in Truth he was never so plagued, and was himself present at that Sermon; and he thereupon brought his Action upon the Case, for calling him a perjured Person; and the Defendant pleaded Not guilty; and this Matter being disclosed upon the Evidence, *Wray* Chief Justice delivered the Law to the Jury, that it being delivered but as a Story, and not with any Malice or Intention to slander any Person, he was not guilty of the Words maliciously, and so was found not guilty.[13]

3. WHAT CERTAINTY IN THE MATTER AND APPLICATION WILL MAKE IT A LIBEL.

It seems to be now agreed, that not only Scandal expressed in an open and direct Manner, but also such as is expressed in Allegory and Irony amounts to a Libel, and that the Judges are to understand it in the same Manner as others do, without any strained Endeavours to find out Loopholes, or to palliate the Offence, which in some Measure would be to encourage Scandal; as where a Writing in a taunting Manner, reckoning up several Acts of publick Charity done by one, says, *You will not play the* Jew, *nor the Hypocrite*, and so goes on, in a Strain of Ridicule, to insinuate, that what he did was owing to his Vainglory; or where a Writing, pretending to recommend to one the Characters of several great Men for his Imitation, instead of taking Notice of what they are generally esteemed famous for, pitched on such Qualities as their Enemies charge them with the Want of; as by proposing such a one to be imitated for his Courage, who is known to be a great Statesman, but no Soldier, and another to be imitated for his Learning, who is known to be a great General, but no Scholar, &*c*. which Kind of Writing is as well understood to mean only to upbraid the Parties with the Want of these Qualities, as if it had directly and expresly done so.[14]

And from the same Foundation it hath also been resolved, that a defamatory Writing expressing only one or two Letters of a Name, in such a Manner that from what goes before, and follows after, it must needs be

understood to signify such a Person in the plain, obvious, and natural Construction of the Whole, and would be perfect Nonsense if strained to any other Meaning, is as properly a Libel as if it had expressed the whole Name at large; for it brings the utmost Contempt upon the Law, to suffer its Justice to be eluded by such trifling Evasions; and it is a ridiculous Absurdity to say, that a Writing, which is understood by every the meanest Capacity, cannot possibly be understood by a Judge and Jury.[15]

But it is said, that no Writing whatsoever is to be esteemed a Libel, unless it reflect upon some particular Person; and that a Writing full of obscene Ribaldry, without any kind of Reflection on any one, is not punishable at all by any Prosecution at Common Law, but the Author may be bound to his good Behaviour, as a scandalous Person of evil Fame.[16]

But a Scandal published of three or four, or any one or two of them, is punishable, at the Complaint of one or more, or all of them.[17]

The Defendant was charged in an Information with writing a Libel against the Protestant Religion and Bishops, *Inuendo* the Bishops of *England*; he was found guilty; and in Arrest of Judgment it was offered, that the Bishops libelled were not *English* Bishops, nor could the *Inuendo* support such Construction; but the Court took upon them to understand the Libel in that Sense, and overruled the Exception.[18]

An Information was prayed for publishing a Paper containing an Account of a Murder on a *Jewish* Woman and her Child, by certain *Jews* lately arrived from *Portugal*, and living near *Broadstreet*, because the Child was begotten by a Christian; and the Affidavit set forth, that several Persons mentioned therein, who were recently arrived from *Portugal*, and lived in *Broadstreet*, were attacked by Multitudes in several Parts of the City, barbarously treated, and threatened with Death, in case they were found abroad any more; and it was objected, that no Information could be granted in this Case, because it did not appear who in particular the Persons reflected on were; and for this was cited *The King* versus *Orme, Trin*. 11 *W* 3. where an Indictment was exhibited for a Libel called *The Ladies Invention*, and alledged to be to the Scandal of several Ladies unknown, and after Verdict for the King Judgment was arrested, because it did not appear who the Persons reflected on were; *sed per Cur*. admitting that an Information for a Libel may be improper, yet the Publication of this Paper is deservedly punishable in an Information for a Misdemeanor, and that of the highest Kind; such Sort of Advertisements necessarily tending to raise Tumults and Disorders among the People, and inflame them with a

universal Spirit of Barbarity against a whole Body of Men, as if guilty of Crimes scarce practicable, and wholly incredible; and in this Case was cited the Case of *The King* and *Franklin*, where tho' only the Words *Ministers* were used in the Libel, yet by suitable Averments in the Information, and Proof made of them to the Jury, they found those Ministers to be Ministers of State to his present Majesty, and the Defendant guilty.[19]

4. WHETHER ANY PROCEEDINGS IN A COURT OF JUSTICE WILL AMOUNT TO A LIBEL.

It seems to be clearly agreed, that no Proceeding in a regular Course of Justice will make the Complaint amount to a Libel; for it would be a great Discouragement to Suitors to subject them to publick Prosecutions, in respect of their Applications to a Court of Justice; and the chief Intention of the Law in prohibiting Persons to revenge themselves by Libels, or any other private Manner, is to restrain them from endeavouring to make themselves their own Judges, and to oblige them to refer the Decision of their Grievances to those whom the Law has appointed to determine them.[20]

Therefore it hath been resolved, that no false or scandalous Matter contained in (*a*) a Petition to a Committee of Parliament, or in (*b*) Articles of the Peace exhibited to Justices of Peace, are libellous.[21]

Also it is held, that no Presentment of a Grand Jury can be a Libel, not only because Persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper Evidence for what they do, but also because it would be of the utmost ill Consequence any way to discourage them from making their Inquiries with that Freedom and Readiness which the publick Good requires.[22]

Also it is holden by some, that no Want of Jurisdiction in the Court to which such a Complaint shall be exhibited will make it a Libel; because the Mistake of the Court is not imputable to the Party, but his Counsel; but herein it is said by *Hawkins*, that if it shall manifestly appear from the whole Circumstances of the Case, that a Prosecution is intirely false, malicious, and groundless, and commenced not with a Design to go thro' with it, but only to expose the Defendant's Character, under the Shew of a legal Proceeding, there can be no Reason why such a Mockery of publick Justice should not rather aggravate the Offence than make it cease to be one, and make such Scandal a good Ground of an Indictment at the Suit of the King, as it makes the Malice of their Proceeding a good Foundation of an Action on the Case at the Suit of the Party, whether the Court had a Jurisdiction of the Cause or not,[23]

5. WHETHER ANY THING OF THIS KIND CAN BE JUSTIFIED.

It seems to be clearly agreed, that in an Indictment or Criminal Prosecution for a Libel the Party cannot justify that the Contents thereof are true, or that the Person upon whom it is made had a bad Reputation; since the greater Appearance there is of Truth in any malicious Invective, so much the more provoking it is; for, as my Lord *Coke* observes, in a settled State of Government the Party grieved ought to complain for every Injury done him, in the ordinary Course of Law, and not by any Means to revenge himself by the odious Course of Libelling, or otherwise.[24]

Also it seems now settled, that no Scandal in Writing is any more justifiable in a Civil Action brought by the Party to vindicate the Injury done him, than in an Indictment or Information at the Suit of the Crown; for tho' in Actions for Words the Law, thro' Compassion, admits the Truth of the Charge to be pleaded as a Justification, yet this Tenderness of the Law is not to be extended to written Scandal, in which the Author acts with more Coolness, and Deliberation gives the Scandal a more durable Stamp, and propagates it wider and further; whereas in Words Men often in a Heat and Passion say Things which they are afterwards ashamed of, and tho' they seem to act with Deliberation, yet the Scandal sooner dies away, and is forgotten; and therefore from the greater Degree of Mischief and Malice attending the one than the other, the Law allows the Party to justify in an Action for Words; tho' not for written Scandal; from whence it follows, that the only Favour Truth affords in such a Case is, that it may be shewn in Mitigation of Damages in an Action, and of the Fine upon an Indictment or an Information.[25]

(b) WHO SHALL BE SAID A LIBELLER: AND HEREIN,

1. WHO SHALL BE SAID THE AUTHOR OR COMPOSER OF A LIBEL.

IT has been already observed, that a Libel may be expressed not only by Printing or Writing, but also by Signs or Pictures; but it seems that some of those Ways are essentially necessary; and it is laid down in *Lamb*'s Case, that every Person convicted of a Libel must be the Contriver, Procurer or Publisher thereof.[26]

It hath been strongly urged, that he who writes a Libel, dictated by another, is not guilty of the Composing and Making thereof, because it appears that another is the Author or Contriver; but herein the Court held, that the Writing being the essential Part of a Libel, the Reducing it into Writing, in the first Instance, was a Making, and differed from a Transcribing; and, according to the Report of this Case, in *5 Mod*. it was

held, that if (*a*) one dictates, and another writes, both are guilty of making it, for he shews his Approbation of what he writes. So if one repeats, another writes a Libel, and a third approves what is written, they are all Makers of it, as all who concur and assent to the doing of an unlawful Act are guilty; and murdering a Man's Reputation by a Libel, may be compared to murdering a Man's Person, in which all who are present and encourage the Act are guilty, tho' the Wound was given by one only.[27]

Also it hath been held, that Transcribing and Collecting libellous Matter is highly Criminal, tho' it be not found that the Party composed or published it; for his having it in Readiness for that Purpose when Occasion served, or its falling into such Hands after his Death as may publish it, might be injurious to the Government.[28]

It is said by *Holt* Chief Justice, that when a Libel appears under a Man's Handwriting, and no other Author is known, he is taken in the Manner, and it turns the Proof upon him; and if he cannot produce the Composer, it is hard to find that he is not the very Man.[29]

And it is said to have been resolved by the Court, that in Libels *Making* is the *Genus*, Composing or Contriving is one *Species*, Writing a second *Species*, and Procuring to be written a third *Species*; and finding a Man guilty of Writing only, is finding him guilty of one Species of making.[30]

But yet in some Cases the Writing of a Libel may be a lawful or innocent Act, as by the Clerk that draws the Indictment, or by a Student who takes Notes of it, because it is not done *ad Infamiam* of the Party; but abstractly considered, the Writing a Copy of a Libel is Writing a Libel, because such Copy contains all Things necessary to the Constitution of a Libel, *viz*. the scandalous Matter, and the Writing; and it has the same pernicious Consequence, for it perpetuates the Memory of the Thing, and some Time or other comes to be published.[31]

2. WHO THE PUBLISHER.

It seems to be agreed, that not only he who publishes a Libel himself, but also he who procures another to do it, is guilty of the Publication; and it is held not to be material, whether he who disperses a Libel knew any Thing of the Contents or Effects of it or not, for that nothing would be more easy than to publish the most virulent Papers with the greatest Security, if the Concealing the Purport of them from an illeterate [sic] Publisher would make him safe in dispersing them.[32]

And on this Foundation it hath been constantly ruled of late, that the buying of a Book or Paper, containing libellous Matter, in a Bookseller's

Shop, is sufficient Evidence to charge the Master with the Publication, altho' it does not appear that he knew of any such Books being there, or what the Contents thereof was; and it will not be presumed that it was brought and sold there by a Stranger, but the Master must, if he suggests any Thing of this Kind in his Excuse, prove it.[33]

The Reading of a Libel in the Presence of another, without knowing it before to be a Libel, or the Laughing at a Libel read by another, or the Saying that such a Libel is made of *J. S.* whether spoken with or without Malice, amounts not to a Publication of it.[34]

Also it is held, that he who repeats Part of a Libel in Merriment, without any Malice or Purpose of Defamation, is no way punishable; but of this *Hawkins* makes a Doubt, for that Jests of this Kind are not to be endured, and the Injury to the Reputation of the Party grieved is no way lessened by the Merriment of him who makes so light of it.[35]

But it seems to be agreed, if he who hath either read a Libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any Part of it in the Presence of others, or lend or shew it to another, he is guilty of an unlawful Publication of it.[36]

It is said by my Lord *Coke* in the Case *de Libellis Famosis*, to have been resolved, that if one finds a Libel, (and would keep himself out of Danger) if it be composed against a private Man, the Finder may either burn it, or presently (*a*) deliver it to a Magistrate; but if it concern a Magistrate, or other publick Person, the Finder ought presently to deliver it to a Magistrate, to the Intent that by Examination and Industry the Author may be found out and punished.[37]

It seems to be a Matter of Doubt, whether the Sending an abusive Letter, filled with provoking Language, to another, will bear an Action as for a Libel, because here is no Publication; but it seems to be clearly agreed, that the Sending such Letter, without other Publication, is an Offence of a publick Nature, and punishable as such, in as much as it tends to create ill Blood, and causes a Disturbance of the publick Peace; and if the bare Making of a Libel be an Offence, whether it be published or not, as it seemeth to be holden, surely the Sending of it to the Party reflected on must be a much greater Crime.[38]

And on this Foundation the Court of King's Bench granted an Information against a Person for sending an abusive Letter to Mr. *Bernardiston*, therein calling him Rascal and Fool; altho' he swore that he wrote this to the Party himself, and never made it publick, being only a

Piece of private Resentment; but the Court held, that this Method provoked Persons to Duelling, that the Writing and Sending was a good Publication, and that the Intent of the Party shall not be explained by himself.[39]

If one deliver a Paper full of Reflections on any Person, in Nature of a Petition to a Committee of Parliament, to any other Persons except the Members of Parliament, he may be punished as the Publisher of a Libel, in respect of such Dispersing thereof among those who have nothing to do with it.[40]

But it hath been held, that the bare Printing of a Petition to a Committee of Parliament, (which would be a Libel against the Party complained of, if it were made for any other Purpose than as a Complaint in a Course of Justice,) and Delivering Copies thereof to the Members of the Committee, shall not be looked upon as the Publication of a Libel, in as much as it is justified by the Order and Course of Proceedings in Parliament, whereof the King's Courts will take Judicial Notice.[41]

(C) THE OFFENDERS HOW PUNISHED.

THERE can be no Doubt but that a Person who writes or publishes a Libel is subject to the Action of the Party injured, in which Damages shall be recovered; and that being convicted on an Indictment or Information, shall pay such Fine, and also suffer such Corporal Punishment, as to the Court, in Discretion, shall seem proper, according to the Heinousness of the Crime and the Circumstances of the Offender.[42]

Bacon Abridgement, vol. III, pp. 490–98.

2.3.1.2Viner, 1743

Libel.

(A) WHAT IS A LIBEL.

1. J. S. was *libelled against, for Incontinency*, and A. B. C. and D. *maliciously repeated a great Part of it in the Presence of several*. They were censur'd for this in the StarChamber, tho' there was no Proof that C. and D. made the Libel, or that they assented or were Privies to the making of it. But *saying that the Libel is made of* [*such a*] *one*, tho' he speaks it with Malice, without repeating any Part of it, is not punishable; nor to *

repeat Part of it in Merriment, without Malice, or any purpose of Defamation; and the Court held, that a Libeller was punishable, tho' the *Matter of the Libel is true*. Mo. 627. Mich. 43 & 44 Eliz. in the StarChamber. Want's Case.[1]

2. Every Infamous Libel either is *in writing, or without writing*. That *in writing is*, when an *Epigram, Rhithme* &c. is composed or published to the Contumely of another, by which his Fame or Dignity may be prejudiced. This may be *by Words or Ballads*. 1. As where it is maliciously sung in the Presence of others. 2. By *giving it* over to another to scandalize the Party. *Without writing, may be by Pictures*, as painting him in an Ignominious Manner. 2. By *Signs*, as fixing a Gallows &c. at his Door or elsewhere. 5 Rep. 125. b. Pasch. 3 Jac. The Case De Libellis Famosis.

3. A. being very old, and having a good Estate, which he intended to settle on B. who was his Heir General, J. S. who had married a Niece of A. *wrote a Letter to A. that B. was not the Son of one of the Name of A. and was a Haunter of Taverns, and that divers Women followed him from London to his House and desired to hear of A's Death, and that all his Estate would not pay his Debts &c.* And sign'd it, and sent it sealed and directed to A. This was held to be a Libel, and J. S. was fin'd 200 l. and B. left at Liberty to bring his Action at Law. 2 Brownl. 151. Pasch. 10 Jac. C. B. Peacock v. Sir Geo. Reynell.[2]

4. A. *wrote an infamous, scandalous &c. Letter to B. and subscribed his Name, and sealed and directed it*, To his Loving Friend Mr. B and added, Speed this. And after *dispersed great Numbers of Copies*. Resolved by Ld. C. Egerton, and the 2 Ch. J. and per tot. Cur. that the said Letter, which in Law is a Libel, shall be punished (tho' it was solely writ to the Plaintiff himself without any Publication) in the StarChamber; For it is a great Offence to the King, and tends to breaking the Peace, and therefore necessary to be punished by Indictment, or in the StarChamber; But the dispersing Copies, or publishing the Effect of it aggravates the Offence; for which the Party may have an Action on the Case. 12 Rep. 35. Edwards v. Wootton.—— In this Case Ld. Cook said, that a Person *libelling himself*, is punishable by the Civil Law, and it seemed to him, that he should be so in the StarChamber. Ibid.[3]

5. A. made Addresses to M. whom he afterwards married; one J. S. during the Courtship, *wrote a Letter to M. advising her not to marry A. For that he is a Debauchee, and has the Pox, and is not worth a Groat, but has declared, that if he marries her, he will allow 50 l. a Year to a Whore*. This Letter was *not subscribed, but conveyed to M.* but it appeared upon

Evidence, that all this was by J. S. But notwithstanding, it was held a Matter indictable. Sid. 270. Trin. 17 Car. 2. B. R. The King v. Summer and Hilliard.[4]

6. The *Printing a Charge of Extortion in his Office, against the Vicar-General of the Bishop of L. and delivering it to several Members of the Committee of Parliament for Examination of Grievances* is justifiable; but if he had delivered it to others it had been otherwise; and the Printing them, which is a Publishing of them to the Printers and Composers, is not so great a Publication, as to have so many Copies transcribed by several Clerks. Lev. 240. Trin. 20 Car. 2. B. R. Lake v. King.[5]

7. C. *forged an Order of Chancery*, in which were several *defamatory Expressions* against the Plaintiff, and *at the End draws a Pillory*, and subscribes it for Sir J. H. and his forsworn Witnesses by him suborned; this is but one complicated Act, and an Action will lie. Skin. 123. Sir John Austin v. Col. Culpepper.[6]

8. A. being chose *Churchwarden, was tendered an Oath Ex Officio, viz.* to present every Parishioner &c. some of which Articles concerned A. himself, and was Excommunicated for Refusal; and thereupon *had a Prohibition, of which he caused 2000 to be printed in English, and dispersed them all over the Kingdom, intituling them, A true translated Copy of a Writ of Prohibition, granted by the Ld. Ch. J. and other, the Justices of the Court of C. B. in Easter-Term 1676, against the Bishop of C. who had proceeded against, and Excommunicated, one T. W. a Churchwarden for refusing to take the Oath usually tendered to Persons in such Office, by which Writ the Illegality of such Oaths is declared, and the said Bishop commanded to take off his Excommunication*. The Court declared this to be a most seditious Libel, and gave Order to enquire after the Printer, that he might be prosecuted. 2 Mod. 118, 119. Mich. 28 Car. 2. C. B. Waterfield v. the Bishop of Chichester.

9. In a Special Action on the Case the Plaintiff declares, that he is an Hackney Coachman, and the Defendant, with Intent to disgrace him, did *ride Skimmington*, and describes how, thereby surmising, that his Wife had beat him, and by Reason thereof Persons, who formerly used him, refused to come into his Coach, ad Damnum. Upon Not Guilty, it was found for the Plaintiff, and upon Motion in Arrest of Judgment, Judgment was Quod Querens Nil capiat per Billam. Raym. 401. Trin. 32 Car. 2. B. R. Mason v. Jennings.[7]

10. A Libel consists not in Words and scandalous Matter only; for that is not of itself sufficient, tho' spoken with never so much Malice; but it is the

putting in writing, or procuring to be put in Writing; for if the Words are not written, he is not guilty of the Libel. 12 Mod. 219. Mich. 10 W. 3. the King v. Beere.[8]

11. The *taking the Copy of a Libel* is a Libel, because it comprehends all that is necessary to the making of a Libel; it hath the same scandalous Matter in it, and the same mischievous Consequences attending it at first; For it is by this Means perpetuated, and it may come into the Hands of other Men, and be published after the Death of the Copyer; and if Men might take Copies with Impunity, by the same Reason, printing of them would be no Offence; and then farewel to all Government. 12 Mod. 220. the King v. Beere.[9]

12. In Action on the Case upon a Libel it is sufficient if the *Matter is reflecting*; as *To paint a Man* playing *at Cudgels with his Wife*; per Holt Ch. J. 11 Mod. 99. Mich. 5 Annae. Anon.

13. A Defamatory Writing, *expressing only one or two Letters of a Name*, in such a Manner, *that* from what goes before, and follows after, *it must needs be understood to signify such a particular Person* in the plain, obvious and natural Construction of the Whole, and would be perfect Nonsence if strained to any other meaning, is as properly a Libel, as if it had expressed the whole Name at large; for it brings the utmost Contempt unto the Law, to suffer its Justice to be eluded by such trifling Evasions : And it is a ridiculous Absurdity to say, that a Writing, which is understood by every the meanest Capacity, cannot possibly be understood by a Judge and Jury. 2 Hawk. Pl. C. 194. cap. 73. S. 5.

14. It seems clear, That no writing whatsoever is to be esteemed a Libel, unless it *reflect upon some particular Person*; and it seems, that a Writing full of *obscene Ribaldry*, without any kind of Reflection upon any one, is not punishable at all by any Prosecution at Common Law, as I have heard it agreed in the Court of King's Bench; yet it seems, that the Author may be bound to his Good Behaviour, as a scandalous Person of evil Fame. 2 Hawk. Pl. C. 195. cap. 73. S. 9.

(B) WHO SHALL BE SAID TO BE MAKER, CONTRIVER, OR PUBLISHER. OR BE PUNISHED AS SUCH.

1. HE who *disperses Libels*, tho' he does *not know the Effect of them* nor ever heard them read, is punishable. Mo. 627. Mich. 43 & 44 Eliz. in the StarChamber. In Want's Case.

2. *Jurors at a Wardmote Inquest presented J. S. for Incontinency*, for

which J. S. complained of them in the StarChamber. But the Court would not examine the Cause against them; because the Precedent would be dangerous, to draw into the StarChamber Jurors for their Inquests. Mo. 627. Want's Case.

3. Resolved in a Case of Libels. 1. The *Procurer*, and also the *Writer* are both Contrivers. 2. The *Procurer of another to publish* the Libel, and the Publisher himself, are both of them Publishers. 3. The *Reading* a Libel, *not knowing it to be a Libel*, is not publishing. 4. He that *writes the Copy* of the Libel *by the Commandment of his Master or his Father*, is not a Publisher. 5. He that *Laughs when he hears another read* a Libel, is not a Publisher if he does no more. 6. He that *lends a Libel to be copied*, *o*r he that * *repeats* the Libel, or any Part of it, or *shews the Contents* of it, or any Part of it, knowing it to be a Libel, is a Publisher. So if one *writes the Copy* by Commandment of his Master or Father, *and then carries it to another*, he is a Publisher. Mo. 813. Mich. 8 Jac. Lamb's Case.[10]

4. If a Libel be made in Writing, and afterwards *burnt*, and one *remembers* the Contents, and dictates to another who writes it, the *Writer* is the Maker of a Libel. He that *takes a Copy* of a Libel in Writing, tho' he be not the Author, is guilty of making a Libel; per Holt Ch. J. Cumb. 359. Hill. 8 W. 3. B. R. the King v. Pain.[11]

5. If a Libel be publickly known, *having a written Copy* of it is *Evidence of a Publication*; but otherwise where it is not known to be published. per Holt Ch. J. Hill. 10 W. 3. B. R. 2 Salk. 418. the King v. Bear.

(C) PUNISHED HOW. AND WHAT OUGHT TO BE DONE WITH LIBELS WHEN MET WITH.[12]

1. A.R. was indicted in the King's Bench, for the making of a Libel in Writing *in the French Tongue* against R. of S. *calling him* therein, *Roy de Raveners* &c. Whereupon he, being arraigned, pleaded thereupon Not Guilty, and was found Guilty, as by the Records appeareth. So as a Libeller, or a Publisher of a Libel, committeth a publick Offence, and may be indicted therefore at the Common Law. 3 Inst. 174. cites Mich. 10 E. 3.

2. J. N. an Attorney of the King's Bench, wrote a *Letter to* J. F. *one of the King's Council, that neither Sir W. S. Chief Justice, nor his Fellows the King's Justices, nor their Clerks, any great Thing would do* by the Commandment of our Lord the King, nor of Queen Philip *in that Place*, more than of any other of the Realm; which said John, being called,

confessed the said Letter by him to be written with his own proper Hand; Judicium Curiæ, et quia prædictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, qui est de Concilio Regis, quæ litera continet in se nullam veritatem, Prætextu cujus Dominus Rex erga Curiam & Justiciarios suos hoc in casu habere posset Indignationem, quod esset in scandalum Justic. & Curiæ; Ideo dictus Johannes *committitur Maresc*. & *postea invenit* 6 *Manucaptores pro bono gestu*. 3 Inst. 174. cap. 76. cites Mich. 18 E. 3.[13]

3. If one finds a Libel *against a private Man*, he may either *burn it, or deliver it to a Magistrate* immediately; But if it concerns a Magistrate, or other *Publick Person*, he ought immediately to *deliver it to a Magistrate*, that the Author may be found out. 5 Rep. 125. b. cites it as resolved Mich. 43 & 44 Eliz. in the StarChamber, in Halliwood's Case.[14]

4. One was prosecuted in the StarChamber for composing and publishing an Infamous Libel in Meter, scandalizing a deceased and present Archbishop of Canterbury. It was resolved, 1. That every Libel, (called Famosus Libellus, or Intamatoria Scriptura) made *against a private Person* deserves a severe Punishment; Because it provokes all the Family of that Person to Revenge &c. If it be against a *Magistrate*, it concerns not only the Peace, but scandalizes the Government. 2. It is punishable, notwithstanding the *Person scandalized* be *dead at the Time*. 3. A Libeller called (Famosus Defamator) shall be punished, either by *Indictment at Common Law or* by *Bill if be deny it, or Ore tenus upon Confession*, in the StarChamber, and that according to the Greatness of his Offence, it may be *by Fine and Imprisonment*, and if the Case be exorbitant, by *Pillory and Loss of Ears*. 4. It is not material, whether it be true or not, or of what Fame the Party libelled is. 5 Rep. 125. Pasch. 3 Jac. The Case De Libellis Famosis.

5. One was indicted for exhibiting an Infamous Libel directed to the King against Coke the Ch. J. of B. R. and the Court for a Judgment given in the said Court in Magdalen Colledge Case, affirming the said Judgment to be Treason, and *calling the Chief Justice Traytor, perjured Judge*, and scandalizing all the Professors of the Law: And this Libel, he *fixed upon the great Gate entring Westminster-Hall*, and divers other Places. And being arraigned, he put in a scandalous Plea, affirming he would not plead otherwise. It was adjudged, that he should be committed to the Marshal, stand upon the Pillory with Paper mentioning the Offence, and be imprisoned till he submit himself to every Court, be bound to his Good Behaviour with Sureties during Life, and pay 1000 *l*. Fine to the King. Cro. C. 175. Mich. 5 Car. B. R. Jeff's Case.

6. An Information was exhibited against A. B. for causing to be framed, printed, and published, a scandalous Libel intitled &c. thereby scandalizing of one C. D. Upon Not Guilty pleaded it appeared upon the Evidence, that *two of these Libels printed were found at the Lodgings of the Defendant* upon Warrants from the Principal Secretary of State to search there, he being suspected to be the Contriver of it. The Opinion of the Court was, That this was no Crime within the Information, though he *gave no Account how they came there*; and the having of a Libel, and not delivering of it to a Magistrate, was only punishable in the StarChamber, unless the Party maliciously * published it. Vent. 31. Pasch. 21 Car. 2. B. R. Anon.[15]

(D) WHAT IS THE DISTINCT POWER OF THE COURT, AND OF THE JURY, AS TO LIBELS.

1. IN an Information for a Libel, it was urged, that the only Thing to be examined by the Court is, whether the Paper published contain any Libellous Matter; For then the *Application must be left to* the Jury. But per Cur. This Rule is not to be taken so extensively; For where the Application is merely indifferent, we will not grant an *Information*, but there must be a seeming and apparent Application to be made. Gibb. 57. Pasch, 2 Geo. 2. B. R. the King v. Butcheler.

(E) PLEADINGS &C.

1. An Indictment was for composing, writing, making, and collecting *several Libels in uno quorum continetur inter alia juxta Tenorem & ad Effectum sequentem*, and then sets forth the Words. Upon Not Guilty, the Jury *found* the Defendant *Guilty as to the Writing and Collecting prout* in Indictamento supponitur, & *quoad omnia alia praeter Scriptionem & Collectionem Not Guilty*. Exception was taken, that (*Inter alia*) shew'd there was somewhat else, which perhaps might, if it appeared, qualify the Rest. But per Cur. non allocator; For then he could not be found Guilty; and if any thing qualifies that which is set forth, it must be given in Evidence. 2. It was agreed, that *ad Effectum sequentem* of itself had been naught; For the Court must judge of the Words themselves, and not of the Construction which the Prosecutor puts upon them; But the Words (ad Effectum) *were corrected by the Words* (*Juxta* * *Tenorem*) which imports the very Words themselves. 3. It was held, that the finding him Guilty of the bare Writing

and Collecting is Criminal; not but that *Collecting* had better been out of the Case; And it being objected, that Defendant being found Guilty of Collecting and Writing, and not of making and composing, the *Verdict* is *Repugnant, or an Acquittal*, Non allocator; For Making is the Genus, and Composing and Contriving is one Species, and Writing a second Species, and procuring to be written a third Species; so that not finding him guilty of all, but Writing only, is finding him not guilty of any Species of making but writing. 2 Salk. 417. Hill. 10 W. 3. B. R. The King v. Bear.[16]

2. A Man may *justify* in an Action on the Case for a Libel; but otherwise in an Indictment; per Holt Ch. J. 11 Mod. 99. Mich. 5 Annae. Anon.

3. Upon a Motion for an Attachment against the Defendant for publishing a Libel on the Court of B. R. and a Rule made upon him to shew Cause why it should not be granted, it was moved to discharge that Rule upon an *Affidavit that his Fault was* not wilful, but *meerly thro' ignorance; that he had the Libel from one C.* a Printer in C. that it *was in Latin, which he did not understand, and* that he *did not know* who was *the Author, otherwise than by a Letter* which he *received from the Printer, and* which was now *annexed to his Affidavit*; by which Letter it appeared, that one Dr. Middleton was the Author; so that having shewed how he came by this Libel, and having told all that he knew of the Author, for that Reason it was insisted in his Behalf, that the Rule should be discharged, and that the Printer should be prosecuted; but the Rule was continued on the Defendant until he made out his Allegation against the Printer, who was therefore joined in the Rule, that both of them might be before the Court. In the next Term *Dr. Middleton appeared and confessed in Court, that he was the Author* of the Book; and thereupon the Rule was discharged against the Defendant and the Printer, and the Doctor was committed till further Consideration of the Matter; and afterwards he was fined 50 *l.* and bound to his Good Behaviour for a Year, and so was Dr. Colebatch the same Term, for the like Offence. 8 Mod. 123. Pasch. 9 Geo. the King v. Wiatt.

4. Information for a Libel was in the *Disjunctive, viz.* Scripsit seu scribi causavit, and held not good. 8 Mod. 328. Mich. 11 Geo. the King v. Brereton.

(F) PUBLICATION. WHAT.

1. WRiting the Copy of a Libel is not a Publication thereof, but only an Evidence of a Publication; per Holt Ch. J. 12 Mod. 220. cites Mo. 813 and 9

Rep. 59. b. Dr. Lamb's Case; and says the writing the original Libel it self is the same; and if a Publication of it has been proved, it is Evidence that the Publication was by him that had it in his Custody.

Viner Abridgment, vol. 15, pp. 84–91.

2.3.1.3Jacob, 1750

Libel, signifies a scandalous Report of a Person spread abroad or otherwise unlawfully published, and thereupon is called in our law an *infamous Libel*. And a *Libel* may be either in Writing, or without it: In Writing, is when any Thing is written and published to the Disgrace of another; and without Writing, is where a Person is painted out in a scandalous Manner, with Asses Ears, a Fool's Coat, *&c*. or where any ignominious Sign is fixed at a Person's Door, such as a Gallows, &*c*. 3 *Inst*. 174. A *Libel* in general may be defined to be a malicious Aspersion of another, signified in Printing or Writing; and which tends to the Blackening the Memory of one that is dead, or the Reputation of one that is living, in Order to expose him to publick Contempt, Hatred, or Ridicule: And a *Libel* may be extended to any Defamation whatsoever. 5 *Rep*. 121. Printing or Writing, tho' the Scandal is not directly charged, but on the contrary in an oblique or ironical Manner, has been held to be a *Libel*. A Defamatory Writing, that expresses only one or two Letters of a Man's Name, if from what precedes and follows it, by the Natural Construction of the whole it must be understood to signify and point at such a particular Person, is as properly a *Libel* as if the whole Name of the Person were mentioned at large. 1 *Hawk. P. C*. 194. *Libels* are Criminal for this Reason, that where any *Libel* is made against a private Man, it may be a Means to excite the libelled Person, or his Friends, to Revenge, and consequently to break the Peace; and where the *Libel* is against a Magistrate, it is not only a Breach of the Peace, but also a Scandal to the Government. 5 *Rep*. 125. It is said, that tho' a private Person or Magistrate be dead at the Time of making the *Libel*, yet the Offence may be punished, as it tends to the Breach of the Peace. *Hob*. 214. With Regard to this, it is no Justification of a *Libel*, that it's Contents are true, or that the Person *libelled* had a bad Reputation, for the greater Appearance there is of Truth in a *Libel*, the more provoking it is. *Moor* 627. It is held, that in a Prosecution on an Indictment or Information, it is not material whether the Matter of *Libel* be true or false; but in an Action upon the Case a Defendant may justify that the Matter is true. *Hob*. 253. If a Printer prints a *Libel*

against a private Person, he may be indicted and punished for it: Where Persons write, print, or sell any Pamphlets or other Treatises reflecting on the Publick, or any private Person, such *libellous Treatise* may be seised, and the Persons concerned therein punished, Writers of false News are likewise indictable and punishable. *State Tri. Vol*. 2. A general Reflection on the Government is a *Libel*; Yet it has been adjudged, that no Writing is esteemed a *Libel*, unless it reflect upon some particular Person; for where a Writing inveighs against Mankind in general, or against a particular Order of Men, it is no *Libel*, as it does not descend to Particulars. 11 *W*. 3. *B. R*. 1 *Hawk*. 195. Where one accidentally finds a *Libel*, he ought to burn it, or deliver it to a Magistrate: In Case such *Libel* be found in a Person's House, he cannot be punished for Framing, Printing and Publishing the same; but 'tis said he may be indicted for having it, and not delivering it to some Magistrate. 1 *Ventr*. 31. The sending a scandalous Letter to the Party himself, without shewing or publishing it to others, is no *Libel*; tho' if it be sent to a third Person, or otherwise dispersed, this is a Publication of the *Libel*. 12 *Rep*. 34. 1 *Lev*. 139. In the Case a Person speaks Words that are scandalous of another, and doth not put them in Writing, he is not guilty of a *Libel*; for that a *Libel* chiefly consists in reducing the infamous Matter into Writing. 3 *Salk*. 226. 'Tis observed, that in the making of *Libels*, if one person dictates, and another writes a *Libel*, both are culpable; since the Writing after another shews the Transcriber's Approbation of what is contained in the *Libel*: And if one dictate, another write, and a third approve of what is written, they are all deemed Makers or Composers of the *Libel*; by Reason all Persons who join in or concur to an unlawful Act, are in Law esteemed guilty. 5 *Mod*. 167. A Person makes a Transcript of a *Libel*, but does not give it to any other, the Copying of it is no Publication; yet the bare Copying of a *Libel*, without Authority, hath been held to be Writing a *Libel*, and the Writer thereof looked upon as a Contriver; also where a Person has a written Copy of a known *Libel* in his Custody, it shall be taken as an Evidence of the Publication; however, in Case the *Libel* be not publickly known, there it is otherwise. 2 *Salk*. 417. And it is said, that the Copying of a *Libel* is the same Thing as Writing or Composing the *Libel* it self, because it has the same pernicious Consequence; and if the Law were not so, Persons might write Copies of *Libels*, and print them with Impunity. Likewise when any *Libel* appears under a Person's Hand, and no Author is known, the proof turns upon him, and if he cannot produce the Composer, it will be difficult for him to be freed from being deemed the Man. *Ibid*. 419. The Writing or Publishing a *Libel* is an Offence against the King's Peace,

and therefore is punishable by Indictment: The Composer, Procurer, and Publisher of a *Libel*, are liable to a Fine, Imprisonment, Pillory, or the like Corporal Punishment, at the Discretion of the Court where the Trial is had, and according to the Heinousness of the Offence. *Moor* 627. 3 *Inst*. 174. A Person for libeling the *Lord Chancellor Bacon* by affirming that his Lordship had done Injustice, &*c*. was fined 1000 *l*. and sentenced to ride on a Horse with his Face to the Tail, from the *Fleet* Prison to *Westminster*, with his Fault writ on his Head, to acknowledge his Offence in all the King's Courts, and that one of his Ears should be cut off at *Westminster*, and the other in *Cheapside*; and further to be imprisoned during Life. *Poph*. 135. There are two ways of describing a *Libel* in Informations and Law Proceedings; the one by the Sense, in these Words, *viz. The Tenor of which follows*: And the other by an exact Description of the particular Words; and if there be any Variance in respect to the Words charged, it will be fatal. 2 *Salk*. 660.

Jacob New-Law Dictionary, unpaginated.

2.3.1.4Cunningham, 1765

Libel, (*libellus*) Literally signifieth a little book, but by use it is the original declaration of any action in the Civil law, 2 *H*. 5. 3. and 2 *Ed*. 6. 13. It signifies also a criminous report of any man cast abroad, or othewise unlawfully published, and then called *famosus libellus*: And this either *in scriptis, aut sine scriptis: In scriptis* is, when an *epigram* or other writing is composed or published to another's disgrace, which may be done *verbis aut cantilenis*: As where this is mallciously [*sic*] repeated or sung in the presence of others; or else *traditione*, when the *libel*, or any copy of it is delivered over to scandalize the party. *Famosus* libellus *sine scriptis* may be twofold; 1. *Picturis*, as to paint the party in a shameful and ignominious manner. Or, 2. *Signis*, as to fix a gallows or other ignominious signs at the door of the party, or elsewhere. 5 *Co. Rep. De famosis* Libellis.

A libel is defined a malicious defamation, expressed either in printing or writing, or by signs, pictures, &*c*. tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to publick hatred, contempt and ridicule. 1 *Hawk. P. C*. 193. 5 *Mod*. 165.

This species of defamation is usually termed written scandal, and thereby

receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer, and propagate wider and farther than any other scandal. 5 *Co*. 125.

But it is clearly agreed, that not only written or printed scandal comes within the notion of a libel, but also may be applied to any defamation whatsoever, expressed either by signs or pictures; as by fixing up a gallows at a man's door, or elsewhere, or by painting him in a shameful or Ignominious manner, as by exposing a man and his wife by a skimmington or riding, though a special custom is alleged for such practice. 5 *Co*. 125. *Skin*. 123. *Raym*. 401. 3 *Keb*. 378.

And since the chief cause, for which the law severely punishes all offences of this nature, is a direct tendency of them to a breach of the publick peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from publick justice for injuries of this kind, which, of all others, are more sensibly felt; and since the plain meaning of such scandal, as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking as that which is expressed by writing or printing, why should it not be equally criminal? 1 *Hawk. P. C*. 193.

1. *What degree of defamation will amount to a libel; and what certainty is requisite in the matter and application of a libel.*
2. *Whether proceedings in a court of justice are libelous; and whether any thing of this kind can be justified.*
3. *Who shall be deemed the author or composer of a libel; who the publisher; and how the offenders shall be punished.*

1. WHAT DEGREE OF DEFAMATION WILL AMOUNT TO A LIBEL; AND WHAT CERTAINTY IS REQUISITE IN THE MATTER AND APPLICATION OF A LIBEL.

As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him, as tend to lessen him in the esteem of the world, and take away his reputation, which to some men is more dear than life itself: Hence it hath been held, that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous ignominious light; for these equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace. 5 *Co*. 125. 1 *Keb*. 293. *Moor* 627. 1 *Rol. Abr*. 37.

Hence it hath been held, that words, though not scandalous in themselves, yet if published in writing, and tending in a degree to the discredit of a man, are libellous, whether such words defame private

persons only, or persons employed in a publick capacity; in which latter case they are said to receive an aggravation, as they tend to scandalize the government, for reflecting on those who are intrusted with the administration of public affairs, which doth not only endanger the publick peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. *Hard*. 470. *Skin*. 123. 5 *Co*. 125. 2 *Rol. Rep*. 86. 1 *Hawk. P. C*. 94.

As where a person delivered a ticket up to the minister after sermon, wherein he desired him to take notice, that offences passed now without controul from the civil magistrate, and to quicken the civil magistate to do his duty, &*c*. and this was held to be a libel, though no magistrates in particular were mentioned, and though it was not averred that the magistrates suffered these vices knowingly. 1 *Sid*. 219. 1 *Keb*. 773. *The King* v. *Pym*.

A. gunsmith, published an advertisement in a common newspaper, that he had invented a short kind of gun that shot as far as others of a longer size, and that he was made gunsmith to the Prince of *Wales*; and *B*. another gunsmith, counter-advertised, that whereas, &*c*. reciting the former paragraph, he desired all gentlemen to be cautious, for that the said *A*. durst not engage with any artist in town, nor ever did make such an experiment, except out of a leather gun, as any gentleman might be satisfied at the *Cross Guns* in *Long Acre*, the said *B*.'s house. And the court held, that tho' *B*. or any other of the trade, might counter-advertise what was published by *A*. yet that that should have been done without any general reflections on him in the way of his business; that the advice to all gentlemen to be cautious, was a reflection on his honesty, as if he would deceive the world by a fictitious advertisement, and the allegation, that he would not engage with an artist, was setting him below the rest of his trade, and calling him a bungler in general terms, and not relative to the precedent matter, and that the words except out of a leather gun, was charging him with a lie, the word gun being vulgarly used for a lie, and gunner for a liar; and that therefore these words were libellous, and gave judgment accordingly; and herein the court held, that words, tho' not scandalous in themselves, yet being published in writing, and tending any way to the party's discredit, were actionable, and that all words were to be construed *secundum subjectam materiam*, and to be understood by the court in the same sense that others do. 3 *Bac. Abr*. 491. *Pasch*. 4 *Geo*. 2. *in B. R. Harman* v. *Delany*.

But though every species and degree of calumny and detraction of this kind are deemed odious in the eye of the law, and punishable either by civil action or criminal prosecution in most cases, at the election of the party injured; yet the court of King's Bench, whose jurisdiction herein is founded upon the necessity of preventing quarrels and ill blood, and which deals with this offence as of dangerous consequence to, and destructive to the peace of the nation, always exercises a discretionary power in granting an information for an offence of this nature, and will, in many cases, leave the party to his ordinary remedy; as where the application is made after a great length of time; so where the matter complained of as a libel happens to be true; so where the granting the information would be a discouragement to learned inquiries; or where the matter complained of was intended for reformation, not defamation. 3 *Bac. Abr*. 492.

So where a man advertises in a publick newspaper, that his wife had eloped from him, and cautioned all persons from trusting her; and an information for a libel being moved for, it was denied, because it was the only way the husband could take to secure himself. 3 *Bac. Abr*. 492. *The King* v. *Enes*, 5 *Geo*. 2. *in B. R.*

So where it was advertised in one of the daily papers, that Lady *Mordington* kept an assembly in *Moorfields*, and it being counter-advertised by my Lord's order, that the person calling herself Lady *Mordington* was an impostrix, and that there was no such person except his wife, who always lived with him; the court refused to grant an information; for though she be called an impostrix, yet that relates to her as assuming the title of Lady *Mordington*, and which she is alleged not to have any right to; and therefore in this respect may well be called an impostrix. 3 *Bac. Abr*. 492. *The King* v. *Jenneaur, Pasch*. 8 *Geo*. 2. *in B. R.*

A writing was directed to general *Wills*, and the four principal officers of the guards, to be presented to his Majesty for redress; the paper contained the defendant's case, that he furnished the guard at *Whitehall* with fire and candle, for which the government owed him 350 *l.* that he obtained a warrant for his money, and Captain *Carr* (the prosecutor) told him, that if he would assign the warrant, he would procure him the money; the warrant was assigned, and the money paid to *Carr*, who refused paying it to the defendant; and the question was, if an information should be granted; and the court held it no libel, but a representation of an injury, drawn up in a proper way for redress, without any intention to asperse the prosecutor; and tho' there be a suggestion of a fraud, yet this is no more than what is in

every bill in Chancery, which was never held libellous, if relative to the subject-matter. 3 *Bac. Abr*. 492. *The King* v. *Bayley, Hill*. 8 *Geo*. 2. *in B. R.*

Here it may be proper to insert the remarkable case of parson *Prick*, who in a sermon recited a story out of *Fox's Martyrology*, that one *Greenwood*, being a perjured person, and a great persecutor, had great plagues inflicted on him, and was killed by the hand of God; whereas in truth he was never so plagued, and was himself present at that sermon; and he thereupon brought his action upon the case, for calling him a perjured person; and the defendant pleaded Not guilty; and this matter being disclosed upon the evidence, *Wray* Ch. Just. delivered the law to the jury, that it being delivered but as a story, and not with any malice or intention to slander any person, he was not guilty of the words maliciously, and so was found Not guilty. *Cro. Jac*. 90, 91.

As to the certainty requisite in the matter and application of a libel, it seems to be now agreed, that not only scandal expressed in an open and direct manner, but also such as is expressed in allegory and irony amounts to a libel, and that the judges are to understand it in the same manner as others do, without any strained endeavours to find out loopholes, or to palliate the offence, which in some measure would be to encourage scandal; as where a writing in a taunting manner, reckoning up several acts of publick charity done by one, says, You will not play the Jew, nor the hypocrite, and so goes on, in a strain of ridicule, to insinuate that what he did was owing to his vainglory; or where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities as their enemies charge them with the want of; as by proposing such a one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &*c*. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so. 5 *Co*. 125. That a libel may be as well by descriptions and circumlocutions as in express terms. *Poph*. 252. *Hob*. 215. 1 *Hawk. P. C*. 193-4.

And from the same foundation it hath also been resolved, that a defamatory writing expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify such person in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any

other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say, that a writing, which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury. 1 *Hawk. P. C.* 194. *Hurt's* case.

But it is said, that no writing whatsoever is to be esteemed a libel, unless it reflect upon some particular person; and that a writing full of obscene ribaldry, without any kind of reflection on any one, is not punishable at all by any prosecution at Common law; but the author may be bound to his good behaviour, as a scandalous person of evil same. 1 *Hawk. P. C.* 195.

But a scandal published of three or four, or any one or two of them, is punishable at the complaint of one or more, or all of them. *Poph.* 252, 254.

The defendant was charged in an information with writing a libel against the Protestant religion and bishops, *innuendo* the bishops of *England*; he was found guilty; and in an arrest of judgment it was offered, that the bishops libelled were not *English* bishops, nor could the *innuendo* support such a construction; but the court took upon them to understand the libel in that sense, and overruled the exception. 3 *Mod.* 68. *The King* v. *Baxter*.

An information was prayed for publishing a paper containing an account of a murder on a Jewish woman and her child, by certain Jews lately arrived from *Portugal*, and living near *Broadstreet*, because the child was begotten by a Christian; and the affidavit set forth, that several persons mentioned therein, who were recently arrived from *Portugal*, and lived near *Broadstreet*, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more; and it was objected, that no information could be granted in this case, because it did not appear who in particular the persons reflected on were; and for this was cited *The King* v. *Orme, Trin.* 11 *W.* 3. Where an indictment was exhibited for a libel called *The Ladies Invention*, and alleged to the scandal of several ladies unknown; and after verdict for the King, judgment was arrested, because it did not appear who the persons reflected on were; *sed per curiam*, Admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarce practicable, and wholly incredible; and in this case was cited the case of *The King* and *Franklin*,

where, tho’ only the word *ministers* was used in the libel, yet by suitable averments in the information, and proof made of them to the jury, they found those ministers to be ministers of state to his present Majesty, and the defendant guilty. 3 *Bac. Abr*. 494. *King* v. *Osborne. Trin*. 5 *Geo*. 2. *in B. R.*

2. WHETHER PROCEEDINGS IN A COURT OF JUSTICE ARE LIBELOUS; AND WHETHER ANY THING OF THIS KIND CAN BE JUSTIFIED.

It seems to be clearly agreed, that no proceeding in a regular course of justice will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to publick prosecutions, in respect of their applications to a court of justice; and the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and oblige them to refer the decision of their grievances to those whom the law has appointed to determine them. *Dyer* 285. 2 *Inst*. 228. *Yelv*. 117. 2 *Buls*. 269. *Godb*. 340. *Palm*. 145, 188. 1 *Vent*. 23. 1 *Hawk. P. C*. 194.

Therefore it hath been resolved, that no false or scandalous matter contained in a petition to a committee of parliament, or in articles of the peace exhibited to justices of peace, are libellous. 1 *Lev*. 240. 1 *Sid*. 414. 2 *Keb*. 832. 4 *Co*. 14. 1 *Hawk. P. C*. 194.

Also it is held, that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence any way to discourage them from making inquiries with that freedom and readiness which the publick good requires. *Moor* 627. 1 *Hawk. P. C*. 195.

And it is holden by some, that no want of jurisdiction in the court to which such a complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party, but his counsel; but herein it is said by Mr. *Hawkins*, that if it shall manifestly appear from the whole circumstances of the case, that a prosecution is intirely false, malicious and groundless, and commenced not with a design to go thro’ with it, but only to expose the defendant’s character, under the shew of a legal proceeding, there can be no reason why such a mockery of publick justice should not rather aggravate the offence than make it cease to be one, and make such scandal a good ground of an indictment at the suit of the King, as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party, whether the court had a

jurisdiction of the cause or not. 2 *Keb*. 832. 4 *Co*. 14. 1 *Hawk. P. C*. 194.

It seems to be clearly agreed, that in an indictment or criminal prosecution for a libel, the party cannot justify that the contents thereof are true, or that the person upon whom it is made had a bad reputation; since the greater appearance there is of truth in any malicious invective, so much the more provoking it is; for, as my Lord *Coke* observes, in a settled state of government the party grieved ought to complain for every injury done him, in the ordinary course of law, and not by any means to revenge himself by the odious course of libelling, or otherwise. 5 *Co*. 125. *Hob*. 253. *Moor* 627. 1 *Hawk. P. C*. 194.

Also it seems now settled, that no scandal in writing is any more justifiable in a civil action brought by the party to vindicate the injury done, than in an indictment or information at the suit of the Crown; for tho' in actions for words, the law, thro' compassion, admits the truth of the charge to be pleaded as a justification, yet this tenderness of the law is not to be extended to written scandal, in which the author acts with more coolness, and deliberation gives the scandal a more durable stamp, and propagates it wider and further; whereas in words men often in a heat and passion say things which they are afterwards ashamed of, and tho' they seem to act with deliberation, yet the scandal sooner dies away, and is forgotten; and therefore from the greater degree of mischief and malice attending the one than the other, the law allows the party to justify in an action for words, tho' not for written scandal; from whence it follows, that the only favour truth affords in such a case is, that it may be shewn in mitigation of damages in an action, and of the fine upon an indictment or an information, 3 *Bac. Abr*. 495. *The King* v. *Roberts*, *Mich*. 8 *Geo*. 2. *in B. R*. agreed *per cur*. in a case for publishing a libel on Mr. *Branley*, recorder of *Warwick*.

3. WHO SHALL BE DEEMED THE AUTHOR OR COMPOSER OF A LIBEL; WHO THE PUBLISHER; AND HOW THE OFFENDERS SHALL BE PUNISHED.

It has been already observed, that a libel may be expressed not only by printing or writing, but also by signs or pictures; but it seems that some of those ways are essentially necessary; and it is laid down in *Lamb's* case, that every person convicted of a libel must be the contriver, procurer or publisher thereof. 9 *Co*. 59. *Moor* 813. *Lamb's* case.

It hath been strongly urged, that he who writes a libel dictated by another, is not guilty of the composing and making thereof, because it appears that another is the author or contriver; but herein the court held, that the writing being the essential part of a libel, the reducing it into writing in the first instance was a making, and differed from a transcribing; and,

according to the report of this case, in 5 *Mod*. it was held, that if one dictates, and another writes, both are guilty of making it, for he shews his approbation of what he writes. So if one repeats, another writes a libel, and a third approves what is written, they are all makers of it, as all who concur and assent to the doing of an unlawful act are guilty; and murdering a man's reputation by a libel, may be compared to murdering a man's person, in which all who are present and encourage the act are guilty, tho' the wound was given by one only. *Carth*. 405. 5 *Mod*. 163. 10. 167. *The King* v. *Paine*.

Also it hath been held, that transcribing and collecting libellous matter is highly criminal, though it be not found that the party composed or published it; for his having it in readiness for that purpose when occasion served, or its falling into such hands after his death; may publish it, might be injurious to the government. *Carth*. 407. 2 *Salk*. 417. *The King* v. *Bear*.

It is said by *Holt* Ch. J. that when a libel appears under a man's handwriting, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. 2 *Salk*. 419.

And it is said to have been resolved by the court, that in libels making is the genus, composing or contriving is one species, writing a second species, and procuring to be written a third species: And finding a man guilty of writing only, is finding him guilty of one species of making. 2 *Salk*. 419.

But where in some cases the writing of a libel may be a lawful or innocent act, as by the clerk that draws the indictment, or by a student who takes notes of it, because it is not done *ad infamiam* of the party; but abstractedly considered, the writing the copy of a libel is writing a libel, because such copy contains all things necessary to the construction of a libel, *viz*. the scandalous matter, and the writing; and it has the same pernicious consequence, for it perpetuates the memory of the thing, and some time or other comes to be published. 2 *Salk*. 418.

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material, whether he who disperses a libel knew any thing of the contents or effects of it or not; for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. 9 *Co*. 59. *Moor*. 627. 1 *Hawk. P. C*. 195.

And on this foundation it hath been constantly ruled of late, that the buying of a book or paper containing libellous matter in a bookseller's

shop, is sufficient evidence to charge the master with the publication, altho' it does not appear that he knew of any such books being there, or what the contents thereof was; and it will not be presumed that it was brought and sold there by a stranger, but the master must, if he suggests any thing of this kind in his excuse, prove it. *The King* v. *Nutt*, *Hil*. 2 *Geo*. 2 so ruled on evidence at *Guildhall*, *per Raymond* Chief Justice.

The reading of a libel in the presence of another, without knowing it before to be a libel, or the laughing at a libel read by another, or the saying that such a libel is made of *J. S.* whether spoken with or without malice, amounts not to a publication of it. 9 *Co*. 59. *Moor* 813. 1 *Hawk. P. C*. 196.

Also it is held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is no way punishable; but of this *Hawkins* makes a doubt, for that jests of this kind are not to be endured, and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it. *Moor* 627. 1 *Hawk. P. C*. 196.

But it seems to be agreed, if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. *Moor* 813. 9 *Co*. 59. 1 *Hawk. P. C*. 195.

It is said by my Lord *Coke* in the case of *De libellis famosis*, to have been resolved, that if one finds a libel, (and would keep himself out of danger) if it be composed against a private man, the finder may either burn it, or presently deliver it to a magistrate; but if it concern a magistrate, or other publick person, the finder ought presently to deliver it to a magistrate, to the intent that by examination and industry the author may be found out and punished. 5 *Co*. 125.

It seems to be a matter of doubt, whether the sending an abusive letter, filled with provoking language to another, will bear an action as for a libel, because here is no publication; but it seems to be clearly agreed, that the sending such letter, without other publication, is an offence of a publick nature, and punishable as such, inasmuch as it tends to create ill blood, and causes a disturbance of the publick peace; and if the bare making of a libel be an offence, whether it be published or not, as it seemeth to be holden, surely the sending of it to the party reflected on must be a much greater offence. 4 *Inst*. 180. 3 *Inst*. 174. *Hob*. 62, 215. 12 *Co*. 34. *Poph*. 136. *Raym*. 201. 1 *Lev*. 139. 1 *Keb*. 931. 1 *M*. 58. *Skin*. 123-4.

And on this foundation the court of King's Bench granted an information against a person for sending an abusive letter to Mr. *Bernardiston*, therein

calling him rascal and fool; although he swore that he wrote this to the party himself, and never made it publick, being only a piece of private resentment; but the court held, that this method provoked persons to duelling, that the writing and sending was a good publication, and that the intent of the party shall not be explained by himself. 3 *Bac. Abr*. 497. *The King* v. *Pillborough. Mich*. 5 *Geo*. 2. *in B. R.*

If one deliver a paper full of reflections on any person in nature of a petition to a committee of parliament, to any other persons except the members of parliament, he may be punished as the publisher of a libel, in respect of such dispersing thereof among those who have nothing to do with it. 1 *Sand*. 133. 1 *Lev*. 240. 1 *Sid*. 414. 1 *Keb*. 832.

But it hath been held, that the bare printing of a petition to a committee of parliament (which would be a libel against the party complained of, if it were made for any other purpose than as a complaint in a course of justice,) and delivering copies thereof to the members of the committee, shall not be looked upon as the publication of a libel, inasmuch as it is justified by the order and course of proceedings in parliament, whereof the King's courts will take judical notice. 1 *Hawk. P. C*. 196, and the authorities *supra*.

There can be no doubt but that a person who writes or publishes a libel is subject to the action of the party injured, in which damages shall be recovered; and that being convicted on an indictment or information, shall pay such fine, and also suffer such corporal punishment as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offenders. *Cro. Car*. 175.

For more learning on this subject, see 3 Bac. Abr. *and* 15 Vin. Abr. *tit*. Libel, *and see* Law of Libels, &*c. and* Digest of the Laws concerning Libels, &*c*.

Cunningham Law Dictionary, vol. II, unpaginated.

2.3.1.5Blackstone, 1765

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is intitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of

person; referring the more minute discussion of their several branches, to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

Blackstone Commentaries, bk. 1, ch. 1, sec. 1; vol. 1, p. 130.

2.3.1.6Burn, 1766

Swearing.

1. By the canons of the church, If any offend their brethren by swearing, the churchwardens shall present them; and such notorious offenders shall not be admitted to the holy communion, till they be reformed. *Can*. 109.[1]

And by the statute of the 19 *G*. 2. *c*. 21. It is enacted as follows:

2. If any person shall profanely curse or swear, and be thereof convicted on confession, or oath of one witness, before one justice (or mayor), he shall forfeit as follows : That is to say,[2]

Every day labourer, common soldier, or common seaman, 1 *s*.
Every other person, under the degree of a gentleman, 2 *s*.
And every person of or above the degree of a gentleman, 5 *s*.
And for a second offence after conviction, double; and for every other offence after a second conviction, treble. *S*. 1.
Which said penalties shall go to the poor of the parish where the offence was committed. *S*. 10.

3. If such person shall curse or swear in the presence and hearing of a justice (or mayor); he shall convict him without other proof. *S*. 2.[3]

4. If in the presence and hearing of a constable, if he is *unknown* to such constable, the said constable shall seize and carry him forthwith before the *next* justice (or mayor of a town corporate), who shall convict him upon the oath of such constable.[4]

If he is *known* to such constable, he shall speedily make information before some justice (or mayor) in order that he may be convicted. *S*. 3.

5. So that the constable, if it is in his hearing, is required to prosecute; but any other person also may prosecute if he pleases.[5]

6. And such justice (or mayor) shall immediately on such information on the oath of any constable, or of any other person, cause the offender to appear before him; and on proof of such information convict him; and if he shall not immediately pay down the penalty, or give security

to the satisfaction of such justice (or mayor); he may commit him to the house of correction, to be kept to hard labour for ten days. *S.* 4.[6]

7. Also the charges of the information and conviction, shall be paid by the offender, if able, over and above the penalties; which charges shall be ascertained by such justice (or mayor). *S.* 11.[7]

But for the information, summons, and conviction, no more shall be paid to the justice's clerk, than 1 *s. S.* 15.

And if he shall not immediately pay such charges, or give security to the satisfaction of such justice (or mayor); he may commit him to the house of correction, to be kept to hard labour for six days, over and above such time for which he may be committed for nonpayment of the penalties; and in such case, no charges of information and conviction shall be paid by any person. *S.* 11.

8. But if such soldier or seaman shall not so pay or secure the penalty, and also the costs, of the information, summons, and conviction; he shall, instead of being committed to the house of correction, be ordered to be publickly set in the stocks for one hour for every single offence, and for any number of offences whereof he shall be convicted at one and the same time two hours. *S.* 5.[8]

9. The conviction shall be in the words and form following;[9]

Be it remembred, that on the — day of — in the year of his majesty's reign, A. B. *was convicted before me (one of his majesty's justices of the peace for the county, riding, division, or liberty aforesaid*; *or before me — mayor of the city or town of — within the county of —) of swearing one or more profane oath or oaths, or of cursing one or more profane curse or curses. Given under my hand and seal the day and year aforesaid*. *S.* 8.

10. Which conviction shall not be removed by certiorari. *S.* 9.[10]

11. And the justice (or mayor) shall cause the conviction to be fairly wrote upon parchment, and returned to the next general or quarter sessions, to be filed by the clerk of the peace, and kept amongst the records. S. 9.[11]

12. If any justice (or mayor) shall omit his duty, in the execution of this act, he shall forfeit 5 *l.* half to the poor where he shall reside, and half to him that shall sue in any court of record. *S.* 6.[12]

13. Constable omitting his duty, shall on conviction, on oath of one witness, before one justice (or mayor), forfeit 40 *s.* to be levied by distress, half to the informer, and half to the poor; and if he have not sufficient goods whereon to levy, such justice (or mayor) may commit him to the house of correction, to be kept to hard labour for one month *S.* 7.[13]

14. And this act shall be publickly read four times in the year, in all churches and chapels, by the minister immediately after morning and evening prayer, on the *Sundays* next after *Mar*. 25. *June* 24. *Sept*. 29. And *Dec*. 25. On pain of 5 *l*. for every offence, to be levied by distress, by warrant of a justice (or mayor). *S*. 14.[14]

15. But no person shall be prosecuted for any offence against this act, unless it be within eight days after the offence committed. *S*. 13.[15]

16. By the 22 *G*. 2. *c*. 33. Persons belonging to his majesty's ships of war, guilty of profane oaths or curses, shall incur such punishment as a court martial shall impose.[16]

Burn Justice of Peace, vol. 4, pp. 200–203.

2.3.2CASE LAW

2.3.2.1Respublica v. Oswald, 1788

On the 12th of *July*, *Lewis* moved for a rule to shew cause why an attachment should not issue against *Eleazer Oswald*, the printer and publisher of the *Independent Gazetteer*.

The case was this: *Oswald* having inserted in his newspapers several anonymous pieces against the character of *Andrew Browne*, the master of a female academy, in the city of *Philadephia*, *Browne* applied to him to give up the authors of those pieces; but being refused that satisfaction, he brought an action for the libel against *Oswald*, returnable into the Supreme Court, *on the 2d day of July;* and therein demanded bail for £1,000. Previously to the return day of the writ, the question of bail being brought by citation before Mr. *Justice* Bryan, at his chambers, the Judge, on a full hearing of the cause of action, in the presence of both the parties, ordered the Defendant to be discharged on common bail; and the Plaintiff appealed from this order to the court. Afterwards, *on the 1st of July*, *Oswald* published under his own signature, an address to the public, which contained a narrative of these proceedings, and the following passages, which, I conceive, to have been the material grounds of the present motion.

"When violent attacks are made upon a person under pretext of justice, and legal steps are taken on the occasion, not perhaps to redress the

supposed injury, but to feed and gratify partisaning and temporising resentments, it is not unwarrantable in such person to represent the real statement of his case, and appeal to the world for their sentiments and countenance.

“Upon these considerations, principally, I am now emboldened to trespass on the public patience, and must solicit the indulgence of my friends and customers, while I present to their notice, an account of the steps lately exercised with me; from which it will appear that my situation *as a printer*, and the *rights of the press* and of *freemen*, are fundamentally struck at; and an earnest endeavour is on the carpet to involve me in difficulties to please the malicious dispositions of old and permanent enemies.”

“But until the news had arrived last *Thursday*, that the *ninth* state had acceded to the new federal government, I was not called upon; and Mr. *Page* in the afternoon of that day visited me in due form of law with a writ. Had Mr. *Browne* pursued me in this line, “without loss of time,” agreeably to his lawyer’s letter, I should not have supposed it extraordinary — but to arrest me the moment the *federal* intelligence came to hand, indicated that the commencement of this suit was not so much the child of his own fancy, as it has been probably dictated to and urged on him by others, whose sentiments upon the new constitution have not in every respect coincided with mine. In fact, it was my idea, in the first progress of the business, that Mr. *Browne* was merely the *hand-maid* of some of my enemies among the federalists; and in this class I must rank, his great patron Doctor *Rush* (whose brother is a judge of the *Supreme Court*). I think Mr. *Brown’s* conduct has since confirmed the idea beyond a doubt.”

“Enemies I have had in the legal profession, and it may perhaps add to the hopes of *malignity*, that this action is instituted in the *Supreme Court* of *Pennsylvania*. However, if former prejudices should be found to operate against me on the bench, it is with a jury of my country, properly elected and empannelled, a jury of freemen and independent citizens, I must rest the suit. I have escaped the jaws of persecution through this channel on certain memorable occasions, and hope I shall never be a sufferer, let the blast of faction blow with all its furies!”

“The doctrine of libels being a doctrine incompatible with law and liberty, and at once destructive of the privileges of a free country in the communication of our thoughts, has not hitherto gained any footing in *Pennsylvania:* and the vile measures formerly taken to lay me by the heels

on this subject only brought down obloquy upon the conductors themselves. I may well suppose the same love of liberty yet pervades my fellow citizens, and that they will not allow the freedom of the press to be violated upon any refined pretence, which oppressive ingenuity or courtly study can invent."

"Upon trial of the cause, the public will decide for themselves, whether Mr. *Browne's* motives have been laudable and dignified; whether his conduct in declining an acquittal of his character in the paper, and suing me in the manner he did, was decent and consistent; and, in a word, whether he is not actuated by some of my inveterate foes and opponents, to lend his name in their service for the purpose of harrassing and injuring me."

A transcript from the records was read to shew that the action between *Browne* and *Oswald* was depending in the court; *James Martin* proved that the paper containing *Oswald's* address was bought at his printing office, fresh and damp from the press; and a deposition, made by *Browne*, was read to prove the preceding facts relative to the cause of action, the hearing before Mr. *Justice* Bryan, and the appeal from his order.

Lewis then adverted to the various pieces, which were charged as libellous in the depending action; and argued, that, though the liberty of the press was invaluable in its nature, and ought not to be infringed: yet, that its value did not consist in a boundless licentiousness of slander and defamation. He contended, that the profession of *Browne*, to whom the education of more than a hundred children was sometimes entrusted, exposed him, in a peculiar manner, to be injured by wanton aspersions of his character; and he inferred the necessity of the action, which had been instituted, from this consideration, that if *Browne* were really the monster which the papers in question described him to be, he ought to be hunted from society; but, that if he had been falsely accused, if he had been maliciously traduced, it was a duty that he owed to himself and to the public to vindicate his reputation, and to call upon the justice of the laws, to punish so gross a violation of truth and decency. For this purpose, he continued, a writ had been issued, and bail was required. The defendant, if not before, was certainly, on the hearing at the Judge's chambers, apprized of the cause of action: The order of Mr. *Justice* Bryan on that occasion, and the appeal to the court, were circumstances perfectly within his knowledge; and yet, while the whole merits of the cause were thus in suspense, he thought proper to address the public in language evidently calculated to excite the popular resentment against *Browne;* to create doubts and suspicions of the

integrity and impartiality of the Judges, who must preside upon the trial; and to promote an unmerited compassion in his own favour. He has described himself as the object of former persecutions upon similar principles; he has asserted that, in this instance, an individual is made the instrument of a party to destroy him; and he artfully calls upon his fellow citizens to interest themselves to preserve the freedom of the press, which he considers as attacked in his person. Nay, in order to cast an odium upon the new government of the *United States*, he insinuates, that his arrest was purposely protracted ‘till the ratification of nine states had given stability to that system: a falsehood, as unwarrantable as it is insidious; for, it will be proved that this delay took place at his own request, communicated by Col. *Proctor*.

Col. *Proctor*, being examined on this point, said, that he, at first, desired the action might not be brought, in hopes of accomplishing a compromise between the parties; that, afterwards, he requested Mr. *Lewis* to defer issuing the writ ‘till as near the term as it was possible: but that all this interference was of his own accord, and not at the instance of the defendant. He acknowledged, however, that he had informed *Oswald*, that the commencement of the action would be postponed as long as possible, after having obtained a promise to that effect from Mr. *Lewis*.

Lewis said he was very much mistaken, indeed, if Col. *Proctor* had not mentioned the request as coming from the defendant; and Col. *Proctor* answered, “if ever I told you so, he certainly sent me; but I cannot remember that ever he asked me to do a thing of the kind.”

Lewis then added, that the address to the public manifestly tended to interrupt the course of justice; it was an attempt to prejudice the minds of the people in a cause then depending, and, by that means, to defeat the plaintiff’s claim to justice, and to stigmatize the Judges, whose duty it was to administer the laws. There could be no doubt, therefore, that it amounted to a contempt of the court; and it only remained, in support of his motion, to shew that an attachment was the legal mode of proceeding against the offender. For this he cited 4 *Black. Com*. 280. 2 *Atk*. 469.

By the Court: — Take a rule to shew cause on *Monday* next, at 9 o’clock in the morning.

The defendant appearing on *Monday* the 14th, agreeably to the rule to shew cause, obtained on *Saturday*, prayed that the rule might be enlarged, as he had not had a reasonable time to prepare for the argument. But *Lewis* opposed the enlargement of the rule, observing that the defendant would be

heard in extenuation, or excuse, of the contempt, after the attachment had issued.

By M'K<sc>ean</sc>, *C. J.* — I know not of any instance where a delay of a term has been allowed in the case of an attachment: one reason for such a summary proceeding is to prevent delay. Let cause be now shewn.

Sergeant, in shewing cause against the attachment, contended, that the doctrine, in 4 *Black. Com*. 280. was laid down much too wide; that in 2 *Atk*. 469. the Chancellor expressly assigns this reason, for his determining without a jury, that he was a judge of *fact;* and in 1 *Burr*. 510. 513. an information is granted on this principle, that courts of common law will not decide upon facts without the intervention of a jury.

M'K<sc>ean</sc>, *C. J.* — This was not the reason that influenced the court in their decision.

But, whatever the law might be in *England*, *Sergeant* insisted, that it could not avail in *Pennsylvania*. Even in *England*, indeed, though it is said to be a contempt to report the decisions of the courts, unless under the *imprimatur* of the judges; yet, we find *Burrow*, and all the subsequent reporters, proceeding without that sanction. But the constitution of *Pennsylvania* authorizes many things to be done which in *England* are prohibited. Here the press is laid open to the inspection of every citizen, who wishes to examine the proceedings of the government; of which the judicial authority is certainly to be considered as a branch. *Const. Penn. Sect.* 35.

M'K<sc>ean</sc>, *C. J.* — Could not this be done in *England?* Certainly it could: for, in short, there is nothing in the constitution of this state, respecting the liberty of the press, that has not been authorized by the constitution of that kingdom for near a century past.

Sergeant. The 9th *section of the Bill of Rights*, however, puts this supposed offence into such a form, as must entitle the defendant to a trial by jury; and precludes every attempt to compel him to give evidence against himself. It declares, "that, in all prosecutions for *criminal offences*, a man has a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, *by an impartial jury of the country*, without the *unanimous* consent of which jury he cannot be found guilty; *nor can he be compelled to give evidence against himself;* nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers." — Now, the present proceeding against

the defendant is for a *criminal offence;* and, yet, if the attachment issues, the essential parts of this section must be defeated: for, in that case, the defendant *cannot be tried by a jury;* and, according to the practice upon attachments, he will *be compelled to answer interrogatories;* in doing which, he must either be guilty of perjury, or *give evidence against himself*. The proceeding by attachment is, indeed, a novelty in this country, except for the purpose of enforcing the attendance of witnesses. Those contempts which are committed in the face of a court stand upon a very different ground. Even the court of *Admiralty* (which is not a court of record) possesses a power to punish them; and the reason arises from the necessity that every jurisdiction should be competent to protect itself from immediate violence and interruption. But contempts which are alledged to have been committed out of doors, are not within this reason; they come properly within the class of *criminal offences;* and, as such, by the 9th *Sect*. of the bill of rights, they can only be tried by a jury.

M'K<sc>ean</sc>, *C. J*. Do you then apprehend that the 9th *Sect*. of the bill of rights introduced something new on the subject of *trials?* I have always understood it to be the law, independent of this section, that the twelve jurors must be *unanimous* in their verdict, and yet this section makes this express provision.

Sergeant said, that he had discussed the subject as well as the little opportunity afforded him would admit. He pressed the court to give further time for the argument, or, at once, to direct a trial. This he contended was, at least, discretionary; and, considering the Defendant's protestation of innocence,[*] his readiness to give ample security for his future appearance, the magnitude of the question as arising from the constitution, and its immense consequences to the public, he thought a delay, that was essential to deliberation and justice, ought not to be refused.

Heatly and *Lewis*, in support of the motion, contended, that under the circumstances of the case, *Oswald's* publication, whether true or false, amounted to a contempt of the court, as it respected a cause then depending in judgment, and reflected upon one of the Judges in his official capacity; that the argument of the adverse counsel went so far as to assert, that there could be no such offence as a contempt even in *England*, since the very words inserted in the constitution of *Pennsylvania*, were used in the *Magna Charta* of that kingdom; that, in truth, neither the bill of rights nor the constitution extended to the case of *contempts*, for they mean only to secure to every citizen the right of expressing his sentiments with a manly

freedom, but not to authorize wanton attacks upon private reputation, or to deprive the court of a power essential to its own existence, and to the due administration of justice; that the court were as competent to judge of the fact and the law, upon the inspection of the publication in question, as *the Chancellor* was in the authority cited from *Atkins;* and that although the prosecutor could, perhaps, proceed either by indictment or information, yet that the abuses of the *Star Chamber* had rendered the process by information odious, and an attachment, which was sanctified by immemorial usage, was the most expeditious, and, therefore, the most proper remedy for the evil complained of.

THE CHIEF JUSTICE delivered the opinion of the Court to the following effect, Judge Bryan having shortly before taken his seat.

M'KEAN, *C. J.* — This is a motion for an attachment against *Eleazer Oswald*, the printer and publisher of the *Independent Gazetteer*, of the 1st of *July* last, No. 796. As a ground for granting the attachment, it is proved, that an action for a libel had been instituted in this court, in which *Andrew Browne* is the plaintiff, and *Eleazer Oswald* the defendant; that a question with respect to bail in that action, had been agitated before one of the Judges, from whose order, discharging the defendant on common bail, the plaintiff had appealed to the court; and that Mr. *Oswald's* address to the public, which is the immediate subject of complaint, relates to the action thus depending before us.

The counsel in support of their motion, have argued, that this address was intended to prejudice the public mind upon the merits of the cause, by propagating an opinion that *Browne* was the instrument of a party to persecute and destroy the defendant; that he acted under the particular influence of Dr. *Rush*, whose brother is a judge of this court; and, in short, that from the ancient prejudices of all the judges, the defendant did not stand a chance of a fair trial.

Assertions and imputations of this kind are certainly calculated to defeat and discredit the administration of justice. Let us, therefore, enquire, *first*, whether they ought to be considered as a contempt of the court; and, *secondly*, whether, if so, the offender is punishable by attachment.

And here, I must be allowed to observe, that libelling is a great crime, whatever sentiments may be entertained by those who live by it. With respect to the heart of the libeller, it is more dark and base than that of the assassin, or than his who commits a midnight arson. It is true, that I may never discover the wretch who has burned my house, or set fire to my barn;

but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeller admit not of this consolation: the injuries which are done to character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life. To what tribunal can he then resort? how shall he be tried, and by whom shall he be acquitted? It is in vain to object, that those who know him will disregard the slander, since the wide circulation of public prints must render it impracticable to apply the antedote as far as the poison has been extended. Nor can it be fairly said, that the same opportunity is given to *vindicate*, which has been employed to *defame* him; for, many will read the charge, who may never see the answer; and while the object of accusation is publicly pointed at, the malicious and malignant author, rests in the dishonorable security of an anonymous signature. Where much has been said, something will be believed; and it is one of the many artifices of the libeller, to give to his charges an aspect of general support, by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be — no!

What then is the meaning of *the Bill of rights*, and *the Constitution of Pennsylvania*, when they declare, "That the freedom of the press shall not be restrained,"[*] and "that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government?"[†] However ingenuity may torture the expressions, there can be little doubt of the just sense of these sections: they give to every citizen a right of investigating the conduct of those who are entrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a *licenser*. The same principles were settled in *England*, so far back as the reign of *William the Third*, and since that time, we all know, there has been the freest animadversion upon the conduct of the ministers of that nation. But is there any thing in the language of the constitution (much less in its spirit and intention) which authorizes one man to impute crimes to another, for which the law has provided the mode of trial, and the degree of punishment? Can it be presumed that the slanderous words, which, when spoken to a few individuals, would expose the speaker to punishment, become sacred, by the authority of the constitution, when delivered to the public through the more permanent and diffusive medium of the press? Or, will it be said, that the constitutional right to examine the

proceedings of government, extends to warrant an anticipation of the acts of the legislature, or the judgments of the court? and not only to authorize a candid commentary upon what has been done, but to permit every endeavour to biass [*sic*] and intimidate with respect to matters still in suspense? The futility of any attempt to establish a construction of this sort, must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.

If, then, the liberty of the press is regulated by any just principle, there can be little doubt, that he, who attempts to raise a prejudice against his antagonist, in the minds of those that must ultimately determine the dispute between them; who, for that purpose, represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice, — wilfully seeks to corrupt the source, and to dishonor the administration of justice.

Such is evidently the object and tendency of Mr. *Oswald's* address to the public. Nor can that artifice prevail, which insinuates that the decision of this court will be the effect of personal resentment; for, if it could, every man might evade the punishment due to his offences, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion, because their treatment has been such as would naturally excite resentment in the human disposition. But it must be remembered, that judges discharge their functions under the solemn obligations of an oath: and, if their virtue entitles them to their station, they can neither be corrupted by favour to swerve from, nor influenced by fear to desert, their duty. That judge, indeed, who courts popularity by unworthy means, while he weakens his pretensions, diminishes, likewise, the chance of attaining his object; and he will eventually find that he has sacrificed the substantial blessing of a good conscience, in an idle and visionary pursuit.

Upon the whole, we consider the publication in question, as having the tendency which has been ascribed to it, that of prejudicing the public (a part of whom must hereafter be summoned as jurors) with respect to the merits of a cause depending in this court, and of corrupting the administration of

justice: We are, therefore, unanimously of opinion, on the *first* point, that it amounts to a contempt.

It only remains then to consider, whether the offence is punishable in the way that the present motion has proposed.

It is certain that the proceeding by *attachment* is as old as the law itself, and no act of the legislature, or section of the constitution, has interposed to alter or suspend it. Besides the sections which have been already read from the constitution, there is another section which declares, that "trials by jury shall be as *heretofore;"* and surely it cannot be contended, that the offence, with which the defendant is now charged, was *heretofore* tried by that tribunal. If a man commits an outrage in the face of the court, what is there to be tried? — what further evidence can be necessary to convict him of the offence, than the actual view of the Judges? A man has been compelled to enter into security for his good behaviour, for giving the lie in the presence of the Judges in *Westminster-Hall*.

On the present occasion, is not the proof, from the inspection of the paper, as full and satisfactory as any that can be offered? And whether the publication amounts to a contempt, or not, is a point of law, which, after all, it is the province of the judges, and not of the jury, to determine. Being a contempt, if it is not punished immediately, how shall the mischief be corrected? Leave it to the customary forms of trial by jury, and the cause may be continued long in suspense, while the party perseveres in this misconduct. The injurious consequences might then be justly imputed to the court, for refusing to exercise their legal power in preventing them.

For these reasons we have no doubt of the competency of our gu- jurisdiction [*sic*]; and we think, that justice and propriety call upon us to proceed by *attachment*.

Bryan, *Justice*, observed, that he did not mean to give an opinion as to the mode of proceeding; but added, that he had always entertained a doubt with respect to the legality of the process by attachment, in such cases, under the constitution of Pennsylvania.

M'KEAN, *C. J.* Will the defendant enter into a recognizance to answer interrogatories, or will he answer *gratis?*

Oswald. I will not answer interrogatories. Let the attachment issue.

M'KEAN, *C. J.* His counsel had better advise him to consider of it.

Sergeant said that the defendant had not had time, even to peruse what had been sworn against him; for only *Sunday* had intervened since the obtaining the rule to shew cause, and that was an improper day for applying

to the records of the court.

M'Kean, *C. J.* In criminal matters *Sunday* has always been deemed a legal day. There has been as ample time for consideration as could well be allowed; the term will end tomorrow. Will he answer, or not?

Sergeant prayed the court would grant 'till tomorrow morning to form a determination on the subject, and offered bail for the defendant's appearance at that time.

M'Kean, *C. J.* Be it so. Let the bail be taken, himself in £200 and one surety in the like sum, for his appearance tomorrow morning.

The Defendant appearing on the 15th of *July*, in discharge of his recognizance; the Chief Justice again asked, whether he would answer interrogatories or not?

Bankson, for the defendant, requested, that the interrogatories might be reduced to writing before he was called upon to determine.

M'Kean, *C. J.* Is that your advice to him? He must *now* say whether he will answer them or not; they will be filed according to the usage of the court, and all just exceptions to them will be allowed.

Bankson. He instructs me to declare that he will not answer interrogatories; and he then began to urge, that there was no contempt committed, but was told by the Chief Justice, that, as that point had been determined by an unanimous opinion of the four judges yesterday, it was not now open for argument.

Lewis said, that as a misrepresentation had been industriously spread abroad respecting the conduct of the court, he thought it proper, at this time, concisely to state the real nature of the present proceedings. It has been asserted that the court were about to compel Mr. *Oswald* to convict himself of the offence with which he is charged: but the fact is this, that it is incumbent upon the person who suggests the contempt to prove it by disinterested witnesses; and then, indeed, the defendant is allowed by his own oath to purge and acquit himself, in spite of all the testimony which can possibly be produced against him. It appears clearly, therefore, that Mr. *Oswald's* being called upon to answer interrogatories, is not meant to establish his guilt (for that has been already done) but to enable him to avoid the punishment which is the consequence of it. The court employ no compulsion in this respect. He may either answer, or not, as he pleases: if he does answer, his single oath, in his own favour, will countervail the oaths of a thousand witnesses; and if he does not answer, his silence corroborates the evidence which has been offered of the contempt, and the

judgment of the court must necessarily follow.

M'Kean, *C. J.* Your statement is certainly right, and the misrepresentation, which is attempted, must either be the effect of wickedness, or ignorance.

Lewis now prayed, that the rule might be made absolute; but remarked, that, according to the authorities, the court might either do that; or, as the defendant was present, they might proceed at once to pass sentence upon him.

M'Kean, *C. J.* There can be no occasion, when the party is present, to make the rule for the attachment absolute: the court will proceed to give judgment.

Bryan, *Justice*. I was not here when the complaint was made to the court, when the evidence in support of the motion was produced, or the arguments against it were delivered: I consider myself therefore totally incapacitated for taking any part in this business.

Lewis. We can immediately furnish the court with the proofs.

Bryan, *Justice*. Can you furnish me, likewise, with Mr. *Sergeant's* arguments?

Lewis said, that he had not penetration enough to discover any argument in what had been said for the defendant; and having again read all the evidence which had been produced, he recapitulated what he had before said in support of the motion.

Page, the undersheriff, was then called upon to prove, that the writ in the action of *Browne* vs. *Oswald* had been in his possession, at least twelve days before it was served; and that the delay in sering [*sic*] it arose at first, from the defendant's being at *Baltimore;* and, afterwards, from his not being at home when the witness had repeatedly called upon him.

Bryan, *Justice*. I still say, that not having heard what has been offered in extenuation of the offence, I am incompetent to join in any opinion respecting the punishment. I cannot surely be suspected of partiality to libellers: I have had my share of their malevolence. But, it is true, I have not suffered much; for these trifles do not wrankle in my mind.

The Chief Justice pronounced the judgment of the court in the following words:

M'Kean, *C. J.* — *Eleazer Oswald:* Having yesterday considered the charge against you, we were unanimously of opinion, that it amounted to a contempt of the court. Some doubts were suggested, whether, even a contempt of the court, was punishable by attachment: but, not only my

brethren and myself, but, likewise, all the judges of *England*, think, that without this power no court could possibly exist; — nay, that no *contempt* could, indeed, be committed against us, we should be *so truly contemptible*. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased, or discontinued. On this point, therefore, we entertain no doubt.

But some difficulty has arisen with respect to our sentence; for, on the one hand, we have been informed of your circumstances, and on the other, we have seen your conduct: your circumstances are small, but your offence is great and persisted in. Since, however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.

Upon the whole, therefore, the Court pronounce this sentence: — That you pay a fine of 10£. to the *Commonwealth;* that you be imprisoned for the space of one month, that is, from the 15th day of July to the 15th day of August next; and, afterwards, till the fine and costs are paid. — Sheriff he is in your custody.

1 Dall. 319 (Pa.).

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

2 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

3 For the reports of the debate, see 3.2.1.2.a–d.

1 1 *Hawk. P. C.* 193. 5 *Mod*. 165. (*a*) It is termed *Libellus famosus seu infamatoria scriptura*, and from its pernicious Tendency has been held a publick Offence at the Common Law; for Men not being able to bear the having their Errors exposed to publick View, were found by Experience to revenge themselves on those who made Sport with their Reputations; from whence arose Duels and Breaches of the Peace; and hence written Scandal has been held in the greatest Detestation, and has received the utmost Discouragement in the Courts of Justice. *Lamb. Sax. Law* 64. *Bract. lib*. 3. *cap*. 36. 3 *Inst.* 174. 5 *Co*. 125.

2 5 *Co*. 125.

3 5 *Co*. 125. *Skin*. 123. *Raym*. 401. 3 *Keb*. 378.

4 1 *Hawk. P. C*. 193.

5 5 *Co*. 125. 1 *Keb*. 293. *Moor* 627. 1 *Rol. Abr*. 37.

6 *Hard*. 470. *Skin*. 123. 5 *Co*. 125. 2 *Rol. Rep*. 86. 1 *Hawk. P. C.* 194.

7 1 *Sid*. 219. 1 *Keb*. 773. *The King* ver. *Pym*.

8 *Pasch*. 4 *Geo*. 2. in *B. R. Harman* ver. *Delany*.

9 (*a*) As in the Case of *the King* versus *Knight, Trin*. 9 *Geo*. 2. in *B. R*. where the Party, after two Terms, three Sessions, and one Assizes applied, the Court refused to grant an Information, tho' it was agreed, had the Application been recent, an Information would have been granted.

(*b*) As in the Case of an Apothecary, who personated Dr. *Crow*, wrote in his Name, and took a Fee, which being published in a common Advertisement, a Motion was made for an Information against the Publisher; but the Truth of what was advertised being made out, the Court left the Prosecutor to his ordinary Remedy. *Hill*. 8 *Geo*. 1. *The King* versus *Bickerston*.

(*c*) As for publishing in a Newspaper, that *Ward*'s Pill and Drop had done great Mischief in twelve several Cases, and that they were a Compound of Poison and Antimony, &*c*. 8 *Geo*. 2. *The King* versus *Roberts*.

(*d*) As where a Person in a private Letter to the Party expostulates with him about some Vices, of which he apprehends him guilty, and desires him to refrain from them, or where a Person sends such Letter to a Father, in relation to some Faults of his Children, which are said to be not at all libellous, being Acts of Friendship, not designed for Defamation, but Reformation, 2 *Brownl*. 151-2. But such Matters published in a NewsPaper, tho' the Pretence be Reformation, is, it seems, libellous, as was agreed 9 *Geo*. 2. *The King* ver. *Knight*.

10 *The King* ver. *Enes*, 5 *Geo*. 2. in *B. R*.

11 *The King* ver. *Jenneaur, Pasch*. 8 *Geo*. 2. in *B. R*.

12 *The King* ver. *Bayley, Hill*. 8 *Georg*. 2. in *B. R*.

13 *Cro. Jac*. 90, 91.

14 5 *Co*. 125. That a Libel may be as well by Descriptions and Circumlocutions as in express Terms. *Poph*. 252. *Hob*. 215. 1 *Hawk. P. C*. 193-4.

15 1 *Hawk. P. C*. 194. *Hurt*'s Case.

16 1 *Hawk P. C*. 195.

17 *Poph*. 252, 254.

18 5 *Mod*. 68. *The King* ver. *Baxter*.

19 *The King* ver. *Osborne, Trin*. 5 *Geo*. 2. in *B. R*.

20 *Dyer* 285. 2 *Inst*. 228. *Yelv*. 117. 2 *Buls*. 269. *Godb*. 340. *Palm*. 145, 188. 1 *Vent*. 23. 1 *Hawk. P. C*. 194.

21 (*a*) 1 *Lev*. 240. 1 *Sid*. 414. 2 *Keb*. 832. (*b*) 4 *Co*. 14. 1 *Hawk, P. C*. 194.

22 *Moor* 627. 1 *Hawk. P. C*. 195.

23 2 *Keb*. 832. 4 *Co*. 14. 1 *Hawk. P. C*. 194.

24 5 *Co*. 125. *Hob*. 253. *Moor* 627. 1 *Hawk. P. C*. 194.

25 *The King* ver. *Roberts, Mich*. 8 *Geo*. 2. in *B. R*. Agreed *per Cur*. in a Case for publishing a Libel on Mr. *Branley*, Recorder of *Warwick*.

26 9 *Co*. 59. *Moor* 813. *Lamb*'s Case.

27 *Carth*. 405. 5 *Mod*. 163. to 167. *The King* ver. *Paine*.

(*a*) But in *Carth*. 406. it is said, that he who dictated cannot be indicted for this Libel, because he did not write it, and that therefore if the Writer could not, the Crime would go unpunished.

28 *Carth*. 407. 2 *Salk*. 417. *The King* ver. *Bear*.

29 2 *Salk*. 419.

30 2 *Salk*. 419.

31 2 *Salk*. 418.

32 9 *Co*. 59. *Moor* 627. 1 *Hawk. P. C*. 195.

33 *The King* ver. *Nutt. Hill*; 2 *Georg*. 2. so ruled on Evidence at *Guildhall*, *per Raymond* Ch. Just.

34 9 *Co*. 59. *Moor* 813. 1 *Hawk. P. C*. 196.

35 *Moor* 627. 1 *Hawk. P. C*. 196.

36 *Moor* 813. 9 *Co*. 59. 1 *Hawk. P. C*. 195.

37 5 *Co*. 125.

(*a*) But it has been since said, that the not delivering it to a Magistrate was only punishable in the StarChamber, and that the bare having a Libel in one's Custody was no Offence; 1 *Vent*. 31. —— But *vide* 2 *Salk*. 418. where it is said to be Evidence of his being the Author or Publisher.

38 4 *Inst*. 180. 3 *Inst*. 174. *Hob*. 62, 215. 12 *Co*. 34. *Poph*. 136. *Raym*. 201. 1 *Lev*. 139. 1 *Keb*. 931. 1 *M*. 58. *Skin*. 123-4.

39 *The King* ver. *Pillborough. Mich*. 5 *Geo*. 2. in *B. R*.

40 1 *Sand*. 133. 1 *Lev*. 240. 1 *Sid*. 414. 1 *Keb*. 832.

41 1 *Hawk. P. C*. 196. and the Authorities *supra*.

42 *Cro. Car*. 175.

1 * Serjeant Hawkins says, that the reasonableness of this Opinion may justly be questioned; For that Jests of this Kind are not to be endured, and the Injury to the Reputation of the Party grieved, is no way lessened by the Merriment of him that makes so light of it. Hawk. Pl. C. 196. cap. 73. S. 14.

2 *But had the Letter been directed to the Plaintiff himself*, and not to A. it should not have been a Libel. Ibid; 152.—— *Or if* it had been directed *to a Father for Reformation of any Acts of his Children*, it should be no Libel; For it is only for Reformation and not for Defamation; For if a Letter contain scandalous Matter, and be *directed to a third Person*, if it be *Reformatory*, *and for no Respect to himself*, it shall not be intended a Libel; For *the Mind with which it was made is to be respected*; As if one write to a Father scandalous Matter concern his Children, giving Notice thereof to the Father, and advising him to have better Regard to them; This is only Reformatory, without any Respect of Profit to him that wrote it; But in the Principal Case, the Defendant intended his Profit and his own Benefit; and this was the Difference; 2 Brownl. 152 in S. C.

3 *So* where A. sent a Letter sealed up and deliver'd into B's Hands, containing many *Ironical* Scandals, as saying, *You will not play the Jew nor the Hypocrite*, and so taunting him for an Alms-House, and other good Works done by him, all which he charged him to have done for Vain Glory, *but never published it*; yet the Court fined the Defendant, and sentenced him to wear Papers, and to make his Submission to B in Cheapside. But an Action of the Case will not lie in this Case, for want of Publication. However, the King

and Common Wealth are interested in it, because it is a Provocation to a Challenge and Breach of the Peace. Hob. 215. Pasch. 16 Jac. in the StarChamber. Sir Baptist Hicks's Case.—— S. C. Poph. 139. and the Ld. C. Bacon said, that such private Letter shall be punished, because that in a Manner it inforces the Party, to whom such Letter is sent, to publish it to his Friends for their Advice, and for fear the other Party should, so that this Compulsary Publication shall be deem'd a Publication in the Delinquent.—— And in an Information for writing &c. the Country-Parson's Advice to the Ld. Keeper, it was held, that it lay for speaking Ironically. And the Attorney General said, it was laid to be wrote Ironice, and the Defendant ought to have shew'd at the Trial, that he did not intend to scandalize them; And the *Jury are Judges Quo Animo* this was done, and they have found the Ill Intent. And Judgment was given, of the Pillory, and a Fine of 40 Marks. 11 Mod. 86 Trin. 5 Annae B. R. The Queen v. Dr. Brown.

4 Lev. 139. S. C.

5 The Matter being again at the Bar, Keeling and Moreton inclined, that the Printing was not justifiable, and that the Committee ought not to be informed by Printing, or Copies, but Viva voce. Ibid. 241. Trin. 22 Car. 2. S. C.—— But after in Mich. Term following, Judgment was given for the Defendant. Ibid. 241. S. C.—— Mod. 58. S. C. Trin. 22 Car. 2. but no Judgment.—— Sid. 414. Pasch. 21 Car. 2. S. C. but Adjornatur.—— Saund. 131. Hill. 19 & 20 Car 2. S. C. and there 133, Reports that after this Case had depended 12 Terms, Judgment was given for the Defendant by Hale Ch. J. Twisden and Rainsford upon this Point, *viz.* That it was the Order and Course of Proceedings in Parliament to print and deliver Copies &c. of which they ought to take Judicial Notice.—— S. C. cited Hawk. Pl. C. 194. cap. 73. S. 8. And says it seems to be holden by some, That no *want of Jurisdiction in the Court, to which* such a Complaint shall be exhibited, will make it a Libel; Because the Mistake of the Court is not imputable to the Party, but to his Counsel. But if it shall *manifestly appear, that a Prosecution is intirely false*, malicious and groundless, *and commenced*, not with a Design to go through with it, but only *to expose the Defendant's Character, under the shew of a legal Proceeding*, Serjeant Hawkins says, he cannot see any Reason why such a Mockery of Publick Justice should not rather aggravate the Offence, than make it cease to be one, and make such Scandal a good Ground of an Indictment at the Suit of the King, as it makes the Malice of their Proceeding a good Foundation of an Action on the Case at the Suit of the Party, whether the Conrt [*sic*] had a Jurisdiction of the Cause or not. Hawk. Pl. C. 194, 195. cap. 73. S. 8 —— But it seems that *no Presentment by a Grand Jury* can amount to a Libel; because it would be of the utmost ill Consequence any way to discourage them from making their Inquiries with that Freedom, which is necessary for the Publick Good, by making them liable to Prosecutions on Account of such Inquiries. Hawk. Pl. C. Abr. 224. cap. 73. S. 7. but in the Book at large, it is S. S.

6 2 Show. 313. S. C.

7 An Action was brought by the Husband for riding Skimmington; and adjudged it lay; because it made him ridiculous, and exposed him; per Holt, 3 Salk. 226. Mich. 5 W. & M. B. R. in Case of Tilney v. Crop. —— *So* carrying a Fellow about *with Horns, and bowing at B's Door*. 2 Show. 314. cites Sir Wm. Bolton v. Dean—— For scandalous Matter is not necessary to make a Libel, it is enough if the Defendant induces an ill Opinion of the Plaintiff, or to make him Contemptible or *Ridiculous*. 3 Salk. 226 in Case of Tilney v. Crop.—— 2 Show. 314. cites Mingay v. Moody.

8 2 Salk. 417. Hill. 10 W. 3. B. R. S. C.

9 2 Salk. 417. S. C.

10 9 Rep. 59. b. Lamb's Case must be expounded by Mo. 813. S. C. where it is Reported as resolved, that the *Writer of a Libel is*, in Judgment of Law, *the Contriver*; and then Coke's Case, that he that is Convict of a Libel must be Contriver, Procurer, or Publisher, is good Law, but not otherwise; per Holt Ch. J. 12 Mod. 219. the King v. Beare.—— S. P. in S. C. 2 Salk. 418. that if it be not expounded by Mo. 813. it may be doubtful; For if that Case be look'd into, the Question there was about the Publication of a Libel, and it was

held, that the Writing the Copy of a Libel was not a Publication, but only Evidence of a Publication. But there was no Question made, how far he was guilty of Libelling. And as for the Matter of Publication, the *bare having* a Libel is not a Publication; per Holt Ch. J.—— But when a Libel appears *under a Man's own Handwriting*, and no other Author is known, it *is a taking in the Manner*, and it turns the Proof upon him; per Holt, Ibid. 419.—— * Mo. 822. Goodrick's Case.

11 2 Salk. 418. —— For he who dictated cannot be indicted for making this Libel. Because he did not write it; and if the Writer cannot be punished, this Crime is unpunishable; per Cur. Carth. 406. S. C.—— * It is highly Criminal. 2 Salk. 417. per Holt Ch. J—— 5 Mod. 167. S. C.—— * Carth. 409. per Holt Ch. J. in Case of the King v. Bear.

12 See (A).

13 S. C. cited per Holt Ch. J. 1 Salk. 419. in Case of the King v. Bear.—and calls it a strong Case.

14 A Libel, tho' the Contents are true, is not to be *justify'd*. But the Right Way is to discover it legally to some Magistrate or other that may have Cognizance of the Cause; but it may be justify'd in an *Action Sur Case*. Hob. 253. Lake v. Hatton.

15 * Tho' he never publishes it, yet his having it in readiness for that Purpose if any Occasion should happen, is highly Criminal, and tho' he might design to keep it private, yet after his Death they might fall into such Hands as might be injurious to the Government, and therefore Men ought not to be allowed to have such evil Instruments in their Keeping &c. Per Cur. Carth. 409. Trin. 9 W. 3. B. R. The King v. Bear.

16 S. P. Resolved. 2 Salk. 66c. Mich. 5 Annae. B. R. The Queen v. Dr. Drake, which was an Information for writing a Libel, setting forth, that it *contained several scandalous Matters secundum Tenorem sequentem*, and in reciting a Sentence of the Libel it was (*nor*) instead of (*not*). Upon Not Guilty pleaded, this appeared in Evidence, and a special Verdict was found. The Court held, that this was not a Tenor by Reason of the Variance of (Nor) for (Not) which are different both in Grammar and Sense. —— And there it was held by Holt Ch. J. That in pleading, there are 2 *Ways of describing a Libel* or other Writing, viz by the Words, or by the Sense. *By the Words*, as if you declare of a Libel Cujus Tenor sequitur &c. or Qui sequitur in his Anglicanis Verbis sequentibus, there you describe it by its particular Words, of which each is such a Mark, that if you vary, you fail in making good their Description. 2. You may describe it *by its Sense and Meaning*; thus it is a good Information to shew, That the Defendant made a Writing, and therein said so and so, translating it into Latin; in which Case exactness of Words is not so material; because it is described by the Sense and Substance of it. —— S. C. 11 Mod. 78. Pasch. 5 Annae. Adjornatur. —— Ibid. 84. Trin. 5 Annae. Adjornatur. —— Ibid. 95. Mich. 5 Annae. Adjudged for the Defendant. But says, that a Writ of Error was intended.

1 Punishment in the spiritual court.

2 Pecuniary penalty,

3 Swearing in presence of a justice.

4 In presence of a constable.

5 In presence of any other.

6 Commitment on not paying the penalty.

7 On not paying the charges.

8 Soldier or seaman.

9 Form of the conviction.

10 Certiorari.

11 Conviction to be filed.

12 Penalty on a justice omitting his duty.

13 Penalty on the constable.

14 Act to be read in the church.

15 Limitation of actions.

16 Navy.

* Mr. *Oswald* repeatedly declared that he meant no contempt of the court in what he had published.

* Declar. of Rights, s. 12.

† Constit. of Penn., s. 35.

CHAPTER 3

AMENDMENT I

ASSEMBLY AND PETITION CLAUSES

3.1TEXTS

3.1.1DRAFTS IN FIRST CONGRESS

3.1.1.1Proposal by Madison in House, June 8, 1789

3.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

…

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.

Congressional Register, June 8, 1789, vol. 1, p. 427.

3.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

3.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

3.1.1.2 Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 2 The people have certain natural rights which are retained by them when they enter into society, Such are the rights of conscience in matters of religion; of acquiring property, and of pursuing happiness & safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably Assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances. Of these rights therefore they Shall not be deprived by the government of the united States.

Madison Papers, DLC.

3.1.1.3 House Committee of Eleven Report, July 28, 1789

Art. I, Sec. 9—Between Par. 2 and 3 insert, …

"The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."

Broadside Collection, DLC.

3.1.1.4 House Consideration, August 15, 1789

3.1.1.4.a The next clause of the 4th proposition was taken into consideration, and was as follows: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed."

Congressional Register, August 15, 1789, vol. 2, p. 197 ("agreed to").

3.1.1.4.b Fifth amendment—"The freedom of speech, and of the press, and of the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."

Daily Advertiser, August 17, 1789, p. 2, col. 1 ("carried in the

Daily Advertiser, August 17, 1789, p. 2, col. 1 ("carried in the affirmative").

3.1.1.4.c Fifth amendment—"The freedom of speech, and of the press, and of the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."

New-York Daily Gazette, August 18, 1789, p. 798, col. 3 ("carried in the affirmative").

3.1.1.4.d Fifth amendment. *The freedom of speech, and of the press, and of the rights of the people peaceably to assemble and consult for their common good, and to apply to government for the redress of grievances shall not be infringed.*

Gazette of the U.S., August 19, 1789, p. 147, col. 1 ("agreed to").

3.1.1.5Motion by Sedgwick in House, August 15, 1789

3.1.1.5.a Mr. SEDGWICK

… therefore moved to strike out "assemble and."

Congressional Register, August 15, 1789, vol. 2, p. 197 (motion "lost by a considerable majority").

3.1.1.5.b Mr. Sedgwick moved to strike out the words "assemble and."

Gazette of the U.S., August 19, 1789, p. 147, col. 1 ("[I]t was negatived.").

3.1.1.6Motion by Tucker in House, August 15, 1789

3.1.1.6.a Mr. TUCKER

[H]e noticed that the most material part proposed by those states [namely, Virginia and North Carolina] was omitted, which was, a declaration that the people should have a right to instruct their representatives; he would move to have those words inserted as soon as the motion [by Mr. Sedgwick] for striking out was decided.

Congressional Register, August 15, 1789, vol. 2, p. 198 ("determined in the negative, 10 in favor and 41 against it.").

3.1.1.6.b Mr. Tucker moved to insert between the words “common good,” “and to” in this paragraph, these words “to instruct their representatives.”

Daily Advertiser, August 17, 1787, p. 2, col. 1 (“the motion was negatived by a great majority”).

3.1.1.6.c Mr. Tucker moved to insert between the words “common good,” “and to” in this paragraph, these words “to instruct their representatives.”

New-York Daily Gazette, August 18, 1789, p. 798, col. 4. (“was negatived by a great majority”).

3.1.1.6.d Mr. Tucker moved to insert these words, *to instruct their representatives.*

Gazette of the U.S., August 19, 1789, p. 147, col. 1 (“[I]t was negatived by a large majority”).

3.1.1.7Further House Consideration, August 21, 1789

Fourth. The freedom of speech, and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.

HJ, p. 107 (“read and debated …, agreed to by House, … two-thirds of the members present concurring”).[1]

3.1.1.8House Resolution, August 24, 1789

ARTICLE THE FOURTH.

The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for a redress of grievances, shall not be infringed.

House Pamphlet, RG 46, DNA.

3.1.1.9Senate Consideration, August 25, 1789

3.1.1.9.a The Resolve of the House of Representatives of the 24th of August, upon certain “Articles to be proposed to the Legislatures of the

several States as Amendments to the Constitution of the United States" was read as followeth:

...

Article the fourth

> The freedom of speech, and of the press, and the right of the People peaceably to assemble and consult for their common good and to apply to the Government for redress of grievances shall not be infringed.
>
> Rough SJ, p. 215.

3.1.1.9.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

Article the Fourth.

> "The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.
>
> Smooth SJ, p. 194.

3.1.1.9.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

"ARTICLE the FOURTH.

> …
>
> "The freedom of speech, and of the press, and the right of the people peaceably to assemble, and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed.
>
> Printed SJ, p. 104.

3.1.1.10Further Senate Consideration, September 3, 1789

3.1.1.10.a On the fourth Article it was moved to insert these words "To instruct their Representatives" after the words "Common good."

Rough SJ, p. 245 ("it passed in the Negative.").

3.1.1.10.b On the fourth Article it was moved to insert these words,—"To instruct their Representatives," after the words "Common good"— …

Smooth SJ, p. 218 ("it passed in the Negative.").

3.1.1.10.c On the fourth Article it was moved to insert these words,—"To instruct their Representatives," after the words "Common good"— …

Printed SJ, p. 117 ("it passed in the Negative.").

3.1.1.11 Further Senate Consideration, September 3, 1789

3.1.1.11.a On Motion, To strike out the words "And consult for their common good and,"

Rough SJ, p. 246 ("It passed in the negative.").

3.1.1.11.b On motion, To strike out the words "And to consult for their common good and,"

Smooth SJ, p. 219 ("It passed in the Negative.").

3.1.1.11.c On motion, To strike out the words "And consult for their common good and,"

Printed SJ, p. 117 ("It passed in the Negative.").

3.1.1.12 Further Senate Consideration, September 4, 1789

3.1.1.12.a On Motion to adopt the fourth Article proposed by Resolve of the House of Representatives to read as followeth,

"That Congress shall make no law, abridging the freedom of speech, or of the press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances,"

Rough SJ, p. 247 ("It passed in the affirmative.").

3.1.1.12.b On motion, To adopt the fourth Article proposed by the Resolve of the House of Representatives, to read as followeth,

"That Congress shall make no law, abridging the freedom of Speech, or of the Press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances,"

Smooth SJ, pp. 220–21 ("It passed in the Affirmative.").

3.1.1.12.c On motion, To adopt the fourth Article proposed by the Resolve of the House of Representatives, to read as followeth,

"That Congress shall make no law, abridging the freedom of Speech, or of the Press, or the right of the People peaceably to assemble and consult for their common good, and to petition the Government for a redress of grievances,"

Printed SJ, p. 118 ("It passed in the Affirmative.").

that the Senate do

3.1.1.12.d Resolved ~~to~~ ∧ concur with the House of Representatives in Article fourth.

To read as follows, to wit:

"That Congress shall make no law, abridging the freedom of Speech or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances,"

Senate MS, RG 46, p. 3.

3.1.1.13 Further Senate Consideration, September 9, 1789

3.1.1.13.a And on Motion to amend article the third to read as follows:

"Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of Religion; or abridging the freedom of Speech, or the press, or the right of the People peaceably to assemble, and petition to the government for the redress of grievances."

…

On motion, To strike out the fourth article,

Rough SJ, p. 274 (As to each motion, "It passed in the Affirmative.").

3.1.1.13.b On motion, To amend article the third, to read as follows:

"Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the Government for the redress of grievances"—

…

On motion, To strike out the fourth article, … .

Smooth SJ, p. 243 (As to each motion, "It passed in the Affirmative.").

3.1.1.13.c On motion, To amend Article the third, to read as follows:

"Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the Government for the redress of grievances"—

…

On motion, To strike out the fourth Article,

Printed SJ, p. 129 (As to each motion, "It passed in the Affirmative.").

3.1.1.13.d On the question to concur with the House of Representatives on their resolution of the 24th of Augt. proposing amendments to the constitution of the United States, with the following amendments viz:

…

To erase from the 3d. Article the word "Religion" & insert—Articles of faith or a mode of Worship. —

And to erase from the same article the words "thereof, nor shall the rights of Conscience be infringed" & insert—of Religion; or abridging the freedom of speech, or of the press, or the right of

the people peaceably to assemble, & to petition to the government for a redress of grievances

To erase the 4th. article, & the words "Article the fourth."

Ellsworth MS, pp. 1–2, RG 46, DNA.

3.1.1.14Senate Resolution, September 9, 1789

ARTICLE THE *THIRD.*

Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition to the government for a redress of grievances.

Senate Pamphlet, RG 46, DNA.

3.1.1.15Further House Consideration, September 21, 1789

Resolved, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

3.1.1.16Further Senate Consideration, September 21, 1789

3.1.1.16.a A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present

concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Smooth SJ, pp. 265–66.

3.1.1.16.b A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Printed SJ, pp. 141–42.

3.1.1.17Further Senate Consideration, September 21, 1789

3.1.1.17.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

3.1.1.17.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a

conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

3.1.1.18 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to & ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

3.1.1.19 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Article the eighth. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence.”

HJ, p. 152 (“On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14”).

3.1.1.20 Senate Consideration of Conference Committee Report, September 24, 1789

3.1.1.20.a Mr. Ellsworth, on behalf of the managers of the conference on “articles to be proposed to the several States as Amendments to the Constitution of the United States,” reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Smooth SJ, pp. 272–73.

3.1.1.20.b Mr. Ellsworth, on behalf of the managers of the conference on “Articles to be proposed to the several States as Amendments to the Constitution of the United States,” reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by

the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Printed SJ, p. 145.

3.1.1.21 Further Senate Consideration of Conference Committee Report, September 24, 1789

3.1.1.21.a A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Smooth SJ, pp. 278–79.

3.1.1.21.b A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or

prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p. 148.

3.1.1.22 Further Senate Consideration of Conference Committee Report, September 25, 1789

3.1.1.22.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

3.1.1.22.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

3.1.1.23 Agreed Resolution, September 25, 1789

3.1.1.23.a Article the Third.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Smooth SJ, Appendix, p. 292.

3.1.1.23.b ARTICLE THE THIRD.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Printed SJ, Appendix, p. 163.

3.1.1.24Enrolled Resolution, September 28, 1789

Article the third … Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Enrolled Resolutions, RG 11, DNA.

3.1.1.25Printed Versions

3.1.1.25.a Art. I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutes at Large, vol. 1, p. 21.

3.1.1.25.b Art. III. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutes at Large, vol. 1, p. 97.

3.1.2PROPOSALS FROM THE STATE CONVENTIONS

3.1.2.1Maryland Minority, April 26, 1788

14. That every man hath a right to petition the legislature for the redress of grievances in a peaceable and orderly manner.

Maryland Gazette, May 1, 1788 (Committee minority).

3.1.2.2Massachusetts Minority, February 6, 1788

[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

Massachusetts Convention, pp. 86–87.

3.1.2.3New York, July 26, 1788

That the People have a right peaceably to assemble together to consult for their common good, or to instruct their Representatives; and that every person has a right to Petition or apply to the Legislature for redress of Grievances.—That the Freedom of the Press ought not to be violated or restrained.

State Ratifications, RG 11, DNA.

3.1.2.4North Carolina, August 1, 1788

15th. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the Legislature for redress of grievances.

State Ratifications, RG 11, DNA.

3.1.2.5Rhode Island, May 29, 1790

15th. That the people have a right peaceably to assemble together, to consult for their common good, or to instruct their representatives; and that every person has a right to petition or apply to the legislature for redress of grievances.

State Ratifications, RG 11, DNA.

3.1.2.6Virginia, June 27, 1788

Fifteenth. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their Representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.

State Ratifications, RG 11, DNA.

3.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

3.1.3.1Delaware: Declaration of Rights, 1776

SECT. 9. That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner.

Delaware Laws, vol. 1, App., p. 80.

3.1.3.2Maryland: Constitution, 1776

11. That every man hath a right to petition the legislature for the redress of grievances, in a peaceable and orderly manner.

Maryland Laws, November 3, 1776.

3.1.3.3Massachusetts

3.1.3.3.aBody of Liberties, 1641

> [12] Every man whether Inhabitant or fforreiner, free or not free shall have libertie to come to any publique Court, Councel, or Towne meeting, and either by speech or writeing to move any lawfull, seasonable, and materiall question, or to present any necessary motion, complaint, petition, Bill or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner.
>
> Massachusetts Colonial Laws, p. 35.

3.1.3.3.bConstitution, 1780

> [Part I, Article] XIX. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good: Give instructions to their representatives; and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.
>
> Massachusetts Perpetual Laws, p. 7.

3.1.3.4New Hampshire: Constitution, 1783

> [Part I, Article] XXXII. The people have a right in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives; and to request of the legislative body, by way of petition or remonstrance, redress of the wrongs done them, and of the grievances they suffer.
>
> New Hampshire Laws, p. 27.

3.1.3.5New York: Bill of Rights, 1787

> *Tenth*, That it is the Right of the Citizens of this State to petition the Person administering the Government of this State for the Time being, or either House of the Legislature; and all Commitments and Prosecutions for such petitioning, are illegal.
>
> New York Laws, vol. 2, p. 2.

3.1.3.6North Carolina: Declaration of Rights, 1776

Sect. XVIII. That the People have a Right to assemble together to consult for their common good, to instruct their Representatives, and to apply to the Legislature for Redress of Grievances.

North Carolina Laws, p. 276.

3.1.3.7Pennsylvania

3.1.3.7.a Constitution, 1776

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

…

XVI. That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.

Pennsylvania Acts, M'Kean, pp. x–xi.

3.1.3.7.b Constitution, 1790

ARTICLE IX.

…

SECT. XX. That the citizens have right [*sic*], in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.

Pennsylvania Acts, Dallas, pp. xxxv–xxxvi.

3.1.3.8Vermont: Constitution, 1777

CHAPTER I.

…

18. That the People have a Right to assemble together, to consult for their common Good—to instruct their Representatives, and to apply to the

Legislature for Redress of Grievances, by Address, Petition or Remonstrance.

Vermont Acts, p. 5.

3.1.4OTHER TEXTS

3.1.4.1Tumultuous Petition Act, 1661

[N]o person or persons whatsoever shall repaire to his Majesty or both or either of the Houses of Parliament upon p[re]tense of presenting or delivering any peticion complaint remonstrance or declaration or other addresses accompanied with excessive number of people not att any one time with abouve the number of ten persons upon pain of incurring a penalty not exceeding the sum of one hundred pounds in money and three months imprisonment … for every offence which offence to be prosecuted at the Court of King's Bench or att the assizes or generall quarter sessions within six months after the offence committed and proved by two or more credible witnesses.

2. PROVIDED alwaies that this Act or any thing therein contained shall not be construed to extend or debar or hinder any person or persons not exceeding the number or ten aforesaid to present any publique or private grievance or complaint to any member or members of Parliament after his election and during the continuance of the Parliament or to the King's Majesty for any remedy to bee thereupon had nor to extend to any address whatsoever to his Majesty by all or any the members of both or either Houses of Parliament during the sitting of Parliament but that they may enjoye theire freedome of accesse to his Majesty as heretofore hath beene used.

13 Chas. 2, st. 1, c. 5.

3.1.4.2English Bill of Rights, 1689

… That it is the right of the subjects to petition the King and all

commitments and prosecutions for such petitioning are illegal.

…

And that for redresse of all grievances, and for the amending strengthening and preserving of the lawes Parlyaments ought to be held frequently.

1 Will. & Mar. sess. 2, c. 2.

3.1.4.3Resolutions of the Stamp Act Congress, October 19, 1765

13th. That it is the right of the British subjects in these colonies, to petition the king or either house of parliament.

First Congress Journal, p. 29.

3.1.4.4Declaration and Resolves of the First Continental Congress, October 14, 1774

*Resolved, N.C.D.*8. That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and committments for the same, are illegal.

Tansill, p. 3.

3.1.4.5Declaration of Independence, July 4, 1776

… In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people. Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have

been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.—

Continental Congress Papers, DNA.

3.1.4.6Richard Henry Lee to Edmund Randolph, Proposed Amendments, October 16, 1787

… That the right of the people to assemble peaceably for the purpose of petitioning the legislature shall not be prevented… .

Virginia Gazette, December 22, 1787.

3.2DISCUSSION OF DRAFTS AND PROPOSALS

3.2.1THE FIRST CONGRESS

3.2.1.1June 8, 17892

3.2.1.2August 15, 1789

3.2.1.2.a The next clause of the 4th proposition was taken into consideration, and was as follows: “The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed.”

*Mr. S*EDGWICK

Submitted to those gentlemen who had contemplated the subject, what effect such an amendment as this would have; he feared it would tend to make them appear trifling in the eyes of their constituents; what, said he,

shall we secure the freedom of speech, and think it necessary at the same time to allow the right of assembling? If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such minutiae—he therefore moved to strike out “assemble and.”

Mr. Benson.

The committee who framed this report, proceeded on the principle that these rights belonged to the people; they conceived them to be inherent, and all that they meant to provide against, was their being infringed by the government.

Mr. Sedgwick

Replied, that if the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased, that he might get up when he pleased, and go to bed when he thought proper; but he would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, under a government where none of them were intended to be infringed.

Mr. Tucker

Hoped the words would not be struck out, for he considered them of importance; beside, they were recommended by the states of Virginia and North-Carolina, though he noticed that the most material part proposed by those states was omitted, which was, a declaration that the people should have a right to instruct their representatives; he would move to have those words inserted as soon as the motion for striking out was decided.

Mr. Gerry

Was also against the words being struck out, because he conceived it to be an essential right; it was inserted in the constitutions of several states, and though it had been abused in the year 1786 in Massachusetts, yet that abuse ought not to operate as an argument against the use of it; the people ought to be secure in the peaceable enjoyment of this privilege, and that can only be done by making a declaration to that effect in the constitution.

Mr. Page.

The gentleman from Massachusetts, (mr. Sedgwick) who has made this motion, objects to the clause; because the right is of so trivial a nature; he supposes it no more essential than whether a man has a right to wear his hat or not, but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights; if the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.

Mr. Vining

Said, if the thing was harmless, and it would tend to gratify the states that had proposed amendments, he should agree to it.

Mr. Hartley

Observed that it had been asserted in the convention of Pennsylvania, by the friends of the constitution, that all the rights and powers that were not given to the government, were retained by the states and the people thereof; this was also his own opinion, but as four or five states had required to be secured in those rights by an express declaration in the constitution, he was disposed to gratify them; he thought every thing that was not incompatible with the general good ought to be granted, if it would tend to obtain the confidence of the people in the government, and upon the whole, he thought these words were as necessary to be inserted in the declaration of rights as most in the clause.

Mr. Gerry

Said that his colleague contended for nothing, if he supposed that the people had a right to consult for the common good, because they could not consult unless they met for that purpose.

Mr. Sedgwick

Replied that if they were understood or implied in the word consult, they were utterly unnecessary, and upon that ground he moved to have them struck out.

The question was now put upon mr. Sedgwick’s motion, and lost by a

considerable majority.

Mr. Tucker then moved to insert these words, “to instruct their representatives.”

Mr. Hartley

Wished the motion had not been made, for gentlemen acquainted with the circumstances of this country, and the history of the country from which we separated, differed exceedingly on this point; the members of the house of representatives, said he, are chosen for two years, the members of the senate for six.

According to the principles laid down in the constitution, it is presumable that the persons elected know the interests and the circumstances of their constituents, and being checked in their determinations by a division of the legislative power into two branches, there is little danger of error, at least it ought to be supposed that they have the confidence of the people during the period for which they are elected; and if, by misconduct, they forfeit it, their constituents have the power of leaving them out at the expiration of that time; thus they are answerable for the part they have taken in measures that may be contrary to the general wish.

Representation is the principle of our government; the people ought to have confidence in the honor and integrity of those they send forward to transact their business; their right to instruct them is a problematical subject. We have seen it attended with bad consequences, both in England and in America. When the passions of the people were excited, instructions have been resorted to and obtained, to answer party purposes; and although the public opinion is generally respectable, yet at such moments it has been known to be often wrong; and happy is that government composed of men of firmness and wisdom to discover and resist the popular error.

If, in a small community, where the interests, habits, and manners are neither so numerous or deversified [*sic*], instructions bind not:—What shall we say of instructions to this body; can it be supposed that the inhabitants of a single district in a state, are better informed with respect to the general interests of the union than a select body assembled from every part? Can it be supposed that a part will be more desirous of promoting the good of the whole than the whole will of the part? I apprehend, sir, that congress will be judges of proper measures, and that instructions will never be resorted to but for party purposes, when they will generally contain the prejudices and acrimony of the party rather than the dictates of honest reason and sound

policy.

In England this question has been considerably agitated, the representatives of some towns in parliament, have acknowledged, and submitted to the binding force of instructions, while the majority have thrown off the shackles with disdain. I would not have this precedent influence our decision; but let the doctrine be tried upon its own merits, and stand or fall as it shall be found to deserve.

It appears to my mind, that the principle of representation is distinct from an agency, which may require written instructions. The great end of meeting is to consult for the common good; but can the common good be discerned without the object is reflected and shewn in every light. A local or partial view does not necessarily enable any man to comprehend it clearly; this can only result from an inspection into the aggregate. Instructions viewed in this light, will be found to embarrass the best and wisest men. And were all the members to take their seats in order to obey instructions, and those instructions were as various as it is probable they would be, what possibility would there exist of so many accommodating each to the other, as to produce any act whatever? Perhaps a majority of the whole might not be instructed to agree to any one point; and is it thus the people of the United States propose to form a more perfect union, provide for the common defence, and promote the general welfare?

Sir, I have known within my own time so many inconveniences and real evils arise from adopting the popular opinions on the moment, that although I respect them as much as any man, I hope this government will particularly guard against them, at least that they will not bind themselves by a constitutional act, and by oath to submit to their influence, if they do, the great object which this government has been established to attain, will inevitably elude our grasp on the uncertain and veering winds of popular commotion.

Mr. Page.

The gentleman from Pennsylvania tells you, that in England this principle is doubted; how far this is consonant with the nature of the government I will not pretend to say, but I am not astonished to find that the administrators of a monarchical government are unassailable by the weak voice of the people, but under a democracy whose great end is, to form a code of laws congenial with the public sentiment, the popular opinion ought to be collected and attended to. Our present object is, I presume, to secure to our constituents

and to posterity these inestimable rights. Our government is derived from the people, of consequence the people have a right to consult for the common good; but to what end will this be done, if they have not the power of instructing their representatives? Instruction and representation in a republic, appear to me to be inseparably connected; but was I the subject of a monarch, I should doubt whether the public good did not depend more upon the prince's will than the will of the people. I should dread a popular assembly consulting for the public good, because under its influence, commotions and tumults might arise that would shake the foundation of the monarch's throne, and make the empire tremble in expectation. The people of England have submitted the crown to the Hanover family, and have rejected the Stuarts, if instructions upon such a revolution were considered as binding, it is difficult to know what would have been the effects, it might be well therefore to have the doctrine exploded from that kingdom; but it will not be advanced as a substantial reason in favor of our treading in the same steps.

The honorable gentleman has said, that when once the people have chosen a representative, they must rely on his integrity and judgment during the period for which he is elected. I think, sir, that to doubt the authority of the people to instruct their representatives, will give them just cause to be alarmed for their fate: I look upon it as a dangerous doctrine, subversive of the great end for which the United States have confederated. Every friend of mankind, every well-wisher of his country will be desirous of obtaining the sense of the people on every occasion of magnitude; but how can this be so well expressed as in instructions to their representatives; I hope, therefore, that gentlemen will not oppose the insertion of it in this part of the report.

Mr. Clymer.

I hope the amendment will not be adopted, but if our constituents chuse to instruct us, that they may be left at liberty to do so; do gentlemen foresee the extent of these words? If they have a constitutional right to instruct us, it infers that we are bound by those instructions, and as we ought not to decide constitutional questions by implication, I presume we shall be called upon to go further, and expressly declare the members of the legislature bound by the instruction of their constituents; this is a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body, which are essential requisites in the legislatures of free governments,

they prevent men of abilities and experience from rendering those services to the community that are in their power, destroying the object contemplated by establishing an efficient general government, and rendering congress a mere passive machine.

MR. SHERMAN.

It appears to me, that the words are calculated to mislead the people by conveying an idea, that they have a right to control the debates of the legislature; this cannot be admitted to be just, because it would destroy the object of their meeting. I think, when the people have chosen a representative, it is his duty to meet others from the different parts of the union, and consult, and agree with them to such acts as are for the general benefit of the whole community; if they were to be guided by instructions, there would be no use in deliberations, all that a man would have to do, would be to produce his instructions and lay them on the table, and let them speak for him, from hence I think it may be fairly inferred, that the right of the people to consult for their common good can go no further than to petition the legislature or apply for a redress of grievances. It is the duty of a good representative to enquire what measures are most likely to promote the general welfare, and after he has discovered them to give them his support; should his instructions therefore coincide with his ideas on any measure, they would be unnecessary; if they were contrary to the conviction of his own mind, he must be bound by every principle of justice to disregard them.

Mr. JACKSON

Was in favor of the right of the people, to assemble and consult for the common good, it had been used in this country as one of the best checks on the British legislature in their unjustifiable attempts to tax the colonies without their consent. America had no representatives in the British parliament, therefore they could instruct none, yet they exercised the power of consultation to a good effect. He begged gentlemen to consider the dangerous tendency of establishing such a doctrine, it would necessarily drive the house into a number of factions, there might be different instructions from every state, and the representation from each state would be a faction to support its own measures.

If we establish this as a right, we shall be bound by those instructions; now, I am willing to leave both the people and the representatives to their

own discretion on this subject, let the people consult and give their opinion, let the representative judge of it, and if it is just, let him govern himself by it as a good member ought to do, but if it is otherwise, let him have it in his power to reject their advice.

What may be the consequence of binding a man to vote in all cases according to the will of others? He is to decide upon a constitutional point, and on this question his conscience is bound by the obligation of a solemn oath; you now involve him in a serious dilemma, if he votes according to his conscience, he decides against his instructions, but in deciding against his instructions he commits a breach of the constitution, by infringing the prerogative of the people, secured to them by this declaration. In short, it will give rise to such a variety of absurdities and inconsistencies as no prudent legislature would wish to involve themselves in.

Mr. Gerry.

By the checks provided in the constitution, we have good grounds to believe that the very framers of it conceived that the government would be liable to maladministration, and I presume that the gentlemen of this house do not mean to arrogate themselves more perfection than human nature has as yet been found to be capable of; if they do not, they will admit an additional check against abuses which this, like every other government, is subject to. Instructions from the people will furnish this in a considerable degree.

It has been said that the amendment proposed by the honorable gentleman from South-Carolina, (mr. Tucker) determines this point, “that the people can bind their representatives to follow their instructions;” I do not conceive that this necessarily follows: I think the representative, notwithstanding the insertion of these words, would be at liberty to act as he pleased; if he declined to pursue such measures as he was directed to attain, the people would have a right to refuse him their suffrages at a future election.

Now, though I do not believe the amendment would bind the representatives to obey the instructions, yet I think the people have a right both to instruct and bind them. Do gentlemen conceive that on any occasion instructions would be so general as to proceed from all our constituents? If they do it is the sovereign will, for gentlemen will not contend that the sovereign will, presides in the legislature; the friends and patrons of this constitution have always declared that the sovereignty resides in the people,

and that they do not part with it on any occasion; to say the sovereignty vests in the people, and that they have not a right to instruct and control their representatives, is absurd to the last degree; they must either give up their principle, or grant that the people have a right to exercise their sovereignty to control the whole government, as well as this branch of it; but the amendment does not carry the principle to such an extent, it only declares the right of the people to send instructions; the representative will, if he thinks proper, communicate his instructions to the house, but how far they shall operate on his conduct, he will judge for himself.

The honorable gentleman from Georgia (mr. Jackson) supposes that instructions will tend to generate factions in this house, but he did not see how it could have that effect, any more than the freedom of debate had. If the representative entertains the same opinion with his constituents, he will decide with them in favor of the measure; if other gentlemen, who are not instructed on the point, are convinced by argument that the measure is proper, they will also vote with them, consequently the influence of debate and of instruction is the same.

The gentleman says further, that the people have the right of instructing their representatives; if so, why not declare it? Does he mean that it shall lay dormant and never be exercised? If so, it will be a right of no utility. But much good may result from a declaration in the constitution that they possess this privilege; the people will be encouraged to come forward with their instructions, which will form a fund of useful information for the legislature; we cannot, I apprehend, be too well informed of the true state, condition, and sentiment of our constituents, and perhaps this is the best mode in our power of obtaining information. I hope we shall never shut our ears against that information which is to be derived from the petitions and instructions of our constituents. I hope we shall never presume to think that all the wisdom of this country is concentred within the walls of this house. Men, unambitious of distinctions from their fellow citizens, remain within their own domestic walk, unheard of and unseen, possessing all the advantages resulting from a watchful observance of public men and public measures, whose voice, if we would descend to listen to it, would give us knowledge superior to what could be acquired amidst the cares and bustles of a public life; let us then adopt the amendment, and encourage the diffident to enrich our stock of knowledge with the treasure of their remarks and observations.

Mr. Madison.

I think the committee acted prudently in omitting to insert these words in the report they have brought forward; if unfortunately the attempt of proposing amendments should prove abortive, it will not arise from the want of a disposition in the friends of the constitution to do what is right with respect to securing the rights and privileges of the people of America; but from the difficulties arising from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say that if we confine ourselves to an enumeration of simple acknowledged principles, the ratification will meet with but little difficulty. Amendments of a doubtful nature will have a tendency to prejudice the whole system; the proposition now suggested, partakes highly of this nature; it is doubted by many gentlemen here; it has been objected to in intelligent publications throughout the union; it is doubted by many members of the state legislatures: In one sense this declaration is true, in many others it is certainly not true; in the sense in which it is true, we have asserted the right sufficiently in what we have done; if we mean nothing more than this, that the people have a right to express and communicate their sentiments and wishes, we have provided for it already. The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this government; the people may therefore publicly address their representatives; may privately advise them, or declare their sentiments by petition to the whole body; in all these ways they may communicate their will. If gentlemen mean to go further, and to say that the people have a right to instruct their representatives in such a sense as that the delegates were obliged to conform to those instructions, the declaration is not true. Suppose they instruct a representative by his vote to violate the constitution, is he at liberty to obey such instructions? Suppose he is instructed to patronize certain measures, and from circumstances known to him, but not to his constituents, he is convinced that they will endanger the public good, is he obliged to sacrifice his own judgment to them? Is he absolutely bound to perform what he is instructed to do? Suppose he refuses, will his vote be the less valid, or the community be disengaged from that obedience which is due from the laws of the union? If his vote must inevitably have the same effect, what sort of a right is this in the constitution to instruct a representative who has a right to disregard the order, if he pleases? In this sense the right does not exist, in the other sense it does exist, and is provided largely for.

The honorable gentleman from Massachusetts, asks if the sovereignty is

not with the people at large; does he infer that the people can, in detached bodies, contravene an act established by the whole people? My idea of the sovereignty of the people is, that the people can change the constitution if they please, but while the constitution exists, they must conform themselves to its dictates: But I do not believe the inhabitants of any district can speak the voice of the people, so far from it, their ideas may contradict the sense of the whole people; hence the consequence that instructions are binding on the representative is of a doubtful, if not of a dangerous nature. I do not conceive, therefore, that it is necessary to agree to the proposition now made; so far as any real good is to arise from it, so far that real good is provided for; so far as it is of a doubtful nature, so far it obliges us to run the risk of losing the whole system.

Mr. Smith (of S.C.)

I am opposed to this motion, because I conceive it will operate as a partial inconvenience to the more distant states; if every member is to be bound by instructions how to vote, what are gentlemen from the extremeties of the continent to do?

Members from the neighbouring states can obtain their instructions earlier than those from the southern ones, and I presume that particular instructions will be necessary for particular measures, of consequence we vote perhaps against instructions on their way to us, or we must decline voting at all; but what is the necessity of having a numerous representation; one member from a state can receive the instructions, and by his vote answer all the purposes of many, provided his vote is allowed to count for the proportion the state ought to send; in this way the business might be done at a less expence than having one or two hundred members in the house, which had been strongly contended for yesterday.

Mr. Stone.

I think the clause would change the government entirely, instead of being a government founded upon representation, it would be a democracy of singular properties.

I differ from the gentleman from Virginia (mr. Madison) if he thinks this clause would not bind the representative; in my opinion it would bind him effectually, and I venture to assert, without diffidence, that any law passed by the legislature, would be of no force, if a majority of the members of this house were instructed to the contrary, provided the amendment become part

of the constitution. What would follow from this? Instead of looking in the code of laws passed by congress, your judiciary would have to collect and examine the instructions from the various parts of the union. It follows very clearly from hence, that the government would be altered from a representative one to a democracy, wherein all laws are made immediately by the voice of the people.

This is a power not to be found in any part of the earth except among the Swiss Cantons; there the body of the people vote upon the laws, and give instructions to their delegates. But here we have a different form of government, the people at large are not authorised under it to vote upon the law, nor did I ever hear that any man required it. Why then are we called upon to propose amendments subversive of the principles of the constitution which were never desired.

Several members now called for the question, and the chairman being about to put the same.

Mr. Gerry.

Gentlemen seem in a great hurry to get this business through, I think, mr. chairman, it requires a further discussion; for my part I had rather do less business and do it well, than precipitate measures before they are fully understood.

The honorable gentleman from Virginia (mr. Madison) stated, that if the proposed amendments are defeated, it will be by the delay attending the discussion of doubtful propositions; and he declares this to partake of that quality. It is natural, sir, for us to be fond of our own work, we do not like to see it disfigured by other hands. That honorable gentleman brought forward a string of propositions; among them was the clause now proposed to be amended, he is no doubt ready for the question and determined not to admit what we think an improvement. The gentlemen who were on the committee, and brought in the report, have considered the subject, and are also ripe for a decision. But other gentlemen may crave a like indulgence, is not the report before us for deliberation and discussion and to obtain the sense of the house upon it, and will not gentlemen allow us a day or two for these purposes, after they have forced us to proceed upon them at this time? I appeal to their candor and good sense on the occasion, and am sure not to be refused; and I must inform them now, that they may not be surprized hereafter, that I wish all the amendments, proposed by the respective states to be considered. Gentlemen say it is necessary to finish the subject, in

order to reconcile a number of our fellow citizens to the government. If this is their principle, they ought to consider the wishes and intentions which the conventions have expressed for them; if they do this, they will find that they expect and wish for the declaration proposed by the honorable gentleman over the way (mr. Tucker) and of consequence they ought to agree to it, and why it, with others recommended in the same way, were not reported, I cannot pretend to say; the committee know this best themselves.

The honorable gentleman near me (mr. Stone) says, that the laws passed contrary to instruction will be nugatory. And other gentlemen ask, if their constituents instruct them to violate the constitution, whether they must do it? Sir, does not the constitution declare that all laws passed by congress are paramount to the laws and constitutions of the several states; if our decrees are of such force as to set aside the state laws and constitutions, certainly they may be repugnant to any instructions whatever without being injured thereby. But can we conceive that our constituents would be so absurd to instruct us to violate our oath, and act directly contrary to the principles of a government ordained by themselves. We must look upon them to be absolutely abandoned and false to their own interests to suppose them capable of giving such instructions.

If this amendment is introduced into the constitution, I do not think we shall be much troubled with instructions; a knowledge of the right will operate to check a spirit that would render instruction necessary.

The honorable gentleman from Virginia asked, will not the affirmative of a member who votes repugnant to his instructions, bind the community as much as the votes of those who conform? There is no doubt, sir, but it will; but does this tend to shew that the constituent has no right to instruct? Surely not. I admit, sir, that instructions contrary to the constitution, ought not to bind, though the sovereignty resides in the people. The honorable gentleman acknowledges that the sovereignty vests there, if so, it may exercise its will in any case not inconsistent with a previous contract. The same honorable gentlemen asks if we are to give the power to the people in detached bodies to contravene the government while it exists? Certainly not, nor does the proposed proposition extend to that point, it is only intended to open for them a convenient mode in which they may convey their sense to their agents. The gentleman therefore takes for granted what is inadmissible, that congress will always be doing illegal things, and make it necessary for the sovereign to declare its pleasure.

He says the people have a right to alter the constitution, but they have no

right to oppose the government. If, while the government exists, they have no right to control it, it appears they have divested themselves of the sovereignty over the constitution. Therefore, our language, with our principles, must change, and we ought to say that the sovereignty existed in the people previous to the establishment of this government. This will be ground for alarm indeed if it is true, but I trust, sir, too much to the good sense of my fellow citizens ever to believe, that the doctrine will generally obtain in this country of freedom.

Mr. Vining.

If, mr. chairman, there appears on one side too great an urgency to dispatch this business, there appears on the other an unnecessary delay and procrastination equally improper and unpardonable. I think this business has been already well considered by the house, and every gentleman in it; however, I am not for an unseemly expedition.

The gentleman last up, has insinuated a reflection upon the committee for not reporting all the amendments proposed by some of the state conventions. I can assign him a reason for this, the committee conceived some of them superfluous or dangerous, and found many of them so contradictory that it was impossible to make any thing of them, and this is a circumstance the gentleman cannot pretend ignorance of.

It is not inconsistent in that honorable member to complain of hurry, when he comes day after day reiterating the same train of arguments, and demanding the attention of this body by rising six or seven times on a question. I wish, sir, this subject discussed coolly and dispassionately, but I hope we shall have no more reiterations or tedious discussions; let gentlemen try to expedite public business, and their arguments will be conducted in a laconic and consistent manner. As to the business of instruction, I look upon it inconsistent with the general good. Suppose our constituents were to instruct us to make paper money, no gentleman pretends to say it would be unconstitutional, yet every honest mind must shudder at the thought. How can we then assert that instructions ought to bind us in all cases not contrary to the constitution?

Mr. Livermore

Was not very anxious whether the words were inserted or not, but he had a great deal of doubt about the meaning of this whole amendment, it provides that the people may meet and consult for the common good; does this mean

a part of the people in a township or district, or does it mean the representatives in the state legislatures? If it means the latter, there is no occasion for a provision that the legislature may instruct the members of this body.

In some states the representatives were chosen by districts, in this case, perhaps, the instructions may be considered as coming from the districts, but in other states, each representative was chosen by the whole people; in New-Hampshire it was the case there, the instructions of any particular place would have but little weight, but a legislative instruction would have considerable influence upon each representative. If, therefore, the words mean that the legislature may instruct, he presumed it would have considerable effect, though he did not believe it binding. Indeed he was inclined to pay a deference to any information, he might receive from any number of gentlemen, even by a private letter, but as for full binding force, no instructions contained that quality. They could not, nor ought not to have it, because different parties pursue different measures, and it might be expedient, nay absolutely necessary, to sacrifice them in mutual concessions.

The doctrine of instructions would hold better in England than here, because the boroughs and corporations might have an interest to pursue, totally immaterial to the rest of the kingdom, in this case it would be prudent to instruct their members in parliament.

Mr. Gerry

Wished the constitution amended without his having any hand in it, but if he must interfere he would do his duty. The honorable gentleman from Delaware, had given him an example of moderation and laconic and consistent debate that he meant to follow, and would just observe to the worthy gentleman last up, that several states had proposed the amendment, and among the rest New-Hampshire.

There was one remark which escaped him, when he was up before, the gentleman from Maryland (mr. Stone) had said that the amendment would change the nature of the government and make it a democracy; now he had always heard that it was a democracy, but perhaps he was mislead, and the honorable gentleman was right in distinguishing it by some other appellation, perhaps an aristocracy was a term better adapted to it.

Mr. Sedgwick

Opposed the idea of the gentleman from New-Hampshire, that the state legislatures had the power of instructing the members of this house; he looked upon it as a subordination of the rights of the people to admit such an authority. We stand not here, said he, the representatives of the state legislatures as under the former congress, but as the representatives of the great body of the people. The sovereignty, the independence, and the rights of the states, are intended to be guarded by the senate; if we are to be viewed in any other light, the greatest security the people have for their rights and privileges is destroyed.

But with respect to instructions, it is well worthy of consideration how they are to be procured, it is not the opinion of an individual that is to control my conduct; I consider myself a representative of the whole union. An individual may give me information, but his sentiments may be in opposition to the sense of the majority of the people: If instructions are to be of any efficacy they must speak the sense of the majority of the people, at least of a state. In a state so large as Massachusetts it will behoove gentlemen to consider how the sense of the majority of the freemen is to be obtained and communicated. Let us take care to avoid the insertion of crude and undigested propositions, more likely to produce acrimony, than that spirit of harmony which we ought to cultivate.

Mr. Livermore

Said that he did not understand the honorable gentleman, or was not understood by him; he did not presume peremptorily to say what degree of influence the legislative instructions would have on a representative, he knew it was not the thing in contemplation here; and what he had said respected only the influence it would have on his private judgments.

Mr. Ames

Said there would be a very great inconvenience attending the establishment of the doctrine contended for by his colleague, those states who had selected their members by districts would have no right to give them instructions, consequently the members ought to withdraw, in which case the house might be reduced below a majority, and not be able, according to the constitution, to do any business at all.

According to the doctrine of the gentleman from New-Hampshire, one part of the government would be annihilated, for of what avail is it that the people have the appointment of a representative, if he is to pay obedience to

the dictates of another body.

Several members now rose and called for the question.

Mr. Page

Was sorry to see gentlemen so impatient, the more so as he saw there was very little attention paid to any thing that was said, but he would express his sentiments if he was only heard by the chair;—he discovered clearly, notwithstanding what had been observed by the most ingenious supporters of the opposition, that there was an absolute necessity for adopting the amendment, it was strictly compatible with the spirit and the nature of the government, all power vests in the people of the United States, it is therefore a government of the people, a democracy; if it was consistent with the peace and tranquility of the inhabitants, every freeman would have a right to come and give his vote upon the law, but inasmuch as this cannot be done, by reason of the extent of territory, and some other causes, the people have agreed that their representatives shall exercise a part of their authority; to pretend to refuse them the power of instructing their agents, appears to me to deny them a right. One gentleman asks how the instructions are to be collected. many [*sic*] parts of this country have been in the practice of instructing their representatives; they found no difficulty in communicating their sense: Another gentleman asks if they were to instruct us to make paper money, what we would do? I would tell them, said he, it was unconstitutional, alter that, and we will consider on the point; unless laws are made satisfactory to the people, they will lose their support, they will be abused or done away; this tends to destroy the efficiency of the government.

It is the sense of several of the conventions that this amendment should take place; I think it my duty to support it, and fear it will spread an alarm among our constituents if we decline to do it.

Mr. Wadsworth.

Instructions have frequently been given to the representatives throughout the United States, but the people did not claim as a right that they should have any obligation upon the representative; it is not right that they should: In troublesome times designing men have drawn the people to instruct the representatives to their harm; the representatives have, on such occasions, refused to comply with their instructions. I have known, myself, that they have been disobeyed, and yet the representative was not brought to account

for it, on the contrary, he was carressed and reelected, while those who have obeyed them, contrary to their private sentiments, have ever after been despised for it: Now, if the people considered it an inherent right in them to instruct their representatives, they would have undoubtedly punished the violation of them. I have no idea of instructions, unless they are obeyed; a discretionary power is incompatible with them.

The honorable gentleman who was up last says, if he was instructed to make paper money, he would tell his constituents it was unconstitutional; I believe that is not the case, for this body would have a right to make paper money, but if my constituents were to instruct me to vote for such a measure, I would disobey them let the consequence be what it would.

Mr. Sumter.

The honorable gentlemen who are opposed to the motion of my colleague, do not treat it fairly; they suppose that it is meant to bind the representative to conform to his instructions, the mover of this question, I presume to say, has no such thing in idea; that they shall notice them and obey them as far as is consistent and proper, may be very just; perhaps they ought to produce them to the house, and let them have as much influence as they deserve; but nothing further, I believe, is contended for.

I rose on this occasion, not so much to make any observations upon the point immediately under consideration, as to beg the committee to consider the consequences that may result from an undue precipitancy and hurry; nothing can distress me more than to be obliged to notice what I conceive to be somewhat improper in the conduct of so respectable a body. Gentlemen will reflect how difficult it is to remove error when once the passions are engaged in the discussion, temper and coolness are necessary to complete what must be the work of time; it cannot be denied but what the present constitution is imperfect, we must therefore take time to improve it. If gentlemen are pressed for want of time, and are disposed to adjourn the sessions of congress at a very early period, we had better drop the subject of amendments, and leave it until we have more leisure to consider and do the business effectually; for my part I would rather sit till this day twelve month, than have this all-important subject inconsiderately passed over; the people have already complained that the adoption of the constitution was done in too hasty a manner, what will they say of us if we press the amendments with so much haste.

Mr. Burke.

It has been asserted, mr. chairman, that the people of America do not require this right; I beg leave to ask the gentleman from Massachusetts, whether the constitution of that state does not recognize that right, and the gentlemen from Maryland, whether their declaration of rights does not expressly secure it to the inhabitants of that state? These circumstances, added to what has been proposed by the state conventions as amendments to this constitution, pretty plainly declares the sense of the people to be in favor of securing to themselves and their posterity, a right of this nature.

Mr. Seney

Said that the declaration of rights prefixed to the constitution of Maryland, secured to every man a right of petitioning the legislature for a redress of grievances, in a peaceable and orderly manner.

Mr. Burke.

I am not positive with respect to the particular expression in the declaration of the rights of the people of Maryland, but the constitutions of Massachusetts, Pennsylvania and North-Carolina, all of them recognize, in express terms, the right of the people to give instruction to their representatives.—I do not mean to insist particularly upon this amendment, but I am very well satisfied that those that are reported and likely to be adopted by this house, are very far from giving satisfaction to our constituents; they are not those solid and substantial amendments which the people expect; they are little better than whip-syllabub, frothy and full of wind, formed only to please the palate, or they are like a tub thrown out to a whale, to secure the freight of the ship and its peaceable voyage; in my judgment they will not be gratified by the mode we have pursued in bringing them forward; there was a committee of eleven appointed, and out of them I think there were five who were members of the convention that formed the constitution, such gentlemen having already given their opinion with respect to the perfection of the work, may be thought improper agents to bring forward amendments; upon the whole, I think it will be found that we have done nothing but lose our time, and that it will be better to drop the subject now, and to proceed to the organization of the government.

Mr. Sinnickson

Enquired of mr. chairman, what was the question before the committee, for

really debate had become so desultory, as to induce him to think it was lost sight of altogether.

Mr. Lawrance

Was averse to entering on the business at first, but since they had proceeded so far, he hoped they would finish it; he said, if gentlemen would confine themselves to the question, when they were speaking, that the business might be done in a more agreeable manner; he said he was against the amendmentproposed bythegentleman [*sic*] from S. Carolina (mr. Tucker,) because every member on this floor ought to consider himself the representative of the whole union, and not of the particular district which had chosen him, as their decisions were to bind every individual of the confederated states, it was wrong to be guided by the voice of a single district, whose interests might happen to clash with that of the general good, and unless instructions were to be considered as binding, they were altogether superfluous.

Mr. Madison

Was unwilling to take up any more of the time of the committee, but on the other hand, he was not willing to be silent after the charges that had been brought against the committee, and the gentleman who introduced the amendments, by the honorable members on each side of him, (mr. Sumter and mr. Burke.) Those gentlemen say we are precipitating the business, and insinuate that we are not acting with candor; I appeal to the gentlemen who have heard the voice of their country, to those who have attended the debates of the state conventions, whether the amendments now proposed are not those most strenuously required by the opponents to the constitution? It was wished that some security should be given for those great and essential rights which they had been taught to believe were in danger. I concurred, in the convention of Virginia, with those gentlemen, so far as to agree to a declaration of those rights which corresponded with my own judgment, and the other alterations which I had the honor to bring forward before the present congress. I appeal to the gentlemen on this floor who are desirous of amending the constitution, whether these proposed are not compatible with what are required by our constituents; have not the people been told that the rights of conscience, the freedom of speech, the liberty of the press, and trial by jury, were in jeopardy; that they ought not to adopt the constitution until those important rights were secured to them.

But while I approve of these amendments, I should oppose the consideration at this time, of such as are likely to change the principles of the government, or that are of a doubtful nature; because I apprehend there is little prospect of obtaining the consent of two-thirds of both houses of congress, and threefourths of the state legislatures, to ratify propositions of this kind; therefore, as a friend to what is attainable, I would limit it to the plain, simple, and important security that has been required. If I was inclined to make no alteration in the constitution I would bring forward such amendments as were of a dubious cast, in order to have the whole rejected.

Mr. Burke

Never entertained an idea of charging gentlemen with the want of candor; but he would appeal to any man of sense and candor, whether the amendments contained in the report were any thing like the amendments required by the states of New-York, Virginia, New-Hampshire and Carolina, and having these amendments in his hand, he turned to them to shew the difference, concluding that all the important amendments were omitted in the report.

Mr. Smith (of S.C.)

Understood his colleague, who has just sat down, to have asserted that the amendment under consideration was contained in the constitution of the state of South-Carolina, this was not the fact.

Mr. Burke

Said he mentioned the state of North-Carolina, and there it was inserted in express terms.

The question was now called for from several parts of the house, but a desultory conversation took place before the conversation was put; at length the call becoming very general, it was stated from the chair, and determined in the negative, 10 rising in favor of it, and 41 against it.

Congressional Register, August 15, 1789, vol. 2, pp. 197–217.

3.2.1.2.b Fifth amendment—“The freedom of speech, and of the press, and of the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.”

Mr. Tucker moved to insert between the words “common good,” “and to” in this paragraph, these words “to instruct their representatives.”

On this motion a long debate ensued.—

Mr. Hartley said it was a problematical subject—The practice on this principle might be attended with danger. There were periods when from various causes the popular mind was in a state of fermentation and incapable of acting wisely—This had frequently been experienced in the mother country, and once in a sister State.—In such cases it was a happiness to obtain representatives who might be free to exert their abilities against the popular errors and passions. The power of instructing might be liable to great abuses; it would generally be exercised in times of public disturbance, and would express rather the prejudices of faction, than the voice of policy; thus it would convey improper influences into the government.—He said he had seen so many unhappy examples of the influence of the popular humours in public bodies, that he hoped they would be provided against in this government.

Mr. Page was in favor of the motion.

Mr. Clymer remarked that the principle of the motion was a dangerous one. It would take away all the freedom and independence of the representatives, it would destroy the very spirit of representation itself, by rendering Congress a passive machine instead of a deliberative body.

Mr. Sherman insisted that instructions were not a proper rule for the representative, since they were not adequate to the purposes for which he was delegated. He was to consult the common good of the whole, and was the servant of the people at large. If they should coincide with his ideas of the common good, they would be unnecessary; if they contradicted them, he would be bound by every principle of justice to disregard them.

Mr. Jackson also opposed the motion.

Mr. Gerry advocated the proposition—he said the power of instructing was essential in order to check an administration which should be guilty of abuses. Such things would probably happen. He hoped gentlemen would not arrogate to themselves more perfection, than any other government had been found to possess, or more at all times than the body of the people.—It had he said been always contended by the friends of this government that the sovereignty resided in the people. That principle seemed inconsistent with what gentlemen now asserted; if the people were the sovereign, he could not conceive why they had not the right to instruct and direct their agents at their pleasure.

Mr. Madison observed that the existence of this right of instructing was at least a doubtful right. He wished that the amendments which were to go to the people should consist of an enumeration of simple and acknowledged principles. Such rights only ought to be expressly secured as were certain and fixed. The insertion of propositions that were of a doubtful nature, would have a tendency to prejudice the whole system of amendments, and render their adoption difficult. The right suggested was doubtful, and would be so considered by many of the states. In some degree the declaration of this right might be true; in other respects false. If by instructions were meant a given advice, or expressing the wishes of the people, the proposition was true; but still was unnecessary, since that right was provided for already. The amendments already passed had declared that the press should be free, and that the people should have the freedom of speech and petitioning: therefore the people might speak to their representatives, might address them through the medium of the press, or by petition to the whole body. They might freely express their wills by these several modes. But if it was meant that they had any obligatory force, the principle was certainly false. Suppose the representatives were instructed to do any act incompatible with the constitution, would he be bound to obey those instructions? Suppose he was directed to do what he knew was contrary to the public good, would be bound [*sic*] to sacrifice his own opinion? Would not the vote of a representative contrary to his instructions be as binding on the people as a different one? If these things then be true, where is the right of the constituent? or where is the advantage to result from. It must either supercede all the other obligations, the most sacred, or it could be of no benefit to the people. The gentleman says, the people are the sovereign—True. But who are the people? Is every small district, the people? and do the inhabitants of this district express the voice of the people, when they may not be a thousandth part, and although their instructions may contradict the sense of the whole people besides? Have the people in detached assemblies a right to violate the constitution or controul the actions of the whole sovereign power? This would be setting up a hundred sovereignties in the place of one.

Mr. Smith (S.C.) was opposed to the motion—He said the doctrine of Instructions in practice would operate partially. The States who were near the seat of government would have an advantage over those more distant.—Particular instructions might be necessary for a particular measure; such could not be obtained by the members of the distant states. He said there was no need of a large representation, if in all important matters they were

to be guided by express instructions—One member from each state would serve every purpose. It was inconsistent with the principle of the amendment which had been adopted the preceding day.

Mr. Stone differed with Mr. Madison, that the members would not be bound by instructions—He said when this principle was inserted in the constitution, it would render instructions sacred and obligatory in all cases; but he looked on this as one of the greatest of evils. He believed this would change the nature of the constitution—Instead of being a representative government, it would be a singular kind of democracy, and whenever a question arose what was the law, it would not properly be decided by recurring to the codes and institutions of Congress, but by collecting and examining the various instructions of different parts of the Union.

Several of the members spoke, and the debate was continued in a desultory manner—and at last the motion was negatived by a great majority —The question on the amendment was then put, and carried in the affirmative.

Daily Advertiser, August 17, 1789, p. 2, cols. 1–2.

3.2.1.2.c Fifth amendment—"The freedom of speech, and of the press, and of the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."

Mr. Tucker moved to insert between the words "common good," "and to" in this paragraph, these words "to instruct their representatives."

On this motion a long debate ensued.—

Mr. Hartley said it was a problematical subject,—The practice on this principle might be attended with danger. There were periods when from various causes the popular mind was in a state of fermentation and incapable of acting wisely—This had frequently been experienced in the mother country, and once in a sister state.—In such cases it was a happiness to obtain representatives who might be free to exert their abilities against the popular errors and passions. The power of instructing might be liable to great abuses; it would generally be exercised in times of public disturbance, and would express rather the prejudices of faction, than the voice of policy; thus it would convey improper influence into the government.—He said he had seen so many unhappy examples of the influence of the popular humours in public bodies, that he hoped they would be provided against in this government.

Mr. Clymer remarked that the principle of the motion was a dangerous one. It would take away all the freedom and independence of the representatives, it would destroy the very spirit of representation itself, by rendering Congress a passive machine instead of a deliberative body.

Mr. Sherman insisted that instructions were not adequate to the purposes for which he was delegated. He was to consult the common good of the whole, and was the servant of the people at large. If they would coincide with the ideas of the common good, they would be unnecessary; if they contradicted them, he would be bound by every principle of justice to disregard them.

Mr. Gerry advocated the proposition—he said the power of instructing was essential in order to check an administration which should be guilty of abuses. Such things would probably happen. He hoped gentlemen would not arrogate to themselves more perfection, than any other government had been found to possess, or more at all times than the body of the people.—It had he said been always contended by the friends of this government that the sovereignty resided in the people. That principle seemed inconsistent with what gentlemen now asserted; if the people were the sovereign, he could not conceive why they had not the right to instruct and direct their agents at their pleasure.

Mr. Madison observed that the existence of this right of instructing was at least a doubtful right. He wished that the amendments which were to go to the people should consist of an enumeration of simple and acknowledged principles. Such rights only ought to be expressly secured as were certain and fixed. The insertion of propositions that were of a doubtful nature, would have a tendency to prejudice the whole system of amendments, and render their adoption difficult. The right suggested was doubtful, and would be so considered by many of the states. In some degree the declaration of this right might be true; in other respects false. If by instructions were meant a given advice, or expressing the wishes of the people, the proposition was true; but still was unnecessary, since that right was provided for already. The amendments already passed had declared that the press should be free, and that the people should have the freedom of speech and petitioning: therefore the people might speak to their representatives, might address them through the medium of the press, or by petition to the whole body. They might freely express their wills by these several modes. But if it was meant that they had any obligatory force, the principle was certainly false. Suppose the representatives were instructed to do any act

incompatible with the constitution, would be bound to obey those instructions? Suppose he was directed to do what he knew was contrary to the public good, would be bound [*sic*] to sacrifice his own opinion? Would not the vote of a representative contrary to his instructions be as binding on the people as a different one? If these things be true, where is the rights of the constituent? Or where is the advantage to result from. It must either supercede all the other obligations the most sacred, or it could be of no benefit to the people. The gentleman says, the people are the sovereign—True. But who are the people? Is every small district, the the [*sic*] *people?* and do the inhabitants of this district express the voice of the people, when they may not be a thousandth part, and although their instructions may contradict the sense of the whole people besides? Have the people in detached assemblies a right to violate the constitution or controul the actions of the whole sovereign power? This would be setting up a hundred sovereignties in the place of one.

Mr. Smith (S.C.) was opposed to the motion—He said the doctrine of instructions in practice would operate partially. The States who were near the seat of government would have an advantage over those more distant. Particular instructions might be necessary for a particular measure; such could not be obtained by the members of the distant states. He said there was no need of a large representation, If in all important matters they were to be guided by express instructions—One member from each state would serve every purpose. It was inconsistent with the principle of the amendment which had been adopted the preceding day.

Mr. Stone differed with Mr. Madison, that the members would not be bound by instructions—He said when this principle was inserted in the constitution, it would render instructions sacred and obligatory in all cases; but he looked on this as one of the greatest of evils: it would change the nature of the constitution—Instead of being a representative government, it would be a singular kind of democracy, and whenever a question arose what was the law, it would not properly be decided by recurring to the codes and institutions of Congress, by collecting and examining the various instructions of different parts of the Union.

Several of the members spoke, and the debate was continued in a desultory manner—and at last the motion was negatived by a great majority —The question on the amendment was then put, and carried in the affirmative.

Committee rose.—

Mr. Ames moved that all questions on the subject of the amendments, should be decided in committee by two thirds of the members. This was laid on the table.

The house was then adjourned.

New-York Daily Gazette, August 18, 1789, p. 798, col. 3, and p. 799, col. 1.

3.2.1.2.d In committee of the whole, on amendments to the constitution— … .

… Fifth amendment. *The freedom of speech, and of the press, and of the rights of the people peaceably to assemble and consult for their common good, and to apply to government for the redress of grievances shall not be infringed.*

Mr. SEDGWICK moved to strike out the words "assemble and." This is a self evident unalienable right of the people, said he, and it does appear to me below the dignity of this house, to insert such things in the constitution. The right will be as fully recognized if the words are struck out, as if they were retained: For if the people may converse, they must meet *for* the purpose.

This motion was opposed by Mr. Gerry, Mr. Page, Mr. Vining and Mr. Hartly; [*sic*] and the question being taken it was negatived.

Mr. TUCKER moved to insert these words, *to instruct their representatives*. This produced a long debate.

Mr. Hartley. I could wish, Mr. chairman, that these words had not been proposed. Representatives ought to possess the confidence of their constituents; they ought to rely on their honour and integrity. The practice of instructing representatives may be attended with danger; we have seen it attended with bad consequences; it is commonly resorted to for party purposes, and when the passions are up. It is a right, which even in England is considered a problematical [*sic*]. The right of instructing is liable to great abuses; it will generally be exercised in times of popular commotion; and these instructions will rather express the prejudices of party, than the dictates of reason and policy. I have known, Sir, so many evils arise from adopting the popular opinion of the moment, that I hope this government will be guarded against such an influence; and wish the words may not be inserted.

Mr. PAGE was in favour of the motion—He said, that the right may well be doubted in a monarchy; but in a government instituted for the sole purpose of guarding the rights of the people, it appears to me to be proper.

Mr. Clymer: I hope, Sir, the clause will not be adopted, for if it is, we must go further, and say, that the representatives are *bound* by the instructions, which is a most dangerous principle, and is destructive of all ideas of an independent and deliberative body.

Mr. Sherman said, these words had a tendency to mislead the people, by conveying an idea that they had a right to controul the debates of the federal legislature. Instructions cannot be considered as a proper rule for a representative to form his conduct by; they cannot be adequate to the purpose for which he is delegated. He is to consult the good of the whole: Should instructions therefore coincide with his ideas of the common good, they would be unnecessary: If they were contrary, he would be bound by every principle of justice to disregard them.

Mr. Jackson opposed the motion: He said this was a dangerous article, as its natural tendency is to divide the house into factions: He then adverted to the absurdities and inconsistencies which would be involved in adopting the measure.

Mr. Gerry supported the motion: He observed, that to suppose we cannot be instructed, is to suppose that we are perfect: The power of instruction is in my opinion essential to check an administration which should be guilty of abuses: No one will deny that these may not happen: To deny the people this right is to arrogate to ourselves more wisdom than the whole body of the people possess.—I contend, Sir, that our constituents have not only a right to instruct, but to *bind* this legislature—It has been contended by the friends to the constitution, that the people are sovereign: if so it involves an absurdity to suppose that they cannot, not only instruct, but controul the house: Debates may create factions, as well as instructions: We cannot be too well informed; this is the best method of obtaining information, and I hope we shall never shut our ears against that information which is to be derived from the voice of the people.

Mr. Madison observed, that the existence of this right is at least doubtful.—I wish that the amendments may consist of an enumeration of simple and acknowledged principles: The insertion of propositions that are of a doubtful nature, will have a tendency to prejudice the whole system of amendments: The right now suggested is doubtful, and will be so considered by many of the States: In some respects the declaration of this right may be true, in others it is false: If we mean nothing more by it than this, that the people have a right to give advice or express their sentiments and wishes it is true; but still unnecessary, as such a right is already

recognized: The press shall be free, and the people shall have the same freedom of speech and petitioning: but if it is meant that the representatives are to be bound by these instructions, the principle is false: Suppose a representative is instructed to do what is contrary to the public good? Would he be bound to sacrifice his own opinion? Or will not the vote of a representative contrary to his instruction be as binding on the people as a different one? If these things are true, where is the right of the constituent to instruct? or where is the advantage to result from it? It must either supercede all other obligations, the most sacred; or it can be of no benefit to the people. The gentleman says, the people are the sovereign; but who are the people? Is every small district the people? And can the inhabitants of this district express the voice of the people, when they may not be a thousandth part, and all their instructions may contradict the sense of the whole people besides? Have the people in detached assemblies a right to violate the constitution or controul the whole sovereign power? This would be setting up an hundred sovereignties in the place of one.

Mr. Smith (S.C.) was opposed to the motion: The doctrine of instructions would, in practice, operate partially: The States near the seat of government will have an obvious advantage over those remote from it: There is no necessity for so large a representation as had been determined on, if the members are to be guided in all their deliberations by positive instructions; one member from a State will serve every purpose; but then the nature of the assembly will be changed from a legislative to a diplomatic body: It would in fact be turning all our representatives into ambassadors.

Mr. Stone observed that to adopt this motion would change the nature of the constitution; instead of being a representative government, it would be a singular kind of democracy; in which, whenever a question arises, what is the law? It will not be determined by recurring to the codes and institutions of Congress, but by collecting the various instructions from different parts of the Union.

Mr. Gerry observed that several of the States had proposed this amendment, which rendered it proper to be attended to: In answer to Mr. Madison’s query he said, he meant that instructions should be consistent with the laws and the constitution.

Mr. Livermore said that though no particular districts could instruct, yet the Legislatures of the States most undoubtedly possessed this right.

This assertion of Mr. Livermore was controverted by several gentlemen—by Mr. Sedgwick, Mr. Smith, Mr. Ames, and Mr. Wadsworth: The last, speaking on the subject of

instructions in general, said, I never knew merely political instructions to be observed; and I never knew a representative brought to an account for it: But I have known representatives follow instructions, contrary to their private sentiments, and they have even been despised for it. Others have disregarded their instructions, and have been reelected, and caressed. Now if the *people* consider it as an inherent right in *them* to instruct their representatives, they would undoubtedly have punished the violation of such instructions; but this I believe has never been the case. I consider the measure as having a mischievous tendency.

The debate was continued much longer, but in a desultory way, as the speakers appeared to take it for granted, that they might touch upon collateral circumstances. The question on the motion being at length taken, it was negatived by a large majority; and then the committee agreed to the amendment in its original form.

Gazette of the U.S., August 19, 1789, p. 147, cols. 1–2.

3.2.2 STATE CONVENTIONS

None.

3.2.3PHILADELPHIA CONVENTION

None.

3.2.4NEWSPAPERS AND PAMPHLETS

3.2.4.1Centinel, No. 2, October 24, 1787

… The new plan, it is true, does propose to secure the people of the benefit of personal liberty by the *habeas corpus;* and trial by jury for all crimes, except in case of impeachment: but there is no declaration, … that the right

of the people to assemble peaceably for the purpose of consulting about public matters, and petitioning or remonstrating to the federal legislature ought not to be prevented;

… .

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 13, p. 466.

3.2.4.2The Federal Farmer, No. 6, December 25, 1787

The following, I think, will be allowed to be unalienable or fundamental rights in the United States:—

No man demeaning himself peaceably, shall be molested on account of his religion or mode of worship—The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it—Individual security consists in having free recourse to the laws—The people are subject to no laws or taxes not assented to by their representatives constitutionally assembled—They are at all times intitled to the benefits of the writ of habeas corpus, the trial by jury in criminal and civil causes—They have the right, when charged, to a speedy trial in the vicinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge—No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects—The people have a right to assemble in an orderly manner, and petition the government for a redress of wrongs—The freedom of the press ought not to be restrained—No emoluments, except for actual service—No hereditary honors, or orders of nobility, ought to be allowed—The military ought to be subordinate to the civil authority, and no soldier be quartered on the citizens without their consent—The militia ought always to be armed and disciplined, and the usual defence of the country—The supreme power is in the people, and power delegated ought to return to them at stated periods, and frequently—The legislative, executive, and judicial powers, ought always to be kept distinct—others perhaps might be added.

Storing, vol. 2, p. 262.

3.2.4.3Samuel, January 10, 1788

And the whole of the purse, and of the sword, is put into the hands of the President, and a Congress so unequal, and which also may consist, of men of no principle or property. For no religion or property is required, as any qualification, to fill any and every seat in the Legislative, Judicial and Executive departments, in the whole nation. That a Pagan, a Mahometan, a Bankrupt, may fill the highest seat, and any and every seat; nothing but age

and residence, are required, as qualifications, for the most important trusts. And there is nothing to hinder their keeping a standing army, at all times, peace or war. Nor is there any provision made for the people or States, to petition or remonstrate, let their grievances be what they will… .

[Boston] Independent Chronicle and Universal Advertiser, Storing, vol. 4, p. 193.

3.2.5LETTERS AND DIARIES

None.

3.3DISCUSSION OF RIGHTS

3.3.1TREATISES

3.3.1.1William Blackstone, 1765

4. If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told that the czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any

riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II. st. 1. c. 5. that no petition to the king, or either house of parliament, for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace or the major part of the grand jury, in the country; and in London by the lord mayor, aldermen, and common council; nor shall any petition be presented by more than two persons at a time. But under these regulations, it is declared by the statute 1 W. & M. st. 2 c. 2. that the subject hath a right to petition; and that all committments and prosecutions for such petitioning are illegal.

Commentaries, bk. 1, ch. 1, sec. 3; vol. 1, pp. 138–39.

3.3.1.2William Blackstone, 1769

6. Riots, *routs*, and *unlawful assemblies* must have *three* persons at least to constitute them. An *unlawful assembly* is when three, or more, do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it.[f] A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way; and make some advances towards it.[g] A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel[h]: as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nusance, in a violent and tumultuous manner. The punishment of unlawful assemblies, if to the number of twelve, we have just now seen may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and routs by the common law; to which the pillory in very enormous cases has been sometimes superadded[i]. And by the statute 13 Hen. IV. c. 7. any two justices, together with the sheriff or undersheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons,

noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable[j]. So that our ancient law, previous to the modern riot act, seems pretty well to have guarded against any breach of the public peace; especially as any riotous assembly on a public or general account, as to redress grievances or pull down all inclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason, by levying war against the king.

7. Nearly related to this head of riots is the offence of *tumultuous petitioning*; which was carried on to an enormous height in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. st. 1. c. 5. it is enacted, that not more than twenty names shall be signed to any petition to the king or either house of parliament, for any alteration of matters established by law in church or state; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assises or quarter sessions; and, in London, by the lord mayor, aldermen, and common council[k]: and that no petition shall be delivered by a company of more than ten persons: on pain in either case of incurring a penalty not exceeding 100 *l*, and three months imprisonment.

Blackstone Commentaries, bk. 4, ch. 11; vol. 4, pp. 146–47.

3.3.1.3Burn, 1766

Riot, rout, and unlawful assembly.

I. *What is a riot, rout, or unlawful assembly.*
II. *How the same may be restrained by a private person.*
III. *How by a constable, or other peace officer.*
IV. *How by one justice.*
V. *How by two justices.*
VI. *How by process out of chancery.*

1. What is a riot, rout, or unlawful assembly.

WHEN *three persons or more shall assemble themselves together, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprize of a private nature, with force or violence,*

against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful; If they only meet to such a purpose or intent, although they shall after depart of their own accord, without doing any thing, this is an *unlawful assembly*.

If after their first meeting they shall move forward towards the execution of any such act, whether they put their intended purpose in execution or not; this, according to the general opinion, is a *rout:*

And if they execute such a thing in deed, then it is a *riot*. (A) 1 *Haw*. 155. *Dalt. c*. 136.

Three persons or more] And therefore if the jury do acquit all but two, and find them guilty, the verdict is void, unless they be indicted *together with other rioters unknown*, because it finds them guilty of an offence, whereof it is impossible that they should be guilty; for there can be no riot, where there are not more persons than two. 2 *Haw*. 441.

And infants under the age of discretion are not persons within this description, punishable as rioters. 1 *Haw*. 159.

Note; In 1 *Haw*. 156, 157, 158, the words *more than three persons* are three times over inserted instead of *three persons or more*; which is only remarked as an instance, that in a variety of matter, it is impossible for the mind of man to be always equally attentive.

Assemble themselves together] It seems agreed, that if a number of persons being met together at a fair, or market, or church ale, or on any other lawful and innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it: Yet it is said, that if persons innocently assembled together, do afterward upon a dispute happening to arise among them, form themselves into parties, with promise of mutual assistance, and then make an affray, they are guilty of a riot; because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. 1 *Haw*. 156.

In the execution of some enterprize if a private nature] It seems agreed, that the injury or grievance complained of, and intended to be revenged or remedied by such an assembly, must relate to some private quarrel only; as

the inclosing of lands, in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interest or disputes of particular persons, and no way concerning the publick; for wherever the intention of such an assembly is to redress publick grievances, as to pull down all inclosures in general, or reform religion, and the like, it is high treason. 1 *Haw*. 157.

Against the peace, or to the terror of the people] It seems to be clearly agreed, that in every riot there must be some such circumstances, either of actual force or violence, or at, least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *to the terror of the people*: And from hence it clearly follows, that assemblies at wakes, or other festival times, or meeting for exercise of common sports of diversions, as bull baiting, wresting, and such like, are not riotous. 1 *Haw*. 157.

And from the same ground also it seems to follow, that it is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprize, without being rioters; as if a man assemble a meet company, to carry away a piece of timber of other thing, whereto he pretends a right, that cannot be carried without a great number, if the number be not more than are needful for such purpose, although another man hath better right to the thing so carried away, and that this act be wrong and unlawful; yet it is of itself no riot, except there be withal threatening words used, or other disturbance of the peace. *Dalt. c*. 137. 1 *Haw*. 157.

Much more may any person, in a peaceable manner, assemble a meet company to do any lawful thing, or to remove or cast down any common nusance: Thus every private man, to whose house or land any nusance shall be erected, made, or done, may in peaceable manner assemble a meet company, with necessary tools, and may remove, pull, or cast down such nusance, and that, before any prejudice received thereby; and for that purpose, if need be, may also enter into the other man’s ground. Thus a man erected a wear cross a common river, where people have a common passage with their boats, and divers did assemble, with spades, crows of iron, and other things necessary to remove the said wear, and make a trench in his land, that did erect the wear, to turn the water, so as they might the better take up the said wear, and they did remove the same nusance; this was

holden neither any forcible entry, nor yet any riot *Dalt. c.* 137.

But in the cases aforesaid, if in removing any such nusance, the persons so assembled shall use any threatning words (as to say, they will do it though they die for it, or such like words) or shall use any other behaviour, in apparent disturbance of the peace, then it seemeth to be a riot; and therefore where there is cause to remove any such nusance, or to do any like act, it is safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only, without disturbance of the peace, or threatening speeches. *Dalt. c.* 137.

Whether the act intended were of itself lawful or unlawful] It hath been generally holden, that it is no way material, whether the act intended to be done by such an assembly, be of itself lawful or unlawful; from whence it follows, that if three or more persons assist a man to make a forcible entry into lands, to which one of them has a good right of entry, or if the like number in a violent and tumultuous manner join together in removing a nusance, or other thing which may lawfully be done in a peaceful manner, they are as properly rioters, as if the act intended to be done by them were never so unlawful. 1 *H.* 158.

II. How the same may be restrained by a private person.

By the common law, any private person may lawfully endeavour to suppress a riot, by flaying those whom he shall see engaged therein, from executing their purpose, and also by stopping others whom he shall see coming to join them. 1 *Haw.* 159.

III. How by a constable or other peace officer.

By the common law, the sheriff, constable, and other peace officers, may and ought to do all that in them lies, towards the suppressing of a riot, and may command all other persons to assist therein. 1 *Haw.* 159.

IV. How by one justice.

By the 34 Ed. 3. c. 1. *The justices of the peace shall have power to restrain rioters, and to arrest and chastise them according to their offence; and cause them to be imprisoned and duly punished, according to the law and custom of the realm, and according to that which to them shall seem best to do, by their discretions and good advisement.*

And this statute hath been liberally construed for the advancement of justice; for it hath been resolved, that if a justice find persons riotously assembled, he alone, without staying for his companions, hath not only power to arrest the offenders, and bind them to their good behaviour, or imprison them if they do not offer bail; but that he may also authorize others to arrest them, by a bare verbal command, without other warrant; and that by force thereof, the persons so commanded may pursue and arrest the offenders in his absence, as well as presence. Also it is said, that after a riot is over, any one justice may send his warrant, to arrest any person who was concerned in it, and also that he may send him to goal, till he shall find sureties for his good behaviour. 1 *Haw*. 160.

But it seems to be agreed, that no one justice hath any power by force of this statute, either to record a riot upon his own view, or to take an inquisition thereof after it is over: Also if one justice, proceeding upon this statute, shall arrest an innocent person as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing himself, because no single justice is by this statute made a judge of the said offence. But if a riot shall be committed by persons armed in an unusual manner, contrary to the statute of *Northampton*, 2 *Ed*. 3. *c*. 3. and any one justice acting *ex officio*, in pursuance of the statute, seize the armour, and imprison the offender, and make a record of the whole matter, such a record cannot be traversed, because it is made by one acting in a judicial capacity. And for the same reason, if a justice proceeding on the statute of the 15 *R*. 2. against forcible entries and detainers, shall upon his own view record a riot, which shall be committed in the making of any such forcible entry or detainer, a riot so recorded cannot be traversed. Also if a justice acting as a judge by any statute whatsoever impowering him so to do, make a record upon his view of a riot committed in his presence, such record shall not be traversed; for the law gives such uncontroulable credit to all matters of record, made by any judge of record as such, that it will never admit of an averment against the truth thereof. 1 *Haw*. 160.

But if the rioters are above the number of twelve, the offence is greatly inhanced, and the power of one justice very much inlarged, by the act commonly called the riot act, 1 *G. st*. 2. *c*. 5. which is required to be read at every quarter sessions and leet: By which it is enacted, That every justice, sheriff, under sheriff, and mayor, shall on notice or knowledge of any unlawful, riotous, and tumultuous assembly of persons to the number of twelve or more, together with such help as he shall command, resort to the

place. *s*. 2, 3.

Whereupon he shall, amongst the rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be, while proclamation is making; and after that, shall openly and with a loud voice make or cause to be made proclamation in these words, or like in effect:

Our sovereign lord the king chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of king George *for preventing tumults and riotous assemblies: God save the king*. f. 2.

And if any person shall with force and arms willfully oppose, hinder, or hurt any person that shall begin or go to make the proclamation, whereby the same shall not be made, he shall be guilty of felony without benefit of clergy. *s*. 5.

And if any twelve or more of them shall continue together by the space of one hour after such proclamation made, or after such hindrance (having knowledge thereof), they shall be guilty of felony without benefit of clergy. *s*. 1, 5.

And every justice, sheriff, under sheriff, mayor, high and petty constable, and other peace officer, and every other person of age and ability commanded by them to assist, shall apprehend the offenders, and carry them before a justice, to be proceeded against according to law. And if any rioters be killed or hurt by any of the said persons in dispersing or apprehending them, by reason of their resistance, such persons shall be indemnified. *s*. 3.

Also, if any rioters (although under the number of twelve, and whether any proclamation be made or not) shall unlawfully and with force demolish or pull down any church or chapel, or any building for religious worship certified and registred according to the act of toleration, or any dwelling-house, barn, stable, or other outhouse, they shall be guilty of felony without benefit of clergy. *s*. 4. And any one justice may proceed against them, as against other felons.

And the hundred, city, or town, shall answer the damages thereof, as in cases of robbery. *s*. 6.

Prosecutions on this act, to be within twelve months after the offence. *s*. 8.

V. How by two justices.

1. *If any riot, assembly, or rout of people, against the law, be made; the justices, three, or two of them at the least, and the sheriff, or under sheriff, shall come with the power of the county, if need be*. 13 H. 4. c. 7. s. 1.

And *the king's liege people being sufficient to travel shall be assistant to them, upon reasonable warning, to ride with them in aid to resist such riots, routs, and assemblies; on pain of imprisonment, and to make fine and ransom to the king*. 2 H. 5. c. 8. s. 2.

If any riot, assembly, or rout of people, against the law, be made] it is said, that the justices are not only impowered hereby to raise the power of the county to assist them, in suppressing a riot which shall happen within their own view, or hearing, but also that they may safely do it upon a credible information given them of a notorious riot happening at a distance, whether there were any such riot in truth or not; for it may be dangerous for them to stay till they can get certain information of the fact: But they seem to be punishable for alarming the county in this manner, without some such probable ground of their proceeding, as would induce a reasonable man to think it necessary and convenient. 1 *Haw*. 161.

Assembly] It seems clear from hence, that if the justices in going towards the place where they have heard that there is a riot, shall meet persons coming from thence riotously arrayed, they may arrest them for being assembled together in such an unlawful manner, and also make a record thereof; for the statute extends to all other unlawful assemblies whatsoever as well to riots. 1 *Haw*. 161.

The king's liege people] Except women, clergymen, persons decrepit, and infants under the age of fifteen. 1 *Haw*. 161.

To resist such riots] And also arrest the rioters, and conduct them to prison. 1 *Haw*. 161.

2. *And shall arrest them*. 13 H. 4. c. 7. s. 1.

And if they shall escape, they may take them on a fresh pursuit; but they cannot at another time award any process against them on the record, but ought to send the record into the king's bench, that process may issue thereon from thence: Yet there seems to be no doubt, but that they may arrest them for their trespass on the aforesaid statute of the 34 *Ed*. 3. in order to compel them to find sureties for their good behaviour. 1 *Haw*. 162.

3. *And the same justices and sheriff, or under sheriff, shall have power to record* (B) *that which they shall find so done in their presence against the*

law: by which record the offenders shall be convict in the some manner and form as is contained in the statute of forcible entries. (C) 13 *H*. 4. *c*. 7. *s*. 1.

Shall have power to record] And this they may do, whether the offenders be in custody at the same time, or have escaped. 1 *Haw*. 161.

Shall be convict] And it seemeth to be certain, that the record of a riot, expressly mentioned to have happened within the view of the justices by whom it is recorded, is a conviction of so great authority, that it can no way be traversed, however little ground of truth there might be to affirm, that any riot at all was committed, or however innocent the parties may be of the fact recorded against them. 1 *Haw*. 162.

However it seemeth clear, that if in such a record of a riot it be contained, that the party was guilty therein of a felony, or main, or rescous, the party shall be concluded thereby as to the riot only, and not as to any of the other matters; because the justices have by this statute a judicial authority over no other offences, except riots, routs, and unlawful assemblies. 1 *Haw*. 162.

And inasmuch as such a record is a final conviction of the parties, as to all such matters as are properly contained in it, it ought to be certain both as to the time and place of the offence, and the number of persons concerned therein, and the several kinds of weapons made use of by them, and all other circumstances of the fact; for since the parties are concluded from denying the truth of such a record, and have no other remedy to defend themselves against it, but only by advantage of the insufficiency of what is contained in it, they may justly demand the benefit of excepting to it, if it do not expressly shew, both that they are guilty within the meaning of the statute, and also how far they are guilty, and that the justices have pursued the power given them by the said statutes: and from the same ground it seems also to follow, that such a record may be excepted against, if it do not appear to have been made by the sheriff or under sheriff in concurrence with the justices. 1 *Haw*. 162.

And this record ought to remain with one of the justices, and shall not be left amongst the records of the sessions, it being made out of sessions, and not appointed to be certified thither. *Dalt. c*. 82.

In the same manner and form as is contained in the statute of forcible entries] That is, the statute of the 15 *R*. 2. *c*. 2. And hereupon it is said, that the offenders being under the arrest of the justices, and also convicted by a record of their offence, ought immediately to be committed to gaol by the same justices, till they shall make fine and ransom to the king; which can be assessed by no other justices of the peace, except those by whom the record

of the offence was made. 1 *Haw*. 162.

And this fine, Mr. *Dalton* says, the justices shall cause to be estreated into the exchequer, that so it may be levied to the king's use; and then they are to deliver the offenders again. *Dalt. c*. 82.

But Mr. *Hawkins* says, that it hath been questioned whether the justices can safely dismiss the offenders upon their paying such a fine as shall be imposed upon them, without some judgment for their imprisonment as well as fine; because it is enacted by the 2 *H*. 5. *c*. 8. that such rioters attainted of great and heinous riots, shall have one whole year's imprisonment at the least, without being let out of prison by bail or mainprize; and that the rioters attainted of petty riots, shall have imprisonment as best shall seem to the king or to his council. 1 *Haw*. 164.

4. And *if the offenders be departed before the coming of the said justices and sheriff or under sheriff, the same justices, three, or two of them, shall diligently enquire* (D) *within a month after such riot, assembly, or rout of people so made, and thereof shall hear and determine according to the law of the land*. 13 H. 4. c. 7. s. 1.

The same justices] It is generally said, that any justices of the county may take such an inquiry, whether they dwell near the place where the riot happened, or at a distance, or whether they went to view the riot or not; for the statute ought to be construed as largely as the words will bear, in favour of the justices power in the suppressing of such riots; and therefore those words in the statute that *the same justices shall inquire*, ought to be thus expounded, that the same justices who were before impowered to raise the posse, shall inquire, and that is, any justices in the county. 1 *Haw*. 163.

Shall diligently inquire] That is, by a jury: In order to which, it is enacted by the 19 *H*. 7. *c*. 13. that the sheriff, on their precept directed to him, shall, on pain of 20 *l*. return 24 persons, whereof every of them shall have lands and tenements within the shire, to the yearly value of 20 *s*. of charter land or freehold, or 26 *s*. 8 *d*. of copyhold, or of both, over and above all charges: And he shall return upon every juror in issues, at the first day 20 *s*. and at the second 40 *s*.

Note; *Charter land* had its name from a particular form in the charter or deed, which ever since the reign of *H*. 8. hath been disused. 1 *Inst*. 6.

Within a month] That is, if they do not make inquiry within a month, they are punishable for the neglect; yet they may inquire after the month: for the lapse of a month doth not determine their authority, but only subjects them to a penalty. 2 *Salk*. 593.

Shall hear and determine according to the law of the land] And therefore they may award process under their own teste, against those who shall be indicted before them of any of the offences abovementioned, according to the form of this statute; and also may award the like process for the trial of a traverse of such an inquisition; and do all other things in relation thereunto, which are of course incident to all courts of record. 1 *Haw*. 163.

And the riot being so found by inquisition, the justices must make a record thereof in writing of such their inquiry or presentment found before them; which record also is to remain with one of the justices. *Dalt. c*. 82.

5. And *if the truth cannot be found in the manner as is aforesaid, then within a month then next following, the justices, three, or two of them, and the sheriff or under sheriff, shall certify before the king and his council, all the deed and circumstances thereof, which certificate shall be of the like force as the presentment of* 12 *men; upon which certificate the offenders shall be put to answer, and shall be punished according to the discretion of the king and his council*. 13 H. 4. c. 7. s. 2.

And if they do traverse the matter so certified, the certificate and traverse shall be sent into the king's bench to be tried. id. s. 3.

And if the offence be not found, by reason of any maintenance or embracery of the jurors, then the same justices and sheriff or under sheriff shall in the same certificate certify the names of the maintainers and embracers, with their misdemeanors. 19 H. 7. c. 13.

Shall certify] And it seemeth certain, that such certificate, being in nature of an indictment at the common law, ought to comprehend the certainty of time, place, and persons, and other material circumstances, both of the riot and maintenance. 1 *Haw*. 165.

Before the king and his council] It seems clear, by the council being here distinguished both from the chancery and king's bench, that the certificate ought to be made to the privy council board, and not to either of those courts, which in some statutes relating to judicial proceedings are taken for the king's council. 1 *Haw*. 165.

6. *And the said justices and other officers shall execute their offices aforesaid at the king's costs, in going and continuing in doing their said offices, by payment thereof to be made by the sheriff, by indentures betwixt the said sheriff and justices, and other officers aforesaid, whereof the sheriff upon his account in the exchequer shall have due allowance*. 2 H. 5. c. 8.

In order to the defraying of which, the said statute directs the fines of the

offenders to be enlarged, and thereout the sheriff may pay the charges of the said justices; and of the jury, that is, for their diet; and the sheriff's fees, and the like. *Dalt. c.* 82.

7. And *the justices dwelling highest in the country, where such riot, assembly, or rout shall be, together with the sheriff or under sheriff, shall do execution of the said statute of the* 13 H. 4. *every one upon pain of* 100 1. *to the king*. s. 4.

The justices dwelling highest] Although these only are liable to this penalty, yet if any others on notice shall neglect to supply their default, they are fineable at discretion. 1 *Haw*. 166.

But if any justices, who do not dwell nearest to the place, do actually execute the statute, they excuse all the rest. 1 *Haw*. 165.

Dwelling nighest in the county] Therefore if they dwell nighest, but in another country, they are not in danger of this penalty. 1 *Haw*. 166.

Shall do execution of the said statute] That is, in the whole, and not in part only; as by recording a riot, and not committing the parties. 1 *Haw*. 166.

VI. How by process out of chancery.

By the 2. H. 5. c. 8. *If default be found in the two justices, sheriff, or under sheriff, then at the instance of the party grieved, a commission shall be issued under the great seal, to inquire as well of the truth of the case for the complainant, as of such default.*

And by the 2 H. 5. c. 9. and 8 H. 6. c. 14. *Rioters shall be taken by writ and proclamation out of chancery, on suggestion of two justices and the sheriff, of the common fame of such riot.*

Burn Justice of Peace, vol. 4, pp. 16–27.

3.3.2CASE LAW

None.

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1 On August 22, 1789, the following motion was agreed to:

ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to

by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.

HJ, p. 112.

2 For reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

f 3 Inst. 176.

g Bro. *Abr. t. Riot*. 4. 5.

h 3 Inst. 176.

i 1 Hawk. P. C. 159.

j 1 Hal. P. C. 495. 1 Hawk. P. C. 161.

k This may be one reason (among others) why the corporation of London has, since the restoration, usually taken the lead in petitions to parliament for the alteration of any established law.

CHAPTER 4

AMENDMENT II

KEEP AND BEAR ARMS CLAUSE

4.1TEXTS

4.1.1DRAFTS IN FIRST CONGRESS

4.1.1.1Proposal by Madison in House, June 8, 1789

4.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit,

…

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

Congressional Register, June 8, 1789, vol. 1, p. 427.

4.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

4.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit:. …

…

The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

4.1.1.2 Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 5 The Militia shall be under the government of the laws of the respective States, when not in the actual Service of the United States, but Such rules as may be prescribed by Congress for their uniform organisation & discipline shall be observed in officering and training them. but military Service Shall not be required of persons religiously Scrupulous of bearing arms.

Madison Papers, DLC.

4.1.1.3 House Committee of Eleven Report, July 28, 1789

ART. I, SEC. 9—Between PAR. 2 and 3 insert, …

"A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."

Broadside Collection, DLC.

4.1.1.4 House Consideration, August 17, 1789

4.1.1.4.a The 3d clause of the 4th proposition in the report was taken into consideration, being as follows; "A well regulated militia, composed of the body of the people, being the best security of a free state; the right of the people to keep and bear arms shall not be infringed, but no person, religiously scrupulous, shall be compelled to bear arms."

Congressional Register, August 17, 1789, vol. 2, p. 219 (reported); *id*., p. 222 (adopted, after motions 4.1.1.5–4.1.1.8).

4.1.1.4.b The House resolved itself into a committee of the whole on the subject of amendments to the constitution.

Sixth Amendment:—"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."

Daily Advertiser, August 18, 1789, p. 2, col. 4.

4.1.1.4.c The house resolved itself into a committee of the whole on the subject of amendments to the constitution.

Sixth amendment—"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."

New-York Daily Gazette, August 19, 1789, p. 802, col. 3.

4.1.1.4.d SIXTH AMENDMENT—"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

4.1.1.5Motion by Gerry in House, August 17, 1789

Mr. Gerry

[W]ished the words to be altered so as to be confined to persons belonging to a religious sect, scrupulous of bearing arms.

Congressional Register, August 17, 1789, vol. 2, p. 220 (motion failed for want of a second).

4.1.1.6Motion by Jackson in House, August 17, 1789

Mr. Jackson

[M]oved to amend the clause, by inserting at the end of it "upon paying an equivalent to be established by law."

…

Mr. Jackson

Was willing to accommodate [a suggestion of Mr. Smith of South Carolina]; he thought the expression was, "No one, religiously scrupulous

of bearing arms, shall be compelled to render military service in person, upon paying an equivalent."

Congressional Register, August 17, 1789, vol. 2, p. 221 (not voted upon).

4.1.1.7Motion by Benson in House, August 17, 1789

4.1.1.7.a Mr. BENSON,

Moved to have the words "But no person religiously scrupulous shall be compelled to bear arms" struck out.

Congressional Register, August 17, 1789, vol. 2, pp. 221–222 (decided in the negative, 22 for, 24 against).

4.1.1.7.b Mr. Benson moved that the words "but no person religiously scrupulous shall be compelled to bear arms," be struck out. He wished that this humane provision should be left to the wisdom and benevolence of the government. It was improper to make it a fundamental in the constitution.

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("The motion was negatived, and the amendment agreed to.").

4.1.1.7.c Mr. Benson moved that the words "but no person religiously scrupulous shall be compelled to bear arms," be struck out. He wished that this humane provision should be left to the wisdom and benevolence of the government. It was improper to make it a fundamental in the constitution.

New-York Daily Gazette, August 19, 1789, p. 802, col. 3 ("The motion was negatived, and the amendment agreed to.").

4.1.1.7.d Mr. Benson moved that the words "but no person religiously scrupulous shall be compelled to bear arms," be struck out. He wished that this humane provision should be left to the wisdom and benevolence of the government. It was improper to make it a fundamental in the constitution.

Gazette of the U.S., August 22, 1789, p. 249, col. 3 ("The motion was negatived, and the amendment agreed to.").

4.1.1.8Motion by Gerry in House, August 17, 1789

Mr. GERRY

Objected to the first part of the clause, …: A well-regulated militia being the best security of a free state, . … It ought to read "a well regulated militia, trained to arms,". …

Congressional Register, August 17, 1789, vol. 2, p. 222 (not seconded).

4.1.1.9Motion by Burke in House, August 17, 1789

4.1.1.9.a Mr. Burke Proposed to add to the clause just agreed to, an amendment to the following effect: "A standing army of regular troops in time of peace, is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both houses, and in all cases the military shall be subordinate to the civil authority."

Congressional Register, August 17, 1789, vol. 2, p. 222 (lost by a majority of 13).

4.1.1.9.b Mr. Burke moved to add a clause to the last paragraph to this effect: That a standing army of regular troops in time of peace is dangerous to public liberty, and should not be supported in time of peace, except by the consent of two thirds of each house of the legislature."

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("This amendment was negatived.").

4.1.1.9.c Mr. Burke moved to add a clause to the last paragraph to this effect: That a standing army of regular troops in time of peace is dangerous to public liberty, and should not be supported in time of peace, except by the consent of two thirds of each house of the legislature."

New-York Daily Gazette, August 19, 1789, p. 802, col. 3 ("This amendment was negatived.").

4.1.1.9.d Mr. Burke moved to add a clause to the last paragraph to this effect: That *a standing army of regular troops in time of peace is dangerous to public liberty, and should not be supported in time of peace, except by the consent of two thirds of both houses*.

Gazette of the U.S., August 22, 1789, p. 249, col. 3 ("This amendment was negatived.").

4.1.1.10Further House Consideration, August 20, 1789

The words *in person* were added after the word “arms,”. …

Gazette of the U.S., August 22, 1789, p. 250.

4.1.1.11Further House Consideration, August 21, 1789

Fifth. A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed; but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.

HJ, p. 107 (“read and debated … agreed to by the House, … two-thirds of the members present concurring”).[1]

4.1.1.12House Resolution, August 24, 1789

ARTICLE THE *FIFTH.*

A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.

House Pamphlet, RG 46, DNA.

4.1.1.13Senate Consideration, August 25, 1789

4.1.1.13.a The Resolve of the House of Representatives of the 24th of August, upon certain “Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States” was read as followeth:

…

Article the fifth

> "A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.
>
> Rough SJ, p. 216.

4.1.1.13.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*Article the Fifth.*

> "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.
>
> Smooth SJ, p. 194.

4.1.1.13.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*ARTICLE* *the* *FIFTH.*

> "A well regulated militia, composed of the body of the people, being the best security of a free State, the right of the people to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person.
>
> Printed SJ, p. 104.

4.1.1.14Further Senate Consideration, September 4, 1789

4.1.1.14.a [On motion, Upon the fifth Article, to subjoin the following proposition, to wit:

> "That standing armies, in time of peace, being dangerous to Liberty, should be avoided as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by the civil Power.—That no standing army or regular] troops shall be raised in time of peace, without the consent of two thirds of the Members present in both Houses, and that no soldier shall be inlisted for any longer term than the continuance of the war."
>
> Rough SJ, pp. 247–48 ("it passed in the Negative.") [material in brackets not legible].

4.1.1.14.b On motion, Upon the fifth Article, to subjoin the following proposition, to wit:

"That standing armies, in time of peace, being dangerous to Liberty, should be avoided as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by the civil Power.—That no standing army or regular troops shall be raised in time of peace, without the consent of two thirds of the Members present in both Houses, and that no Soldier shall be enlisted for any longer term than the continuance of the war."

Smooth SJ, p. 221 ("It passed in the Negative.").

4.1.1.14.c On motion, Upon the fifth Article, to subjoin the following proposition, to wit:

"That standing armies, in time of peace, being dangerous to Liberty, should be avoided as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by the civil Power.—That no standing army or regular troops shall be raised in time of peace, without the consent of two thirds of the Members present in both Houses, and that no soldier shall be inlisted for any longer term than the continuance of the war."

Printed SJ, p. 118 ("it passed in the Negative.").

4.1.1.15Further Senate Consideration, September 4, 1789

4.1.1.15.a On Motion to adopt the fifth article of the amendment proposed by the House of Representatives, amended to read as followeth—

"A well regulated militia, being the best security of a free state, the right of the People to keep and bear Arms, shall not be infringed."

Rough SJ, p. 248 ("It passed in the Affirmative.").

4.1.1.15.b On motion, To adopt the fifth article of the Amendment proposed by the House of Representatives, amended to read as followeth—

"A well regulated militia, being the best security of a free State, the right of the people to keep and bear arms, shall not be infringed—

Smooth SJ, p. 222 ("It passed in the affirmative.").

4.1.1.15.c On motion, To adopt the fifth Article of the Amendment proposed by the House of Representatives, amended to read as followeth—

"A well regulated militia, being the best security of a free State, the right of the people to keep and bear arms, shall not be infringed—

Printed SJ, p. 119 ("It passed in the Affirmative.").

4.1.1.16Further Senate Consideration, September 9, 1789

4.1.1.16.a On Motion to amend Article the fifth, by inserting these words,

“For the common defence,” next to the words “bear arms”—

Rough SJ, p. 274 (“It passed in the Negative.”).

4.1.1.16.b On motion, To amend Article the fifth, by inserting these words, “For the common defence,” next to the words “Bear arms”—

Smooth SJ, p. 243 (“It passed in the Negative.”).

4.1.1.16.c On motion, To amend Article the fifth, by inserting these words, “For the common defence,” next to the words “Bear arms”—

Printed SJ, p. 129 (“It passed in the Negative.”).

4.1.1.17Further Senate Consideration, September 9, 1789

4.1.1.17.a On motion, To strike out of the Article, line the second, these words, “The best,” and insert in lieu thereof “Necesary to the.”

Rough SJ, p. 274 (“It passed in the Affirmative.”).

4.1.1.17.b On motion, To strike out of this Article, line the second, these words, “The best,” and insert in lieu thereof “Necesary to the”

Smooth SJ, p. 243 (“It passed in the Affirmative.”).

4.1.1.17.c On motion, To strike out of this Article, line the second, these words, “The best,” and insert in lieu thereof “Necesary to the”

Printed SJ, p. 129 (“It passed in the Affirmative.”).

4.1.1.17.d Resolved ∧ that the Senate do ~~to~~ concur with the House of Representatives in

Article fifth

amended to read as follows:

"A well regulated Militia, being ~~the best~~ ∧ necessary to the security of a free State the right of the People to keep and bear Arms shall not be infringed."

Senate MS, pp. 2–3, RG 46, DNA.

4.1.1.18 Further Senate Consideration, September 9, 1789

4.1.1.18.a On motion, on article the fifth, to strike out the word "fifth," after "Article the," and insert "fourth"—

And to amend the Article to read as follows "A well regulated Militia being the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

Rough SJ, pp. 274–75 ("It passed in the affirmative.").

4.1.1.18.b On motion, On article the fifth, to strike out the word "Fifth," after "article the," and insert "Fourth"—

And to amend the article to read as follows,

"A well regulated militia being the security of a free State, the right of the people to keep and bear arms, shall not be infringed"—

Smooth SJ, pp. 243–44 ("It passed in the Affirmative.").

4.1.1.18.c On motion, On Article the fifth, to strike out the word "Fifth," after "Article the," and insert "Fourth"—

And to amend the Article to read as follows,

"A well regulated militia being the security of a free State, the right of the people to keep and bear arms, shall not be infringed"—

Printed SJ, p. 129 ("It passed in the Affirmative.").

4.1.1.18.d To erase the word "fifth"— & insert—fourth—& to erase from the fifth article the words, "composed of the body of the people"—the word "best"—& the words "but no one religiously scrupulous of bearing arms shall be compelled to render military service in person"—& insert after the word ~~the~~ ∧ "being" in the first line—necessary to.

Ellsworth MS, p. 2, RG 46, DNA.

4.1.1.19 Senate Resolution, September 9, 1789

ARTICLE THE FOURTH.

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Senate Pamphlet, RG 46, DNA.

4.1.1.20 Further House Consideration, September 21, 1789

Resolved, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

4.1.1.21 Further Senate Consideration, September 21, 1789

4.1.1.21.a A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Smooth SJ, pp. 265–66.

4.1.1.21.b A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th,

15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Printed SJ, pp. 141–42.

4.1.1.22 Further Senate Consideration, September 21, 1789

4.1.1.22.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

4.1.1.22.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

4.1.1.23 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said

Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances; “And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows “In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & & to have the assistance of counsel-for his defence.”

Conference MS, RG 46, DNA (Ellsworth’s handwriting).

4.1.1.24 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Article the eighth. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

4.1.1.25 Senate Consideration of Conference Committee Report, September 24, 1789

4.1.1.25.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Council for defence."

Smooth SJ, pp. 272–73.

4.1.1.25.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Printed SJ, p. 145.

4.1.1.26Further Senate Consideration of Conference Committee Report, September 24, 1789

4.1.1.26.a A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

4.1.1.26.b A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p.148.

4.1.1.27Further Senate Consideration of Conference Committee

Report, September 25, 1789

4.1.1.27.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

4.1.1.27.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

4.1.1.28Agreed Resolution, September 25, 1789

Article the Fourth.

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Smooth SJ, Appendix, p. 293.

ARTICLE the FOURTH.

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Printed SJ, Appendix, p. 163.

4.1.1.29Enrolled Resolution, September 28, 1789

Article the fourth … A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Enrolled Resolutions, RG 11, DNA.

4.1.1.30Printed Versions

4.1.1.30.a Art. II. A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Statutes at Large, vol. 1, p. 21.

4.1.1.30.b Art. IV. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Statutes at Large, vol. 1, p. 97.

4.1.2PROPOSALS FROM THE STATE CONVENTIONS

4.1.2.1Maryland Minority, April 26, 1788

4. That no standing army shall be kept up *in time of peace*, unless with the consent of two thirds of the members present of each branch of congress.

…

10. That no person, conscientiously scrupulous of bearing arms in any case, shall be compelled *personally* to serve as a soldier.

Maryland Gazette, May 1, 1788 (committee minority).

4.1.2.2Massachusetts Minority, February 6, 1788

[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

Massachusetts Convention, pp. 86–87.

4.1.2.3New Hampshire, June 21, 1788

Twelfth

Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.—

State Ratifications, RG 11, DNA.

4.1.2.4New York, July 26, 1788

That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People capable of bearing Arms, is the proper, natural and safe defence of a free State.

That the Militia should not be subject to Martial Law except in time of War, Rebellion or Insurrection.

That standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be under strict Subordination to the civil Power.

State Ratifications, RG 11, DNA.

4.1.2.5North Carolina, August 1, 1788

17th. That the people have a right to keep and bear arms; that a well regulated militia composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free state. That standing armies in time of peace are dangerous to Liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that in all cases, the military should be under strict subordination to, and governed by the civil power.

…

19th. That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.

State Ratifications, RG 11, DNA.

4.1.2.6Pennsylvania Minority, December 12, 1787

7. That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and governed by the civil power.

Pennsylvania Packet, December 18, 1787.

4.1.2.7Rhode Island, May 29, 1790

17th. That the people have a right to keep and bear arms, that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural and safe defence of a free state; that the militia shall not be subject to martial law except in time of war, rebellion or insurrection; that standing armies in time of peace, are dangerous to liberty, and ought not be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power; that in time of peace no soldier ought to be quartered in any house without the consent of the owner, and in time of war, only by the civil magistrate, in such manner as the law directs.

State Ratifications, RG 11, DNA.

4.1.2.8Virginia, June 27, 1788

Seventeenth, That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power.

State Ratifications, RG 11, DNA.

4.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

4.1.3.1Delaware: Declaration of Rights, 1776

SECT. 18. That a well regulated militia is the proper, natural and safe defence of a free government.

SECT. 19. That standing armies are dangerous to liberty, and ought not to be

raised or kept up without the consent of the Legislature.

SECT. 20. That in all cases and at all times the military ought to be under strict subordination to and governed by the civil power.

Delaware Laws, vol. 1, App., p. 81.

4.1.3.2Georgia: Constitution, 1777

XXXV. Every county in this State that has, or hereafter may have, two hundred and fifty men, and upwards, liable to bear arms, shall be formed into a battalion; and when they become too numerous for one battalion, they shall be formed into more, by bill of the legislature; and those counties that have a less number than two hundred and fifty, shall be formed into independent companies.

Georgia Laws, p. 13.

4.1.3.3Massachusetts: Constitution, 1780

[Part I, Article] XVII. The people have a right to keep and to bear arms for the common defence. And as in time of peace armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

Massachusetts Perpetual Laws, p. 7.

4.1.3.4New Hampshire: Constitution, 1783

[Part I, Article] XIII. No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.

New Hampshire Laws, p. 24.

4.1.3.5New York: Constitution, 1777

XL. AND WHEREAS it is of the utmost Importance to the Safety of every State, that it should always be in a Condition of Defence; and it is the Duty of every Man who enjoys the Protection of Society, to be prepared and willing to defend it: This Convention therefore, in the Name and by the Authority of the good People of this State, doth ORDAIN, DETERMINE, AND DECLARE, That the Militia of the State, at all Times hereafter, as well in Peace as in War, shall be armed and disciplined, and in Readiness for Service. That all such of the Inhabitants of this State, being of the People called Quakers, as from Scruples of Conscience may be averse to the bearing of Arms, be therefrom excused by the Legislature; and do pay to the State such Sums of Money in Lieu of their personal Service, as the same may, in the Judgment of the Legislature, be worth: And that a proper

Magazine of warlike Stores, proportionate to the Number of Inhabitants, be for ever hereafter at the Expence of this State, and by the Acts of the Legislature, established, maintained, and continued in every County of this State.

New York Laws, vol. 1, pp. 13–14.

4.1.3.6North Carolina: Declaration of Rights, 1776

Sect. XVII. That the People have a Right to bear Arms for the Defense of the State; and, as standing Armies in Time of Peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil Power.

North Carolina Laws, p. 276.

4.1.3.7Pennsylvania

4.1.3.7.a Constitution, 1776

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

…

VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent; nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.

…

XIII. That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up: And that the military should be kept under strict subordination to, and governed by, the civil power.

Pennsylvania Acts, M'Kean, pp. ix–x.

4.1.3.7.b Constitution, 1790

ARTICLE IX.

…

SECT. XXI. That the right of citizens to bear arms, in defence of themselves and the state, shall not be questioned.

Pennsylvania Acts, Dallas, p. xxxvi.

4.1.3.8Vermont: Constitution, 1777

CHAPTER I.

…

15. That that [*sic*] the People have a Right to bear Arms, for the Defence of themselves and the State:—And, as standing Armies, in the Time of Peace, are dangerous to Liberty, they ought not to be kept up; and that the military should be kept under strict Subordination to, and governed by, the civil Power.

Vermont Acts, p. 4.

4.1.3.9Virginia: Declaration of Rights, 1777

XIII. THAT a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases, the military should be under strict subordination to, and governed by, the civil power.

Virginia Acts, p. 33.

4.1.4OTHER TEXTS

4.1.4.1English Bill of Rights, 1689

… By causing severall good subjects being Protestants to be disarmed at the

same time when Papists were both armed and imployed contrary to law.

…

That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.

1 Will. & Mar. sess. 2, c. 2.

4.1.4.2Declaration of Independence, 1776

… He has kept among us, in times of Peace, Standing Armies without the Consent of our legislatures.—He has affected to render the Military independent of and superior to the Civil power. …

Engrossed Manuscripts, DNA.

4.1.4.3Richard Henry Lee to Edmund Randolph, Proposed Amendments, October 16, 1787

… That standing armies in times of peace are dangerous to liberty, and ought not to be permitted unless assented to by two thirds of the members composing each house of the legislature under the new constitution. …

Virginia Gazette, December 22, 1787.

4.2DISCUSSION OF DRAFTS AND PROPOSALS

4.2.1THE FIRST CONGRESS

4.2.1.1June 8, 17892

4.2.1.2August 17, 1789

4.2.1.2.a The house went into a committee of the whole, on the subject of amendments. The 3rd clause of the 4th proposition in the report was taken into consideration, being as follows; “A well regulated militia, composed of the body of the people, being the best security of a free state; the right of the people to keep and bear arms shall not be infringed, but no person, religiously scrupulous, shall be compelled to bear arms.”

Mr. Gerry.

This declaration of rights, I take it, is intended to secure the people against the maladministration of the government; if we could suppose that in all cases the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty. Now it must be evident, that under this provision, together with their other powers, Congress could take such measures with respect to a militia, as make a standing army necessary. Whenever government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The assembly of Massachusetts, seeing the rapid progress that administration were making, to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia, but they were always defeated by the influence of the crown.

Mr. Seney

Wished to know what question there was before the committee, in order to ascertain the point upon which the gentleman was speaking?

Mr. Gerry Replied that he meant to make a motion, as he disapproved of the words as they stood. He then proceeded, No attempts that they made, were successful, until they engaged in the struggle which emancipated them at once from their thraldom. Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provision on this head; for this reason he wished the words to be altered

so as to be confined to persons belonging to a religious sect, scrupulous of bearing arms.

Mr. JACKSON

Did not expect that all the people of the United States would turn Quakers or Moravians, consequently one part would have to defend the other, in case of invasion; now this, in his opinion, was unjust, unless the constitution secured an equivalent, for this reason he moved to amend the clause, by inserting at the end of it "upon paying an equivalent to be established by law."

Mr. SMITH, (of S.C.)

Enquired what were the words used by the conventions respecting this amendment; if the gentleman would conform to what was proposed by Virginia and Carolina, he would second him: He thought they were to be excused provided they found a substitute.

Mr. JACKSON

Was willing to accommodate; he thought the expression was, "No one, religiously scrupulous of bearing arms, shall be compelled to render military service in person, upon paying an equivalent."

Mr. SHERMAN

Conceived it difficult to modify the clause and make it better. It is well-known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent; many of them would rather die than do either one or the other—but he did not see an absolute necessity for a clause of this kind. We do not live under an arbitrary government, said he, and the states respectively will have the government of the militia, unless when called into actual service; beside, it would not do to alter it so as to exclude the whole of any sect, because there are men amongst the quakers who will turn out, notwithstanding the religious principles of the society, and defend the cause of their country. Certainly it will be improper to prevent the exercise of such favorable dispositions, at least whilst it is the practice of nations to determine their contests by the slaughter of their citizens and subjects.

Mr. VINING

Hoped the clause would be suffered to remain as it stood, because he saw

no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the government, was the same as if the person himself turned out to fight.

Mr. Stone

Enquired what the words “Religiously scrupulous” had reference to, was it of bearing arms? If it was, it ought so be expressed.

Mr. Benson,

Moved to have the words “But no person religiously scrupulous shall be compelled to bear arms” struck out. He would always leave it to the benevolence of the legislature—for, modify it, said he, as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the government. If this stands part of the constitution, it will be a question before the judiciary, on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not? It is extremely injudicious to intermix matters of doubt with fundamentals.

I have no reason to believe but the legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of, but they ought to be left to their discretion.

The motion for striking out the whole clause being seconded, was put, and decided in the negative, 22 members voting for it, and 24 against it.

Mr. Gerry

Objected to the first part of the clause, an account of the uncertainty with which it is expressed: A well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one. It ought to read “a well regulated militia, trained to arms,” in which case it would become the duty of the government to provide this security and furnish a greater certainty of its being done.

Mr. Gerry’s motion not being seconded, the question was put on the clause as reported, which being adopted,

Mr. Burke

Proposed to add to the clause just agreed to, an amendment to the following effect: “A standing army of regular troops in time of peace, is dangerous to

public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both houses, and in all cases the military shall be subordinate to the civil authority." This being seconded,

Mr. Vining

Asked whether, this was be considered as an addition to the last clause, or an amendment by itself? If the former, he would remind the gentleman the clause was decided; if the latter, it was improper to introduce new matter, as the house had referred the report specially to the committee of the whole.

Mr. Burke

Feared that what with being trammelled in rules, and the apparent disposition of the committee, he should not be able to get them to consider any amendment; he submitted to such proceeding because he could not help himself.

Mr. Hatley [sic; Hartley]

Thought the amendment in order, and was ready to give his opinion of it. He hoped the people of America would always be satisfied with having a majority to govern. He never wished to see two-thirds or three-forths required, because it might put it in the power of a small minority to govern the whole union.

The question on mr. Burke's motion was put, and lost by a majority of 13.

Congressional Register, August 17, 1789, vol. 2, pp. 219–23.

4.2.1.2.b The House resolved itself into a committee of the whole on the subject of amendments to the constitution.

Sixth Amendment:—"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."

Mr. Benson moved that the words "but no person religiously scrupulous shall be compelled to bear arms," be struck out. He wished that this humane provision should be left to the wisdom and benevolence of the government. It was improper to make it a fundamental in the constitution.

The motion was negatived, and the amendment agreed to.

Mr. Burke moved to add a clause to the last paragraph to this effect: That a standing army of regular troops in time of peace is dangerous to public liberty, and should not be supported in time of peace, except by the consent of two thirds of each house of the legislature."

This amendment was negatived.

Daily Advertiser, August 18, 1789, p. 2, col. 4.

4.2.1.2.c The house resolved itself into a committee of the whole on the subject of amendments to the constitution.

Sixth amendment—"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."

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This amendment was negatived.

New-York Daily Gazette, August 19, 1789, p. 802, col.3.

4.2.1.2.d SIXTH AMENDMENT—"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed, but no person religiously scrupulous shall be compelled to bear arms."

Mr. Benson moved that the words "but no person religiously scrupulous shall be compelled to bear arms," be struck out. He wished that this humane provision should be left to the wisdom and benevolence of the government. It was improper to make it a fundamental in the constitution.

The motion was negatived, and the amendment agreed to.

Mr. Burke moved to add a clause to the last paragraph to this effect: That *a standing army of regular troops in time of peace is dangerous to public liberty, and should not be supported in time of peace, except by the consent*

of two thirds of both houses.

This amendment was negatived.

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

4.2.1.3August 20, 1789

4.2.1.3.a Mr. Scott

Objected to the clause in the sixth amendment, “No person religiously scrupulous, shall be compelled to bear arms.” He observed that if this becomes part of the constitution, such persons can neither be called upon for their services, nor can an equivalent be demanded; it is also attended with still further difficulties, for a militia can never be depended upon. This would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army. I conceive it said he to be a legislative right altogether. There are many sects I know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts, to get excused from bearing arms.

Mr. Boudinot

Thought the provision in the clause, or something similar to it, was necessary. Can any dependence said he, be placed in men who are conscientious in this respect; or what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them. He adverted to several instances of oppression in this point, that occurred during the war. In forming a militia, an effectual defence ought to be calculated, and no characters of this religious description ought to be compelled to take up arms. I hope that in establishing this government, we may show the world that proper care is taken that the government may not interfere with the religious sentiments of any person. Now, by striking out the clause, people may be led to believe that there is an intention in the general government to compel all its citizens

to bear arms.

Some further desultory conversation arose and it was agreed to insert the words “in person” to the end of the clause; after which, it was adopted, as was the 4th, 5th, 6th, 7th, and 8th clauses of the 4th proposition; then the 5th, 6th, and 7th propositions was agreed to, and the house adjourned.

Congressional Register, August 20, 1789, vol. 2, pp. 242–43.

4.2.1.3.b Mr. Scot objected to the clause in the sixth amendment, “No person religiously scrupulous shall be compelled to bear arms.” He said, if this becomes part of the constitution, we can neither call upon such persons for services nor an equivalent; it is attended with still further difficulties, for you can never depend on your militia. This will lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, as in this case you must have recourse to a standing army. I conceive it is a matter of legislative right altogether. I know there are many sects religiously scrupulous in this respect: I am not for abridging them of any indulgence by law; my design is to guard against those who are of no religion. It is a said that religion is on the decline; if this is the case, it is an argument in my favour; for when the time comes that there is no religion, persons will more generally have recourse to these pretexts to get excused.

Mr. Boudinot said that the provision in the clause or something like it appeared to be necessary. What dependence can be placed in men who are conscientious in the respect? Or what justice can there be in compelling them to bear arm [*sic*], when, it they are honest men they would rather die than use them. He then averted to several instances of oppression in the case which occurred during the war. In forming a militia we ought to calculate for an effectual defence, and not compel characters of this description to bear arms. I wish that in establishing the government we may be careful to let every person know that we will not interfere with any person’s particular religious profession. If we strike out this clause, we shall lead such persons to conclude that we mean to compel them to bear arms.

Mr. Vining and Mr. Jackson spake upon the question. The words *in person* were added after the word “arms,” and the amendment was adopted.

Adjourned.

Gazette of the U.S., August 22, 1789, p. 250, col. 2.

4.2.2STATE CONVENTIONS

4.2.2.1Massachusetts, January 24, 1788

The Hon. Mr. SEDGWICK. … Is it possible, he asked, that an army could be raised for the purpose of enslaving themselves and their brethren? or, if raised, whether they could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?

Elliot, vol. 2, pp. 96–97.

4.2.2.2North Carolina, July 30, 1788

Mr. LENOIR. …

…

[Congress] can disarm the militia. If they were armed, they would be a resource against the great oppressions. The laws of a great empire are difficult to be executed. If the laws of the Union were oppressive, they could not carry them into effect, if the people were possessed of proper means of defence.

Elliot, vol. 4, p. 203.

4.2.2.3Pennsylvania, December 6, 1787

JOHN SMILIE: (113) I object to the power of Congress over the militia and to keep a standing army.

…

(123) In a free government there never will be need of standing armies; for it depends on the confidence of the people. If it does not so depend, it is not free.

(124) The Convention, in framing this government, knew it was not a free one; otherwise they would not have asked the power of the purse and the sword.

(125) The last resource of a free people is taken away; for Congress are

to have the command of the militia.

(126) The laws of Pennsylvania have hitherto been executed without the aid of the militia.

(127) The governor of each state will be only the drill sergeant of Congress.

(128) The militia officers will be obliged by oath to support the general government against that of their own state.

(129) Congress may give us a select militia which will, in fact, be a standing army—or Congress, afraid of a general militia, may say there shall be no militia at all.

(130) When a selected militia is formed; the people in general may be disarmed.

(131) Will the states give up to Congress their last resource—the command of the militia?

(132) Will the militia laws be as mild under the general government as under the state governments? Militia men may be punished with whipping or death. They may [be] dragged from one state to any other.

(133) "Congress guarantees to each State a *Republican* Form of Government." Is this a security for a *free* government?

(134) Can even the shadow of state governments be continued if Congress please to take it away?

(134) [*sic*] The Senate and President may dismiss the Representatives, when once a standing army is established with funds; and there this government will terminate.

…

WILLIAM FINDLEY: (135) The objections of the member from Fayette [John Smilie] are founded, important, and of extensive practical influence. Tax and militia laws are of universal operation.

(136) The militia will be taken from home; and when the militia of one state has quelled insurrections and destroyed the liberties, the militia of the last state may, at another time, be employed in retaliation on the first.

(137) No provision in behalf of those who are conscientiously scrupulous of bearing arms.

Jensen, vol. 2, pp. 508–09 (references omitted).

4.2.2.4Virginia, June 14, 1788

Mr. CLAY wished to be informed why the Congress were to have power to provide for calling forth the militia, to put the laws of the Union into execution.

Mr. MADISON supposed the reasons of this power to be so obvious that they would occur to most gentlemen. If resistance should be made to the execution of the laws, he said, it ought to be overcome. This could be done only in two ways—either by regular forces or by the people. By one or the other it must unquestionably be done. If insurrections should arise, or invasions should take place, the people ought unquestionably to be employed, to suppress and repel them, rather than a standing army. The best way to do these things was to put the militia on a good and sure footing, and enable the government to make use of their services when necessary.

Mr. GEORGE MASON. Mr. Chairman, unless there be some restrictions on the power of calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions, we may very easily see that it will produce dreadful oppressions. It is extremely unsafe, without some alterations. It would be to use the militia to a very bad purpose, if any disturbance happened in New Hampshire, to call them from Georgia. This would harass the people so much that they would agree to abolish the use of the militia, and establish a standing army. I conceive the general government ought to have power over the militia, but it ought to have some bounds. If gentlemen say that the militia of a neighboring state is not sufficient, the government ought to have power to call forth those of other states, the most convenient and contiguous. But in this case, the consent of the state legislatures ought to be had. On *real* emergencies, this consent will never be denied, each state being concerned in the safety of the rest. This power may be restricted without any danger. I wish such an amendment as this—that the militia of any state should not be marched beyond the limits of the adjoining state; and if it be necessary to draw them from one end of the continent to the other, I wish such a check, as the consent of the state legislature, to be provided. Gentlemen may say that this would impede the government, and that the state legislatures would counteract it by refusing their consent. This argument may be applied to all objections whatsoever. How is this compared to the British constitution? Though the king may declare war, the Parliament has the means of carrying it on. It is not so here. Congress can do both. Were it not for that check in the British government, the monarch would be a despot. When a war is necessary for the benefit of

the nation, the means of carrying it on are never denied. If any unjust requisition be made on Parliament, it will be, as it ought to be, refused. The same principle ought to be observed in our government. In times of real danger, the states will have the same enthusiasm in aiding the general government, and granting its demands, which is seen in England, when the king is engaged in a war apparently for the interest of the nation. This power is necessary; but we ought to guard against danger. If ever they attempt to harass and abuse the militia, they may abolish them, and raise a standing army in their stead. There are various ways of destroying the militia. A standing army may be perpetually established in their stead. I abominate and detest the idea of a government, where there is a standing army. The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them, &c. Here is a line of division drawn between them—the state and general governments. The power over the militia is divided between them. The national government has an exclusive right to provide for arming, organizing, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. The state governments have the power of appointing the officers, and of training the militia, according to the discipline prescibed by Congress, if they should think proper to prescribe any. Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.

No man has a greater regard for the military gentlemen than I have. I admire their intrepidity, perseverance, and valor. But when once a standing army is established in any country, the people lose their liberty. When, against a regular and disciplined army, yeomanry are the only defence,—yeomanry, unskillful and unarmed,—what chance is there for preserving freedom? Give me leave to recur to the page of history, to warn you of your present danger. Recollect the history of most nations of the world. What havoc, desolation, and destruction, have been perpetrated by standing armies! An instance within the memory of some of this house will show us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man, who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that

they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. [Here Mr. Mason quoted sundry passages to this effect.] This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use. I am not acquainted with the military profession. I beg to be excused for any errors I may commit with respect to it. But I stand on the general principles of freedom, whereon I dare to meet anyone. I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them. With this single exception, I would agree to this part, as I am conscious the government ought to have the power.

They may effect the destruction of the militia, by rendering the service odious to the people themselves, by harassing them from one end of the continent to the other, and by keeping them under martial law.

The English Parliament never pass a mutiny bill but for one year. This is necessary; for otherwise the soldiers would be on the same footing with the officers, and the army would be dissolved. One mutiny bill has been here in force since the revolution. I humbly conceive there is extreme danger of establishing cruel martial regulations. If, at any time, our rulers should have unjust and iniquitous designs against our liberties, and should wish to establish a standing army, the first attempt would be to render the service and use of militia odious to the people themselves—subjecting them to unnecessary severity of discipline in time of peace, confining them under martial law, and disgusting them so much as to make them cry out, “Give us a standing army!” I would wish to have some check to exclude this danger; as, that the militia should never be subject to martial law but in time of war. I consider and fear the natural propensity of rulers to oppress the people. I wish only to prevent them from doing evil. By these amendments I would give necessary powers, but no unnecessary power[.] If the clause stands as it is now, it will take from the state legislatures what divine Providence has given to every individual—the means of self-defence. Unless it be moderated in some degree, it will ruin us, and introduce a standing army.

Mr. MADISON. Mr. Chairman, I most cordially agree, with the

honorable member last up, that a standing army is one of the greatest mischiefs that can possibly happen. It is a great recommendation for this system, that it provides against this evil more than any other system known to us, and, particularly, more than the old system of confederation. The most effectual way to guard against a standing army, is to render it unnecessary. The most effectual way to render it unnecessary, is to give the general government full power to call forth the militia, and exert the whole natural strength of the Union, when necessary. Thus you will furnish the people with sure and certain protection, without recurring to this evil; and the certainty of this protection from the whole will be a strong inducement to individual exertion. Does the organization of the government warrant a belief that this power will be abused? Can we believe that a government of a federal nature, consisting of many coëqual sovereignties, and particularly having one branch chosen from the people, would drag the militia unnecessarily to an immense distance? This, sir, would be unworthy the most arbitrary despot. They have no temptation whatever to abuse this power; such abuse could only answer the purpose of exciting the universal indignation of the people, drawing on themselves the general hatred and detestation of their country.

I cannot help thinking that the honorable gentleman has not considered, in all its consequences, the amendment he has proposed. Would this be an equal protection, sir, or would it not be a most partial provision? Some states have three or four states in contact. Were this state invaded, as it is bounded by several states, the militia of three or four states would, by this proposition, be obliged to come to our aid; and those from some of the states would come a far greater distance than those of others. There are other states, which, if invaded, could be assisted by the militia of one state only, there being several states which border but on one state. Georgia and New Hampshire would be infinitely less safe than the other states. Were we to adopt this amendment, we should set up those states as butts for invasions, invite foreign enemies to attack them, and expose them to peculiar hardships and dangers. Were the militia confined to any limited distance from their respective places of abode, it would produce equal, nay, more inconveniences. The principles of equality and reciprocal aid would be destroyed in either case.

I cannot conceive that this Constitution, by giving the general government the power of arming the militia, takes it away from the state governments. The power is concurrent, and not exclusive. Have we not

found, from experience, that, while the power of arming and governing the militia has been solely vested in state legislatures, they were neglected and rendered unfit for immediate service? Every state neglected too much this most essential object. But the general government can do it more effectually. Have we not also found that the militia of one state were almost always insufficient to succor its harassed neighbor? Did all the states furnish their quotas of militia with sufficient promptitude? The assistance of one state will be of little avail to repel invasion. But the general head of the whole Union can do it with effect, if it be vested with power to use the aggregate strength of the Union. If the regualtion of the militia were to be committed to the executive authority alone, there might be reason for providing restrictions. But, sir, it is the legislative authority that has this power. They must make a law for the purpose.

The honorable member is under another mistake. He wishes martial law to be exercised only in time of war, under an idea that Congress can establish it in time of peace. The states are to have the authority of training the militia according to the congressional discipline; and of governing them at all times when not in the service of the Union. Congress is to govern such part of them as may be employed in the actual service of the United States; and such part only can be subject to martial law. The gentlemen in opposition have drawn a most tremendous picture of the Constitution in this respect. Without considering that the power was absolutely indispensable, they have alarmed us with the possible abuse of it, but have shown no inducement or motive to tempt them to such abuse. Would the legislature of the state drag the militia of the eastern shore to the western frontiers, or those of the western frontiers to the eastern shore, if the local militia were sufficient to effect the intended purpose? There is something so preposterous, and so full of mischief, in the idea of dragging the militia unnecessarily from one end of the continent to the other, that I think there can be no ground of apprehension. If you limit their power over the militia, you give them a pretext for substituting a standing army. If you put it in the power of the state governments to refuse the militia, by requiring their consent, you destroy the general government, and sacrifice particular states. The same principles and motives which produce disobedience to requisitions, will produce refusal in this case.

The restrictions which the honorable gentleman mentioned to be in the British constitution are all provisions against the power of the executive magistrate; but the House of Commons may, if they be so disposed,

sacrifice the interest of their constituents in all those cases. They may prolong the duration of mutiny bills, and grant supplies to the king to carry on an impolitic war. But they have no motives to do so; for they have strong motives to do their duty. We have more ample security than the people of Great Britain. The powers of the government are more limited and guarded, and our representatives are more responsible than the members of the British House of Commons.

Mr. CLAY apprehended that, by this power, our militia might be sent to the Mississippi. He observed that the sheriff might raise the *posse comitatus* to execute the laws. He feared it would lead to the establishment of a military government, as the militia were to be called forth to put the laws into execution. He asked why this mode was preferred to the old, established custom of executing the laws.

Mr. MADISON answered, that the power existed in all countries; that the militia might be called forth, for that purpose, under the laws of this state and every other state in the Union; that public force must be used when resistance to the laws required it, otherwise society itself must be destroyed; that the mode referred to by the gentleman might not be sufficient on every occasion, as the sheriff must be necessarily restricted to the *posse* of his own county. If the *posse* of one county were insufficient to overcome the resistance to the execution of the laws, this power must be resorted to. He did not, by any means, admit that the old mode was superseded by the introduction of the new one. And it was obvious to him, that, when the civil power was sufficient, this mode would never be put in practice.

Mr. HENRY. Mr. Chairman, in my judgment the friends of the opposition have to act cautiously. We must make a firm stand before we decide. I was heard to say, a few days ago, that the sword and purse were the two great instruments of government; and I professed great repugnance at parting with the purse, without any control, to the proposed system of government. And now, when we proceed in this formidable compact, and come to the national defence, the sword, I am persuaded we ought to be still more cautious and circumspect; for I feel still more reluctance to surrender this most valuable of rights.

The honorable member who has risen to explain several parts of the system was pleased to say, that the best way of avoiding the danger of a standing army, was, to have the militia in such a way as to render it unnecessary; and that, as the new government would have power over the militia, we should have no standing army—it being unnecessary. This

argument destroys itself. It demands a power and denies the probability of its exercise. There are suspicions of power on one hand, and absolute and unlimited confidence on the other. I hope to be one of those who have a large share of suspicion. I leave it to this house, if there be not too small a portion on the other side, by giving up too much to that government. You can easily see which is the worst of two extremes. Too much suspicion may be corrected. If you give too little power to-day, you may give more tomorrow. But the reverse of the proposition will not hold. If you give too much power to-day, you cannot retake it tomorrow: for tomorrow will never come for that purpose. If you have the fate of other nations, you will never see it. It is easier to supply deficiencies of power than to take back excess of power. This no man can deny.

But, says the honorable member, Congress will keep the militia armed; or, in other words, they will do their duty. Pardon me if I am too jealous and suspicious to confide in this remote possibility. My honorable friend went on a supposition that the American rulers, like all others, will depart from their duty without bars and checks. No government can be safe without checks. Then he told us they had no temptation to violate their duty, and that it would be their interest to perform it. Does he think you are to trust men who cannot have separate interests from the people? It is a novelty in the political world (as great a novelty as the system itself) to find rulers without private interests, and views of personal emoluments, and ambition. His supposition, that they will not depart from their duty, as having no interest to do so, is no satisfactory answer to my mind. This is no check. The government may be most intolerable and destructive, if this be our only security.

My honorable friend attacked the honorable gentleman with universal principles—that, in all nations and ages, rulers have been actuated by motives of individual interest and private emoluments, and that in America it would be so also. I hope, before we part with this great bulwark, this noble palladium of safety, we shall have such checks interposed as will render us secure. The militia, sir, is our ultimate safety. We can have no security without it. But then, he says that the power of arming and organizing the militia is concurrent, and to be equally exercised by the general and state governments. I am sure, and I trust in the candor of that gentleman, that he will recede from that opinion, when his recollection will be called to the particular clause which relates it to.

As my worthy friend said, there is a positive partition of power between

the two governments. To Congress is given the power of "arming, organizing, and disciplining the militia, and governing such part of them as may be employed in the service of the United States." To the state legislatures is given the power of "appointing the officers, and training the militia according to the discipline prescribed by Congress." I observed before, that, if the power be concurrent as to arming them, it is concurrent in other respects. If the states have the right of arming them, &c., concurrently, Congress has a concurrent power of appointing the officers, and training the militia. If Congress have that power, it is absurd. To admit this mutual concurrence of powers will carry you into endless absurdity—that Congress has nothing exclusive on the one hand, nor the states on the other. The rational explanation is, that Congress shall have exclusive power of arming them, &c., and that the state governments shall have exclusive power of appointing the officers, &c. Let me put it in another light.

May we not discipline and arm them, as well as Congress, if the power be concurrent? so that our militia shall have two sets of arms, double sets of regimentals, &c.; and thus, at a very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms &c.? Every one who is able may have a gun. But we have learned, by experience, that necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for sure I am that nation which shall trust its liberties in other hands cannot long exist. If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or discipline them, till the states shall have refused or neglected to do it? This is my object. I only wish to bring it to what they themselves say is implied. Implication is to be the foundation of our civil liberties, and when you speak of arming the militia by a concurrence of power, you use implication. But implication will not save you, when a strong army of veterans comes upon you. You would be laughed at by the whole world for trusting your safety implicitly to implication.

The argument of my honorable friend was, that rulers might tyrannize. The answer he received was, that they will not. In saying that they would not, he admitted they might. In this great, this essential part of the Constitution, if you are safe, it is not from the Constitution, but from the

virtues of the men in government. If gentlemen are willing to trust themselves and posterity to so slender and improbable a chance, they have greater strength of nerves than I have.

The honorable gentleman, in endeavoring to answer the question why the militia were to be called forth to execute the laws, said that the civil power would probably do it. He is driven to say, that the civil power may do it instead of the militia. Sir, the military power ought not to interpose till the civil power refuse. If this be the spirit of your new Constitution, that the laws are to be enforced by military coercion, we may easily divine the happy consequences which will result from it. The civil power is not to be employed at all. If it be, show me it. I read it attentively, and could see nothing to warrant a belief that the civil power can be called for. I shall be glad to see the power that authorizes Congress to do so. The sheriff will be aided by military force. The most wanton excesses may be committed under color of this; for every man in office, in the states, is to take an oath to support it in all its operations. The honorable gentleman said, in answer to the objection that the militia might be marched from New Hampshire to Georgia, that the members of the government would not attempt to excite the indignation of the people. Here, again, we have the general unsatisfactory answer, that they will be virtuous, and that there is no danger.

Will gentlemen be satisfied with an answer which admits of dangers and abuses if they be wicked? Let us put it out of their power to do mischief. I am convinced there is no safety in the paper on the table as it stands now. I am sorry to have an occasion to pass a eulogium on the British government, as gentlemen may object to it. But how natural it is, when comparing deformities to beauty, to be struck with the superiority of the British government to that system! In England, self-love—self-interest—powerfully stimulates the executive magistrate to advance the posterity of the nation. In the most distant part, he feels the loss of his subjects. He will see the great advantage of his prosperity inseparable from the felicity of his people. Man is a fallen creature, a fallible being, and cannot be depended on without self-love. Your President will not have the same motives of self-love to impel him to favor your interests. His political character is but transient, and he will promote, as much as possible, his own private interests. He will conclude, the constant observation has been that he will abuse his power, and that it is expected. The king of England has a more permanent interest. His stock, his family, is to continue in possession of the

same emolument. The more flourishing his nation, the more formidable and powerful is he. The sword and purse are not united, in that government, in the same hands, as in this system. Does not infinite security result from a separation?

But it is said that our Congress are more responsible than the British Parliament. It appears to me that there is no real, but there may be some specious responsibility. If Congress, in the execution of their unbounded powers, shall have done wrong, how will you come at them to punish them, if they are at the distance of five hundred miles? At such a great distance, they will evade responsibility altogether. If you have given up your militia, and Congress shall refuse to arm them, you have lost every thing. Your existence will be precarious, because you depend on others, whose interests are not affected by your infelicity. If Congress are to arm us exclusively, the man of New Hampshire may vote for or against it, as well as the Virginian. The great distance and difference between the two places render it impossible that the people of that country can know or pursue what will promote our convenience. I therefore contend that, if Congress do not arm the militia, we ought to provide for it ourselves.[3]

Elliot, vol. 3, pp. 378–88.

3 For further reports of the debate, *see* Elliot, vol. 3, pp. 388 *et seq*.

4.2.3PHILADELPHIA CONVENTION

4.2.3.1June 8, 1787

In Committee of the Whole.—On a reconsideration of the clause giving the national legislature a negative on such laws of the states as might be contrary to the Articles of Union, or treaties with foreign nations,—

Mr. PINCKNEY moved, "that the national legislature should have authority to negative all laws which they should judge to be improper." He urged that such a universality of the power was indispensibly necessary to render it effectual; that the states must be kept in due subordination to the nation; that, if the states were left to act of themselves in any case, it would be impossible to defend the national prerogatives, however extensive they might be, on paper. …

Mr. MADISON seconded the motion. He could not but regard an indefinite power to negative legislative acts of the states as absolutely necessary to a perfect system. … Was such a remedy eligible? Was it practicable? Could the national resources, if exerted to the upmost, enforce a national decree against Massachusetts, abetted, perhaps, by several of her neighbors? It would not be possible. A small proportion of the community, in a compact situation, acting on the defensive, and at one of its extremities, might at any time bid defiance to the national authority. Any government for the United States, formed on the supposed practicability of using force against the unconstitutional proceedings of the states, would prove as visionary and fallacious as the government of Congress. The negative would render the use of force unnecessary. The states could of themselves pass no operative act, any more than one branch of a legislature, where there are two branches, can proceed without the other. But, in order to give the negative this efficacy, it must extend to all cases. …

Mr. WILLIAMSON was against giving a power that might restrain the states from regulating their internal police.

Mr. GERRY could not see the extent of such a power, and was against every power that was not necessary. He thought a remonstrance against unreasonable acts of the states would restrain them. If it should not, force might be resorted to. He had no objection to authorize a negative to paper money, and similar measures. When the Confederation was depending before Congress, Massachusetts was then for inserting the power of emitting paper money among the exclusive powers of Congress. He observed, that the proposed negative would extend to the regulations of the militia—a matter on which the existence of the state might depend. The national legislature, with such a power, may enslave the states. Such an idea as this will never be acceded to. It has never been suggested or conceived among the people.

Elliot, vol. 5, pp. 170–72.

4.2.4NEWSPAPERS AND PAMPHLETS

4.2.4.1The Federal Farmer, No. 3, October 10, 1787

… By the constitution it is proposed that congress shall have power "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions: to provide for organizing, arming, and disciplining the militia: reserving to the states the right to appoint the officers, and to train the militia according to the discipline prescribed by congress; congress will have unlimited power to raise armies, and to engage officers and men for any number of years; but a legislative act applying money for their support can have operation for no longer term than two years, and if a subsequent congress do not within two years renew the appropriation, or further appropriate monies for the use of the army, the army will be left to take care of itself. When an army shall once be raised for a number of years, it is not probable that it will find much difficulty in getting congress to pass laws for applying monies to its support. I see so many men in America fond of a standing army, and especially among those who probably will have a large share in administering the federal system; it is very evident to me, that we shall have a large standing army as soon as the monies to support them can be possibly found. An army is a very agreeable place of employment for the young gentlemen of many families. A power to raise armies must be lodged some where; still this will not justify the lodging this power in a bare majority of so few men without any checks; or in the government in which the great body of the people, in the nature of things, will be only nominally represented. In the state governments the great body of the people, the yeomanry, *etc.* of the country, are represented: It is true they will chuse the members of congress, and may now and then chuse a man of their own way of thinking; but it is impossible for forty, or thirty thousand people in this country, one time in ten to find a man who can possess similar feelings, views, and interests with themselves: Powers to lay and collect taxes and to raise armies are of the greatest moment; for carrying them into effect, laws need not be frequently made, and the yeomanry, etc of the country ought substantially to have a check upon the passing of these laws; this check ought to be placed in the legislatures, or at least, in the few men the common people of the country, will, probably, have in congress, in the true sense of the word, "from among themselves." It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended—and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to

their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible them, totally deprived of that boasted weight and strength: This may be done in a great measure by congress, if disposed to do it, by modelling the militia. Should one fifth, or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenceless. The state must train the militia in such form and according to such systems and rules as congress shall prescribe: and the only actual influence the respective states will have respecting the militia will be in appointing the officers. I see no provision made for calling out the *posse commitatus* [*sic*] for executing the laws of the union, but provision is made for congress to call forth the militia for the execution of them—and the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance and thereby introduce an entire military execution of the laws. I know that powers to raise taxes, to regulate the military strength of the community on some uniform plan, to provide for its defence and internal order, and for duly executing the laws, must be lodged somewhere; but still we ought not so to lodge them, as evidently to give one order of men in the community, undue advantages over others; or commit the many to the mercy, prudence, and moderation of the few. And so far as it may be necessary to lodge any of the peculiar powers in the general government, a more safe exercise of them ought to be secured, by requiring the consent of two-thirds or threefourths of congress thereto—until the federal representation can be increased, so that the democratic members in congress may stand some tolerable chance of a reasonable negative, in behalf of the numerous, important, and democratic part of the community.

Storing, vol. 2, pp. 241–43.

4.2.4.2The Federal Farmer, No. 6, December 25, 1787

The following, I think, will be allowed to be unalienable or fundamental rights in the United States:—

No man, demeaning himself peaceably, shall be molested on account of his religion or mode or worship—The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it—Individual security consists in having free recourse to the laws—The people are subject to no laws or taxes not assented to by their representatives constitutionally assembled—They are at all times intitled to the benefits of the writ of habeas corpus, the trial by jury in criminal and civil causes—They have a right, when charged, to a speedy trial in the vicinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge—No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects—The people have a right to assemble in an orderly manner, and petition the government for a redress of wrongs—The freedom of the press ought not to be restrained—No emoluments, except for actual service—No hereditary honors, or orders of nobility, ought to be allowed—The military ought to be subordinate to the civil authority, and no soldier be quartered on the citizens without their consent—The militia ought always to be armed and disciplined, and the usual defence of the country—The supreme power is in the people, and power delegated ought to return to them at stated periods, and frequently—The legislative, executive, and judicial powers, ought always to be kept distinct—others perhaps might be added.

Storing, vol. 2, p. 262.

4.2.4.3The Federalist, No. 29, January 9, 1788

The power of regulating the militia and of commanding its services in times of insurrection and invasion are natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy.

It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defence. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert; an advantage of peculiar moment in the operations of an army: And it would fit them much sooner to acquire the degree of proficiency in military functions, which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.

…

Of the different grounds which have been taken in opposition to the plan of the Convention, there is none that was so little to have been expected, or

so untenable in itself, as the one which from this particular provision has been attacked. If a well regulated militia be the most natural defence of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought as far as possible to take away the inducement and the pretext to such unfriendly institutions. If the foederal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions upon paper.

…

… Where in the name of common sense are our fears to end if we may not trust our sons, our brothers, our neighbours, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen; and who participate with them in the same feelings, sentiments, habits and interests? What reasonable cause of apprehension can be inferred from a power in the Union to prescribe regulations for the militia and to command its services when necessary; while the particular States are to have the *sole and exclusive appointment of the officers?* If it were possible seriously to indulge a jealousy of the militia upon any conceivable establishment under the Foederal Government, the circumstance of the officers being in the appointment of the States ought at once to extinguish it. There can be no doubt that this circumstance will always secure to them a preponderating influence over the militia.

Kaminski & Saladino, vol. 15, pp. 318–19, 321.

4.2.4.4A Pennsylvanian, June 18, 1789

As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article in their right to keep and bear their private arms.

[Philadelphia] Federal Gazette, p. 2, col. 1.

4.2.5LETTERS AND DIARIES

4.2.5.1Jeremy Belknap to Paine Wingate, May 29, 1789

… You will see in the speech wh. our *new* Lieut. Governor [*Samuel Adams*] made at his investiture that he has not thrown off the old idea of *"independence"* as an attribute of each individual State in the "confederated Republic"—& you will know in what light to regard his "devout & fervent wish" that the "people may enjoy well grounded confidence that their *personal & domestic* rights are *secure."* This is the same Language or nearly the same which he used in the Convention when he moved for an addition to the proposed Amendments—by inserting a clause to provide for the Liberty of the press—the right to keep arms—Protection from seizure of person & property & the *Rights of Conscience*. By which motion he gave an alarm to both sides of the house & had nearly overset the whole business which the Friends of the Constitution had been labouring for several Weeks to obtain. …

Veit, p. 241.

4.2.5.2Samuel Nasson to George Thatcher, July 9, 1789

… I find that Ammendments are once again on the Carpet. I hope that such may take place as will be for the Best Interest of the whole A Bill of rights well secured that we the people may know how far we may Pro ceade [*sic*] in Every Department then their will be no Dispute Between the people and rulers in that may be secured the right to keep arms for Common and Extraordinary Occations [*sic*] such as to secure ourselves against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy you know to learn the Use of arms is all that can Save us from a forighn [*sic*] foe that may attempt to subdue us for if we keep up the Use of arms and become well acquainted with them we Shall allway be able to look them in the face that arise up against us for it is impossible to

Support a Standing armey large Enough to Guard our Lengthy Sea-Coast and now Spare me on the subject of Standing armeys in a time of Peace they allway was first or last the downfall of all free Governments it was by their help Caesar made proud Rome Own a Tyrant and a Traytor for a Master.

Veit, pp. 260–61.

4.2.5.3John Randolph to St. George Tucker, September 11, 1789

… A majority of the Senate were for not allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution. They are afraid that the Citizens will stop their full Career to Tyranny & Oppression.

Veit, p. 293.

4.3DISCUSSION OF RIGHTS

4.3.1TREATISES

4.3.1.1Bond, 1707

Of Armour.

Persons with offensive Weapons in Fairs, Markets or elsewhere in Affray of the King's People, may be arrested by the Sheriff, or other the King's Officers, and every Justice upon View or Complaint thereof may cause them to be stayed and bound to the Peace or Good Behaviour, or else seise their Armour, which every Constable may do, and cause them to be appraised and answered to the King; so of those that carry Guns charged, 2 *Ed*. 3. *cap*. 3. 7 *R*. 2. *cap*. 13. 20 *R*. 2. *cap*. 1. And yet the King's Servant, in his presence; Sheriffs, and other Officers in executing their Offices, and all other persons in pursuing Huy and Cry may lawfully bear Arms.

Every Subject may arm himself to suppress Riots, Routs, Rebellions, or

resist Enemies; but ’tis safer to assist the Justices or other the Queen’s Ministers in doing it, *Poph*. 121.

It is High Treason in such as agreed to arm themselves, and go from House to House to get Assistance to pull down Inclosures, &c. But if such Persons have an Interest, it amounts but to an high Misdemeanor, *ibidem* 122.

A Man for going secretly armed under his Apparel in *Westminster-Hall* was committed to Ward by the Justices, and was denied Bail or Mainprise, and forfeited his Armour, *Co. Bail and Mainp. fo*. 23.

Justice of Peace may arm himself, or any other person to suppress Riots, Rebellion, or resist Enemies. *Poph*. 121.

Justices of Peace and other Officers are indempnified for seizing of Horses, Arms, &c. 4 & 5 *W. & M. cap*. 19.

Any Justice of Peace may command Weapons to be taken from such Prisoners as are brought before them.

Any Justice of Peace may imprison all Servants in Husbandry, Artificers, Victuallers or Labourers which shall wear any Sword or Dagger, Buckler, (except they be travelling with their Masters, or being upon their Message) until they find Sureties of the Peace, and take away their Weapons, as forfeited, and present them at the next Sessions, 12 *R*. 2. *cap*. 6 repealed by 21 *Jac. cap*. 28 And yet the Justice of Peace may do it by the first *Assignavimus* in his Commission, especially if he suspect any Breach of the Peace to be intended.

Bond Justice of the Peace, pp. 42–43.

4.3.1.2Viner, 1742

Gun.

(A) WHO MAY NOT KEEP GUNS, AND THE PUNISHMENT OF OFFENDERS, AND BY WHOM.

1. 33 H. 8. Cap. 6. *S*. 1. ENacts that *none shall shoot in, or use to* keep in his House, *cap*. 6. *S*. 1. *a Hand-gun, Cross-Bow, Hagbut, or Demihake, unless his Lands are of the Value of* 100 l. *a Year, in Pain to* forfeit 10 l. *for every such Offence*.[1]

S. 2, *&c. Howbeit the* Followers of Lords *Spiritual or Temporal, Knights, Esquires, Gentlemen, and the Inhabitants of Cities, Boroughs, or Market Towns, may keep in their Houses, and use to shoot (but at a dead Mark only) with any Hand Gun of the Length of one Yard, or Hagbut, or*

Demihake of 3 *Quarters of a Yard; so may the Owner of a Ship, for the Defence of his Ship, and also he that dwells two Furlongs distance from a Town, or within five Miles from the Sea-Coast. And this last may shoot at any Wild Beast or Fowl, save only Deer, Heron, Shovlard, Partridge, Wild Swan, or Wild Elke.*

S. 5. *None may licence his Servant to shoot, except his Game-Keeper, on pain of* 10*l.*

All former Laws against Shooting repealed.

S. 12, 13. *Gunsmiths or Merchants, may keep Guns by them, observing the Lengths abovesaid.*

S. 14. *Proclamation to issue before an Offender can be punished.*

S. 15. *Owner of the Gun to forfeit, and not the Master of the House.*

S. 16. *It shall be lawful for any Person, to convey the Person offending against this Act before the next Justice of Peace; who, upon due Examination and Proof, shall have Power to commit him to Prison, there to remain 'till he has satisfied the Penalty, which in this Case shall be divided between the King and Party that so takes the Offender.*[2]

S. 19. *Justices of Peace in their Sessions, and Stewards of Leets, have Power to hear and determine these Offences.*[3]

S. 20. *Penalty of* 20 *s. a Piece on Juries concealing Offenders.*

S. 22. *Forfeitures arising by this Act shall be sued for within one Year by the King, and within six Months by a common Person, otherwise they shall be lost.*

S. 24. *Saving for Servants carrying Guns by their Masters Orders.*

2. S. was convicted of *Shooting* in a Gun contrary to this Statute, and committed to Gaol; and upon Hab. Corp. *Exceptions* were taken to the Return.—1st. That the *Caption* is taken *before J. S. and J. N. ad Pacem conservandam*, without saying, (*Justices*) and so by what appears they may be Constables.—2dly, That it appears to be *Conviction by Oath* where the Statute says (*Proof and Examination*) which must be intended by Jury. —— 3dly, That it does *not appear, that it was before the next Justices* as it ought to be. —— 4thly, *Nor that the Statute had been Proclaimed in the same County*, whereas there is an express Provision in the Statute, that none shall be punished before it is Proclaimed, which Twisden J. said, ought to appear in the Return, (tho' the Statute perhaps was proclaimed 100 Years since). 1 Sid. 419. no Judgment. Trin. 21 Car. 2. B. R. The King v. Saunders.[4]

3. A Person being brought before the next *Justice of Peace* in the County where &c. for shooting with Hail Shot in a Hand-Gun, who, upon Examination, finding it true made *a Record* thereof, *and committed the Party* to Prison, *'till he should pay* 10*l. viz.* 5 *l. to the Informer and 5 l. to the King*. This Record being certified upon an Habeas Corpus, it was held by the Whole Court, that if the Justice of Peace does not observe and Form proscribed by the Statute, it is void & Coram non Judice, and needs no Writ of Error; but if he acts according to the Statute, then neither B. R. nor Justices of Peace, can redress it, or set the Party at large. Jo. 170. Hill 3. Car. B. R. Cole's Case.

4. The Judgment on an Indictment upon this Statute was, that the Defendant *solvet dicto Domino Regi, &c. decent librarum, &c*. where the Words should have been *Solvat* instead of Solvet, and *Libras* instead of Librarum, and for those and other Reasons the Judgment was reversed. Raym. 378. Trin. 32 Car. 2. B. R. The King v. Alsop.

5. The *Conviction* was *for having a Gun in his House*, and this being excepted to, because the *Statute is*, (*Use to keep in his or her House*) and perhaps it might be lent him, and the Words of the Statute ought to be pursued, So the Conviction as quash'd. 1 Show. 48. Trin. 1 W. & M. The King v. Lewellin.

6. The Conviction was *Non habuisset* 100 *l. per Annum*, and did not say *when*; and this was excepted to, because it may be, that he had 100 *l.* a Year at the Time when he kept a Gun, but not when he was convicted; to which it was answered, that those Words were as much as to say, Nunquam habuit, and the Conclusion being * *Contra formam Statuti*, must explain such Words which seem to be doubtful. But per Cur. This being a Conviction before a Justice of Peace, the Time when the Offence was committed should be certainly alleged, *viz.* that the Defendant *praedict' Die & Anno had not* 100*l. per Annum*, and for that Reason it was quash'd. 3 Mod. 280. Pasch. 2 W. & M. The King v. Silcot.[5]

7. 2 & 3 *E*. 6 *cap*. 14. *Prohibited Shooting with* Hail Shot.[6]

8. In an Indictment on the Statute of 2 & 3 E. 6. 14. of Shooting with Hail Shot, the *Judgment* was, quod *Forisfaccat, &c*. where it should be *Forisfaciat*, &c. But the Court would not quash the Conviction upon this Exception. 4 Mod. 49. Mich. 3 & 4 W. & M. B. R. The King v. Alsop.[7]

9. Another Exception was taken, that the Indictment was, that the Defendant *did shoot Conies in Codden Wood, but* it *doth not appear where he stood when he shot, which may be in several Vills*, and that the Shooting

being the Offence, it must be certainly laid, so that upon this Indictment there can be no Issue. But the Court would not quash the Indictment upon this Exception, nor upon this and the former Exception. 4 Mod. 49, 50. Mich. 3 W. & M. B. R. The King v. Alsop.[8]

10. Another Exception was taken that there was no *Vi & Armis*, Sed no Allocatur; For it is needless. Show. 339. S. C.

11. 3 *Jac*. 1. *cap*. 13. *S*. 5. Enacts that *Persons using Guns, &c. to kill Deer, or Conveys, not having* 40*l. per Annum, or* 200*l. &c. may have them taken from them by any one having* 100*l. per Ann.*

12. By 22 & 23 *Car*. 2. *cap* 25. *S*. 3. *Persons not having* 100l. per Ann. *for Life. or* 150*l. per Ann. for a Term of* 99 *Years, are disabled to keep Guns, Dogs, or Nets.*

S. 9. *Persons aggrieved by any Judgment, by Virtue of this Act, may appeal to the next Quarter Sessions, whose Order shall be final, if no Title to any Land, Royalty or Fishery be therein concerned.*

Viner Abridgment, vol. 14, ch. 4, pp. 206–08.

4.3.1.3Jacob, 1750

Guns. None may shoot in, or keep in his House any *Gun*, Hand-gun, *&c*. who hath not Lands to the Value of 100 *l*[.] a Year, in Pain of 10 *l*[.] Nor shall any Person shoot in such *Guns*, under the Length of one Yard, or three Quarters of a Yard, under the like Penalty: If any do so, one that hath 100 *l*[.] *per Ann*. Land, may seise the *Guns* unlawfully kept and used; but then he must break them within 20 Days, or shall forfeit 40 *s*. In Forests, Parks and Chases, those who have Power from the King to take away *Guns*, may retain the same. *Stat*. 33 *H*. 8. *cap*. 6.

Jacob New-Law Dictionary, unpaginated.

4.3.1.4Hawkins, 1762

CHAP. LXIII.
Of Affrays.

In treating of Affrays, I shall consider,

1. What shall be said to be an Affray.

2. How far it may be suppressed by a private Person.
3. How far by a Constable.
4. How far by a Justice of Peace.
5. In what Manner the several Kinds of Affrays may be punished.

Sect. 1. As to the first Point, it is said, That the Word Affray is derived from the *French* Word *Effraier*, to terrify, and that in a legal Sense it is taken for a publick Offence, to the Terror of the People, from whence it seems clearly to follow, That there may be an Assault which will not amount to an Affray; as where it happens in a private Place, out of the hearing or seeing of any, except the Parties concerned; in which Case it cannot be said to be to the Terror of the People; and for this Cause such a private Assault seems not to be inquirable in a Court-Leet, as all Affrays certainly are, as being common Nusances.[1]

Sect. 2. Also it is said, that no quarrelsome or threatening Words whatsoever shall amount to an Affray; and that no one can justify laying his Hands on those who shall barely quarrel with angry Words, without coming to Blows; yet it seemeth, That the Constable may, at the Request of the Party threatened, carry the Person, who threatens to beat him, before a Justice of Peace, in Order to find Sureties.[2]

Sect. 3. Also it is certain, That it is a very high Offence to challenge another, either by Word or Letter, to fight a Duel, or to be the Messenger of such a Challenge, or even barely to endeavour to provoke another to send a Challenge, or to fight; as by dispersing Letters to that Purpose, full of Reflections, and insinuating a Desire to fight, *&c.*[3]

Sect. 4. But granting that no bare Words, in the Judgment of Law, carry in them so much Terror as to amount to an Affray; yet it seems certain, That in some Cases there may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People, which is said to have been always an Offence at Common Law, and is strictly prohibited by many Statutes: For by 2 *Ed.* 3. 3. it is enacted, *That no Man, great nor small, of what Condition soever he be, except the King's Servants, in his Presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such Places where such Acts happen, be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office, with Force and Arms, nor bring no Force in Affray of Peace, nor to go nor ride armed by Night nor by Day,*

in Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no part elsewhere, upon Pain to forfeit their Armour to the King, and their Bodies to Prison, at the King's Pleasure. And that the King's Justices in their Presence, Sheriffs, and other Ministers in their Bailiwicks, Lords of Franchises, and their Bailiffs in the same, and Mayors and Bailiffs of Cities and Boroughs, within the same Cities and Boroughs, and Borough-holders, Constables and Wardens of the Peace within their Wards, shall have Power to execute this Act: And that the Justices assigned, at their coming down into the Country, shall have Power to enquire how such Officers and Lords have exercised their Offices in this Case, and to punish them whom they find, that have not done that which pertained to their Office; and this Statute is farther enforced by 7 *Rich*. 2. 13. and 20 *Rich*. 2. 1.[4]

And in the Exposition of it, the following Points have been holden:

Sect. 5. I. That any Justice of Peace, or other Person, who is impowered to execute this Statute, may proceed thereon, either *ex Officio*, or by Force of a Writ out of Chancery formed upon the Statute, and that if he find any Person in Arms contrary to the Form of the Statute, he may seize the Arms, and commit the Offender to Prison; and that he ought also to make a Record of his whole Proceeding, and certify the same into the Chancery, where he proceeds by Force of the said Writ, or into the Exchequer, where he proceeds *ex Officio*.[5]

Sect. 6. II. That where a Justice of Peace, *&c*. proceeds upon the said Writ, he may not only imprison those whom he shall find offending against the Statute in his own View, but also those who shall be found by an Inquest taken before him, to have offended in such Manner in his Absence; and I do not see why he may not do the same where he proceeds *ex Officio*; for feeing the said Writ hath no other Foundation but the said Statute, and is the most authentick Explication thereof, it seemeth that the Rules therein prescribed, should be the best Direction for all Proceedings upon that Statute.[6]

Sect. 7. III. That the UnderSheriff may execute the said Writ, being directed to the Sheriff, if it name him only by the Name of his Office, and not by his proper Name, and do not expresly command him to act in his proper Person.[7]

Sect. 8. IV. That a Man cannot excuse the wearing such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his Person from his Assault; but it hath been resolved, That no one shall incur the Penalty of the said Statute for assembling his

Neighbours and Friends in his own House, against those who threaten to do him any violence therein, because a Man's House is as his Castle.[8]

Sect. 9. V. That no Wearing of Arms is within the Meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People; from whence it seems clearly to follow, That Persons of Quality are in no Danger of offending against this Statute by wearing common Weapons, or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace. And from the same Ground it also follows, That Persons armed with privy Coats of Mail, to the Intent to defend themselves against their Adversaries, are not within the Meaning of this Statute, because they do nothing *in terrorem populi*.[9]

Sect. 10. VI. That no Person is within the Intention of the said Statute, who arms himself to suppress dangerous Rioters, Rebels, or Enemies, and endeavours to suppress or resist such Disturbers of the Peace or Quiet of the Realm; for Persons who so arm themselves, seem to be exempted out of the general Words of the said Statute, by that Part of the Exception in the Beginning thereof, which seems to allow all Persons to arm themselves upon a Cry made for Arms to keep the Peace, in such Places where such Acts happen.[10]

Sect. 11. As to the second Point, *viz.* How far an Affray may be suppressed by a private Person, it seems agreed, That any one who sees others fighting, may lawfully part them, and also stay them till the Heat be over, and then deliver them to the Constable, who may carry them before a Justice of Peace, in order to their finding Sureties for the Peace: Also it is said, That any private Person may stop those whom he shall see coming to join either Party; and from hence it seems clearly to follow, That if a Man receive a Hurt from either Party in thus endeavouring to preserve the Peace, he shall have his Remedy by an Action against him; also upon the same Ground it seems equally reasonable, That if he unavoidably happen to hurt either Party, in thus doing what the Law both allows and commends, he may well justify it, inasmuch as he is no way in Fault; and the Damage done to the other, was occasioned by a laudable Intention to do him a Kindness.[11]

Sect. 12. However it seems clear, That if either Party be dangerously wounded in such an Affray, and a Stander-by, endeavouring to arrest the

other, be not able to take him without hurting, or even wounding him, yet he is no way liable to be punished for the same, inasmuch as he is bound, under Pain of Fine and Imprisonment, to arrest such an Offender, and either detain him till it appear whether the Party will live or die, or carry him before a Justice of Peace, by whom he either is to be bailed or committed, *&c*.[12]

Sect. 13. As to the third Point, *viz*. How far an Affray may be suppressed by a Constable; it seems agreed, That a Constable is not only impower'd, as all private persons are, to part an Affray which happens in his Presence, but is also bound at his Peril to use his best Endeavours to this Purpose, and not only to do his utmost himself, but also to demand the Assistance of others, which if they refuse to give him, they are punishable with Fine and Imprisonment.[13]

Sect. 14. And it said, That if a Constable see Persons either actually engaged in an Affray, as by Striking, or offering to strike or drawing their Weapons, *&c*. or upon the very Point of entering upon an Affray, as where one shall threaten to kill, wound, or beat another, he may either carry the Offender before a Justice of the Peace, to the end that such Justice may compel him to find Sureties for the Peace, *&c*. or he may imprison him of his own Authority for a reasonable Time, till the Heat shall be over, and also afterwards detain him till he find such Surety by Obligation: But it seems, That he has no Power to imprison such an Offender in any other Manner, or for any other Purpose; for he cannot justify the committing an Affrayed to Gaol till he shall be punished for his Offence: And it is said, That he ought not to lay Hands on those, who barely contend with hot Words, without any Threats of personal Hurt, and that all which he can do in such a Case, is to command them under Pain of Imprisonment to avoid Fighting.[14]

Sect. 15. But he is so far intrusted with a Power over all actual Affrays, that though he himself is a Sufferer by them, and therefore liable to be objected against, as likely to be partial in his own Cause, yet he may suppress them; and therefore, if an Assault be made upon him, he may not only defend himself, but also imprison the Offender, in the same Manner as if he were no way a Party.[15]

Sect. 16. And if an Affray be in a House, the Constable may break open the Doors to preserve the Peace, and if Affrayers fly to a House and he follow with fresh Suit, he may break open the Doors to take them.[16]

Sect. 17. But it is said, That a Constable hath no Power to arrest Man for

an Affray done out of his own View, without a Warrant from a Justice of Peace, unless a Felony were done or likely to be done; for it is the proper Business of a Constable to preserve the Peace, not to punish the Breach of it; nor does it follow from his having Power to compel those to find Sureties who break the Peace in his Presence, that he has the same Power over those who break it in his Absence, inasmuch as in such Case it is most proper to be done by those who may examine the whole Circumstances of the Matter upon Oath, which a Constable cannot do; yet is it said, That he may carry those before a Justice of Peace, who were arrested by such as were present at an Affray, and delivered by them into his Hands.[17]

Sect. 18. As to the fourth Point, *viz*. In what Manner an Affray may be suppressed by a Justice of Peace; there is no doubt, but that he may and must do all such Things to that Purpose, which a private Man or Constable are either enabled, or required by the Law to do: But it is said, That he cannot without a Warrant authorize the Arrest of any Person for an Affray out of his View; yet it seems clear, that in such Case he may make his Warrant to bring the Offender before him, in order to compel him to find Sureties for the Peace.[18]

Sect. 19. Also it seems, That a Justice of Peace has a greater Power over one who has dangerously wounded another in an Affray, than either a private Person or a Constable, for there does not seem to be any good Authority, that these have any Power at all to take Sureties of such an Offender; but it seems certain, That a Justice of the Peace has a discretionary Power either to commit him, or to bail him, till the Year and Day be past; but it said, that he ought to be very cautious how he takes Bail, if the Wound be dangerous; for that if the Party die, and the Offender appear not, he is in Danger of being severely fined, if he shall appear upon the whole Circumstances of the Case to have been too favourable.[19]

Sect. 20. As to the fifth Point, *viz*. In what Manner the several Kinds of Affrays are to be punished; it sufficiently appears from the foregoing Part of this Chapter, how such Affrays as are accompanied with Force and Arms, are to be dealt with upon the Statute of *Northampton*; and therefore I shall only examine in this Place, what Penalties other Affrays are liable unto; as to which it is to be observed, That all Affrays in general are punished by Fine and Imprisonment, the Measure of which is to be regulated by the Discretion of the Judges according to the Circumstances of the Case, which very much vary the Nature of this Crime, and in some Cases make it so inconsiderable as scarce to deserve to be taken Notice of;

and in others make it an Offence of a very heinous Nature, as in the following Instances:[20]

1. In Respect of the dangerous Tendency thereof.
2. In Respect of the Persons against whom it is committed.
3. In Respect of the Place wherein it happens.

Sect. 21. And first, an Affray may receive an Aggravation from the dangerous Tendency thereof, as where Persons coolly and deliberately engage in a Duel, which cannot but be attended with the apparent Danger of Murder, and is not only an open Defiance of the Law, but carries with it a direct Contempt of the Justice of the Nation, as putting Men under a Necessity of righting themselves; upon which Considerations, Persons convicted of barely sending a Challenge, have been adjudged to pay a Fine of one hundred Pounds, and to be imprisoned for one Month without Bail, and also to make a publick Acknowledgment of their Offence, and to be bound to their good Behaviour.[21]

Sect. 22. Secondly, An Affray may receive another Aggravation from the Persons against whom it is committed; as where the Officers of Justice are violently disturbed in the due Execution of their Office, as by the Rescous of a Person legally arrested, or the bare Attempt to make such a Rescous; for all the ministers of the Law are under its more immediate Protection.

Sect. 23. Thirdly, An Affray may receive a farther Aggravation from the Place wherein it is committed, and upon this Respect all Affrays in the King’s Court are so severely punished, as hath been shewn already in Chapter 21, and upon the same Account also, all Affrays in a Church or Churchyard, have been always esteemed very heinous Offences, as being great Indignities to the Divine Majesty, to whose Worship and Service such Places are immediately dedicated. And upon this Consideration, all irreverent Behaviour in these Places hath been esteemed so criminal by the Makers of our Laws, that they have not only severely punished such Disturbances in them which are punishable where-ever they happen, as all actual Affrays, &*c*. but also such, which if they happen elsewhere, are not punishable at all; as bare quarrelsome Words, and even such which would be commendable if done in another Place; as Arrests by Virtue of legal Process: But for the better Understanding hereof, I shall consider the several Statutes made for this Purpose.[22]

Sect. 24. And first, it is enacted by 5 and 6 *Ed*. 6. 4. *That if any Person whatsoever, shall by Words only quarrel, chide, or brawl, in any Church or Churchyard, that then it shall be lawful unto the Ordinary of the Place*

where the same Offence shall be done, and proved by two lawful Witnesses, to suspend every Person so offending; that is to say, if he be a Layman, ab ingressu Ecclesiæ, *and if he be a Clerk, from the Ministration of his Office, for so long Time as the some ordinary shall by his Discretion think meet and convenient, according to the Fault.*

Sect. 25. And it is further enacted by the said Statute, *That if any Person shall smite or lay any violent Hands upon any other, either in any Church or Churchyard; that then*, ipso Facto, *every Person so offending shall be deemed excommunicate, and be excluded from the Fellowship and Company of Christ's Congregation.*

Sect. 26. And it is also further enacted by the said Statute, *That if any Person shall maliciously strike any Person with any Weapon in any Church or Churchyard, or shall draw any Weapon in any Church or Churchyard, to the Intent to strike another with the same Weapon; that then every Person so offending, and thereof being convicted by Verdict of twelve Men, or by his own Confession, or by two lawful Witnesses, before the Justices of Assize, Justices of Oyer and Terminer, or Justices of Peace in their Sessions, by Force of this Act, shall be adjudged by the same Justices before whom such Person shall be convicted, to have one of his Ears cut off*, &c. *and besides that every such Person to be, and stand* ipso Facto *excommunicated, as aforesaid.*

And in the Exposition hereof it hath been holden:

Sect. 27. I. That notwithstanding the Words of the Statute be expressed, That he who smites another in the Church, &*c.* shall, *ipso Facto*, be deemed excommunicate; yet there ought either to be a precedent Conviction at Law, which must be transmitted to the Ordinary, or else the Excommunication must be declared in the Spiritual Court upon a proper Proof of the Offence there; for it is implied in every Penal Law, that no one shall incur the Penalty thereof, till he be found guilty upon a lawful Trial; also it must be intended in the Construction of this Statute, that the Excommunication ought to appear Judicially, for otherwise there could be no Absolution.[23]

Sect. 28. II. That he who strikes another in a Church, &*c.* can no way excuse himself, by shewing that the other assaulted him.[24]

Sect. 29. III. That Churchwardens, or perhaps private Persons, who whip Boys for playing in the Church, or pull off the Hats of those who obstinately refuse to take them off themselves, or gently lay their Hands on those who disturb the Performance of any Part of divine Service, and turn them out of the Church, are not within the Meaning of the Statute.[25]

Sect. 30. Also it is enacted by 1 *Ma. Sess.* 2. cap. 3. *That if any Person or Persons, of their own Power and Authority, shall willingly and of Purpose by open and overt Word, Fact, Act, or Deed, maliciously or contemptuously molest, let, disturb, vex or trouble, or by any other unlawful Ways and Means, disquiet, or misuse, any Preacher who shall be licensed, allowed, or authorized to preach by the Queen's Highness, or by any Archbishop, or Bishop of this Realm, or by any other lawful Ordinary, or by any of the Universities of* Oxford *and* Cambridge, *or otherwise lawfully authorized or charged, by Reason of his or their Care, Benefice, or other Spiritual Promotion or Charge, in any of his, or their open Sermon,* &c. *or if any Person or Persons shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble any Parson, Vicar, Parish-Priest, or Curate, or any lawful Priest, preparing, saying, doing, singing, ministring or celebrating the Mass, or other such divine Service, Sacraments, or Sacramentals, as was most commonly frequented and used in the last Year of the Reign of the late Sovereign Lord King* Henry *the Eighth, or that at any Time hereafter should be allowed, set forth, or authorized by the Queen's Majesty; or if any Person or Persons shall unlawfully, contemptuously, or maliciously, of their own Power or Authority, pull down, deface, spoil, or otherwise break any Altar or Altars, or any Crucifix, or Cross, in any Church, Chapel, or Churchyard; every such Offender and Offenders, his or their Aiders, Procurers or Abettors, may be apprehended by any Constable, or Churchwarden of the Place where such Offence shall be committed, or by any other Officer or Person then being present at the Time of the said Offence; and being so apprehended shall be brought before some Justice of Peace by whom they shall be committed forthwith, and within six Days the Matter shall be examined by the same, together with same other Justices; and on Proof by two Witnesses, or Confession, the Offender shall be committed for three Months, and also till the next Quarter Sessions, where, if they repent, they shall be discharged upon giving Sureties for their good Behaviour for a Year, and if they do not repent they shall be committed till they do.*

Sect. 31. It hath been resolved, That the Disturbance of a Minister in saying the present Common Prayer is within this Statute; for the express Mention of such Divine Service, as should afterwards be authorized by Queen *Mary,* doth implicitly include such also as should be authorized by her Successors; for since the King never dies, a Prerogative given generally to one, goes of Course to others.[26]

Sect. 32. Also it is enacted by 1 *Will*. and *Mar*. 18. Par. 19. *That if any Person shall willingly and of Purpose, maliciously or contemptuously come into any Cathedral or Parish Church, Chapel, or other Congregation permitted by the said Act, and disquiet or disturb the same, or misuse any Preacher or Teacher, such Persons, upon Proof before any Justice of Peace, by two or more sufficient Witnesses, shall find two Sureties to be bound by Recognizance in the penal Sum of fifty Pounds, and on Default of such Sureties shall be committed to Prison, there to remain till the next General or Quarter Sessions, and upon Conviction of the said Offence at the said General or Quarter Sessions, shall suffer the Pain and Penalty of twenty Pounds*.

Hawkins Pleas of the Crown, book I, pp. 134–40.

4.3.1.5Cunningham, 1764

Armour or Arms, (*Arma*) In the understanding of law, are extended to any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another. *Crompt. Justices of Peace, fol*. 65. So that *armorum appellatio non ubique scuta & gladios, & galeas significat, sed & sustes & lapides*. Arms are also what we call in Latin *insignia*, ensigns of honour. *Cowell*. As to the original of arms, or ensigns of honour, it was to distinguish commanders in war; for the antient defensive armour being a coat of mail, &*c*. which covered the persons, they could not be distinguished, and therefore a certain badge was painted on their shields, which was called *arms*; but not made hereditary in families till the time of King *Rich*. 1. on his expedition to regain *Jerusalem* from the *Turks:* And besides shields with *arms*, they had a silk coat drawn over their armour, and afterwards a stiff coat, on which their arms were painted all over, now the herald's coat of *arms. Sid. Rep*. 352.

By *stat*. 7 *Ed*. 1. men shall come peaceably to all parliaments without force and arms.

All men shall have arms according to their ability, and view of *arms* shall be made twice in the year. *St*. 13 *Ed*. 1. *st*. 2. *c*. 6. Men shall not come *armed* before the justices. *Stat*. 2 *Ed*. 3. *c*. 3. Going and riding armed is an offence. *St*. 25 *Ed*. 3. *st*. 5. *c*. 2. Launcegays prohibited, and riding armed. 7 *R*. 2. *c*. 13. 20 *R*. 2. *c*. 1.

Servants and labourers shall use bows and arrows on *Sundays*, &c. and

not bear other arms. *St*. 12 *Ric*. 2. *c*. 6. Imbezilling the King's armour felony. *St*. 31 *Eliz*. *c*. 4. Armour may be exported. 12 *Car*. 2 *c*. 4. *sect*. 10. Unless prohibited by proclamation. 12 *Car*. 2. *c*. 4. *sect*. 12. Importing arms or ammunition prohibited. 1 *Jac*. 2. *c*. 8.

Cunningham Law Dictionary, vol. I, unpaginated.

4.3.1.6Blackstone, 1765

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2 c. 2 and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

Blackstone Commentaries, bk. 1, ch.1, sec. 3; vol. 1, p. 139.

4.3.2CASE LAW

4.3.2.1Sir John Knight's Case, 1686

An information was exhibited against him by the Attorney General, upon the statute of 2 Edw. 3, c. 3, which prohibits "all persons from coming with force and arms before the King's Justices, &c., and from going or riding armed in affray of peace, on pain to forfeit his armour, and suffer imprisonment at the King's pleasure." This statute is confirmed by that of 20 Rich. 2, c. 1, with an addition of a further punishment, which is to make a fine to the King.

The information sets forth, that the defendant did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects, *contra formam statuti*.

This case was tried at the Bar, and the defendant was acquitted.

The Chief Justice said, that the meaning of the statute of 2 Edw. 3, c. 3, was to punish people who go armed to terrify the King's subjects. It is likewise a great offence at the *common law*, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law; and it having appointed a penalty, this Court can inflict no other punishment than what is therein directed.

87 Eng. Rep. 75 (K.B.).

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

2 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.a–c.

1 J. S. being constituted *special Bailiff to serve an Execution* in Debt on a Judgment, and fearing a Rescous, carried with him *a Dagg*; whereupon the Defendant, being a Justice of P. made one of his Servants go and Search him, and finding him arm'd brought him before his Master, being the next J. of P. who by Colour thereof committed him to Gaol, 'till he paid 10*l*. But on a Hab. Corp. it was held no Offence for a Sheriff or his Ministers in Execution of their Office to carry such a Hand-Gun, and that it was lawful, and that a Dagg was a Hand Gun within this Statute Cro. E. 825. Gardener's Case. —— 5 Rep. 71. b. Trin. 34 Eliz. Saintjohn's Case. als. Gardiner v. St. John's. S. C.

2 The Defendant, not having 100 *l*. a Year, did *shoot in a Gun in Feb. and in March following was carried before a J. of P. and by him convicted* of this Offence. It was moved, to quash this Conviction, because it was before a single Justice, who had not Power by the Statute to proceed *in a Summary Way*, unless the Party is *brought before him Instanter, upon View* of the Offence committed, which was not done in this Case, and therefore was ordered to shew cause why it should not be quash'd; 4 Mod. 147, 148. Trin. 4 W. & M. The King v. Bullock. ——— 1 Show. 367. Trin. 4 W. & M. S. P. The King v. Litten.

3 An *Indictment* will lie on this Statute *before the Sessions*, tho' this hath been formerly doubted; because, tho' the Justices have Power by the general Words of their Commission of punish Offences against the Peace, yet *shooting* is not such an Offence; For 'tis *only a Defect of the Qualification of the person who shoots* in a Gun. Dalton's Just. cap. 47. pag. 143.

4 1 Saund. 263. S. C. says, that it was quash'd for the Exception, that the *Conviction* was said to be *Coram T. B. & G. B. Ar. duobus Justice. Domini Regis ad Pacem in Cont. praedicto conservand*. But that the Word * (*Assign*) was omitted. For it ought to have been Conservand. Assignatis. And so it does not appear, whether the said Justices were assigned to keep the Peace or not. ——— The Reporter adds a Nota, that the Conviction was before two Justices of P. but the *Statute gives Authority to one Justice alone, being the next Justice of the County where the Offence is committed, to commit the Offender for the Forfeiture*, but that here it does not appear whether either of the said 2 Justices was the next Justice or not, which was another Exception intended to be moved, but the Conviction being quash'd for the Exception aforesaid, this Exception was not moved, and that he was of Counsel with Defendant. ——— * Vent. 39. S. C. and P.

Vent. 33. Anon, but S. C. reports, that as to the Words (upon due Examination and *Proof* before a Justice of

P.) it was resolved, that that was not intended by a Jury but *by Witnesses*, and that no Writ *of Error* lies upon such Conviction. And that an Exception was taken, because it was *Coram J. S.* Justice of the Peace, *without* adding *nec' non ad diversas Felonias Transgressiones, &c. audiend. assignat*, and that the Court agreed it ought so to be in Returns upon Certioraries to remove Indictments taken at Session, but otherwise of Convictions of this Nature; For it is known to the Court, that the Statute gives them Authority in this Case. Vent. 33. Trin. 21 Car. 2. Anon.

5 So where the Indictment Was *Non habens Terras, &c*. Exception was taken, that it referred to the Time of the Indictment, and not to the Shooting; The Judgment for that and other Reasons was reversed. Raym. 378. Trin. 32 Car. 2. B. R. The King v. Alsop. —— * Vid. 4 Mod. 51. in Case of the King v. Alsop.

6 This Statute is *repealed by* 6 & 7 *W*. 3. *cap*. 13.

7 Show. 339. S. C. but reports the Word of the Judgment to have been *forisfaceret*, instead of forisfaciat.

8 Show. 339. S. C. and says, that the Judgment was reversed.—But according to 4 Mod. 51. S. C. the Reasons of the Reversal were given by Holt Ch. J. because the *Conviction was before Justices of the Peace*, whereas, upon this Act of 2 and 3 E. 6. 14. the Peace is in no wise concerned; Because the *Offence thereby created is for want of due Qualification of the Person to shoot, which is not an Offence against the Peace*. And this cannot be an Indictment upon the Statute of 33 *H*. 8. because they do not set forth the *length of the Gun*, which by that Law *ought to be a Yard* long; and therefore the general Conclusion, Contra formam Statuti, will not help it; and for these Reasons the Indictment was quash'd. But it was agreed, that the Party might be indicted for this Offence before the *Justices of Oyer and Terminer*, but not before Justices of Peace for want of Jurisdiction.

1 3 Inst. 158. Dalt. ca. 8. Lamb. 125, 126. 4 H. 6. 10. a. 8 Ed. 4. 5. b.

2 H. P. C. 135. 23 E. 4.45. b. Dalt. ch. 8. Lamb. Constable, 14.

3 Poph. 158. 3 Inst. 158. 1 Sid. 186. 1 Keb 694. Hob. 120, 215. 2 Rol. Ab. 78.

4 Lamb. 126. 3 Inst. 160. 76. D. 2 Rol. Ab. 78. Pl. 4. H. P. C. 137.

5 F. N. B. 249. 3 Inst. 161. Dal. ch. 22. Lamb. 168, &c. Dalis. 23. 2 Buls. 330.

6 Cro. El. 294. Con. Lamb. 170.

7 Cro. El. 294.

8 24 Ed. 3. 33. a. b. 21 H. 7. 39 a. 3 Inst. 161, 162. Con. 2 Rol. 78. d. 2 H. 7. 39. a. 3 Inst. 162.

9 3 Mod. 117, 118. 2 Bulst. 330. Crom. 64. a.

10 Poph. 121, 122.

11 Lamb. 131. 3 Inst. 158. H. P. C. 131. 2 Inst. 52. 22 E. 4. 44. b. Dalt. ca. 8. Lamb. 131. Infra. 17. 3 Inst. 138. Con. Lamb. 131. Dalt. cap. 8.

12 Lamb. 131. Dalt. cap. 8. 3 Inst. 158. Bro. Faux Imprisonment 35, 44. H P. C. 135. 10 H. 7. 20. 2 Inst. 52.

13 3 Inst. 158. H. P. C. 135. Lamb. 132. 133. Dalt cap. 8. 3 H. 7. 10 b.

14 Lamb. 132, 133. Dalt. ca. 1, 8. H. P. C. 136. Dalt. Cap. 1, 8. Bro. Surety, 23, 36. Cro. El. 375. 9 Ed. 4. 26. a. Moor 284. Pl. 436. 3 H. 4. 9. a. 22 Ed. 4. 35. b. 10 Ed. 4. 18. 5 H. 7. 6. a. Savil 97, 98.

15 5 H. 7. 6.a. H. P. C. 136. 1 Rol. Re. 238. 2 Bulst. 329.

16 13 Ed. 4. 9. a. 7 Ed. 3. 12. b. Dalt. cap. 8, 67. Lamb. 133, 134.

17 H. P. C. 135. Cro. El. 375. Owen 105. H. P. C. 92, 136. Lamb. 131. Dalt. ca. 8.

18 H. P. C. 136. Dalt. cap. 8. Bro. False Imprisonment, 6, 12, 33. 14 H. 8. 7. Moor 468. Pl. 551.

19 See 38 Ed. 3. 6. b. 7. a. 22 Ass. 56. 5 Mod. 84. H. P. C. 36. Dalt. cap. 8. Poph. 153.

20 Aleyn 79.

21 Poph. 153. 3 Inst. 158. 1 Sid. 186. 1 Keb. 694. Moor 563. Pl. 763.

22 12 Co. 101. 1 Keb. 290, 491. 1 Mod. 186.

23 Dyer 275 Pl. 48. Cro. Ja. 462. 1 Vent. 146. Lit. 149. Hett. 86. Cro. El. 919.

24 Cro. Ja. 367.

25 1 Saund. 13, 14. 1 Sid. 301. 3 Keb. 124. 1 Mod. 168.

26 2 Jon. 159. Con. Aleyn 50. 2 Bulst. 51.

CHAPTER 5

AMENDMENT III

QUARTERING SOLDIERS CLAUSE

5.1TEXTS

5.1.1DRAFTS IN FIRST CONGRESS

5.1.1.1Proposal by Madison in House, June 8, 1789

5.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, . . .

. . .

No soldier shall in time of peace be quartered in any house without the consent of the owner; nor at any time, but in a manner warranted by law.

Congressional Register, June 8, 1789, vol. 1, p. 427.

5.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: . . .

. . .

No soldier shall in time of peace be quartered in any house, without consent of the owner; nor at any time, but in a manner warranted by law.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

5.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: . . .

. . .

No soldier shall in time of peace be quartered in any house, without consent of the owner; nor at any

time but in a manner warranted by law.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

5.1.1.2 Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 6 No Soldier Shall be quartered in any private house, in time of Peace, nor at any time, but by authority of law.

Madison Papers, DLC.

5.1.1.3 House Committee of Eleven Report, July 28, 1789

ART. I, SEC. 9—Between PAR. 2 and 3 insert, . . .

"No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law."

Broadside Collection, DLC.

5.1.1.4 House Consideration, August 17, 1789

5.1.1.4.a The 4th clause of the 4th proposition was taken up as follows: "No soldier shall in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in a manner to be prescribed by law."

Congressional Register, August 17, 1789, vol. 2, p. 223 (reported); *id.* (carried, after motions 5.1.5–5.1.6).

5.1.1.4.b Seventh amendment—"No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

Daily Advertiser, August 18, 1789, p. 2, col. 4.

5.1.1.4.c Seventh amendment—"No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

New-York Daily Gazette, August 19, 1789, p. 802, col. 3.

5.1.1.4.d 7th Amendment. “No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.”

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

5.1.1.5Motion by Sumter in House, August 17, 1789

5.1.1.5.a He [Mr. Sumter] moved to strike out all the words from the clause but “No soldier shall be quartered in any house without the consent of the owner.”

Congressional Register, August 17, 1789, vol. 2, p. 223 (motion lost by a majority of 16).

5.1.1.5.b Mr. Sumter moved to strike out the words “in time of peace” and also all the last words of the paragraph from the word “owner.”

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“This was negatived”).

5.1.1.5.c Mr. Sumter moved to strike out the words “in time of peace” and also all the last words of the paragraph from the word “owner.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“This was negatived.”).

5.1.1.5.d Mr. Sumter moved to strike out the words “in time of peace” and also the last words of the paragraph from the word “owner.”

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (motion negatived).

5.1.1.6Motion by Gerry in House, August 17, 1789

5.1.1.6.a Mr. Gerry

Moved to insert between “but” and “in a manner” the words “by a civil magistrate.”. . .

Congressional Register, August 17, 1789, vol. 2, p. 223 (failed, 13 in favor, 35 against).

5.1.1.6.b Mr. Gerry then moved to insert between the words “but” and “in a manner,” the words “by a civil magistrate”

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“Negatived”).

Daily Advertiser, August 18, 1789, p. 2, col. 1 ("Negatived").

5.1.1.6.c Mr. Gerry then moved to insert between the words "but" and "in a manner," the words "by a civil magistrate."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 ("Negatived").

5.1.1.6.d Mr. Gerry. . . moved to insert between the words "but" and "in a manner," the words *by a civil magistrate*.

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

5.1.1.7 Further Consideration by House, August 21, 1789

Sixth. No soldier shall in time of peace be quartered in any house, without the consent of the owner; nor in time of war but in a manner to be prescribed by law.

HJ, p. 107 ("read and debated. . . agreed to by the House, two-thirds of the members present concurring").[1]

5.1.1.8 House Resolution, August 24, 1789

ARTICLE THE SIXTH.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

House Pamphlet, RG 46, DNA.

5.1.1.9 Senate Consideration, August 25, 1789

5.1.1.9.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth: . . .

Article the sixth

No soldier shall in time of Peace be quartered in any house, without the consent of the owner, nor in time of War, but in a manner to be prescribed by law.

Rough SJ, p. 216.

5.1.1.9.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

Article the Sixth.

No Soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Smooth SJ, p. 194.

5.1.1.9.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

ARTICLE THE SIXTH.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Printed SJ, p. 104.

5.1.1.10Further Senate Consideration, September 4, 1789

5.1.1.10.a On motion to adopt the sixth Article of Amendments proposed by the House of Representatives—

Rough SJ, p. 248 (“It passed in the affirmative.”).

5.1.1.10.b On motion, To adopt the sixth article of Amendments proposed by the House of Representatives—

Smooth SJ, p. 222 (“It passed in the affirmative.”).

5.1.1.10.c On motion, To adopt the sixth Article of Amendments proposed by the House of Representatives—

Printed SJ, p. 119 (“It passed in the Affirmative.”).

5.1.1.10.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in Articles Sixth and Seventh

Senate MS, p. 3, RG 46, DNA.

5.1.1.11 Further Senate Consideration, September 9, 1789

5.1.1.11.a On motion, To alter Article 6th so as to stand Article 5th, and Article 7th so as to stand Article 6th, and Article 8th so as to stand Article 7th

Rough SJ, p. 275 ("It passed in the Affirmative.").

5.1.1.11.b On motion, To alter article the sixth so as to stand article the fifth, and article the seventh so as to stand article the sixth, and article the eighth so as to stand article the seventh—

Smooth SJ, p. 244 ("It passed in the affirmative.").

5.1.1.11.c On motion, To alter Article the sixth so as to stand Article the fifth, and Article the seventh so as to stand Article the sixth, and Article the eighth so as to stand Article the seventh—

Printed SJ, p. 129 ("It passed in the Affirmative.").

5.1.1.11.d To erase the word "Sixth" & insert Fifth.—

Ellsworth MS, p. 2, RG 46, DNA.

5.1.1.12 Senate Resolution, September 9, 1789

ARTICLE THE *FIFTH.*

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Senate Pamphlet, RG 46, DNA.

5.1.1.13 Further House Consideration, September 21, 1789

RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

5.1.1.14 Further Senate Consideration, September 21, 1789

5.1.1.14.a A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Smooth SJ, pp. 265–66.

5.1.1.14.b A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Printed SJ, pp. 141–42.

5.1.1.15 Further Senate Consideration, September 21, 1789

5.1.1.15.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

5.1.1.15.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

5.1.1.16 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to & ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

5.1.1.17 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first,

third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

5.1.1.18 Senate Consideration of Conference Committee Report, September 24, 1789

5.1.1.18.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor,

and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

5.1.1.18.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Printed SJ, p. 145.

5.1.1.19 Further Senate Consideration of Conference Committee Report, September 24, 1789

5.1.1.19.a A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

5.1.1.19.b A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the

Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p. 148.

5.1.1.20 Further Senate Consideration of Conference Committee Report, September 25, 1789

5.1.1.20.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

5.1.1.20.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

5.1.1.21 Agreed Resolution, September 25, 1789

5.1.1.21.a Article the Fifth.

No Soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Smooth SJ, Appendix, p. 293.

5.1.1.21.b ARTICLE THE FIFTH.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Printed SJ, Appendix, p. 163.

5.1.1.22Enrolled Resolution, September 28, 1789

Article the fifth. . . No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Enrolled Resolutions, RG 11, DNA.

5.1.1.23Printed Versions

5.1.1.23.a ART. III. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

Statutes at Large, vol. 1, p. 21.

5.1.1.23.b ART. V. No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

Statutes at Large, vol. 1, p. 97.

5.1.2PROPOSALS FROM THE STATE CONVENTIONS

5.1.2.1Maryland Minority, April 26, 1788

10. That soldiers be not quartered in time of peace upon private houses, without the consent of the owners.

Maryland Gazette, May 1, 1788 (committee majority).

5.1.2.2New Hampshire, June 21, 1788

Tenth,

That no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be quartered upon private Houses without the consent of Owners.

State Ratifications, RG 11, DNA.

5.1.2.3New York, July 26, 1788

That in time of Peace no Soldier ought be quartered in any House without the consent of the Owner, and in time of War only by the Civil Magistrate in such manner as the Laws may direct.

State Ratifications, RG 11, DNA.

5.1.2.4North Carolina, August 1, 1788

18th. That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the Laws direct.

State Ratifications, RG 11, DNA.

5.1.2.5Rhode Island, May 29, 1790

17th. That the people have a right to keep and bear arms, that a well regulated militia, including the body of the people capable of bearing arms,

is the proper, natural and safe defence of a free state; that the militia shall not be subject to martial law except in time of war, rebellion or insurrection; that standing armies in time of peace, are dangerous to liberty, and ought not be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power; that in time of peace no soldier ought to be quartered in any house without the consent of the owner, and in time of war, only by the civil magistrate, in such manner as the law directs.

State Ratifications, RG 11, DNA.

5.1.2.6Virginia, June 27, 1788

Eighteenth. That no Soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the laws direct.

State Ratifications, RG 11, DNA.

5.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

5.1.3.1Delaware: Declaration of Rights, 1776

Sect. 21. That no soldier ought to be quartered in any house in time of peace without the consent of the owner; and in time of war in such manner only as the Legislature shall direct.

Delaware Laws, vol. 1, App., p. 81.

5.1.3.2Maryland: Declaration of Rights, 1776

28. That no soldier ought to be quartered in any house in time of peace without the consent of the owner, and in time of war in such manner only as the legislature shall direct.

Maryland Laws, November 3, 1776.

5.1.3.3Massachusetts: Constitution, 1780

[Part I, Article] XXVII. In time of peace no soldier ought to be quartered in any house without the consent of the owner; and in time of war such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature.

Massachusetts Perpetual Laws, p. 7.

5.1.3.4New Hampshire: Bill of Rights, 1783

[Part I, Article] XXVII. No soldier in time of peace, shall be quartered in any house without the consent of the owner; and in time of war, such quarters ought not to be made but by the civil magistrate, in a manner ordained by the legislature.

New Hampshire Laws, pp. 26–27.

5.1.3.5New York

5.1.3.5.aAct Declaring. . . Rights & Priviledges, 1691

That no Freeman shall be compelled to receive any Souldiers or Marriners, except Inholders, and other Houses of publick Entertainment, who are to quarter for ready Money into his House, and there suffer them to sojourn again their Wills; provided it be not in time of actual War within this Province.

New York Acts, p. 18.

5.1.3.5.bBill of Rights, 1787

Thirteenth, That by the Laws and Customs of this State, the Citizens and Inhabitants thereof cannot be compelled, against their Wills, to receive Soldiers into their Houses, and to sojourn them there; and therefore no Officer, military or civil, nor any other Person whatsoever, shall, from henceforth, presume to place, quarter or billet any Soldier or Soldiers, upon

any Citizen or Inhabitant of this State, of any Degree or Profession whatever, without his or her Consent; and that it shall and may be lawful for every such Citizen and Inhabitant, to refuse to sojourn or quarter any Soldier or Soldiers, notwithstanding any Command, Order, Warrant, or billetting whatever.

New York Laws, vol. 2, p. 2.

5.1.3.6Pennsylvania: Constitution, 1790

ARTICLE IX.

. . .

SECT. XXIII. That no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Pennsylvania Acts, Dallas, p. xxxvi.

5.1.4 Other Texts

5.1.4.1PETITION OF RIGHT, 1627

6. And whereas of late great companies of souldiers and marriners have been dispersed into divers counties of the realme, and the inhabitants against their wille have been compelled to receive them into their houses, and there to suffer them to sojourne against the lawes and customes of this realme and to the great greivance and vexacion of the people.

3 Chas. 1, c. 1.

5.1.4.2English Bill of Rights, 1689

. . . By raising and keeping a standing army within this kingdome in time of peace without consent of Parlyament and quartering soldiers contrary to law. . . .

. . .

That the raising or keeping a standing army within the kingdome in time of peace unlesse it be with consent of Parlyament is against law.

1 Will. & Mar. sess. 2, c. 2.

5.1.4.3Declaration and Resolves of the First Continental Congress, 1774

Resolved, N.C.D. That the following acts of parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great-Britain and the American colonies, *viz.*

. . .

Also the act passed in the same session, for the better providing suitable quarters for officers and soldiers in his majesty's service, in North-America.

Tansill, pp. 4–5.

5.1.4.4Declaration of Independence, 1776

. . . For Quartering large bodies of armed troops among us. . . .

Continental Congress Papers, DNA.

5.2DISCUSSION OF DRAFTS AND PROPOSALS

5.2.1THE FIRST CONGRESS

5.2.1.1June 8, 1789[2]

5.2.1.2August 17, 1789

5.2.1.2.a The house went into a committee of the whole on the subject of amendments.

. . .

The 4th clause of the 4th proposition was taken as follows: “No soldier shall in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in a manner to be prescribed by law.”

Mr. Sumter

Hoped soldiers would never be quartered on the inhabitants, either in time of peace or war, without the consent of the owner: It was a burthen, and very oppressive, even in cases where the owner gave his consent; but where this was wanting, it would be a hardship indeed! Their property would lie at the mercy of men irritated by a refusal, and well disposed to destroy the peace of the family.

He moved to strike out all the words from the clause but “No soldier shall be quartered in any house without the consent of the owner.”

Mr. Sherman

Observed that it was absolutely necessary that marching troops should have quarters, whether in time of peace or war, and that it ought not to be put in the power of an individual to obstruct the public service; if quarters were not be obtained in public barracks, they must be procured elsewhere. In England, where they paid considerable attention to private rights, they billeted the troops upon the keepers of public houses also, with the consent of the magistracy. Mr. Sumter’s motion being put, was lost by a majority of sixteen.

Mr. Gerry

Moved to insert between “but” and “in a manner” the words “by a civil magistrate,” observing that there was no part of the Union but what they could have access to such authority.

Mr. Hartley

Said those things ought to be entrusted to the legislature; that cases might arise where the public safety would be endangered by putting it in the power of one person to keep a division of troops standing in the inclemency

of the weather for many hours, therefore he was against inserting the words.

Mr. Gerry said either his amendment was essential, or the whole clause was unnecessary.

On putting the question 13 rose in favor of the motion, 35 against it, and then the clause was carried on as reported.

Congressional Register, August 17, 1789, vol. 2, pp. 219, 223–24.

5.2.1.2.b Seventh amendment—"No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

Mr. Sumter moved to strike out the words "in time of peace" and also all the last words of the paragraph from the word "owner." This was negatived.

Mr. Gerry then moved to insert between the words "but" and "in a manner," the words "by a civil magistrate"—Negatived.

The amendment was agreed to.

Daily Advertiser, August 18, 1789, p. 2, col. 4.

5.2.1.2.c Seventh amendment—"No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

Mr. Sumter moved to strike out the words "in time of peace" and also all the last words of the paragraph from the word "owner." This was negatived.

Mr. Gerry then moved to insert between the words "but" and "in a manner," the words "by a civil magistrate." Negatived.

The amendment was agreed to.

New-York Daily Gazette, August 19, 1789, p. 802, cols. 3–4.

5.2.1.2.d 7th Amendment. "No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

Mr. Sumter moved to strike out the words "in time of peace" and also the last words of the paragraph from the word "owner."

Mr. Sherman said he thought this was going too far; occasion might arise in which it would be extremely injurious to put it in the power of any man to obstruct the public service: He adverted to the British regulations in this case, of quartering soldiers in public houses. This motion was negatived.

Mr. Gerry said, that he conceived the article might be so altered as to relieve the minds of the citizens of the United States. It is said, government

will take care of the rights of the people; but these amendments are designed to prevent the arbitrary exercise of power. He then moved to insert between the words “but” and “in a manner,” the words *by a civil magistrate*. Negatived.

The amendment was agreed to.

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

5.2.2STATE CONVENTIONS

5.2.2.1Maryland, April 1788

I am opposed to the new Government;—

3. Because Congress will have a right to quarter soldiers in our *private* houses, not only in time of war, but also in time of *peace*. Bill of Rights 28.

Samuel Chase, Storing, vol. 5, pp. 85–86.

5.2.2.2Virginia, June 16, 1788

Mr. HENRY. . . .

. . . One of our first complaints, under the former government, was the quartering of troops upon us. This was one of the principal reasons for dissolving the connection with Great Britain. Here we may have troops in time of peace. They may be billeted in any manner—to tyrannize, oppress, and crush us.

Mr. MADISON. . . .

He says that one ground of complaint, at the beginning of the revolution, was, that a standing army was quartered upon us. This was not the whole complaint. We complained because it was done without the local authority of this country—without the consent of the people of America.

Elliot, vol. 3, p. 411–13.

5.2.3 PHILADELPHIA CONVENTION

None.

5.2.4NEWSPAPERS AND PAMPHLETS

5.2.4.1The Federal Farmer, No. 6, December 25, 1787

The following, I think, will be allowed to be unalienable or fundamental rights in the United States:—

No man, demeaning himself peaceably, shall be molested on account of his religion or mode or [*sic*] worship—The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it—Individual security consists in having free recourse to the laws—The people are subject to no laws or taxes not assented to by their representatives constitutionally assembled—They are at all times intitled to the benefits of the writ of habeas corpus, the trial by jury in criminal and civil causes—They have a right, when charged, to a speedy trial in the vicinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge—No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects—The people have a right to assemble in an orderly manner, and petition the government for a redress of wrongs—The freedom of the press ought not to be restrained—No emoluments, except for actual service—No hereditary honors, or orders of nobility, ought to be allowed—The military ought to be subordinate to the civil authority, and no soldier be quartered on the citizens without their consent—The militia ought always to be armed and disciplined, and the usual defence of the country—The supreme power is in the people, and power delegated ought to return to them at stated periods, and frequently—The legislative, executive, and judicial powers, ought always to be kept distinct—others perhaps might be added.

Storing, vol. 2, p. 262.

5.2.4.2The Federal Farmer, No. 16, January 20, 1788

The constitution will give congress general powers to raise and support armies. General powers carry with them incidental ones, and the means necessary to the end. In the exercise of these powers, is there any provision in the constitution to prevent the quartering of soldiers on the inhabitants?

you will answer, there is not. This may sometimes be deemed a necessary measure in the support of armies; on what principle can the people claim the right to be exempt from this burden? They will urge, perhaps, the practice of the country, and the provisions made in some of the state constitutions—they will be answered, that their claim thus to be exempt is not founded in nature, but only in custom and opinion, or at best, in stipulations in some of the state constitutions, which are local, and inferior in their operation, and can have no controul over the general government—that they had adopted a federal constitution—had noticed several rights, but had been totally silent about this exemption—that they had given general powers relative to the subject, which, in their operation, regularly destroyed the claim. Though it is not to be presumed, that we are in immediate danger from this quarter, yet it is fit and proper to establish, beyond dispute, those rights which are particularly valuable to individuals, and essential to the permanency and duration of free government. An excellent writer observes, that the English, always in possession of their freedom, are frequently unmindful of the value of it: we, at this period, do not seem to be so well off, having, in some instances abused ours; many of us are quite disposed to barter it away for what we call energy, coercion, and some other terms we use as vaguely as that of liberty—There is often as great a rage for change and novelty in politics, as in amusements and fashions.

Storing, vol. 2, p. 329.

5.2.5LETTERS AND DIARIES

None.

5.3DISCUSSION OF RIGHTS

5.3.1TREATISES

5.3.1.1Jacob, 1750

Soldiers. The *Military State of England* includes the *Soldiery* by Land and Sea; and it is against our ancient Law to keep up any Army of *Soldiers* in the Time of Peace. In Time of War particular Orders are made for the Order and Discipline of Officers and *Soldiers*, which are to be consulted upon all Emergencies; and therefore we are not to expect many standing and perpetual Laws on that Account. *Wood's Inst.* 45. The chief Statutes relating to the Army, and their Contents, are as follow, *viz.*. . . By 31 *Car.* 2. *c.* 1. no *Soldiers* shall be quartered on any Persons without their Consent; and Inhabitants of Places may refuse to quarter any *Soldier*, notwithstanding any Order whatsoever. . . . Officers receiving Subsistence Money, are to give Notice to Innkeepers, and pay their Accounts; and Accounts shall be made up between the Paymaster General and Colonels of Regiments, *&c.* Constables shall quarter *Soldiers* in Inns, Alehouses, Victualling-houses, and those selling Brandy, *&c.* by Retail, (Distillers excepted) and Officers taking Money for excusing Quarterage, shall be cashiered: Justices of Peace are to issue Warrants to Constables to provide Carriages for Baggage, where *Soldiers* are on the March, and Officers shall pay 1 *s. per* Mile for Waggons, and 9 *d.* for Carts; and forcing Horses, *&c.* from the Owners, is liable to a Forfeiture of 5 *l.* . . . No Justice of Peace having a military Office, shall be concerned in Quartering of *Soldiers* in the Company, *&c.* under his Command: And Victuallers refusing *Soldiers* Quartered, or Constables receiving Reward to excuse them, are to forfeit not above 5 *l.* nor under 4 *s.* 3 *Geo.* 2. *c.* 2. By subsequent Acts, no Justice, Constable, *&c.* may direct more Billets for Quartering *Soldiers* than there are effective Men: And if any *Soldier* be Quartered on a private House, without the Owner's Consent, he may have his Remedy at Law; and Officers or Constables that quarter Wives, Children, or Maid Servants of any Officer or *Soldier*, in such Manner: the Officer shall be cashiered, and Constable forfeit 20 *s.* Likewise where Persons are grieved in Billeting *Soldiers*, by Constables, they may complain to the Justices of Peace, who shall order so many to be removed as they see Cause. 13 *Geo.* 2. *c.* 10. It is also enacted, when Orders are issued to Quarter *Soldiers* in *Westminster*, the High Constable there shall deliver his Precepts to the Petty Constables, *&c.* to Billet them properly in their Districts, who must give, on Oath to the Justices in Sessions, Lists of the Houses obliged to receive the Officers and *Soldiers*; also the Number quartered on each House, *&c.* and if the Lists are defective, shall forfeit 5 *l.* Officers or *Soldiers*, if they destroy Game on their Marches, or Poultry or Fish, being convicted before a Justice, are to forfeit 5 *l.* an Officer, and 20 *s.* a *Soldier*. *Ibid.*

Jacob New-Law Dictionary, unpaginated.

5.3.1.2Bacon, 1759

Of **the quartering of Soldiers.**

By the 30 *G.* 2. *c.* 6. *par.* 22. After reciting, that whereas by *the Petition of Right*, in the third Year of King *Charles* the First, it is enacted and declared, that the People of this Land are not by the Laws to be burthened with the sojourning of Soldiers against their Wills; and by a Clause in an Act of Parliament, made in the one and thirtieth Year of the Reign of King *Charles* the Second, it is declared and enacted, that no Officer, Civil or Military, nor other Person whatsoever, should from thenceforth presume to place, quarter or billet, any Soldier or Soldiers upon any Subject or Inhabitant of this Realm, of any Degree, Qualify or Profession whatsoever, without his Consent; and that it shall and may be lawful for any Subject, Sojourner or Inhabitant, to refuse to quarter any Soldier or Soldiers, notwithstanding any Demand or Warrant, or Billeting whatsoever; But forasmuch as at this Time, and during the Continuance of this Act, there is and may be Occasion for the marching and quartering of Regiments, Troops and Companies, in several Parts of this Kingdom, it is enacted, "that for and during the Continuance of this Act, and no longer, it shall and may be lawful to and for the Constables, Tythingmen, Headboroughs, and other chief Officers and Magistrates of Cities, Towns and Villages, and other Places, within *England*, *Wales*, and the Town of *Berwick upon Tweed*; and in their Default or Absence, for any one Justice of the Peace inhabiting in or near any such City, Town, Village or Place, and for no others; and such Constables, and other chief Magistrates as aforesaid, are hereby required to quarter and billet the Officers and Soldiers, in his Majesty's Service, in Inns, Livery-Stables, Alehouses, Victualling Houses, and the Houses of Sellers of Wine by Retale, to be drank in their own Houses or Places thereunto belonging, and all Houses of Persons selling Brandy, Strong Waters, Cyder or Metheglin, by Retale, to be drank in Houses, other than and except the House or Houses of any Distillers, who keep Houses or Places of distilling Brandy or Strong Waters, and the House of any Shopkeeper, whose principal Dealings shall be more in other Goods and Merchandizes, than in Brandy or Strong Waters, so as such Distillers or Shopkeepers do not permit or suffer tippling in his or their Houses, and in no other, and in no

private House whatsoever; nor shall any more Billets at any Time be ordered, than there are effective Soldiers present to be quartered."[1]

By the same *Par*. it is enacted, "That if any Constable, Tythingman, or such like Officer, or Magistrate, as aforesaid, shall presume to quarter or billet any Officer or Soldier in any private House, without the Consent of the Owner or Occupier, in such Case, such Owner or Occupier shall have his or their Remedy at Law, against such Magistrate or Officer, for the Damage that such Owner or Occupier shall thereby sustain."[2]

In an Action of Trespass against a Constable for quartering a Dragoon upon the Plaintiff, it was found by a special Verdict, that the Plaintiff kept a House at *Epsom*, and let Lodgings to such as came there for the Benefit of the Air and Waters, that he dressed Meat for his Lodgers at four Pence *per* Joint, sold them Small Beer at two Pence *per* Mugg, and also found them Stable Room, Hay, and other Things for Horses, at such and such Rates. Judgment was in this Case for the Plaintiff; and by *Holt*, Ch. J. this Case is so plain that there is no Occasion for giving Reasons.[3]

By the 30 *G*. 2. *c*. 6. *par*. 22. it is enacted, "That if any military Officer shall take upon him to quarter Soldiers otherwise than is limited and allowed by this Act, or shall use or offer any Menace or Compulsion to or upon any Mayors, Constables, or civil Officers, before mentioned, tending to deter and discourage any of them from performing any Part of their Duty hereby required, or appointed, such military Officer shall, for every such Offence, being thereof convicted, before any two or more of the next Justices of the Peace of the County, by the Oath of two credible Witnesses, be deemed and taken to be *ipso facto* cashiered, and shall be utterly disabled to have or hold any military Employment within this Kingdom, or in his Majesty's Service; provided the said Conviction be affirmed at the next Quarter-Sessions of the Peace of the said County, and a Certificate thereof be transmitted to the Judge Advocate, who is hereby required to certify the same to the next Court-martial."[4]

By *par*. 46. it is enacted, "That if any Officer, military or civil, by this Act authorized to quarter Soldiers in any Houses hereby appointed for that Purpose, shall at any Time, during the Continuance of this Act, quarter the Wives, Children, or Men or Maid Servants, of any Officer or Soldier in any such Houses, against the Consent of the Owners, the Party offending, if an Officer of the Army, shall upon Complaint and Proof thereof made to the Commander in chief of the Army, or Judge Advocate, be *ipso facto* cashiered; and if a Constable, Tythingman, or other civil Officer, he shall

forfeit to the Party aggrieved twenty Shillings, upon Complaint and Proof made thereof to the next Justice of Peace, to be levied by Warrant of such Justice, by Distress and Sale of his Goods."[5]

By *par*. 22. it is enacted, "That in case any Person shall find himself aggrieved, in that such Constable, Tythingman or Headborough, chief Officer or Magistrate, such chief Officer or Magistrate not being a Justice of the Peace, has quartered or billeted in his House a greater Number of Soldiers than he ought to bear in Proportion to his Neighbours, and shall complain thereof to one or more Justice or Justices of the Peace of the Division, City or Liberty, where such Soldiers are quartered; or in case such chief Officer or Magistrate shall be a Justice of the Peace, then on Complaint made to two or more Justices of the Peace of such Division, City or Liberty, such Justices respectively shall have, and have hereby, Power to relieve such Person, by ordering such and so many of the Soldiers to be removed, and quartered upon such other Person or Persons, as they shall see Cause; and such other Person or Persons shall be obliged to receive such Soldiers accordingly."[6]

By *par*. 23. it is enacted, "That no Justice or Justices of the Peace, having or executing any military Office or Commission in that Part of *Great Britain* called *England*, shall or may, during the Continuance of this Act, directly or indirectly be concerned in the quartering, billeting or appointing any Quarters for, any Soldier or Soldiers in the Regiment, Troop or Company, under the immediate Command or Commands of such Justice or Justices, according to the Disposition made for quartering of any Soldier or Soldiers by Virtue of this Act; but that all Warrants, Acts, Matters or Things, executed or appointed by such Justice or Justices of the Peace, for or concerning the same, shall be void, any Thing in this Act to the contrary notwithstanding."[7]

By *par*. 26. it is enacted, "That if any Officer shall take, or cause to be taken, or knowingly suffer to be taken, any Money of any Person for excusing the quartering of Officers or Soldiers, or any of them, in any House allowed by this Act, every such Officer shall be cashiered, and be incapable of serving in any military Employment whatsoever."[8]

By *par*. 28. After reciting, that some Doubts have arisen, whether commanding Officers of any Regiment, Troop or Company, may exchange any Men or Horses quartered in any Town or Place, with another Man or Horse quartered in the same Town or Place, for the Benefit of the Service, it is enacted, "that such exchange as above mentioned may be made by such

commanding Officers respectively, provided the Number of Men and Horses do not exceed the Number at that Time billeted on such House or Houses; and the Constables, Tythingmen, Headboroughs, and other chief Officers and Magistrates of the Cities, Towns and Villages, or other Places, where any Regiment, Troop or Company, shall be quartered, are hereby required to billet such Men and Horses hereby exchanged accordingly."[9]

By *par*. 66, it is enacted, "That if any High Constable, Constable, Bedel, or other Officer or Person whatsoever, who, by Virtue or Colour of this Act, shall quarter or billet, or be employed in quartering or billetting, any Officers or Soldiers, shall neglect or refuse, for the Space of two Hours, to quarter or billet such Officers or Soldiers, when thereunto required, in such Manner as is by this Act directed, provided sufficient Notice be given before the Arrival of such Troops; or shall receive, demand, contract, or agree for any Sum or Sums of Money, or any Reward whatsoever, for or on Account of excusing, or in order to excuse, any Person or Persons whatsoever from quartering or receiving into his, her or their, House or Houses, any such Officer or Soldier, and shall be thereof convicted, before any one or more Justice or Justices of Peace of the County, City or Liberty, within which such Offence shall be committed, either by his own Confession, or by the Oath of one or more credible Witness or Witnesses, which Oath the said Justice or Justices is and are hereby impowered to administer, every such High Constable, Constable, Bedel, or other Officer or Person so offending, shall forfeit, for every such Offence, the Sum of five Pounds, or any Sum of Money not exceeding five Pounds, nor less than forty Shillings, as the said Justice or Justices, before whom the Matter shall be heard, shall in his or their Discretion think fit, to be levied by Distress and Sale of the Goods of the Person offending, by Warrant under the Hand and Seal, or Hands and Seals, of such Justice or Justices, before whom such Offender shall be convicted, or one or more of them, to be directed to any other Constable within the County, City or Liberty, or to any of the Overseers of the Poor of the Parish, where the Offender shall dwell; the said Sum of five Pounds, or the said Sum not exceeding five Pounds, nor less than forty Shillings, when levied, to be paid to the Overseer of the Poor of the Parish wherein the Offence shall be committed, or to some one of them, for the Use of the Poor of the said Parish."[10]

By *par*. 67. it is enacted, "That it shall and may be lawful to and for any one or more Justice or Justices of the Peace, within their respective Counties, Cities or Liberties, by Warrant or Order under his or their Hand

and Seal, or Hands and Seals, at any Time or Times, during the Continuance of this Act, to require and Command any High Constable, Constable, Bedel, or other Officer, who shall quarter or billet any Soldiers in pursuance of this Act, to give an Account in Writing, unto the said Justice or Justices requiring the same, of the Number of Officers or Soldiers who shall be quartered or billeted by them, and also the Names of the Housekeepers or Persons upon whom every such Officer or Soldier shall be quartered or billeted, together with an Account of the Street or Place where every such Housekeeper dwells, and the Signs, if any, belonging to their Houses; to the End it may appear, to the said Justice or Justices, where such Officers and Soldiers are quartered and billeted, and that he or they may be thereby the better enabled to prevent, or punish, all Abuses in the quartering or billeting of them."[11]

By *par*. 24. it is enacted, "That the Officers and Soldiers, so quartered and billeted as aforesaid, shall be received and furnished with Diet and Small Beer by the Owners of the Inns, Livery Stables, Alehouses, Victualling-houses, and other Houses in which they are allowed to be quartered and billeted by this Act, paying and allowing for the same the several Rates, herein after mentioned to be payable, out of the Subsistence Money for Diet and Small Beer."[12]

But by *par*. 25. it is provided, "That in case any Innholder, or other Person, on whom any Non-commission Officers, or Soldiers, shall be quartered by Virtue of this Act, except on a March, or employed in recruiting, and likewise except the Recruits by them raised, for the Space of seven Days at most, for such Non-commission Officers and Soldiers who are recruiting, and Recruits by them raised, shall be desirous to furnish such Non-commission Officers or Soldiers with Candles, Vinegar and Salt, and with either Small Beer or Cyder, not exceeding five Pints for each Man *per Diem, gratis*, and allow to such Non-commission Officers or Soldiers the Use of Fire, and the necessary Utensils for dressing and eating their Meat, and shall give Notice of such his Desire to the commanding Officer, and shall furnish and allow the same accordingly; then and in such Case, the Non-commission Officers and Soldiers so quartered shall provide their own Victuals."[13]

By *par*. 66, it is enacted, "That if any Victualler, or any other Person, liable by this Act to have any Officer or Soldier quartered or billeted on him or her, shall refuse to receive or victual any such Officer or Soldier, so quartered or billeted upon him or her as aforesaid; or shall refuse to furnish

or allow, according to the Directions of this Act, the several Things herein before respectively directed to be furnished or allowed to Non-commission Officers or Soldiers, so quartered or billeted on him or her as aforesaid; or shall neglect or refuse to furnish good and sufficient Hay and Straw for each Horse, so quartered or billeted on him or her as aforesaid, at the Rate herein before mentioned, and shall be thereof convicted, before one or more Justice or Justices of the Peace of the County, City or Liberty, within which such Offence shall be committed, either by his own Confession, or by the Oath of one or more credible Witness or Witnesses, which Oath the said Justice or Justices is and are hereby impowered to administer, every Person so offending shall forfeit, for every such Offence, the Sum of five Pounds, or any Sum of Money not exceeding five Pounds, nor less than forty Shillings, as the said Justice or Justices, before whom the Matter shall be heard, shall in his or their Discretion think fit, to be levied by Distress and Sale of the Goods of the Person offending, by Warrant under the Hand and Seal, or under the Hands and Seals, of such Justice or Justices, before whom such Offender shall be convicted, or one or more of them, to be directed to any Constable within the County, City or Liberty, or to any of the Overseers of the Poor of the Parish, where the Offender shall dwell; the said Sum of five Pounds, or the said Sum not exceeding five Pounds, nor less than forty Shillings, when levied, to be paid to the Overseers of the Poor of the Parish, wherein the Offence shall be committed, or to some one of them, for the Use of the Poor of the said Parish."[14]

In an Action of Trespass against two Justices of the Peace, who had issued a Warrant for levying the Penalty upon the Plaintiff, for not receiving a Soldier billeted upon him; the Case appeared from the Evidence to be thus. A Shopkeeper, who also dealt in Spirituous Liquors, in order to intitle himself to a Licence for selling Spirituous Liquors by Retale, had a Licence as a Victualler. For the Sake of obtaining this last Licence some Beer was laid in by him, of which an Account was taken by the Excise Officer, as is done of the Stock of a Victualler; but he never sold any of this, nor acted in any Manner as a Victualler, nor suffered Spirituous Liquors to be drank in his House.[15]

In this Case there was a Nonsuit for want of producing the Warrant of the two Justices; but *Foster*, J. who tried the Cause, said he should upon the Merits have been of Opinion, that the Plaintiff was not liable to have Soldiers quartered upon him.

By *par*. 33. that the Quarters of Officers and Soldiers in *Great Britain*,

and in *Jersey*, *Guernsey*, *Alderney*, and *Sark*, and the Islands thereunto belonging, may hereafter be duly paid and satisfied, and his Majesty's Duties of Excise be better answered, it is enacted, "That every Officer, to whom it belongs to receive, or that does actually receive, the Pay or Subsistence Money, either for a whole Regiment, or particular Troops or Companies, or otherwise, shall immediately, upon each Receipt of every particular Sum, which shall from Time to Time be paid, returned, or come to his or their Hands, on Account of Pay or Subsistence, give publick Notice thereof to all Persons keeping Inns, or other Places, where Officers or Soldiers are quartered by Virtue of this Act; and shall appoint the said Innkeepers, and others, to repair to his or their Quarters at such Times as they shall appoint, for the Distribution and Payment of the said Pay or Subsistence Money to the Officers or Soldiers, which shall be within four Days at the furthest after the Receipt of the same as aforesaid: And the said Innkeepers and others shall then and there acquaint such Officer or Officers with the Accounts or Debts, if any shall be, between them and the Officers and Soldiers so quartered in their respective Houses; which Accounts the said Officer or Officers are hereby required to accept of, and immediately pay the same, before any Part of the said Pay or Subsistence Money be distributed either to the Officers or Soldiers: Provided the said Accounts exceed not, for one Commission Officer of Horse, being under the Degree of a Captain, for such Officer's Diet and Small Beer *per Diem* two Shillings; nor for one Commission Officer of Dragoons, being under the Degree of a Captain, for such Officer's Diet and Small Beer *per Diem* one Shilling; nor for one Commission Officer of Foot, being under the Degree of a Captain, for such Officer's Diet and Small Beer *per Diem* one Shilling; and if such Officer shall have a Horse or Horses, for each such Horse or Horses for their Hay and Straw *per Diem*, six Pence; nor for one Light Horseman's Diet and Small Beer *per Diem* six Pence, and Hay and Straw for his Horse *per Diem* six Pence; nor for one Dragoon's Diet and Small Beer *per Diem* six Pence, and Hay and Straw for his Horse *per Diem* six Pence; nor for one Foot Soldier's Diet and Small Beer *per Diem* four Pence: And if the Officer or Officers, as aforesaid, shall not give Notice, as aforesaid, and shall not immediately, upon producing such Account stated, satisfy, content and pay, the same, upon Complaint and Oath made thereof by any two Witnesses, at the next Quarter-Sessions for the County or City where such Quarters were, which Oath the Justices of the Peace at such Sessions are hereby authorized and required to administer, the Paymaster or Paymasters of his Majesty's Guards and Garrisons are hereby required and

authorized, upon Certificate of the said Justices, before whom such Oath was made, of the Sums due upon such Accounts, and the Persons to whom the same is owing, to pay and satisfy the said Sums out of the Arrears due to the said Officer or Officers, upon Penalty that such Paymaster or Paymasters shall forfeit their respective Place or Places of Paymaster or Paymasters, and be discharged from holding the same for the future; and in case there shall be no Arrears due to the said Officer or Officers, then the said Paymaster or Paymasters are hereby authorized and required to deduct the Sums he or they shall pay, pursuant to the Certificate of the said Justices, out of the next Pay or Subsistence Money of the Regiment to which such Officer or Officers shall belong; and such Officer or Officers shall, for every such Offence, or for neglecting to give Notice of the Receipt of such Pay or Subsistence Money as aforesaid, be deemed or taken, and are hereby declared *ipso facto* cashiered. And where it shall happen, that the Subsistence Money due to any Officer or Soldier shall, by Occasion of any Accident, not be paid to such Officer or Soldier, or such Officer or Soldier shall neglect to pay the same, so that Quarters cannot be or are not paid, as this Act directs; and where any Horse, Foot or Dragoons, shall be upon their March, so that no Subsistence can then be remitted to them, to make Payment as this Act directs, or they shall neglect to pay the same; in every such Case it is hereby further enacted, that every such Officer shall, before his or their Departure out of their Quarters, where such Regiment, Troop or Company, shall remain for any Time whatsoever, make up the Accounts, as this Act directs, with every Person with whom such Regiment, Troop or Company, have quartered, and sign a Certificate thereof, and give the said Certificate by him so signed to the Party to whom such Money is due, with the Name of such Regiment, Troop or Company, to which he or they shall belong; to the End the said Certificate may be forthwith transmitted to the Paymaster of his Majesty's Guards and Garrisons, who is hereby required immediately to make Payment thereof to the Person or Persons to whom such Monies shall be due, to the End the same may be applied to such Regiment, Troop or Company, respectively, under Pain as is in this Act before directed for Nonpayment of Quarters."[16]

By *par*. 30. it is enacted, "That it shall and may be lawful to quarter Officers and Soldiers in *Scotland*, in such and the like Places and Houses as they might have been quartered in, by the Laws in Force in *Scotland*, at the Time of the Union; and that the Possessors of such Houses shall only be liable to furnish the said Officers and Soldiers quartered there, as by the said Laws in Force at the Time of the Union was provided; and that no

Officer shall be obliged to pay for his Lodging, where he shall be regularly billeted, except in the Suburbs of *Edinburgh*."[17]

By the 8 *G*. 2. *c*. 30. *par*. 1. After reciting, that by the ancient common Law of this Land all Elections ought to be free; and that by an Act passed in the third Year of the Reign of King *Edward* the First, of famous Memory, it is commanded, upon great Forfeiture, that no Man by Force of Arms, nor by Malice or Menacing, shall disturb any to make free Election; and that the Freedom of Elections, of Members to serve in Parliament, is of the utmost Consequence to the Preservation of the Rights and Liberties of this Kingdom; and that it hath been the Usage and Practice to cause any Regiment, Troop or Company, or any Number of Soldiers, which hath been quartered in any City, Borough, Town or Place, where any Election of Members to serve in Parliament hath been appointed to be made, to remove and continue out of the same during the Time of such Election, except in such particular Cases as are herein after specified, to the End that the said Usage and Practice may be settled and established for the future, it is enacted, "That when and as often as any Election of any Peer or Peers to represent the Peers of *Scotland* in Parliament, or of any Member or Members to serve in Parliament, shall be appointed to be made, the Secretary at War for the Time being, or in case there shall be no Secretary at War, then such Person who shall officiate in the Place of the Secretary at War, shall and is hereby required, at some convenient Time before the Day appointed for such Election, to issue and send forth proper Orders, in Writing, for the Removal of every such Regiment, Troop or Company, or other Number of Soldiers, as shall be quartered or billeted in any such City, Borough, Town or Place, where such Election shall be appointed to be made, out of every such City, Borough, Town or Place, one Day at the least before the Day appointed for such Election, to the Distance of two or more Miles from such City, Borough, Town or Place, and not to make any nearer Approach to such City, Borough, Town or Place, as aforesaid, until one Day at the least after the Poll, to be taken at such Election, shall be ended and the Poll Books closed."[18]

By *par*. 2. it is enacted, "That in case the Secretary at War for the Time being, or such Person who shall officiate in the Place of the Secretary at War, shall neglect or omit to issue or send forth such Orders as aforesaid, according to the true Intent and Meaning of this Act, and shall be thereof lawfully convicted, upon any Indictment to be presented at the next Assizes, or Sessions of Oyer and Terminer, to be held for the County where

such Offence shall be committed, or on an Information to be exhibited in the Court of King's Bench, within six Months after such Offence committed, such Secretary at War, or Person who shall officiate in the Place of the Secretary of [*sic*] War, shall for such Offence be discharged from their said respective Offices, and shall from thenceforth be utterly disabled, and made incapable to hold any Office or Employment, civil or military, in his Majesty's Service."[19]

But by *par*. 5. it is provided, "That the Secretary at War, or such Person who shall officiate in the Place of the Secretary at War, shall not be liable to any Forfeiture or Incapacity for not sending such Order, as aforesaid, upon any Election to be made of a Member to serve in Parliament, on a Vacancy of any Seat there, unless Notice, of the making out any new Writ for such Election, shall be given to him by the Clerk of the Crown in Chancery, or other Officer making out any new Writ for such Election, which Notice he is hereby directed and required to give with all convenient Speed after the making out the said Writ."[20]

By *par*. 3. it is provided, "That nothing in this Act contained shall extend, or be construed to extend, to the City and Liberty of *Westminster*, or the Borough of *Southwark*, for or in Respect of the Guards of his Majesty, his Heirs or Successors, nor to any City, Borough, Town or Place, where his Majesty, his Heirs or Successors, or any of his Royal Family, shall happen to be or reside at the Time of any such Election as aforesaid, for or in Respect of such Number of Troops or Soldiers only, as shall be attendant as Guards to his Majesty, his Heirs or Successors, or to such other Person of the Royal Family as is aforesaid; nor to any Castle, Fort or fortified Place, where any Garrison is usually kept, for or in Respect of such Number of Troops or Soldiers only, whereof such Garrison is composed."[21]

By *par*. 4. it is provided, "That nothing in this Act shall extend, or be construed to extend, to any Officer or Soldier, who shall have a Right to Vote at any such Election as aforesaid, but that every such Officer and Soldier may freely, and without Interruption, attend and give his Vote at such Election, any Thing herein before contained to the contrary notwithstanding."[22]

Bacon Abridgment, vol. 4, pp. 576–583.

5.3.1.3Cunningham, 1765

Soldiers not to be quartered on the subject without consent, 31 *Car*. 2, *c*. 1, *s*. 54.

Cunningham Law Dictionary, vol. 2, unpaginated.

5.3.2CASE LAW

None.

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

2 For reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

1 Soldiers may be quartered in Inns, Alehouses, &c. but not in private Houses.

2 A Magistrate or Constable, quartering Soldiers in private Houses liable to an Action.

3 *Salk*. 387. *Parkhurst* and *Foster*, *Carth*. 417. Ld. *Raym*. 479. *Post*. 580.

4 Penalty on a Military Officer quartering Soldiers contrary to this Act.

5 Soldiers Wives, Children or Servants, not to be quartered without Consent.

6 Persons aggrieved by the quartering of Soldiers to be relieved.

7 No Justice being a military Officer to quarter the Soldiers under his own Command.

8 Penalty on an Officer taking Money to excuse the quartering of a Soldier.

9 In what Manner Officers may exchange Men or Horses in their Quarters.

10 Penalty on a Constable for not quartering Soldiers or for taking Money to excuse the quartering them.

11 A Justice may require an Account of the quartering of Soldiers.

12 Officers and Soldiers to be furnished with Diet and Small Beer in their Quarters.

13 What may be allowed Soldiers in the Room of furnishing Diet for them.

14 Penalty on a Person not receiving an Officer or Soldier quartered upon him.

15 *MS. Rep. Morton* and *Cloebury* and another, *Bucks, Lent Assizes* 1757.

16 Officer receiving the Subsistence Money to pay what is due where Soldiers are quartered at certain Rates, and in Default thereof the Paymaster of the Army is to do it.

17 Officers and Soldiers to be quartered in *Scotland*, as they were quartered before the Union.

18 Soldiers to be removed, if quartered in a Place where an Election for a Member of Parliament is to be made.

19 Penalty on a Secretary at War not removing Soldiers so quartered.

20 The Secretary at War is not to incur the Penalty, unless he has Notice of the issuing of the Writ.

21 This Act is not to extend to any Place, where any of the Royal Family resides, nor to any Garrison.

22 Nor to any Soldier, who has a Right to Vote at such Election.

CHAPTER 6

AMENDMENT IV

SEARCH AND SEIZURE CLAUSE

6.1TEXTS

6.1.1DRAFTS IN FIRST CONGRESS

6.1.1.1Proposal by Madison in House, June 8, 1789

6.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

…

The rights of the people to be secured in their persons, their houses, their papers. [*sic*] and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Congressional Register, June 8, 1789, vol. 1, p. 428.

6.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

Daily Advertiser, June 12, 1789, p. 2, col. 2.

6.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

6.1.1.2House Committee of Eleven Report, July 28, 1789

ART. I, SEC. 9—Between PAR. 2 and 3 insert, …

…

"The right of the people to be secure in their person, houses, papers and effects, shall not be violated by warrants issuing, without probable cause supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized."

Broadside Collection, DLC.

6.1.1.3House Consideration, August 17, 1789

6.1.1.3.a The committee went on to the consideration of the 7th clause of the 4th proposition, being as follows; "the right of the people to be secured in their person, houses, papers and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized."

Congressional Register, August 17, 1789, vol. 2, p. 226 (reported).

6.1.1.3.b 10th Amendment. "The rights of the people to be secure in their persons, houses, papers and effects, shall not be violated [by warrants issuing] without probable cause, supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized."

Daily Advertiser, August 18, 1789, p. 2, col. 4.

6.1.1.3.c Tenth amendment.—"The rights of the people to be secure in their persons, houses, papers and effects, shall not be violated by warrants

issuing without probable cause, supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

6.1.1.3.d 10th Amendment. "The rights of the people to be secure in their persons, houses, papers and effects, shall not be violated [by warrants issuing] without probable cause, supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized."

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

6.1.1.4Motion by Gerry or Benson in House, August 17, 1789

6.1.1.4.a Mr. Gerry

Said he presumed there was a mistake in the wording of this clause, it ought to be "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches," … .

Congressional Register, August 17, 1789, vol. 2, p. 226 (adopted); *id*., p. 226 (agreed to, following motions 6.1.5–6.1.6).

6.1.1.4.b Mr. Benson moved to insert after the words "and effects," these words "against unreasonable searches and seizures."

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("This was carried. The question was then put on the amendment and carried.").

6.1.1.4.c Mr. Benson moved to insert after the words "and effects," these words, "against unreasonable searches and seizures."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4. ("This was carried.").

6.1.1.4.d Mr. Benson moved to insert after the words "and effects," these words *against unreasonable seizures, and searches*.

Gazette of the U.S., August 22, 1789, p. 249, col. 3 ("This was carried.").

6.1.1.5Motion by Benson or Gerry in House, August 17, 1789

6.1.1.5.a Mr. Benson

Objected to the words "by warrants issuing," … he therefore proposed to alter it so as to read "and no warrant shall issue."

Congressional Register, August 17, 1789, vol. 2, p. 226 (motion "lost by a considerable majority").

6.1.1.5.b Mr. Gerry objected to the words, "by warrants issuing"—He said the provision was good, as far as it went; but he thought it was not sufficient: He moved that it be altered to *and no warrant shall issue*.

Gazette of the U.S., August 22, 1789, p. 249, col. 3 ("This was negatived.").

6.1.1.6Motion by Livermore in House, August 17, 1789

Mr. Livermore objected to the words "and not" between "affirmative and particularly." He moved to strike them out … .

Congressional Register, August 17, 1789, vol. 2, p. 226 ("the motion passed in the negative.").

6.1.1.7Further House Consideration, August 21, 1789

Ninth. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

HJ, p. 108 ("read and debated … agreed to by the House, … two-thirds of the members present concurring").[1]

6.1.1.8House Resolution, August 24, 1789

ARTICLE the SEVENTH.

The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated,

and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

House Pamphlet, RG 46, DNA.

6.1.1.9Senate Consideration, August 25, 1789

6.1.1.9.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth:

…

Article the seventh

> [“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.]
>
> Rough SJ, p. 216 [matter in brackets not legible].

6.1.1.9.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

“*Article the Seventh.*

> “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> Smooth SJ, pp. 194–95.

6.1.1.9.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

“*ARTICLE* THE *SEVENTH.*

> “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> Printed SJ, pp. 104–05.

6.1.1.10Further Senate Consideration, September 4, 1789

6.1.1.10.a On Motion to adopt the seventh article of amendments proposed by the House of Representatives.

Rough SJ, p. 249 (“It passed in the affirmative.”).

6.1.1.10.b On motion, To adopt the seventh article of Amendments proposed by the House of Representatives—

Smooth SJ, p. 222 (“It passed in the Affirmative.”).

6.1.1.10.c On motion, To adopt the seventh Article of Amendments proposed by the House of Representatives—

Printed SJ, p. 119 (“It passed in the Affirmative.”).

6.1.1.10.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in Articles Sixth and Seventh

Senate MS, p. 3, RG 46, DNA.

6.1.1.11 Further Senate Consideration, September 9, 1789

6.1.1.11.a On motion, To alter Article 6th so as to stand Article 5th, and Article 7th so as to stand Article 6th, and Article 8th so as to stand Article 7th

Rough SJ, p. 275 (“It passed in the Affirmative.”).

6.1.1.11.b On motion, To alter article the sixth so as to stand article the fifth, and article the seventh so as to stand article the sixth, and article the eighth so as to stand article the seventh—

Smooth SJ, p. 244 (“It passed in the affirmative.”).

6.1.1.11.c On motion, To alter Article the sixth so as to stand Article the fifth, and Article the seventh so as to stand Article the sixth, and Article the eighth so as to stand Article the seventh—

Printed SJ, p. 129 (“It passed in the Affirmative.”).

6.1.1.11.d To erase the word “Seventh” & insert Sixth.—

Ellsworth MS, p. 2, RG 46, DNA.

6.1.1.12 Senate Resolution, September 9, 1789

ARTICLE THE SIXTH.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Senate Pamphlet, RG 46, DNA.

6.1.1.13Further Consideration by House, September 21, 1789

Resolved, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

6.1.1.14Further Senate Consideration, September 21, 1789

6.1.1.14.a A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Smooth SJ, pp. 265–66.

6.1.1.14.b A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Printed SJ, pp. 141–42.

6.1.1.15 Further Senate Consideration, September 21, 1789

6.1.1.15.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

6.1.1.15.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

6.1.1.16 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~

in his favour, & to & ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

6.1.1.17 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

6.1.1.18 Senate Consideration of Conference Committee Report, September 24, 1789

6.1.1.18.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Smooth SJ, pp. 272–73.

6.1.1.18.b Mr. Ellsworth, on behalf of the managers of the conference on “Articles to be proposed to the several States as Amendments to the Constitution of the United States,” reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Printed SJ, p. 145.

6.1.1.19 Further Senate Consideration of Conference Committee Report, September 24, 1789

6.1.1.19.a A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Smooth SJ, pp. 278–79.

6.1.1.19.b A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Printed SJ, p.148.

6.1.1.20Further Senate Consideration of Conference Committee Report, September 25, 1789

6.1.1.20.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States”—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

6.1.1.20.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States”—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

6.1.1.21 Agreed Resolution, September 25, 1789

6.1.1.21.a Article the Sixth.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Smooth SJ, Appendix, p. 293.

6.1.1.21.b ARTICLE the SIXTH.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Printed SJ, Appendix, p. 164.

6.1.1.22 Enrolled Resolution, September 28, 1789

Article the sixth … The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Enrolled Resolutions, RG 11, DNA.

6.1.1.23 Printed Versions

6.1.1.23.a Art. IV. The right of the people to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes at Large, vol. 1, p. 21.

6.1.1.23.b Art. VI. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes at Large, vol. 1, pp. 97–98.

6.1.2PROPOSALS FROM THE STATE CONVENTIONS

6.1.2.1Maryland Minority, April 26, 1788

8. That all warrants without oath, or affirmation of a person conscientiously scrupulous of taking an oath, to search suspected places, or seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any person suspected, without naming or describing the place or person in special, are dangerous, and ought not to be granted.

Maryland Gazette, May 1, 1788 (committee majority).

6.1.2.2Massachusetts Minority, February 6, 1788

[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to

prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.

Massachusetts Convention, pp. 86–87.

6.1.2.3New York, July 26, 1788

That every Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.

State Ratifications, RG 11, DNA.

6.1.2.4North Carolina, August 1, 1788

14. That every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers, and property: all warrants therefore to search suspected places, or seize any freeman, his papers or property, without information upon oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive, and all general warrants to search suspected places, or to apprehend any suspected person without specially naming or describing the place or person, are dangerous and ought not to be granted.

State Ratifications, RG 11, DNA.

6.1.2.5Pennsylvania Minority, December 12, 1787

5. That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and shall not be granted either by the

magistrates of the federal government or others.

Pennsylvania Packet, December 18, 1787.

6.1.2.6Virginia, June 27, 1788

Fourteenth, That every freeman has a right to be secure from all unreasonable searches and siezures [*sic*] of his person, his papers and his property; all warrants, therefore, to search suspected places, or sieze [*sic*] any freeman, his papers or property, without information upon Oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general Warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not to be granted.

State Ratifications, RG 11, DNA.

6.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

6.1.3.1DELAWARE: DECLARATION OF RIGHTS, 1776

Sect. 17. That all warrants without oath to search suspected places, or to seize any person or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend all persons suspected, without naming or describing the place or any person in special, are illegal and ought not to be granted.

Delaware Laws, vol. 1, App., p. 81.

6.1.3.2Maryland: Declaration of Rights, 1776

23. That all warrants without oath, or affirmation, to search suspected places, or to seize any person, or property, are grievous and oppressive; and

all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.

Maryland Laws, November 3, 1776.

6.1.3.3Massachusetts: Constitution, 1780

[Part I, Article] XIV. Every subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: And no warrant ought to be issued, but in cases, and with the formalities, prescribed by the laws.

Massachusetts Perpetual Laws, p. 7.

6.1.3.4New Hampshire: Constitution, 1783

[Part I, Article] XIX. Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath, or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

New Hampshire Laws, p. 26.

6.1.3.5North Carolina: Declaration of Rights, 1776

Sect. XI. That General Warrants whereby an Officer or Messenger may be

commanded to search suspected Places, without Evidence of the Fact committed, or to seize any Person or Persons not named, whose Offence is not particularly described and supported by Evidence, are dangerous to Liberty, and ought not to be granted.

North Carolina Laws, p. 275.

6.1.3.6Pennsylvania

6.1.3.6.a Constitution, 1776

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

…

X. That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

Pennsylvania Acts, M'Kean, pp. x.

6.1.3.6.b Constitution, 1790

ARTICLE IX.

…

SECT. VIII. That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures: And that no warrant to search any place, or to seize any person or things, shall issue, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Pennsylvania Acts, Dallas, p. xxxiv.

6.1.3.7Vermont: Constitution, 1777

CHAPTER I.

…

11. That the People have a Right to hold themselves, their Houses, Papers and Possessions free from Search or Seizure; and therefore Warrants, without Oaths or Affirmations first made, affording a sufficient Foundation for them, and whereby any Officer or Messenger may be commanded or required to search Suspected Places, or to seize any Person or Persons, his, her or their Property, not particularly described, are contrary to that Right, and ought not to be granted.

Vermont Acts, p. 4.

6.1.3.8Virginia: Declaration of Rights, May 6, 1776

X. THAT general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Virginia Acts, p. 33.

6.1.4OTHER TEXTS

6.1.4.1RICHARD HENRY LEE TO EDMUND RANDOLPH, PROPOSED AMENDMENTS, OCTOBER 16, 1787

… That the citizens shall not be exposed to unreasonable searches, seizure of their persons, houses, papers or property; and it is necessary for the good of society, that the administration of government be conducted with all possible maturity of judgment, for which reason it hath been the practice of civilized nations and so determined by every state in the Union … .

Virginia Gazette, December 22, 1787.

6.2DISCUSSION OF DRAFTS AND PROPOSALS

6.2.1THE FIRST CONGRESS

6.2.1.1June 8, 1789[2]

6.2.1.2August 17, 1789

6.2.1.2.a The committee went on to the consideration of the 7th clause of the 4th proposition, being as follows; "the right of the people to be secured in their persons, houses, papers and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized."

Mr. Gerry

Said he presumed there was a mistake in the wording of this clause, it ought to be "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches," and therefore moved that amendment.

This was adopted by the committee.

Mr. Benson

Objected to the words "by warrants issuing," this declaratory provision was good as far as it went, but he thought it was not sufficient, he therefore proposed to alter it so as to read "and no warrant shall issue."

The question was put on this motion, and lost by a considerable majority.

Mr. Livermore objected to the words "and not" between "affirmative and particularly." He moved to strike them out, in order to make it an affirmative proposition.

But the motion passed in the negative.

The clause as amended being now agreed to, … .

Congressional Register, August 17, 1789, vol. 2, p. 226.

6.2.1.2.b Tenth Amendment—"The rights of the people to be secure in

their persons, houses, papers and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized."

Mr. Benson moved to insert after the words "and effects," these words "against unreasonable searches and seizures." This was carried.

The question was then put on the amendment and carried.

Daily Advertiser, August 18, 1789, p. 2, col. 4.

6.2.1.2.c Tenth amendment—"The rights of the people to be secure in their persons, houses, papers and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not describing the places to be searched, and the persons or things to be seized."

Mr. Benson moved to insert after the words "and effects," these words, "against unreasonable searches and seizures." This was carried.

The question was then put on the amendment and carried.

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

6.2.1.2.d 10th Amendment. "The rights of the people to be secure in their persons, houses, papers and effects, shall not be violated without probable cause, supported by oath or affirmation, and not particularly describing the places to be searched, and the persons or things to be seized."

Mr. Benson moved to insert after the words "and effects," these words *against unreasonable seizures, and searches*.

This was carried.

Mr. Gerry objected to the words, "by warrants issuing"—He said the provision was good, as far as it went; but he thought it was not sufficient: He moved that it be altered to *and no warrant shall issue*. This was negatived.

The question was then put on the amendment and carried.

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

6.2.2STATE CONVENTIONS

6.2.2.1Maryland, April 26, 1788

> This amendment was considered indispensable by many of the committee, for congress having the power of laying excises, the horror of a free people, by which our dwelling-houses, those castles considered so sacred by the English law will be laid open to the insolence and oppression of office, there could be no constitutional check provided, that would prove so effectual a safeguard to our citizens. General warrants too, the great engine by which power may destroy those individuals who resist usurpation, are also hereby forbid to those magistrates who are to administer the general government.[3]

Maryland Gazette, May 1, 1788.

6.2.2.2Massachusetts, January 30, 1788

Mr. HOLMES.

> …
>
> The framers of our state constitution took particular care to prevent the General Court from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrant being granted; why it should be esteemed so much more safe to intrust Congress with the power of enacting laws, which it was deemed so unsafe to intrust our state legislature with, I am unable to conceive.

Elliot, vol. 2, pp. 111–12.

6.2.2.3Virginia, June 24, 1788

Mr. HENRY … .

> …
>
> A bill of rights may be summed up in a few words. What do they tell us? —That our rights are reserved. Why not say so? Is it because it will consume too much paper? Gentlemen’s reasoning against a bill of rights does not satisfy me. Without saying which has the right side, it remains doubtful. A bill of rights is a favorite thing with the Virginians and the

people of the other states likewise. It may be their prejudice, but the government ought to suit their geniuses; otherwise, its operation will be unhappy. A bill of rights, even if its necessity be doubtful, will exclude the possibility of dispute; and, with great submission, I think the best way is to have no dispute. In the present Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, &c. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds … .

…

I feel myself distressed, because the necessity of securing our *personal rights* seems not to have pervaded the minds of men; for many other valuable things are omitted:—for instance general warrants, by which an officer may search suspected places, without evidence of the commission of a fact, or seize any person without evidence of his crime, ought to be prohibited. As these are admitted, any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power. We have infinitely more reason to dread general warrants here than they have in England, because there, if a person be confined, liberty may be quickly obtained by the writ of *habeas corpus*. But here a man living many hundred miles from the judges may get in prison before he can get that writ.

Elliot, vol. 3, pp. 448–49, 588.

6.2.3 Philadelphia Convention

None.

6.2.4NEWSPAPERS AND PAMPHLETS

6.2.4.1Centinel, No. 1, October 5, 1787

… Permit one of yourselves to put you in mind of certain *liberties* and *privileges* secured to you by the constitution of this commonwealth, and to beg your serious attention to his uninterested opinion upon the plan of federal government submitted to your consideration, before you surrender these great and valuable privileges up forever. Your present frame of government, secures you to a right to hold yourselves, houses, papers and possessions free from search and seizure, and therefore warrants granted without oaths or affirmations first made, affording sufficient foundation for them, whereby any officer or messenger may be commanded or required to search your house or seize your persons or property, not particularly described in such warrant, shall not be granted … . The constitution of Pennsylvania is *yet* in existence, *as yet* you have the right to *freedom of speech*, and of *publishing your sentiments*. How long those rights will appertain to you, you yourselves are called upon to say, whether your *houses* shall continue to be your *castles*; whether your *papers*, your *persons*, and your *property*, are to be held sacred and free from *general warrants*, you are now to determine.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, pp. 328–29.

6.2.4.2The Federal Farmer, No. 4, October 12, 1787

… There are other essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men’s papers, property, and persons.

Storing, vol. 2, p. 249.

6.2.4.3Centinel, No. 2, October 24, 1787

…

The new plan, it is true, does propose to secure the people of the benefit of personal liberty by the *habeas corpus;* and trial by jury for all crimes, except in case of impeachment: but there is no declaration, … that the people have a right to hold themselves, their houses, papers and possessions free from search or seizure; and that therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or his property, not particularly described, are contrary to that right and ought not to be granted; …

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 13, pp. 466–67.

6.2.4.4Brutus, No. 2, November 1, 1787

For the security of liberty it has been declared, "that excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted—That all warrants, without oath or affirmation, to search suspected places, or seize any person, his papers or property, are grievous and oppressive."

These provisions are as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, granting search warrants, and seizing persons, papers, or property, in certain cases, as the other.

New York Journal, Kaminski & Saladino, vol. 13, p. 527.

6.2.4.5An Old Whig, No. 5, November 1, 1787

It is needless to repeat the necessity of securing other personal rights in the forming a new government. The same argument which proves the necessity of securing one of them shews also the necessity of securing others. Without a bill of rights we are totally insecure in all of them; and no man can promise himself with any degree of certainty that his posterity will enjoy the inestimable blessings of liberty of conscience, of freedom of

speech and of writing and publishing their thoughts on public matters, of trial by jury, of holding themselves, their houses and papers free from seizure and search upon general suspicion or general warrants; or in short that they will be secured in the enjoyment of life, liberty and property without depending on the will and pleasure of their rulers.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 541.

6.2.4.6A Son of Liberty, November 8, 1787

… Having observed in your paper of the 25th ult. that a writer under the signature of *A Slave*, has pointed out a number of advantages or blessings, which, he says, will result from an adoption of the new government, proposed by the Convention:—I have taken the liberty to request, that you will give the following a place in your next paper, it being an enumeration of a *few* of the *curses* which will be entailed on the people of America, by this preposterous and newfangled system, if they are ever so infatuated as to receive it.

…

4th. Men of all ranks and conditions, subject to have their houses searched by officers, acting under the sanction of *general warrants*, their private papers seized, and themselves dragged to prison, under various pretences, whenever the fear of their lordly masters shall suggest, that they are plotting mischief against their arbitrary conduct.

5th. Excise laws established, by which our bed chambers will be subjected to be searched by brutal tools of power, under pretence, that they contain contraband or smuggled merchandize, and the most delicate part of our families, liable to every species of rude or indecent treatment, without the least prospect, or shadow of redress, from those by whom they are commissioned.

New York Journal, Kaminski & Saladino, vol. 13, p. 481–82.

6.2.4.7The Federal Farmer, No. 6, December 25, 1787

The following, I think, will be allowed to be unalienable or fundamental

rights in the United States:—

No man, demeaning himself peaceably, shall be molested on account of his religion or mode of worship—The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it—Individual security consists in having free recourse to the laws—The people are subject to no laws or taxes not assented to by their representatives constitutionally assembled—They are at all times intitled to the benefits of the writ of habeas corpus, the trial by jury in criminal and civil causes—They have a right, when charged, to a speedy trial in the vicinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge—No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects—The people have a right to assemble in an orderly manner, and petition the government for a redress of wrongs—The freedom of the press ought not to be restrained—No emoluments, except for actual service—No hereditary honors, or orders of nobility, ought to be allowed—The military ought to be subordinate to the civil authority, and no soldier be quartered on the citizens without their consent—The militia ought always to be armed and disciplined, and the usual defence of the country—The supreme power is in the people, and power delegated ought to return to them at stated periods, and frequently—The legislative, executive, and judicial powers, ought always to be kept distinct—others perhaps might be added.

Storing, vol. 2, p. 262.

6.2.4.8A Columbian Patriot, February 1788

14. There is no provision by a bill of rights to guard against the dangerous encroachments of power in too many instances to be named: but I cannot pass over in silence the insecurity with which we are left with regard to warrants unsupported by evidence—the daring experiment of granting *writs of assistance* in a former arbitrary administration is not yet forgotten in the Massachusetts; nor can we be so ungrateful to the memory of the patriots who counteracted their operation, as so soon after their manly exertions to save us from such a detestable instrument of arbitrary power, to subject ourselves to the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure. We are told by a gentleman of too much virtue and real probity to suspect he has a design to deceive—"that the whole constitution is a declaration of rights"—but mankind must think for themselves, and to many judicious and discerning characters, the whole constitution with very few exceptions appears a perversion of the rights of particular states, and of private citizens.

Kaminski & Saladino, vol. 16, p. 281.

6.2.4.9A Farmer and Planter, April 1, 1788

… The excise-officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretence of searching for exciseable goods, that the duty has not been paid on, break open your doors, chests, trunks, desks, boxes, and rummage your houses from bottom to top; nay, they often search the cloaths, petticoats and pockets of ladies or gentlemen, (particularly when they are coming from on board an East-India ship) and if they find any the least article that you cannot prove the duty to be paid on, seize it and carry it away with them; who are the very scurf and refuse of mankind, who value not their oaths, and will break them for a shilling. This is their true character in England, and I speak from experience, for I have had the opportunity of putting their virtue to the test; and saw two of them break their oath for one guinea, and a third for one shilling's worth of punch. What do you think of a law to let loose such a set of vile officers among you! Do you expect the Congress excise-officers will be any better, if God, in his anger, should think it proper to punish us for our ignorance, and sins of ingratitude to him, after carrying us through the late war, and giving us liberty, and now so tamely to give it up by adopting this aristocratical government?

Maryland Journal, Storing, vol. 5, pp. 75–76.

6.2.5LETTERS AND DIARIES

6.2.5.1Jeremy Belknap to Paine Wingate, May 29, 1789

… You will see in the speech wh. our *new* Lieut. Governor [*Samuel Adams*] made at his investiture that he has not thrown off the old idea of "*independence*" as an attribute of each individual State in the "confederated Republic"—& you will know in what light to regard his "devout & fervent wish" that the "people may enjoy well grounded confidence that their *personal & domestic* rights are *secure.*" This is the same Language or nearly the same which he used in the Convention when he moved for an addition to the proposed Amendments—by inserting a clause to provide for the Liberty of the press—the right to keep arms—Protection from seizure of person & property & the *Rights of Conscience*.

By which motion he gave an alarm to both sides of the house & had nearly overset the whole business which the Friends of the Constitution had been labouring for several Weeks to obtain … .

Veit, p. 241.

6.2.5.2Fisher Ames to Thomas Dwight, June 11, 1789

Mr. Madison has introduced his long expected Amendments. They are the fruit of much labour and research. He has hunted up all the grievances and complaints of newspapers—all the articles of Conventions—and the small talk of their debates. It contains a Bill of Rights—the right of enjoying property—of changing the govt. at pleasure—freedom of the press—of conscience—of juries—exemption from general Warrants gradual increase of representatives till the whole number at the rate of one to every 30,000 shall amount to—and allowing two to every State, at least this is the substance. There is too much of it—O. I had forgot the right of the people to bear Arms.

Risum teneatis amici—

Upon the whole, it may do good towards quieting men who attend to sounds only, and may get the mover some popularity—which he wishes.

Veit, p. 247.

6.3DISCUSSION OF RIGHTS

6.3.1TREATISES

6.3.1.1Bond, 1707

Of Arrest and Imprisonment.

ARrest and Imprisonment are much the same, and signifie no more than the restraining of a Subject of his Liberty against his Will. If a Constable, &c. have the Warrant from a Justice to bring any person before him, he ought first to require the Party to go before the Justice, and if he refuse, Arrest him; for such requiring is no Arrest of Imprisonment, *Dalt. cap.* 129.

If a Bailiff, &c. say to a Man, *I arrest you*, this is a good Arrest, and if the Party go away it is a Rescue, 8 *Car. B. R.* Sir *James Wink*'s Case; but after this he must arrest him if he may, for the Words of the Writ are *Capias, Attachias, &c*. which implies as much.

All sorts of persons may be arrested under the degree of a Peer of the Realm, and that by Warrant of the Justice of Peace, *Dalt. Cap*. 129.

A Feme Covert may be committed for a Force or Riot, by a Justices Warrant, otherwise of Infants in such Case, yet for not finding Sureties for the Peace being demanded may be committed, *Dalt. cap*. 129.

For breach of a Statute Law, an Infant shall not be imprisoned unless expressed in the *Stat. Plow*. 264. *a*.

This Liberty of every Subject is specially favoured by the Common Law, insomuch that if an Officer (whose Actions are favourably interpreted) shall unduly imprison any person by an usurped Jurisdiction, it is grievously punishable, *Magna Chart. cap*. 29. 5 *Ed*. 3. *cap*. 9. *and the Petition of Right*, 3 *Car*. 1.

None can be arrested but by Process upon an Indictment, Upon an Original Writ at Common Law, or by Matter of Record, and the Process must be out of a Court of Record.

Therefore Commissions to arrest Men were held to be agaist Law, *Dalt. cap*. 129.

No Man can be committed to Prison, unless it be by a Judge of Record.

For Misdemeanours against the Queen's Peace as Treason, &c. an Offender may be arrested by any Person by a Warrant in Law, so that there be just cause or lawful suspicion.

A Man who knoweth of a Robbery may arrest a person by him suspected, and carry him to the Constable, if he be to be found, or else imprison him in the Stocks; or if there be none, carry him to the next Constable, or else to the next Justice to be examined, &c. *Dalt. ibid.*

If a Robbery, &c. be known to be committed, any one may arrest a Person of ill Fame, and if he resist may justifie beating of him.

Where a Person suspected of an intended Felony may be therefore arrested, *Finch* 127.

Hue and Cry after *J. S.* or any other Person suspected of Felony is sufficient Case to arrest him though no Felony be committed, *Bro. False Impris*. 22. *Dalt. cap*. 129.

If a Felony is done, to be in Company of the Offenders is cause to arrest

a Person; so is the living idlely and as as Vagrant, *Bro. False Impris*. 22. *Dalt*. 129.

If Hue and Cry be levied after a stoln Horse, *&c*. and *J. S*. be taken driving him, he may be imprisoned for it though a Man of good Fame. If a Man be dangerously hurt in an Affray, any Man may arrest the Offender, *Dalt. ibid*.

Park-keepers and their Servants may lawfully arrest such as hunt in their Parks, or case them to depart, *Lib. Int. Tit. False Impris*. 12.

If a person keep or use a Gun contrary to the Statute, any man may arrest him and bring him to a Justice.

Watchmen may arrest Nightwalkers, and if they suspect them, justifie the detaining them till the morning, See the Statute of *Winchester*, 13 *E*. 1. *c*. 4.

Justice of Peace and Sheriffs, *&c*. ought not to commit or imprison any Person but in the County Gaol, 5 *H*. 4. 23 *H*. 8. *cap*. 2. A Constable regularly ought to imprison in the Stocks.

A Constable by a Warrant from a Justice arrests a person which escapes into another County, he may arrest him there upon fresh pursuit and bring him before the Justice, *Cromp*. 122, 123. *Dalt. c*. 129.

A person taken in Execution escapes into another County, yet the Sheriff, *&c*. upon fresh pursuit may take him there, and he shall be still in Execution, *Co. Rep. lib*. 3. 52. b.

The Constable carries a man arrested for Felony unto the Gaol, and the Gaoler refuseth him, he may be brought back to the Town where he was taken, and they shall be charged to keep him till the next Goal-delivery. Or the Constable may keep him in his own House, *Bro. False Impris*. 25.

When a Statute appoints Imprisonment, but limits no time how long, *&c*. or when to be committed, the Party must be sent to Gaol presently, and continue there so long as the Court shall award, 3 *Co*. 119. *Plowd*. 17. *Crompt*. 171.

No persons at Common Law could have Irons put upon them, but see now the Statute of *Westminster* 2. *cap*. 11. *quod Carceri mancipentur in ferris*. And 7 *Jac*. 4. all Rogues, *&c*. sent to the House of Correction, may be punish’d by putting Fetters or Gives upon them.

If an Offender arrested by the Constable refuse to bear the Charge of conveying him to the Goal, the Justice may by his Warrant cause the Constable to levy the same upon the Prisoners Goods, if he hath sufficient; if not, upon the Inhabitants of the Town where he was apprehended. 3 *Jac*.

10.

Bond Justice of the Peace, pp. 43–46.

6.3.1.2Jacob, 1750

6.3.1.2.aArrest

Arrest, (*Arrestum*) Cometh of the *French* Word *Arrester*, to stop, or stay. It is a Restraint of a Man's Person, obliging him to be obedient to the Law: And it is defined to be the Execution of the Command of some Court of Record, or Officer of Justice. An *Arrest* is the Beginning of Imprisonment, where a Man is first taken, and restrained of his Liberty, by Power or Colour of a lawful Warrant: Also it signifies the Decree of a Court, by which a Person is *arrested*. 2 *Shep. Abr*. 299. None shall be *arrested* for Debt, Trespass, &*c*. or other Cause of Action, but by Virtue of a Precept or Commandment out of some Court: But for Treason, Felony, or Breach of the Peace, any Man may *arrest* without Warrant or Precept. *Terms de Ley* 54. Persons present at the Committing of a Felony, must use their Endeavours to apprehend the Offender, under Penalty of Fine and Imprisonment. 3 *Inst*. 117. 4 *Inst*. 177. The King cannot command any one by Word of Mouth to be *arrested*; but he must do it by Writ, or Order of his Courts, according to Law: Nor may the King *arrest* any Man for Suspicion of Treason, or Felony, as his Subjects may; because if he doth wrong, the Party cannot have Action against him. 2 *Inst*. 186. After Presentment or Indictment found in Felony, &*c*. the first Process is a *Capias*, to *arrest* and imprison the Offender: And if the Offender cannot be taken, an Exigent is awarded in order to Outlawry. *H. P. C*. 209. When a Person is apprehended for Debt, &*c*. he is said to be *arrested:* And Writs express *Arrest* by two Several Words *Capias* and *Attachias*, to take and catch hold of a Man; for an Officer must actually lay hold of a Person, besides saying he *arrests* him, or it will be no lawful *Arrest*. 1 *Lill. Abr*. 96. If a Bailiff be kept off from making an *Arrest*, he shall have an Action of Assault: And where the Person *arrested* makes Resistance, or assaults the Bailiff, he may justify Beating of him. If a Bailiff touches a Man, which is an *Arrest*, and he makes his Escape, it is a Rescous, and Attachment may be had against him. 1 *Salk*. 79. If a Bailiff lays hold of one by the Hand (whom he had a Warrant to *arrest*) as he holds it out at the Window, this is such a Taking of him, that the Bailiff may justify the Breaking open of the House to carry

him away. 1 *Vent*. 306. When a Person has committed Treason or Felony, &*c*. Doors may be broke open to *arrest* the Offender; but not in Civil Cases, except it be in Pursuit of one *arrested*; or where a House is recovered by Real Action, to deliver Possession to the Person recovering. *Plowd*. 5 *Rep*. 91. Action of Trespass, &*c*. lies for breaking up a House to make *Arrest* in a Civil Action. *Mod. Cas*. 105. But if it appears, a Bailiff found an outer Door, &*c*. open, 'tis said he may open the inner Door to make an *Arrest. Comber*. 327. An *Arrest* in the Night, as well as the Day, is lawful. 9 *Rep*. 66. And every one is bound by the Common Law to assist not only the Sheriff in the Execution of Writs, and making *Arrests*, &*c*. but also his Bailiff that hath his Warrant to do it. 2 *Inst*. 193. A Bailiff upon an *Arrest* ought to shew at whose Suit, out of what Court the Writ issues, and for what Cause, &*c*. but this is when the Party *arrested*, submits himself to the *Arrest:* A Bailiff sworn and known, need not shew his Warrant, though the Party demands it; nor is any other special Bailiff bound to shew his Warrant, unless it be demanded. 9 *Rep*. 68, 69. An *Arrest* without shewing the Warrant, and without telling at whose Suit, until the other demanded it, was held legal; and that this need not to be done until the Party obeyed and demanded the same. *Cro. Jac*. 485. Sheriffs are not to grant Warrants for *Arrests*, before the Receipt of the Writs; if they do, they shall forfeit 10 *l*. and Damages, and pay a Fine to the King. *Stat*. 43 *Eliz. c*. 5. And every Warrant to issue upon any Writ to *arrest* any Person, shall have the same Day and Year set down thereon as on the Writ, under the like Penalty of 10 *l. Stat*. 6 *Geo*. 1. *c*. 21. If an Action is entered in one of the *Compters* of *London*, a City Serjeant may *arrest* the Party without the Sheriff's Warrant. 1 *Lill. Abr*. 94. And by the Custom of *London*, a Debtor may be *arrested* before the Money is due, to make him find Sureties; but not by the Common Law. 1 *Nels. Abr*. 258. By *Stat*. 29 *Car*. 2. *c*. 7. No Writ, Process, Warrant, &*c*. (except in Cases of Treason, Felony, or for Breach of the Peace) shall be served on a *Sunday*; on Pain that the Person serving them shall be liable to the Suit of the Party grieved, and answer Damages, as if the same had been done without Writ: An Action of False Imprisonment lies for *Arrest* on a *Sunday*, and the *Arrest* is void. 1 *Salk*. 78. A Defendant was *arrested* on a *Sunday* by a Writ out of the *Marshalsea*; and the Court of *B. R*. being moved to discharge him, it was denied; and he was directed to bring Action of False Imprisonment. 5 *Mod. Rep*. 95. The Defendant being taken upon a *Sunday*, without any Warrant, and locked up all that Day, on *Monday* Morning a Writ was got against him, by which he was *arrested*; it was ruled, that he might have an Action of False Imprisonment, and that an

Attachment should go against those who took him on the *Sunday*. *Mod. Cas*. 96. Attachments have been often granted against Bailiffs for making *Arrests* on *Sunday*: But Affidavit is usally [*sic*] made, that the Party might be taken upon another Day. 1 *Mod*. 56. A Person may be retaken on a *Sunday*, where *arrested* the Day before, &*c. Mod. Cas*. 231. And a Man may be taken on a *Sunday* on an Escape Warrant; when he goes at Large out of the Rules of the *King's Bench* or *Fleet* Prison, &*c. Stat*. 5 *Ann. c*. 9. Also Bail [*sic*] may take the Principal on a *Sunday*, and confine him till *Monday*, and then render him; tho' a Plaintiff may not *arrest* the Defendant on a *Sunday*. 1 *Nels*. 258. If a wrong Person is *arrested*; or one for Felony, where no Felony is done, &*c*. it will be False Imprisonment, liable to Damages. Attornies, &*c*. for Vexation, maliciously causing any Person to be *arrested*, where there is no Cause of Suit, &*c*. shall suffer six Months Imprisonment, and before discharged pay treble Damages, and forfeit 10 *l. Stat*. 8 *Eliz. c*. 2. A Bailiff having a Writ to *arrest A. B.* comes up to another Person, and asks him if his Name be *A. B.* and he answers that it is, whereupon the Bailiff *arrests* him, it will be a False *Arrest*, for which Action lies. *Lane* 49. And if a Warrant be to take *A*. the Son of *B*. and the Bailiff makes an *Arrest* on the Son of *D*. who indeed is the right Person intended, but not the Party within his Warrant, it will be false Imprisonment. *Ibid*. The Bailiff's Fee for an *Arrest*, by an ancient Statute, is but Four Pence, and the Sheriff's Twenty Pence: And Bailiff, cannot legally take any Thing but what is allowed by this Statute, and other subsequent Acts. For taking Fees not warranted by Law, they shall render treble Damages to the Party grieved, and incur a Forfeiture of 40*l. Stat*. 23 *Hen*. 6. *cap*. 10. No Bailiff, or other Officer, shall carry any Person under *Arrest*, to any Tavern, Alehouse, &*c*. without his Consent; so as to charge him with any Beer, Ale, Wine, &*c*. but what he shall freely call for: Nor shall demand or receive more from him for the *Arrest* or Waiting, than by Law ought to be, until an Appearance procured, Bail found, &*c*. Nor take or exact any more for keeping such Person out of Prison, than what he shall of his own voluntary Accord truly give; nor take more for Lodging than what is reasonable, or shall be adjudged so by the next Justice of Peace. *Stat*. 22 & 23 *Car*. 2. *cap*. 2. And by a late Act, Bailiffs, &*c*. are not to carry any Person *arrested* to a Tavern, Alehouse, &*c*. or the private House of such Officers, without the free and voluntary Consent of the Party; nor carry such Person to Prison within twenty-four Hours from the Time of the *Arrest:* or take any Reward for keeping him out of Gaol, &*c. Stat*. 2 *Geo*. 2. *cap*. 22. But if a Person *arrested* refuse to be carried to some convenient

House of his own Nomination, &*c*. to be kept in safe Custody during the twenty-four Hours before carried to Prison, then the Sheriff's Officer, &*c*. may immediately convey him to Gaol, to prevent an Escape. 3 *Geo*. 2. *c*. 27. Peers of the Realm, Members of Parliament, &*c*. may not be *arrested*, unless it be in Criminal Cases; but the Process against them is to be Summons, Distress infinite, &*c*. 12 *W*. 3. *c*. 3. Also Corporations and Companies must be made to appear by *Distringas*, and cannot be *arrested*. *Finch* 353. 3 *Salk*. 46. Persons attending upon any Courts of Record, on Business there, are to be free from *Arrests*. 3 *Inst*. 141. A Clerk of the Court ought not to be *arrested* for any Thing which is not Criminal, because he is supposed to be always present in Court to answer the Plaintiff. 1 *Lill*. 94. *Arrests* are not to be made within the Liberty of the King's Palace: Nor may the King's Servants be *arrested* in any Place, without Notice first given to the Lord Chamberlain, that he remove them, or make them pay their Debts. Ambassadors Servants, &*c*. freed from *Arrests*; vide *Ambassador*. No *Arrests* are to be generally in *Wales*, the Counties Palatine, &*c*. by Writs issuing from *Westminster Hall*. If a Debt be under 10*l*. on Process out of a superior Court, or 40 *s*. in itial in an inferior Court, the Defendant shall not be *arrested*, but be served personally with a Copy of the Process; and if he do not appear at the Return thereof, the Plaintiff may enter an Appearance for him, and proceed, &*c*. *Stat*. 12 *Geo*. 1. *c*. 29. The Fee for making and serving the Copy of Process, taken by Attornies, Bailiffs, &*c*. shall be 5 *s*. out of the Superior Courts, and 1 *s*. the inferior Courts: And no special Writ shall be sued out, unless the Cause of Action be 10 *l*. or above, on Pain of 10 *l*. and the Proceedings thereon to be void, by *Stat*. 5 *Geo*. 2. *c*. 27. This Statute and the *Stat*. 12 *Geo*. 1. *c*. 29. are made perpetual by the *Stat*. 21 *Geo*. 2. *c*. 3. A Bill was lately brought into Parliament, for the more easy Recovery of small Debts in a summary Way, the Determination to be by the Judges of Assise, &*c*. without any Writ of *Arrest*, or Trial by Juries, in like Manner as on the *English Bill* for recovering Debts under 10 *l*. in *Ireland*; but there were many Petitions against this Bill, from Corporations for preserving their ancient Trials, and from Officers of Courts, &*c*. whereupon it stopp'd in the House of Lords, and did not then pass. *Anno* 3 *Geo*. 2.

Jacob New-Law Dictionary, unpaginated.

6.3.1.2.bWarrant

Warrant, A Precept under Hand and Seal to some Officer to bring an Offender before the Person granting it: And *Warrants* of Commitment are

issued by the Privy Council, a Secretary of State, or a Justice of Peace, *&c*. where there hath been a private Information, or a Witness has deposed against an Offender. *Wood's Inst*. 614. Any one under the Degree of Nobility, may be arrested for a Misdemeanor, or any Thing done against the Peace of the Kingdom, by *Warrant* from a Justice of Peace; though if the Person be a Peer of the Realm, he must be apprehended for a Breach of the Peace by Process out of *B. R. & c. Dalt. Just*. 263. A Constable ought not to execute a Justice's *Warrant*, where the *Warrant* is unlawful, or the Justice hath no Jurisdiction; if he doth, he may be punished. *Plowd*. 394. But if any Person abuse by throwing in the Dirt, *&c*. or refuse to execute a lawful *Warrant*; it is a Contempt of the King's Process, for which the Offender may be indicted and fined. *Crompt*. 149. See *Constable*.

Jacob New-Law Dictionary, unpaginated.

6.3.1.3Hawkins, 1762

CHAP. XII

Of Arrests by private Persons.

HAVING thus endeavoured to shew the Nature of the Courts which have Jurisdiction over criminal Offences. I am now to shew in what Manner Offenders are to be proceeded against by such Courts; and in Order hereto I shall consider,

1. How they are to be apprehended.
2. In what Manner and in what Cases they are to be bailed.
3. In what Cases and in what Manner they are to be committed to Prison.
4. How far they and their Assistants are punishable for an Hindrance in bringing them to publick Justice.

As to the first of these Points I shall consider,

1. In what Manner such Offenders are to be apprehended by private Persons.
2. In what Manner by publick Officers.
3. In what Cases it is lawful to break open Doors in order to apprehend them.

As to Arrests of such Offenders by private Persons, I shall examine,

1. Where Arrests of this Kind are commanded and injoined by Law.
2. Where they are permitted by Law.

3. Where they are rewarded.

Sect. 1. As to the first Point it seems clear, That [a] all Persons whatsoever who are present when a Felony is committed, or a dangerous Wound given, are bound to apprehend the Offender; on Pain of being fined and imprisoned for their Neglect, [b] unless they were under Age at the Time.[1]

Sect. 2. And for this [c] Cause, by the Common Law if any Homicide be committed, or dangerous Wound given, whether with or without Malice, or even by [d] Misadventure of Self-Defence, in any Town or in the [e] Lanes or Fields thereof, in the Day-time, and the Offender escape, the Town shall be amerced, and if out of a Town, the [f] Hundred shall be amerced.[2]

Sect. 3. And since the Statute of *Winchester, cap.* 5. which ordains that [g] walled Towns shall be kept shut from Sunsetting to Sunrising, if the Fact happen in any such Town by Night or by Day, and the Offender escape, the Town shall be amerced.[3]

Sect. 4. And as all [a] private Persons are bound to apprehend all those, who shall be guilty of any of the Crimes abovementioned in their View; so also are they with the utmost Diligence to pursue, and endeavour to take all those who shall be guilty thereof out of their View, upon a Hue and Cry levied against them.[4]

Sect. 5. [b] Hue and Cry is the Pursuit of an Offender from Town to Town till he be taken, which all who are present when a Felony is committed, or a dangerous Wound given, are, by the Common Law as well as by Statute, bound to raise against the Offenders who escape; on Pain of Fine and Imprisonment: Also it [c] seems certain, That a Man may lawfully raise it against one who sets upon him in the Highway to rob him: Also it is enacted by the Statute of [d] *Winchester, cap.* 4. That Hue and Cry shall be levied upon any Stranger who shall not obey the Arrest of the Watch in the Night-Time; and [e] 21 *E.* 1. which was made against Trespassers in Forests, Chases, Parks and Warrens, seems to allow the Levying thereof upon any such Offenders. But if a Man take upon him to [f] levy a Hue and Cry without sufficient Cause, he shall be punished as a Disturber of the Peace.[5]

Sect. 6. In Order rightly to raise a Hue and Cry, you ought to go to the Constable of the next Town, and declare the Fact, and [g] describe the Offender, and the Way he is gone; whereupon the Constable ought immediately, whether it be Night or Day, to raise his own Town, and make a Search for the Offender: And upon the not finding him, to send the like Notice, with the utmost Expedition, by Horsemen as well as Footmen, to the Constables of all the neighbouring Towns who ought in like Manner to

search for the Offender, and also to give Notice to their neighbouring Constables and they to the next, till the Offender be found.[6]

Sect. 7. Also every [h] private Person is bound to assist an Officer demanding his Help for the Taking of a Felon, or the Suppressing an Affray, or apprehending the Affrayers, *&c.*[7]

Arrests of Offenders by private Persons permitted by Law, are either,

1. By their own Authority: Or,
2. By a Warrant from a Justice of Peace.

Arrest of this Kind by their own Authority, are either,

1. In Respect of Treason or Felony: Or,
2. In Respect of inferior Offences.

Arrests of this Kind in Respect of Treason or Felony, are either,

1. For the Suspicion of such Crimes already done, or supposed to have been done; Or,
2. To prevent their being done.

As to such Arrests for such Suspicion, I shall endeavour to shew,

1. What are sufficient Causes of Suspicion.
2. By whom the Person arrested must be suspected.
3. Whether any such Cause will justify an Arrest, where no Treason or Felony at all hath been committed, *&c.*
4. In what Manner an Arrest for such Suspicion is to be justified in Pleading.

Sect. 8. As to the first Particular, *viz.* What are sufficient Causes of Suspicion, I shall take Notice of some of the Principal of them, which are generally agreed to justify the Arrest of an innocent Person for Felony, as,

Sect. 9. I. The common [a] Fame of the Country, But it [b] seems, That it ought to appear upon Evidence, in an Action brought for such an Arrest, that such Fame had some probable Ground.[8]

Sect. 10. II. The [c] living a vagrant, idle and disorderly Life, without having any visible Means to support it.[9]

Sect. 11. III. The being in [d] Company with one known to be an Offender, at the Time of the Offence; or [e] generally at other Times keeping Company with Persons of scandalous Reputations.[10]

Sect. 12. IV. The being found in such Circumstances as induce a strong Presumption of Guilt; as [f] coming out of a House wherein Murder has been committed, with a bloody Knife in one's Hand; or being found in [g] Possession of any Part of Goods stolen, without being able to give a

probable Account of coming honestly by them.[11]

Sect. 13. V. The Behaving one's self in such Manner as betrays a Consciousness of Guilt; as [h] where a Man being charged with a Treason or Felony, says nothing to it, but seems tacitly by his Silence to own himself guilty; or where a Man accused of any such Crime, upon hearing that a Warrant is taken out against him, doth abscond.[12]

Sect. 14. VI. The being [i] pursued by an Hue and Cry.[13]

Sect. 15. As to the second Particular, *viz*. By whom the Person must be suspected, upon such an Arrest for Suspicion, it seems to be [k] agreed, That the Law hath so tender a Regard to the Liberty and Reputation of every Person, That no Causes of Suspicion whatsoever, let the Number and Probability of them be ever so great, will justify the Arrest of an innocent Man, by one who is not himself induced by them to suspect him to be guilty, whether he make such Arrest of his own Head, or in Obedience to the Commands of a private Person, or even of a [l] Constable.[14]

Sect. 16. As to the third Particular, *viz*. Whether any such Cause of Suspicion will justify an Arrest where no Treason or Felony at all hath been committed, or dangerous Wound given: It is holden in some [m] Books, That none of the above mentioned Causes will in any Case justify the Arresting a Man for the Suspicion of a Crime, where in Truth no such Crime hath been committed either by him or any other Person whatsoever. But howsoever this Rule may in general be true, it seems very hardly maintainable in the Case of an Arrest of an innocent Person upon a Hue and Cry levied against him, in such a Place where his Character is unknown, and with such other Circumstances, that the People of the County have no Reason to presume it groundless; for in such Cases, it would be a great Inconvenience to discourage Persons from following a Hue and Cry, with that Vigour and Diligence, which the Law expects, and the Publick Good requires, by making them liable to an Action if it should in the Event prove to have been levied without sufficient Cause, which they cannot take Time to examine without delaying their Pursuit: And since the Person injur'd by such an ill-grounded Hue and Cry, has a good Action against him that raised it, there seems to be no Necessity, that he should also have a Remedy against another. And this Opinion seems to be the more plausible, for that among the [n] Books [o] cited to maintain the contrary, [p] that which alone doth directly affirm it, seems to go upon an Argument manifestly inconclusive; for it says, That an Hue and Cry is not a sufficient Authority to arrest a Man unless a Felony be done, because the Words of the Statute of *Westminster*

1. *cap*. 9. are, That all Men shall be ready upon Hue and Cry to arrest Felons; but where no Felony is done, there can be no Felon, *&c*. to which it may be replied, That this Argument, if it prove any Thing, proves that none but Felons can be arrested on a Hue and Cry, which seems to be manifestly false; for it is agreed by all the Books, That is a Felony be actually committed, an innocent Person on whom a Hue and Cry for it is levied, may lawfully be arrested: Also there seems to be no Doubt, but that he who barely attempts to rob a Man, or who dangerously wounds him, may safely be pursued and taken by a Hue and Cry, and yet there is no Pretence to all such a Person a Felon.[15]

Sect. 17. And if it be granted lawful to arrest a Man on an Hue and Cry where no Felony hath been committed; from the like Grounds it seems also to follow, That it is lawful to arrest a Man on the Warrant of a Justice of Peace, where no Felony hath been committed; but this Point shall be more fully considered in the next Chapter.

Sect. 18. As to the fourth Particular, *viz*. In what Manner an Arrest for such Suspicion is to be justified in Pleading; it seems to be certain, That whoever would justify the Arrest of an innocent Person, by Reason of any such Suspicion, must not only shew that he suspected the Party [a] himself, but must also set forth the [b] Cause which induced him to have such a Suspicion, that it may appear to the Court to have been a sufficient Ground for his Proceeding: Also it seems [c] certain, That regularly he ought expresly to shew, that the very same Crime for which he made the Arrest, was actually committed. But [d] if a Man have several Causes of such Suspicion, he is not bound to insist upon some one of them only, but may alledge them all; for that the Replication *De son tort Demesne*, answers the whole. As [e] where a Man arrests another, who is actually guilty of the Crime for which he is arrested, it seems, That he needs not in justifying it, set forth any special Cause of his Suspicion, but may say in general, that the Party feloniously did such a Fact, for which he arrested him, *&c*. [16]

Sect. 19. As to the arresting of Offenders by private Persons of their own Authority, permitted by Law for the Prevention of Treason or Felony only intended to be done; it [f] seems, that any one may lawfully lay only on another, whom he shall see upon the point of committing a Treason or Felony, or doing any Act which would manifestly endanger the Life of another, and may detain him so long till it may reasonably be presumed, that he hath changed his Purpose; and upon this Ground it [g] seemeth to be the better Opinion, That not only a Constable, but any private Person, who

shall see another expose an Infant in the Street, and refuse to take it away, may lawfully apprehend and detain him, till he shall consent to take Care of it.[17]

Sect. 20. As to the Arrest of Offenders by private Person of their own Authority, permitted by Law, for inferior Offences; it [h] seems clear, That regularly no private Person can of this own Authority arrest another for a bare Breach of the Peace after it is over; for if an Officer cannot justify such an Arrest, without a Warrant from a Magistrate, surely *à fortiori* a private Person cannot: Yet it is holden by [i] some, that any private Person may lawfully arrest a suspicious Nightwalker, and detain him till he make it appear, that he is a Person of good Reputation. Also it hath been [k] adjudged, That any one may lawfully apprehend a common notorious Cheat, going about the Country with false Dice, and being actually caught playing with them, in order to have him before a Justice of Peace; for the publick Good requires the utmost Discouragement of all such Persons, and the Restraining of private Persons from arresting them without a Warrant from a Magistrate, would often give them an Opportunity of escaping: And from the Reason of this Case it seems to follow, That the Arrest of any other Offenders by private Persons, for Offences in like Manner scandalous and prejudicial to the Publick, may be justified.[18]

Sect. 21. As to Arrests of such Offenders by private Persons, having a Warrant form a Justice of Peace permitted by Law, there is no Doubt but that where the Law authorizes Justices of Peace to direct their Warrants to such Persons, it doth implicitly authorize the Execution of them by them.[19]

As to the third general Point of this Chapter, *viz*. In what Cases the Arrests of Offenders by private Persons are rewarded by Law, I shall give a short Account of the Statutes concerning this Matter, in Relation,

1. To Robbers in Highways.
2. To Counterfeiters and Clippers of the Coin.
3. To Shoplifters and other Offenders of like Nature.
4. To Burglars and felonious Breakers of Houses.

Sect. 22. And first, As to Robbers in Highways, it is enacted by 4 & 5 *W. & M*. 8. *That whoever shall apprehend and take one or more Thief or Robber in any Highway or Road in* England *or* Wales, *and prosecute him or them till be or they be convicted of any Robbery, committed in or upon any Highway, Passage, Field or open Place, shall receive from the Sheriff of the County where such Robbery and Conviction shall be, without paying any Fee for the same, for every such Offender so convicted* 40 l. *within one*

Month after such Conviction and Demand thereof made, by tendring [sic] a Certificate to the said Sheriff under the Hand or Hands of the Judge or Justices before whom such Felon or Felons shall be convicted; and in Case any Dispute shall arise, between the Persons so apprehending any the said Thieves and Robbers touching their Right to the said Reward, That then the said Judge or Justices so respectively certifying, shall by their said Certificate direct and appoint the said Reward to be paid in such Shares and Proportions as to them shall seem just and reasonable. And if any such Sheriff shall die or be removed before the Expiration of one Month after such Conviction and Demand made, That then the next Sheriff shall pay the same within one Month after Demand and Certificate brought as aforesaid: And the Sheriff making Default in paying the said Sum, shall forfeit double as much.

Sect. 23. And it is farther enacted, *That if any Person shall be killed by any such Robber in endeavoring to apprehend, or making Pursuit after him, the Executors or Administrators,* &c. *of such Person, shall receive* 40 l. *from the Sheriff,* &c. *upon Certificate delivered under the Hands and Seals of the Judge or Justices of Assize for the County where the Fact was done, or the two next Justices of the Peace, of such Person being so killed, which Certificate the said Judge or Justices, upon sufficient Proof before them made, are immediately required to give without Fee or Reward.*

Sect. 24. And it is farther enacted, *That every Person who shall so take, apprehend, prosecute, or convict such Robber as aforesaid, shall have as a farther Reward, the Horse, Furniture, and Arms, Money and other Goods of such Robber, that shall be taken with him; any their Majesties Right or Title, Bodies politick or Corporate, or the Right or Title thereunto of the Lord of any Manor or Franchise, or of him or them lending or letting the same to Hire to any such Robber notwithstanding: Provided that this shall not be extended to take away the Right of any Person to such Horses, Funiture and Arms, Money or other Goods, from whom the same were before feloniously taken.*

Sect. 25. Secondly, As to Counterfeiters and Clippers of the Coin, it is enacted by 6 & 7 *Gul.* 3. 17. *That whoever shall apprehend any Person who shall counterfeit any of the current Coin of this Realm, or for Lucre clip, wash, file, or otherwise diminish the same, or shall cause to be brought into the Kingdom any clipt, false, or counterfeit Coin, and prosecute such Person to Conviction, shall have from the Sheriff of the County where such Conviction shall be, forty Pounds upon the Judge's Certificate,* &c.

Sect. 26. Thirdly, As to Shoplifters, *&c*. it is enacted by 10 & 11 *W*. 3. 23. *That whosoever shall take and prosecute to Conviction, any Person who by Night or Day shall in any Shop, Warehouse, Coach-house or Stable, privately and feloniously steal any Goods, Wares, or Merchandizes, of the Value of* 5 s. *(though such Shop,* &c. *were not broken, and tho' no Person were in such Shop,* &c.*) or shall assist, hire, or command any Person to commit such Offence, shall have a Certificate thereof* Gratis *from the Judge or Justices, expressing the Parish or Place where such Felony was committed; and if any Dispute shall happen about the Right to such Certificate, the Judge or Justices shall direct and appoint the said Certificate into so many Shares, to be divided among the Persons therein concerned, as to the said Judge,* &c. *shall seem reasonable, which Certificate (before any Benefit has been made of it) may be once assigned over, and no more, and the original Proprietor or Assignee shall by Virtue thereof be discharged from all Parish and Ward Offices, within the Parish or Ward wherein the Felony was committed; and the said Certificate shall be enrolled by the Clerk of the Peace of the County, for the Fee of one Shilling: And in Case any Person happen to be slain by any such Felons by endeavouring to apprehend them, his Executors,* &c. *shall have the like Reward*, &c.

Sect. 27. Fourthly, As to Burglars and felonious Breakers of Houses, it is enacted by 5 *Annae* 31. *That every Person who shall take any one guilty of Burglary, or the felonious breaking and entring any House in the Day-time, and prosecute them to Conviction, shall receive above the Reward given by the abovementioned Statute of* 10 & 11 W. 3. *the Sum of* 40 l. *within one Month after such Conviction*; concerning which the same Rules in Effect are prescribed, as provided by the abovementioned Statue of 4 & 5 *W. & M*. 8. concerning the Reward of 40 *l*. to be paid to those who shall apprehend a Highwayman.

CHAP. XIII.

Of Arrests by publick Officers.

ARRESTS of Offenders by publick Officers, are either by Virtue of Process from some Court of Record, or without such Process. Arrests of this Kind by Virtue of such Process, shall be considered hereafter in their proper Place.

Arrests by publick Officers without such Process, are either

1. By Watchmen.

2. By Constables.
3. By Bailiffs of Towns, or
4. By Justices of Peace.

Sect. 1. But before I consider the Nature of each of these in particular, I shall take it for granted, That where-ever any such Arrest may be justified by a private Person, in every such Case *a fortiori* it may be justified by any such Officer. As to Arrests by Watchmen, I shall first premise in what Manner Watch is to be kept in every Town, and then shall shew the Power of the Watchmen.

Sect. 2. And first, As to the keeping Watch in every Town, it is enacted by the Statute of *Winchester*, Ch. 4. *That from thenceforth all Towns be kept as it had been used in Times passed, That is to wit, from the Day of* Ascension *unto the Day of St*. Michael, *in every City six Men shall keep at every Gate, in every Borough twelve Men, in every Town six or four, according to the Number of Inhabitants of the Town, and shall watch the Town continually all Night, from the Sunsetting to the Sunrising*.

Sect. 3. And it is farther enacted by 5 *H*. 4. 3. *That the Watch to be made upon the Sea-Coasts through the Realm, shall be made by the Number of the People in the Places, and in Manner and Form, as they were wont to be made in Times past, and that in the same Case the Statute of* Winchester *be observed and kept*; and that in the Commissions of the Peace this Article be put in, That the Justices of Peace have Power thereof to make Inquiry in their Sessions from Time to Time, and to punish them which be found in Default after the Tenor of the said Statute.

Sect. 4. It hath been resolved, That a Stranger who is not an Inhabitant of a Town, [a] cannot be compelled by Virtue of the said Statute of *Winchester* to keep Watch in it; but it seems to be agreed, That every Inhabitant is bound to keep it in his Turn, or to [b] find another sufficient Person to keep it for him; from whence it follows, That he is indictable for a Refusal: But it is [c] not agreed, That he may be committed by the Constable till he consent to do his Duty.[20]

Sect. 5. As to the Power of Watchmen, it is farther enacted by the said Statute of *Winchester*, Ch. 4. *That if any Stranger do pass by the Watch, he shall be arrested until Morning. And if no Suspicion be found, be shall go quit; and if they find Cause of Suspicion, they shall forthwith deliver him to the Sheriff, and the Sheriff may receive him without Damage, and shall keep him safely until he be acquitted in due Manner. And if they will not obey the Arrest, they shall levy Hue and Cry upon them, and such as keep the Town*

shall follow with Hue and Cry with all the Town and the Towns near, and so Hue and Cry shall be made from Town to Town, until that they be taken, and delivered to the Sheriff as before is said: And for the Arrestments of such Strangers none shall be punished.[21]

Sect. 6. It is holden, That this Statute was made in Affirmance of the Common Law, and that every private Person may by the Common Law arrest any suspicious Nightwalker, and detain him till he give a good Account of himself, as hath been more fully shewn in the precedent Chapter, Section 20.[22]

Secondly, As to such Arrests by Constables, I shall endeavour to shew,

1. How far they may be justified by their own Authority.
2. How far by Virtue of a Warrant from a Justice of Peace.

Sect. 7. And first, As to the justifying of such Arrests by the Constable's own Authority; it seems difficult to find any Case, wherein a Constable is impowered to arrest a Man for a Felony committed or attempted, in which a private Person might not as well be justified in doing it: But the chief Difference between the Power and Duty of a Constable and a private Person, in Respect of such Arrests, seems to be this, That the [a] former has the greater Authority to demand the Assistance of others, and is liable to the severer Fine for any Neglect of this Kind, and has no sure Way to discharge himself of the Arrest of any Person apprehended by him for Felony, [b] without bringing him before a Justice of Peace in order to be examined, as shall be more fully shewn in the 16th Chapter; whereas a private Person having made such an Arrest, needs only to deliver his Prisoner into the Hands of the Constable.[23]

Sect. 8. But it is said, That a Constable hath Authority not only to arrest those whom he shall see actually engaged in an Affray, but also to detain them till they find Sureties of the Peace, as hath been more fully shewn in the [c] first Book; whereas a private Person seems to have no other Power in a bare Affray, not attended with the Danger of Life, but only to stay the [d] Affrayers till the Heat be over, and then deliver them to the Constable, and also to stop those whom he shall see coming to join either Party: But it is difficult to find any Instance wherein a Constable hath any greater Power than a private Person over a Breach of the Peace out of his View; and it seems clear, That he cannot justify an Arrest for any such Offence, without a Warrant from a Justice of Peace, *&c.*[24]

Sect. 9. As to the justifying such Arrests by Constables, by Virtue of a Warrant from a Justice of Peace, it seems [e] clear, That such an Arrest

unlawfully made by a Constable without a Warrant, cannot be made good by a Warrant taken out afterwards; also it hath been [f] holden, That if a Constable, after he hath arrested the Party by Force of any such Warrant, suffer him to go at large, upon his Promise to come again at such a Time and find Sureties, he cannot afterwards arrest him by Force of the same Warrant: However, if the Party return and put himself again under the Custody of the Constable, it seems, that it may be probably argued, That the Constable may lawfully detain him, and bring him before the Justice in Pursuance of the Warrant; for if a Person taken by Virtue of a civil Process, and voluntarily suffered by the Sheriff to escape, may afterwards upon his Return to the Prison be kept by the Sheriff by Virtue of the same Process, unless the Plaintiff rather chuse to take Advantage of the Escape against the Sheriff; surely *a fortiori* upon an Arrest for a Crime, in which Case it is to be presumed, That the Publick Good requires that the Party be brought to Justice, it shall likewise be lawful to detain a Person returning to the Officer after such an Escape: However as the Law seems [g] not to be settled in Relation to such an Escape after an Arrest by Virtue of a civil Process; so neither doth it seem to be clear in Relation to an Escape after an Arrest by Force of such a Warrant from a Justice of Peace.[25]

Sect. 10. But it seems clear, That a Constable cannot justify any Arrest by [h] Force of a Warrant from a Justice of Peace, which expresly appears in the Face of it, to be for an Offence whereof a Justice of Peace hath no Jurisdiction, or to bring the [i] Party before him at a Place out of the County for which he is a Justice. But it seems, That he both may and ought to execute a general Warrant to bring a Person before a Justice of Peace, to answer such Matters as shall be objected against him on the Part of the King; for that the Officer ought to presume, That the Justice hath a Jurisdiction of the Matter, which he takes [k] Conusance of, unless the contrary appear; and it may often endanger the Escape of the Party to make known the Crime he is accused of. But it seems to be very questionable, Whether a Constable can justify the Execution of a general Warrant to search for Felons or stolen Goods, because such Warrant seems to be illegal in the very Face of it; for that it would be extremely hard to leave it to the Discretion of a common Officer to arrest what Persons, and search what Houses he thinks fit: And if a Justice cannot legally grant a blank Warrant for the Arrest of a single Person, leaving it to the Party to fill it up, surely he cannot grant such a general Warrant, which might have the Effect of an Hundred blank Warrants.[26]

Sect. 11. Yet perhaps it is the better Opinion at this Day, That any Constable, or even private Person, to whom a Warrant shall be directed from a Justice of Peace to arrest a particular Person for Felony, or any other Misdemeanor within his Jurisdiction, may lawfully execute it, whether the Person mentioned in it be in Truth guilty or innocent, and whether he were before indicted of the same Offence or not, and whether any Felony were in Truth committed or not, for however the Justice himself may be punishable for granting such a Warrant without sufficient Grounds, it is reasonable that he alone be answerable for it, and not the Officer, who is not to examine or dispute the Reasonableness of his Proceeding; and therefore it seems that the old Books, (cited in the foregoing Chapter, Sect. 15, 16.) which say generally, That no one can justify an Arrest upon a Suspicion of Felony, unless he himself suspect the Party, and unless the Felony were in Truth committed, ought to be intended only of Arrests made by a Person of his own Head, or in Obedience to the Command of a Constable, or other such like ministerial Officer, and not of such as are made in Pursuance of the Warrant of a Justice of Peace; for inasmuch as it seems to have been the constant and allowed Practice of late, to make out Warrants on the Suspicion of Felony, before any Indictment hath been found against the Person suspected, and the same seems to be countenanced by 1 & 2 *Ph. & Mar*. 13. and 2 & 3 *Ph. & Mar*. 10. which direct in what Manner Persons brought before Justices of Peace upon Suspicion, shall be examined in order to their being committed or bailed; and since the ancient [a] Opinion, That a Justice of Peace cannot make out a Warrant against a Man for Felony, who has not been indicted before, hath been [b] contradicted by constant Experience; and since in the very same [c] Report in which this Rule is laid down. That a Justice of Peace cannot make a Warrant against a Person who has not been indicted; it seems nevertheless to be agreed, That such a Warrant is a good Justification for the Officer; and since none of the [d] Books cited by Sir *Edward Coke* to maintain the contrary Opinion, mention the Case of an Arrest by Force of a Warrant from a Justice of Peace, but generally relate only to Arrests by private Persons of their own Authority, or by the Command of a Constable; and since too, the [e] Case, which is fullest to the Purpose, wherein it is resolved, That an Arrest of a Person by the Command of a Bishop for saying, That he was not bound to pay Tithes, could not be justified by Force of the [f] Statute, which authorized Bishops to arrest Persons for Heresy, for which this Reason is given among others, That the Bishop himself could not justify such an Arrest, and consequently could not authorize another to make it; it may be answered, That the

Resolution in that Case doth not wholly depend upon this Reason, but rather perhaps upon these, that the Bishop's Command was by Parol only, and not by Writing, and that the Statute gave him no Jurisdiction over Points not Heretical; and that the Power of Imprisoning Persons for mere Matters of Opinion ought to be strictly construed: And farther, since the Person injured by an Arrest on a Justice's Warrant, hath a good Action against the Justice who granted it, if he did it maliciously of his own Head, in order to oppress or defame the Party without any probable Ground of Suspicion, and therefore there is no Necessity of giving a farther Remedy against the Officer who obeys the Warrant: And farther, since it is in general a great Discouragement to Officers, to subject them to Actions for endeavoring to serve the Publick, by paying Obedience to the Precepts of those whose Officers they are; it would certainly be very difficult at this Day to maintain an Action against them for any Arrest of this Kind, unless the Warrant appear to be for a Matter whereof the Justice has no Jurisdiction. It seems indeed to be holden in *Broucher*'s Case in *Croke*'s second Report, That where an Officer arrests a Man by Force of a Warrant from a Magistrate, *pro certis Causis*, without shewing any Cause in particular, he cannot justify himself in an Action brought against him for such Arrest, without setting forth the particular Cause in his Plea; and yet in this very Report it seems to be allowed, That such a general Warrant is good; and if so, it seems strange, That the Officer should not be justified by setting forth the Truth of his Case; since if there were no good Cause to justify the Granting of the Warrant, the Magistrate ought to answer for it, not the Officer.[27]

Sect. 12. Thirdly, As to such Arrests by Bailiffs of Towns, it is enacted by the abovementioned Statute of *Winchester*, Ch. 4. *That in great Towns being walled, The Gates shall be closed from the Sunsetting until the Sunrising, and that no Man do lodge in the Suburbs, nor in any Place out of the Town, from nine of the Clock until Day, without his Host will answer for him: And the Bailiffs of Towns every Week, or at the least every fifteenth Day, shall make Inquiry of all Persons being lodged in the Suburbs, or in foreign Place of the Towns; and if they do find any that have lodged or received any Strangers or suspicious Persons against the Peace, the Bailiffs shall do Right therein.* And surely it cannot be doubted, but that by Force hereof such Bailiffs may lawfully arrest and detain any such Stranger, being found under probable Circumstances of Suspicion, till he shall give a good Account of himself.

Sect. 13. Fourthly, As to such Arrests by Justices of Peace, I shall first take it for granted, That where-ever an Arrest of this Kind by a private Person, or inferior Officer acting of their own Authority, is either permitted or injoined by the Law, in every such Case, *a fortiori*, such an Arrest by a Justice of Peace in Person, is also permitted or injoined.[28]

Arrests by the Command of Justices of Peace, as such, are either,

1. By Parol.
2. By Warrant.

Sect. 14. And first, As to such Arrest by Parol, it seems, That any such Justice may lawfully, by Word of Mouth, authorize any one to arrest another, who shall be guilty of any actual Breach of the Peace in his Presence, of shall be engaged in a Riot in his Absence, as hath been more fully shewn in the first Book, Ch. 65. Sect. 16.[29]

As to such Arrests by the Warrant of a Justice of Peace, I shall endeavour to shew,

1. In what cases a Warrant for such an Arrest may lawfully be made by such a Justice.
2. In want Form it ought to be made.
3. How it is to be executed.

As to the first Point, I shall consider,

1. For what Offences such a Warrant may be granted.
2. Upon what Evidence.

Sect. 15. And first, as to the Offences for which such a Warrant may be granted, there seems to be no Doubt, but that it may be lawfully granted by Justice of Peace for Treason, Felony or *Praemunire*, or any other Offence against the Peace, as hath been more fully shewn in the Chapter concerning *Justices of Peace:* Also it seems clear, That where-ever a Statute gives to any one Justice of Peace a Jurisdiction over any Offence, or a Power to require any Person to do a certain Thing ordained by such Statute, it impliedly gives a power to every such Justice to make out a Warrant to bring before him any Person accused of such Offence, or compellable to do the Thing ordained by such Statute; for it cannot but be intended, that a Statute giving a Persons Jurisdiction over an Offence, doth mean also to give him the Power incident to all Courts, of compelling the Party to come before him. And it would be to little Purpose to authorize a Man to require another to do a Thing, if it were to be understood that the Person authorized had no Power to compel the Party to come before him.[30]

Sect. 16. But it seems, That anciently no one Justice of Peace could

legally make out a Warrant for an Offence against a penal Statute, or other Misdemeanor, cognizable only by a Sessions of two or more Justices; for that one single Justice of Peace hath no Jurisdiction of such Offence, and regularly those only who have Jurisdiction over a Cause can award Process concerning it. Yet the long, constant, universal and uncontrolled Practice of Justices of Peace seems to have altered the Law in this Particular, and to have given them an Authority in Relation to such Arrests, not now to be disputed.[31]

Sect. 17. But I do not find any good Authority, That a Justice can justify sending a general Warrant to search all suspected Houses in general for stolen Goods, as hath been more fully shewn, *Sect*. 10.[32]

Sect. 18. Secondly, As to the Evidence on which such a Warrant is to be granted, it seems probable, That the Practice of Justices of Peace in Relation to this Matter also, is now become a Law, and that any Justice of Peace may justify the Granting of a Warrant for the Arrest of any Person upon strong Grounds of Suspicion for a Felony or other Misdemeanor, before any Indictment hath been found against him. Yet inasmuch as Justices of Peace claim this Power rather by Connivance, than any express Warrant of Law, and since the undue Execution of it may prove so highly prejudicial to the Reputation as well as the Liberty of the Party, a Justice of Peace cannot well be too tender in his Proceedings of this Kind, and seems to be punishable not only at the Suit of the King, but also of the Party grieved; if he grant any such Warrant groundlesly and maliciously, without such a probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty.[33]

Sect. 19. And since both *Coke* and *Hale* seem to disapprove of such Warrants granted upon Suspicion, and the old Books seem generally to disallow all Arrests for the Suspicion of Felony made by any other Person whatsoever, except the very Person who hath the Suspicion; it is certainly a safe Way of Proceeding of him, who hath the Suspicion, to make the Arrest in his proper Person, and to get a Warrant from a Justice of Peace to the Constable to keep the Peace.[34]

Sect. 20. And perhaps there may be this Difference between the Warrant of a Justice of Peace, for such Causes which he has not Authority to hear and determine as Judge without the Concurrence of others, and such Warrant for an Offence which he may so determine, without the Concurrence of any other: That in the former Case, inasmuch as he rather proceeds ministerially than judicially, if he act corruptly, he is liable to an

Action at the Suit of the Party, as well as to an Information at the Suit of the King: But in the latter Case he is punishable only at the Suit of the King, for that regularly no Man is liable to an Action for what he doth as Judge.[35]

As to the second Point, *viz*. In what Form such a Warrant is to be made, I shall lay down the following Rules:

Sect. 21. I. That [a] it ought to be under the Hand and Seal of the Justice who makes it out.[36]

Sect. 22. II. That it [b] ought to set forth the Year and Day wherein it is made, That in an Action brought upon an Arrest made by Virtue of it, it may appear to have been prior to such Arrest.[37]

Sect. 23. III. That it is [c] safe, but perhaps not necessary, in the Body of the Warrant to shew the Place where it was made; yet it seems necessary to set forth the County in the Margin at least, if it be not set forth in the Body.[38]

Sect. 24. IV. That it may be made either in the Name of the King, or of the Justice himself, as appears from the Precedents above referred to.

Sect. 25. V. [d] That if it be for the Peace of Good Behaviour, it is adviseable to set forth the special Cause upon which it is granted; but if it be for Treason or Felony, or other Offence of an enormous Nature, it is said, That it is not necessary to set it forth; and it seems to be rather discretionary, than necessary to set it forth in any Case.[39]

Sect. 26. VI. [e] That such a Warrant may be either general, to bring the Party before any Justice of Peace of the County, or special, to bring him before the Justice only who granted it.[40]

Sect. 27. VII. [f] That it may be directed to the Sheriff, Bailiff, Constable, or to any indifferent Person by Name, who is no Officer; for that the Justice may authorize any one to be his Officer, whom he pleases to make such, yet it is most adviseable to direct it to the Constable of the Precinct wherein it is to be executed; [g] for that no other Constable, and *a fortiori* no private Person, is compellable to serve it.[41]

As to the third Point, *viz*. In what Manner such Warrant is to be executed, I shall lay down the following Rules:

Sect. 28. I. That a Bailiff, or a Constable, if they be sworn and commonly known to be Officers, and act within their own Precincts, need not shew their Warrant to the Party, notwithstanding he demand the Sight of it; but that these and all other Persons whatsoever making an Arrest, ought to acquaint the Party with the Substance of their Warrants, even Officers, if

they be not sworn and commonly known, and even these, if they act out of their own Precincts must shew their Warrants, if demanded.[42]

Sect. 29. II. That the Sheriff having such Warrant directed to him, may authorize others to execute it; but that every other Person to whom it is directed, must personally execute it; yet it seems, That any one may lawfully assist him.[43]

Sect. 30. III. That if a Warrant be generally directed to all Constables, no one can execute it out of his own Precinct; but if it be directed to a particular Constable by Name, he may execute it where within the Jurisdiction of the Justice.[44]

CHAP. XIV.

Where Doors may be broken open in Order to make an Arrest.

Sect. 1. AND now I am to consider in what Cases it is lawful to break open Doors, in Order to apprehend Offenders; and to this Purpose I shall premise, That the Law doth never allow of such [a] Extremities but in Case of Necessity; and therefore, That no one can justify the Breaking open another's Doors to make an Arrest, unless he first signify to those in the House the Cause of his Coming and request them to give him Admittance.[45]

Sect. 2. But where a Person authorized to arrest another who is sheltered in a House, is denied quietly to enter into it, in Order to take him; it seems generally to be agreed, That he may justify Breaking open the Doors in the following Instances.

Sect. 3. I. Upon a [b] *Capias* grounded on an Indictment for any Crime whatsoever, or upon a [c] *Capias* from the [d] King's Bench or Chancery, to compel a Man to find Sureties for the Peace or Good Behaviour, or even upon a Warrant from a Justice of Peace for such Purpose.[46]

Sect. 4. II. Upon a [e] *Capias utlagatum*, or *Capias pro fine*, in any Action whatsoever.[47]

Sect. 5. III. Upon the [f] Warrant of a Justice of Peace, for the Levying of a Forfeiture in Execution of a Judgment or Conviction for it grounded on any Statute which gives the Whole, or put Part of such Forfeiture to the King, and authorizes the Justice of Peace to give such Judgment or Conviction for it.[48]

Sect. 6. IV. Where a [g] forcible Entry or Detainer is either found by Inquisition before Justices of Peace, or appears upon their View.[49]

Sect. 7. V. [h] Where one known to have committed a Treason or Felony,

or to [i] have given another a dangerous Wound, is pursued either with or without a Warrant, by a Constable or private Person: But where one lies under a probable Suspicion only, and is not indicted, it seems the better [a] Opinion at this Day, That no one can justify the Breaking open Doors in Order to apprehend him.[50]

Sect. 8. VI. Where an [b] Affray is made in a House in the View or Hearing of a Constable; or where those who have made an Affray in his Presence fly to a House, and are immediately pursued by him, and he is not suffered to enter; in Order to suppress the Affray in the first Case, or to apprehend the Affrayers in either Case.[51]

Sect. 9. VII. Wherever a [c] Person is lawfully arrested for any Cause and afterwards escapes, and shelters him in a House.[52]

Sect. 10. Also it is enacted by 3 & 4 *Jac*. 1. Par. 35. *That upon any lawful Writ, Warrant or Process awarded to any Sheriff or other Officer, for the Taking of any Popish Recusant, standing excommunicated for such Recusancy, it shall be lawful, if need be, to break open any House*.

Sect. 11. But it hath been resolved, That where Justices of Peace are, by Virtue of a Statute, authorized to require Persons to come before them, to take certain Oaths prescribed by such Statute, the Officer cannot lawfully break open the Doors of the Persons who shall be named in any Warrant made in Pursuance of such Statute, in order to be brought before the Justices to take such Oath, because such Warrant is not grounded on a precedent Offence; neither doth it appear, That the Party either is or will be guilty of any: But it seems clear, That if an Officer enter into any House to serve any such Warrant, and the Doors of the House be locked upon him, being in such House, he or his Friends may justify Breaking them open, in Order to regain his Liberty; for that even in the Execution of civil Process, the Law allows of the Breaking open Doors in the like Circumstances.[53]

Hawkins Pleas of the Crown, book II, pp. 74–87.

6.3.1.4Burn, 1766

6.3.1.4.a Search Warrant

SEARCH WARRANT.

ALthough it is not unusual for justices to grant general warrants, to search

all suspected places for stolen goods, and there is a precedent in *Dalton* requiring the constable to search *all such suspected places as he and the party complaining shall think convenient;* yet such practice is generally condemned by the best authorities.

Thus lord *Hale*, in his pleas of the crown, says a general warrant to search for felons or stolen goods, is not good. *H. Pl.* 93.

Mr. *Hawkins* says, I do not find any good authority that a justice can justify sending a general warrant, to search all suspected houses in general for stolen goods; because such warrant seems to be illegal in the very face of it; for it would be extremely hard, to leave it to the discretion of a common officer, to arrest what persons, and search what houses he thinks fit; and if a justice cannot legally grant a blank warrant for the arrest of a single person leaving it to the party to fill up, surely he cannot grant such a general warrant, which might have the effect of an hundred blank warrants. 2 *Haw*. 82, 84.

Again, lord *Hale*, in his history of the pleas of the crown, expresseth himself thus; I do take it, that a general warrant to search in all suspected places, is not good; but only to search in such particular places, where the party assigns before the justice this suspicion, and the probable cause thereof; for these warrants are judicial acts, and must be granted upon examination of the fact. 2 *H. H*. 150.

And therefore, he says, he takes it that the those warrants dormant, which are many times made before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretence of such general warrants, give no more power to the officer or party, than what they may do by law without them. 2 *H. H*. 150.

Likewise, upon a *bare surmise*, a justice cannot make a warrant to break any man’s house, to search for a felon, or for stolen goods; for the justices being created by act of parliament, have no such authority granted to them by any act of parliament; and it would be full of inconvenience, that it should be in the power of any justice of the peace, being a judge of record, upon a bare suggestion to break the house of any person, of what state, quality, or degree soever, either in the day or night, upon such surmises. 4 *Inst*. 177.

But in case of a complaint, and oath made, of goods stolen, and that the party suspects the goods are in such a house, and shews the cause of his suspicion; the justice may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods, and the party in

whose custody they are found, and bring them before him, or some other justice, to give an account how he came by them, and further to abide such order as to law shall appertain. 2 *H. H.* 113, 150.

But in that case, lord *Hale* says, it is convenient that such warrant do require the search to be made in the day time; and though I will not affirm (says he) that they are unlawful without such restriction, yet they are very inconvenient without it; for many times, under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbances. 2 *H. H.* 150.

But in case not of probable suspicion only, but of positive proofs, it is right to execute the warrant in the night time, lest the offenders and goods also be gone before morning. *Barl.* Search War.

Furthermore, such warrant ought to be directed to the constable, or other publick officer, and not to any private person; though it is fit the party complaining should be present and assistant, because he knows his goods. 2 *H. H.* 150.

So much for *granting* a search warrant; Next touching the *execution* of it.

Whether the stolen goods are in a suspected house or not, the officer and his assistants in the day time may enter, the doors being open, to make search, and it is justifiable by the warrant. 2 *H. H.* 151.

If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door. 2 H. H. 151.

If the goods be not in the house, yet it seems the officer is excused that breaks open the door to search, because he searched by warrant, and could not know whether the goods were there, till search made; but it seems the party that made the suggestion is punishable in such case; for as to him the breaking of the door is *in eventu* lawful or unlawful, to wit, lawful if the goods are there, unlawful if not there. 2 *H. H.* 151.

On the *return* of the warrant executed, the justice hath these things to do:

As touching the *goods* brought before him, if it appears they were not stolen, they are to be restored to the possessor; if it appear they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, to the end the party robbed may proceed indicting and convicting the offender, to have restitution 2 *H. H.* 151.

As touching the *party* that had the custody of the goods; if they were not stolen, then he is to be discharged; if stolen, but not by him, but by another

that sold or delivered them to him, if it appear that he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence as a witness against him that sold them; if it appear he was knowing they were stolen, he must be committed or bound over to answer the felony 2 *H. H.* 152.

Form of a search warrant.

Westmorland. { To the constable of

WHEREAS *it appears to me* J. P. *esquire, one of the justices of our lord the king, assigned to keep the peace in the said county, by the information on oath of* A. I. of ——— *in the county aforesaid, yeoman, that the following goods to wit,* ——— *have within two days last past, by some person or persons unknown, been feloniously taken, stolen, and carried away, out of the house of the said* A. I. *at* ——— *aforesaid, the county aforesaid and that said A. I. hath probable cause to suspect, and doth suspect, that the said goods, or parts thereof, are concealed in the dwelling house of* A. O. of ——— *in the said county, yeoman: These are therefore, in the name of our said lord the king, to authorize and require you, with necessary and proper assistants, to enter in the day time into the said dwelling house of the said* A. O. *at* ——— *aforesaid, in the county aforesaid, and there diligently to search for the said goods; and if the same, or any part thereof, shall be found upon such search, that you bring the goods so found, and also the body of the said* A. O. *before me, or some other of the justices of our said lord the king, assigned to keep the peace in the county aforesaid, to be disposed of and dealt withal according to law. Given under my hand and seal at* ——— *in the said county, the* ——— *day of* ——— *in the* ——— *year of the reign of* ———.

Burn Justice of the Peace, vol. 4, pp. 50–53.

[*6.3.1.4.b Warrant*]

WARRANT.

FOR a warrant to search for stolen goods, see Search Warrant.

If a justice see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon; and so he may by word command any person to apprehend him, and such command is a good warrant without writing: but if the same be done in his absence, then he must issue his warrant in writing. 2 *H. H.* 86.

Concerning which we will shew,

I. *For what causes it may be granted*.
II. *What is to be done previous to the granting of it*.
III. *How far it is grantable on suspicion*.
IV. *The form of it*.

I. FOR WHAT CAUSES IT MAY BE GRANTED.

There seems to be no doubt, but that a warrant may be lawfully granted by any justice, for treason, felony, or præmunire, or any other offence against the peace: Also it seems clear, that where-ever a statute gives to any one justice a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do the thing ordained by such statute; for it cannot but be intended, that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts, of compelling the party to come before him. 2 *Haw*. 84.

But in cases where the king is no party, or where no corporal punishment is appointed, as in cases for servants wages, and the like, it seemeth that a *summons* is the more proper process; and for default of appearance the justice may proceed; and so indeed oftentimes it is directed by special statutes.

II. WHAT IS TO BE DONE PREVIOUS TO THE GRANTING OF IT.

It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put into writing. 1 *H. H*. 582. 2 *H. H*. 111.

Or at least it is safe to bind him over to give evidence; lest afterwards when the offender shall be apprehended, or shall surrender himself, the party that procured the warrant be gone. *Dalt. c*. 169.

III. HOW FAR IT IS GRANTABLE ON SUSPICION.

Lord *Hale* proves at large, contrary to the opinion of lord *Coke* (4 *Inst*. 177.) that a justice hath power to issue a warrant to apprehend a person suspected of felony, before he is indicted; and that though the original suspicion be not in himself, but in the party that prays his warrant. 2 *H. H*. 107—110.

For the justices are judges of the reasonableness of the suspicion, and when they have examined the party accusing touching the reasons of his suspicion, if they find the causes of suspicion to be reasonable, it is now

become the justices suspicion as well as theirs. 2 *H. H*. 80.

And in another place speaking of this opinion of lord *Coke*, he delivers himself seemingly with a kind of warmth not usual to him: I think, says he, the law is not so, and the constant practice in all cases hath obtained against it, and it would be pernicious to the kingdom if it should be as lord *Coke* delivers it; for malefactors would escape unexamined and undiscovered, for a man may have a probable and strong presumption of the guilt of a person, whom yet he cannot positively swear to be guilty. 1 *H. H*. 579.

Mr. *Hawkins* likewise seems to be of the same opinion against lord *Coke*, but delivereth himself with his wonted caution and candour: It seems probable, he says, that the practice of justices of the peace in relation to this matter, is now become a law, and that a justice may justify the granting of a warrant for the arrest of any person, upon strong grounds of suspicion, for a felony or other misdemeanor, before any indictment hath been found against him; yet inasmuch as justices claim this power rather by connivance, than any express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation as well as the liberty of the party, a justice cannot well be too tender in his proceedings of this kind, and seems to be punishable not only at the suit of the king, but also of the party grieved, if he grant any such warrant groundlesly [*sic*] and maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to the guilty. 2 *Haw*. 85.

But a general warrant, upon a complaint of robbery, to apprehend *all persons suspected*, and to bring them before a justice, hath been ruled void; and false imprisonment lies against him that issues such a warrant. 1 *H. H*. 580. 2 *H. H*. 112.

IV. THE FORM OF IT.

1. Mr. *Dalton* says, the warrant is the better, if it bear date of the place where it was made. *Dalt. c*. 169.

And lord *Hale* says, the place, though it must be alledged in pleading, need not be expressed in the warrant. 2 *H. H*. 111.

And Mr. *Hawkins* says, It is safe, but perhaps not necessary, in the body of the warrant to shew the place where it was made; yet it seems necessary to set forth the county, in the margin at least, if it be not set forth in the body. 2 *Haw*. 85.

2. It may be directed to the sheriff, bailiff, constable, or to any indifferent person by name who is no officer; for the justice may authorize any one to

be his officer, whom he pleases to make such; yet it is most adviseable to direct it to the constable of the precinct wherein it is to be executed, for that no other constable, and *à fortiori* no private person, is compellable to serve it. 2 *Haw*. 85. *Dalt. c*. 169. 2 *H. H*. 110.

But in the case of an act of parliament, it is said, that if the act directeth that a justice shall grant a warrant, and doth not say to whom it shall be directed, by consequence of law it must be directed to the constable, and it cannot be directed to the sheriff, unless such power is given in the act. *Ld. Raym*. 1192. 2 *Salk*. 381.

3. The warrant may be stiled in divers manners: As 1. In the name of the king; and yet the teste must be under the name of the justice that grants it out. Or, 2. It may be stiled and made only in the name of the justice. Or, 3. It may be made without any such stile, and only under the teste of the justice, or only subscribed by him. As followeth:

In the King's majesty's name.

Westmorland. GEORGE *the third, by the grace of God, of* Great Britain, France, *and Ireland, king, defender of the faith, and so forth; To our sheriff of the county of ——— to the high constables of the hundred of ——— in the same county, and to the petty constables of the town of ——— in the same county, and to all and singular our bailiffs and ministers in the same county, as well within liberties, as without, greeting:*

Forasmuch as A. I. *of ——— hath come before* J. P. *esquire, one of our justices assigned to keep our peace within the said county, and hath,* &c.

(Concluding it in the justice's name, as thus:) *Witness the said* J. P. *at ——— the ——— day of ———.*

Note, That wheresoever the warrant is made in the king's name, there it ought to be directed to all ministers, as well within liberties, as without, for that the king is made a party: And so it may be done in all other warrants, especially for felony, or for the peace or the good behaviour, because it is the service of the king. *Dalt. c*. 174.

Or thus, in the name of the justice himself.

Westmorland. J. P. *esquire, one of the justices of our lord the king, assigned to keep the peace within the said county; To the sheriff of the said country, to the bailiff or constables of the hundred of ——— within the said county, to the petty constables of the town of ——— within the said hundred and county, and to all other the ministers and officers of our said lord the king within the said county, and to every of them, greeting:*

Forasmuch as, &c. *Given under my hand and seal the ——— day of*, &c. Dalt. c. 174.

4. Regularly, the warrant, especially if it be for the peace or good behaviour, or the like, where sureties are to be found or required, ought to contain the special cause and matter, whereupon it is granted, to the intent that the party upon whom it is to be served, may provide his sureties ready, and take them with him to the justice to be bound for him; but if the warrant be for treason, murder, or felony, or other capital offence, or for great conspiracies, rebellious assemblies, or the like, it hath been said, that it needeth not to contain and special cause, but the warrant of the justice may be to bring the party before him, to make answer to such things or matters generally, as shall be objected against him on the king's behalf. *Dalt. c*. 169. 2 *Haw*. 85. 2 *H. H*. 111.

But Mr. *Lambard* says, every warrant made by a justice of the peace ought to comprehend the special matter upon which it proceedeth; even as all the king's writs do bear their proper cause in their mouth with them: And as for the form that is commonly used, *to answer to such things as shall be objected*, and such like, they were not fetched out of the old learned precedents, but lately brought in by such as either knew not, or cared not, what they writ. *Lamb*. 87.

5. The warrant ought regularly to mention the name of the party to be attached, and must not be left in general, or with blanks to be filled up by the party afterwards. 2 *H*. 114. *Dalt. c*. 169.

6. The warrant may issue to bring the party before the justice who granted the warrant specially, and then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice, then it is in the election of the officer to bring him before what justice of the county he thinks fit, and not in the election of the prisoner. 1 *H. H*. 582. 2 *H. H*. 112.

7. It ought to set forth the year and day wherein it is made, that in an action brought upon an arrest by virtue of it, it may appear to have been prior to such arrest; and also, in case where a statute directeth the prosecution to be within such a time, that it may appear, that the prosecution is commenced within such time limited: Likewise, where a penalty is given to the poor of the parish where the offence shall be committed, or the like, it ought to specify the place where the offence was committed. 2 *Haw*. 85.

8. Finally, it ought to be under the hand and seal of the justice who

makes it out. 2 *Haw*. 85.

The execution of a warrant belongs to title Arrest.

Burn Justice of the Peace, vol. 4, pp. 271–76.

6.3.1.5Cunningham, 1765

Arrest, (*Arrestum*) Is derived from the French word *arrester*, to stop or stay, and signifies a restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: And it may be called the beginning of imprisonment. *Cowell*.

Arrest is either *civil* or *criminal*.

1. *Arrest in civil cases*.
2. *Arrest in criminal cases*.

1. ARREST IN CIVIL CASES.

An arrest in a civil cause is the apprehending or restraining one's person by process in execution of the command of some court, or officer of justice. *Wood's Inst*. 575.

Magna Charta, *c*. 29. None shall be taken, imprisoned, or disseised of his freehold, but by judgment of his peers, or according to the law of the land.

Stat. 3 *Ed*. 1. *c*. 35. Whereas great men and their bailiffs used to attach others passing thro' their jurisdiction with their goods, compelling them to answer upon contracts, covenants and trespasses, done out of their jurisdiction; this practice is hereby prohibited, on pain of the offenders forfeiting double damages to the party grieved, and being amerced by the King.

Stat. 50 *Ed*. 3. *c*. 5. Clerks attending divine service in churches, churchyards, and other sacred places, shall not be arrested by authority royal, or the command of other temporal lords, upon pain of grievous forfeiture, so that collusion or feigned cause be not found in the said clerks.

Stat. 1 *Ric*. 2. *c*. 15. If any minister of the King or other, do arrest any person of holy church, in churches or churchyards, or in other places, while they are attending divine service, he shall be imprisoned and ransomed at the King's will, and make satisfaction to the party so arrested, provided that the said people of holy church shall not hold them within the churches or sanctuaries, by fraud or collusion in any manner.

Stat. 23 *Hen*. 6. *c*. 10. No sheriff, undersheriff, or bailiff, shall take any

reward for arresting, or for the omitting to arrest any man; and upon every arrest, the sheriff shall have for his fee but twenty pence, the bailiff who makes the arrest four pence, and the gaoler to whom he is committed four pence.

No sheriff or his officer shall take any obligation, by colour of his office, of a prisoner in his custody, but only to himself, by the name of his office, and upon condition written, that the prisoner shall appear at the day contained in the writ or warrant in the court or place required, and if he take any other obligation, he shall forfeit his office: nor shall he take more than four pence for making such obligation, precept, or warrant: And if the said sheriffs return *cepi corpus*, or *reddidit se*, they shall be chargeable to have the bodies of the said persons at the days of the returns of the said writs, *&c*. as before the making this act. *Ibid*.

Stat. 23 *H*. 8. *c*. 15. If any person commence or sue in any court of record, or other court, any action, bill or plaint of trespass, upon the statute of 5 *Ric*. 2. *c*. 7. or any action, bill, or plaint of debt or covenant, upon specialty, or upon any contract, or upon any action of the case, or upon any statute, for any personal wrong, and the plaintiff after appearance of the defendant be nonsuited, or verdict pass against him, then the defendant shall recover his costs; for which he shall have such process, as the plaintiff might have in case he had recovered.

Persons suing *in forma pauperis*, shall not be compelled to pay costs by virtue of this act, but shall be punished at the discretion of the justices or judge, before whom the action is brought. *ib*.

Stat. 8 *Eliz. c*. 2. If any one shall, maliciously and without just cause, procure any person to be molested and troubled by attachments and arrests, by process of *latitat*, *alias* and *pluries capias*, sued out of the King’s Bench, and the defendant shall be arrested or appear, and put in bail, then if the plaintiff do not within three days after such bail had and taken, declare against the defendant, or after his declaration, discontinue or become nonsuit, the court shall award to the defendant so arrested, vexed or troubled, his costs, damages and charges thereby sustained.

If any person shall be attach’d or arrested by process, out of the marshalsea or of any court in the city of *London*, or in any city, borough, town corporate, or other place, having the privilege of holding a plea in personal actions, and do not in all courts, having their continuance *de die in diem*, declare within three days after the appearance of the defendant, or bail put in, and where such courts are otherwise kept, declare at the next

court after the appearance, *&c*. and prosecute his suit with effect, *&c*. the defendant shall have his costs, damages and charges. *ib*.

And if any person shall maliciously, or for vexation and trouble, cause any one to be arrested or attached in a fictitious name, or without the consent of the person at whose suit the defendant is arrested, such offender convicted by presentment, indictment, or two witnesses, shall suffer six months imprisonment, without bail or mainprize, and pay to the party so arrested or attached, treble the cost, charges and expences he shall be put to, and shall forfeit to the person in whose name the suit was brought, if there be any such, the sum of ten pounds. *ib*.

Stat. 4 *Jac*. 1. *c*. 3. Persons to whom costs or damages are given, by this act may recover the same by action, *&c*. in any court of record, against the offender, his executors and administrators, in which action, no essoin, protection, *&c*. shall be allowed.

Stat. 43 *Eliz. c*. 6. If any sheriff or other person, having authority, or taking upon him to break writs, do make a warrant, as upon any writ, process, or suit, or for the arrest or attaching of any person to appear in courts at *Westminster* or elsewhere, not having before an original writ or process warranting the same; upon conviction thereof before a judge of assise, or the judges of the court out of which the process issued, such offender may by the said judges, be committed to the county gaol where he was examined, until he pay ten pounds to the party grieved, with costs, and twenty pounds to the King.

Stat. 4 *Jac*. 1. *c*. 3. In any action whatever, where the plaintiff or defendant should have costs, if judgment had been given for him, and such plaintiff or defendant after appearance become nonsuit, or judgment pass against him, there the defendant shall recover his full costs, to be levied as is directed by 23 *Hen*. 8. *cap*. 15.

Stat. 13 *Car*. 2. *c*. 2. *sect*. 2. Persons arrested by any process out of the King's Bench or Common Pleas, in which the certainty or true cause of action is not expressed, and in which the defendant is bailable, by 23 *Hen*. 6. *cap*. 10. shall not be compelled to give bond, with sureties for their appearance, in any penal sum exceeding forty pounds.

Sect. 3. And such bail-bonds, after appearance entred by attorney, shall be discharged, and no amerciaments shall be set or estreated upon the sheriff or other officer, concerning such appearance; and unless the plaintiff in a personal action or *ejectione firmæ*, declare before the end of the term next following the appearance, a nonsuit may be entered, and the defendant

shall have judgment to recover costs, according as is provided by the 23 *Hen*. 8. *c*. 15.

Sect. 4. Provided this act do not extend to any writ of *capias utlagat*. attachment, upon *rescous*, or for contempt, or attachment at the suit of any privileged person, altho' there be no particular certainty of the cause of action expressed in the writ, but such security shall be taken by the sheriff, *&c*. in these cases as heretofore.

Stat. 22 & 23 *Car*. 2. *c*. 20. No under sheriff, bailiff, serjeant, or other officer, having a person in his custody, by virtue of any process, shall cause him to be carried to any tavern, or other publick house, without his consent, so as to charge such prisoner with any sum of money, for wine, ale, victuals, *&c*. but what he shall voluntarily call for; nor shall demand or receive more for such arrest or waiting than by law he ought, until such prisoner have procured an appearance, found bail, agreed with his adversary, or be sent to gaol; nor shall take any other reward for keeping such prisoner out of the gaol, than what he shall voluntarily give; nor shall exact more for a night's lodging or other expences, than is reasonable, or shall be so adjudged by the next justice of the peace; nor shall cause such person to pay for any provisions or other things, but what he shall particularly and freely call for.

Every under sheriff, gaoler, *&c*. to whom a prisoner shall be committed, shall suffer him to send for beer and food where he pleases, and to use such bedding, linen, and other things, as he thinks fit, without detaining or paying for the same; nor shall take more than the usual fees for his commitment or discharge; or more than shall be allowed by three justices of peace of the county or place, *quor. un*. for chamber rent, or by the two lord chief justices and lord chief baron in *London, Middlesex*, and *Surry*. *ib*.

The rates of fees signed by the chief justices and chief baron, or two of them, *&c*. shall be hung up in every prison, and registred by every clerk of the peace; and no other or greater fees shall be taken, than shall be so established. *ib*.

Prisoners for debt, and felons, shall not be kept in the same room, on pain that every sheriff and gaoler offending in this particular, shall lose their respective offices. *ib*.

Stat. 29 *Car*. 2. *c*. 7. No person on the Lord's day, shall serve or execute any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace; but such service shall be void, and the person serving or executing the same, shall be liable to answer such

damages, as if he had done the same without any writ, process, warrant, order, judgment, or decree.

Stat. 6 *Geo.* 1. *c.* 21. *sect.* 53, No high sheriff, under sheriff, their deputies or agents, shall make out any warrant, before they have in their custody the writs upon which such warrants ought to issue, on forfeiture of 10 *l.*

Sect. 54. Every warrant to be made out upon any writ out of the King's Bench, Common Pleas, or Exchequer, before judgment, to arrest any person, shall have the same day and year set down thereon as shall be set down on the writ itself, under forfeiture of 10 *l.* to be paid by the person who shall fill up or deliver out such warrant.

Stat. 12 *Geo.* 1. *cap.* 29. *sect.* 1. No person shall be held to special bail upon any process issuing out of any superior court, where the cause of action shall not amount to 10 *l.* nor out of any inferior court, where the cause of action shall not amount to 40 *s.* and in all cases where the cause of action shall not amount to 10 *l.* in a superior court, or to 40 *s.* in any inferior court (and the plaintiff shall proceed by way of process against the person) he shall not arrest the body of the defendant, but shall serve him personally, within the jurisdiction of the court, with a copy of the process; and if such defendant shall not appear at the return of the process, or within four days after, it shall be lawful for the plaintiff, upon affidavit being made and filed, of the personal service of such process (which affidavit shall be filed *gratis*) to enter a common appearance, or file common bail for the defendant, and to proceed thereon, as if such defendant had enter'd his appearance, or filed common bail.

Sect. 2. In all cases where the plaintiff's cause of action shall amount to 10 *l.* or 40 *s.* as aforesaid, affidavit shall be made and filed of the cause of action (which affidavit may be made before any judge or commissioner of the court, out of which such process shall issue, or else before the officer who shall issue such process, or his deputy) and for such affidavit 1 *s.* over and above the stamp-duties, shall be paid, and no more; and the sum specified in such affidavit, shall be indorsed on the back of such writ or process, for which sum so indorsed the sheriff, *&c.* shall take bail, and for no more: but if any writ or process shall issue for 10 *l.* or upwards, and no affidavit or indorsement shall be made, as aforesaid, the plaintiff shall not proceed to arrest the body of the defendant, but shall do in like manner, as is by this act directed in cases where the cause of action does not amount to 10 *l.* or 40 *s.* as aforesaid.

Continued by 5 *Geo.* 2. *cap.* 27. *from the end of that session for seven years, and made perpetual by* 21 *Geo.* 2. *cap.* 3.

Stat. 21 *Geo.* 2. *cap.* 22. *sect.* 1. No sheriff, bailiff or other officer shall convey any person by him arrested by virtue of any process or warrant, to any tavern, alehouse or other publick victualling or drinking-house, or to the house of such officer, or of any tenant or relation of his, without the free consent of the person so arrested; nor charge him for wine, beer, victuals or other things, save what he shall call for of his own accord; nor shall take any greater sum than is by law allowed for such arrest, detaining or waiting, till the person arrested shall have given an appearance or bail, or agreed with the person at whose suit he shall be arrested, or till he shall be sent to gaol; nor shall take any reward for keeping the person arrested out of prison; nor shall carry any such person to prison within 24 hours from the time of arrest; nor shall take any greater sum for his lodging or diet, or other expences, than shall be allowed by some orders for ascertaining such expences within their respective counties.

Sect. 2. Every sheriff, and other persons, entrusted with the execution of process, shall deliver a printed copy of the said clause to every bailiff or officer by them employed to execute warrants, and when such officer shall give security upon his entring into office, shall require him to make it part of the condition, that he will deliver a copy of the said clause to every person whom he shall arrest by virtue of any warrant, and carry to any house, and permit him or any friend of his to read it, before any liquor or meat be called for; and in case any officer shall carry to any house any person in his custody, and permit any liquor or victuals to be called for, before such clause be read to or by the prisoner, such neglect, besides the breach of such security, shall be accounted a misdemeanor in the execution of the process.

Sect. 3. Every sheriff, gaoler, *&c.* shall permit every person so arrested to send for beer or other food from what place they please, and also to have such bedding and other things as they shall think fit, without purloining or detaining the same, or requiring them to pay for the use thereof, or putting any difficulty upon them relating thereto.

Stat. 3 *Geo.* 2. *c.* 27. *sect.* 6. If any person shall be arrested by virtue of any process or warrant, and shall refuse to be carried to some safe dwelling-house of his own appointment, so as such dwelling-house be in a city or market-town, if such person shall be there arrested; or if out of a city or market-town, then within three miles from the place where the arrest shall

be made, and so as such house be not the house of the person arrested, provided it be within the same county and liberty, it shall be lawful for the officer to carry the person so refusing to gaol by virtue of such process.

Stat. 5 *Geo*. 2. *cap*. 27. *sect*. 1. In all cases where the cause of action shall not amount to 10 *l*. in any superior court, or to 40 *s*. in any inferior court, the defendants (a copy of process having been served) shall appear at the return thereof, or within eight days after, and the affidavit of service of such process may be made before any judge or commissioner of the court, out of which such process shall issue, or before the proper officer for entring common appearances, or his deputy; and is to be filed *gratis*.

Sect. 2. No attorney, or other person, shall have more than 5 *s*. for making and serving a copy of such process issuing out of any superior court, or more than 1 *s*. for making and serving a copy of such process, issuing out of any inferior court.

Sect. 3. In particular franchises the proper officer shall execute such process.

Sect. 4. Upon every copy of such process, to be served upon any defendant, shall be written an *English* notice to such defendant, of the intent of such service, to the effect following, *viz*.

A. B. *you are served with this process, to the intent that you may by your attorney appear in his Majesty's court of* ——— *at the return thereof, being the* ——— *day of* ——— (as the case shall be) *in order to your defence in this action*.

for which notice no fee shall be demanded.

Sect. 5. Where the cause of action shall not amount to 10 *l*. in any superior court, or to 40 *s*. in any inferior court, no special writ, nor process specially expressing the cause of action, shall be issued; and every attorney or officer of such courts suing forth or issuing any such process, shall forfeit 10 *l*. to the person agrieved. *Made perpetual by* 21 *Geo*. 2. *cap*. 3.

Seamen in the King's service privileged from arrests for debts under 20 *l*. 1 *Geo*. 2. *c*. 14. *sect*. 15. 14 *Geo*. 2. *c*. 38. *sect*. 3.

Soldiers or marines not liable to arrests for a debt of less than 10 *l*. 30 *Geo*. 2. *c*. 6. *sect*. 64. 30 *Geo*. 2. *c*. 11. *sect*. 37.

Peers of the realm, and members of parliament may not be *arrested*, unless it be in criminal cases; but the process against them is to be summons, distress infinite, *&c*. 12 *Will*. 3. *c*. 3.

The execution of writs, which comes to the sheriff, or his under sheriff,

ought to be executed by bailiffs of hundreds, tho' now the use is to put in special bailiffs with them. A special bailiff is an officer of the sheriff, to execute some particular writ, *&c.* and for that time only. This arrest is the arrest of the sheriff, and if he suffers a prisoner to escape, an action lies against the sheriff. And if the prisoner is rescued, the return of the rescous shall be, *that it was done to the sheriff himself.* The statute of the 27 *Eliz. cap.* 12. does not extend to special bailiffs, so that in effect, the design of that statute is evaded, and too loose a restraint laid upon those who are usually a great grievance to the people; however the sheriff shall answer for the misdemeanors of his bailiffs, if they offend in their office, tho' he may have his remedy over against them. *Wood's Inst.* 127, 128.

A bailiff sworn, and commonly known, need not, (tho' they demand it) shew his warrant, but a special bailiff is bound to shew it upon demand. *ib.*

An arrest without shewing the warrant, and without telling at whose suit, until the other demanded it, was held legal; and that this need not be done until the party obeyed and demanded the same. *Cro. Jac.* 485.

Where the husband is arrested for the debt or trespass of the wife, he must appear or give bail both for himself and his wife, as the case requires; but if a writ be against husband and wife, and the wife only is arrested, upon the entring a common appearance, she shall be discharged. *Inst. Leg.* 171.

It is not sufficient for a bailiff to say, *I arrest you at the suit of,* &c. but he must lay hold of the defendant, or touch him, otherwise, 'tis no arrest. 1 *Salk.* 79.

If an action be entred in either of the counters in *London,* a serjeant may arrest the party without the sheriff's warrant. *Trin.* 22 *Car. B. R.* For the entry of the action there, is a warrant in law for the arrest, and the serjeants are attendants at the compters, and may take notice of such entries, it being the custom of the city, used time out of mind. *Pract. Reg.* 72.

By *Glynn* Ch. J. *Mich.* 1658. if one be arrested by the sheriff of the county, within a liberty, without a *non omittas,* yet the arrest is good; for the sheriff is sheriff of the whole county, but the bailiff of the liberty may have his action against the sheriff, for entring of his liberty. But upon a *quo minus,* a sheriff may enter any liberty, and execute it *impune. Pract. Reg.* 72.

Generally, the bailiff cannot justify the breaking open a house to arrest a man, but where the officer took the defendant by the hand as he held it out of a window, it was deemed a good arrest, and that the bailiff might

afterwards justify breaking open the house for his prisoner. 1 *Vent*. 306.

An arrest may be by night or day. 9 *Rep*. 66.

If the person arrested make resistance, or assault the officer, he may justify the beating of him, and if the party be killed, 'tis justifiable. *D. and Stud. dial*. 2. *chap*. 41. But if the officer be killed in doing his duty, 'tis murder, malice being implied in this case, and that notwithstanding the process be erroneous. 9 *Rep*. 67, 68.

Corporations and companies must be made to appear by *distringas*, and cannot be arrested. *Finch* 353. 3 *Salk*. 46.

Persons attending upon any courts of record, on business there, are to be free from arrests. 3 *Inst*. 141.

A clerk of the court ought not to be *arrested* for any thing which is not criminal, because he is supposed to be always present in court to answer the plaintiff. 1 *Lill*. 94.

The King cannot command any one by word of mouth to be *arrested*; but he must do it by writ, or order of his courts, according to law: nor may the King *arrest* any man for suspicion of treason, or felony, as his subjects may; because if he doth wrong, the party cannot have action against him. 2 *Inst*. 186.

Every one is bound by the Common law to assist not only the sheriff in the execution of writs, and making *arrests*, &c. but also his bailiff that hath his warrant to do it. 2 *Inst*. 193.

A bailiff upon an *arrest* ought to shew at whose suit, out of what court the writ issues, and for what cause, *&c*. but this is when the party *arrested*, submits himself to the arrest. 9 *Rep*. 68, 69.

Genner, a bailiff, having a warrant against *Sparks*, went to him in his yard, and being at some distance, told him he had a warrant, and said he arrested him. *Sparks* having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house, and this was moved as a contempt; *et per cur*. The bailiff cannot have an attachment, for here was no arrest, nor rescous, bare words will not make an arrest; but, if the bailiff touched him, that had been an arrest, and the retreat a rescous, and the bailiff might have pursued, and broke open the house, or might have had an attachment or a rescous against him; but as this case is, the bailiff has no remedy, but an action for the assault, for the holding up of the fork at him, when he was within reach, is good evidence of that. 1 *Salk*. 79.

In these cases a person may be apprehended and restrained of his liberty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman or private person, without any warrant or precept; and a private person may be fined and imprisoned for not apprehending notorious offenders.

All persons whatsoever, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect, unless they were under age at the time. 2 *Hawk*. 74.

And for this cause, by the Common law, if any homicide be committed, or dangerous wound given, whether with, or without malice, or even by misadventure or self-defence, in any town, or in the lanes or fields thereof, in the day time, and the offender escape, the town shall be amerced, and if out of a town, the hundred shall be amerced, 3 *Inst*. 53.

And since the statute of *Winchester, c*. 5. which ordains that walled towns shall be kept shut from sunsetting to sunrising; if the fact happen in any such town by night, or by day, and the offender escape; the town shall be amerced. 3 *Inst*. 53.

And, as private persons are bound to apprehend all those who shall be guilty of any of the crimes above mentioned in their view, so also are they, with the utmost diligence, to pursue and endeavour to take all those who shall be guilty thereof, out of their view, upon a hue and cry levied against them. 3 *Inst*. 117.

By the vagrant act 17 *Geo*. 2. every private person may apprehend beggars and vagrants.

And every private person is bound to assist an officer, requiring him to apprehend a felon.

As to what are sufficient causes of suspicion of treason or felony, to justify a private person in apprehending the suspected person, it is held, 1. That the common fame of the country is sufficient to justify the arrest, but then it ought to appear upon evidence, in an action brought for such an arrest, that such fame had some probable ground. 2 *Hawk*. 76.

2. The living a vagrant, idle and disorderly life, without having any visible means to support it. *ibid*.

3. The being in company with one known to be an offender at the time of the offence, or generally, at other times, keeping company with persons of scandalous reputations. *ib*.

4. The being found in such circumstances as induce a strong presumption of guilt, as coming out of a house wherein murder has been committed, with a bloody knife in one's hand, or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. *ib*.

5. The behaving one's self in such a manner as betrays a consciousness of guilt; as where a man being charged with treason or felony, says nothing to it, but seems tacitly, by his silence, to own himself guilty; or where a man accused of any such crime, upon hearing that a warrant is taken out against him, doth abscond. *ib*.

Tho' it is held, that no causes of suspicion whatever, let the number or probability of them be never so great, will justify the arrest of an innocent man; by one who does not, himself, believe him guilty, whether he make such arrest of his own head, or in obedience to the commands of a constable. *ib*.

And it is holden by some, that none of the above mentioned causes will justify the arresting a man for the suspicion of crimes, unless a crime was actually committed; but out of this rule, the apprehending a person upon hue and cry, or such as attempt to commit a robbery, or felony, may very well be excepted; for any one may lay hold of a person, whom he sees upon the point of committing treason, or felony, or doing an act which would manifestly endanger the life of another, and detain him, till it may be reasonably presumed, he has changed his purpose. 2 *Hawk*. 77.

As to arrests for inferior offences, no private person can arrest another for a bare breach of the peace after it is over; but it is held, that a private man may arrest a nightwalker, or a common cheat going about with false dice, and actually caught playing with them, in order to have him before a justice of peace; and the arrest of any other offenders, by private persons, for offences in like manner scandalous, and prejudicial to the publick, seems justifiable. 2 *Hawk*. 77.

As to arrests by constables, by their own authority, it seems difficult to find any case wherein a constable is impowered to arrest a man for a felony committed or attempted, in which a private person might not as well be justified in doing it: But the chief difference between the power and duty of a constable, and a private person in respect of such arrests, seems to be this; that the former has the greater authority, to demand the assistance of others, and is liable to the severer fine for any neglect of this kind, and has no sure way to discharge himself of the arrest, of any person apprehended by him,

for felony, without bringing him before a justice of peace; in order to be examined; whereas a private person, having made such an arrest, needs only to deliver his prisoner into the hands of the constable. 2 *Hawk*. 80.

As to the justifying such arrests by constables, by virtue of a warrant from a justice of peace, it seems clear, that such an arrest, unlawfully made by a constable without a warrant, cannot be made good by a warrant taken out afterwards; also it hath been holden, that if a constable, after he hath arrested the party by force of any such warrant, suffer him to go at large upon his promise to come again at such a time, and find sureties, he cannot afterwards arrest him by force of the same warrant; however, if the party return and put himself again under the custody of the constable, the constable may lawfully detain him, and bring him before the justice, in pursuance of the warrant. 2 *Hawk*. 80. *Dyer* 244. *b*.

A constable cannot justify any arrest by force of a warrant from a justice of peace, which expresly appears on the face of it, to be for an offence whereof a justice of peace hath no jurisdiction, or to bring the party before him at a place out of the county for which he is a justice; but it seems that he both may, and ought to execute a general warrant, to bring a person before a justice of peace, to answer such matters as shall be objected against him, on the part of the King, for that the officer ought to presume, that the justice hath a jurisdiction, which he takes conusance of, unless the contrary appear, and it may often endanger the escape of the party, to make known the crime he is accused of: But it seems to be very questionable, whether a constable can justify the execution of a general warrant, to search for felons or stolen goods, because such warrant seems to be illegal on the very face of it; for, that it would be extreamly [*sic*] hard, to leave it to the discretion of a common officer, to arrest what persons, and search what houses he thinks fit; and if a justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill it up; surely he cannot grant such a general warrant, which might have the effect of a hundred blank warrants. 2 *Hawk*. 82.

Yet, perhaps, ’tis the better opinion at this day, that any constable, or even private person, to whom a warrant shall be directed from a justice of peace, to arrest a particular person for felony, or any other misdemeanor within his jurisdiction, may lawfully execute it, whether the person mention’d in it be, in truth, guilty or innocent, and whether he were before indicted of the same offence or not, and whether any felony were, in truth, committed or not? for, however the justice himself may be punishable for

granting such a warrant, without sufficient grounds, it is reasonable that he alone be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding. *ib*.

As to arrests by the command of a justice of peace: a justice of peace may, by word of mouth, authorise any one to arrest another, who shall be guilty of an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. 2 *Hawk*. 83. *Dalt. c*. 117.

And a justice of peace may lawfully grant a warrant for apprehending, or arresting persons charg'd with treason, felony, premunire [*sic*], or any other offence against the peace; and generally, wherever a statute gives one or more justices of peace a jurisdiction over any offence, any one justice of peace may, by his warrant, cause such offenders to be arrested and brought before him. 2 *Hawk*. 84.

A justice of peace may justify the granting a warrant for the arrest of any person upon strong grounds of suspicion of felony, or misdemeanor, but he seems to be punishable, as well at the suit of the King, as of the party grieved, if he grant any such warrant groundlesly, or maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty. 2 *Hawk*. 84.

Every warrant ought to be under the hand and seal of the justice of peace, and specify the day it was made out: if it be for the peace or good behaviour, it is advisable to set forth the special cause upon which it is granted, but if it be for treason or felony, or other offences of an enormous nature, it is said, that it is not necessary to set it forth, and it seems to be rather discretionary than necessary to set it forth in any case. 2 *Hawk*. 85.

It may be directed to the sheriff, bailiff, constable, or to any indifferent person by name, who is no officer, for, tho' the justice may authorise any one to be his officer, whom he pleases to make such; yet it is most advisable to direct to the constable of the precinct wherein it is to be executed; for that no other constable, and *a fortiori* no private person, is compellable to serve it. 2 *Hawk*. 85.

A bailiff or constable, if they be sworn, and commonly known to be officers, and act within their own precincts, need not shew their warrant to the party, notwithstanding he demand the fight of it; but that these and all other persons whatsoever making an arrest, ought to acquaint the party with the substance of their warrant; and all private persons to whom such warrants shall be directed, and even officers, if they be not sworn and commonly known; and even these, if they act out of their own precincts,

must shew their warrants if demanded. 2 *Hawk*. 86.

The sheriff having such warrant directed to him, may authorise others to execute it; but every other person, to whom it is directed, must personally execute it, yet, it seems, that any one may lawfully assist him. 2 *Hawk*. 86.

If a warrant be generally directed to all constables, no one can execute it out of his own precinct; but if it be directed to a particular constable by name, he may execute it any where within the jurisdiction of the justice. 2 *Hawk*. 86.

Where one is authorised to arrest a person who shelters himself in a house; if entrance be denied, the officer may justify the breaking open the doors in the following instances.

1*st*. Upon a *capias*, grounded on an indictment for any crime whatsoever, or upon a *capias* from the King's Bench or Chancery, to compel a man to find sureties for the peace or good behaviour, or even upon a warrant from a justice of peace for such purpose. *ib*.

2*dly*. Upon a *capias utlagatum*, or *capias pro fine*, in any action whatsoever. *ib*.

3*dly*. Upon the warrant of a justice of peace, for the levying of a forfeiture in execution of a judgment, or conviction for it, grounded on any statute which gives the whole, or but part of such forfeiture to the King, and authorises the justice of peace to give such judgment or conviction for it. *ib*.

4*thly*. Where a forcible entry or detainer is either found by inquisition before justices of peace, or appears upon their view. *ib*.

5*thly*. Where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with, or without warrant by a constable, or private person; but where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day, that no one can justify the breaking open doors in order to apprehend him. *ib*.

6*thly*. Where an affray is made in a house, in the view or hearing of a constable, or where those who have made an affray in his presence, fly to a house, and are immediately pursued by him, and he is not suffered to enter, in order to suppress the affray in the first case, or to apprehend the affrayer in either case.

7*thly*. Wherever a person is lawfully arrested for any cause, and afterwards escapes and shelters himself in a house. *ib*.

Also it is enacted by the 3 & 4 *Jac*. 1. *par*. 35. that upon any lawful writ, warrant or process awarded to any sheriff or other officer, for the taking of

any popish recusant, standing excommunicated for such recusancy, it shall be lawful, if need be, to break any house. 2 *Hawk*. 87.

But it hath been resolved, that where justices of peace are by virtue of a statute, authorised to require persons to come before them to take certain oaths prescribed by such statute, the officer cannot lawfully break open the doors. 2 *Hawk*. 87.

Cunningham Law Dictionary, vol. I, unpaginated.

6.3.1.6Blackstone, 1768, 1769

An *arrest* must be by corporal seising or touching the defendant's body; after which the bailiff may justify breaking open the house in which he is, to take him: otherwise he has no such power; but must watch his opportunity to arrest him. For every man's house is looked upon by the law to be his castle of defence and asylum, wherein he should suffer no violence. Which principle is carried so far in the civil law, that for the most part not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls. Peers of the realm, members of parliament, and corporations, are privileged from arrests … .

…

First then, of an *arrest:* which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable to all criminal cases: but no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken. And, in general, an arrest may be made in four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private person also without warrant: 4. By an hue and cry.

1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state[a]; but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence; in order to compel the person accused to appear before them[b]: for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. Sir Edward Coke

indeed[c] hath laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found; and the contrary practice is by others[d] held to be grounded rather upon connivance, than the express rule of law; though now by long custom established. A doctrine, which would in most cases give a loose to felons to escape without punishment; and therefore sir Matthew Hale hath combated it with invincible authority, and strength of reason: maintaining, 1. That a justice of peace hath power to issue a warrant to apprehend a person *accused* of a felony, though not yet *indicted*[e]; and 2. That he may also issue a warrant to apprehend a person *suspected* of a felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well as to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed[f]. This warrant ought to be under the hand and seal of justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the constable, or other peace officer, requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a *special* warrant[g]. A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it's [*sic*] uncertainty[h]; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons guilty of a crime therein specified, is no legal warrant: for the point, upon which it's [*sic*] authority rests, is a fact to be decided on a subsequent trial; namely whether the person apprehended thereupon be really guilty or not. It is therefore in fact no warrant at all: for it will not justify the officer who acts under it[i]; whereas a lawful warrant will at all events indemnify the officer, who executes the same ministerially. When a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief, or other, justice of the court of king's bench extends all over the kingdom: and is *teste*'d, or dated, *England*; but not Oxfordshire, Berks, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly

speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55.

2. Arrests by *officers*, *without warrant*, may be executed, 1. By a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence[k]. 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke[l], hath great original and inherent authority with regard to arrests. He may, without warrant, arrest anyone for a breach of the peace, and carry him before a justice of the peace. And, in case of a felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrest, it is murder in all concerned[m]. 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4. to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning[n].

3. Any private person (and *a fortiori* a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon; on pain of fine and imprisonment, if he escapes through the negligence of the standers by[o]. And they may justify breaking open doors upon following such felon: and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavouring to make such an arrest, it is murder[p]. Upon probable suspicion also a private person may arrest the felon, or other person so suspected[q], but he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more[r]. It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an *hue* and *cry* raised upon a felony committed. An hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the

old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another[s]. It is also mentioned by statute Westm. I. 3 Edw. I. c. 9. and 4 Edw. I. *de officio coronatoris*. But the principal statue [*sic*], relative to this matter, is that of Winchester, 13 Edw. I. c. 1 & 4. which directs, that from thenceforth every country shall be so well kept, that, immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff . …

Blackstone Commentaries, bk. 3, ch. 19; vol. 3, pp. 288–89; bk. 4, ch. 21, vol. 4, pp. 286–90.

6.3.2 CASE LAW

6.3.2.1SEMAYNE'S CASE, 1604

Semayne's Case.

Mich. 2. Jac. 1.

In the King's Bench.

[S. C. Cro. Eliz. 908. 1 Sm. L. C. (11th ed. 1905), 104. See *Harvey* v. *Harvey*, 1884, 26 Ch. D. 651; *Hodder* v. *Williams* [1895], 2 Q. B. 666.]

Resolved:—1. The house of every one is his castle, and if thieves come to a man's house to rob or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is no felony and he shall lose nothing.

2. Where any house is recovered by any real action, or by *eject. firmae*, the sheriff may break the house and deliver the seisin or possession.

3. In all cases where the King is party, the sheriff may break the house, either to arrest or do other execution of the King's process, if he cannot otherwise enter. But he ought first to signify the cause of his coming, and make request to open the doors.

4. Where the door is open the sheriff may enter, and do execution at the suit of a subject, and so also in such case may the lord, and distrain for his rent or service.
It is not lawful for the sheriff, on request made and denial, at the suit of a common person, to break the defendant's house, *scil*. to execute any process at the suit of a subject.
5. The house of any one is only a privilege for himself, and does not extend to protect any person who flies to his house, or the goods of any other which are brought there, to prevent a lawful execution and to escape the process of the law: in such cases after request and denial, the sheriff may break the house.
6. If the sheriff might break open the door to execute civil process, yet it must be after request made.
7. The allegation *praemisorum non ignarus* is not sufficient, where notice is material. S. C. [Moor, 668. Yelv. 28. Cro. Eliz. 908]. *Vide* the entry, Co. Ent. 12. pl. 11.

In an action on the case by Peter Semayne, plaintiff, and Richard Gresham, defendant, the case was such; the defendant and one George Berisford were joint-tenants of a house in Blackfriars in London for years. George Berisford acknowledged a recognizance in the nature of a statute-staple to the plaintiff, and being possessed of divers goods in the said house died, by which the defendant was possessed of the house by survivorship, in which the goods continued and remained; the plaintiff sued process of extent on the statute to the sheriffs of London; the sheriffs returned the conusor dead, on which the plaintiff had another writ to extend all the lands which he had at the time of the statute acknowledged, or at any time after, and all his goods which he had at the day of his death; which writ the plaintiff delivered to the sheriffs of London, and told them that divers goods, which were the said George Berisford's at the time of his death, were in the said house; and thereupon the sheriffs, by virtue of the said writ, charged a jury to make inquiry according to the said writ, and the sheriffs and jury *accesserunt ad domum praedictam ostio domus praedict' aperto existen' et bonis praedictis in praedicta domo tunc existen'*, and they offered to enter the said house, to extend the [91 b] goods according to the said writ; and the defendant *praemissorum non ignarus*, intending to disturb the execution, *ostio praed' domus tunc aperto existen', claudebat contra vicecom' & jurator' praed';* whereby they could not come, and extend the said goods, nor the sheriff seize them, by which he lost the benefit and profit of his

writ, &c. And in this case these points were resolved.

1. That the house of every one is to him as his (a) castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills (b) one *per infortun'*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels,(A) for the great regard which the law has to a man's life; but if thieves come to a man's (c) house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing (B), and therewith agree 3 E. 3. Coron. 303, & 305. & 26 Ass. pl. 23. So it is held in 21 H. 7. 39. every one may assemble his friends and neighbours (d) to defend his house against violence: but he cannot assemble them to go with him to the market, (e) or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium*.[1]

2. It was resolved, when any house is recovered by any real action, or by *eject' firmae*, the sheriff may break the house and deliver the seisin or possession to the demandant or pl. for the words of the writ are, *habere facias seisinam*, or *possessionem*, *&c*. and after judgment it is not the house in right and judgment of law of the tenant or defendant.

3. In all cases when the King (f) is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors (C); and that appears well by the stat. of Westm. 1. c. 17. (which is but an affirmance of the common law) as hereafter appears, for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 E. 2. (a) Execut. 252. where it is said, that the K.'s officer who comes to do execution, &c. may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them, 7 E. 3. (b) 16. J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J. retreats into the house of T. they who pursue him (D), if the house be kept and defended with force (which proves that first request ought **[92 a]** to be made) may lawfully break the house of T. for it is at the

K.’s suit. 27 Ass. p. 66. the K.’s bailiff may distrain for issues (c) in a sanctuary. 27 (28) Ass. p. 35. by force of a *capias* on an indictment of trespass the sheriff may (d) break his house to arrest him; but in such case, if he breaks the house when he may enter without breaking it (that is, on request made, or if he may open the door without breaking), he is a trespasser, 41 Ass. 15. on issue joined on a traverse of an office in Chancery, *venire facias* was awarded returnable in the King’s Bench, without mentioning *non* (a) *omittas propt’ aliquam libertat’;* yet forasmuch as the K. is party, the writ of itself is *non omittas propl’ aliquam libertat’*, 9 E. 4. 9. (E) for felony (b) or suspicion of felony, the K.’s officer may break (F) the house to apprehend the felon, and that for two reasons: 1. For the commonwealth, for it is for the commonwealth to apprehend felons. 2. In every felony the King has interest, and where the King has interest the writ is *non omittas propter aliquam libertatem;* and so the liberty or privilege of a house doth not hold against the King.[2]

4. In all cases when the door is (c) open the sheriff may enter the house, and do execut. at the suit of any subject, either of the body, or of the goods (G); and so may the lord in such case enter the house (d) and distrain for his rent or service, 38 H. 6. 26. a. 8 E. 2. Distr. 21 & 33 E. 3. Avow. 256. the lord may distrain in the house, although lands are also held in which he may distrain. *Vule* 29 (e) Ass. 49. But the great question in this case was, if by force of a *capias* or *fieri facias* at the suit of the party the sheriff after request made to open the door, and denial made, might break the defendant’s house to do execut. if the door be not opened. And it was objected, that the sheriff might well do it for divers causes: 1. Because it is by process of law; and it was said, that it would be granted on the other side, that a house is not a liberty, for if a *fieri fac*. or a *capias* be awarded to the sher. at the suit of a common person, and he makes a mandate to the bailiff of a liberty who has return of writs, who *nullum dedit respons*. in that case another writ shall issue with *non omittas propter aliquam libertat’* (H); yet it will be said on the other side that he shall not break the defendant’s house, as he shall do of another liberty; for whereas in the county of Suffolk there are two liberties, one of St. Edmund Bury, and the other of St. Etheldred of Ely, suppose a *capias* comes at the suit of A., to the Sheriff of Suffolk to arrest the body of B. the sheriff makes a mandate to the bailiff of the liberty of St. Etheldred, who makes no answer, in that case the plaintiff shall have a writ of *non omittas*, and by force thereof he may arrest the defend. within the liberty of Bury, although no default was in him: 2. Admitting it to be a liberty, the defendant himself shall never take

advantage of a liberty: as **[92 b]** if the bailiff of a liberty be def. in any action, and process of *cap'* or *fieri fac'* comes to the sher. against him, the sheriff shall execute the process against him; for a liberty is always for the benefit of a stranger to the action. 3. For necessity the sheriff shall break the defendant's house after such denial as is aforesaid, for at the common law a man should not have any execut. for debt, but only of the defendant's goods. Suppose then the def. would keep all his goods in his house, and so the def. himself by his own act would prevent not only the pl. of his just and true debt, but there would also be a great imputation to the law, that there should be so great a defect in it, that in such case the pl. by such shift without any default in him should be barred of his execut. And the book in 18 E. 2. (a) Execut. 252. was cited to prove it where it is said, that it is not lawful for any one to disturb the King's officer, who comes to execute the K.'s process; for if a man might stand out in such manner, a man would never have execution, but there it appears (as has been said) that there ought to be request made before the sheriff breaks the house. 4. It was said, that the sheriffs were officers of great authority, in whom the law reposed great trust and confidence, and are to be of sufficiency to answer for all wrongs which should be done; and they had *custodiam comitat'*, and therefore it should not be presumed that they would abuse the house of any one by colour of doing their office in execution of the King's writs against the duty of their office, and their oath also: but it was resolved, that it is not lawful for the sher. (on request made and denial) at the suit of a (b) common person, to break the defendant's house, *sc*. to execute any process at the suit of any subject; for thence would follow great inconvenience that men as well in the night (c) as in the day should have their houses (which are their castles) broke, by colour, whereof great damage and mischief might ensue; for by colour thereof, on any feigned suit, the house of any man at any time might be broke when the defendant might be arrested elsewhere, and so men would not be in safety or quiet in their own houses? And although the sheriff be an officer of great authority and trust, yet it appears by experience, that the King's writs are served by bailiffs, persons of little or no value: and it is not to be presumed, that all the substance a man has in his house, nor that a man would lose his liberty, which is so inestimable, if he has sufficient to satisfy his debt. And all the said books, which prove, that when the process concerns the King, that the sheriff may break the house, imply that at the suit of the party, the house may not be broken: otherwise the addition (at the suit of the King) would be frivolous. And with this resolution agrees the book in (d) 13 E. 4. 9. and the express

difference there taken between the case of felony, which (as has been said) concerns the commonwealth, and the suit **[93 a]** of any subject, which is for the particular interest of the party, as there it is said in (e) 18 El. 4. 4. a. by Littleton and all his companions it is resolved, that the sheriff cannot break the defendant's house by force of a *fieri facias*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good. And it was said, that the said book of (a) 18 E. 2. was but a short note, and not any case judicially adjudged, and it doth not appear at whose suit the case is intended, but it is an observation or collection (as it seems) of the reporter. And if it be intended of a *quo* (b) *minus* or other action in which the King is party, or is to have benefit, the book is good law.[3]

5. It was resolved, that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any (c) person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases after denial on request made, the sheriff may break the house (I); and that is proved by the stat. of West. 1. c. (d) 17. by which it is declared, that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him conveyed to his house or castle, to prevent the owner to have a replevin of his goods: which Act is but an affirmance of the common law in such points. But it appears there, that before the sheriff in such case breaks the house, he ought to demand the goods to be delivered to him for the words of the statute are, After that the cattle shall be solemnly demanded by the sheriff's, &c.[4]

6. It was resolved, admitting that the sheriff after denial made might have broke the house, as the plaintiff's counsel pretend he might, then it follows that he has not done his (e) duty, for it doth not appear, that he made any request to open the door of the house. Also the defendant, as this case is, has done that which he might well do by the law, *scil*. to shut the door of his own house.[5]

Lastly, the general allegation, (f) *praemisorum non ignarus*, was not sufficient in this case where the notice of the premises is so material; but in this case it ought to have been certainly, and directly alledged; for without notice of the process of law, and of the coming of the sheriff with the jury to execute it, the shutting of the door of his own house was lawful. And

judgment was given against the plaintiff.[6]

Coke’s Reports, vol. 5, p. 91a; English Reports, vol., 77, p. 194.

6.3.2.2The King v. Dr. Purnell, 1748

The defendant was vice chancellor of Oxford; and the Attorney-General had ex officio exhibited against him an information, for not taking the deposition of Blacow the evidence [*sic*], and for neglect of his duty both as vice chancellor and justice of the peace, in not punishing Whitmore and Dawes, who had spoken treasonable words in the streets of Oxford. The defendant appeared to the first information, upon which a noli prosequi was entered, and a second filed, to which also the defendant appeared and pleaded; and a trial at Bar was appointed November 21, but it was countermanded, and a new day, *viz.* February 6th was afterwards appointed. And now the last day of the term, the attorney, without any affidavit, moved for a rule directed to the proper officers of the university to permit their books, records and archives to be inspected, in order to furnish evidence against the vice chancellor. This was moved as a motion of course for a preemptory rule, on a suggestion that the King, being visitor of the university, had a right to inspect their books whenever he thought proper. Notice of the motion was however given the night before at nine o’clock, and it was opposed by Henley and Evans. And the Court, being of opinion it was not a preemptory motion, only granted a rule to shew cause.

In the next term, Mr. Wilbraham, standing counsel for the university, shewed cause. That the rule was made on no affidavit: that it was drawn in very general terms, (to inspect books, records, and archives).—Records, if any, may be seen elsewhere. Archives cannot be inspected but by a figure, continens pro contenta. But this is a case of too much concern, to stand upon form. The principal case is, whether on a prosecution of a public officer for a supposed misdemeanor, the Court ought to grant inspection of the public books of a corporation. The rule is on Dr. Purnell himself. Nemo tenetur seipsum accusare. The law will not tempt a man to make shipwreck of his conscience, in order to disculpate himself. In Chancery, a man may demur, if on the face of the bill it appears, that the matter to be discovered will affect the defendant in a criminal way. It will be said, the Court usually grants rules to inspect public books. True, but then it is usually when franchises are contested, and the like; when inspection of those books are

the only evidence, and the corporation are considered only as trustees, just as lords of manors are, of the public evidences belonging to the manor. But in no case has the Court ever interposed in a criminal prosecution to grant such a rule, and force such inspection. Many indeed have been granted to inspect poor's rates; but those are public evidences which every body has a right to do. Was there never any prosecution carried on with the same spirit as this? Why then are no examples produced? By the same reason every person indicted might be obliged to shew, whether he had any evidence against himself. In *Bradshaw qui tam* v. *Philips*, a.d. 1735, in an action for bribery, motion was, to inspect the books of a corporation, to prove the defendant a freeman. Hardwick, C.J., denied the rule, because the plaintiff was a stranger. This case is much stronger. It is a precedent of the first impression. There seems to be a general want of evidence; but it is to be hoped, there is no other view than for evidence in this particular case. A hundred cases may be shewn where such rules have been granted in quo warranto's, &c. but none in criminal cases. [The Attorney "mentioned *K. and Burkins*, 7 Geo. 1, which was an indictment at a borough sessions, removed into B. R. by certiorari. Court said, the defendant might have a rule on the clerk of the peace, to have a copy of the names on the back of the indictment."] This is by no means a case. The indictment is a public record; he might have had it without a rule … .

Mr. Henley on the same side.—This is a rule of the greatest importance to the most respectable body in the nation. It gives authority to the lowest agent of the Crown to rummage the MSS. of the university. One rule, in applications of this kind, is, that the person applying has an interest in the books and papers, so that in justice he is at all times entitled to have recourse to them. Another, that the person in possession is a trustee for the person applying (as a lord of a manor &c.), and then the trust must be the subject in dispute; the suit must be about land in the manor, and averred by affidavit so to be. So corporations are the trustees and repository of the common franchise has been disputed, as on a mandamus or quo warranto. The present rule is on an information against an individual of the university, and therefore desires to inspect the records of the university. By the parity of reason, on an indictment against a citizen of London, they might inspect the records of the city. But it is suggested, that the King is visitor, and therefore entitled to a rule. I question the fact. The Court will require to be well satisfied of that. But if so, 'tis a strong reason against granting the rule, for then the Crown may enforce its demand in a visitatorial way. Suppose the Crown has a general interest in the books of a corporation; that will not

entitle them to an inspection, except the books are the subject of the dispute. *Crew qui tam and Blackburn*, H. 8 G. 2, an action for interfering in elections of members of Parliament, being a clerk of the post-office: the Court would not grant a rule to inspect the post-office books (though public books), because the cause did not concern them. *Benson and Cole*, M. 22 G. 2; motion to inspect Custom-House books, to prove the plaintiff in an insurance cause had no interest: urged that they were public books: refused, because they were not the subject of dispute. These were civil actions; the present otherwise. The avowed design of this motion being to furnish evidence, some precedent will be necessary; especially as a very bad use may be made of such a rule, when the university is much out of favour with some people.

Mr. Ford, on the same side.—*The College of Physicians* v. *Dr. West*, H. 2 G. 1; action for practising sans license; motion to inspect the public books of the college; denied, because the defendant is a stranger to the college. *Cox and Copping*, 5 Mod. 395; dispute about the glebe: Court would not grant rule to inspect the churchwardens' books; because it was a private dispute. There is no reason to grant this inspection, because the vice-chancellor is a justice. Is it because he is a vice-chancellor? Why? Not on account of his supposed visitatorial power; for in *Dr. Walker's case*, the Court quashed a rule because they would not take upon themselves to act the part of visitors. The Court will not assist visitors, but only in support of their visitatorial authority. The visitatorial authority is not now in question; the vice-chancellor is prosecuted for a supposed offence at common law. If a witness has a question put him that may affect himself, the Court will not oblige him to answer it. *Qu. and Mead*, 2 Lord Raym. 927; defendant was an attorney, and with others incorporated by Act of Parliament as surveyors of highways, &c. Action against him, for not talking the oaths to qualify. Motion to inspect the corporation books; but denied, because they would not force a man to produce evidence against himself. *K. and Lee*, M. 17 G. 2; information against defendant as overseer, for making rate without churchwardens. Rule obtained by surprise, to inspect papers: not obeyed. Motion against Lee for attachment. Lee C.J., cited *Bradshaw and Philips;* Court refused to grant attachment, enlarged the rule, and it was dropped. The *K. and Burkins* only shews the tenderness which the Court always shews for persons under prosecution, and was to let him know his accusers. If the present defendant has evidence in his custody, and refuses to obey the rule, an attachment must issue; which would be as strange, as to grant one against a man, for not confessing his crime.

Mr. Evans on the same side.—Had this been an information for exercising the office of vice-chancellor, motion might have been regular. In ecclesiastical jurisdictions, they used to compel a man to furnish evidence against him: but by Stat. Car. 2. oaths ex officio are taken away. On indictment for coining, the attorney might as well move, to have a prisoner discover all his correspondence. 'Tis true, the crimes are less, and the punishment less; but the barrier of liberty is the same. If this rule be granted, the Court of K. B. would be no longer a Court of Justice, but an aid to an inquisition of State. This Court sits to hear, not to furnish evidence.

Mr. Morton, on the same would not repeat.

Ryder, Attorney General, in support of the rule. This prosecution is out of favour to the university; to keep up a spirit of religion and loyalty there. Hard, that the university should interest themselves, to vindicate a member of their body that is under prosecution. If the prosecution be just, or unjust, it cannot hurt the university. Motion relates only to the public records, not the MSS. letters, &c. therefore cannot be so prejudicial as is represented. The intent is to see the statutes of the university, to which the motion shall be confined. The information is for not taking depositions against an enormous crime, as vice-chancellor. The Court grants motions of course to inspect public books. It is as reasonable that public records should be produced for public justice, as private papers for private justice. It is not desired that the vice-chancellor but the public officer should produce them: should he prove to be the public officer, that is no reason against the motion; for it does not respect him as defendant, but as public officer. The public is interested in the university statutes. We do not apply on behalf of the King as visitor, but as guardian of the public peace. In *K. and Blackburn*, there was a rule of this kind made in a penal prosecution; a rule on a public officer, keeping a public record, for an inspection in a criminal prosecution. Informations in nature of quo warranto are public and criminal suits. There, rules of this sort are frequent. The case of *Bradshaw and Philips* was not of a public nature. *K. and Blackburn;* post-office books are not public, but the King's private books. *Benson and Cole*; same answer. As to the case of *College of Physicians*, that was the case of plaintiffs, and the Court will not compel the plaintiff to produce evidence against himself. In *The Qu. and Mead*, the books were of a private nature, and it appeared that the defendant was the person who kept the books. In *The K. and Lee*, it was plain, that the defendant was himself the person against whom the rule is to be made. Not so here; the vice-chancellor is not the person on whom

the rule is to be made.

[Hereupon Mr. Henley suggested, that the vice-chancellor had the custody of the original statutes.]

Sir John Strange for the Crown.—Affidavits are not usual in such cases. In the case of *The Skinners' Company*, the clerk refused to grant inspection, and an attachment was granted; but it was argued, whether the papers required were proper to be seen, and the Court held that they were. So here, if any thing improper be demanded, the inspection may be refused. Strange, that the university should conceal their statutes; since they are of so public a nature, that all the youth there entered, take oaths to observe them, and yet they are secreted from them. The Crown is the founder and lawgiver of the university, and such has a right to inspect those laws.

[Lee, C.J.—I apprehend this case is argued to differ from all others (as qui tam actions, &c.) because in those the party applying is a stranger; but that in the present case the King is no stranger, because he is founder. But how does that appear? Another question; is there any instance of an information against an officer of a corporation for breach of by-laws, and a rule granted to inspect those by-laws?]

Murray, Solicitor-General for the Crown.—Four necessary requisites for inspections of this kind. First, that they be public books. Second, that the party applying has an interest in them. Third, that they be material in a suit in this Court. Fourth, that the person in possession be forced to discover nothing to charge himself criminally.—First, these are of a public nature, given by the King, and open to all members of university. The very youngest have a copy given them at their matriculation. Second, the King has an interest; he gave them, and has an interest in seeing them obeyed; and may enforce that obedience two ways; as visitor, and as King, where an offence at common law is mixed with the breach of them. Third, there is a suit in this Court, and the statutes may be material; and, if it is suggested that they will be so, the Court will grant the rule. Fourth, the objection is, that in criminal suits no one is bound to furnish evidence against himself. Agreed, but a distinction may be made. When a man is magistrate, and as such has books in his custody; his having the office shall not secrete those books, which another vice-chancellor must have produced. Besides, the statutes are not in the vice-chancellor's custody only, but also in the hands of the custos archivorum.

Sir R. Lloyd, on the same side.—The university is not accused; the university may therefore very safely produce their books. The King is as

much related to the Corporation of the University of Oxford, as to that of the City of York, and no more a stranger to one than the other. It is hoped, that the King is no stranger to either university. If a man were to be indicted for burning the records of a corporation; no doubt but such rule would then be granted, and why not now? Per Lee, C.J.—This is quite a new case. There is no precedent to warrant it, I therefore chuse to consider of it.

Afterwards, Lee C.J., delivered the opinion of the Court. This rule has been much narrowed, since it was first moved by Mr. Attorney. But still we are all of opinion, that we cannot, consistently with the rules of this Court, make such a rule. We ground ourselves on what has been done in similar cases, though none so strong as this. No case has been cited to support this application, but *The K. and Burkin*, which is not apposite. The clerk of the peace ought ex officio to have given a copy of the indictment, and the Court would have granted a rule on him to do it. The cases which we apprehend to be close to this are 1st. *Qu. and Mead*, 2 Ann. Ld. Raym. 927. The reasons for denying the motion were, because, 1. The books were of a private nature. 2. Granting such rule would be to make a man produce evidence against himself, in a criminal prosecution. The second case is *The K. and Cornelius and Others, Justices of Ipswich*, T. 17 & 18 Geo. 2, an information for exacting money from persons for licensing ale houses: a motion to inspect the corporation-books; cause was shewn against it by Sir J. Strange and Sir R. Lloyd. The Court on consideration were of opinion, that the rule could not be granted; as it was in a criminal proceeding, and it tended to make the defendants furnish evidence against themselves. These cases are very similar, only the present is rather stronger; because the information here is for a breach of and crime against the laws of the land, and this is an application to search books, which relate to the defendant's behaviour, as a nature of quo warranto; because these; [*sic*] concern franchises, whereof the corporation books are the proper and only evidence, and they concern the Crown and the defendants equally. We know no instance, wherein this Court has granted a rule to inspect books in a criminal prosecution nakedly considered.

The rule was discharged per totam Curiam.

"N.B. As the university statute-book really contains nothing which could affect the merits of this case in any degree; and as (if it had) printed copies of it are very numerous and easy to be met with; and the custos archivorum, in whose keeping the original is, might have been compelled to have attended with it at the trial: this extraordinary motion seemed only to have

been intended, as an excuse for dropping a prosecution, which could not be maintained: and it was accordingly dropped immediately after, having cost the defendant to the amount of several hundred pounds."

96 Eng. Rep. 20 (K.B. 1748).

6.3.2.3Writs of Assistance

6.3.2.3.aCharles Paxton's Plea for Writ of Assistance, 1755

To the Honourable Majestys Justices of his Superior Court for said Province to be held at York in and for the County of York on the third Tuesday of June 1755.

HUMBLEY SHEWS Charles Paxton Esqr: That he is lawfully authorized to Execute the Office of Surveyor of all Rates Duties and Impositions arising and growing due to his Majesty at Boston in this Province & cannot fully Exercise said Office in such Manner as his Majestys Service and the Laws in such Cases Require Unless Your Honours who are vested with the Power of a Court of Exchequer for this Province will please to Grant him a Writ of Assistants under the Seal of this Superior Court in Legal form & according to Usage in his Majestys Court of Exchequer & in Great Britain, & your Petitioner &Ca: "CHAS PAXTON"

…

UPON READING the petition of Charles Paxton Esquire wherein he shewed that he is lawfully authorized to execute the office of Surveyor of all Rates Duties and Impositions arising & growing due to his majesty at Boston in this Province, and could not fully exercise said office in such manner as his Majestys Service and the Laws in such cases require, unless said Court who are vested with the power of a Court of Exchequer for this province would grant him a writ of Assistants, he therefore prayed that he and his Deputies might be aided in the Execution of said office with his District by a writ of Assistants under the Seal of Said Court in Legal form and according to Usage in his Majestys Court of Exchequer & in Great Britain. Allowed, and Tis Ordered by said Court that a writ be issued as prayed for.

1761–72 Quincy's Reports (Mass.), pp. 402–03.

6.3.2.3.bJohn Adams' Report of Argument, 1761

GRIDLEY.—The Constables distraining for Rates, more inconsistent with

Eng. Rts. & liberties than Writts of assistance. And Necessity, authorizes both.

Thatcher. I have searched, in all the ancient Repertories, of Precedents, in Fitzherberts Natura Brevium, and in the Register (Q. w^{t} y^{e} Reg. is) and have found no such Writt of assistance as this Petition prays.—I have found two Writts of ass. in the Reg. But they are very difft, from y^{e} Writt prayd for.—

In a Book, intitled the Modern Practice of the Court of Exchequer there is indeed one such Writt, and but one.

By y^{e} Act of Pal^{t}. any other private Person, may as well as a Custom House Officer, take an officer, a Sheriff, or Constable, &c and go into any Shop, Store &c & seize: any Person authorized by such a Writt, under the Seal of the Court of Exchequer, may, not Custom House Officers only.—Strange.—Only a temporary thing.

The most material Question is, whether the Practice of the Exchequer, will warrant this Court in granting the same.

The Act impowers all the officers of y^{e} Revenue to enter and seise in the Plantations, as well as in England. 7. & 8 W^{m} 3, C. 22, § 6, gives the same as 13. & 14. Of C. Gives in England. The Ground of M^{r} Gridleys arg^{t} is this, that this Court has the Power of the Court of Exchequer.—But This Court has renounced the Chancery Jurisdiction, w^{h} the Exchequer has in Cases where either Party, is y^{e} Kings Debtor.—Q. Into y^{t} Case.

In Eng. all Informations of uncusted or prohibited Importations, are in y^{e} Exchequer.—So y^{t} y^{e} Custom House officers are the officers of y^{t} Court.—under the Eye, and Direction of the Barons.

The Writ of Assistance is not returnable.—If such seisure were brot before your Honours, youd often find a wanton Exercise of their Power.

At home, y^{e} officers, seise at their Peril, even with Probable Cause.—

Otis. This Writ is against the fundamental Principles of Law.—The Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle—notwithstanding all his Debts, & civil processes of any Kind.—But

For flagrant Crimes, and in Cases of great public Necessity, the Priviledge may be incrohd on.—For Felonies an officer may break, upon Proscess, and oath.—i.e. by a Special Warrant to search such an House, sworn to be suspected, and good Grounds of suspicion appearing.

Make oath cor^{m} Ld. Trea^{er} or Exchequer, in Eng^{d} or a Magistrate here,

and get a Special Warrant, for y^e^ public good, to infringe the Priviledge of House.

Gen^l^ Warrant to search for Felonies. Hawk. Pleas Crown.—every petty officer from the highest to y^e^ lowest, and if some of 'em are uncom others are uncomm. Gouv^t^ Justices used to issue such perpetual Edicts. (Q. with w^t^ particular Reference?)

But one Precedent, and y^t^ in y^e^ Reign of C. 2 when Star Chamber Powers, and all Powers but lawful & useful Powers were pushed to Extremity.—

The authority of this Modern Practice of the Court of Exchequer.—it has an Imprimatur.—But w^t^ may not have?—It may be owing to some ignorant Clerk of y^e^ Exchequer.

But all Precedents and this am'g y^e^ Rest are under y^e^ Control of y^e^ Principles of Law. Ld. Talbot. better to observe the Known Principles of Law y^n^ any one Precedent, tho in the House of Lords.—

As to acts of Parliament. an Act against the Constitution is void: an Act against natural Equity is void: and if any Act of Parliament should be made, in the very Words of this Petition, it would be void. The Executive Courts must pass such Acts into disuse—8. Rep. 118. from Viner.—Reason of y^e^ Com Law to control an Act of Parliament.—Iron Manufacture. noble Lord's Proposal, y^t^ we should send our Horses to Eng. To be shod.—

If an officer will justify under a Writ he must return it. 12th Mod. 396.—perpetual Writ.

Stat. C. 2. We have all as good Rt to inform as Custom House officers—& every Man may have a general, irreturnable Commission to break Houses.—

By 12. Of C. on oath before L^d^ Treasurer, Barons of Exchequer, or Chief Magistrate to break with an officer.—14th C. to issue a Warrant requiring sheriffs &c to assist the officers to search for Goods not entrd, or prohibitd; 7 & 8th W. & M. gives Officers in Plantations same Powers with officers in England.—

Continuance of Writts and Proscesses, proves no more nor so much as I grant a special Writ of ass. On special oath, for sped Purpose.—

Pew indorsd Warrant to Ware.—Justice Walley fearc'd House. Law Prov. Bill in Chancery.—this Court confined their Chancery Power to Revenue &c.

Gridley. By the 7. & 8 of W^m^ C. 22. § 6th—This authority, of breaking and entering Ships, Warehouses Cellars &c given to the Custom House

officers in England by the Statutes of the 12th and 14th of Charl. 2[d], is extended to the Custom House officers in y[e] Plantations:—and by the Statute of the 6th of Anne, Writts of Assistance are continued, in Company with all other legal Proscesses for 6 months after the Demise of the Crown. —Now what this Writ of assistance is, we can know only by Books of Precedents.—And we have produced, in a Book intituld the modern Practice of the Court of Exchequer, a form of such a Writ of assistance to the officers of the Customs. The Book has the Imprimatur of Wright C. J. of the K.'s B. w[h] is as great a sanction as any Books of Precedents ever have. altho Books of Reports are usually approved by all the Judges—and I take Brown the author of this Book to have been a very good Collector of Precedents.—I have two Volumes of Precedents of his Collection, w[h] I look upon as good as any, except Coke & Rastal.

And the Power given in this Writ is no greater Infringement of our Liberty than the Method of collecting Taxes in this Province.—

Every Body knows that the Subject has the Priviledge of House only against his fellow Subjects, not vs y[e] K. either in matters of Crime or fine.

1761–72 Quincy's Reports (Mass.), pp. 469–77.

6.3.2.4Huckle v. Money, 1763

…

Lord Chief Justice.—In all motions for new trials, it is as absolutely necessary for the Court to enter into the nature of the cause, the evidence, facts, and circumstances of the case, as for a jury; the law has not laid down what shall be the measure in damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and cicumstances; torts or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c. the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages. The few cases to be found in the books of new trials for torts, shews that Courts of Justice have most commonly set their faces against them; and the Courts interfering in these cases would be laying aside juries. Before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages.

I shall now state the nature of this case, as it appeared upon the evidence at the trial: a warrant was granted by Lord Halifax, Secretary of State, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the *North Briton*, Number 45, without any information or charge laid before the Secretary of State, previous to the granting thereof, and without naming any person whatsoever in the warrant; Carrington, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that Leech was the printer of the *North Briton*, Number 45, directed the defendant to execute the warrant upon the plaintiff, (one of Leech's journeymen,) and took him into custody for about six hours, and during that time treated him well; the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20l damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Charta, Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale judicium parium suorum vel per legem terrae, &c. which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages against the Solicitor-General's argument. Upon the whole, I am of opinion the damages are not excessive; and that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.

Bathurst J.—I am of my Lord's opinion, and particularly in the matter of

damages, wherein he directed the jury that they were not bound to certain damages. This is a motion to set aside 15 verdicts in effect; for all the other persons who have brought actions against these messengers have had verdicts for 200l in each cause by consent, after two of the actions were fully heard and tried. Clive J. absent.

Per Curiam.—New trial refused.

95 Eng. Rep. 768 (C.P. 1763).

6.3.2.5Wilkes v. Wood, 1763

… His Lordship then went upon the warrant, which he declared was a point of the greatest consequence he had ever met with in his whole practice. The defendants claimed a right, under precedents, to force persons houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.

And as for the precedents, will that be esteemed law in a Secretary of State which is not law in any other magistrate of this kingdom? If they should be found to be legal, they are certainly of the most dangerous consequences; if not legal, must aggravate damages. Notwithstanding what Mr. Solicitor-General has said, I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who were able to have given an account (which might have been an extenuation of their guilt) have produced none. It lays upon the jury to allow what weight they think proper to that part of the evidence. It is my opinion the office precedents, which had been produced since the revolution, are no justification of a practice in itself

illegal, and contrary to the fundamental principles of the constitution; though its having been the constant practice of the office, might fairly be pleaded in mitigation of damages.

He then told the jury they had a very material affair to determine upon, and recommended it to them to be particularly cautious in bringing in their verdict. Observed, that if the jury found Mr. Wilkes the author or publisher of No. 45, it will be filed, and stand upon record in the Court of Common Pleas, and of course be produced as proof, upon the criminal cause depending, in barr of any future more ample discussion of that matter on both sides; that on the other side they should be equally careful to do justice, according to the evidence; he therefore left it to their consideration.

The jury, after withdrawing for near half an hour, returned, and found a general verdict upon both issues for the plaintiff, with a thousand pounds damages.

After the verdict was recorded, the Solicitor-General offered to prefer a bill of exceptions, which the Lord Chief Justice refused to accept, saying it was out of time.

The Court sat at nine o'clock in the morning, and the verdict was brought in at twenty minutes past eleven o'clock at night.

98 Eng. Rep. 489, 498–99 (C.P. 1763).

6.3.2.6Rex v. Wilkes, 1763

…

Lord Chief Justice Pratt, after stating the warrant of commitment, said, there are two objections taken to the legality of this warrant, and a third matter insisted on for the defendant, is privilege of Parliament.

The first objection is, that it does not appear to the Court that Mr. Wilkes was charged by any evidence before the Secretaries of State, that he was the author or publisher of the *North Briton*, Number XLV. In answer to this, we are all of the opinion, that it is not necessary to state in the warrant that Mr. Wilkes was charged by any evidence before the Secretaries of State, and that this objection has no weight. Whether a justice of peace can, ex officio, without any evidence or information, issue a warrant for apprehending for a crime, is a different question: if a crime be done in his sight, he may commit the criminal upon the spot; but where he is not present, he ought

not to commit upon discretion. Suppose a magistrate hath notice, or a particular knowledge that a person has been guilty of an offence, yet I do not think it is a sufficient ground for him to commit the criminal; but in that case he is rather a witness than a magistrate, and ought to make oath of the fact before some other magistrate, who should thereupon act the official part, by granting a warrant to apprehend the offender, it being more fit that the accuser should appear as a witness than act as a magistrate. But that is not the question upon this warrant; the question here is, whether it is an essential part of the warrant that the information, evidence, or grounds of the charge before the Secretaries of State, should be set forth in the warrant? And we think it is not. *Thomas Rudyard's case*, 2 Vent. 22, cannot be applied to this case, for in the case of a conviction it is otherwise. It was said that a charge by witness was the ground of a warrant; but we think it not requisite to set out more than the offence, and the particular species of it. It may be objected, if this be good every man's liberty will be in the power of a justice of peace. But Hale, Coke, and Hawkins take no notice that a charge is necessary to be set out in the warrant. In the case of *The Seven Bishops* their counsel did not take this objection, which no doubt but they would have done if they had thought there had been any weight in it. I do not rely upon the determination of the Judges who then presided in the King's Bench. I have been attended with many precedents of warrants returned into the King's Bench; they are almost universally like this; and in *Sir William Wyndham's case*, 1 Stra. 2, 3, this very point before us is determined. And Hawkins, in his 2 Pl. Coron. 120, sect. 17, says, "It is safe to set forth that the party is charged upon oath; but this is not necessary; for it hath been resolved that a commitment for treason, or for suspicion of it, without setting forth any particular accusation, or ground of suspicion, is good;" and cites *Sir William Wyndham's case*, Trin. 2 Geo. Dalt. cap. 125. Cromp. 233 b.

The second objection is, that the libel ought to be set forth in the warrant in haec verba, or at least so much thereof as the Secretaries of State deemed infamous, seditious, &c. that the Court may judge whether any such paper ever existed, or if it does exist, whether it be an infamous and seditious libel or not. But we are all of a contrary opinion: a warrant of commitment for felony must contain the species of felony briefly, "as for felony for the death of J. S., or for burglary in breaking the house of J. S. &c.; and the reason is, because it may appear to the Judges upon the return of an habeas corpus, whether it be felony or not." The magistrate forms his judgment upon the writing, whether it be an infamous and seditious libel or not, at his

peril, and perhaps the paper itself may not contain the whole of the libel; inuendoes may be necessary to make the whole out; there is no other word in the law but libel whereby to express the true idea of an infamous writing; we understand the nature of a libel as well as a species of felony; it is said the libel ought to be stated, because the Court cannot judge whether it is a libel or not without it; but that is a matter for the Judge and jury to determine at the trial. If the paper was here, I should be afraid to read it. We might perhaps be able to determine that it was a libel, but we could not judge that it was not a libel, because of inuendoes, &c. It may be said, that without seeing the libel we are not able to fix the quantum of the bail; but in answer to this, the nature of the offence is known by us; it is said to be an infamous and seditious libel, &c.: it is such a misdemeanor as we should require good bail for, (moderation to be observed,) and such as the party may be able to procure.

The third matter insisted upon for Mr. Wilkes is, that he is a member of Parliament, (which has been admitted by the King's Serjeants,) and entitled to privilege to be free from arrests in all cases except treason, felony, and actual breach of the peace, and therefore ought to be discharged from imprisonment without bail; and we are all of opinion that he is entitled to that privilege, and must be discharged without bail. In the case of *The Seven Bishops* the Court took notice of the privilege of Parliament, and thought the bishops would have been entitled to it if they had not judged them to have been guilty of a breach of the peace; for three of them, Wright, Holloway, and Allybone, deemed a seditious libel to be an actual breach of the peace, and therefore they were ousted of their privilege most unjustly. If Mr. Wilkes had been described as a member of Parliament in the return, we must have taken notice of the law of privilege of Parliament, otherwise the members would be without remedy where they are wrongfully arrested against the law of Parliament; we are bound to take notice of their privileges, as being part of the law of the land. 4 Inst. 25 says, the privilege of Parliament holds unless it be in three cases, *viz.* treason, felony, and the peace; these are the words of Coke. In the trial of *The Seven Bishops* the word peace, in this case of privilege, is explained to mean where surety of the peace is required. Privilege of Parliament holds in informations for the King, unless in the cases before excepted; the case of an information against Lord Tankerville for bribery, 4 Annae, was within the privilege of Parliament. See the resolution of the Lords and Commons, anno 1675. We are all of opinion that a libel is not a breach of the peace: it tends to the breach of the peace, and that is the utmost. 1 Lev. 139. But that which only

tends to the breach of the peace cannot be a breach of it. Suppose a libel be a breach of the peace, yet I think it cannot exclude privilege, because I cannot find that a libeller is bound to find surety of the peace, in any book whatever, nor ever was, in any case, except one, *viz.* the case of *The Seven Bishops*, where three Judges said, that surety of the peace was required in the case of a libel: Judge Powell, the only honest man of the four Judges, dissented, and I am bold to be of his opinion, and to say that case is not law; but it shews the miserable condition of the State at that time. Upon the whole, it is absurd to require surety of the peace or bail in the case of a libeller, and therefore Mr. Wilkes must be discharged from his imprisonment: whereupon there was a loud huzza in Westminster-Hall. He was discharged accordingly.

95 Eng. Rep. 737 (C.P. 1763).

6.3.2.7Entick v. Carrington, 1765

Lord Chief Justice.—I shall not give any opinion at present, because this case, which is of the utmost consequence to the public, is to be argued again; I shall only just mention a matter which has slipped the sagacity of the counsel on both sides, that it may be taken notice of upon the next argument. Suppose a warrant which is against law be granted, such as no justice of peace, or other magistrate high or low whomsoever, has power to issue, whether that magistrate or justice who grants such warrant, or the officer who executes it, are within the stat. 24 Geo. 2, c. 44? To put one case (among an hundred that might happen); suppose a justice of peace issues a warrant to search a house for stolen goods, and directs it to four of his servants, who search and find no stolen goods, but seize all the books and papers of the owners of the house, whether in such a case would the justice of peace, his officers or servants, be within the Stat. 24 Geo. 2? I desire that every point of this case may be argued to the bottom; for I shall think myself bound, when I come to give judgment, to give my opinion upon every point in the case.

… [Counsel made their arguments.]

Curia.—The defendants make two defences; first, that they are within the stat. 24 Geo. 2, c. 44; 2dly, that such warrants have frequently been granted by Secretaries of State ever since the Revolution, and have never been controverted, and that they are legal; upon both which defences the

defendants rely.

A Secretary of State, who is a Privy Counsellor, if he be a conservator of the peace, whatever power he has to commit is by the common law: if he be considered only as a Privy Counsellor, he is the only one at the board who has exercised this authority of late years; if as a conservator, he never binds to the peace; no other conservator ever did that we can find: he has no power to administer an oath, or take bail; but yet it must be admitted that he is in the full exercise of this power to commit, for treason and seditious libels against the Government, whatever was the original source of that power; as appears from the cases of *The Queen and Derby*, *The King and Earbury*, and *Kendale and Roe's case*.

We must know what a Secretary of State is, before we can tell whether he is within the stat. 24 Geo. 2, c. 44. He is the keeper of the King's signet wherewith the King's private letters are signed. 2 Inst. 556. Coke upon Articuli Super Chartas, 28 Ed. 1. Lord Coke's silence is a strong presumption that no such power as he now exercises was in him at that time; formerly he was not a Privy Counsellor, or considered as a magistrate; he began to be significant about the time of the Revolution, and he grew great when the princes of Europe sent ambassadors hither; it seems inconsistent that a Secretary of State should have power to commit, and no power to administer an oath, or take bail; who can commit and not have power to examine? the House of Commons indeed commit without oath, but that is nothing to the present case; there is no account in our law-books of Secretaries of State except in the few cases mentioned; he is not to be found among the old conservators; in Lambert, Crompton, Fitzherbert, &c. nor is a Privy Counsellor to be found among our old books till *Kendall and Roe's case*, and 1 Leon. 70, 71, 29 Eliz. is the first case that takes notice of a commitment by a Secretary of State; but in 2 Leon. 175 the Judges knew no such committing magistrate as the Secretary of State. It appears by the Petition of Right, that the King and Council claimed a power to commit; if the Secretary of State had claimed any such power, then certainly the Petition of Right would have taken notice of it; but from its silence on that head we may fairly conclude he neither claimed nor had any such power; the Stat. 16 Car. 1, for regulating the Privy Council, and taking away the Court of StarChamber, binds the King not to commit, and in such case gives a habeas corpus; it is strange that House of Commons should take no notice of the Secretary of State, if he then had claimed power to commit. This power of a Secretary of State to commit was derivative from the

commitment per mandatum Regis: Ephemeris Parliamentaria. Coke says in his speech to the House, “If I do my duty to the King, I must commit without shewing the cause;” 1 Leon. 70, 71, shews that a commitment by a single Privy Counsellor was not warranted. By the Licensing Statute of 13 & 14 Car. 2, cap. 33, sec. 15, licence is given to a messenger under a warrant of the Secretary of State to search for books unlicensed, and if they find any against the religion of the Church of England, to bring them before the Secretary of State; the warrant in that case expressed that it was by the King’s command. See Stamford’s comments on the mandate of the King, and Lambert, cap. Bailment. All the Judges temp. Eliz. held that in a warrant or commitment by one Privy Counsellor he must shew it was by the mandate of the King in Council. See And. 297, the opinion of all the Judges; they remonstrated to the King that no subject ought to be committed by a Privy Counsellor against the law of the realm. Before the 3 Car. 1 all the Privy Counsellors exercised this power to commit; from that aera they disused this power, but then they prescribed still to commit per mandatum Regis. Journal of the House of Commons 195. 16 Car. 1. Coke, Selden, &c. argued that the King’s power to commit, meant that he had such power by his Courts of Justice. In the case of *The Seven Bishops* all the Court and King’s Council admit, that supposing the warrant had been signed out of the Council, that it would have been bad, but the Court presumed it to be signed at the board; Pollexfen in his argument says, we do not deny but the Council board have power to commit, but not out of Council; this is a very strong authority; the whole body of the law seem not to know that Privy Counsellors out of Council had any power to commit, if there had been any such power they could not have been ignorant of it; and this power was only in cases of high treason, they never claimed it in any other case. It was argued that if a Secretary of State hath power to commit in high treason, he hath it in cases of lesser crimes: but this we deny, for if it appears that he hath power to commit in one case only, how can we then without authority say he has that power in other cases? He is not a conservator of the peace; Justice Rokeby only says he is in the nature of a conservator of the peace: we are now bound by the cases of *The Queen and Derby*, and *The King and Earbury*.

The Secretary of State is no conservator nor a justice of the peace, quasi secretary, within the words or equity of Stat. 24 Geo. 2, admitting him (for arguments sake) to be a conservator, the preamble of the statute shews why it was made, and for what purpose; the only grantor of a warrant therein mentioned, is a justice of the peace; justice of peace and conservator are not

convertible terms; the cases of construction upon old statutes, in regard to the warden of the Fleet, the Bishop of Norwich, &c. are not to be applied to cases upon modern statutes. The best way to construe modern statutes is to follow the words thereof; let us compare a justice of peace and a conservator; the justice is liable to actions, as the statute takes notice, it is applicable to him who acts by warrant directed to constables; a conservator is not intrusted with the execution of the laws, which by this Act is meant statutes, which gives justices jurisdiction; a conservator is not liable to actions; he never acts: he is almost forgotten; there never was an action against a conservator of the peace as such; he is antiquated, and could never be thought of when this Act was made; and ad ea quae frequenter accidunt jura adaptantur. There is no act of a constable or tithingman as conservator taken notice of in the statute; will the Secretary of State be ranked with the highest or lowest of these conservators? the Statute of Jac. 1, for officers acting by authority to plead the general issue, and give the special matter in evidence, when considered with this Statute of 24 Geo. 2, the latter seems to be a second part of the Act of Jac. 1, and we are all clearly of the opinion that neither the Secretary of State, nor the messengers, are within the Stat. 24 Geo. 2, but if the messengers had been within it, as they did not take a constable with them according to the warrant, that alone would have been fatal to them, nor did they pursue the warrant in the execution thereof, when they carried the plaintiff and his books, &c. before Lovel Stanhope, and not before Lord Halifax; that was wrong, because a Secretary of State cannot delegate his power, but ought to act in this part of his office personally.

The defendants having failed in their defence under the Statute 24 Geo. 2; we shall now consider the special justification, whether it can be supported in law, and this depends upon the jurisdiction of the Secretary of State; for if he has no jurisdiction to grant a warrant to break open doors, locks, boxes, and to seize a man and all his books, &c. in the first instance upon an information of his being guilty of publishing a libel, the warrant will not justify the defendants: it was resolved by B. R. in the case of *Shergold v. Holloway*, that a justice's warrant expressly to arrest the party will not justify the officer, there being no jurisdiction. 2 Stran. 1002. The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing the plaintiff, or proof that he was the author of the supposed libels; a power claimed by no other magistrate whatever (Scroggs C. J. always excepted); it was left to the discretion of these defendants to execute the warrant in the absence or presence of the plaintiff, when he might have no witness present to see what they did; for

they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed; there might be nobody to detect them. If this be lawful, both Houses of Parliament are involved in it, for they have both ruled, that privilege doth not extend to this case. In the case of *Wilkes*, a member of the Commons House, all his books and papers were seized and taken away; we were told by one of these messengers that he was obliged by his oath to sweep away all papers whatsoever; if this was law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbours close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbor's ground, he must justify it by law. The defendants have no right to avail themselves of the usage of these warrants since the Revolution, and if that would have justified them they have not averred it in their plea, so it could not be put, nor was in issue at the trial; we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have. This case was compared to that of stolen goods; Lord Coke denied the lawfulness of granting warrants to search for stolen goods, 4 Inst. 176, 177, though now it prevails to be law; but in that case the justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and his strong reason to believe they are concealed in such a place; but if the goods are not found there, he is a trespasser; the officer in that case is a witness; there are none in this case, no inventory taken; if it had been legal many guards of property would have attended it. We shall now consider the usage of these warrants since the Revolution; if it began then, it is too modern to be law; the common law did not begin with the Revolution; the ancient constitution which had been almost overthrown and destroyed, was then repaired and revived; the Revolution added a new buttress to the ancient venerable edifice: the K.B. lately said that no objection had ever been taken to general warrants, they have passed sub silentio: this is the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house, search for and take away all his books and papers in the first instance, to be law, which is not found in our books. It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful till this time. We are inclined

to think the present warrant took its first rise from the Licensing Act, 13 & 14 Car. 2, c. 33, and are all of the opinion that it cannot be justified by law, notwithstanding the resolution of the Judges in the time of Cha. 2, and Jac. 2, that such search warrants are lawful. State Trials, vol. 3, 58, the trial of Carr for a libel. There is no authority but of the Judges of that time that a house may be searched for a libel, but the twelve Judges cannot make law; and if a man is punishable for having a libel in his private custody, as many cases say he is, half the kingdom would be guilty in the case of a favourable libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit. It is said it is better for the Government and the public to seize the libel before it is published; if the Legislature be of that opinion they will make it lawful. Sir Samuel Astry was committed to the Tower, for asserting there was a law of State distinct from the common law. The law never forces evidence from the party in whose power it is; when an adversary has got your deeds, there is no lawful way of getting them again but by an action. 2 Stran. 1210, *The King and Cornelius. The King and Dr. Purnell*, Hil. 22 Geo. B.R. Our law is wise and merciful, and supposes every man accused is innocent before he is tried by his peers; upon the whole, we are all of the opinion that this warrant is wholly illegal and void. One word more for ourselves; we are no advocates for libels, all Governments must set their faces against them, and whenever they come before us and a jury we shall set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst government better than none at all.

Judgment for the plaintiff.

95 Eng. Rep. 807 (K.B. 1765).

6.3.2.8Money v. Leach, 1765

[Lord Mansfield] … . The last point is, “whether this general warrant be good.”—

One part of it may be laid out for the case: for, as to what relates to the seizing of his papers, that part of it was never executed; and therefore it is out of the case.

It is not material to determine, “whether the warrant be good or bad;” except in the event of the case being within 7 J. 1, but not within 24 G. 2.

At present—As to the validity of the warrant, upon the single objection

of the incertainty of the person, being neither named nor described—The common law, in many cases, gives authority to arrest without warrant; more especially, where taken in the very act: and there are many cases where particular Acts of Parliament have given authority to apprehend, under general warrants; as in the case of writs of assistance, or warrants to take up loose, idle and disorderly people. But here it is not contended, that the common law gave the officer authority to apprehend; nor that there is any act of Parliament which warrants this case.

Therefore it must stand upon principles of common law.

It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. This is so, upon reason and convenience.

Then as to authorities—Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary.

It is said, "that the usage has been so; and that many such have been issued, since the revolution, down to this time."

But a usage, to grow into law, ought to be a general usage, communiter usitata et approbata; and which, after a long continuance, it would be mischievous to overturn.

This is only the usage of a particular office, and contrary to the usage of all other justices and conservators of the peace.

There is the less reason for regarding this usage; because the form of the warrant probably took its rise from a positive statute; and the former precedents were inadvertently followed, after that law was expired.

Mr. Justice Wilmot declared, that he had no doubt, nor ever had, upon these warrants: he thought them illegal and void.

Neither had the two other Judges, Mr. Justice Yates, and Mr. Justice Aston, any doubt (upon this first argument) of the illegality of them: for, no degree of antiquity can give sanction to a usage bad in itself. And they esteemed this usage to be so. They were clear and unanimous in opinion that "this warrant was illegal and bad."

97 Eng. Rep. 1075, 1088 (K.B. 1765).

6.3.2.9Frisbie v. Butler, 1787

Error from the judgment of a justice of the peace. On the application of Butler, to George Catlin, a justice of the peace, the following warrant was issued, *viz.* "Whereas Josiah Butler hath made complaint, under oath, that he lost, on or about the 11th day of March, in Torrington, about twenty pounds of good pork, out of the cellar of Daniel Winchel, of the value of ten shillings, lawful money; it being taken by some evil-minded person: And said Butler suspects one Benjamin Frisbie, of Harwinton, to be the person that hath taken said pork, and prays for a writ, or search warrant, to search for his lost meat, etc.—To John Birge, an indifferent person, lawfully to serve this writ, there being no proper officer, without cost and charge, greeting: By authority of the state of Connecticut, you are commanded forthwith to search all suspected places and persons that the complainant thinks proper, to find his lost pork, and to cause the same, and the person with whom it shall be found, or suspected to have taken the same, and have him to appear before some proper authority, to be examined according to law."

By virtue of this warrant, Frisbie was arrested, brought before the justice who issued it, and upon the plea, not guilty, judgment was rendered, that "he was guilty of stealing said pork; and that he pay eighteen shillings as treble damages, to the complainant, and a fine of six shillings to the town treasurer."

The errors assigned, were,

1. That the warrant issued upon a verbal complaint only being exhibited.
2. That the warrant for searching and arresting was illegal, the facts alleged being of civil nature, and not such as would justify such a process.
3. The warrant is a general search warrant, commanding all persons and places throughout the world to be searched, at the discretion of the complainant;—therefore, illegal and void.
4. The judgment was for the gross sum of eighteen shillings as treble damages, for the loss of said pork, without ascertaining the real value.
5. That the process is not founded on any statute of this state; and the common law does not empower a justice to adjudge treble damages to the complainant, as was done in this case.
6. That said justice adjudged that said Frisbie should pay a fine to the treasurer of the town of Harwinton, without complaint or prosecution by any public officer, or any other person, on the part of the public.

Without argument, the judgment of the justice was reversed,

By the whole Court. The complaint on which the arraignment and conviction was had, contained no direct charge of the theft, but only an averment that

the defendant was suspected to be guilty; nor, indeed, does it appear to have been theft that he was even suspected of, but only a taking away of the plantiff's property, which might amount to no more than a trespass;—and his being found guilty of the matters alleged against him in the complaint, could be no ground for sentencing and punishing him as for theft.

With regard to the warrant—Although it is the duty of a justice of the peace granting a search warrant (in doing which he acts judicially) to limit the search to such particular place or places, as he, from the circumstances, shall judge there is reason to suspect; and the arrest of such person or persons as the goods shall be found with: And the warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal; yet, how far this vitiates the proceedings upon the arraignment, may be a question, which is not necessary now to determine; as also the sufficiency of several of the other matters assigned in error.

Kirby 213 (Conn. 1787).

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

2 For the reports of Madison's speech in support of his proposals, see 1.2.1.1.a–c.

3 *See* 6.1.2.1.

1 a 3 Inst. 53, 139, 152. H. P. C. 89, 90. 1 H. H. P. C. 448, 449. 3 H. 7. cap. 1. 2 Inst. 52. Fitz. Coron. 293.

b Fitz. Coron. 395. 2 H. H. P. C. 75, 76.

2 c H. P. C. 89, 90. 2 H. H. P. C. 73, 75, 76. 3 H. 7. cap. 1. 3 Inst. 53. 4 Inst. 183. Cro. Car. 252. 3 Leon. 207. Fitz. Coron. 238, 293, 299, 352, 425. Cont. 1 Leon. 107.

d 2 Inst. 315. Fitz. Coron. 302.

e Dyer 210. pl. 25.

f S. P. C. 34. F. P.

3 g S. P. C. 34.a. 3 Inst. 53. 7 Co. 6. b. 7.a.

4 a H. P. C. 90. 1 H. H. P. C. 448, 449, 484, 493. 2 H. H. P. C. 75, 76. 3 Inst. 117. 2 Inst. 172.

5 b 3 Inst. 116, 117. 1 H. H. P. C. 588. 2 H. H. P. C. 99, 102. Dalt. Justice, ch. 28. 109. 2 Inst. 172. Fitz. Coron. 395. Cro. El. 654. Crompt. 178, 179.

c 9 E. 4. 26. b.

d 13 Ed. 1.

e Keble’s Statutes, fol. 59.

f 29 E. 3. 39. Fitz. Tresp. 252. Crompt. 179. 2 H. H. P. C. 100, 101. 21 H. 7. 28. a.

6 g 3 Inst. 116. Dalt. Justice. cap. 28. 109. H. P. C. 91. Cromp. 178, 179.

7 h B. 1. Ch. 63. Sect. 13.

8 a 2 H. 7. 15. b. 16. 1 H. H. P. C. 588. 2 H. H. P. C. 81. 5 H. 7. 4. b. 5. a. 11 E. 4. 4. b. Dy. 236. p. 26. Bridg. 62. 7 E. 4. 20. a. H. P. C. 91. Keilw. 81. Pult. 13. a.

b 2 Inst. 52. Crom. 98, 99. S. P. C. 97. Bracton 143.

9 c 7 E. 4. 20. a. 17 E. 4. 5. b. H. P. C. 91. Pult. 13. b.

10 d 7 E. 4. 20. a. Keilw. 71. Pult. 13. a. H. P. C. 91.

e 2 Inst. 52. Crompt. 98.

11 f 11 E. 4. 4. b. 12 Co. 92.

g 7 E. 4. 20. a. Cro. E. 901. Cro. Jac. 190, 191. Pult. 136. H. P. C. 91. 12 Co. 92. Moor 600. pl. 828.

12 h Crom. 98, 99. Fitz. Cor. 24.

13 i 29 El. 871. 29 E. 3. 39. Fitz. Tresp. 252. 5 H. 7. 5. a. 21 H. 7. 28. a. H. P. C. 91.

14 k 10 H. 7. 17. b. 2 H. H. P. C. 79. 2 H. 7. 15. b. 16. a. 5 H. 7. 4. b. 5. a. 7 Ed. 4. 20. a. 20 E. 4. 6. b. 11 E. 4. 4. b. Cro. El. 871. H. P. C. 93. 12 Co. 92.

l 10 H. 7. 17. b. 2 H. 7. 15. b. 16 a. 17 E. 4. 5. a. b.

15 m 2 Inst. 173. Cro. Jac. 194. 2 H. H. P. C. 78. H. P. C. 91. 2 H. 7. 3. a. 27 H. 8. 23. a. 8 E. 4. 3. b. 3 Inst. 118. b. Fitz. Tresp. 252. 29 E. 3. 39. 2 Rol. Abr. 559. D.

n 29 E. 3. 39. 11 E. 4. 4. b. 2 H. 7. 15.

o 2 Inst. 173.

p 5 H. 7. 5. a. Vide supra Sect. 4, 3.

16 a Vide supra Sect. 15.

b 2 Inst. 52. Finch 340. 17 E. 4. 5. a. b. 1 E. 4. 20. a. Bridgm. 62. 2 H. H. P. C. 78. 7 H. 4. 35.

c 8 E. 4. 3. b. 27 H. 8. 23. a. Cro. Jac. 194. Finch 340.

d 7 E. 4. 20. a. 2 H. H. P. C. 81. 17 E. 4. 5. a. b. Bridgm. 62. Finch 394. 4 H. 7. 1. b. 2. a.

e 10. E. 4. 17. b. Fitz. Faux Imprisonm. 5.

17 f 9 E. 4. 26. b. See B. 1. Ch. 60. Sect. 23.

g Popham 12, 13. Owen 98. Moor 284. 2 H. H. P. C. 88.

18 h See B. 1. Ch. 63. Sect. 13, 14, 17.

i Latch 173. 4 H. 7. 18. b. Poph. 208. Quaere 4 H. 7. 1. b. 2. a. 5 H 7. 5. a. 2 Inst. 52.

k 1 Jon. 249. Cro. Ca. 234. 2 Rol. Abr. 546. C. 2.

19 Cromp. 147. 14 H. 8. 16. a.

20 a Cro. El. 204.

b Vide Co. Lit. 70. a.

c Cro. El. 204.

21 2 H. H. P. C. 96.

22 Poph. 208. Latch 173.

23 a 3 Inst. 158. Lamb. Constable, 12. 17 E. 4. 5. a. b. 3 H. 7. 1. a. 2 H. 7. 15. b.

b H. P. C. 91, 112. 10 E. 4. 17. b. 2 H. H. P. C. 81.

24 c Ch. 65. Sect 14, 17.

d B. 1. Ch. 63. sect. 11, 12.

25 e Dyer. 244. pl. 61. Fitz. Bar. 248. Crompt. 149. a. 2 Keb 705. Dalt. cap. 117. fol. 338.

f Crom. 148. 2 Keb. 206. Dalt. Ch. 117. 13 E. 4. 9. a.

g See 1 Danv. Abr. 633. pl. 4. 635. pl. 11. Hob. 202. 1 Lev. 21. Cro. Ca. 75. 2 Keb. 206.

26 h 14 H. 8. 16. Crompt. 147, 148.

i Crompt. 149. b.

k Dalt. ch. 117. 1 H. H. P. C. 577. 2 H. H. P. C. 111. Dalt. ch. 117 Crompt. 147, 148. 1 H. P. C. 577. 2 H. H. P. C. 114, 115. Cro Jac. 81. H. P. C. 93. 3 Inst. 177. Yet see a Precedent of this Kind, Dalt. 114.

27 Dalt. ch. 117. Crompt. 147, 148. Dalt. Justice, cap. 118. 14 H. 8. 16. See ch. 12. sect. 15. Cont. 4 Inst. 177. H. P. C. 93, 94. Dalt. ch. 118, 121. 6 Mod. 179. Cro. E. 130. 1 Leon, 187.

a 4 Inst. 177. 14 H. 8. 16.

b 6 Mod. 179.

c 14 H. 8. 16. Bro. Faux Imprisonment, 33.

d 2 H. 7. 3. pl. 9, 15. pl. 1. 4 H. 7. 2. a. 5 H. 7. 4, 5. 10 H. 7. 17. 20 H. 7. 12. 7 E. 4. 20. 8 E. 4. 3. b. 9 E. 4. 26. b. 10 E. 4. 17. b. 11 E. 4. 4. b. 13 E. 4. 9. a. 17 E. 4. 5. 7 E. 4. 35. Dyer 236.

e 10 H. 7. 17.

f 2 H. 4. ch. 15. Cro. El. 130. 1 Leon. 187. Cro. Jac 81.

28 H. P. C. 93.

29 Dalt. c. 117.

30 Supra ch. 8. sect. 33, 34. Dalt. ch. 117. 12 Co. 130, 131.

31 Dalt. ch. 117. Bro. Peace, 6. 6 Mod. 179.

32 H. P. C. 93. 4 Inst. 177. b.

33 2 H. H. P. C. 108, 109. 6 Mod. 179. Quaere Dalt. 117. Con. 14 H. 8. 16. Cro. El. 130. 1 Leon 187.

34 4 Inst. 177. H. P. C. 93. Supr. sect. 10. ch. 12. sect. 15.

35 Cro. El. 130. 1 Leon. 187. 1 Danv. Abr. 179. pl. 1, 2, 6. Carth. 492.

36 a 1 H. H. P. C. 577. 2 H. H. P. C. 111. Dalt. cap. 117. 3 Inst. 76. 14 H. 8. 16.

37 b Dalt. cap. 117. See the Precedents in Dalt. cap. 121.

38 c Dalt. cap. 117, 221. Lamb. 85, 86. Crompt. 147, 232, &c.

39 d Dalt. c. 117. Supra sect. 10. 2 H. H. P. C. 111.

40 e Dalt. cap. 117. 1 Rol. Rep. 375. 5 Co. 59. b. Bro. Peace, 9.

41 f Dalt. cap. 117. Cromp. 147. 14 H. 8. 16. Bro. Peace, 6. Salk. 176.

g Salk. 176. 1 H. H. P. C. 582. 2 H. H. P. C. 110.

42 8 E. 4. 14. a. 14 H. 7. 9. b. 6 Co. 54. 9 Co. 69. 1 H. H. P. C. 583. 2 H. H. P. C. 116.

43 Dalt. cap. 117. 8 E. 4. 14. a.

44 Carth. 508. Salk. 176. H. H. P. C. 581. 2 H. H. P. C. 110 Ld. Raym. 546.

45 a 27 Ass. 35. 4 Inst. 177. 5 Co. 91, 92. Dalt. cap. 78. 2 H. H. P. C. 103, 116, 117. H. P. C. 90. Fitz. Execution, 252.

46 b 27 Ass. 35. 12 Co. 131. 4 Inst. 131.

c Moor 606, 668.

d Dalt. cap. 78. Crom. 170. b.

47 e Moor 606, 668. Cro. El. 908. Yelv. 28. Dalt. cap. 78.

48 f Jones 233, 234.

49 g Dalt. cap. 22 and 78.

50 h H. P. C. 90, 93. 1 H. H. P. C. 588, 589. Dalt. cap. 78. 13 E. 4. 9. a.

i 13 E. 3. 7. b.

a H. P. C. 91. 4. Inst 117. Con. 13 E. 4. 9. a. Bro. Coron. 159. Dalt. cap. 78. Fitz. Bar. 110.

51 b H. P. C. 134, 135. 2 H. H. P. C. 95. Crom. 170 b. Dalt. Cap. 78. Bro. Faux Imprisonment, 6.

52 c 6 Mod. 173, 174, 211. Skin. 8. Salk. 79.

53 Palm. 52, 53. Cro. Jac. 555.

a 1 Lord Raym. 65.

b 2 Hawk. P. C. 84.

c 4 Inst. 176.

d 2 Hawk. P. C. 84.

e 2 Hal. P. C. 108.

f *Ibid*. 110.

g 2 Hawk. P. C. 85.

h 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

i A practice had obtained in the secretaries office ever since the restoration, grounded on some clauses in

the acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers and publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued, in every reign and under every administration, except the four last years of queen Anne, down to the year 1763: when such a warrant being issued to apprehend the authors, printers and publishers of a certain seditious libel, it's validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of Money *v.* Leach. *Trin.* 5 *Geo. III. B. R.* After which the issuing of such general warrants was declared illegal by a vote of the house of commons. (Com. Journ. 22 Apr. 1766.).

k Hal. P. C. 86.

l See Vol. I. pag. 355.

m 2 Hal. P. C. 88–96.

n *Ibid.* 98.

o 2 Hawk. P. C. 74.

p 2 Hal. P. C. 77.

q Stat. 30 Geo. II. c. 24.

r 2 Hal. P. C. 82, 83.

s Bracton. *l.* 3. *tr.* 2. *c.* 1. §. 1. Mirr. c. 2. §. 6.

1 (a) 3 Inst. 162. Cr. El. 753. 2 Co. 32. a. 7 Co. 6. a. 8 Co. 126. a. 11 Co. 82. a. 1 Bulst. 146. Stanf. Cor. 14. b.

(*b*) Co. Lit. 391. a. Hale's Pl. Cor. 32. Stanf. Cor. 15. c. 16. d.

(A) This position is laid down much too broadly, there are many cases in which the killing another *se defendendo* or *per infortunium*, will not be considered by the law to be felony, and it is doubted by Foster, J., whether in cases of homicide *per infortunium* or *se defendendo*, a forfeiture of all the party's chattels was ever incurred. Foster. 287. 1 Hale P. C. 477. Hawk. P. C. b. 1. chap. 27 b. 2. chap. 37. 4 Black. Comm. 188.

(c) 3 Inst. 56. Stanf. Cor. 14. a. Cor. 192. 3 E. 3. Car. 205. 330. Br. Cor. 100. 1 Roll. Rep. 182. 22 H. 8. c. 5.

(B) The same law of a lodger or sojourner in the house. *Cooper's case*, Cro. Car. 544. 1 Hale, P. C. 487.

(*d*) 11 Co. 82. b. Br. Riots, &c. 1. 21 H. 7. 39. a. Fitz. Tresp. 246. 2 Inst. 161, 162.

(*e*) 11 Co. 82. b. 1 Roll. Rep. 182.

2 (f) O. Benl. 112. 1 Bulstr. 146. Cr. El. 908, 909. Moor, 606. 668. Yelv. 28, 29. Cr. Car. 537, 538. 3 Inst. 161. Dy. 36. pl. 40. 12 Co. 131. 4 Inst. 177. Goldsb. 79. 2 Jones, 233, 234. 4 Leon. 41. 13 E. 4. 9. a.

(C) The distinction taken in this case (*vid. post.* 92 b.) between those cases in which the King, and those in which a common person is party, is fully recognized in *Burdett* v. *Abbott*, 14 East, 157. and per Lord Ellenborough, C.J. "It stands perfectly clear that an execution at the suit of an individual cannot be carried into effect by breaking open the outer door," and per Bailey, J.: "In every breach of the peace the public are considered as interested, and the execution of process against the offender is the assertion of a public right, and in all such cases I apprehend that the officer has a right to break open the outer door, provided there is a request of admission first made, and a denial of the parties who are within," *ibid.* In that case it was held that process of contempt warranted the breaking of the outer door for the purpose of executing it, request being first made to open the door: (*vid.* the cases there cited). In the execution of criminal process against

any man in the case of a misdemeanour, it is necessary to demand admittance before the breaking of the outer door of the house can be legally justified. *Launock* v. *Brown*, 2 Barn. and Ald. 592. The Court did not give their opinion in that case, whether in the case of felony it would be necessary to make a previous demand of admittance before breaking open the outer door; the language of Bailey, J., is general: "Even in the execution of criminal process you must demand admittance before you can justify breaking open the outer door:" and Lord Hale, 2 H. P. C. 117. lays it down expressly that in case of felony such previous demand is necessary; and Foster, J., in his Discourse on Homicide, p. 3. 20. says, that in every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity. The rule that the outer door cannot be broken open in executing civil process, in the case of arrest, applies to arrests only in the first instance; for if a man being legally arrested, escapeth from the officer, and taketh shelter though in his own house, the officer may upon fresh suit break open doors in order to retake him, having first given due notice of his business and demanded admission, and been refused. *Genner* v. *Sparks*, 1 Salk. 79. S. C. 6 Mod. 173. *White* v. *Wiltshire*, 2 Rolle's Rep. 138. S. C. [Palm. 52. Cro. Jac. 555]. Foster. 320. *Vid*. Vin. Ab. House b. And this privilege is confined to a man's dwelling-house, or outhouse adjoining thereto, for the sheriff on a *fieri facias* may break open the door of a barn standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close. *Penton* v. *Brown*, 2 Keb. 698. S. C. 1 Sid. 186.

(*a*) Yelv. 29. *Postea*, 92. b. Cr. El. 909. Moor, 668.

(*b*) 4 Inst. 177.

(D) Either with or without a warrant, and whether the pursuit is by a constable or private person. Hawk. P. C. B. 2. chap. 14. § 7.

(*c*) Br. Distress 35. Br. Trespass, 151.

(*d*) Fitz. Trespass, 252. Br. Trespass, 248.

(*a*) Br. Prerogative le Roy, 109. Br. Franchise, 18. Br. Process, 102. Fitz. Prerogative, 21.

(E) *Vid*. Gilb. C. B. 27, 28.

(*b*) 13 E. 4. 9. a. Fitz. Bar. 110. 4 Inst. 177. 1 Bulstr. 146. 2 Bulstr. 61.

(F) Acc. 1 Hale, P. C. 583. but Hawkins says, it seems the better opinion at this day that no one can justify the breaking open outer doors, in order to apprehend one who lies under a probable suspicion only. Hawk. P. C. b. 2. chap. 14. § 7.

3 (c) 1 Brown, 50. Cr. Jac. 486.

(G) When the officers are once in the house they may break open any inner doors or trunks for executing the writ. Foster 320. *Lee* v. *Gansell*, Cowp. 1. S. C. Loft. 374. *Astley* v. *Pindar*, Cowp. 7. *Ratcliffe* v. *Burton*, 3 Bos. & Pull. 223. So also if the outer door is open, the officer may enter forcibly, either through an inner door or window. *Lloyd* v. *Sandilands*, 8 Taunt. 250. S. C. 2 B. Moore 207. And the officer need not demand entrance at the inner doors before they are broken open. *Hutchinson* v. *Birch*, 4 Taunt. 619. And if the sheriff's officers enter the house, the outer door being open, and the owner lock them in, the sheriff may justify breaking open the outer door for setting them at liberty. *White* v. *Wiltshire*, 2 Rolle's Rep. 138.

(*d*) Br. Trespass, 226. Br. Issue, 26.

(*e*) Br. Disseisor, 52. Fitz. Assise, 286. Lucas, 290.

(H) By the long-established and recognized practice of the Court of K. B. a *non omittas* writ may be issued in the first instance without suing out a previous writ and waiting for the sheriff's return of *mandavi*

ballivo qui nullum dedit responsum. Carrett v. *Smallpage*, 9 East, 330. Tidd's Practice, 8th edition, 146. 1062.

(*a*) Yelv. 29. *Antea*, 91. b. Moor, 668. Cr. El. 409. O. Benl. 121. See 18 E. 4. 4. *contrà*.

(*b*) 1 Jones, 429, 430. 1 Brownl. 50. 1 Bulstr. 146. Cr. Jac. 556. O. Benl. 121. 4 Inst. 177. Palm. 53. Dyer, 36. pl. 41. Moor. 668. Cr. Car. 537, 538. Cr. El. 908, 909. Yelv. 29. Hob. 62. 263, 264. 4 Leon. 41. 11 Co. 82. March, 3, 4. 18 E. 4. 4. a. Br. Execut. 100. Br. Trespass, 390.

(*c*) 9 Co. 66 a. Cr. Jac. 280. 486. Jenk. Cent. 291. Hale's Pl. Cor. 45. Owen, 63.

(*d*) 13 E. 4. 9. a. *Antea*, 92. a. Fitz. Bar. 110. 4 Inst. 177.

(e) Cr. Eliz. 909. Yelv. 29. Br. Execution, 100. Br. Tresp. 390.

(a) 18 E. 2. Execut. 252. Yelv. 29. Moor. 668. Cr. El. 909. *Antea*, 91. b. 92. b. O. Benl. 121.

(b) Plow. 208. a. 2 Show. 87.

4 (c) Cr. Car. 544.

(I) *Vul*. Foster, 320. "The sheriff finding the door open may enter the house of a stranger, and is justified if the defendant's goods are in it, but it is at his own risk," per Gibbs, C.J. *Cooke* v. *Birt*, 5 Taunt. 770. S. C. 1 Marsh. 339. So also where he enters in search of the defendant, it is at his own risk if the defendant is not there; therefore in trespass against him for breaking and entering the plaintiff's house: a plea averring that he suspected and believed that the defendant was there without avering that the defendant actually was in the house, is bad. *Johnson* v. *Leigh*, 6 Taunt. 247. S. C. 1 Marsh. 565. But when the principal resides in the house of a stranger the bail above may justify the breaking and entering the house (the outer door being open) in order to seek for him, for the purpose of rendering him, without averring that the principal was in the house at the time, for there is no difference between a house of which a man is solely possessed and a house in which he resides by the consent of another; *Sheere* v. *Brooks*, 2 H. Black. 120. In all these cases the outer door was open; in order to justify the breaking the outer door; after denial on request made to take a person or goods in the house of a stranger, it must be understood either that the person *upon a pursuit* taketh refuge in the house of another, Foster, 320, or the goods must be there, of fraud and covin to prevent the execution. *Vid*. text *supra*.

(d) 2 Inst 192, 193, 194.

5 (e) Stile, 447.

6 (f) Hard. 2.

CHAPTER 7

AMENDMENT V

GRAND JURY CLAUSE

7.1TEXTS

7.1.1DRAFTS IN FIRST CONGRESS

7.1.1.1Proposal by Madison in House, June 8, 1789

7.1.1.1.a Seventhly. That in article 3d, section 2 [of the Constitution], the third clause be struck out, and in its place be inserted the clauses following, to wit:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

Congressional Register, June 8, 1789, vol. 1, pp. 428–29.

7.1.1.1.b *Seventhly*. That in article 3d, section 2 [of the Constitution], the

third clause be struck out, and in its place be inserted the clauses following, to wit: …

The trial of all crimes (except in cases of impeachments, and cases arising in the land and naval forces, or the militia when on actual service in time of war, or public danger,) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate.

Daily Advertiser, June 12, 1789, p. 2, col. 2.

7.1.1.1.c *Seventh*. That in article 3d, section 1 [of the Constitution], the third clause be struck out, and in its place be inserted the clauses following, to wit,

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war, or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

New-York Daily Gazette, June 13, 1789, p. 574, col. 4.

7.1.1.2 Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 3 No person shall be tried for any crime whereby he may incur loss of life or any infamous punishment, without Indictment by a grand Jury, nor be convicted but by the unanimous verdict of a Petit Jury of good and lawful men Freeholders of the vicinage or district where the trial shall be had.

Madison Papers, DLC.

7.1.1.3House Committee of Eleven Report, July 28, 1789

ART. 3, SEC. 2—Strike out the whole of the 3d paragraph, and insert— …

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State; and if it be committed in a place not within a State, the indictment and trial may be at such place or places as the law may have directed."

Broadside Collection, DLC.

7.1.1.4House Consideration, August 18, 1789

7.1.1.4.a The house now resolved itself into a committee of the whole on the subject of amendments, and took into consideration the 2d clause of the 7th proposition, in the words following, "The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war, or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment, by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed."

Congressional Register, August 18, 1789, vol. 2, p. 233 (after the motions noted below, "The clause was now adopted without amendment." *Id*.).

7.1.1.4.b The committee took up the fifteenth amendment which is as follows:

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the

indictment and trial may by law be authorized in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed."

Daily Advertiser, August 19, 1789, p. 2, col. 2 ("Some inconsiderable amendments to this amendment were moved and lost, and the main question was carried.").

7.1.1.4.c The committee took up the fifteenth amendment, which is

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed."

Gazette of the U.S., August 22, 1789, p. 250, col. 1 (reported as August 19, 1789; after the motions noted below, "And then the paragraph was adopted. *Id*.).

7.1.1.5Motion by Burke in House, August 18, 1789

7.1.1.5.a Mr. Burke

Moved to change the word "vicinage" into "district or county in which the offence has been committed," …

Congressional Register, August 18, 1789, vol. 2, p. 233 ("[t]he question on mr. Burke's motion being put was negatived").

7.1.1.5.b Mr. Burke moved to strike out "vicinage," and to insert *county or district in which the offence has been committed."*

Gazette of the U.S., August 22, 1789, p. 250, col. 1 ("The motion was negatived.").

7.1.1.6Motion by Burke in House, August 18, 1789

7.1.1.6.a Mr. Burke then revived his motion for preventing prosecutions upon information … .

Congressional Register, August 18, 1789, vol. 2, p. 233 ("on the question this was also lost").[1]

7.1.1.6.b Mr. Burketh n [*sic;* then] proposed to add a clause to prevent

prosecutions upon informations: …

Gazette of the U.S., August 22, 1789, p. 250, col. 1 (“This motion was lost.”).

7.1.1.7Motion by Gerry in House, August 21, 1789

7.1.1.7.a Mr. Gerry

Then proposed to amend it by striking out these words, “public danger” and to insert foreign invasion … .

Congressional Register, August 21, 1789, vol. 2, p. 243 (“this being negatived”).

7.1.1.7.b Mr. Gerry moved to strike out these words, “public danger,” to insert *foreign invasion.*

New-York Daly Gazette, August 24, 1789, p. 818, col. 3 (“This was negatived.”).

7.1.1.8Motion by Gerry in House, August 21, 1789

[I]t was then moved to strike out the last clause, “and if it be committed, &c.” to the end.

Congressional Register, August 21, 1789, vol. 2, p. 243 (“This motion was carried, and the amendment was adopted.”); New-York Daily Gazette, August 24, 1789, p. 818, col. 3 (“This motion obtained, and the amendment as it then stood was adopted.”).

7.1.1.9Further House Consideration, August 21, 1789

Fourteenth. The trial of all crimes, (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment

or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same state.

HJ, p. 108 ("read and debated … agreed to by the House, … two-thirds of the members present concurring").[2]

7.1.1.10 House Resolution, August 24, 1789

ARTICLE the *TENTH.*

The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of War or public danger) shall be by an Impartial Jury of the Vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accostomed [*sic*] requisites; and no person shall be held to answer for a capital, or otherways infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.

House Pamphlet, RG 46, DNA.

7.1.1.11 Senate Consideration, August 25, 1789

7.1.1.11.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth:

…

Article the tenth

> [The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by] an impartial jury of the Vicinage, with the requisite of unanimity for conviction, the right of Challenge, and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an Enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.
>
> Rough SJ, pp. 217–18 [material in brackets not legible].

7.1.1.11.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*Article the Tenth.*

> "The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.
>
> Smooth SJ, pp. 195–96.

7.1.1.11.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*ARTICLE the TENTH.*

> "The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherways infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.
>
> Printed SJ, p. 105.

7.1.1.12Further Senate Consideration, September 4, 1789

7.1.1.12.a On Motion to adopt the tenth Article amended to read thus To

strike out all the clauses in the Article, except the following:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury.”

Rough SJ, p. 249 (“It passed in the affirmative.”).

7.1.1.12.b On motion, To adopt the tenth Article amended by striking out all the clauses in the Article, except the following:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury.”

Smooth SJ, pp. 222–23 (“It passed in the Affirmative.”).

7.1.1.12.c On motion, To adopt the tenth Article amended by striking out all the clauses in the Article, except the following:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury.”

Printed SJ, p. 119 (“It passed in the Affirmative.”).

7.1.1.12.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in Article tenth

with the following amendment, to wit:

To Strike out all the clauses in the Article, except the following:

“no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury.”

Senate MS, p. 3, RG 46, DNA.

7.1.1.13Further Senate Consideration, September 9, 1789

7.1.1.13.a On motion, To alter Article 6th so as to stand Article 5th, and Article 7th so as to stand Article 6th, and Article 8th so as to stand Article 7th

…

On motion, That this last mentioned Article be amended to read as follows:[3]

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; Nor shall private property be taken for public use without just compensation.”

Rough SJ, p. 275 (“It passed in the affirmative.”).

7.1.1.13.b On motion, To alter article the sixth so as to stand article the fifth, and article the seventh so as to stand article the sixth, and article the eighth so as to stand article the seventh—

…

On motion, That this last mentioned article be amended to read as follows:[4]

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation"—

Smooth SJ, p. 244 ("It passed in the Affirmative.").

7.1.1.13.c On motion, To alter Article the sixth so as to stand Article the fifth, and Article the seventh so as to stand Article the sixth, and Article the eighth so as to stand Article the seventh—

…

On motion, That this last mentioned Article be amended to read as follows: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation"—[5]

Printed SJ, pp. 129–30 ("It passed in the Affirmative.").

7.1.1.13.d To erase the word "Eighth" & insert Seventh—

To insert in the ~~Eighth~~ 8th [7th] article ~~as~~ after the word "shall" in the "1" line—be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual Service in time of War or publick danger, nor shall any person—&

To erase from the same article the words "except in case of impeachment, to more than one trial or one punishment" & insert—to be twice put in jeopardy of life or limb—

Ellsworth MS, p. 3, RG 46, DNA.

7.1.1.14Senate Resolution, September 9, 1789

ARTICLE THE SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Senate Pamphlet, RG 46, DNA.

7.1.1.15 Further House Consideration, September 21, 1789

Resolved, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

7.1.1.16 Further Senate Consideration, September 21, 1789

7.1.1.16.a A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Smooth SJ, pp. 265–66.

7.1.1.16.b A message from the House of Representatives—

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Printed SJ, pp. 141–42.

7.1.1.17 Further Senate Consideration, September 21, 1789

7.1.1.17.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

7.1.1.17.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

7.1.1.18 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

7.1.1.19 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

7.1.1.20 Senate Consideration of Conference Committee Report, September 24, 1789

7.1.1.20.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

7.1.1.20.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and

to have the assistance of Counsel for defence."

Printed SJ, p. 145.

7.1.1.21 Further Senate Consideration of Conference Committee Report, September 24, 1789

7.1.1.21.a A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

7.1.1.21.b A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p.148.

7.1.1.22Further Senate Consideration of Conference Committee Report, September 25, 1789

7.1.1.22.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

7.1.1.22.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

7.1.1.23Agreed Resolution, September 25, 1789

7.1.1.23.a Article the Seventh.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Smooth SJ, Appendix, p. 293.

7.1.1.23.b ARTICLE the SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for

the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Printed SJ, Appendix, p. 164.

7.1.1.24Enrolled Resolution, September 28, 1789

Article the seventh … . No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Enrolled Resolutions, RG 11, DNA.

7.1.1.25Printed Versions

7.1.1.25.a Art. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 21.

7.1.1.25.b Art. VII. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 98.

7.1.2PROPOSALS FROM THE STATE CONVENTIONS

7.1.2.1New Hampshire, June 21, 1788

Sixthly That no Person shall be Tryed for any Crime by which he may incur an Infamous Punishment, or loss of Life, untill he first be indicted by a Grand Jury except in such Cases as may arise in the Government and regulation of the Land & Naval Forces.—

State Ratifications, RG 11, DNA.

7.1.2.2Massachusetts, February 6, 1788

Sixthly, That no person Shall be tried for any Crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury, except in such cases as may arise in the Government & regulation of the Land & Naval forces

State Ratifications, RG 11, DNA.

7.1.2.3New York, July 26, 1788

That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such Trial should be speedy, public, and by an impartial Jury of the County where the Crime was committed; and that no person can

be found Guilty without the unanimous consent of such Jury. But in cases of Crimes not committed within any County of the United States, and in Cases of Crimes committed within any County in which a general Insurrection may prevail, or which may be in the possession of a foreign Enemy, the enquiry and trial may be in such County as ∧ the Congress shall by Law direct; which County in the two Cases last mentioned should be as near as conveniently may be to that County in which the Crime may have been committed. And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defence, and should not be compelled to give Evidence against himself.

That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.

State Ratifications, RG 11, DNA.

7.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

7.1.3.1Georgia: Constitution, 1777

XLV. No grand jury shall consist of less than eighteen, and twelve may find a bill.

Georgia Laws, p. 14.

7.1.3.2New Jersey: Fundamental Constitutions for East New Jersey, 1683

That no Person or Persons within the said Province shall be taken and imprisoned, or be devised of his Freehold, free Custom or Liberty, or be outlawed or exiled, or any other Way destroyed; nor shall they be condemn'd or Judgment pass'd upon them, but by lawful Judgment of their

Peers: Neither shall Justice nor Right be bought or sold, defered or delayed, to any Person whatsoever: In order to which by the Laws of the Land, all Tryals shall be by twelve Men, and as near as it may be, Peers and Equals, and of the Neighbourhood, and Men without just Exception. In Cases of Life there shall be at first Twenty four returned by the Sherriff for a Grand Inquest, of whom twelve at least shall be to find the Complaint to be true; and then the Twelve Men or Peers to be likewise returned, shall have the final Judgment; but reasonable Challenges shall be always admitted against the Twelve Men, or any of them: But the Manner of returning Juries shall be thus, the Names of all the Freemen above five and Twenty Years of Age, within the District or Boroughs out of which the Jury is to be returned, shall be written on equal Pieces of Parchment and put into a Box, and then the Number of the Jury shall be drawn out by a Child under Ten Years of Age. And in all Courts Persons of all Perswasions may freely appear in their own Way, and according to their own Manner, and there personally plead their own Causes themselves, or if unable, by their Friends, no Person being allowed to take Money for pleading or advice in such Casas [*sic*]: And the first Process shall be the Exhibition of the Complaint in Court fourteen Days before the Tryal, and the Party complain'd against may be fitted for the same, he or she shall be summoned ten Days before, and a Copy of the Complaint delivered at their dwelling House: But before the Complaint of any Person be received, he shall solemnly declare in Court, that he believes in his Conscience his Cause is just. Moreover, every Man shall be first cited before the Court for the Place where he dwells, nor shall the Cause be brought before any other Court but by way of Appeal from Sentence of the first Court, for receiving of which Appeals, there shall be a Court consisting of eight Persons, and the Governor (protempore) President thereof, (*to wit*) four Proprietors and four Freemen, to be chosen out of the great Council in the following Manner, *viz*. the Names of Sixteen of the Proprietors shall be written on small pieces of Parchment and put into a Box, out of which by a Lad under Ten Years of Age, shall be drawn eight of them, the eight remaining in the Box shall choose four; and in like Manner shall be done for the choosing of four of the Freemen.

New Jersey Grants, pp. 163–64.

7.1.3.3New York

7.1.3.3.aAct Declaring … Rights & Priviledges, 1691

> That In all Cases Capital and Criminal, there shall be a grand Inquest, who shall first present the Offence, and then Twelve Good Men of the Neighbourhood to Try the Offender, who, after his Plea to the Indictment, shall be allowed his reasonable Challenges.
>
> New York Acts, p. 18.

7.1.3.3.bConstitution, 1777

> XXXIV. AND IT IS FURTHER ORDAINED, That in every Trial on Impeachment or Indictment for Crimes or Misdemeanors, the Party impeached or indicted, shall be allowed Counsel, as in civil Actions.
>
> New York Laws, vol. 1, p. 12.

7.1.3.3.cBill of Rights, 1787

> *Third*, That no Citizen of this State shall be taken or imprisoned for any Offence upon Petition or Suggestion, unless it be by Indictment or Presentment of good and lawful Men of the same Neighbourhood where such Deeds be done, in due Manner, or by due Process of Law.
>
> New York Laws, vol. 2, p. 1.

7.1.3.4North Carolina

7.1.3.4.aFundamental Constitutions of Carolina, 1669

> 66th. The Grand Jury at the several assizes, shall upon their oaths and under their hands and seals, deliver into their itinerant Judges, a presentment of such grievances, misdemeanors, exigencies, or defects, which they think necessary for the public good of the country; which presentments shall by the itinerant Judges, at the end of their circuit, be delivered in to the grand council, at their next sitting. And whatsoever therein concerns the execution of laws already made, the several Proprietor's courts, in the matters belonging to each of them respectively, shall take cognizance of it, and give such order about it, as shall be effectual for the due execution of the laws … .
>
> North Carolina State Records, pp. 144–45.

7.1.3.4.bDeclaration of Rights, 1776

Sect. VIII. That no Freeman shall be put to answer any criminal Charge, but by Indictment, Presentment, Impeachment.

North Carolina Laws, p. 275.

7.1.3.5Pennsylvania

7.1.3.5.aLaws Agreed Upon in England, 1682

VIII. That all **Tryals** shall be by **Twelve Men,** and as near as may be, *Peers* or *Equals*, and of the *Neighbourhood*, and men without just Exception. In cases of *Life* there shall be first **Twenty Four** returned by the Sheriffs for a **Grand Inquest,** of whom *Twelve*, at least, shall find the Complaint to be true, and then the **Twelve Men** or *Peers*, to be likewise returned by the Sheriff, shall have the *final Judgment:* But reasonable Challenges shall be alwayes admitted against the said *Twelve Men*, or any of them.

Pennsylvania Frame, p. 8.

7.1.3.5.b Constitution, 1790

ARTICLE IX.

…

Sect. X. That no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office. No person shall, for the same offence, be twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made.

Pennsylvania Acts, Dallas, p. xxxiv–xxxv.

7.1.4OTHER TEXTS

7.1.4.1Assize of Clarendon, 1166

CHAPTER I

First the aforesaid King Henry established by the counsel of all his barons for the maintenance of peace and justice, that inquiry shall be made in every county and in every hundred by the twelve most lawful men of the hundred and by the four most lawful men of every vill, upon oath that they shall speak the truth, whether in their hundred or vill there be any man who is accused or believed to be a robber, murderer, thief, or a receiver of robbers, murderers or thieves since the King’s accession. And this the justices and sheriffs shall enquire before themselves.

CHAPTER II

And he who shall be found, by the oath of the aforesaid, accused or believed to be a robber, murderer, thief, or receiver of such since the King's accession shall be taken and put to the ordeal of water and made to swear that he was no robber, murderer, thief, or receiver of such up to the value of five shillings, as far as he knows, since the King's accession … .

…

CHAPTER IV

> And when a robber, murderer, thief, or receiver of such is captured as a result of the oath, the sheriff shall send to the nearest justice (if there are no justices shortly visiting the county wherein he was captured) by an intelligent man saying that he has captured so many men. And the justices shall reply telling the sheriff where prisoners are to be brought before them. And the sheriff shall bring them before the justices together with two lawful men from the hundred and the vill where they were captured to bring the record of the county and the hundred as to why they were captured; and there they shall make their law before the justices.
>
> Theodore F. T. Plucknett, A Concise History of the Common Law, 5th ed. (Boston: Little, Brown & Co., 1956), pp. 112–13.

7.2DISCUSSION OF DRAFTS AND PROPOSALS

7.2.1THE FIRST CONGRESS

7.2.1.1June 8, 17896

7.2.1.2August 18, 1789

7.2.1.2.a The house now resolved itself into a committee of the whole on the subject of amendments, and took into consideration the 2d clause of the 7th proposition, in the words following, “The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war, or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment, by a grand jury;

but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed."

Mr. Burke

Moved to change the word "vicinage" into "district or county in which the offence has been committed," he said this was conformable to the practice of the state of South Carolina, and he believed to most of the states in the union, it would have a tendency also to quiet the alarm entertained by the good citizens of many of the states for their personal security, they would no longer fear being dragged from one extremity of the state to the other for trial, at the distance of 3 or 400 miles.

Mr. Lee

Thought the word "vicinage" was more applicable than that of "district, or county," it being a term well understand by every gentleman of legal knowledge.

The question of mr. Burke's motion being put was negatived.

Mr. Burke then revived his motion for preventing prosecutions upon information, but on the question this was also lost.

The clause was now adopted without amendment.

Congressional Register, August 18, 1789, vol. 2, p. 233.

7.2.1.2.b The house then resolved itself into a committee of the whole on the subject of amendments.

Mr. Boudinot in the chair.

The committee took up the fifteenth amendment which is as follows:

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed."

Some inconsiderable amendments to this amendment were moved and lost,

and the main question was carried.

Daily Advertiser, August 19, 1789, p. 2, col. 2.

7.2.1.2.c Committee of the whole on the subject of amendments.

Mr. Boudinot in the chair.

The committee took up the fifteenth amendment, which is

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed."

Mr. Burke moved to strike out "vicinage," and to insert *county or district in which the offence has been committed."* The gentleman enforced the motion by a variety of observations; and among others said that it was agreeable to the practice of the state he represented, and would give the constitution a more easy operation; that it was a matter of serious alarm to the good citizens of many of the States, the idea that they might be dragged from one part of the State perhaps 2 or 300 miles to the other for trial.

Mr. Gerry objected to the word "district" as too indefinite.

Mr. Sedgwick said, that he conceived that the proposed amendment is not so adequate to the gentleman's object as the word "vicinage"—the latter part of the clause is sufficient for the gentleman's purpose.

The motion was negatived.

Mr. Burketh n [*sic;* then] proposed to add a clause to prevent prosecutions upon informations: This was objected to, as the object of the clause was to provide that high crimes, &c. should be by presentment of a grand jury; but that other things should take the course heretofore practised. This motion was lost.

And then the paragraph was adopted.

Gazette of the U.S., August 22, 1789, p. 250, col. 1 (reported as August 19).

7.2.1.3August 21, 1789

7.2.1.3.a The house proceeded in the consideration of the amendments to the constitution reported by the committee of the whole, and took up the 2nd clause of the 4th proposition.

Mr. Gerry

Then proposed to amend it by striking out these words, “public danger” and to insert foreign invasion; this being negatived, it was then moved to strike out the last clause, “and if it be committed, &c.” to the end. This motion was carried, and the amendment was adopted.

Congressional Register, August 21, 1789, vol. 2, p. 243.

7.2.1.3.b The order of the day, on amendments to the constitution. 15th amendment under consideration.

Mr. Gerry moved to strike out these words, “public danger,” to insert *foreign invasion*. This was negatived. It was then moved to strike out the last clause, “and if it be committed, &c.” to the end. This motion obtained, and the amendment as it then stood was adopted.

New-York Daily Gazette, August 24, 1789, p. 818, col. 3.

7.2.2STATE CONVENTIONS

7.2.2.1Massachusetts

7.2.2.1.a January 30, 1788

… Mr. HOLMES. Mr. President, I rise to make some remarks on the paragraph under consideration, which treats of the judiciary power.

It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not; for in a criminal process, a person shall not have a right to insist on a trial in the vicinity where the fact was committed, where a jury of the peers would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge of the *credibility* of the witnesses. There a person must be tried by a jury of strangers; a jury who *may be* interested in his conviction; and where he

may, by reason of the distance of his residence from the place of trial, be incapable of making such a defence as he is, in justice, entitled to, and which he could avail himself of, if his trial was in the same county where the crime is said to have been committed.

These circumstances, as horrid as they are, are rendered still more dark and gloomy, as there is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not; in consequence of which the most innocent person in the commonwealth may be taken by virtue of a warrant issued in consequence of such information, and dragged from his home, his friends, his acquaintance, and confined in prison, until the next session of the court, which has jurisdiction of the crime with which he is charged, (and how frequent those sessions are to be we are not yet informed of,) and after long, tedious, and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liberty, the loss of his time, great expenses, and perhaps cruel sufferings.

But what makes the matter still more alarming is, that the mode of criminal process is to be pointed out by Congress, and they have no constitutional check on them, except that the trial is to be by a *jury:* but who this jury is to be, how qualified, where to live, how appointed, or by what rules to regulate their procedure, we are ignorant as of yet: whether they are to live in the county where the trial is; whether they are to be chosen by certain districts, or whether they are to be appointed by the sheriff *ex officio;* whether they are to be for one session of the court only, or for a certain term of time, or for good behavior, or during pleasure, are matters which we are entirely ignorant of as yet.

The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.

These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges, neither is it made certain, in the Constitution, that a person charged with the crime shall have the privilege of appearing before the court or jury which is to try him.

On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little

less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.

There is nothing to prevent Congress from passing laws which shall compel a man, who is accused or suspected of a crime, to furnish evidence against himself, and even from establishing laws which shall order the court to take the charge exhibited against a man for truth, unless he can furnish evidence of his innocence.

I do not pretend to say Congress *will* do this; but, sir, I undertake to say that Congress (according to the powers proposed to be given them by the Constitution) *may* do it; and if they do not, it will be owing *entirely*—I repeat it, it will be owing *entirely*—to the goodness of the men and not in the *least degree* owing to the goodness of the Constitution.

The framers of our state constitution took particular care to prevent the General Court from authorizing the judicial authority to issue a warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrant being granted; why it should be esteemed so much more safe to intrust Congress with the power of enacting laws, which it was deemed so unsafe to intrust our state legislature with, I am unable to conceive.

Mr. GORE observed, in reply to Mr. Holmes, that it had been the uniform conduct of those in opposition to the proposed form of government, to determine, in every case where it was possible that the administrators thereof could do wrong, that they would do so, although it were demonstrable that such wrong would be against their own honor and interest, and productive of no advantage to themselves. On this principle alone have they determined that the trial by jury would be taken away in civil cases; when it had been clearly shown, that no words could be adopted, apt to the situation and customs of each state in this particular. Jurors are differently chosen in different states, and in point of qualification the laws of the several states are very diverse; not less so in the causes and disputes which are entitled to trial by jury. What is the result of this? That

the laws of Congress may and will be conformable to the local laws in this particular, although the Constitution could not make a universal rule equally applying to the customs and statutes of the different states. Very few governments (certainly not this) can be interested in depriving the people of trial by jury, in questions of *meum et tuum*. In criminal cases alone are they interested to have the trial under their own control; and, in such cases, the Constitution expressly stipulates for trial by jury; but then, says the gentleman from Rochester, (Mr. Holmes,) to the safety of life it is indispensably necessary the trial of crimes should be in the vicinity; and the vicinity is construed to mean county; this is very incorrect, and gentlemen will see the impropriety, by referring themselves to the different local divisions and districts of the several states. But further, said the gentleman, the idea that the jury coming from the neighborhood, and knowing the character and circumstances of the party in trial, is promotive of justice, on reflection will appear not founded in truth. If the jury judge from any other circumstances but what are part of the cause in question, they are not impartial. The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable. From such motives did the wise Athenians so constitute the famed Areopagus, that, when in judgment, this court should sit at midnight, and in total darkness, that the decision might be on the thing, and not on the person. Further, said the gentleman, it has been said, because the Constitution does not expressly provide for an indictment by grand jury in criminal cases, therefore some officer under this government will be authorized to file informations, and bring any man to jeopardy of his life, and indictment by grand jury will be disused. If gentlemen who pretend such fears will look into the constitution of Massachusetts, they will see that no provision is therein made for an indictment by grand jury, or to oppose the danger of an attorney-general filing informations; yet no difficulty or danger has arisen to the people of this commonwealth from this defect, if gentlemen please to call it so. If gentlemen would be candid, and not consider that, wherever Congress may possibly abuse power, they certainly will, there would be no difficulty in the minds of any in adopting the proposed Constitution.

Elliot, vol. 2, pp. 109–13.

7.2.2.1.bFebruary 1, 1788

Hon. Mr. ADAMS. As your Excellency was pleased yesterday to offer, for

the consideration of this Convention, certain propositions intended to accompany the ratification of the Constitution before us, I did myself the honor to bring them forward by a regular motion, not only from the respect due to your excellency, but from a clear conviction, in my own mind, that they would tend to effect the salutary and important purposes which you had in view—"the removing the fears and quieting the apprehensions of many of the good people of this commonwealth, and the more effectually guarding against an undue administration of the federal government."

…

Your excellency's next proposition is, to introduce the indictment of a grand jury, before any person shall be tried for any crime, by which he may incur infamous punishment, or loss of life; and it is followed by another, which recommends a trial by jury in civil actions between citizens of different states, if either of the parties shall request it. These, and several others which I have mentioned, are so evidently beneficial as to need no comment of mine. And they are all, in every particular, of so general a nature, and so equally interesting to every state, that I cannot but persuade myself to think they would all readily join with us in the measure proposed by your excellency, if we should now adopt it.

Elliot, vol. 2, pp. 130, 132–33.

7.2.3PHILADELPHIA CONVENTION

None.

7.2.4NEWSPAPERS AND PAMPHLETS

7.2.4.1Federal Farmer, No. 16, January 20, 1788

Security against expost [*sic*] facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the course of the common law. These may be secured in general words, as

in New-York, the Western Territory, &c. by declaring the people of the United States shall always be entitled to judicial proceedings according to the course of the common law, as used and established in the said states. Perhaps it would be better to enumerate the particular essential rights the people are entitled to in these proceedings, as has been done in many of the states, and as has been done in England. In this case, the people may proceed to declare, that no man shall be held to answer to any offence, till the same be fully described to him; nor to furnish evidence against himself: that, except in the government of the army and navy, no person shall be tried for any offence, whereby he may incur loss of life, or an infamous punishment, until he be first indicted by a grand jury: that every person shall have a right to produce all proofs that may be favourable to him, and to meet the witnesses against him face to face: that every person shall be entitled to obtain right and justice freely and without delay; that all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure: and that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land. A celebrated writer observes upon this last article, that in itself it may be said to comprehend the whole end of political society. These rights are not necessarily reserved, they are established, or enjoyed but in few countries: they are stipulated rights, almost peculiar to British and American laws. In the execution of those laws, individuals, by long custom, by magna charta, bills of rights &c. have become entitled to them. A man, at first, by act of parliament, became entitled to the benefits of the writ of habeas corpus—men are entitled to these rights and benefits in the judicial proceedings of our state courts generally: but it will by no means follow, that they will be entitled to them in the federal courts, and have a right to assert them, unless secured and established by the constitution or federal laws. We certainly, in federal processes, might as well claim the benefits of the writ of habeas corpus, as to claim trial by a jury—the right to have council—to have witnesses face to face—to be secure against unreasonable search warrants, &c. was the constitution silent as to the whole of them:—but the establishment of the former, will evince that we could not claim them without it; and the omission of the latter, implies they are relinquished, or deemed of no importance. These are rights and benefits individuals acquire by compact;

they must claim them under compacts, or immemorial usage—it is doubtful, at least, whether they can be claimed under immemorial usage in this country; and it is, therefore, we generally claim them under compacts, as charters and constitutions.

Storing, vol. 2, pp. 327–28.

7.2.4.2Hampden, January 26, 1788

I have had no hand in the productions respecting the proposal plan of government—but I feel interested as a citizen. I have waited to see if any motion might be made, or any disposition appear in the Convention, to prevent one of two evils taking place; the first is, *that of rejecting the Constitution;* the second is, *that of adopting it by a bare majority*.

I am not contented with it as it now stands, my reasons are assigned:—

I am not satisfied with the provision for amendments, as it stands in that system, because the amendments I propose, are such as two thirds of the Senate will perhaps never agree to—the indictment by grand jury, and trial of fact by jury, is not so much set by in the southern States, as in the northern—the great men there, are too rich and important to serve on the juries, and the smaller are considered as not having consequence enough to try the others; in short, there can be no trial by peers there:—The middle States gain advantages by having the legal business done in one of them, which may prevent their leading men, from engaging seriously in amendments:—I therefore propose the adopting the Constitution, in the following manner, in which I conceive there will be great unanimity.

That this Convention do adopt and ratify the Constitution, or frame of government for the United States of America, proposed by the Federal Convention, lately holden at Philadelphia; upon the following conditions, *viz.*

That the first Congress which shall be holden under the same, shall before they proceed to exercise any powers possessed under the Constitution, excepting those of organising themselves, and of establishing rules of procedure, take into consideration all amendments proposed by the Convention of this or any other State, and to make such amendments therein proposed as aforesaid, as any seven of the States shall agree to; and which amendments shall be considered as part of the Constitution.

And that the Senators and Representatives of the several States, shall set together in one body, and vote by States, in considering such amendments;—but the President or Vice-President elect, shall have no vote therein.

…

5th. In the second clause of the same section, strike out the words, “Both as to law and fact,” *and add to that clause these words*—Provided nevertheless, that all issues of fact shall be tried by a jury to be appointed according to standing laws made by Congress.

This will preserve the inestimable right of a trial by jury—This right is the democratical balance in the Judicary [*sic*] power; without it, in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens; without this the English Constitution would be a tyranny—See Judge Blackstone's excellent Commentary on this privilege, in his third volume, page 2.

6th. In the last clause in the same section next after the word State, insert these words, In, or near the County.

This keeps up the idea of trial in the vicinity. See the Massachusetts declaration of rights on this point —Also, that of other States, &c.

7th. At the end of the same clause, add these words—Provided that no person shall be held to answer to any charge of a criminal nature, unless it be upon indictment of a Grand Jury, appointed, sworn and charged according to known and standing laws.

This is the greatest security against arbitrary power; without this, every person who opposes the violation of the constitutional right of the people, may be dragged to the bar, and tried upon a bare information of an Attorney-General.—The loss of this privilege carries with it the loss of every friend to the people.—There is no instance yet, in England, or in America, excepting in the Stuart's reign, of a person's being tried for his life, otherwise than upon indictment. It was attempted before the Revolution, but successfully opposed.

Massachusetts Centinel, Storing, vol. 4, pp. 198–200.

7.2.5LETTERS AND DIARIES

7.2.5.1William Pierce to St. George Tucker, September 28, 1787

…

"As to trial by jury in criminal cases, it is right, it is just, perhaps it is indispensable,—the life of a citizen ought not to depend on the fiat of a single person. Prejudice, resentment, and partiality, are among the weaknesses of human nature, and are apt to pervert the judgment of the greatest and best of men. The solemnity of trial by jury is suited to nature of criminal cases, because, before a man is brought to answer the indictment, the fact or truth of every accusation is inquired into by the Grand Jury, composed of his fellow citizens, and the same truth or fact afterwards (should the Grand Jury find the accusation well founded) is to be confirmed by the unanimous suffrage of twelve good men, "superior to all suspicion." I do not think there can be a greater guard to the liberties of a people than such a mode of trial on the affairs of life and death … . ["]

Gazette of the State of Georgia, Kaminski & Saladino, vol. 16, p. 445.

7.3DISCUSSION OF RIGHTS

7.3.1TREATISES

7.3.1.1Hale, 1736

CHAP. XIX.

Concerning *Presentments*, *Inquisitions*, and *Indictments*, and their kinds.

…

That which follows to be considered is the manner of bringing the offender to his legal trial and judgment, which is either by appeal, which is the suit of the party, or by indictment, which is immediately the king's suit.

The former of these, namely appeals, I shall consider after the business of indictments, because it is but rare to have an appeal, and the most prosecutions of this nature are by indictment or presentment, and therefore I shall consider this first.

I shall distribute this matter into these general heads, namely, 1. Touching indictments and presentments. 2. Process. 3. Arraignment. 4. Pleas of the offender. 5. Trial. 6. Judgment. 7. Execution; each of which will take in several particular heads and distributions.

Presentment is a more comprehensive term than *indictment*, for regularly an indictment is an accusation given in against a person by the grand inquest for some misdemeanor, whereunto he is put to answer; but presentments do not only include such indictments, but also some other informations whereunto the party is not put to answer, as presentments of *felo de se*, of *fugam fecit*, of deodands, of deaths *per infortunium*, and many others.

In this title concerning presentments and indictments I shall consider these points. 1. The several kinds of presentments and indictments. 2. Where a man shall be put to answer in criminals without indictment. 3. Who may be indicters, and how returned. 4. Of what they may inquire. 5. What the penalty of not inquiring or presenting. 6. What formalities are required in indictments.

First, Touching the several kinds of presentments; inquisitions and indictments in matters capital.

They may be distinguished, 1. In relation to the courts or judicatories, or jurisdictions, where they are made.

And, 2. In respect of their effects or natures.

1. Touching the former branch of distribution in relation to the jurisdictions where made, and that multiplies presentments or indictments according to the jurisdictions, as some are in the leet, some in the sheriff's *Turn*, some before the coroner, some before justices of peace, justices of *oyer* and *terminer*, gaol-delivery, king's bench, whereof enough before hath been said, and shall not need here to be repeated.

But those, that most concern capital offenses, are such as are taken before the coroner, or such as are taken before justices by commission, whereof more shall be said in the ensuing chapters.

II. As to the second kind of distribution in respect of the nature and effect thereof.

1. Some presentments are of themselves convictions, and not traversable.
2. Others are not convictions, but only in nature of informations, and therefore traversable.

Regularly all presentments or indictments before justices of the peace, *oyer* and *terminer*, gaol-delivery, *&c*. are traversable, and conclude not the party or those claiming under him.

And therefore, tho it hath been held, that the presentment of a *felo de se* before the coroner be not traversable, (*de quo supra*, yet of all hands it is agreed, that a presentment of a *felo de se* before justices of peace or *oyer* and *terminer* is traversable by the executors, *&c. Co. P. C. cap*. 8. *p*. 55. *H*. 37 *Eliz. B. R. Laughton*'s case.

If a presentment be made *super visum corporis*, that *A.* kild *B.* and fled, this presentment of the flight is held not traversable, but conclusive to forfeit the goods, tho he be after acquitted of the felony, and expressly found by the petty jury upon his trial, that *non se retraxit* [d], 13 *H*. 4. 13. *b. Forfeiture* 32. 3 *E*. 3. *Forfeiture* 35. 7 *Eliz. Dy*. 238. *b*. And the same law is, if it be found *super visum corporis*, that the felon fled and was kild in the flight, this presentment, tho after the party's death is conclusive as to the forfeiture for the flight. 3 *E*. 3. *Coron*. 289, 290, 312.

But if before justices assigned to hear and determine, it be presented, that *J. S.* committed a felony and fled, or if upon the arraignment of a person for felony he be found not guilty, and that he fled, this is but in nature of an inquest of office, and the flight is traversable in an action, or information, or *scire facias* brought by the king for the goods of the person; 37 *Assiz*. 7. 47

E. 3. 26. *a*. And all the reason, that can be given why the coroner's inquest of a *fugam fecit* is conclusive, and not the other, is only that which is given 8 *E*. 4. 4. *a. Ceo est un ancient positif ley del coron'*.

If a man be presented to have suffered an escape, because in this case the party is at least to be fined, he shall have his traverse to it, and is not concluded by it.

But if either before the justices in *eyre* or before the coroner an escape be presented upon a vill either before or after the arrest, this is held not to be traversable, because there is only an amercement to be set upon the vill, *viz. villata in misericordia*; and the reason given by *Stamford* is, *quia de minimis non curat lex; Stamf. P. C. Lib*. I. *cap*. 32. *f*. 35. *b*.

But if it fall out, that there be an indictment for such an escape, (as there hath been formerly against the city of *London* for the escape of those, that riotously kild Dr. *Lamb* [e], who were thereupon fined 2000 *l*.) such an indictment is not conclusive, but traversable.

Whether an inquisition of a *felo de se* before the coroner be traversable, *vide que supra, Part*. I. *cap*. 31. *p*. 414.

And there are no presentments besides what are before mentiond, that are in themselves convictions and not traversable, but a presentment in a leet of bloodshed or the like, and in the *Swanimote* court of the forest for offenses of *Vert* and *Venison*.

But even those presentments are traversable also in two cases, *viz*. 1. If the offense presented be out of their jurisdiction. 2. Or if the presentment be such as concerns the freehold, as presentments of nusances, or such matter as charge the freehold; 41 *E*. 3. 26. *b*. 45 *E*. 3. 8. *b*.

And therefore it was resolved in the *Exchequer* in a *quo warranto* against the water-bailiff and conservator of the river *Severn*, 22 *Car*. 2. that upon a bare presentment the conservators cannot set a fine upon a supposed unlawful fishing or the like, unless the party comes in and confesses it, or plead to it, and be convicted by a jury of the offense.

A presentment of a riot or forcible detainer by a justice or two justices of peace, as the case shall require, is a conviction by the statute of 15 *R*. 2. *cap*. 2. 8 *H*. 6. *cap*. 9. 13 *H*. 4. *cap*. 7.

But a presentment by a justice of a default in repairs of an highway, tho by the statute of 5 *Eliz. cap*. 13. it is such a presentment, as the parties shall be put to answer, yet it is not conclusive, but the traverse of the party is saved by the statute; and it is but reason, for tho the view of the justice can ascertain the decay or want of repairs, yet it cannot ascertain in what parish

it lies, or who is bound by tenure or prescription to repair.

CHAP. XX.

Where a man shall be *put to answer* in *criminal* and *capital offenses without indictment* at the king's suit.

AT the common law there were several means of putting the party to answer a felony without any indictment, some whereof are still in force, others are taken away by statute.

I. If a thief or robber were taken with the *mainouvre*, *cum manu opere*, and the *mainouvre* brought into court with the prisoner, he should have been arraignd upon the *mainouvre* at the king's suit; 2 *E*. 3. *Coron*. 156. And therefore *M*. 18 & 19 *E*. 1. *coram rege, rot*. 28. *Norf. Et quia praedictus* Johannes de Brampton [*falsarius sigilli regis & brevium suorum, ut dicitur,*] *non est appellatus, nec indictatus, nec captus cum manu opere, per quod secta domino regi in hujusmodi casu potest competere, ideò* [*consideratum est, quòd*] *praedictus* Johannes [*eat inde*] *sine die*, &c.

And *T*. 10 *E*. 2. *rot*. 132. *Bucks, Robert Legat* was arraignd for counterfeiting the king's seal, upon the counterfeit commission brought into court without indictment, and he pleaded not guilty; and was acquit[*].

But upon a bare information or bill, without indictment or the *mainouvre* at common law no party was to be put to answer for a felony; and therefore, *M*. 20 & 21 *E*. 1. *coram rege, rot*. 27. *Hibernia, William Prene*, the king's carpenter in *Ireland*, being accused for felony by a bill in the king's-bench there, and convicted and condemned, but after ransomed for 200 *l*. and a writ of error brought in the king's-bench in *England*, and assignd, that he ought not to be put to answer in case of life or member *per vocem & per billam, quam* Nigellus le Broun *porrexit versùs ipsum, licèt non esset indictatus per* 12. [f]

But it seems to me, that this proceeding upon the *mainouvre* is wholly taken away by the statutes of 25 *E*. 3. *cap*. 4. 28 *E*. 3. *cap*. 3. 42 *E*. 3. *cap*. 3. and therefore I do not find any proceeding upon the *mainouvre* since these statutes.

II. A second sort of proceeding in cases capital without indictment is, where an appeal is brought at the suit of the party, and the plaintiff is nonsuit upon that appeal, yet the offender shall be arraigned at the king's suit upon such appeal; and so it is in case the appellant die or release; and in such case, altho the party be indicted as well as appeald, yet upon the nonsuit of the plaintiff, the proceeding for the king shall not be upon the

indictment, but upon the appeal. 4 *E*. 4. 10. *a*.

But this hath these two qualifications.

1. It must be where the plaintiff in the appeal hath either declared upon his appeal by writ, or formed his appeal by bill, for the bare suing of a writ without a declaration is not such an appeal, as the party being nonsuit the defendant shall be thereupon arraigned, for 1. The writ may be brought in his name by a stranger without his privity. 2. Because the writ alone contains not such certainty of time, place, and other matters, whereby the party may be put to answer. 7 *H*. 7. 6. *b*.

2. It must be where an appeal is well begun, and by a party enabled to prosecute it, therefore, if the appeal abate, because the plaintiff is outlawd, or a woman (who cannot bring an appeal, but only of the death of her husband,) or if the year and day be past, or by the misnosmer of the defendant, *&c*. there the appellee shall not be arraigned at the king's suit, because the appeal was never good, but shall be dismissed, only the judges may arraign him upon an indictment, if any be before them for that offense, or if none be, yet they may bind him over to another sessions, and in the mean time to be of good behaviour; 19 *E*. 2. *Coron*. 317. All the learning touching this business is fully declared by *Stamf. Lib*. III. *cap*. 59. *f*. 147. & *sequentibus*.

III. A third sort is upon an appeal by an approver, but the whole learning touching that will come in its proper place hereafter. [g]

IV. The fourth sort is by appeals by particular persons, especially of treason in parliament; and this was very frequent in antient times, especially in the time of *R*. 2. namely *anno septimo, undecimo, & duodecimo,* which bred great inconveniencies.

And therefore by the statute of 1 *H*. 4. *cap*. 14. all these kinds of appeals in parliament are wholly taken away; and since that time I find not any such appeals brought in parliament.

And therefore, when the now earl of *Bristol* in this present parliament in the lords house preferd articles of high treason and other misdemeanors against the earl of *Clarendon*, then lord chancellor, upon a reference unto all the judges and upon great consideration the judges *unâ voce* returned their opinions, that these articles were contrary to the statute of 1 *H*. 4. and could not be preferd in the lords house by the said earl or any other private

person.[h]

But impeachments by the house of commons of high treason, or other misdemeanors in the lords house have been frequently in practice, notwithstanding the statute of 1 *H*. 4. and are neither within the words nor intent of that statute, for it is a presentment by the most solemn grand inquest of the whole kingdom.

V. If in a civil action *de uxore raptâ cum bonis viri* upon not guilty pleaded the defendant be convicted, this antiently served in nature of an indictment of felony. 13 *Assiz*. 6. 18 *E*. 3. 32. *a*. *Stamf. P. C. f*. 94. *b*. So if upon a special verdict in trespass brought in the king's-bench it be found, that the defendant took them feloniously, antiently this served for an indictment. 31 *E*. 1. *Enditement* 31.

So if in an action of slander for calling a man thief, the defendant justifies, that he stole goods, and issue thereupon taken, it be found for the defendant, if this be in the king's bench, and for a felony in the same county, where the court sits, or if it be before justices of assize, who have also a commission of gaol-delivery, he shall be forthwith arraigned upon this verdict, as on an indictment, and the reason is, because here is a verdict of twelve men in these cases, and so the verdict, tho in a civil action, serves the king's suit as an indictment, and is not contrary to the acts of 25, 28, & 42 *E*. 3. which enact, *that no man shall be put to answer, &c. but upon indictment or presentment*.

But if the sheriff return a rescue of a prisoner taken for felony, 1 *H*. 7. 6. *a*. or a breach of prison by one arrested for felony, 2 *E*. 3. 1. *b*. this is not sufficient to arraign the party, nor doth it countervail an indictment, for it is not by the oath of twelve men; *vide hoc totum Stamf. P. C. Lib*. II. *cap*. 29. *f*. 95. *a*.

By the statute of 11 *H*. 7. *cap*. 3. there was power given to proceed upon all penal statutes by information before justices of assize and peace, but there is an exception of all cases of treason, murder and felony.

Ill use was made of this statute by *Empson* and *Dudley*, and great inconvenience and trouble to the people did arise by it, and therefore 1 *H*. 8. *cap*. 6. it was repeald.

And tho informations are practised oftentimes in the crown-office in cases criminal, and by many penal statutes the prosecution upon them is by the acts themselves limited to be by *bill, plaint, information* or *indictment*, yet thus much is observable.

1. That the method of prosecution of *capital* offenses is still to be by

indictment, except the cases above mentiond.
2. That in all criminal causes the most regular and safe way, and most consonant to the statutes of *Magna Carta, cap*. 29. 5 *E*. 3. *cap*. 9. 25 *E*. 3. *cap*. 4. 28 *E* 3. *cap*. 3. & 42 *E*. 3. *cap*. 3. is by presentment or indictment of twelve sworn men.

CHAP. XXI.

Who may be indictors, and where and how returned.

INquisitions, presentments, or indictments are taken before courts or officers of several kinds, and accordingly by acts of parliament several things are prescribed touching them.

I. Touching inquests before coroners: By the statute of 4 *E*. 1. *De officio coronatoris*, the coroner is to issue his precept to four, five or six vills to appear before him at a certain day to make inquiry, this precept is directed to the constables of the vills, who accordingly give summons to a competent number of inquirers, twelve at least [i], and by them the inquisition is made, when they have been sworn and have heard their evidence upon oath taken before the coroner.

II. Touching inquests of felonies in leets and *Turns:* By the statute of *Westminster* 2. *cap*. 13. indictments in the sheriffs *Turns* are to be by twelve at least, and they are to set their seals to the inquisitions, otherwise they are void [k].

And by the statute of 1 *E*. 3. *cap*. 17. which extends as well to leets as *Turns*, they are to be by indenture, one part to remain with the indictors, the other with the sheriff or steward.

And by the statute of 1 *R*. 3. *cap*. 4. no person shall be returned upon a pannel in the sheriff's *Turns*, unless he hath 20 *s*. *per ann*. of freehold, or 26 *s*. 8 *d*. of copyhold, and all indictments in the *Turn* taken otherwise shall be void.

But now by the statute of 1 *E*. 4. *cap*. 2. the sheriff cannot proceed upon any indictments for felony, or otherwise taken in his *Turn*, but must send them to the sessions of the peace, and the justices there are to make process and proceed thereupon.

But then there must be care taken, 1. That the indictments be of such matters only, as are within the jurisdiction of the sheriff's *Turn*, otherwise the justices may not proceed upon them, 4 *E*. 4. 31. *a*. 8 *E*. 4. 5. *b*. [*] and 2. That they be by indenture and under the seals of the presenters according to the former statutes.

III. Indictments taken in the county of *Lancaster* before the sheriff or justices against any person inhabiting out of the same county, or taken in any other county against inhabitents of the county of *Lancaster* ought to be by twelve men, and each indictor to have lands or tenements of the yearly value of 5 *l*. by the statute of 33 *H*. 6. *cap*. 2.[†]

IV. Touching murders, *&c*. committed in the king's palace the statute of 33 *H*. 8. *cap*. 12. hath appointed that twenty-four of the king's yeomen officers of the cheque-roll of the king's house shall be returned to make inquiry, and the trial to be by a jury of the gentlemen officers.

V. Concerning inquiries to be made before justices itinerant, the course was this: There first went out the writ of the common summons of the *eyre*, directed to the sheriff to summon *de quálibet villâ quatuor homines & praepositum, & de quolibet burgo duodecim legales burgenses* to be at the day and place for the *eyre*, and upon that day the sheriff and lords of liberties were to return the names of the bailiffs of their hundreds and liberties, and those bailiffs were sworn to elect two men in their several hundreds, and present their names to the court, and these two hundreders for each hundred were to choose of themselves and the rest of their several hundreders respectively, ordinarily sixteen, or sometimes only twelve, who were severally sworn upon inquiries and presentments of things done within their hundred, as so many grand inquests for every several hundred, and the twelve returned for each borough were the grand inquest for the borough; this caused a vast and chargeable attendance upon the courts in *eyre*, and hath been long disused, and therefore I shall not say more of it.

VI. Concerning the choosing and returning of the grand jury before justices assigned to keep the peace, *oyer* and *terminer*, and gaol-delivery, I shall be somewhat more large, because before these justices ordinarily criminal and capital causes are heard and determined.

Upon the summons of any session of the peace there goes out a precept either in the name of the king or of two or more justices of peace directed to the sheriff, …

Upon this precept the sheriff is to return twenty-four or more out of the whole county, namely a considerable number out of every hundred, out of which the grand inquest at the sessions of the peace, *oyer* and *terminer*, or gaol-delivery are taken and sworn *ad inquirendum pro domino rege & corpore comitatûs*, (not, as antiently in *eyre*, a kind of grand inquest out of every hundred;) but in some counties which consist of gildable and such franchise, where anciently several justices of gaol-delivery sat, as in *Suffolk*

[*] there are two grand juries, one for the gildable, another for the franchise, because there are two several commissions of gaol-delivery.

Now touching the grand jury thus returned before justices assigned there are some things considerable.

They must be *probi & legales homines*, and therefore, if any one of the indictors be outlawd, tho in a personal action, it is a sufficient plea to avoid the indictment; 11 *H*. 4. 41. *b. M*. 4 *Car. B. R. Croke p*. 134. Sir *William Withipole*'s case, and the statute of 11 *H*. 4. *cap*. 9. hereafter mentioned fortifies this, *de quo infra*.

And therefore, if any of them be attainted in a conspiracy, or *decies tantum*, or of perjury, or outlawd in any personal action, or attaint of felony or in a *praemunire*, they are not to be indictors, because in law, they are not *probi & legales. Lamb. Justic*. 391.

Touching their *annuus census* I do not find any thing determined, but freeholders they ought to be. The statute of 2 *H*. 5. *cap*. 3. that requires jurors, that pass upon the trial of a man's life, to have 40 *s. per ann*. freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions [†].

By the statute of 11 *H*. 4. *cap. ultimo*, reciting, that inquests had been formerly returned of persons outlawd, fled to sanctuary for treason or felony, *&c*. enacts, "That no indictments be made by such persons but by inquest of loyal subjects returned by the sheriffs or bailiffs duly without denomination of any person, but only by the sworn bailiffs and ministers of the sheriff; and if any indictment be otherwise taken, it be void."

Upon this statute it hath been resolved in Sir *William Withipole*'s case above cited. 1. That it extends to coroners inquests. 2. It is a good plea upon this statute, that one of the indictors is outlawd in a personal action, as well as of felony, or that any of the jurors were impanneld at the denomination of any contrary to this statute.

By the statute of 3 *H*. 8. *cap*. 12. it is enacted, "That the justices of gaol-delivery, and justices of peace, whereof one of the *quorum*, in open sessions may reform the pannels returned by the sheriff, (which be not at the suit of the parties,) by putting to and taking out the names of persons returned, and shall command the sheriff to return the same accordingly, upon pain of 20 *l*. and the king's pardon to be no bar to the prosecutor."

This act extends not only to pannels of grand inquests returned, but also to pannels of the petty jury, commonly called the jury of life and death, which may be reformed by the justices according to this act, and the sheriff

is bound to return the pannel so reformed.

The grand inquest returned the first day of the sessions and sworn commonly serves the whole sessions of the peace, *oyer* and *terminer*, or gaol-delivery; yet the court may command another grand inquest to be returned and sworn, which is done ordinarily upon two occasions.

1. If before the end of the sessions the grand jury having brought in all their bills are discharged by the court, and after that discharge either some new felony or other misdemeanor is committed, and the party taken and brought into gaol; or if after the discharge of the grand inquest some offender be taken and brought in during the sessions. In the former case, there is a necessity to make a special record of the adjournment of the sessions from day to day, because otherwise the whole sessions are in supposition of law only the first day, and therefore without the entry of such adjournment the offense and proceedings will be in supposition of law after the sessions ended, and so the proceeding will be erronious [*]: This was the case of *Sampson* [b], who being arraigned and tried for a murder committed after the first day of the sessions and before the sessions ended, for want of entry of an adjournment it was ruled erronious. And the same is to be observed, if upon record it appears, that the grand inquest was returned after the first day of the sessions, unless an adjournment be enterd of record.
2. The second ordinary instance of a new grand jury returned is upon the statute of 3 *H*. 7. *cap*. 1. namely, a grand inquest impanneld to inquire of the concealment of another grand inquest, upon which defaults presented the former grand inquest is to be amerced; and this tho it mention only an inquest thus to be taken by justices of peace, yet it extends to the king's bench, and hath been practised there accordingly in my knowledge, and possibly at the sessions of *oyer* and *terminer* and gaol-delivery, tho that can rarely come in question, because the sessions of the peace ordinarily accompanies those commissions.

And this is the proper and legal way of punishing the grand inquest, if they refuse to present such things as are within their charge, and for which they have probable evidence to make a presentment, but of this more in the next chapter.

CHAP. XXII.

Concerning the *demeanor of the grand inquest* in relation to their presentments.

THE coroners inquest may must hear evidence of all hands, if it be offerd to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office, *quomodo* J. S. *ad mortem suam devenit*, tho it be also true, that the offender may be arraigned upon that presentment.

But the grand inquest before justices of peace, gaol-delivery, or *oyer* and *terminer* ought only to hear the evidence for the king, and in case there be *probable* evidence [a], they ought to find the bill, because it is but an accusation, and the party is to be put upon his trial afterwards.

But if a bill of indictment for murder, or other capital offense be presented against *A.* if upon the hearing the king's evidence, or upon their own knowledge of the incredibility of the witnesses they are dissatisfied, they may return the bill *ignoramus*.

If *A.* be kild by *B.* so that it doth *constare de personâ occisi & occidentis*, and a bill of murder be presented to them, regularly they ought to find the bill for murder, and not for manslaughter, or *se defendendo*, because otherwise offenses may be smotherd without due trial; and when the party comes upon his trial, the whole fact will be examined before the court and the petty jury, and in many cases it is a great disadvantage to the party accused [*]. For if a man kill *B.* in his own defense, or *per infortunium*, or possibly in executing the process of law upon an assault made upon him, or in his own defense upon the highway, or in defense of his house against those that come to rob him, (in which three last cases it is neither felony nor forfeiture, but upon not guilty pleaded he ought to be acquitted,) yet if the grand inquest find an *ignoramus* upon the bill, or find the special matter, whereby the prisoner is dismissed and discharged, he may nevertheless be indicted for murder seven years after.

But if the grand jury had found the bill for murder, (yea or for manslaughter,) and the party pleading not guilty the special matter is given in evidence, and the petty jury find the special matter, (or in the three last cases find him not guilty, as they may,) this acquittal upon this finding will be a good plea of *autrefoits acquit*, and he shall never be arraigned for it again.

If a bill be against *A.* for muder, and the grand inquest upon the evidence before them or their own knowledge be satisfied that it was but *per infortunium*, or *se defendendo*, and accordingly return the bill specially, the court may remand them to consider better of it, or may hear the evidence at the bar, and accordingly direct the grand inquest; but I have known a judge

blamed for setting a fine upon the grand inquest for such a return, because in truth it comes not up to felony.

But if a bill go out against *B.* for murder, and it doth *constare de personâ occidentis*, may the grand inquest find the bill for manslaughter, and *ignoramus* for the murder? and is the court bound to receive such a return?

In this case of all hands it is agreed [b], that the grand jury is to blame, because they take upon them to anticipate the evidence, that is to be given to the petit jury, and so determine matter of law, which belongs to the court to determine, and by this means many murders may escape under the disguise of manslaughter, and so escape with their clergy.

Some therefore have made it a practice to set a fine upon the grand jury in this case, and it hath proceeded so far, as to fine petit juries also in such like cases; whereof hereafter.

That which I think herein, and in other concealments of grand inquests is, as follows, *viz*.

1. That the court may receive such a return from the grand inquest, and it is a matter of discretion, especially, if upon inquiry from the indictors or witnesses, or upon view of their examinations it do plainly appear, that the crime amounts to no more.
2. That barely upon such a return no fine can be set upon the grand inquest, unless the evidence to the grand inquest be given at the bar in the presence of the court; for otherwise the court cannot understand, whether the grand inquest doth well or ill in such case.
3. That if the evidence to the grand inquest be given at the bar upon an indictment in the king's bench, and the grand inquest will not find a bill according to the direction of that court, as for instance, will find a man guilty, only *se defendendo*, or of manslaughter, when it is murder, that court may set a fine upon the grand inquest, and so it hath been practised; for it is the highest court in *England* of ordinary justice, especially in criminal causes.
4. That if, the justices of *oyer* and *terminer*, or gaol-delivery having heard the evidence at the bar, the grand inquest will not find according to their directions, the justices may bind them over by recognizance into the king's bench, and upon an information against them they may be fined.
5. That in such a case justices of peace, *oyer* and *terminor*, or gaol-delivery may according to the statute of 3 *H.* 7. *cap.* 1. impanel another inquest to inquire of their concealments, and thereupon set fines upon them.
6. But in my opinion fines set upon grand inquests by justices of the peace,

oyer and *terminer*, or gaol-delivery for concealments or non-presentments in any other manner are nor warrantable by law; and tho the late practice hath been for such justices to set fines arbitrarily, yea not only upon grand inquests, but also upon the petit jury in criminal causes, if they find not according to their directions, it weighs not much with me for these reasons; 1. because I have seen arbitrary practice still go from one thing to another, the fines set upon grand inquests began, then they set fines upon for petit juries for not finding according to the directions of the court; then afterwards the judges of *nisi prius* proceeded to fine jurors in civil causes, if they gave not a verdict according to direction even in points of fact; this was done by a judge of assise [c] in *Oxfordshire*, and the fine estreated, but I by the advice of most of the judges of *England* staid process upon that fine; the like was done by the same judge in a case of burglary, the fine was estreated into the *Exchequer*; but by like advice I stayed process, and in the case of *Wagstaff* [d] and other jurors fined at the *Old-Bailey* for giving a verdict contrary to direction, by the advice of all the judges of *England* (only one dissenting) it was ruled to be against law; but of this hereafter [e]. 2. My second reason is, because the statute of 3 *H*. 7. *cap*. 1. prescribes a way for their fining, which would not have been, if they had been arbitrarily subject to a fine before. 3. It is of very ill consequence, for the privilege of an *Englishman* is, that his life shall not be drawn in danger without due presentment or indictment, and this would be but a slender screen or safeguard, if every justice of peace or commissioner of *oyer* and *terminer*, or gaol-delivery may make the grand jury present what he pleases, or otherwise fine them; and there is no parity of reason or example between inferior judges and the court of king's bench, which is the supreme ordinary court of justice in such cases; and thus far concerning fining of grand inquests. [f]

They are sworn to keep the king's counsel undiscovered, the revealing or disclosing whereof was heretofore taken for felony, 27 *Ass*. 63. but that law is antiquated, it is now only fineable; if there be thirteen or more of the grand inquest, a presentment by less than twelve ought not to be; but if there be twelve assenting, tho some of the rest of their number dissent, it is a good presentment; for if twelve agree, it is not necessary for the rest to agree. *Lamb. Justice* 400.

But in case of a trial by the petit jury, it can be by no more nor less than twelve, and all assenting to the verdict, [g] accordingly it was adjudged *M*. 42 *E*. 3. *Rot*. 16. *Suff. Rex* [h], the judgment was reversed, because but eleven

indictors.

But if a presentment be deliverd into a court of sessions and received, no amerciament lies, that it was not assented to by twelve, but otherwise it is in case of a presentment by a leet, for the party distrained, *&c*. may aver, that it was not presented by twelve. 45 *E*. 3. 26. *b. B. Leet* 7.

The indictors are presumed in law to be indifferent, unless the contrary appear; 1. Because returned by the sheriff. 2. Because sworn by the court to present, and therefore shall never be charged by writ of conspiracy for any conspiracy before their being sworn, tho the party be acquit. 7 *H*. 4. 31. *b*. 19 *H*. 6. 19. *a*. But 21 *E*. 3. 17. by *R. Th*. it is a good replication to say, he procured himself to be returned of the grand inquest.

If a bill of indictment be for murder, and the grand jury return it *billa vera quoad* manslaughter, & *ignoramus quoad* murder, the usual course is in the presence of the grand jury to strike out *malitiosè & ex malitiâ suâ praecogitatâ* and *murderavit*, and leave in so much as makes the bill to be but bare manslaughter, and so to receive it.

But the safest way is to deliver them a new bill for manslaughter, and they to indorse it generally *billa vera*, for the words of the indorsement make not the indictment, but only evidence the assent or dissent of the grand inquest, it is the bill itself is the indictment, when affirmed. And so in like cases, where the bill contains two offenses, as burglary and theft, forcible entry and detainer. *H*. 4 *Jac. B. R. Yelverton* 99. *Ford*'s case.

The grand jury are sworn *ad inquirendum pro corpore comitatûs*, and therefore regularly they cannot inquire of a fact done out of that county for which they are sworn, unless specially enabled by act of parliament, but only in some special cases. *Mich*. 9 *Car. B. R. Bell*'s case.

If a man had been stricken in the county of *A*. and had died in the county of *B*. the offender had not been indictable of murder, *&c*. in the county of *A*. because the death was in the county of *B*. neither had he been indictable in the county of *B*. because the stroke was given in the county of *A*. but by the statute of 2 & 3 *E*. 6. *cap*. 24. he may be indicted in the county, where the party died, tho the stroke were in another county, and also the offender shall be tried there, but an appeal may be brought in either county. 7 *Co. Rep*. 2. *a. Bulwer*'s case.

So if *A*. had committed a felony in the county of *D*. and *B*. had been accessary before or after in the county of *C. B*. could not have been indicted as accessary in either county at common law, but by that statute he is indictable, and shall be tried in the county where he so became accessary.

Stamf. P. C. Lib. I. *cap*. 46.

So if a stroke were given *super altum mare*, and the party came into the body of the county, and there died, this is *casus omissus*, and the party is neither indictable by the jury of the county where he died, nor before the admiral by the statute of 28 *H*. 8. *cap*. 15. *Co. P. C. cap*. 7. *p*. 48.

If *A*. rob *B*. in the county of *C*. and carry the goods into the county of *D*. *A*. cannot be indicted of robbery in the county of *D*. because the robbery was in another county, but he may be indicted of larciny or theft in the county of *D*. because it is theft wherever he carries the goods; the like law in an appeal, 4 *H*. 7. 5 *b*. 7 *Co. Rep*. 2. *a*. *Bulwer*'s case.

But by the force of some acts of parliament treasons and felonies committed in one county may be indicted and tried in another county.

By the statute 33 *H*. 8. *cap*. 23. upon examination, as in that statute is provided, treasons, misprisions of treasons, and murders committed in any place within the king's dominions or without may be inquired of, heard, and determined in any county, where the king by his commission shall appoint.

This statute, at least as to the trial of treasons and misprisions, is repealed by the statute of 1 & 2 *P. & M. cap*. 10. *Stamf. P. C. Lib*. II. *cap*. 26. *fol*. 89, 90. *Co. P. C. cap*. 2. *p*. 27.

But it seems that statute stands in force as to indictments and trials of murder, the circumstances required by that statute being observed.

By the statute 35 *H*. 8. *cap*. 2. because some doubt was conceived, whether forein treasons committed out of this realm might be inquired of, heard and determined within the realm, it is enacted, that such offenses shall be inquired of, heard and determined in the king's bench, or in such counties, where the king shall issue his commission, by the good men of the same county.

This statute stands in force, not repealed by 1 & 2 *P. & M. cap*. 10. *Co. P. C. cap*. 2. *p*. 24.

By the statute 27 *Eliz. cap*. 2. treasons by priests or jesuits coming into *England*, and felony for receiving them; and by the statute 1 *Jac. cap*. 11. felony for taking a second husband or wife, the first living, are inquirable and determinable where the offender is apprehended; the like for felony in exportation of wools by the statute of 14 *Car*. 2. *cap*. 18. But yet it was held at common law, that treason in adhering to the king's enemies beyond the sea was inquirable and triable where the offender had lands, *vide Coke* super *Littleton, Sect*. 440. *p*. 261. *b*. 5 *R*. 2. *Trial* 54. but this is now settled by the statute of 35 *H*. 8. *cap*. 2. *vid. Co. P. C. cap*. 1. *p*. 11.

If *A*. by reason of tenure of lands in the county of *B*. be bound to repair a bridge in the county of *C*. if the bridge be in decay, he may be indicted in the county of *C*. that he is bound *ratione tenurae* of lands in the county of *B*. to repair the bridge. 5 *H*. 7. 3. 3 *E*. 3. *Assise* 446.

Hale Pleas of the Crown, vol. II, pp. 152–64.

7.3.1.2Hawkins, 1762

CHAP. XXV.

Of Indictment.

Sect. 1. AN Indictment is an Accusation, at the Suit of the King, by the Oaths of twelve Men of the same County wherein the Offence was committed, returned to inquire of all Offences in general in the County, determinable by the Court into which they are returned, and finding a Bill brought before them to be true; but when such Accusation is found by a Grand Jury, without any Bill brought before them, and [d] afterwards reduced to a formed Indictment, it is called a Presentment; and when it is found by Jurors returned to inquire of that particular Offence only which is indicted, it is properly called an Inquisition. And for the better Understanding the Nature of such Proceedings, I shall consider the following Particulars,

1. Whether a Grand Jury may find Part of a Bill brought before them true, and Part false.
2. Whether an Indictment be merely the Suit of the King.
3. What Matters are indictable.
4. Where a Man may be tried at the Suit of the King for a capital Offence, without any Indictment.
5. Whether a Man may be arraigned on an Indictment while an Appeal is depending against him for the same Offence.
6. Who may and ought to be Indictors, and in what Manner they are to be returned.
7. Within what Place the Offences inquired of must arise.
8. What ought to be the Form of the Body of an Indictment.
9. What ought to be the Form of the Caption of it.
10. Upon what Proof it may be found.
11. In what Cases it may be quashed.
12. What may be pleaded to it, and in what Manner.

Sect. 2. As to the first Point, *viz*. Whether a Grand Jury may find Part of the Bill brought before them true, and Part false; it seems to be generally agreed, That they must either find *Billa Vera*, or *Ignoramus*, for the Whole;

and that if they take upon them to find it specially, or conditionally, or to be true for Part only, and not for the rest, the Whole is void, and the Party [a] cannot be tried upon it, but ought to be indicted anew; and accordingly it hath been resolved, that if a Grand Jury indorse a Bill of Murder, [b] *Billa vera se defendendo*; or *Billa vera* for Manslaughter, [c] and not Murder; or it they indorse a Bill upon the Statutes of News, *Billa Vera*, [d] but whether *Ista verba prolata fuerunt maliciose, seditiose, vel econtra, ignoramus*; or if they indorse an Indictment of Forcible Entry, and Forcible Detainer, *Billa vera* [e] as to the Forcible Entry, and *Ignoramus* as to the Forcible Detainer; or if they indorse, [f] That if the Freehold were in *J. S.* or the Possession were in *J. S.* then they find *Billa vera*, the Whole is void.

Sect. 3. As to the second Point, *viz.* Whether an Indictment be merely the Suit of the King; it is every Day's Practice, That it is so far esteemed the King's Suit, that the Party who prosecutes it is a good Witness to prove it: Also it seems to be agreed, [g] That no Damages can be given to the Party grieved upon an Indictment, or any other criminal Prosecution, [h] notwithstanding the King, by his Commission erecting a New Court, expressly direct, That the Party shall recover his Damages by such a Prosecution. Also, where by Statute Damages are given to the Party grieved by the Offence intended to be redressed, it [i] seems that they cannot be recovered on an Indictment grounded on such Statute, unless such Method of recovering them be expressly given by the Statute; but that they ought to be sued for in an Action on the Statute, in the Name of the Party grieved. But it seems [k] certain, That the Court of King's Bench having the King's Privy Seal for that Purpose, may give to the Prosecutor the third Part of the Fine assessed on a Criminal Prosecution, for any Offence whatsoever. Also, it is every Day's Practice of that Court, to induce Defendants to make Satisfaction to Prosecutors for the Costs of the Prosecution, and also for the Damages sustained by the Injury whereof the Defendants are convicted, by intimating an Inclination on that Account to mitigate the Fine due to the King.

Sect. 4. As to the third Point, *viz.* What Matters are indictable: There can be no Doubt, but that all Capital Crimes whatsoever, and also all Kinds of inferior Crimes of a publick Nature, as Misprisons, and all other Contempts, all Disturbances of the Peace, all Oppressions, and all other Misdemeanors whatsoever of a publick evil Example against the Common Law, may be indicted; but no Injuries of a [l] private Nature, unless they some Way concern the King. Also it seems to be a good general Ground, That where-

ever the Statute prohibits a Matter of a publick Grievance to the [m] Liberties and Security of a Subject; or commands a Matter of publick [n] Convenience, as the repairing of the Common Streets of a Town; an Offender against such Statute is punishable, not only at the Suit of the Party aggrieved, but also by Way of Indictment for his Contempt of the Statute, unless such Method of Proceeding do manifestly appear to be excluded by it. Yet if the Party offending have been fined to the King in the Action brought by the Party, as it is said [o] that he may in every Action for doing a Thing prohibited by Statute, it seems questionable, whether he may afterwards be indicted, because that would make him liable to a second Fine for the same Offence. Also, if a Statute extend only to private [a] Persons, or if it extend to all Persons in general, but chiefly concern Disputes of a private Nature, as those relating to [b] Distresses made by Lords on their Tenants, It is said that Offences against such Statute will hardly bear an Indictment. Also, where a Statute make a new Offence, which was no Way prohibited by the Common Law, and appoints a particular Manner of proceedings against the Offender, as by Commitment, or Action of Debt, or Information, *&c*. without mentioning an Indictment, it seems to be [c] settled at this Day, that it will not maintain an Indictment, because of Mentioning the other Methods of proceeding only, seems impliedly to exclude that of indictment. [d] Yet it hath been adjudged, That if such a Statute give a Recovery by Action of Debt, Bill, Plaint, or Information, or otherwise, it authorizes a Proceeding by Way of Indictment. [e] Also, where a Statute adds a farther Penalty to an Offence prohibited by the Common Law, there can be no Doubt but that the Offender may still be indicted, if the Prosecutor think fit, at the Common Law. And if the Indictment for such Offence conclude *contra formam Statuti*, and cannot be made good as an Indictment upon the Statute, it seems [f] to be now settled, That it may be maintained as an Indictment at Common Law, as will be more fully shewn in the following Part of this Chapter.

As to the fourth Point, *viz*. Where a Man may be tried at the Suit of the King for a capital Offence without any Indictment, I shall endeavour to shew,

1. Where one may be so tried as having been taken with the Manner.
2. Where one may be so tried upon a Verdict.
3. Where upon an Appeal not prosecuted.
4. Whether one may be so tried upon a Sheriff’s Return.

Sect. 5. As to the first Point, *viz*. Where one may be so tried as having

been taken with the Manner: [g] It is said, That anciently if one guilty of Larceny had been freshly pursued and taken with the Manner, and the Goods so found upon him had been brought into the Court with him, he might be tried immediately without any Indictment; and this is said to have been the proper Method of Proceeding in such Manors which had the Franchise of Infangthefe, but seems to be altogether obsolete at this Day.

Sect. 6. As to the second Point, *viz.* Where one may be so tried upon a Verdict: It is [h] said, That in an Action of Trespass in the King's Bench, *De muliere abducta cum bonis viri*, if the Defendant be found guilty of having carried away the Woman and Goods with Force, and feloniously; or [i] in a common Action of Trespass in the said Court, for Goods carried away, if it be found that the Defendant feloniously stole them, he shall be put to answer the Felony without any further Accusation; for such a Charge by the Oath of twelve Men, on their Inquiry into the Merits of a Cause, in a Court which has Jurisdiction over the Crime, is equivalent to an Indictment, and the King being always in Judgment of Law present in Court, may take Advantage of any Matter therein properly disclosed for his Benefit. But such a Verdict in a Court which has [k] no Jurisdiction over criminal Matters, seems to be of little Force, because such Court has nothing to do with such Matters. And it seems,

[a] That even in the King's Bench, if on any Indictment whatsoever, except only an Inquisition of Death found before a Coroner on View, a Person not mentioned in it be found guilty of the Crime whereof others are indicted, yet such Finding shall not serve for an Indictment against him, because it was wholly extrajudicial. [b] But such finding of others guilty, whether in the King's Bench, or other Court of Criminal Jurisdiction, upon an Inquisition of Death, found before a Coroner on View, is of greater Force, because the Jury acquitting the Party so indicted, [c] ought to inquire what other Person did the Fact; because it appears by a Record of the highest Credit, that a Person is killed, [d] Also, if a Person be declared against in a proper Court, for having been guilty of a Misdemeanor, *simul cum A. B. & C.* and thereupon the Jury find *A. B.* and *C.* guilty; it seems that such Verdict will serve for an Indictment against them, because it was not wholly extrajudicial.

As to the third Point, *viz.* Where one may be so tried upon an Appeal not prosecuted; the following Particulars seem most remarkable.*

Sect. 7. First, That an Appeal by an innocent Person, and an Appeal by an [e] Approver, are equally favoured in this Respect.

Sect. 8. Secondly, That regularly where a Person is indicted and appealed of the same [f] Crime, and the Appeal is not prosecuted, he shall not [g] be arraigned upon the Indictment, but upon the Appeal.[34]

Sect. 9. Thirdly, [h] That if an Appellant be nonsuit in an Appeal by Writ, before he hath declared, the Appellee cannot be arraigned at the King's Suit on the Writ of Appeal; not only because it contains no Certainty of the Circumstances of the Fact, which is the proper [i] Office of the Declaration to ascertain; but also because, for what appears to the contrary by the Record, the Writ might [k] have been purchased by a Stranger. And therefore in such case it seems to be in the Discretion [l] of the Court, either to dismiss the Appellee, or to bail him, till it shall appear whether there will be any other Prosecution against him. But if an Appellant, by Writ, be nonsuit after Declaration, or any Appellant by Bill or Approver, be nonsuit, it seems, [m] That regularly the Appellee shall be arraigned at the King's Suit, on the Bill Declaration; because they must be as certain as an Indictment, and cannot be commenced but in Person.

Sect. 10. Fourthly, That it seems to be a settled Rule, That where-ever an Appeal is once well commenced, and afterwards so far determined, without a full Acquittal, That neither the same, nor any [n] other Plaintiff, can never [*sic*] bring another Appeal against the same Appellee, he may be arraigned upon the Bill or Declaration, at the Suit of the King; as where an Appellant, having a good Title to the Appeal, makes a Release [o] to the Appellee, hanging the Action, or suffers a [p] Nonsuit, or [q] *Retraxit*, or [r] demurs to a good Plea or Issue, tendered by the Appellee, which Demurrer is adjudged against him; or where such an Appellant or Approver [s] confess their Appeal to be false, [t] unless they make such Confession in the Field, upon a Trial awarded by Battel; for such Confession amounts to a Vanquishment of the Appellant or Approver, and consequently is a full Acquittal of the Appellee; after which his Life shall not be brought again into Danger for the same Crime. And this seems to be the only Reason why after such a Vanquishment, or a Verdict in his Favour, an Appellee shall be discharged, as well against the Suit of the King, as that of the Party. But it seems, That in all other Cases whatsoever, an Appellee, in an Appeal well commenced, being wholly discharged of the Suit of the Party, may be arraigned upon the Appeal, at the Suit of the King, whether such discharge were merely owing to the Act of the Party, as in the Cases abovementioned, or to the Act of the Court; as [a] where an Approver is judged to be hanged before he hath perfected his Appeal; or partly to the Act of Law, and partly to the Act of

the Party; as [b] where an Appeal by a Woman for the Death of her first Husband, is abated by her marrying a second; or where an Appellee is discharged of an Appeal, for not [c] having been made a Defendant in a former Appeal, brought by the same Appellant for the very same Fact; or whether such Discharge be merely owing to the Act of God; as [d] where an Appellant dies a natural Death, while his Appeal is depending. It seems indeed to be holden in the Year-Book [e] of 4 *H*. 6. As a general Rule, that wherever a Writ is abated, the Declaration depending upon it is determined also, and consequently, that the Appellee cannot be arraigned upon it; but to this it may be answered, that in the very same Place it is allowed, that after a Nonsuit in an Appeal, the Appellee may be arraigned at the Suit of the King; and it seems difficult to give a Reason, why a Writ is not as much determined upon a Nonsuit, as upon an Abatement; to which may be added, that the Point adjudged, which was this, That where a Writ abates for a Misnosmer, the Defendant shall not be arraigned at the Suit of the King, seems plainly to go on this Ground, That where a Suit is ill commenced, the King shall not have a greater Advantage from it than the Party might have had; and therefore the Opinion abovementioned; being also contradicted by the best [f] Authorities, seems to be of little Weight.

Sect. 11. Fifthly, That wherever [g] an Appeal abates for an Insufficiency of the Writ, or is barred for want of a good Title in the Appellant, or for any other Matter which shews it was ill commenced, the Defendant shall not be arraigned upon it at the Suit of the King, because it never had a good Foundation, and cannot give a greater Advantage to the King than to the Party himself who sued it; and therefore it seems to be agreed, That if an Appeal be abated for want of Form apparent in the Writ, as [h] for the Omission of the Word *Habeas*, or for false [i] *Latin*, or for any other [k] apparent Defect; or if it be abated for a Defect not apparent of itself, but disclosed by the Pleadings of the Parties, as for a [l] Misnosmer, or wrongful Addition, or any such like Insufficiency; or if it be abated on Account of the Disability of the Appellant, as by the Plea of Outlawry [m] for Felony or Trespass; or if it be put without Day upon a Plea of Excommunication of the Appeallant; or [n] if it be barred by a Release made before the Commencement of the Suit, or by Reason that the Time for bringing it was elapsed [o] before it was commenced, or because the Appellant appears to have never had any Right to bring it; as where in an Appeal by one as Wife, it is found that she was [p] never lawfully married to the Deceased; or in an Appeal by one as Heir [q] to his Father, it is found that he hath an elder Brother alive by the same Father, *&c*. the Appellee shall not be arraigned

upon the Appeal, the Suit of the King, but shall be wholly discharged of it. But where an Appeal is put without Day on the Plea of [a] Excommunication, the Appellee shall be mainprised from Day to Day till the Plaintiff be absolved; and notwithstanding it seems to be holden generally in some [b] Books, That where an Appeal is abated for any of the Insufficiencies abovementined, or barred, the Appellee shall be set at large, and be discharged, as well against the King as Party; yet [c] surely this must be understood only of such Cases wherein it appears, That neither any Indictment is preferred, nor intended to be preferred by the King, nor any other Appeal preferred, nor intended to be preferred by the same or some other Party; for otherwise surely it cannot but be intended, that it must be in the Discretion of the Court, upon Consideration of the Circumstances of the Case, either to commit or bail the Appellee for a reasonable Time, in order to answer such further Prosecution, or [d] to bind him to his Good Behaviour for a certain Time, *&c*.

Sect. 12. Sixthly, That whatsoever may be pleaded by an Appellee either in Bar or Abatement of an Appeal, while it is carried on at the Suit of the Party, may [e] as well be pleaded by him, when it is prosecuted at the Suit of the King; as [f] that the Appellant suing an Appeal of Death, as Wife to the Deceased, was never married to him, or [g] that she is outlawed, *&c*. which depends upon the Reason taken Notice of in the precedent Sections, *viz*. That an Appeal shall not give the King a greater Advantage than the Party himself who sued it.

Sect. 13. Seventhly, That [h] wherever an Appellee is arraigned upon the Suit of the King, he may plead the King's Pardon, in the same Manner as if he had been arraigned upon an Indictment: But if an Appellee, who by pleading such a Pardon discharges himself of an Appeal at the Suit of the King, be also indicted, it is adviseable [i] to take Care at the same Time when he is in such Manner discharged of the Appeal, to have a Cesser of Process entered on the Indictment, to prevent the Vexation of causeless Prosecution upon it.

Sect. 14. As to the fourth Point, *viz*. Whether one may be tried at the Suit of the King for a Capital Offence, without any Indictment upon a Sheriff's Return, it seems to be generally agreed, [k] That neither the Sheriff's Return of a Rescous or Escape, or of any other Matter, nor any other Record whatsoever, except only an Appeal or Indictment, or something equivalent thereto, as the Verdict of twelve Men, finding a Man guilty in such Manner as is above set forth in the sixth Section of this Chapter, can at this Day put

a Man upon his Trial for a Capital Offence, as being contrary not only to the Common Law, but to [l] *Magna Charta*, and other [m] Statutes made in Affirmance of it.

Sect. 15. As to the fifth general Point of this Chapter, *viz*. Whether a Man may be arraigned on an Indictment, while an Appeal is depending against him for the same offence, it seems [n] that it it was the Common Practice before the Statute of 3 *H*. 7. 1. whether any Appeal were depending or not, not to try any Man upon an Indictment of Murder, be-before [*sic*; before] the Year and Day were passed, lest thereby the Suit of the Party should be prevented. And if such Regard were had to an Appeal where none was depending, it cannot be thought but that much [o] greater was had to one actually depending whether before or after the Year and Day were passed, [a] Yet in seems that the Court was never in any Case peremptorily bound to suspend the Proceedings on an Indictment in respect of an Appeal, but might always in Discretion, whenever it should seem proper, proceed on an Indictment, hanging an Appeal. And accordingly we find, that in many Instances [b] in the Old Books, when it is was holden, That in an Appeal by an Infant, the Parol should [c] demur till his full Age, the Court have proceeded to try a Man upon an Indictment, while an Appeal by an Infant was depending against him, to prevent the Delay, which could not but be occasioned, if the Pceceedings [*sic;* Proceedings] should be deferred till the Appellant should come to full Age. Also [d] where a Writ of Appeal of Robbery hath been sued out against a Person under an Indictment for the same Robbery, and ready to be tried, the Court have refused to put off the Trial of the Indictment in respect of such Writ of Appeal; because before the Appellant hath declared, it doth not judicially appear, that both the Indictment and Appeal are for the very same Fact. But if there was no such special Reason to induce the Court to proceed upon an Indictment while an Appeal is depending, if seems to have been the general [e] Practice to suspend the Proceedings on the Indictment till the Appeal were determined.

As to the sixth general Point of this Chapter, *viz*. Who may be, and ought to be Indictors, and in what Manner they are to be returned, I shall endeavour to shew,

1. How these Matters stand by the Common Law.
2. How by Statute.

Sect. 16. As to the first Particular, it seems clear, That by the Common Law every Indictment most be found by twelve [f] Men at the least, every [g] one of which ought to be of the same [h] County, and returned by the Sheriff,

or other proper Officer, without the Nomination of any other Person whatsoever; and ought also to be a Freeman, and a Lawful liege Subject; and consequently neither under an [i] Attainder of any Treason or Felony; nor a [k] Villein, nor Alien, nor outlawed, whether for a criminal Matter, or, as [l] some say, in a personal Action. And from hence it seems clear, that if it appear by the Caption of an Indictment, or otherwise, that it was found by [m] less than twelve, the Proceedings upon it will be erroneous.[n] Also, it seems that any one who is under a Prosecution for any Crime whatsoever, may, by the Common Law, before he is indicted, challenge any of the Persons returned on the Grand Jury; as being outlawed for Felony, *&c*. or Villeins, or returned at the Instance of a Prosecutor, or not returned by the proper Officer, *&c*.

Sect. 17. Also may Indictments in inferior [o] Courts have been [p] quashed for want of the Words *Proborum & legalium hominum*, in the Caption of the Indictment, setting forth by what Persons it was found; [q] but this is said to be no Exception to an Indictment found in the Court of King's Bench, or Grand Sessions, or Counties Palatine, and hath been often [r] overruled, as to Indictments in other Courts, because all Men shall be intended to be honest and lawful, till the contrary appear.

Sect. 18. It is resolved in the [a] Year-Book of 11 *H*. 4. by the Advice of all the Justices, That one outlawed on an Indictment of Felony, may plead in Avoidance of it, that one of the Indictors was outlawed for Felony, *&c*. But it seems to be the general [b] Opinion, That this Resolution is rather grounded on the Statute of 11 *H*. 4. *ch*. 9. which was made in the same Term, in which this Resolution was given, than on the Common Law; because it appears by the very same Year-Book, that when this Plea was first proposed it was disallowed; from whence, as I suppose, it is collected, that the subsequent Resolution was founded on the Authority of the said Statute, which may be intended to have been made after the Plea was disallowed, and before the subsequent Resolution, by which it was adjudged good. Yet, considering that the said Resolution was given in the Beginning of *Hillary* Term, and that the Parliament which made the said Statute was not holden before the Beginning of the same Term; and therefore it is not likely that the said Statute was so soon made; and also considering, that the said Resolution was given by Advice of all the Judges, who seem to have been consulted about the Validity of the Plea abovementioned at the Common Law, and takes no Manner of Notice of any Statute, but only of the Law in General, it may deserve a Question, Whether such Plea be not good at the

Common Law?

Sect. 19. I do not find it any where holden, that none but Freeholders ought to be returned on a Grand Jury; but how far the Law is in this Respect altered by Statute, shall be shewn in the twenty-first Section.[*]

Sect. 20. As to the second Particular, *viz*. How the Matters abovementioned stand by Statute, it is enacted by the Statute of *Westminster* 2. 28. *That old Men above the Age of seventy Years, Persons perpetually sick, or infirm at the Time of the Summons, or not dwelling in the County, shall not be put in Juries, or lesser Assises*. And the Equity thereof, and the Reason of the Thing, seem plainly so far to extend to Grand Juries, that if it shall appear, that any of the persons abovementioned be returned on a Grand Jury, the Court, into which they are returned, will easily excuse their Non-appearance. But it seems clear, [c] that any such Persons being returned on a Grand Jury, may lawfully serve upon it, if they think fit; neither do I find that they can have an Action on the said Statute for being so returned; for the Writ [d] in the Register grounded on, and reciting the statute, mentions the Prohibition of it to be, that Men above the Age of seventy Years shall not be put in *Assisis, juratis, vel recognitionibus aliquibus*, which Expressions seem proper for Petit. Juries only; whereas the [e] Writ grounded on the Statue of *Articuli super chartas*, set forth at large in the twenty-first Section, recites the Prohibition thereof to be, that none of the Persons in the Writ mentioned shall be put *in inquisitionibus nec juratis*, which Expression seems to be of a larger Extent, and to take in Grand as well as Petit Juries; by which it seems clearly to be implied, that in the Judgment of those who formed the said Writ, the Statute last mentioned is more general than the former.

Sect. 21. It is farther enacted by the abovementioned Statue of *Westminster* 2. 38. *That none shall be put on Assises or Juries, though they ought to be taken in the proper County, who have less Tenements than to the Value of twenty Shillings yearly*. And it is required by the Statue of 21 *Ed*. 1. Commonly called the Statute *De his qui ponendi sunt in Assisis, That they should have Tenements to the Value of* 40 s. *yearly; Provided, That before Justices in Eyre for Common Pleas in their Eyres, and also in Assises, and Juries, which shall be taken in Cities and Burghs, and other trading Towns, the same may be done as was accustomed:* And this Exception is likewise mentioned in the [a] Writ in the Register, which seems to be grounded on both these Statutes; by which it appears, That neither by the Common Law nor by these Statutes there was any Necessity in

Proceedings before Justices in Eyre, *&c*. That Petit Jurors should be Freeholders; and if so, it seems probable that there is no greater Necessity that Grand Jurors making an Inquiry before them should be Freeholders; and if a Grand Juror before such Justices need not to be a Freeholder, why should there be a greater Necessity that a Grand Juror before other Justices should be a Freeholder? And it is farther remarkable, that the above mentioned Writ in the Register, which seems to be grounded on these Statutes, mentions only Persons put *in assisis, juratis vel recognitionibus aliquibus;* To which may be added, that the [b] several subsequent Statutes, which require that none but Freeholders or Copyholders of Lands of such a Value shall be returned on Juries, expresly [*sic*] extend only to Juries returned for the Trial of Issues, except only the [c] Statutes concerning Indictments in the Sheriff's Torn, which require, that every Juror finding such Indictment shall have 20 *s*. yearly of Freehold, or 26 *s*. of Copyhold, and also except 3 *H*. 7. 1. which requires that every Juror of an Inquest by which Justices of Peace shall inquire of Concealments by other Inquests shall have Tenements of the yearly Value of 40 *s*. and also except 33 *H*. 6. 2. which requires that every Indictment in the County Palatine of *Lancaster*, of Persons supposed by the same Indictment to live in some other County, and also every Indictment in any other County, of Persons in the same Indictment, supposed to live in the said County of *Lancaster*, shall be taken by such Jurors only as have Lands to the yearly Value of one hundred Shillings; All which seems to make it doubtful, Whether there be any Necessity either by the Common Law or Statute, That a Grand Juror in any other Case must be a Freeholder.

Sect. 22. It is enacted by 28 *Ed*. 1. Commonly called the Statue of *Articuli super Chartas, cap*. 9. *That no Sheriff, nor Bailiff shall impanel in Inquests, nor in Juries over many Persons, nor others, nor otherwise than as is ordained by Statute: And that they shall put in those Inquests and Juries, such as be next Neighbours, most sufficient and least suspicious*. And the like is enacted almost in the very same Words by 42 *Ed*. 3. 11. And it is farther enacted by the said Statute of *Articuli super Chartas, That he who doth contrary, and is attainted thereupon, shall pay unto the plaintiff his Damages double, and shall be grievously amerced to the King*. And the said Statute of *Articuli super Chartas*, is said by Sir *Edward Coke* [d] to extend to all Suits or Proceedings, either criminal or civil, Real, Personal, or mixed, Publick or Private, Assises or Enquests; and surely that Part of it which ordains, that the most sufficient and least suspicious shall be returned on all Juries, is so agreeable to common Right and natural Justice, that it

cannot but be thought to be in Affirmance of the Common Law, and equally to extend to Grand and Petit Juries, and consequently if any Officer shall be willfully guilty of an Offence against it in the Return of any Jury, he cannot but be punishable for his Contempt, at the Suit of the King. And it is enacted by 23 *E*. 3. 6. *That Justices of Assises shall have Commissions sufficient to inquire in their Sessions of Sheriffs*, &c. *for putting into Panels Jurors suspect and of evil Fame*. And it is farther enacted by 34 *Ed*. 3. 4. *That all Panels shall be made of the next People, which shall not be suspect nor procured. And that the Ministers which do against the same, shall be punished before the Justices who take the Inquest, according to the Quantity of their Trespass, as well against the King as against the Party for the Quantity of the Damage which he hath suffered in such Manner*; and both these Statutes seem equally to extend to the undue Return of Grand and Petit Juries. But it is observable, that the Clause of the above recited Statute of *Articuli super Chartas*, which ordains that the Sheriff, *&c*. shall render double Damages, extends only to Juries returned in Suits between Party and Party, because it says, that he shall render them to the Plaintiff, which is a Denomination never given to the King or Prosecutor, where the Proceeding is by Way of Indictment; and accordingly we find that the Writs in the [a] Register grounded on this Statute expressly relate to suits between Party and Party.

Sect. 23. But the principal Statutes relating to the Return of Grand Juries, are 11 *H*. 4. 9. and 3 *H*. 8. 12. the first whereof is as followeth, *Because that now of late Enquests were taken at* Westminster, *of Persons named to the Justices, without due Return of the Sheriff, of which Persons some were outlawed before the said Justices of Record, and some fled to Sanctuary for Treason, and some for felony, there to have Refuge, by whom, as well many Offenders were indicted, as other lawful liege People of our Lord the King, not guilty, by Conspiracy, Abetment, and false Imagination of other Persons, for their special Advantage and singular Lucre, against the Course of the Common Law used and accustomed before this Time: Our said Lord the King, for the greater Ease and Quietness of his People, will and granteth, that the same Indictment so made, with all the Dependance thereof, be revoked [,] annulled, void, and holden for none for ever: and that from henceforth no Indictment be made by any such Persons, but by Enquest of the King's lawful liege People, in the Manner as was used in the Time of his noble Progenitors, returned by the Sheriffs, or Bailiffs of Franchises, without any Denomination to the Sheriffs, or Bailiffs of Franchises before made by any Person, of the Names, which by him should*

be impanelled, except it be by the Officers of the said Sheriffs or Bailiffs of Franchises sworn and known to make the same, and other Officers to whom it pertaineth to make the same according to the Law of England: *And if any Indictment be made hereafter in any Point to the contrary, that the same Indictment be also void, revoked, and for ever holden for none*.

…

Sect. 137. *First*, That where the Statute of 1 *Ed*. 6. requires, That the Party be accused [of Treason] by two lawful Witnesses; and the 5 & 6 *Ed*. 6. That he be accused by two lawful Accusers; they both mean the very [a] same Thing, because the Common Law admits of no other Accusers but Witnesses.

Sect. 138. *Secondly*, That according to the general [b] Opinion, it is not required either by the 1st, or 5 & 6 *Ed*. 6. That such Accusers or Witnesses be present with the Indictors in Person, but that they may send their Accusation to the Indictors in Writing under their Hands, which will be sufficient even after their Death. Also it is observable, That the Books which speak of this Matter do not expressly say, that such Accusation must be upon Oath, but surely this cannot but be intended; for how can any Accuser be said to be a lawful Witness, if he be not upon his Oath? But this is cleared by 7 *W*. 3. as to the Treasons within that Statute; for it expresly provides, That no Person shall be indicted thereof, but by and upon the Oath and Testimony of two lawful Witnesses.

Sect. 139. *Thirdly*, By the Judgment both of [a] *Coke* and [b] *Hale*, one who can only witness by Hearsay what he had heard a good Witness say, is not a lawful Accuser within any of these Statutes; for if this were to be allowed, nothing would be more easy than in any Case, where there is one Witness, to get a second, which would totally elude the Provision of the Statutes in requiring two lawful Witness, *&c*.

Sect. 140. *Fourthly*, That the Words, *unless the Party shall willingly, without Violence, confess the same*, in the 1st, and 5 & 6 *Ed*. 6. are to be understood [c] where the Party accused upon his Examination, before his Arraignment, willingly confesses the same without Torture: But it is observable, that 7 *W*. 3. is thus expressed, *Unless the Party indicted and arraigned, or tried, shall willingly, without Violence, in open Court confess the same*.

Sect. 141. *Fifthly*, That one Witness to one, and another Witness to another Overt Act of the very same [d] Treason, have been construed to be sufficient, within the Statutes of the 1st, and 5 & 6 *Ed*. 6. and the express

Words of 7 *W*. 3. are agreeable hereto.

Sect. 142. *Sixthly*, That the Statute of 1 & 2 *Ph. & Ma*. 10. by enacting, That all Trials of Treason shall from thenceforth be according to the Course of Common Law, doth not [e] take away the Necessity of two Witnesses upon an Indictment, required by the 1st, and 5 & 6 *Ed*. 6. because the Indictment is no Part of the Trail, but is more properly the Accusation to be tried.

Sect. 143. *Seventhly*, [f] That the said Statute of 1 & 2 *Ph. & Ma*. doth not extend to Misprision of Treason; but this is expressly provided for by 7 *W*. 3. as to such Treasons as are within that Statute, and therefore there must be two Witnesses to the Indictment, as well as Trial of every such Misprision.

Sect. 144. *Eighthly*, That [g] Petit Treason is within the 1st, and 5 & 6 *Ed*. 6. and 1 & 2 *Ph. & Ma*. 10. but not within the 7th of *W*. 3. from whence it follows, That two Witnesses are required to the Indictment, and not to the Trial of it, and that two Witnesses are not necessary even upon the Indictment, if [h] the Party, upon his Examination, confess it.

Sect. 145. *Ninthly*, That the Statute of 1 & 2. *Ph. & Ma*. 11. which enacts, That all Persons accused of any Offences concerning the Impairing, Counterfeiting or Forging the Coin, shall be indicted and tried as at the Common Law, hath been construed [i] to extend to Clipping, and all other Offences in impairing the Coin, which have been made Treasons since the said Statute of 1 & 2 *Ph. & Ma*. From whence it may be probably argued, That the Statute of 7 *W*. 3. by expresly providing, That nothing therein shall extend to High Treason for counterfeiting the Coin, intended in like Manner, that it should not extend to any other High Treason concerning the Coin.

Sect. 146. As to the eleventh general Point of this Chapter, *viz*. In what Cases an Indictment may be quashed: I take it to be [k] settled, That by the Common Law the Court may, in Discretion, quash any Indictment, for any such Insufficiency, either in the Caption, or Body of it, as will make any Judgment whatsoever, given upon any Part of it against the Defendant, erroneous; yet it seems That Judges are in no Case bound, *ex debito justitiae*, to quash an Indictment, but may oblige the Defendant either to plead or to demur to it: And this they generally do where it is for a Crime of an enormous or publick Nature, as Perjury, Forgery, Sedition, Nusances to the Highways, and other Offences of the like Nature.[a] Neither will the Court quash an Indictment removed by *Certiorari*, if a Recognisance for the Trial of it hath been forfeited.

Sect. 147. Also it is enacted by 7 *W*. 3. 3. *That no Indictment for High*

Treason, or Misprision thereof, (except only Indictments for counterfeiting the King's Coin, Seal, Sign or Signet,) nor any Process or Return thereupon, shall be quashed on the Motion of the Prisoner, or his Counsel, for miswriting, misspelling false or improper Latin, *unless Exception concerning the same be taken and made in the respective Court, where such Trial shall be, by the Prisoner, or his Counsel assigned, before any Evidence given in open Court upon such Indictment; not shall any such Miswriting, Misspelling, false or improper* Latin, *after Conviction on such Indictment, be any Cause to stay or arrest Judgment thereupon: But nevertheless, any Judgment given upon such Indictment shall and may be liable to be reversed upon a Writ of Error, in the same Manner, and no other than as if this Act had not been made*.

Sect. 148. It hath been settled [b] in the Construction of this Statute, that no such Exception can be taken, after Plea pleaded.

Sect. 149. It is said [c] in *Siderfin*'s Reports, That the Court never [d] quasheth an Information exhibited by a common Person, but that it will quash an Information exhibited by the Attorney General, or by the Master of the Crown Office, upon Motion, if there be Cause: But this was denied in one [e] *Nixon*'s Case, wherein the Court seemed to be agreed, That they never have, or will quash any Information whatsoever.

Sect. 150. As to the twelfth general Point of this Chapter, *viz*. What may be pleaded to an Indictment, and in what Manner: Having already shewn in this Chapter how a Defendant may plead [f] to an Inictment, That the Indictors were returned contrary to the Purview of 11 *H*. 4. 9. And having also [g] shewn, how he may plead a Misnosmer, or wrongful Addition; and intending in the following Part of the Book to shew, how he may plead a former Acquittal, Conviction or Attainder, or a Pardon or other special Plea, or the general Issue: I shall in this Place only take Notice, That the Defendant may plead any Plea in Abatement of an Indictment of Felony; and also plead over in Bar, and take [h] the general Issue also, in the same Manner as an Appellee may do, as hath been more fully shewn, *Ch*. 23. *Sect*. 127, 138.

Hawkins Pleas of the Crown, book II, pp. 209–18, 257–59.

7.3.1.3Blackstone, 1769

The next step towards the punishment of offenders is their prosecution, or

the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by *presentment*, or *indictment*.

I. A presentment, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation [a], without any bill of indictment laid before them at the suit of the king. As, the presentment of a nusance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented as the author can be put to answer it. An inquisition of office is the act of a jury, summoned by the proper officer to enquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest, or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like; and presentments of petty offences in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide: for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore enquire a little more minutely.

II. An *indictment* [b] is a written accusation of one or more persons of a crime or misdemesnor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer*, and of general gaol delivery, twenty four good and lawful men of the county, some out of every hundred, to enquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them [c]. They ought to be freeholders, but to what amount is uncertain [d]: which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel, are sworn upon the grand jury,

to the amount of twelve at the least, and not more than twenty three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of king Ethelred [e]. *"Exeant seniores duodecim thani, et praefectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare."* In the time of king Richard the first (according to Hoveden) the process of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remain, in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of the enquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to enquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury however ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine, that might be applied to very oppressive purposes [f].

The grand jury are sworn to enquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly enquire of a fact done out of that county for which they are sworn, unless particularly enabled by act of parliament. And to so high a nicety was this matter antiently carried, that where a man was wounded in one county, and died in antoher, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them: but by statute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And so in some other cases: as particularly, where treason is committed out of the realm, it may be enquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13. 35 Hen. VIII. c. 2. and 5 & 6 Edw. VI. c. 11. But, in general, all offences must be enquired into as well as tried in the county where the fact is committed.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "*ignoramus*;" or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, "not a true bill;" and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it, "a true bill;" antiently, "*billa vera.*" The indictment is then said to be found and the party stands indicted. But, to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But, if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree [g]. And the indictment, when so found, is publicly delivered into court.

Indictments must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5. all indictments must set forth the christian name, sirname [*sic*], and addition of the state and degree, mystery, town, or place, and the county of the offender: and all this to identify his *person*. The *time*, and *place*, are also to be ascertained, by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of indictment, and the *place* to be within the jurisdiction of the court. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king) unless the bill of indictment be found within three years after the offence committed [h]; and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The *offence* itself must also be set forth with clearness and certainty: and in some crimes particular words of art must be used which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus in treasons, the facts must be laid to be done, "treasonably, and against his allegiance;" antiently "*proditorie*

et contra ligeantiae suae debitum:" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed" or "slew," the other; which till the late statute was expressed in Latin by the word "*murdravit*" [i]. In all indictments for felonies, the adverb "feloniously, *felonice,"* must be used; and for burglaries also, *"burglariter,"* or in English, "burglariously:" and all these to ascertain the intent. In rapes, the word *"rapuit,"* or "ravished," is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcinies also, the words *"felonice cepit et asportavit*, feloniously took and carried away," are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then it's dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also where a limb, or the like, is absolutely cut off, there such description is impossible.[k] Lastly, in indictments the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed. In indictments for larcinies this is necessary, that it may appear whether it be grand or petit larciny; and whether entitled or not to the benefit of clergy: in homicide of all sorts it is necessary; as the weapon, with which it is committed, is forfeited to the king as a deodand.

Blackstone Commentaries, bk. 4, c. 23; vol. 4, pp. 298–303.

7.3.2CASELAW

7.3.2.1Earl of Shaftesbury's Case, 1681

[Then a Bill of High-Treason was offered against the Earl of Shaftesbury; and Sir Francis Withins moved, That the evidence might be heard in court.]

Foreman. My Lord Chief Justice, it is the opinion of the jury, that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it; and they insist upon it as their right to examine in private, because they are bound to keep the king's secrets, which they cannot do, if it be done in court.

[Pemberton,] L.C.J. Look ye, gentlemen of the jury, it may very probably be, that some late usage has brought you into this error, that it is your right, but it is not your right in truth … . What you say concerning keeping your counsels, that is quite of another nature, that is, your debates, and those things, there you shall be in private, for to consider of what you hear publicly. But certainly it is the best way, both for the king, and for you, that there should, in a case of this nature, be an open and plain examination of the witnesses, that all the world may see what they say.

Foreman. My lord, if your lordship pleases, I must beg your lordship's pardon, if I mistake in anything, it is contrary to the sense of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, "That they shall keep the counsel's, and their own secrets:" Now, my lord, there can be no secret in public; the very intimation of that doth imply, that the examination should be secret; besides, my lord, I beg your lordship's pardon if we mistake, we do not understand any thing of law.

Mr. *Papillon* [a juror] … . If it be the ancient usage and custom of England, that hath never been altered from time to time, and hath continued so, we desire your lordship's opinion upon that; as we would not do any that may be prejudicial to the king, so we would not do the least that should be prejudicial to the liberties of the people; if it be the ancient custom of the kingdom to examine in private, then there is something may be very prejudicial to the king in this public examination; for sometimes in examining witnesses in private, there come to be discovered some persons guilty of treason, and misprision of treason, that were not known, nor thought on before. Then the jury sends down to the court, and gives them intimation, and these men are presently secured; whereas, my lord, in case they be examined in open court publicly, then presently there is intimation given and these men are gone away. Another thing that may be prejudicial to the king, is, that all the evidences here, will be foreknown before they come to the main trial upon issue by the petty jury; then if there be not a very great deal of care, these witnesses may be confronted by raising up witnesses to prejudice them, as in some cases it has been: Then besides, the jury do apprehend, that in private they are more free to examine things in particular, for the satisfying their own consciences, and that without favour or affection; and we hope we shall do our duty.

[Pemberton,] L.C.J … . [T]he king's counsel have examined whether he hath cause to accuse these persons, or not; and, gentlemen, they understand very

well, that it will be no prejudice to the king to have the evidence heard openly in court; or else the king would never desire it.

Foreman. My lord, the gentlemen of the jury desire that it may be recorded, that we insisted upon it as our right; but if the court overrule, we must submit to it.

Howell's State Trials, vol. 8, pp. 759, 771–74.

7.3.2.2Respublica v. Shaffer, 1788

AFTER some conversation with the Grand Inquest, the Attorney General informed the court, that a list of eleven persons had been presented to him by the Foreman, with a request, that they might be qualified and sent to the jury, as witnesses upon a bill then depending before them. He stated that the list had been made out by the defendant's bail: that the persons named were intended to furnish testimony in favor of the party charged, upon facts with which the Inquest, of their own knowledge, were unacquainted; and he concluded with requesting, that the opinion of the court might be given upon this application. The Chief Justice, accordingly, addressed the Grand Jury to the following effect:

M'KEAN, *Chief Justice*.—Were the proposed examination of witnesses, on the part of the Defendant, to be allowed, the long-established rules of law and justice would be at an end. It is a matter well known, and well understood, that by the laws of our country, every question which affects a man's life, reputation, or property, must be tried by *twelve* of his peers; and that their *unanimous* verdict is, alone, competent to determine the fact in issue. If, then, you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the Petit Jury, you will supersede the legal authority of the court, in judging of the competency and admissibility of witnesses, and, having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the law of the land. This point has, I believe, excited some doubts upon former occasions; but those doubts have never arisen in the mind of any lawyer, and they may easily be removed by a proper consideration of the subject. For, the bills, or presentments, found by a grand Jury, amount to nothing more than an official accusation, in order to put the party accused upon his trial; 'till the

bill is returned, there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here, then, is the just line of discrimination: It is the duty of the Grand-Jury to enquire into the nature and probable grounds of the charge; but it is the exclusive province of the Petit Jury, to hear and determine, with the assistance, and under the direction of the court, upon points of law, whether the Defendant is, or is not guilty, on the whole evidence, for, as well as against, him. —— You will therefore, readily perceive, that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must, consequently, be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for, by the law, it is declared, that no man shall be twice put in jeopardy for the same offence: and, yet, it is certain, that the enquiry now proposed by the Grand Jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but, I think, likewise, upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely upon the testimony in support of the prosecution, the Petit Jury receive no biass [*sic*] from the sanction which the indorsement of the Grand Jury has conferred upon it.—But, on the other hand, would it not, in some degree, prejudice the most upright mind against the Defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient?—which would then be the natural inference from every *true bill*. Upon the whole, the court is of opinion, that it would be improper and illegal to examine the witnesses, on behalf of the Defendant, while the charge against him lies before the Grand-Jury.

One of the Grand Inquest then observed to the court, that “there was a clause in the qualifications of the Jurors, upon which he, and some of his brethren, wished to hear the interpretation of the Judges—to wit—what is the legal acceptation of the words *“diligently to enquire?”*[”] To this the Chief Justice replied, that “the expression meant, *diligently to enquire* into the circumstances of the charge, the credibility of the witnesses who support it, and, from the whole, to judge whether the person accused ought to be put upon his trial. For, (he added), though it would be improper to determine the merits of the cause, it is incumbent upon the Grand Jury to satisfy their minds, by a *diligent enquiry*, that there is a probable ground for the accusation, before they give it their authority, and call upon the Defendant to make a public defence.”

1 On August 17, 1789, Mr. Burke made an identical motion to amend the proposed amendment. After being referred to the proposed grand jury clause and after "[a] desultory conversation … Mr. Burke withdrew [the motion] for the present."

Congressional Register, August 17, 1789, vol. 2, pp. 228–29.

2 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committtee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

3 "Article the 7th," the prior textual history of which is found in Chapters 8, 9 and 10.

4 "Article the seventh," the prior textual history of which is found in Chapters 8, 9 and 10.

5 "Article the seventh," the prior textual history of which is found in Chapters 8, 9 and 10.

6 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

d *Vide supra*, p. 63, 64.

e *Cro. Car*. 252.

* *Vide Part* 1. *p*. 186 & 349.

f That case was thus: *William Prene* assigned for error, that "par ceo que le commune laie de *Engleterre*, e de *Irelaund*, veut, ke nul homme par bille saunz enditement, ou par sute de apel, suz les plez de corone, ne sait [soit] attache, ne mis en respounz; yet that he the said *William* had been imprisond, & *de diversis foloniis acculpatus* par une bille par *Nel la Broun* bote en mayns des justices; altho par enquest, ne par chapiter, ne fut endite." And upon consideration of the whole matter the court of king's-bench in *England* were of opinion, "Quòd praedictum recordum est irritandum, & adnichilandum; & ideo mandatum est capitali justic' *Hiberniae*, quod corrigat, &c. & acceptâ securitate de praedicto *Willielmo* ad standum recto in com' ubi deliquisse debuit, & vocatis super hoc convocandis ponat praedictum *Willielmum* per apertum & manifestum indictamentum de certis feloniis in certis locis, si aliquis vel aliqui eum fortè indictare sive appellare voluerit secundùm legem & consuetudinem regni, &c. & quòd interim per manucaptionem bona & catalla, terras & tenements, eidem *Willielmo* deliberet, &c."

g *Vide infra cap*. 29. *p*. 226.

h *See Stat. Tr*. Vol. II. *p*. 550.

i *Vide Cobat's case supra, p*. 161. *in notis*.

k 2 *Co. Instit. p*. 387.

* *Vide supra. p*. 71.

† *Part* I. *p*. 286.

* *Vide supra, p*. 26.

† *Vide infra, p*. 272. *in notis*.

* *Supra p*. 248

b [*sic*] *W. Jones*, 420.

a This same doctrine is laid down by C. J. *Pemberton* in the case of the earl of *Shaftsbury, Stat. Tr. Vol*. III. *p*. 415. *Vide tamen* Sir *John Hawles* remarks on that case, *Stat. Tr. Vol*. IV. *p*. 183. wherein he unanswerably shows, that a grand jury ought to have the same persuasion of the truth of the indictment, as a petty jury, or a coroner's inquest: *vide supra p*. 61.

* Notwithstanding this, according to lord *Coke* 9 *Co*. 119. *a*. indictments, which concern the life of a man, ought to be framed as near the truth, as may be.

b This is far from being agreed of all hands, for such an anticipation of the evidence by the grand jury is what they cannot avoid, they being bound by their oaths, as much as the petit jury, to *present the whole truth, and nothing but the truth*, nor do they in this case so properly determine matter of law as matter of fact; for whether murder or not depends upon a preconceived malice, which (tho it is to be presumed, where no provocation appears, is matter of fact, and proper for the consideration of a jury, and tho judges have sometimes fined jurors for not finding such bills for murder, yet such proceedings have been generally censured, as in the case of *Sir H. Wyndham* and others, *P*. 19 *Car*. 2. who were fined by *Keeling*, C. J. for not finding a bill of murder, albeit they were satisfied the man died by the hand of the party indicted; but upon complaint in parliament the chief justice was fain to submit. 2 *Keb*. 180.

c Justice *Hide* at *Oxford. Vaugh*. 145.

d *Vaugh*. 153.

e *Cap*. 42.

f The court of king's bench, it is true, may much more safely be trusted, than other inferior courts, but yet our author's arguments do sufficiently evince, that no court whatever ought to have such a power of making juries find what they please, nor has the law vested such a power in any court; for as to matter of fact the jury are the sole judges, and herein are to be guided entirely by their own judgments and consciences; indeed in matters of law the court is the proper judge, and the jury are not to find contrary to their direction, but even here they are not bound to follow the direction of the court, but, if they cannot assent thereto, ought to find the fact specially; indeed where the fact is agreed, if they will obstinately find matter of law contrary to the direction of the court, there may be some reason why they should be fined. See *Hood*'s case *Kelyng* 50. but barely finding matter of fact against the direction of the court is no sufficient cause to fine a jury. *Bushell*'s case, *Vaugh*. 153. and this distinction is founded on the antient maxim of the common law; *ad quaestionem juris non respondent juratoris, sed judices; ad quaestionem facti non respondent judices, sed juraratores*. Co. Lit. §366. & *libros ibi*.

g See the inconveniences hereof, *Pref*. to *Stat. Tr. p*. 7.

h This case proves nothing as to the petit jury, it being an indictment on the coroner's inquest, as appears by the record, which is as follows: "*John Cobat* of *Ipswich* was indicted by the coroner's inquest consisting only of eleven, quòd die Sabbati prox' ante festum Sancti ad vincula anno regni regis *E*. 3. post conquestum tricesimo quinto insultum fecit *Johanni le Swon* servienti Prioris sanctae Trinitat. *Gippewici* in suburbio libertat. villae praedictae in quodam compo juxta *Tromons' Hegg*, & dictum *Johannem le Swon* ibidem cum quadam armâ vocat' *Sparth'* precii quatuor denar, verberavit felon' de quâ quidem verberatione dictus *Johannes le Swon* moriebatur, sed languebat à dicto die Sabbati prox. ante festum Sancti *Petri* ad vincula usque ad diem Jovis tunc prox. sequent", the which indictment was afterwards in *Mich'* term *anno* 42 of the same reign removed into the king's bench, "& continuato inde processu versus praefat' *Johannem* usque à die Paschae in xv dies anno regni regis nunc *Angliae* quadragesimo tertio, ad quem diem coram domino rege apud *Westm'* venit praedictus *Johannes Cobat* per man', & viso & diligenter examinento per cur'

indictamento praedicto, pro eo quod compert. est in eodem, quod fuerunt nisi undecim, juratores tantum in inquisitione praedictâ, ubi in qualibet inquisitione de jure fore deberent xii jurati, & sic videtur cur', quod indictamentum praedictum minus sufficiens est ad praefat' *Johannem Cobat* ulterius inde ponere responsur'. Ideo idem *Johannes Cobat* ad praesens eat inde sine die, salvo semper jure regis, &c."

d 4 Lamb. B. 4. ch. 3

a 2 Rol. Rep. 52. 3 Bulst. 206. 1 Rol. Rep. 407, 408.

b 2 Rol. Rep. 52. Powel's Case

c 3 Bulst. 206. 1 Rol. 408. 2 Sid. 230.

d Leon. 287.

e Yelv. 99. 3 Sid. 414. Vide B. 1. 64. sect. 40. Cro. Jac. 151. Con 1. Sid 99.

f Yelv. 15.

g 1 Rol. Abr. 220. Letter B. 2 Rol. Abr. 83. Letter P. Cro. Car. 531, 558.

h Cro. Car. 558. Vide supra Ch. 1. Sect. 3, 4, 6, 7, 8.

i 1 Rol. Abr. 220. Letter B. 1 Jon. 380. Cro. Car. 448.

k 1 Keb. 487 pl. 30.

l 27 Ass. pl. 20. Bro. Indictment, 16. Prosentment, 26.

m 2 Inst. 55, 163. Cro. Jac. 577.

n 1 Mod. 34. 1 Sid. 209.

o 8 Co. 60. b. 2 Inst. 131.

a 1 Sid. 209. 2 Mod. 34.

b 1 Mod. 71, 288. 1 Lev. 299. Raym. 205. 1 Vent. 104. 2 Inst. 131, 132.

c Bond's Case, Michaelmas 3 Georgii. 1. Shower 398, 399. 3 Keb. 34, 273. Cro. Jac. 643, 644. 3 Mod. 79. 4 Mod. 144. Carth. 263. Palmer. 388. 1 Sid. 434, 439. 6 Mod. 86. 2 Rol. Rep. 247, 248, 398. Stra. 679. Sess. Cas. 295.

d Domimus Rex versus Dixon, Trin. 3 Georg. 1.

e 3 Mod. 118. 1 Sid. 192. seem contrary.

f The Case of the County of the City of Norwich, adjudged Pasch. 3 Georgii 1. 2 H. H. P. C. 171. contra.

g Vide supra Ch. 15. Sect. 41. 7 H. 4. 43. pl. 9. S. P. C. 28, 29, 148. Letter C. 179. Letter B. H. P. C. 198. 2 H. H. P. C. 156, 149.* Bro. Appeal, 130. 1 Ass. pl. 5. Fitz. Coron. 156, 357.

h H. P. C. 199. 2 H. H. P. C. 150*, 151*. S. P. C. 94. Letter B. 95. Fitz. Coron. 122. Fitz. Utlagary, 49. 13 Aff. pl. 5. Bro. Coron. 77.

i H. P. C. 199. S. P. C. 94. Letter B. Fitz. Indictment, 31.

k S. P. C. 94. Letter B. Fitz. Indictment, 31.

a 13 Ed. 4. 3. pl. 7. Fitz. Coron. 39.

b 13 Ed. 4. 3. pl. 7.

c Supra Ch. 9. Sect. 33.

d Bro. Indict. 13. 26 Ass. pl. 62.

* EDITOR'S NOTE: The following are margin notes inserted at this location: 2 H. H. P. C. 149*, 150*.

e S. P. C. 147. Letter E. 148. H. P. C. 199, 200. Bro. Appeal, 53. Bro. Coron. 3, 16, 49.

f H. P. C. 199. 31 H. 6. 11. pl. 6. Fitz. Coro. 18. S. P. C. 107. Letter A.

g H. P. C. 199. 2 H. H. P. C. 221. S. P. C. 107. Letter E. 33 H. 6. 1. pl. 6. 4 Ed. 4. 10. pl. 14. Bro. Appeal, 92, 149. S. P. C. 147. Letter A. Fitz. Coron. 114.

h S. P. C. 148. Letters A, B, C. H. P. C. 199, 200. Bro. Appeal, 67, 130. Fitz. Coron. 156, 198, 357, 384.

i See Ch. 23. Sect. 86, 87, &c.

k See Ch. 23. Sect 26, 131.

l S. P. C. 148. Letter C. Bro. Appeal. 67, 130. 27 Ass. pl. 7. 1 Ass. pl. 5. Fitz. Coro. 156, 198, 357.

m S. P. C. 148. H. P. C. 199, 200. Bro. Appeal. 130.

n S. P. C. 148. Bro. Appeal. 118. Fitz. Coron. 369. Vide Bro. Coron. 35. 9 H. 5. 2. pl. 7.

o S. P. C. 148. Letter B. H. P. C. 200. Bro. Appeal 27. Fitz. Coron. pl. 12.

p H. P. C. 199. S. P. C. 147. Letter E. Cro. Eliz. 460. Fitz. Coron. 25, 381. Bro. Nisi Prius. 28. Fitz. Utlagary. 47.

q S. P. C. 147. Letter E. 148. Letter B.

r Dyer, 120. pl. 13.

s S. P. C. 148. Letter B. Fitz. Coron. 103. 3 H. 6. 50. pl. 16. 13 Ass. pl. 10. H. P. C. 200. 47 Ed. 3. 5. pl. 10. Bro. Coron. 3, 16, 49, 78. Bro. Appeal, 53.

t 21 H. 6. 34. pl. 1. S. P. C. 148. Letter B. H. P. C. 200.

a S. P. C. 147. Letter E. 21 Ed 3. 17. pl. 20.

b S. P. C. 147. Letter E. H. P. C. 200.

c 47 Ed. 3. 16. pl. 27. Fitz. Coro. 104.

d S. P. C. 147. Letter E. 47 Ed. 3. 5. pl. 10

e 4 H. 6. 16. Bro. Appeal, 44.

f S. P. C. 147. Letter E. H. P. C. 200.

g Bro. Appeal, 5. Fitz. Coro. 63. Bro. Coro. 35. Contra, 41. Ass. pl. 14. Fitz. Age, 74.

h Fitz. Coro. 121. S. P. C. 149. Letter A. 13 Ass. pl. 10. Bro. Appeal, 53.

i H. P. C. 200.

k Bro. Coro. 78. S. P. C. 148. Letter C.

l Bro. Appeal, 44. Fitz. Coro. 12, 103. 4 H. 6. 15, 16. S. P. C. 148. Letter C. H. P. C. 200.

m S. P. C. 149. Letter A. H. P. C. 200. Fitz. Utla. 47. Bro. Appeal. 57, 118, 146. 17 Ass. pl. 26. Fitz Coro. 175.

n S. P. C. 148. Letter B. Fitz. Coro. 12. H. P. C. 200. Vide supra Sect. 10.

o S. P. C. 149. Letter A. H. P. C. 200.

p S. P. C. 149. Letter A. H. P. C. 200. Fitz. Coro. 3.

q S. P. C. 149. Letter A. 27 Ass. pl. 25. Bro. Appeal, 68. H. P. C. 200. Fitz. Coro. 201, 384. Contra Bro. Appeal, 53. 13 Ass. pl. 10.

a S. P. C. 149. Letter A. 13 Ed. 4. 8. pl. 3. 3 Ass. pl. 12. Fitz. Mainprise, 6.

b 18 Ed. 3. 35. pl. 15. Bro. Appeal, 146. 11 Ass. pl. 27. 17 Ass. pl. 26. Fitz. Utlagary 47. Fitz Coro. 12. 68, 167, 175, 201, 384. Bro. Nonab. 23.

c H. P. C. 200. Vide S. P. C. 149. Letter A. Bro. Appeal. 67. 130. Fitz. Coro. 156, 198, 357. Fitz. Error, 52. 27 Ass. pl. 7. 1 Ass. pl. 5. 32 Ass. pl. 8. 7 H. 7. 5. pl. 7.

d Fitz. Coro. 387. S. P. C. 149. Letter D.

e S. P. C. 172. Letter B. Quaere Fitz. Coro. 452.

f Fitz. Coro. 3.

g 21 Ed. 3. 17. pl. 20. Bro. Coro. 37.

h Fitz. Monstrans de faits 118. H. P. C. 201. S. P. C. 104. Letter A, B. Fitz. Coro. 25. 11 H. 4. 41. pl. 6. Vide supra Ch. 24. Sect. 25.

i S. P. C. 104. H. P. C. 201. 4 Ed 4. 10. pl. 14. Fitz. Coro. 25.

k 2 H. H. P. C. 151. H. P. C. 201. 2 Inst. 50. S. P. C. 31. Letter C. 94. Letter B. 95. 2 Ed. 3. 1. pl. 4. 1 H. 7. 6 pl. 2. Fitz. Coro. 48, 149. Bro. Coro. 130. Vide supra Ch. 19. Sect. 15.

l 9 H. 3. ch. 29.

m 25 Ed. 3. de proditionibus, cap. 4. 28 Ed. 3. 3. 37 Ed. 3. 18.

n See the Preamble of 3 H. 7. 1. S. P. C. 107. Letter A. Fitz. Coro. 44, 82. 7 H. 4. 36 a.

o 44 Ed. 3. 38. pl. 35. 31 H 6. 11 pl. 6. 21 Ass. pl. 4. 21 Ed. 3. 23. pl. 16. Fitz. Coro. 18, 114. Fitz. Responder. 36.

a 4 Co. 45. b. 47. 7 H. 4. 34. pl. 22. 35. pl. 4. 21 H. 6. 28. 29. Fitz. Consp'r. 6. Fitz. Coro. 82. Quaere Fitz. Coro. 114. Bro. Appeal, 41.

b Fitz. Coro. 278, 279. 32 Ass. pl. 8. 41 Ass. pl. 14. Bro. Appeal, 75. Quaere Fitz. Coro. 114. 21 Ed. 3. 23. pl. 16. Bro. Appeal; 105, 119.

c 13 Ass. pl. 10. Fitz. Age. 41, 57. 17 Ed. 4. 2. pl. 4. Bro. Appeal, 105. Vide supra Ch. 23. Sect. 30.

d 31 H. 6. 11. pl. 6. Fitz. Coro. 18.

e Dyer. 296. pl. 20. See the Books cited to the other Parts of this Section.

f Cro. Eliz. 654. 3 Inst. 30. 2 Inst. 387.

g See the Preamble of 11 H. 4. 9. 3 Inst. 32, 33, 34. 12 Co. 99.

h 2 Rol. Rep. 82.

i 3 Inst. 32.

k Popham. 202. 1 Inst. 156. b.

l 2 H. H.P.C. 155. 3 Inst. 32. 21 H. 6. 30. pl. 17. Vide Fitz. Process, 208. Quaere Cro. Car. 134, 147. 1 Jon. 198, 199.

m Cro. Eliz. 654. pl. 16.

n 11 H. 4. 41. pl. 8. Bro. Coro. 189. Bro. Indict. 2. 21 H. 6. 30. pl. 17. Quaere Cro. Car. 134, 135, 147.

o 1 Keb. 629. pl. 112. 2 Keb. 471. pl. 63.

p Cro. Eliz. 751. pl. 7. Cro. Jac. 635. Palm, 282, 389. 2 Rol. Rep. 400. 2 Rol. Ab. 82. pl. 7. 3 Mod. 122. Poph. 202.

q 1 Keb. 629. pl. 112. 2 Keb. 471. pl. 63. 1 Lev. 208.

r 2 Keb. 135, 284. 1 Keb. 50. pl. 5. Cro. Jac. 41. 1 Sid. 106, 367. Quaere 2 Rol. Ab. 82. pl. 8.

a 11 H. 4. 41. pl. 8. Fitz. Indict. 25. Coron. 89. Bro. Indict. 2. Vide infra Sect. 27.

b S. P. C. 88. 12 Co. 99. H. P. C. 202. 3 Inst. 32. 33. 34. Vide Cro. Car. 134, 135.

* EDITOR'S NOTE: The following are unlettered margin notes inserted at this location: Vide 2 Rol. Abr. 647. 648. Cro. Eliz. 413. Cro. Jac. 672.

46 c 2 Inst. 448.

d Register 180. b. F. N. B. 166. D. Vide 2 Inst. 447, 448.

e Regist. 178. F. N. B. 165. Vide 2 Inst. 561.

a Register 181. a. F.N.B. 166. D. Vide 2 Rol. Ab. 647, 648. Cro. El. 413.

b 2 H. 5. Stat. 2. cap. 3. 35 H. 8. c. 6. 27 El. c. 6. 4 & 5 Gul. & Mar. c. 24. 7 & 8 Gul. 3. 32. 3 Geo. 2. c. 25.

c Vide supra cap. 10. Sect. 65, 66, 67, 68.

[d] 2 Inst. 561.

a Regist. 178. F. N. B. 165.

[Sect. 137.] a Bro. Coro. 220. 3 Inst. 25, 26. H. P. C. 208. 1 H. H. P. C. 301.

b S. P. C. 164. Bro. Coro. 220. H. P. C. 208. But 3 Inst. 25, 26. seems contrary.

a 3 Inst. 25, 26.

b H. P. C. 208. 1 H. H. P. C. 306. Contra, Dyer. 99. pl. 68. Vide S. P. C. 164. Bro. Coro. 220.

c 2 And. 66, 67. 3 Inst. 25.

d Raym. 407, 408. Kel. 9.

e S. P. C. 90, 164. 3 Inst. 24, 25, 26, 27. Bro. Coro. 220.

f Bro. Coro. 220. 3 Inst. 24.

g Bro. Coro. 220. 3 Inst. 24.

h Vide supra sect. 140.

i 2 Jo. 233. Vide Bro. Coro. 220. 3 Keb. 68. pl. 7.

k State Trials. Vol. 4. Page 135. 1 Sid. 54. pl. 19. 247. pl. 11. 2 Keb. 128. pl. 83. 1 Keb. 45. pl. 120. Co.

Car. 584. Palm. 389. Salk. 372. pl. 11. State Trials, Vol, 4. Page 134.

a Salk. 380, pl. 26.

b State Trials. Vol. 4. Page 135, 329.

c 1 Sid. 152. Vide 1 Sid. 54 pl. 19.

d Cont. 1 Keb. 255. pl. 28.

e King versus Nixon, Trin. 5 Georgii. 1. Vide Salk. 372. pl. 11.

f Supra Sect. 25.

g Supra Sect. 70, 71, 72. Vide Ch. 23. Sect. 103.

h Finch. 385. H. P. C. 202, 249, 254.

a Lamb. *Eirenarch. l.* 4 *c*. 5.

b See appendix. §. 1.

c 2 Hal. P. C. 154.

d *Ibid*. 155.

e Wilk. *LL. Angl. Sax*. 117.

f State Trials. IV. 183.

g 2 Hal. P. C. 161.

h Fost. 249.

i See Vol. III. pag. 321.

k 5 Rep. 122.

CHAPTER 8

AMENDMENT V

DOUBLE JEOPARDY CLAUSE

8.1TEXTS

8.1.1DRAFTS IN FIRST CONGRESS

8.1.1.1Proposal by Madison in House, June 8, 1789

8.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Congressional Register, June 8, 1789, vol. 1, pp. 427–28.

8.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

8.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4 [of

the Constitution], be inserted these clauses, to wit: …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

8.1.1.2House Committee of Eleven Report, July 28, 1789

Art. 1, Sec. 9 — Between Par. 2 and 3 insert,

…

"No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Broadside Collection, DLC.

8.1.1.3House Consideration, August 17, 1789

8.1.1.3.a The 5th clause of the 4th proposition was taken up, *viz.* "no person shall be subject, [*sic;* except] in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Congressional Register, August 17, 1789, vol. 2, p. 224.

8.1.1.3.b Eighth Amendment — "No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Daily Advertiser, August 18, 1789, p. 2, col. 4.

8.1.1.3.c Eighth Amendment — "No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same

offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

8.1.1.3.d 8th Amendment. "No person shall be subject, except in case of impeachment, to more than one trial for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

8.1.1.4Motion by Benson in House, August 17, 1789

8.1.1.4.a Mr. Benson

[H]e would move to amend it by striking out the words "one trial or."

Congressional Register, August 17, 1789, vol. 2, p. 224 ("was lost by a considerable majority").

8.1.1.4.b Mr. Benson moved to strike out the words "One trial or"

Daily Advertiser, August 18, 1789, p. 2, col. 4. ("This was negatived.").

8.1.1.4.c Mr. Benson moved to strike out the words "one trial or."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4. ("This was negatived").

8.1.1.4.d Mr. Benson … moved to strike out the words "one trial or"

Gazette of the U.S., August 22, 1789, p. 249, col. 3 ("This was negatived.").

8.1.1.5Motion by Partridge in House, August 17, 1789

8.1.1.5.a Mr. Partridge moved to insert after "same offence," the words, "by any law of the United States;" …

Congressional Register, August 17, 1789, vol. 2, p. 225 ("this amendment was lost also").

8.1.1.5.b Mr. Partridge moved to insert after the words “same offence,” the words “by any law of the United States,” Resolved in the negative.

Daily Advertiser, August 18, 1789, p. 2, col. 4.

8.1.1.5.c Mr. Partridge moved to insert after the words “same offence,” the words “by any law of the United States.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“Resolved in the negative.”).

8.1.1.5.d Mr. Partridge moved to insert after the words “same offence,” the words *by any law of the United States*, …

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (“Negatived”).

8.1.1.6Motion by Lawrance in House, August 17, 1789

8.1.1.6.a Mr. Lawrance

[H]e thought it [the clause] ought to be confined to criminal cases, and moved an amendment for that purpose, …

Congressional Register, August 17, 1789, vol. 2, p. 225 (“which amendment being adopted, the clause as amended was unanimously agreed to by the committee”).

8.1.1.6.b Mr. Lawrance moved to insert after the words “nor shall” these words “in any criminal case.”

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“This amendment was agreed to.”).

8.1.1.6.c Mr. Lawrance moved to insert after the words “nor shall,” these words, “in any criminal case.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“This amendment was agreed to”).

8.1.1.6.d Mr. Laurance moved to insert after the words “nor shall” these words *in any criminal case*.

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (“This amendment was agreed to”).

8.1.1.7Further House Consideration, August 21, 1789

Seventh. No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

HJ, p. 107 ("read and debated … agreed to by the House, … two-thirds of the members present concurring").[1]

8.1.1.8House Resolution, August 24, 1789

ARTICLE THE *EIGHTH.*

No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

House Pamphlet, RG 46, DNA.

8.1.1.9Senate Consideration, August 25, 1789

8.1.1.9.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth:

…

Article the Eighth

> "No person shall be subject, except in case of Impeachment, to more than one Trial, or one punishment for the same offence, nor shall be compelled in any Criminal case, to be a witness against himself, nor be deprived to life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Rough SJ, p. 217.

8.1.1.9.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*Article the Eighth.*

> No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Smooth SJ, p. 195.

"*ARTICLE THE EIGHTH.*

8.1.1.9.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

> "No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Printed SJ, p. 105.

8.1.1.10Further Senate Consideration, September 4, 1789

8.1.1.10.a On Motion to adopt the eighth Article of amendments proposed by the House of Representatives, striking out these words "Except in case of impeachment to more than one trial or one punishment" and substitute the following words.

> "Be twice put in jeopardy of life or limb by any public prosecution."
>
> Rough SJ, p. 249 ("It passed in the affirmative.").

8.1.1.10.b On motion, To adopt the eighth article of Amendments proposed by the House of Representatives, striking out these words, —

“Except in case of impeachment to more than one trial or one punishment,” and substitute the following words —

“Be twice put in jeopardy of life or limb by any public prosecution” —

Smooth SJ, p. 222 (“It passed in the Affirmative.”).

8.1.1.10.c On motion, To adopt the eighth Article of Amendments proposed by the House of Representatives, striking out these words, — “Except in case of impeachment to more than one trial or one punishment,” and substitute the following words —

“Be twice put in jeopardy of life or limb by any public prosecution” —

Printed SJ, p. 119 (“It passed in the Affirmative.”).

8.1.1.10.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

~~by~~ striking out these words. “Except in cases of impeachment to more than one trial or one punishment,” and substitute ∧ [ing] the following words;

“Be twice put in jeopardy of life or limb by any public prosecution.”

Senate MS, p. 3, RG 46, DNA.

8.1.1.11 Further Senate Consideration, September 9, 1789

8.1.1.11.a On motion, To alter Article 6th so as to stand Article 5th, and Article 7th so as to stand Article 6th, and Article 8th so as to stand Article 7th

…

On motion, That this last mentioned Article be amended to read as follows: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; Nor shall private property be taken for public use without just compensation.”

Rough SJ, p. 275 (“It passed in the affirmative.”).

8.1.1.11.b On motion, To alter article the sixth so as to stand article the fifth, and article the seventh so as to stand article the sixth, and article the eighth so as to stand article the seventh —

…

On motion, That this last mentioned article be amended to read as follows:

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation” —

Smooth SJ, p. 244 (“It passed in the Affirmative.”).

8.1.1.11.c On motion, To alter Article the sixth so as to stand Article the fifth, and Article the seventh so as to stand Article the sixth, and Article the eighth so as to stand Article the seventh —

…

On motion, That this last mentioned Article be amended to read as follows: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation" —

Printed SJ, pp. 129–30 ("It passed in the Affirmative.").

8.1.1.11.d To erase the word "Eighth" & insert Seventh —

To insert in the ~~Eighth~~ 8th [7th] article ~~as~~ after the word "shall" in the "1" line — be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual Service in time of War or publick danger, nor shall any person — &

To erase from the same article the words "except in case of impeachment, to more than one trial or one punishment" & insert — to be twice put in jeopardy of life or limb —

Ellsworth MS, p. 3, RG 46, DNA.

8.1.1.12 Senate Resolution, September 9, 1789

ARTICLE THE SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Senate Pamphlet, RG 46, DNA.

8.1.1.13 Further House Consideration, September 21, 1789

RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

8.1.1.14 Further Senate Consideration, September 21, 1789

8.1.1.14.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

8.1.1.14.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

8.1.1.15 Further Senate Consideration, September 21, 1789

8.1.1.15.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

8.1.1.15.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

8.1.1.16Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to & ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

8.1.1.17 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

8.1.1.18 Senate Consideration of Conference Committee Report, September 24, 1789

8.1.1.18.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as

follows: “Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Smooth SJ, pp. 272–73.

8.1.1.18.b Mr. Ellsworth, on behalf of the managers of the conference on “Articles to be proposed to the several States as Amendments to the Constitution of the United States,” reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Printed SJ, p. 145.

8.1.1.19 Further Senate Consideration of Conference Committee Report, September 24, 1789

8.1.1.19.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been

committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

8.1.1.19.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p.148.

8.1.1.20Further Senate Consideration of Conference Committee Report, September 25, 1789

8.1.1.20.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

8.1.1.20.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the

House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

8.1.1.21 Agreed Resolution, September 25, 1789

8.1.1.21.a Article the Seventh.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Smooth SJ, Appendix, p. 293.

8.1.1.21.b ARTICLE THE SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Printed SJ, Appendix, p. 164.

8.1.1.22 Enrolled Resolution, September 28, 1789

Article the seventh … No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Enrolled Resolutions, RG 11, DNA.

8.1.1.23Printed Versions

8.1.1.23.a Art.V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 21.

8.1.1.23.b Art. VII. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 98.

8.1.2PROPOSALS FROM THE STATE CONVENTIONS

8.1.2.1Maryland Minority, April 26, 1788

2. That there shall be a trial by jury in all criminal cases, according to the

course of proceeding in the state where the offence is committed; and that there be no appeal from matter of fact, or second trial after acquittal; but that this provision shall not extend to such cases as may arise in the government of the land or naval forces.

Maryland Gazette, May 1, 1788 (committee majority).

8.1.2.2New York, July 26, 1788

That no Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence, nor, unless in case of impeachment, be punished more than once for the same Offence.

State Ratifications, RG 11, DNA.

8.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

8.1.3.1Massachusetts: Body of Liberties, 1641

[42] No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse.

Massachusetts Colonial Laws, p. 43.

8.1.3.2New Hampshire: Constitution, 1783

[Part I, Article] XVI. No subject shall be liable to be tried, after an acquittal, for the same crime or offence. — Nor shall the legislature make any law that shall subject any person to a capital punishment, excepting for the government of the army and navy, and the militia in actual service, without trial by jury.

New Hampshire Laws, p. 25.

8.1.3.3North Carolina: Fundamental Constitutions of Carolina, 1669

64th. No cause shall be twice tried in any one court, upon any reason or pretence whatsoever.

North Carolina State Records, p. 144.

8.1.3.4Pennsylvania: Constitution, 1790

ARTICLE IX

…

Sect. X. That no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office. No person shall, for the same offence, be twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made.

Pennsylvania Acts, Dallas, pp. xxiv–xxxv.

8.1.4OTHER TEXTS

None.

8.2DISCUSSION OF DRAFTS AND PROPOSALS

8.2.1THE FIRST CONGRESS

8.2.1.1June 8, 17892

8.2.1.2August 17, 1789

8.2.1.2.a The 5th clause of the 4th proposition was taken up, *viz.* “no person shall be subject, in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.”

Mr. Benson

Thought the committee could not agree to the amendment in the manner it stood, because its meaning, appeared rather doubtful, it says that no person shall be tried more than once for the same offence, this is contrary to the right heretofore established, he presumed it was intended to express what was secured by our former constitution, that no man’s life should be more than once put in jeopardy for the same offence, yet it was well known, that they were intitled to more than one trial; the humane intention of the clause was to prevent more than one punishment, for which reason he would move to amend it by striking out the words “one trial or.”

Mr. Sherman

Approved of the motion, he said, that as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor, he thought that the courts of justice would never think of trying and punishing twice for the same offence, if the person was acquitted on the first trial, he ought not to be tried a second time, but if he was convicted on the first, and anything should appear to set the judgement aside, he was intitled to a second, which was certainly favorable to him. Now the clause as it stands would deprive him of this advantage.

Mr. Livermore

Thought the clause very essential, it was declaratory of the law as it now stood, striking out the words, would seem as if they meant to change the law by implication, and expose a man to the danger of more than one trial; many persons may be brought to trial for crimes they are guilty of, but for want of evidence may be acquitted; in such cases it is the universal practice in Great-Britain, and in this country, that persons shall not be brought to a second trial for the same offence, therefore the clause is proper as it stands.

Mr. Sedgwick thought, instead of securing the liberty of the subject, it would

be abridging the privileges of those who were prosecuted.

The question on Mr. Benson's motion being put, was lost by a considerable majority.

Mr. Partridge moved to insert after "same offence," the words, "by any law of the United States;" this amendment was lost also.

Congressional Register, August 17, 1789, vol. 2, pp. 224–25.

8.2.1.2.b Eighth Amendment — "No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Mr. Benson moved to strike out the words "One trial or"

This was negatived.

Mr. Partridge moved to insert after the words "same offence," the words "by any law of the United States," Resolved in the negative.

Mr. Lawrance moved to insert after the words "nor shall" these words "in any criminal case." This amendment was agreed to.

Daily Advertiser, August 18, 1789, p. 2, col. 4.

8.2.1.2.c Eighth amendment—"No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Mr. Benson moved to strike out the words "one trial or."

This was negatived.

Mr. Partridge moved to insert after the words "same offence," the words "by any law of the United States." Resolved in the negative.

Mr. Lawrance moved to insert after the words "nor shall," these words, "in any criminal case."

This amendment was agreed to.

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

8.2.1.2.d 8th Amendment. "No person shall be subject, except in case of impeachment, to more than one trial for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for

public use without just compensation."

Mr. Benson observed, that it was certainly a fact, that a person might be tried more than once for the same offence: Instances of this kind frequently occured. He therefore moved to strike out the words "one trial or" This was negatived.

Mr. Sherman was in favor of the motion.

Mr. Livermore was opposed to it: He said: The clause appears to me essential; if it is struck out, it will hold up the idea that a person may be tried more than once for the same offence. Some instances of this kind have taken place; but they have caused great uneasiness: It is contrary to the usages of law and practice among us; and so it is to those of that country from which we have adopted our laws. I hope the clause will not be struck out.

Mr. Partridge moved to insert after the words "same offence," the words *by any law of the United States,"* Negatived.

Mr. Laurance moved to insert after the words "nor shall" these words *in any criminal case*. This amendment was agreed to.

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

8.2.2STATE CONVENTIONS

None.

8.2.3PHILADELPHIA CONVENTION

None.

8.2.4NEWSPAPERS AND PAMPHLETS

None.

8.2.5LETTERS AND DIARIES

None.

8.3 Discussion of Rights

8.3.1TREATISES

8.3.1.1Hale, 1736

CHAP. XXXII.

Concerning the plea of *auterfoits attaint* or *convict* of the same felony, or any other offense.

IF *A.* be indicted and convict of felony, but hath neither judgment of death, nor hath prayd his clergy, this is no bar of a new indictment for the same offense, if the first were insufficient. 4 *Co. Rep*. 45. *a. Vauxe*'s case, and it seems, tho it were sufficient, yet it is no bar without clergy or judgment; but if he had his clergy allowd him, *auterfoits convict* and had his clergy is a good bar to an indictment, or an appeal for the same crime, and so remains at this day, notwithstanding the statute of 3 *H*. 7. *cap*. I. 4 *Co. Rep*. 40. *a*. 45. *b. Wigg*'s case.

And so it is tho he prays his clergy, and the court will advise upon it, tho the clergy be not actually allowd.(*) 4 *Co. Rep*. 46. *a. Holcroft*'s case. *Co. P. C. cap*. 57.

Auterfoits attaint de mesme felonie, tho upon an insufficient indictment, was at common law a bar to appeals, as well as indictments of the same offense. 4 *Co. Rep*. 45. *a. Vauxe*'s case, and remains so still at this day in all cases but in appeals of death, which is alterd by the statute of 3 *H*. 7. *cap*. I.

If *A.* be attaint of felony by outlawry, yet, if he reverse the outlawry, he shall be put to answer the same felony, and plead to the indictment, whereof he was outlawd; but if he reverse the outlawry for this error, because he was *auterfoits acquit* for the same felony, (which, as before is said, is assignable for error,) he shall be discharged of the indictment, for it stands as well a

plea to the indictment, as an error in the outlawry.

If *A.* be indicted of piracy and refusing to plead hath judgment of *peine fort & dure,* and by the general pardon piracies are excepted, but the judgment of *peine fort & dure* is pardond by the general words of all contempts, *quaere,* whether he may be arraigned for the same piracy, but by the better opinion he may be arraigned of any other piracy committed before that award. 14 *Eliz. Dy.* 308. *a.*

If *A.* be attaint of treason or felony by outlawry, yet he shall not be *de novo* indicted or appeald for the same felony till the outlawry be reversed, for *auterfoits attaint* of the same felony is a good plea. *Co. P. C.* 213.

Auterfoits attaint de murder is a good plea to an indictment of petit treason.

If *A.* had been indicted at common law of felony, and had judgment of death, yet he may notwithstanding his attainder be arraigned for treason committed before the felony for the advantage of the king, who is to have the escheat, but not for a treason committed after the felony. 1 *H.* 6. 5. *b. Stamf. P. C. Lib.* II. *cap.* 37. *fol.* 107. *b.* But in this my lord *Coke* differs from *Stamford,* and saith that for a treason committed after he shall be arraigned. *Co. P. C. p.* 213.[(a)]

If *A.* commit divers robberies, one upon *B.* another afterwards upon *C.* and afterwards another upon *D.* and they bring several appeals, and he be attaint at the suit of *B.* yet he shall be put to answer to the appeals of *C.* and *D.* for the benefit of the restitution of their goods. *Stamf. ubi supra.*

And if there be an indictment and attainder at the prosecution of *B.* yet *quaere,* whether after at the prosecution of *C.* he may not be put to answer an indictment at his prosecution to have benefit of restitution upon the statute of 21 *H.* 8. *cap.* II. *Stamf. Lib.* 3. *cap.* 10.

It seems in that case there may be an inquest of office to inquire of the robbery of *C.* so as to intitle him to restitution without arraigning the party upon the indictment of *C.*

If *A.* commit several felonies and be attaint for one of those felonies, and the king pardon that attainder and the felony, for which he was attaint, if he be after indicted or appeald for the same felony, he may plead his attainder, and it will be no good replication to say he was pardoned after.

But yet he may be indicted or appeald for the other felonies, and if he plead his former attainder, it is a good replication to say he was pardoned after, whereby he is now restored to be a person able to answer to those offenses. 6 *H.* 4. 6. *b.* 10 *H.* 4. *Coron.* 227. *vide contra Co. P. C. p.* 213.

And so if a person attaint commit a felony after, and be pardoned the first felony and attainder, yet he shall be put to answer the new felony. 6 *H*. 4. 6. *b*.

If *A*. commit several felonies and be convict for one of them, but no judgment of death nor clergy given him, he may be indicted for all those former felonies. *Stamf. ubi supra*.

But if he had been convict for any one felony, and prayd his clergy, and read and been deliverd to the ordinary, he should never be arraigned for any of those former felonies. And it seems by the better opinion, that if he had prayd his clergy, *& tradito ei libro legit ut clericus*, but no award of *tradatur ordinario*, yet he should not be arraigned for any felony committed before his clergy allowd, for it was the fault of the court, that they did not award *tradatur ordinario*. 4 *Eliz. Dy*. 211. *b. Co. P. C. cap*. 57.

And the reason is, because the statute of 25 *E*. 3. *cap*. 5. *pro clero* enacts, that he shall be arraigned of all his offenses together, and then deliverd to the ordinary, and therefore if once deliverd to the ordinary, all his capital offenses committed before are in effect discharged, and therefore at least before the prisoner departs from the bar after his clergy allowd, he must be indicted, or otherwise he is for ever discharged.

But for any felony committed after conviction and clergy allowd, he may be indicted and arraigned, but not if he stands attainted and unpardoned.

But at this day that old law concerning the discharge of offenses by clergy allowd is alterd.

By the statute of 8 *Eliz. cap*. 4. it is enacted, “That if any person admitted to his clergy shall before such his admission have committed any offense, whereupon clergy is not allowable by the laws and statutes of this realm, and not being thereof indicted and acquitted, convicted or attainted, or pardoned shall and may be indicted or appeald for the same, and put to answer, as if no such admission to clergy had been.”

And by the statute of 18 *Eliz. cap*. 7. delivery to the ordinary is taken away, and burning in the hand wholly substituted in lieu thereof, and that every person admitted to his clergy shall answer such felonies or offenses, as he should have done, if he had been deliverd to the ordinary and made his purgation.

So that now clergy doth discharge all offenses precedent within clergy, but not such other offenses, as are out of the benefit of clergy.

There remains one special kind of *auterfoits acquit* of another person, than he that pleads it, which I shall mention and so conclude this chapter.

The accessory upon his arraignment may plead the acquittal of the principal.

A gaoler arraigned for the voluntary escape of a prisoner for felony may plead the acquittal of the felon of the principal felony, and so may the rescuer arraigned upon an indictment for rescue of a felon, and that is the reason, that the gaoler and rescuer shall never be arraigned till the principal felon be tried and convicted, because if he be acquitted, the gaoler or rescuer cannot be guilty of felony.

If *A.* steal the goods of *B.* and break prison, *A.* may be arraigned for the felony of breaking the prison before the arraignment upon the principal felony, but if *A.* be arraigned upon the principal felony and acquitted before conviction of the felony for breaking the prison, *A.* may plead this acquittal, for hereby that felony is purged before his conviction, this was Mrs. *Samford*'s case in *Kent* for stealing the goods of the earl of *Leicester*(*).

To conclude this whole matter of *auterfoits acquit, convict* or *attaint* these things are to be observed. 1. The party that pleads the record must plead it specially setting forth the record. 2. He must either shew the record *sub pede sigilli*, or have the record removed into the court, where it is pleaded by *certiorari*, or if it be a record of the same court must vouch the term, year and roll, for the record is part of his plea. 3. He must make averments, as the case shall require, as that he is the same person, that it is the same offense. 4. No issue shall be taken upon the plea of *nul tiel record*, because it is pleaded in court, but the king's attorney may have *oyer* of the record. 5. The averments are issuable. 6. If issue be taken upon them, they shall be tried by the jury, that is returned to try the prisoner by the statute of 22 *H.* 8. *cap.* 14. 7. He, that pleads these pleas, must also plead over *not guilty* to the felony, for if the pleas be adjudged against him, yet he shall be tried upon the *not guilty*.

Hale Pleas of the Crown, vol. II, pp. 251–55.

8.3.1.2Hawkins, 1762

CHAP. XXXV.

Of the Plea of *Autrefoits acquit*.

PLeas in Chief are either,

1. In Bar, or

2. The General Issue.

As to the Pleas in Bar, having shewn already, *Chap*. 23. Sect. 190. What Pleas of this Kind to an Appeal are good, which shew that the Plaintiff had never any Right to bring it; and in *Sections* 131, 132, 133, where a *Retraxit*, Nonsuit, Discontinuance, or Abatement, of one Appeal may be pleaded in Bar of another; and in *Section* 134. Where the Bringing of an Appeal against one Person will be a Bar to a subsequent one against another Person not named in the First; and in *Section 135*. where a Release will bar an Appeal; and in *Section* 136. where anAppellant may be barred as to one Appellee, and continue his Suit against the Rest; and in *Section* 137. what Pleas of this Kind are consistent with the General Issue, and in *Ch*. 26. *Sect*. 64, 65. what is a good Plea in Bar to an Information; I shall in this Place only consider,

1. The Plea of *Autrefoits acquit*.
2. The Plea of *Autrefoits attaint* or *convict*.
3. The Plea of a Pardon.

Sect. 1. And first of the Plea of *Autrefoits acquit*, which is grounded on this *Maxim*, [a] That a Man shall not be brought into Danger of his Life for one and the same Offence, more than once. From whence it is generally taken, by all the Books, [b] as an undoubted Consequence, that where a Man is once found Not guilty on an Indictment or Appeal free [c] from Error, and [d] well commenced before any [e] which hath Jurisdiction of the Cause, he may by the Common Law in all [f] cases whatsoever Court ever plead such Acquittal in Bar of any subsequent Indictment or Appeal for the same Crime. But for the more distinct Understanding hereof I shall particularly consider,

1. How far he who pleads this plea must be ready to produce the Record of his former Acquittal.
2. Where a Variance between the Record of the former Acquittal and the Indictment or Appeal to which it is pleaded, may be helped.
3. How far other Discharges of a former Prosecution have the same Effect as an Acquittal by Verdict.
4. How far it is necessary that the Indictment or Appeal in the Record of Acquittal be free from Error, and well commenced.
5. Whether an Acquittal in any Court which has a Jurisdiction be sufficient for this Purpose.
6. How far an Acquittal of a Person as Principal will bar a subsequent Prosecution against him as Accessary; *& e converso*, how far an Acquittal

of a Man as Accessary will bar a Prosecution against him as Principal. 7. How far the Law is altered in these Respects as to an Indictment of Death, by 3 *H*. 7. 1.

Sect. 2. As to the first Particular, *viz*. How far he who pleads this Plea must be ready to produce the Record of his formal Acquittal: I take it to be [a] agreed, that such Plea being a Plea in [b] Bar, and the Record not in the Custody of nor the Property of him that pleads it, there is no need to plead with a *profert sub pede sigilli*; but the Defendant shall have a [c] Day given him to bring it in. And there is in *Brook* a Note of a [d] Case in the Time of *Edw*. 3. wherein a Plea of *Autrefoits acquit* was disallowed, because the Defendant shewed forth the Record when he pleaded it; and the Book gives this Reason, That *the Record ought to come before the Court by Writ*.

Sect. 3. As to the second Particular, *viz*. Where a [e] Variance between the Record of the former Acquittal, and the Indictment or Appeal to which it is pleaded, may be helped: I take it to be clear, That if the Nature of the Crime be in [f] Substance the same, a Variance may generally be helped by proper [g] Averments. And therefore if a Man be named in the first Record *Yeoman*, and in the second *Gentleman*, yet it seems [h] clear, That he may make good the Variance, with an Averment that he only was meant under each Addition. Also if a Man be acquitted of an Indictment of Murder or Robbery *cujusdam* [i] *ignoti*, and afterwards arraigned on an Indictment for the same Fact, describing the Person killed or robbed by his proper Name; yet it hath been holden, [k] That he may plead the Acquittal in Bar, averring that both the Indictments are for the very same Felony. Also if the Person kill'd be described by his proper Name and Surname in the first Indictment, and by the same Christain but by a different Surname in the second, yet it hath been [l] adjudged, That he may plead an Acquittal on the first in Bar of the second Indictment, averring that the Person so differently named was one and the same Person. But it seems [m] adviseable in such Case to add a farther Averment, That the Person killed was known as well by the Name in the first, as by that in the second Indictment; for if he were never known by the Name in the first Indictment, I much question whether the Defendant could be found guilty upon it; and if he could not, it seems plain that his Life having never been in Danger by it, the Acquittal upon it [n] cannot be any Bar to a subsequent Indictment. But if there be no other Variance between the first and second Indictment but only as to the [o] Times when the Crime is alledged to have been committed, or as to the [p] Places being both in the same County, there is no Doubt but that regularly it may be helped by

an Averment, that the Felony in both is one and the same, because neither the Time nor Place laid in an Indictment *&c*. are material upon Evidence, so that the Defendant be proved guilty at any other [a] Time before the Indictment, or at any other place [b] within the County. And it is holden by [c] *Staundforde*, that an Acquittal of Murder in one County may be pleaded in Bar of a subsequent Indictment in another County for the same Murder. But this seems questionable, because all Indictments are local; and therefore if the first were laid in an improper County, the Defendant could not be found guilty upon it, and consequently was in no Danger of his Life, and therefore [d] cannot plead an Acquittal upon it in Bar of a subsequent Indictment in the proper County: But if the first Indictment were in the proper County, the second cannot but be in an improper one, and consequently the Defendant not being liable to be found guilty upon it, cannot be said to be reduced by it to the Inconvenience of being twice brought into Danger of his Life for one and the same Offence, the Avoiding of which Inconvenience [e] seems the chief Inducement for which the Law allows the Plea of *Autrefoits acquit*.

Sect. 4. But if a Man steal Goods in one County, and then carry them into another, in which Case it is certain [f] that he may be indicted and found guilty in either, it seems very reasonable, that an Acquittal in the one County for such Stealing may [g] be pleaded in Bar of a subsequent Prosecution for the same Stealing in another County, because the Defendant may be altogether as well convicted in the one County, as in the other; and therefore if he could not bar the second Prosecution by the Acquittal on the first, his Life would be twice in Danger from that which is in Truth but one and the same Offence, and only considered as a new one by a mere Fiction or Construction of Law, which shall hardly [h] take Place against a Maxim made in Favour of Life. And as to the [i] Objection, That the Jurors of the one County can take no Manner of Conusance of what is done in the other, and consequently cannot try whether the Felony whereof the Party is indicted in the second County be the very same with that of which he is acquitted in the first, it may be answered, That it appears from the old Books, that anciently the Judges often satisfied themselves of the Truth of an Averment that the Offences in both Indictments were the same, by [k] Witnesses, or by an [l] Inquest of Office, without putting it to a Trial by Jury upon an issue joined, on the Denial thereof by the Prosecutor, which seems [m] to have been of later Years the usual Method. But granting, that it is to be tried by such Jury, I do not see how it follows, That because they cannot convict a Defendant upon Evidence of a Fact done out of their own County, therefore

they cannot collaterally inquire whether an offence laid in their own County be in Substance the same with that done in another other, since it cannot be denied but that in Abundance of cases a Jury of one County may receive Evidence of Facts done in another. To which may be added, That in the Year-Book of 4 *H.* 7. 5. pl. [*sic*] which is the [n] Chief Authority for the contrary Opinion, it is admitted that an Acquittal of an Appeal of Larceny in the one County, may be pleaded in Bar of a subsequent Appeal in the other; because such an Appeal intitles the Plaintiff to a Restitution of the Goods, whereof being once barred he is barred for ever. But granting this to be a good Reason, which yet it seems difficult to make out, the very same may be said at this Day as to an Indictment, which since [a] 21 *H.* 8. 11. intitles the Prosecutor to a Restitution also. Besides, taking the Law as it stood formerly, why may not a Jury of one County try whether a Felony therein indicted, be the same whereon the Party was before acquitted in another County, in the Case of a second Indictment, as well as of a second Appeal?

Sect. 5. It seems [b] that it is no Plea to an Appeal of Larceny, That the Defendant hath been found Not guilty in an Action of Trespass brought against him by the same Plaintiff for the same Goods; for Larceny and Trespass are entirely different: Also it seems a general [c] Rule, That a Bar in an Action of an inferior Nature, will not bar another of a superior. Yet it seems, [d] That an Acquittal in an Indictment of Murder, will be a good Bar of an Indictment of Petit Treason, because both Offences are in Substance the same. But it is clear, That an Acquittal of one Felony is [e] no Manner of Bar to a Prosecution for another in Substance different, whether committed before or at the same Time with that of which he is acquitted; and therefore if a Man commit a Burglary, and steal the Goods of *A.* and *B.* and be indicted for the Burglary, and stealing the Goods of *A.* and acquitted; it hath been adjudged, [f] that he cannot plead such Acquittal to an Indictment for stealing the Goods of *B.* But it seems agreed, That he may plead it to a second Indictment for the Burglary.

Sect. 6. As to the third Particular, *viz.* How far other Discharges of a legal Prosecution have the same Effect as an Acquittal by Verdict: Having shewn already in the [g] Chapter of *Appeals*, how far the Discharge of one Appeal will Bar another, I shall only add in this Place, That notwithstanding the [h] Allowance of a Pardon, or any other Bar of one Indictment, seems to be pleadable in Bar of another, and by the like Reason whatever hath been allowed a good Bar of one Appeal may be pleaded in Bar of another: Yet it

seems that no other Discharge of an Indictment will bar an Appeal, and no other Discharge of an Appeal will bar an Indictment, but only an [i] Acquittal by Battel, or an Acquittal by Verdict on the general Issue, finding the Defendant's [k] Innocence; as where it finds him Not guilty on such an Issue, on an Indictment or Appeal of any Felony whatsoever; or where it finds [l] him guilty of Homicide *se defendendo*, or *per infortunium*, on an Indictment of Murder. But it hath been adjudged, [m] That where a Demurrer by an Appellant to a Tender of Battel, or to a Plea, hath been adjudged against him, yet the Appellee may be afterwards arraigned at the Suit of the King.

Sect. 7. It is said by Sir *Matthew Hale* in the [n] Chapter of *Autrefoits acquit*, That an Acquittal by Battel in an Appeal is no Bar of an Indictment. But I find no other Authority to this Point but a Note in *Fitzherbert* [o] of a Case to this Purpose in the Time of King *Edward* the Second. To which it may be answered, That this Matter is only spoken of incidentally, and not adjudged. And the *Staunforde* in the same Place [p] where he cites it, makes a *Quaere*, whether it be Law or not. And it is expresly holden by *Bracton*, [q] That an Appellee who vanquishes the Appellant in Battel, shall go quit not only from all other Appeals, *but also from the Suit of the King; because by this he clears his Innocence against all, in the same Manner, as if he had put himself upon his Country, and his Country had acquitted him*. Also it is admitted by Sir *Matthew Hale* in the [a] Chapter of *Indictments*, That if an Approver be vanquished in Battel joined on his Appeal, he shall be hanged, and the Appellee discharged, without being arraigned at the Suit of the King. Also it hath been [b] adjudged, That upon such a Vanquishment the Appellee is intitled to his Damages against the Appellant, as being *legitimo modo acquietatus*, which seems [c] necessarily to imply that he is finally acquitted as well against the King as against the Party.

Sect. 8. As to the fourth Particular, *viz*. How far it is necessary that the Indictment or Appeal in the Record of Acquittal be free from Error and well commenced: I take it to be settled [d] at this Day, [e] That where-ever the Indictment, or Appeal, whereon a Man is acquitted, is so far erroneous (either for want of Substance in setting out the Crime or of Authority in the [f] Judge before whom it was taken,) that no good Judgment could have been given upon it against the Defendant, the Acquittal can be no Bar of a subsequent Indictment or Appeal, because in Judgment of Law the Defendant was never in Danger of his Life from the first; for the Law will presume *prima facie* that the Judges would not have given a Judgment,

which would have been liable to have been reversed. But if there be no Error in the Indictment or Appeal, but [g] only in the Process, it seems agreed, That the Acquittal will be a good Bar of a subsequent Prosecution, notwithstanding such Error; the best Reason whereof seems to be this, That such Error is [h] salved by the Appearance.

Sect. 9. It seems agreed, [i] That an Acquittal on an Appeal brought by one who had no Right to bring it, as by any other woman except the Wife of the deceased, or by any other Man [k] except the next Heir, is no more a Bar to an Appeal by another Appellant, or to an Indictment, than an Acquittal on an insufficient Appeal or Indictment would have been.

Sect. 10. As to the fifth Particular, *viz.* Whether an Acquittal in any Court which has a Jurisdiction, be sufficient for this Purpose: Notwithstanding the [m] Opinion in the Book of *Assises*, That no Acquittal in any other Court can be any Bar to a Prosecution in the Court of King's Bench, because that is the Highest Court, I take it to be settled [n] at this Day, That an Acquittal in any Court whatsoever, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the Highest Court. And therefore, it hath been adjudged, [o] That an Acquittal of Murder at a Grand Sessions in *Wales*, may be pleaded to an Indictment for the same Murder in England. For the [p] Rule is, That a Man's Life shall not be brought into Danger for the same Offence more than once.

Sect. 11. As to the sixth Particular, *viz.* How far an Acquittal of a Person as Principal will bar a subsequent Prosecution against him as Accessary; *& è converso*, how far an Acquittal of a Man as Accessary will bar a Prosecution against him as Principal: It seems to be [a] settled at this [b] Day, That an Acquittal of a Man as Principal is no Bar of a subsequent Prosecution against him as Accessary after the Fact, because such Acquittal clears him only of the Charge of having committed the Fact, which being a Crime entirely different from that of receiving him that hath committed it, there seems no more Reason that the Acquittal of it should Bar a Prosecution for the Receipt, than if they were Offences that bore no manner of Relation to one another. But it is [c] holden in many Books of good Authority, (contrary to what is admitted [d] to have been the ancient Law,) that the Acquittal of a Man as Principal is a good Bar of a subsequent Prosecution against him as Accessary before; for it is said, That such an Accessary is in some Measure [e] guilty of the Fact, and therefore that an Acquittal which clears a Man from being guilty of the Fact, doth by Consequence clear him from being such an Accessary. And this seems

reasonable upon the Supposition that a Man may be found guilty of an Indictment against him as Principal, upon Evidence which only proves him to have been an Accessary before. But if a Man cannot be found guilty of such an Indictment upon such Evidence, as it is strongly [f] holden that he cannot, it may with great Reason be said, that the Acquittal of him as Principal no way acquits him as Accessary before; for if so, he might save himself by a mere Slip in the Indictment, and bar all other Prosecutions by an Acquittal on a Trial, which in Truth never brought him into [g] Danger of his Life. And it is upon this Supposition, as I suppose, that it is holden in some [h] Books, contrary to those abovecited, that one who has been acquitted as Principal may be tried again as Accessary before, as well as after.

Sect. 12. But it seems [i] agreed, That an Acquittal of a Man as Accessary before, or after, is no Bar to a subsequent Prosecution against him as Principal.

Sect. 13. Also it hath been holden, that an Acquittal of a Man as Accessary to one Principal, will not save him from being arraigned afterwards as Accessary to another in the same Fact; but for this I shall refer to *Chap*. 29. *Sect*. 46.

Sect. 14. As to the seventh Particular, *viz*. How far the Law is altered in these Respects as to an Indictment by 3 *H*. 7. 1. It seem agreed, [k] That by the Common Law an Acquittal on an Indictment might be pleaded in Bar of an Appeal of Death, in the same Manner as an Acquittal of any other Felony might be pleaded in Bar of a subsequent Prosecution, and therefore in Favour of Appeals a general Practice was introduced, [l] not to try any Person on an Indictment of Death, till after the Year and Day had been passed, by which Time it often happened that all was forgotten; and *for Reformation thereof it is enacted, 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. And if it happen any Person named as Principal or Acessory 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* [a] *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. 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 attained, 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 attained, if they be on live, and the Benefit of his Clergy thereof before not had; and that the Appellant shall have such and like Advantage, as if the said Acquittal or Attainder had not been, the said Acquittal or Attainder notwithstanding.[b]

Sect. 15. It seems [c] agreed, That this Statute shall not be construed to extend to any other Appeal, but of Death, nor to any other Acquittal but upon an Indictment; from whence it follows, That an Acquittal on an Indictment, or Appeal, for any other [d] Felony except Death, may still be pleaded in Bar of an Appeal for the same Crime, and that an Acquittal on an Appeal of Death [e] may still be pleaded in Bar of an Indictment, in the same Manner as by the Common Law.

Sect. 16. How far a Person found guilty of Manslaughter, or of Homicide *se defendendo*, on an Indictment of Murder, is liable to be tried again upon an Appeal by Force of this Statute, shall be considered in the next Chapter.

Hawkins Pleas of the Crown, book II, pp. 368–74.

8.3.1.3Blackstone, 1769

IV. Special pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal [i] : but these are applicable to both appeals and indictments.

1. First, the plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such

acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment of the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law [k] : and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. VII. c. 1. enacts, that indictments shall be proceeded on, immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and that the plea, of *auterfoits acquit* on an indictment, shall be no bar to the prosecuting of any appeal.

2. Secondly, the plea of *auterfoits convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the benefit of clergy or other causes) is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime [l]. Hereupon it has been held, that a conviction of manslaughter, on an appeal, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of *auterfoits acquit*, and *auterfoits convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise, in

3. Thirdly, the plea of *auterfoits attaint*, or former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony [m], by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony. And this because, generally, such proceeding on a second prosecution cannot be to any purpose; for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attaint him a second time. But to this general rule however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex*. As, 1. Where the former attainder is reversed for error, for then it is the same as if it had never been. And the same reason holds, where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies

committed afterwards. 2. Where the attainder was upon indictment, such attainder is no bar to an appeal: for the prior sentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second, and then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons. 4. Where a person attainted of one felony, as robbery, is afterwards indicted as principal in another, as murder, to which there are also accessories, prosecuted at the same time; in this case it is held, that the plea of *auterfoits attaint* is no bar, but he shall be compelled to take his trial, for the sake of public justice: because the accessories to such second felony cannot be convicted till after the conviction of the principal. And from these instances we may collect that the plea of *auterfoits attaint* is never good, but when a second trial would be quite superfluous.

Blackstone Commentaries, bk. 4, ch. 26, sec. 4; vol. 4, pp. 329–31 (footnotes omitted).

8.3.2CASE LAW

8.3.2.1Respublica v. Shaffer, 1788

AFTER some conversation with the Grand Inquest, the Attorney General informed the court, that a list of eleven persons had been presented to him by the Foreman, with a request, that they might be qualified and sent to the jury, as witnesses upon a bill then depending before them. He stated that the list had been made out by the defendant's bail: that the persons named were intended to furnish testimony in favor of the party charged, upon facts with which the Inquest, of their own knowledge, were unacquainted; and he concluded with requesting, that the opinion of the court might be given upon this application. The Chief Justice, accordingly, addressed the Grand Jury to the following effect:

M'KEAN, *Chief Justice*.—Were the proposed examination of witnesses, on the part of the Defendant, to be allowed, the long-established rules of law

and justice would be at an end. It is a matter well known, and well understood, that by the laws of our country, every question which affects a man's life, reputation, or property, must be tried by *twelve* of his peers; and that their *unanimous* verdict is, alone, competent to determine the fact in issue. If, then, you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the Petit Jury, you will supersede the legal authority of the court, in judging of the competency and admissibility of witnesses, and, having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the law of the land. This point has, I believe, excited some doubts upon former occasions; but those doubts have never arisen in the mind of any lawyer, and they may easily be removed by a proper consideration of the subject. For, the bills, or presentments, found by a grand Jury, amount to nothing more than an official accusation, in order to put the party accused upon his trial; 'till the bill is returned, there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here, then, is the just line of discrimination: It is the duty of the Grand-Jury to enquire into the nature and probable grounds of the charge; but it is the exclusive province of the Petit Jury, to hear and determine, with the assistance, and under the direction of the court, upon points of law, whether the Defendant is, or is not guilty, on the whole evidence, for, as well as against, him. —— You will therefore, readily perceive, that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must, consequently, be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for, by the law, it is declared, that no man shall be twice put in jeopardy for the same offence: and, yet, it is certain, that the enquiry now proposed by the Grand Jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but, I think, likewise, upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely upon the testimony in support of the prosecution, the Petit Jury receive no biass [*sic*] from the sanction which the indorsement of the Grand Jury has conferred upon it.—But, on the other hand, would it not, in some degree, prejudice the most upright mind against the Defendant, that on a full hearing of his defence, another tribunal had

pronounced it insufficient?—which would then be the natural inference from every *true bill*. Upon the whole, the court is of opinion, that it would be improper and illegal to examine the witnesses, on behalf of the Defendant, while the charge against him lies before the Grand-Jury.

One of the Grand Inquest then observed to the court, that "there was a clause in the qualifications of the Jurors, upon which he, and some of his brethren, wished to hear the interpretation of the Judges—to wit—what is the legal acceptation of the words "*diligently to enquire?*" To this the Chief Justice replied, that "the expression meant, *diligently to enquire* into the circumstances of the charge, the credibility of the witnesses who support it, and, from the whole, to judge whether the person accused ought to be put upon his trial. For, (he added), though it would be improper to determine the merits of the cause, it is incumbent upon the Grand Jury to satisfy their minds, by a *diligent enquiry*, that there is a probable ground for the accusation, before they give it their authority, and call upon the Defendant to make a public defence."

1 Dall. 236 (Pa. O. & T., 1788).

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1 On August 22, 1789, the following motion was agreed to:

ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.

HJ, p. 112.

2 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

(*) See the case of *Armstrong* and *Lisle*, *Kel*. 103, 104.

(a) The case in 1 *H*. 6. 5. *b*. was of a treason subsequent to the felony, and therefore rather makes against *Stamford* in favour of lord *Coke*'s opinion.

(*) *Vide supra*, *Part* I. *p*. 612.

a S. P. C. 105. Letter A. 4 Co. 40. a. 45. a. 47. a. 9 H. 7. 19. pl: 14. Fitz. Pard. 3. Bro. Appeal, 9, 12, 89. Coro. 11. Cromp. Just. 111. pl. 1.

b See the Authorities cited to all the other Parts of this Chapter, and 5 E. 3. 25. pl. 36.

c Vide infra sect. 8.

d Vide infra sect. 9.

e Vide infra sect. 10.

f 25 E. 3. 44. pl. 16. Abridged Fitz. Coro. 136. 41 Ass. 9. Abridged Fitz. Coro. 220. Bro. Coro. 120 or 121. 2 Leon. 161. Vide infra sect. 14, 15. 47 E. 3. 16. pl. 27. Abridged Fitz. Coro. 104. Bro. Appeal, 14.

a S. P. C. 105. Letter A. H. P. C. 245. 2 H. H. P. C. 241, 242, 243. Fitz. Coro. 33. Fitz Monstrans de faits, 33. Vide Rast. Entr. 385. pl. 4. seems contrary.

b Co. Litt. 128. See the Chapter of Pardon.

c Co. Litt. 128. b. Fitz. Coro. 232.

d Bro. Coro. 218. But 26 Ass. pl. 15. Abridged Fitz. Coro. 189. 11 H. 4. 41. pl. 6. Abridged Fitz. Monstrans de faits, 128. Bro. Coro. 29. 9 H. 7. 19. pl. 14. Abridged Bro. Appeal. 89. seems contrary.

e Vide 2 Keb. 705. pl. 71.

f 14 H. 7. 2. pl. 8. S. P. C. 168. Letter B.

g S. P. C. 105. H.P.C. 246.

h Vide Keil. 58. a.

i Vide supra ch. 25. sect. 73.

k Keil. 25. b. Dy. 285. pl. 38. Vide Fitz. Coro. 159.

l 26 Ass. pl. 15. Abridged Bro. Coro. 98. Fitz. Coro. 189. Crompt. Just. 112. pl. 12. S. P. C. 105. Letter C. 2 H. H. P. C. 244. Vide 11 H. 4. 41. pl. 6. Abridged Fitz. Monstrans de faits, 128. Bro. Variance, 31. Coro. 29. 1 Rol. Rep. 368. pl. 22.

m Vide H. P. C. 246. S. P. C. 105. Letter C. Crompt. Just. 112. pl. 12.

n Vide supra sect. 1. & infra sect. 8, 9, 10.

o Dy. 285. pl. 31. H. P. C. 246. 2 H. H. P. C. 244. Vide 22 Ass. pl. 55. Abridged Fitz. Coro. 179. S. P. C. 105. Letter C. 11 H. 4. 41. pl. 6. Abridged Bro. Coro. 29. Variance, 31. Fitz. Monstrans de faits, 128. 25 Ed. 3. 44. pl. 16. Abridged Fitz. Coro. 136. 3 Ass. pl. 15. Abridged Fitz. Coro. 165. Crompt. Just. 112. pl. 13.

p H. P. C. 246. 2 H. H. P. C. 245. S. P. C. 105. Letter C. 106. Letter A.

a H. P. C. 264. Salk. 288.

b See the Chapter of Evidence; and H. P. C. 264.

c S. P. C. 105. Letter C. See Crompt. Just. 12. pl. 9.

d Vide sect. 1, 8, 9, 10.

e Supra sect. 1, 8, 9, 10.

f Supra ch. 23. sect. 47. ch. 25. sect. 38. and B. 1. ch. 33. sect. 9.

g 41 Ass. pl. 9. Fitz. Coro. 220. But this is left doubtful. S. P. C. 105. Lett. C. 106. Lett. A. H. P. C. 246. Crompt. Just. 112. pl. 9. Bro. Coro. 139 or 140. 4 H. 7. 5. pl. 1. Fitz. Coro. 62.

h Vide supra ch. 13. sect. 13. and ch. 19. sect. 25. and ch. 29. sect. 35.

i 4 H. 7. 5. pl. 1. Fitz. Cor. 62.

k 26 Ass. pl. 15. Abridged Fitz. Coro. 189. Bro. Coro. 98. 41 Ass. pl. 9. Abridged Fitz. Coro. 220.

l 3 Ass. pl. 15. Abridged Fitz. Coro. 166. See the sixth Section.

m 9 H. 7. 19. pl. 14. Abridged Bro. Appeal, 89.

n Vide Bro. Coro. 139 or 140. Fitz. Coro. 62. S. P. C. 106. H. P. C. 246. 2 H. H. P. C. 245.

a Vide supra ch. 23. sect. 55, 56.

b 2 Ric. 3. 14. a. Bro. Appeal, 121. Vide infra ch. 36. sect 7.

c Co. Litt. 146. a. 2 Ri. 3. 14. 15.

d 3 Inst. 213. H. P. C. 246. 2 H. H. P. C. 246.

e S. P. C. 105. Letter A. H. P. C. 244. Bro. Coro. 11.

f Kely 30. 52.

g Ch. 23. sect. 129, 130, 131.

h 11 H. 4. 41. pl. 6. Abridged Fitz. Monstrans de faits, 128. Bro. Coro. 29. Appeal, 33. Variance, 31. Vide S. P. C. 106. Lett. B.

i 2 H. H. P. C. 246. See the next Section.

k S. P. C. 169. a.

l 3 Inst. 213. Crompt. Just. 111. pl. 6. 4 Co. 46. b.

m Dy. 120. pl. 13. Crompt. Just. 112. pl. 18.

n H. P. C. 245. 2 H. H. P. C. 249.

o Fitz. Coro. 375.

p S. P. C. 106. Letter D.

q Lib. 3. ch. 19. sect. 8.

a H. P. C. 200. 2 H. H. P. C. 233, 234. Vide supra ch. 25. sect. 10. Letter [illegible]. 21 H. 6. 34. pl. 1. S. P. C. 168. Letter B.

b Fitz. Coro. 98. S. P. C. 168. Letter E. Supra ch. 23. sect. 140.

c S.P.C. 169. Supra ch. 23. sect. 140.

d 4 Co. 45. a. 47. a. H. P. C. 244, 245. 2 H. H. P. C. 248, 251. 3 Inst. 214. Fitz. Coro. 444. Supra ch. 23. sect. 140. Crompt. Just. 112. pl. 14, 15, 16, 19. 20 H. 7. 11. b. 12. a. 9 H. 5. 2. pl. 7. Abridged Bro. Appeal, 39. Coro. 35. Fitz. Cor. 68.

e But Staundforde seems to be of O pinion, That an Acquittal on an erroneous Appeal, is a good Bar to an Indictment till it be reversed by Error. S. P. C. 106. Lett. B. cited in Crompt. Just. 112. pl. 15. But this seems repugnant to all Books, and to what is said by Staundforde himself, in the very same page. Indeed in the second Edition of Hale's Pleas of the Crown, there is a Note to the same Effect with what is said in Staundforde's but this is manifestly misprinted, and the Word Acquit put for Attaint.

f Crompt. Just. 111. Pl. 4, 5. Supra ch. 9. sect. 15, 16. 4 Co. 46.

g Fitz. Coro. 444. 9 H. 5. 2. pl. 7. Abridged Bro. Appeal, 39. Coro. 35. Fitz. Coro. 68. S. P. C. 106. Letter B. 169. Letter A. Crompt. 112, pl. 15. 2 H. H. P. C. 248.

h Supra ch. 27. sect, 107.

i 20 H. 7. 11. b. 12. a. 21 H. 6. 28. b. 29. a. Abridged Bro. Appeal, 41. Crompt. Just. 112. pl. 14. S. P. C. 106. Letter B. H. P. C. 245. 2 H. H. P. C. 249.

k Supra ch. 23. sect. 36, 37, 38. Supra ch. 23. sect. 39, 40, 41, 42.

m 9 Ass. pl. 15.

n 4 Co. 45. b. Rast. Ent. 385. pl. 4. 11 H. 4. 41. pl. 6. Abridged Fitz. Monstrans de faits, 128. 25 E. 3. 44. pl. 16. Abridged Fitz. Coro. 136. 41 Ass. pl. 9. Abridged Bro. Coro. 120 or 121. Crompt. Just. 112. pl. 8. Fitz. Coro. 220.

o 1 Lev. 118. 1 Sid. 179. Supra ch. 25, sect. 41, 42.

p Supra sect. 1, 8, 9.

a Kely. 25, 26. H. P. C. 244. 2 H. H. P. C. 244. S. P. C. 105. Lett. A. Crompt. Just. 42. pl. 18. 112. pl. 7. 27 Ass. pl. 10. Abridged Fitz. Coro. 200. Bro. Coro. 105. Lamb. B. 2. ch. 7.

b Cont. Fitz. Coro. 282.

c S. P. C. 44. Lett. C. 105. Lett. A. B. Kely. 25, 26. Lamb. B. 2. ch. 7. H. P. C. 224, 244. 2 H. H. P. C. 244. Crompt. Just. 42. pl. 18. 112. pl. 7. But the Principal Authority in the old Book is 2 E. 3. 20. pl. 14. Abridged Fitz. Coro. 150, which seems inconsistent with itself; for the Words are for an Example, that a Man may in such Case be twice put to answer, We award that you go quit. And Fitz. Coro. 282. is contradicted by all other Books; for it says, That a Man acquitted as Principal, cannot be so much as arraigned as an Accessary after. And 27 Ass. pl. 10. Abridged Bro. Coro. 105. and Fitz. Coro. 200. extend only to the Case of an Accessary after. And 8 H. 5. 6. pl. 26. Abridged Fitz. Coro. 463. expresly goes upon the Supposition, that a Man may be found guilty as Principal, upon Evidence which only proves him Accessary.

d S. P. C. 105. Lett. B. Fitz. Coro. 424. 2 H.H. P. C 244.

e Vide supra ch. ch. [*sic*] 29. sect. 13, 14.

f H. P. C. 266. Keilw. 107. Dalis. 14.

g Vide supra sections 1, 8, 9, 10.

h Keilw. 107. Dalis. 14. Lamb. B. 2. ch. 7.

i Crompton’s Justice 43. pl. 30. Bro. Coro. 186.

k Vide supra ch 25. sect. 15. 21 H. 6. 28, 29. Abridged Bro. Appeal 41. 44 E. 3. 25. pl. 36. Abridged Bro. App. 12. H. P. C. 244, 245. 47 E. 3. 16. pl. 27. Abridged Fitz. Coro. 104. Bro. Appeal, 33, 35, 102. 2 Leon. 161. But this is made a Quaere, 17 Ass. pl. 1.

l Vide supra ch. 25. sect. 15. Crompt. Justice 111. pl. 2, 3. Kely 95, 96, 97, 98. 2 Leon. 161. H. P. C. 244, 245. S. P. C. 107. Lett. A. Bro. Appeal, 9. 32 Ass. pl. 8. Abridged Bro. Appeal 119. 45 E. 3. 25. pl. 36. Abridged Bro. Appeal, 12. 11 H. 4. 94. pl. 56. Abridged Bro. Appeal, 36. 41. Ass. pl. 14. Abridged Bro. Appeal, 75.

a Vide supra ch. 33. S. 121. F. N. B. 251. Lett. G. Crompt. Just. 111. pl. 2. 3.

b Vide S. P. C. 107. and Rast. Statutes, Title Murder, 2.

c H. P. C. 244, 245. 2 H. H. P. C. 250. S. P. C. 107. Lett. A.

d H. P. C. 244, 245. S. P. C. 107. Lett. A.

e H. P. C. 244, 245. S. P. C. 107. Lett. A. Crompton's Justice, 111. pl. 2, 3.

i 2 Hawk. P. C. ch. 23.

k *Ibid*. 373.

l 2 Hawk. P. C. 377.

m *Ibid*. 375.

CHAPTER 9

AMENDMENT V

SELF-INCRIMINATION CLAUSE

9.1TEXTS

9.1.1DRAFTS IN FIRST CONGRESS

9.1.1.1Proposal by Madison in House, June 8, 1789

9.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, . . .

. . .

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Congressional Register, June 8, 1789, vol. 1, pp. 427–28.

9.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: . . .

. . .

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

9.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4, be

inserted these clauses, to wit: . . .

. . .

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

9.1.1.2House Committee of Eleven Report, July 28, 1789

ART. I, SEC. 9—Between PAR. 2 and 3 insert,

. . .

"No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Broadside Collection, DLC.

9.1.1.3House Consideration, August 17, 1789

9.1.1.3.a The 5th clause of the 4th proposition was taken up, *viz.* "no person shall be subject, [*sic;* except] in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Congressional Register, August 17, 1789, vol. 2, p. 224.

9.1.1.3.b Eighth Amendment. "No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Daily Advertiser, August 18, 1789, p. 2, col. 4.

9.1.1.3.c Eighth Amendment—"No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same

offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

9.1.1.3.d 8th Amendment. "No person shall be subject, except in case of impeachment, to more than one trial for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

9.1.1.4Motion by Benson in House, August 17, 1789

9.1.1.4.a Mr. Benson

[H]e would move to amend it by striking out the words "one trial or."

Congressional Register, August 17, 1789, vol. 2, p. 224 ("was lost by a considerable majority").

9.1.1.4.b Mr. Benson moved to strike out the words "One trial or."

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("This was negatived.").

9.1.1.4.c Mr. Benson moved to strike out the words "one trial or."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 ("This was negatived").

9.1.1.4.d Mr. Benson. . . moved to strike out the words "one trial or."

Gazette of the U.S., August 22, 1789, p. 249, col. 3 ("This was negatived.").

9.1.1.5Motion by Partridge in House, August 17, 1789

9.1.1.5.a Mr. Partridge moved to insert after "same offence," the words, "by any law of the United States;". . . .

Congressional Register, August 17, 1789, vol. 2, p. 225 ("this amendment was lost also").

9.1.1.5.b Mr. Partridge moved to insert after the words “same offence,” the words, “by any law of the United States,”. . .

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“Resolved in the negative.”).

9.1.1.5.c Mr. Partridge moved to insert after the words “same offence,” the words “by any law of the United States.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“Resolved in the negative”).

9.1.1.5.d Mr. Partridge moved to insert after the words “same offence,” the words *“by any law of the United States,”*. . .

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (“Negatived”).

9.1.1.6Motion by Lawrance in House, August 17, 1789

9.1.1.6.a Mr. Lawrance

[H]e thought it [the clause] ought to be confined to criminal cases, and moved an amendment for that purpose. . . .

Congressional Register, August 17, 1789, vol. 2, p. 225 (“which amendment being adopted, the clause as amended was unanimously agreed to by the committee”).

9.1.1.6.b Mr. Lawrance moved to insert after the words “nor shall” these words “in any criminal case.”

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“This amendment was agreed to.”).

9.1.1.6.c Mr. Lawrance moved to insert after the words “nor shall,” these words, “in any criminal case.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“This amendment was agreed to”).

9.1.1.6.d Mr. Laurance moved to insert after the words “nor shall” these words *in any criminal case*.

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (“This amendment was agreed to”).

9.1.1.7Further House Consideration, August 21, 1789

Seventh. No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

HJ, p. 107 ("read and debated. . . agreed to by the House, . . . two-thirds of the members present concurring").[1]

9.1.1.8House Resolution, August 24, 1789

ARTICLE THE EIGHTH.

No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

House Pamphlet, RG 46, DNA.

9.1.1.9Senate Consideration, August 25, 1789

9.1.1.9.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth:

. . .

Article the Eighth

> No person shall be subject, except in case of Impeachment, to more than one Trial, or one punishment for the same offence, nor shall be compelled in any Criminal case, to be a witness against himself, nor be deprived to life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Rough SJ, p. 217.

9.1.1.9.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

. . .

"*Article the Eighth.*

> "No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Smooth SJ, p. 195.

9.1.1.9.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

. . .

"*ARTICLE THE EIGHTH.*

> "No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Printed SJ, p. 105.

9.1.1.10Further Senate Consideration, September 4, 1789

9.1.1.10.a On Motion to adopt the eighth Article of amendments proposed by the House of Representatives, striking out these words "Except in case of impeachment to more than one trial or one punishment" and substitute the following words.

> "Be twice put in jeopardy of life or limb by any public prosecution."
>
> Rough SJ, p. 249 ("It passed in the affirmative.").

9.1.1.10.b On motion, To adopt the eighth article of Amendments proposed by the House of Representatives, striking out these words, —

“Except in case of impeachment to more than one trial or one punishment,” and substitute the following words —

“Be twice put in jeopardy of life or limb by any public prosecution” —

Smooth SJ, p. 222 (“It passed in the Affirmative.”).

9.1.1.10.c On motion, To adopt the eighth Article of Amendments proposed by the House of Representatives, striking out these words, — “Except in case of impeachment to more than one trial or one punishment,” and substitute the following words —

“Be twice put in jeopardy of life or limb by any public prosecution” —

Printed SJ, p. 119 (“It passed in the Affirmative.”).

9.1.1.10.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

~~by~~ striking out these words. “Except in cases of impeachment to more than one trial or one punishment,” and substitute ∧ [ing] the following words;

“Be twice put in jeopardy of life or limb by any public prosecution.”

Senate MS, p. 3, RG 46, DNA.

9.1.1.11 Further Senate Consideration, September 9, 1789

9.1.1.11.a On motion, To alter Article 6th so as to stand Article 5th, and Article 7th so as to stand Article 6th, and Article 8th so as to stand Article 7th.

. . .

On motion, That this last mentioned Article be amended to read as follows: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; Nor shall private property be taken for public use without just compensation.”

Rough SJ, p. 275 (“It passed in the affirmative.”).

9.1.1.11.b On motion, To alter article the sixth so as to stand article the fifth, and article the seventh so as to stand article the sixth, and article the eighth so as to stand article the seventh—

. . .

On motion, That this last mentioned article be amended to read as follows:

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation” —

Smooth SJ, p. 244 (“It passed in the Affirmative.”).

9.1.1.11.c On motion, To alter Article the sixth so as to stand Article the fifth, and Article the seventh so as to stand Article the sixth, and Article the eighth so as to stand Article the seventh —

. . .

On motion, That this last mentioned Article be amended to read as follows: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation" —

Printed SJ, pp. 129–30 ("It passed in the Affirmative.").

9.1.1.11.d To erase the word "Eighth" & insert Seventh—

To insert in the ~~Eighth~~ 8th [7th] article ~~as~~ after the word "shall" in the "1" line — be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual Service in time of War or publick danger, nor shall any person — &

To erase from the same article the words "except in case of impeachment, to more than one trial or one punishment" & insert — to be twice put in jeopardy of life or limb —

Ellsworth MS, p. 3, RG 46, DNA.

9.1.1.12Senate Resolution, September 9, 1789

ARTICLE THE *SEVENTH.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Senate Pamphlet, RG 46, DNA.

9.1.1.13Further House Consideration, September 21, 1789

Resolved, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

9.1.1.14 Further Senate Consideration, September 21, 1789

9.1.1.14.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

9.1.1.14.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

9.1.1.15 Further Senate Consideration, September 21, 1789

9.1.1.15.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

9.1.1.15.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

9.1.1.16Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to & ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

9.1.1.17 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

9.1.1.18 Senate Consideration of Conference Committee Report, September 24, 1789

9.1.1.18.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as

follows: “Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Smooth SJ, pp. 272–73.

9.1.1.18.b Mr. Ellsworth, on behalf of the managers of the conference on “Articles to be proposed to the several States as Amendments to the Constitution of the United States,” reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.”

Printed SJ, p. 145.

9.1.1.19 Further Senate Consideration of Conference Committee Report, September 24, 1789

9.1.1.19.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been

committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

9.1.1.19.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p.148.

9.1.1.20Further Senate Consideration of Conference Committee Report, September 25, 1789

9.1.1.20.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

9.1.1.20.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the

House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

9.1.1.21Agreed Resolution, September 25, 1789

9.1.1.21.a Article the Seventh.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Smooth SJ, Appendix, p. 293.

9.1.1.21.b ARTICLE THE SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Printed SJ, Appendix, p. 164.

9.1.1.22Enrolled Resolution, September 28, 1789

Article the seventh. . . No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Enrolled Resolutions, RG 11, DNA.

9.1.1.23Printed Versions

9.1.1.23.a ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 21.

9.1.1.23.b ART. VII. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private proprty be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 98.

9.1.2PROPOSALS FROM THE STATE CONVENTIONS

9.1.2.1New York, July 26, 1788

That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be

observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such Trial should be speedy, public, and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such Jury. But in cases of Crimes not committed within any County of any of the United States, and in Cases of Crimes committed within any County in which a general Insurrection may prevail, or which may be in the possession of a foreign Enemy, the enquiry and trial may be in such County as the Congress shall by Law direct; which County in the two Cases last mentioned should be as near as conveniently may be to that County in which the Crime may have been committed. And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defence, and should not be compelled to give Evidence against himself.

State Ratifications, RG 11, DNA.

9.1.2.2North Carolina, August 1, 1788

8th. That, in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

State Ratifications, RG 11, DNA.

9.1.2.3Pennsylvania Minority, December 12, 1787

3. That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusations, as well in the federal courts, as in those of the several states; to be heard by himself or his counsel; to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial, by an impartial jury of the vicinage, without whose unanimous consent, he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Pennsylvania Packet, December 18, 1787.

9.1.2.4Rhode Island, May 29, 1790

8th. That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favour, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

State Ratifications, RG 11, DNA.

9.1.2.5Virginia, June 27, 1788

Eighth, That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair and speedy trial by an impartial Jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

State Ratifications, RG 11, DNA.

9.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

9.1.3.1Delaware: Declaration of Rights, 1776

Sect. 15. That no man in the Courts of Common Law ought to be compelled to give evidence against himself.

Delaware Laws, vol. 1, App., p. 81.

9.1.3.2Maryland: Declaration of Rights, 1776

20. That no man ought to be compelled to give evidence against himself in a court of common law, or in any other court, but in such cases as have been usually practised in this state, or may hereafter be directed by the legislature.

Maryland Laws, November 3, 1776

9.1.3.3Massachusetts

9.1.3.3.aBody of Liberties, 1641

[45] No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be in some Capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty, After which if the cause be that of nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.

Massachusetts Colonial Laws, p. 43.

9.1.3.3.bConstitution, 1780

[Part I, Article] XII. No subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favourable to him; to meet the witnesses against him, face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Massachusetts Perpetual Laws, pp. 6–7.

9.1.3.4New Hampshire: Constitution, 1783

[Part I, Article] XV. No subject shall be held to answer for any crime, or offence, until the same is fully and plainly, substantially and formally described to him; or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to himself: To meet the witnesses against him face to face, and to be fully heard in his defence by himself and counsel. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or priviliges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

New Hampshire Laws, p. 25.

9.1.3.5North Carolina: A Declaration of Rights, 1776

Sect. VII. That in all criminal Prosecutions every Man has a Right to be informed of the Accusation against him, and to confront the Accusers and Witnesses with other Testimony, and shall not be compelled to give Evidence against himself.

North Carolina Laws, p. 275.

9.1.3.6Pennsylvania

9.1.3.6.a Constitution, 1776

CHAPTER I.

. . .

IX. That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.

Pennsylvania Acts, M’Kean, pp. ix–x.

9.1.3.6.b Constitution, 1790

ARTICLE IX.

. . .

SECT. IX. That, in all criminal prosecutions, the accused hath a right to be heard by himself and his council, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favour, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage: That he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Pennsylvania Acts, Dallas, p. xxxiv.

9.1.3.7Vermont: Constitution, 1777

CHAPTER I.

. . .

10. That, in all Prosecutions for criminal Offences, a Man hath a Right to be heard by himself and his Counsel, — to demand the Cause and Nature of his Accusation, — to be confronted with the Witnesses, — to call for Evidence in his Favor, and a speedy public Trial, by an impartial Jury of the Country, without the unanimous Consent of which Jury, he cannot be [fo]und guilty; nor can he be compelled to give Evidence against himself; nor can any man be justly deprived of his Liberty, except by the Laws of the Land, or the Judgment of his Peers.

Vermont Acts, p. 4.

9.1.3.8Virginia: Declaration of Rights, 1776

VIII. THAT in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the

land, or the judgment of his peers.

Virginia Acts, p. 33.

9.1.4 Other Texts

None.

9.2DISCUSSION OF DRAFTS AND PROPOSALS

9.2.1THE FIRST CONGRESS

9.2.1.1June 8, 17892

9.2.1.2August 17, 17893

9.2.1.2.a Mr. Lawrance

Said this clause contained a general declaration, in some degree contrary to laws passed, he alluded to that part where a person shall not be compelled to give evidence against himself; he thought it ought to be confined to criminal cases, and moved an amendment for that purpose, which amendment being adopted, the clause as amended was unanimously agreed to by the committee. . . .

Congressional Register, August 17, 1789, vol. 2, p. 225.

9.2.1.2.b Mr. Lawrance moved to insert after the words “nor shall” these words “in any criminal case.” This amendment was agreed to.

Daily Advertiser, August 18, 1789, p. 2, col. 4.

9.2.1.2.c Mr. Lawrance moved to insert after the words “nor shall,” these words, “in any criminal case.”

This amendment was agreed to.

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

9.2.1.2.d Mr. LAURANCE moved to insert after the words “nor shall” these words *in any criminal case*. This amendment was agreed to.

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

9.2.2STATE CONVENTIONS

9.2.2.1Massachusetts, January 30, 1788

. . . Mr. HOLMES. Mr. President, I rise to make some remarks on the paragraph under consideration, which treats of the judiciary power.

. . .

On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.

There is nothing to prevent Congress from passing laws which shall compel a man, who is accused or suspected of a crime, to furnish evidence against himself, and even from establishing laws which shall order the court to take the charge exhibited against a man for truth, unless he can furnish evidence of his innocence.

I do not pretend to say that Congress *will* do this; but, sir, I undertake to say that Congress (according to the powers proposed to be given them by the Constitution) *may* do it; and if they do not, it will be owing *entirely*—I repeat it, it will be owing *entirely*—to the goodness of the men, and not in

the *least degree* owing to the goodness of the Constitution.

Elliot, vol. 2, pp. 109, 111.

9.2.2.2Virginia, June 14, 1788

Mr. GEORGE NICHOLAS, in answer to the two gentlemen last up, observed that, though there was a declaration of rights in the government of Virginia, it was no conclusive reason that there should be one in this Constitution; for, if it was unnecessary in the former, its omission in the latter could be no defect.

. . .

But sir, this Constitution is defective because the common law is not declared to be in force! What would have been the consequence if it had? It would be immutable. But now it can be changed or modified as the legislative body may find necessary for the community. But the common law is not excluded. There is nothing in that paper to warrant the assertion. As to the exclusion of a jury from the vicinage, he has mistaken the fact. The legislature may direct a jury to come from the vicinage. But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. Treason against the United States is defined in the Constitution, and the forfeiture limited to the life of the person attainted. Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution. If we had no security against torture but our declaration of rights, we might be tortured tomorrow; for it has been repeatedly infringed and disregarded. A bill of rights is only an acknowledgment of the preëxisting claim to rights in the people. They belong to us as much as if they had been inserted in the Constitution. But it is said that, if it be doubtful, the possibility of dispute ought to be precluded. Admitting it was proper for the Convention to have inserted a bill of rights, it is not proper here to propose it as the condition of our accession to the Union. Would you reject this government for its omission, dissolve the Union, and bring miseries on yourselves and posterity? I hope the gentleman does not oppose it on this ground solely. Is there another reason? He said that it is not only the general wish of this state, but all the

states, to have a bill of rights. If it be so, where is the difficulty of having this done by way of subsequent amendment? We shall find the other states willing to accord with their own favorite wish. The gentleman last up says that the power of legislation includes every special power of legislation. Therefore, it does not contain that plenitude of power which he imagines. They cannot legislate in any case but those particularly enumerated. No gentleman, who is a friend to the government, ought to withhold his assent from it for this reason.

Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

Mr. NICHOLAS acknowledged the bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity.

Elliot, vol. 3, pp. 449–52.

9.2.3PHILADELPHIA CONVENTION

None.

9.2.4NEWSPAPERS AND PAMPHLETS

9.2.4.1Brutus, No. 2, November 1, 1787

For the security of life, in criminal prosecutions, the bill of rights of most of the States have declared, that no man shall be held to answer for a crime

until he is made fully acquainted with the charge brought against him; he shall not be held to accuse, or furnish evidence against himself — The witnesses against him shall be brought face to face, and he shall be fully heard by himself and counsel. That it is essential to the security of life and liberty that trial of facts be in the vicinity where they happen. Are not provisions of this kind as necessary in the general government, as in that of a particular state? The powers vested in the new Congress extend in many cases to life; they are authorised to provide for the punishment of a variety of capital crimes, and no restraint is laid upon them in its exercise, save only, that "the trial of all crimes, except incases of impeachment, shall be by jury; and such trial shall be in the state where the said crimes shall have been committed."

New York Journal, Storing, vol. 2, pp. 374–75.

9.2.4.2The Federal Farmer, No. 6, December 25, 1787

The following, I think, will be allowed to be unalienable or fundamental rights in the United States: —

No man, demeaning himself peaceably, shall be molested on account of his religion or mode of worship — The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it — Individual security consists in having free recourse to the laws — The people are subject to no laws or taxes not assented to by their representatives constitutionally assembled — They are at all times intitled to the benefits of the writ of habeas corpus, the trial by jury in criminal and civil causes — They have a right, when charged, to a speedy trial in the vicinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge — No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects — The people have a right to assemble in an orderly manner, and petition the government for a redress of wrongs — The freedom of the press ought not to be restrained — No emoluments, except for actual service — No hereditary honors, or orders of nobility, ought to be allowed — The military ought to be subordinate to the civil authority, and no soldier be quartered on the citizens without their consent — The militia ought always to be armed and disciplined, and the usual defence of the country — The supreme power is in the people, and power delegated ought to return to them at stated periods, and frequently — The legislative, executive, and judicial powers, ought always to be kept distinct — others perhaps might be added.

Storing, vol. 2, p. 262.

9.2.5LETTERS AND DIARIES

None.

9.3DISCUSSION OF RIGHTS

9.3.1TREATISES

9.3.1.1Bond, 1707

EXAMINATION.

When any Person is brought before a Justice of Peace for Murder, or Manslaughter, or other Felony, or Suspicion thereof, before such Justice commit him to Prison, he shall first take the Examination of the Offender. 2. The Information of such as bring him, and so much as is material to prove the Felony, he shall put in Writing within two Days after such Examination. 3. He shall bind the Witnesses by Recognizance to appear at the next Gaol-delivery to give Evidence, &c. 4. He shall make his *Mittimus* to carry him to Prison, unless he be Bailable, and then two Justices (*Quorum unus*) may Bail him. 5. The said Justice or Justices shall certifie at the next Gaol-delivery such Examination, Information, Recognizance and Bailment. 1 & 2 *P. & M. cap*. 13. & 2 & 3 *P. & M. cap*. 10.

Yet for Petty Larcenies, and small Felonies, the Offenders may be tried at the Quarter-Sessions, and the Examinations and Informations certified, and the Informers bound thither, *vide Stat*. 3 *H*. 7. *cap*. 2. *Dalt. cap*. 122.

A Justice of Peace cannot detain a Person suspected in Prison, but during a convenient time only to examine him, which the Law intends to be three Days. *Cro. Eliz*. 829, 830.

Bond, pp. 91–92.

9.3.1.2Nelson, 1729

THE Justices may examine Witnesses upon Oath; and by Virtue of the Statute of 2 & 3 *Ph. & Mar*. they may examine the Felon likewise, but not on Oath. *H. P. C*. 292.

This Examination must be in Writing, and it must be * certified to the next Assizes, or else the Justice may be fined by the Judge.[4]

It may be given in † Evidence at the Trial, but 'tis not sufficient to convict, unless the Accused confess at the Trial; yet *Dalton* mentions a Conviction upon it without any further Evidence.[5]

And yet in the Case of *Tony Philips* and *Stubbs*, who were indicted for High Treason, it was resolved by all the Judges, That if a Traitor is examined before a Justice of Peace, or Privy Counsellor, and confesseth the Treason, and should afterwards deny it at his Trial ; yet two Witnesses, who can prove such Confession, are good Evidence against the Party himself, who made it at his Examination, but not against any other Person whom he then accused ; and that in such Case there needs not two Witnesses to prove the Criminal guilty of Treason.

So in my Lord *Morley*'s Case it was held, That if Witnesses examined before the Coroner were dead, or unable to travel, and Oath made thereof, such Examination might be read, the Coroner making Oath, That they are the same, and not altered.

Several Persons conspir'd, *&c*. to pull down Enclosures, and to provide Armour, &*c*. and to go to *London* and join with more ; and this they confessed on Examination : The Question was, Whether they should be arraigned for this Offence, because they had confessed it already? And it was held they should, and that their Confession before the Arraignment might be given in Evidence against them. If upon Examination the Felon confesseth the Fact, the Justice should take his Name subscribed to his Confession.[6]

And such Confession may be given in Evidence with an Oath, before whom it was made.[7]

Examination taken in one County, may be certified in another.

The Felon may be examined before he is committed, but not upon Oath, because *nemo debet seipsum accusare*.

His Examination, as well as that of the Witnesses, must be certified by the Justice to the next Assizes.

The Form of the Examination of the Felon.

THE *Examination of* T. R. &c. *taken before me,* H. P. *Esq; one of his Majesty's Justices of the Peace for the County of* S. *on the* 31*st Day of* March, &*c.*

The said T. R. *being charged before me by* S. C. *of,* &c. *with the felonious Stealing out of the House of the said* S. C. *in,* &c. *on such a Day,* &c. *the following Goods, viz.* &c. *to the Value of,* &c. *he the said* T. R. *upon his Examination now taken before me, confesseth that,* &c. *or denieth that,* &c.

The Examination of the Witnesses must be taken severally, and upon Oath, thus:

The Examination of R. B. *of,* &c. *taken upon Oath before me,* H. P. *Esq*; ut prius, &c.

Nelson Justice of Peace, pp. 273–74.

9.3.1.3Hawkins, 1762

CHAP. XXX.
Of standing Mute.

HAVING shewn in what Manner a Prisoner is to be arraigned, I am in the next Place to examine in what Manner he is to he dealt with afterwards; and to that End shall endeavour to shew what is to be done with him,

1. Upon his standing Mute.
2. Upon his Confession.
3. Upon his Pleading.

And first as to the Prisoner's standing Mute I shall consider,

1. Where he shall be said to stand Mute.
2. How it shall be tried whether he do so of Malice, or by the Act of God.
3. What shall be done where one is found to stand Mute by the Act of God.
4. Where he who stands Mute shall be awarded to the same Execution as if he had not stood Mute, and where he shall be adjudged to his Penance.
5. What is the Nature of such Penance.
6. What he shall forfeit, and to whom.
7. Whether the Prosecutor of an Indictment of Appeal of Larceny be entitled to a Restitution of the Goods stolen, upon the Defendant's standing Mute.
8. Where one that stands Mute shall have the Benefit of Clergy.

Sect. 1. As to the first Point, *viz*. In what Cases a Man shall be said to stand Mute : I take it to be agreed, That he who answers impertinently, or ineffectually, or refuses to put himself upon his Trial in such Manner as the Law directs, may as properly be said to stand Mute as he who makes no Answer at all; as where a Man [a] refuses to plead a Plea in Chief, or the General Issue, but insists on some frivolous Defence, or even to plead a good [b] dilatory Plea, and refuses to plead over to the Felony, in which Case after such a Plea is found against him, he shall not [c] be admitted to plead in Chief, but shall be adjudged to his Penance in the same Manner as if he had made no Plea at all. And so shall he be who pleads a good Plea in Chief, or the General Issue, but [a] refuseth to put himself upon the Inquest (that is, to tried by God and his Country if a Commoner, or by God and his [b] Peers, if a Lord) or to wage Battle where such Trial is [c] allowed.[8]

Sect. 2. It seems to be holden in the [d] second *Institute*, and also in the latter Part of Sir *Matthew Hale's Pleas of the* [e] *Crown*, That if a Prisoner on his Trial peremptorily challenge above the Number allowed him by Law, he shall not be dealt with as one that stands Mute, but shall be hanged ; But this very Point is made a *Quaere* in another [f] Part of *Hale's Pleas if the Crown* ; and also in [g] *Kelynge*, and the Contrary is holden in the third [h] *Institute :* Neither does it seem easy to assign a Reason why he who challenges more Jurors than he ought, shall, in Respect of an implied Refusal of a legal Trial, be thought worthy if a greater Punishment than he who obstinately, directly, and expressly refused it. To which may be added, That there seems to be but one [i] full Authority in the Old Books for the Maintenance of this Opinion, whereas there is a great [k] Number of the other Side.[9]

Sect. 3. But it is clear, [l] That he who demurs in Law to an Indictment or Appeal, shall not be esteemed to stand Mute, nor be dealt with as such, as having refused a Trial by his Country, for he puts himself upon a Trial by the Court, which is the proper Trial of a Matter in Law.[10]

Sect. 4. Also it seems clear, That after a Man hath [m] confessed himself guilty, or pleaded, and put himself upon his [n] Country, he shall not afterwards be demeaned as one that stands Mute, in Respect of his subsequent Silence : But the Jury shall be charged, and the Trial shall proceed, and the like Judgment shall be given as in Common Case.[11]

Sect. 5. As to the second Point, *viz*. In what Cases, and in what Manner it shall be tried, whether one who stands Mute do so of Malice, or of the Act of God : It seems agreed, [o] That where a Prisoner wholly stands Mute

without making any Answer at all, the Court shall take an Inquest of Office by the Oath of any [p] twelve Persons that [q] happen to be present, whether he do so of Malice, or by the Act of God. But [r] after an Issue hath been joined, if the Prisoner stand Mute when the Jury are in Court, if there be any Need for such Inquiry, it shall be made by them, and not by an Inquest of Office.[12]

Sect. 6. Where [s] a Man answers, but not effectually, it seems needless to make any Inquiry whether his Refusal be owing to his Malice or not, because it is apparent.[13]

Sect. 7. As to the third Point, *viz.* What shall be done where one is found to stand Mute by the Act of God : It is agreed, [t] That in such a Case, the Judges of the Court, (who are always to be of Counsel with the Prisoner, to see that he have Law and Justice) shall not only cause the Felony to be enquired of, but also whether the Prisoner be the same Person, and all other Matters which he might have pleaded in his Defence. And such Inquiry shall be made, as I suppose, not by an Inquest of Office, but by a Jury returned by the Sheriff in the same Manner as if the Defendant had actually pleaded ; for since it is no way his Fault that he did not so plead, there is no Reason why his Trial should be in a more loose and summary Manner, or any way less regular, or solemn, than if he had. To which may be added, That Sir *Matthew Hale* saith, [a] *That the Felony shall be enquired of*, &c. *in the same Manner as if the Prisoner had pleaded Not guilty* ; from which Words it seems plain, That in his Opinion the Inquiry ought to be an Inquest returned by the Sheriff as in other Trials at the Mise of the parties, because if the Defendant had pleaded, it must certainly have been so. And therefore it seems reasonable, That where Sir *William Staundeforde* [b] having spoken of such Inquiry, adds immediately, That it is but an Inquest of Office, ought to be understood, not of the Inquiry of the Felony, whereof he had last spoken, but of the Inquiry whether the Prisoner stood Mute of Malice, or by the Act of God, whereof he had spoken in the Sentence next before. And I the rather incline to think that this is his Meaning, because the [c] Books cited by him, to this Point, relate to this Inquiry only.[14]

As to the fourth Point, *viz.* in what Cases he that stands Mute shall be awarded to the same Execution as if he had not stood Mute, and where he shall be adjudged to his Penance, I shall consider,

1. What shall be done to him who stands Mute after an Attainder.
2. What to a Person arraigned for High Treason.
3. What to one arraigned for Petit Larceny.

4. What to one arraigned for a Felony by Statute.
5. What to one arraigned upon an Appeal.
6. What to one indicted of a Capital Felony, or Petit Treason.

Sect. 8. As to the first Particular, *viz*. What is to be done to him who stands Mute after an Attainder : It seems to be settled [d] at this Day, That where-ever one who is attainted, either by Judgment on a Verdict, or Confession, or by Outlawry, or Abjuration, stands Mute to the Demand why Execution should not go against him, he shall not be awarded to his Penance, but to the same kind of Execution, if any, that would have been awarded, if he had not stood Mute. Yet there seems to be this Difference, That where one who hath always continued in Prison, after an Attainder by Verdict or Confession, stands Mute to the Demand why Execution should not go, it shall be awarded [e] against him, without any Inquiry whether he stand Mute by Malice, or otherwise, or whether he be the same Person who is so attained or not ; because it sufficiently appears that he is the same Person, and that is sufficient to justify an Award of Execution against him, where nothing appears to the contrary. But if a Person so attainted, be retaken after an Escape; or if one be taken after an Outlawry or Abjuration, and stand Mute to the Demand, Why Execution should not go against him? It shall be inquired, whether he stand Mute of Malice, or of the Act of God, and if it be found of Malice it seems that Execution shall be awarded without any farther Inquiry: [f] But if it be found to be of the Act of God, it seems That it ought to be also inquired, whether he be the same Person or not, in the same Manner as where one stands Mute by the Act of God, when first brought upon his Trial.[15]

Sect. 9. As to the second Point, *viz*. What is to be done to one who stands Mute to an Arraignment for High Treason : It is clearly settled [a] at this Day, That standing Mute upon an Arraignment for High Treason is equivalent to a Conviction by Verdict, or Confession, and consequently subjects the Criminal to the same Kind of Judgment and Execution as such a Conviction would do. But I take it for granted, That such standing Mute must in [b] like manner appear to be obstinate ; and that if it be found to be the Act of God, the whole Matter shall in like Manner [c] be inquired of, as hath been more fully shewn in the former Part of this Chapter. But where such Person appears to stand obstinately Mute, I do not find it any where holden, that there is any Necessity that he probably appear to be Guilty, or that any Evidence be examined to prove him so, before he shall be condemned or executed. But this is advisable, where one stands obstinately Mute on an

Arraignment for Felony by Statute, as shall be more fully shewn in the fourteenth and fifteenth *Sections*.[16]

Sect. 10. As to the third Particular, *viz*. What is to be done to one who stands Mute to an Arraignment for Petit Larceny : I take it to be agreed, [d] That if a Man appear to stand obstinately Mute on an Arraignment for Petit Larceny, he shall have the like Judgment, *&c*. as if he had confessed the Indictment.[17]

Sect. 11. As to the fourth Particular, *viz*. What is to be done to those who stand Mute to an Arraignment for felony by Statute ; It is expressly enacted by 33 *H*. 8. 12. *Par*. 12. *That if a Person indicted, and arraigned of Treason, Misprision of Treason, Murder, Manslaughter, or Bloodshed*, &c. *against that Act, within the Verge of the Court, shall obstinately refuse to answer directly, or shall stand Mute, he shall have the like Judgment*, &c. *as if he were found Guilty*, &c. But [e] where a Statute, as that of *Piracy, &c*. ordains a Trial by the Common Course of the law, it hath been adjudged, That the Criminal shall have Judgment of his Penance *&c*. as in other Felonies.[18]

Sect. 12. As to the fifth particular, *viz*. What is to be done to one who stands Mute to an Arraignment on an Appeal: It is holden by Sir *Matthew Hale*, [f] That an Appellee of Felony standing Mute shall not have Judgment of Penance, but to be hanged; but this is made a *Quaere* in [g] *Staundforde*, and [h] *Brook* ; and the contrary Opinion seems to be favoured by Sir [i] *Edward Coke*, and is expressly holden by [k] *Kelynge*, and supported by several [l] Resolutions in the Old Books. Whereas the *Year-Book* of 21[m] *E*. 3. seems to be the only Resolution in favour of the other Side ; to which it may be answered, Not only that three of the abovecited Resolutions to the contrary, are much later, but also that the Appellee in this Case appears to have been taken with the Manner, [n] which probably might be a Circumstance of considerable Weight in the Judgment.[19]

Sect. 13. As to the sixth particular, *viz*. What is to be done to one who stands Mute to an Indictment of a Capital Felony, or a Petit Treason : It is enacted by the [o] abovementioned Statute of *Westminster*, 1, 12. *That notorious Felons which openly be of evil Fame, and will not put themselves in Enquests of Felonies, that Men shall charge them with before the Justices at the King's Suit, shall have strong and hard Imprisonment, as they which refuse to stand to the Common Law of the Land. But this is not to be understood of such Prisoners as be taken on light Suspicion*.[20]

Sect. 14. Sir [a] *Edward Coke*, in the Construction of this Statute, saith,

That no Person shall be put to this Punishment, unless the Matter be evident, or probable, which it is the Duty of the Judge to look into ; and Sir *William* [b] *Staundforde*, saith, That there ought to be evident or probable matter to convince the Party of the Crime whereof he is arraigned, or otherwise that he be a notorious Felon, or openly of bad Fame ; and therefore he advises the Judge, for the Satisfaction of this Statute, and Discharge of his Duty, to examine the Evidence which proves the Prisoner Guilty of the Fact, before he proceed to the Judgment of *Pain fort & dure*. Yet I cannot find any Book which takes Notice of any Examination of this Kind, or of any Entry that the Defendant appeared to be a notorious Felon, before such Judgment given against him, upon his standing Mute, whether upon an [c] Indictment or [d] Appeal ; But all the Books cited in the Margin seem to intimate, that the standing Mute is of itself a sufficient Ground for such Judgment. Yet all that can be inferred from thence seems to be this, That it is not necessary to make any thing of this Kind Part of the Record, it being a Matter left to the Discretion and Conscience of the Judge, and to be presumed where it is not expressed. But as to all Capital Appeals whatsoever, and all Indictments and Appeals of Petit Treason, perhaps it may be said, That [e] not being within this Statute, but remaining as they were at the Common Law, the Obstinacy of a Criminal in standing Mute to them, may be of itself, without more, a sufficient Inducement to a Judge to award him to his Penance. But considering that such Appeals and Indictments are within the same Reason with those mentioned in the Statute ; and it is uncertain how the Common Law stood in Relation to these Matters, as appears by the best Authors, [f] differing among themselves concerning them ; and seeing the Method prescribed by the Statute is very just and equitable, it seems prudent at least in a Judge to observe the same Rules in all Cases of this Kind.[21]

Sect. 15. I do not find it said in any Book, what shall be done to a Prisoner who obstinately standing Mute to an Arraignment, shall appear to be charged upon very light Suspicion ; but I take it for granted, That he may be severely fined and imprisoned for the Contempt.

Sect. 16. As to the fifth Point, *viz*. What is the Nature of the Penance to which a Prisoner is to be adjudged upon his obstinately standing Mute : It is observable, That the abovecited Statute of *Westminster* I. says only in general, That Felons standing Mute shall be put *in Prison fort & dure*, without saying any Thing of the Manner of it, which it seems to leave as a known Thing to the usual Practice in such Cases ; which we shall best find

from the Books of Entries, and other Law Books, all of which generally agree That the Prisoner shall be remanded [g] to the Place from whence he came, and put [h] in some low dark Room, [i] and there laid on his Back, without any manner of Covering, except for the Privy Parts, and [a] that as many Weights shall be laid upon him as he can bear, and more, and that he shall have no Manner of Sustenance but of the worst [b] Bread and [c] Water, and that he shall [d] not eat the same Day in which he drinks, nor drink the same Day on which he eats; and that he shall so continue till he die.[e] But it is said, [f] That anciently the Judgment was not, That he should so continue till he should die, but till he should answer, and that he might save himself from the Penance by putting himself on his Trial, which he cannot do this Day after the Judgment of Penance is once given.[22]

Sect. 17. It seems clear, [g] That Women upon standing Mute, are liable to such Penance as well as Men.[23]

Sect. 18. It is said [h] to be the constant Practice of *Newgate* Sessions, where a Prisoner refuses to plead, to endeavour to compel him to do it by tying his Thumbs together with Whipcord, and not to proceed to the Judgment and Penance, before all Methods of persuading him to plead, are found ineffectual.[24]

Sect. 19. As to fifth Point, *viz*. What he who obstinately stands Mute shall forfeit, and to whom : There is no Doubt but that in Case of [i] High Treason he shall forfeit both Lands and Good [*sic*], in the same Manner as if he had been attainted any other way. Also I take it for granted that in the Case of Felony and Petit Treason, where a Person by standing Mute shall not avoid being attainted for such Crimes, he shall forfeit his Lands and Goods in the same Manner as on other Attainders. But where ever a Person standing Mute is adjudged to his Penance, and thereby prevents that Attainder which otherwise he might have incurred, it seems agreed, [k] That he forfeit his Chattels only, and not his Lands.[25]

Sect. 20. It is agreed in the *Year-Book* of 8 [l] *H*. 4. That the Goods so forfeited ought not to be delivered to any Person claiming them under a Grant from the Crown, till he have shewed a good Title to them in the King’s Court, by some Grant sufficient to pass them.[26]

Sect. 21. And it seems [m] That such Goods will not pass by Grant of all Felons Goods, having no Words specially extending to the Goods of those who stand Mute, *&c*. because a Person adjudged to his Penance for standing Mute, does not seem to suffer as a Felon, being neither attained nor convicted of any Felony, but as Person refusing to stand to the Law of the

Land. And it seems rather the stronger Opinion, [n] That they pass not by the Grant of *all Goods of Felons and Fugitives of all Persons within such a District* ; *so that if such Persons for any Trespass or other Fault ought to lose Life or Member* ; *or shall fly and refuse to stand Judgment, or do any other Trespass for which they ought to lose their Cattels*.[27]

Sect. 22. As to the sixth Point, *viz*. Whether the Prosecutor of an Indictment or Appeal of Larceny be intitled to a Restitution of the Goods stolen, upon the Defendant's standing Mute : It seems agreed, [o] That by the Common Law, where a Person stands Mute to an Appeal of Larceny, it is proper to charge the same Inquest which is to enquire whether the standing Mute be of Malice or not, to enquire also whether the Goods mentioned in the Appeal are the Goods of the Appellant, and whether the Defendant were taken upon a fresh Suit [p] made by such Appellant, which Points being found [a] for him, he shall have an Award of Restitution to such Goods, and to such only, [b] in whose Hands soever [c] they are found. And it is said in general in some Books, [d] That in an Appeal of Larceny there shall be a Restitution of the Goods, upon the Appellee's standing Mute, without saying any thing of any Inquiry concerning the Property, or fresh Suit : But I take it for granted, That where it is so omitted, it is taken as a Thing known, and done of Course, and therefore needless to be expresly mentioned.[28]

Sect. 23. But it seems questionable, Whether the Prosecutor of an Indictment of Larceny, be in like Manner intitled to a Restitution, upon the Defendant's standing Mute? Because it seems agreed, [e] That by the Common Law there could be no such Restitution upon any other Prosecution but an Appeal ; and it is certain, That the Prosecutor of an Indictment is not intitled to a Restitution by the express Words of 21 [f] *H*. 8. 11. which require, *That the Felon be found guilty*, *or otherwise attainted*, &c. And I do not know that he is intitled to it by any other Statute, or any equitable Construction of this.[29]

Sect. 24. As to the seventh Point, *viz*. Where one who stands Mute shall have the Benefit of his Clergy : It seems clear, [g] That unless it happen to be otherwise specially provided by some Statute, where-ever he shall be allowed it upon a Conviction, by Verdict or Confession, he shall have it upon his standing Mute. Also I take it to be agreed,[h] That a Statute taking away the Benefit of Clergy from those who shall be convicted of a Crime, doth not thereby take it away from those who stand Mute on an Indictment or Appeal for such Crime. But it is enacted by 3 & 4 *W*. & *M*. 9. set forth more at large in the Chapter of Clergy, *That if any Person shall be indicted*

of any Offence, for which by Virtue of any former Statute, he is excluded from the Benefit of his Clergy, if he had been thereof convicted by Verdict or Confession, if he stand Mute he shall not be admitted to it. But Appeals and Offences excluded from the Benefit of Clergy by subsequent Statutes, seem not to be within the Purview of this Statute; for the fuller Consideration whereof I shall refer the Reader to the Chapter of *Clergy*.[30]

CHAP. XXXI.
Of Confession and Demurrer.

AND now I am to consider what is to be done to a Prisoner upon his Confession, which may be either,

1. Express, or,
2. Implied.

Sect. 1. An express Confession is where a Person directly confesses [a] the Crime with which he is charged, which is the highest Conviction that can be, and may be received [b] after the Plea of Not guilty recorded, notwithstanding the Repugnancy ; for the Entry is, That the Defendant *postea* or *relicta verificatione, cognovit indictamentum*.[31]

Sect. 2. Such a Confession carries with it so strong a a [*sic*] Presumption of Guilt, that an Entry [c] on Record *quod cognovit indictamentum, &c.* in an Indictment of Trespass, estops the Defendant to plead Not guilty to an Action brought afterwards against him for the same Matter. But it seems questionable, Whether such Entry of a Confession of an Indictment of a Capital Crime, will in the like Manner estop a Defendant to plead Not guilty to an Appeal, because in Case of Life, the Court will be very tender in going upon Presumptions. And where a Person upon his Arraignment actually confesses [d] himself Guilty, or unadvisedly discloses the Special [e] Manner of the Fact, supposing that it doth not amount to Felony, where it doth, yet the Judges, upon probable Circumstances, that such Confession may proceed from Fear, Menace, or Duress, or from Weakness or Ignorance, may refuse to record such Confession, and suffer the Party to plead Not guilty.[32]

Sect. 3. An implied Confession is where a Defendant in a Case not Capital, doth not directly own himself Guilty, but in a Manner admits it by yielding to the King’s Mercy, and desiring it submit to a small Fine ; in which Case, if the Court think fit to accept of such Submission, and make an Entry that the Defendant *posuit se in gratiam Regis*, without putting him to a direct Confession, or Plea, (which in such Cases seems to be left to

Discretion) the Defendant shall [f] not be estopped to plead Not guilty to an Action for the same Fact, as he shall [g] be where the Entry is *quod cognovit indictamentum*.[33]

Sect. 4. I take it for granted, That no Confession whatever shall, before final [h] Judgment, deprive the Defendant of the Privilege of taking Exceptions in Arrest of Judgment to Faults Apparent in the Record; [i] for the Judges must *ex officio* take Notice of all such Faults, and any one, as amicus Curiae may inform them of them.[34]

Sect. 5. It seems to be taken for granted, both by [a] *Brook* [b] *Staunforde*, [c] *Coke* and [d] *Hale*, speaking, as I suppose, of a general Demurrer, That it amounts so far to a Confession of the Indictment as laid, that if the Indictment be good, Judgment and Execution shall go against the Prisoner. But it is observable, That no adjudged Case is cited for the Maintenance of this Opinion, nor any Authority from the old Books except the *Year-Book* of 14 *Ed*. 4. 7. *a. pl*. 10. in which it is reported to have been said by *Choke*, That if a Defendant demur to a Plea, he shall be hanged, *quod fuit concessum*. But to this it may be said, That it was only spoken incidentally, and not a Point adjudged ; and besides that is so short and obscure that it is scarce intelligible, which appears by *Brook*'s abridging it in different Senses ; for in one Place [e] he seems to understand it of a Demurrer by a Defendant to a Plea in Bar, which seems impossible; and in another [f] Place he seems to understand it in a different Sense. And therefore perhaps the Meaning of it may be only this, That after a Defendant hath pleaded such a Bar, as confesses the Fact, and concludes him to plead the General Issue afterwards, as some Pleas are said [g] to do ; if he afterwards demur to a Replication to such Plea, he shall be condemned if the Demurrer be adjudged against him, and the Indictment or Appeal be good.[35]

Sect. 6. But howsoever the Law may stand in Relation to a [h] General Demurrer concluding in Bar of an Appeal, or Indictment, as in Common Demurrers in Civil Actions, or a Demurrer to a Plea in Bar, [i] which admits the Fact, or to a [k] Replication to such a Plea : It hath been adjudged, That if an Appellee demur in Law to an Appeal by Reason of the [l] Insufficiency of the Declaration, or generally demur to the Declaration, with a [m] Conclusion *& petit judicium de narratione illa & quod narratio illa cassetur* ; or having prayed [n] *Oyer* of the Writ and Process, demand Judgment of the Appeal, *quia dicit quod breve de appello praedict. & process. inde minus sufficient' in lege existunt ad ipsum W. C. ad dictum breve de Appello respondere compellend ; & hoc. parat. est verificare prout Cur', &c. unde petit*

judicium de brevi de Appello praedict. & petit inde allocationem, & quod breve illud de Appello cassetur ; such Demurrer shall not conclude him from pleading over to the Felony, either at the same Time [o] with the Demurrer, or [p] after it shall be adjudged against him.[36]

Sect. 7. But it seems, That in Criminal Cases not Capital, if the Defendant demur to an Indictment, *&c.* whether in Abatement or otherwise, the Court will not give Judgment against him to answer over, but final [q] Judgment ; for it seems, That in such Cases there can be no Demurrer properly in Abatement, except [r] it be to a Plea in Abatement, or to a [s] Replication to such a Plea.[37]

Sect. 8. A Demurrer to an Appeal hath been [t] received after Issue joined : But it hath been adjudged, [u] That a Demurrer to an Indictment ought not to be received after Verdict.[38]

Hawkins Pleas of the Crown, book II, pp. 326–34.

9.3.1.4Burn, 1766

EXAMINATION.

If a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty ; yet the justice shall not discharge him, but he must either be bailed or committed : for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without farther trial [.] *Dalt. c.* 164.

In order to which bail or commitment, the examination and information of the parties must first be taken, according to the following statutes:

Two or more justices (1 Q.) *or one of the said justices, before they bail a person apprehended for felony (if the offence is bailable) shall take his examination* (A) *and the information* (B) *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 ; which examination they shall certify (together with the bailment) at the next general gaol delivery, to be holden within the limits of their commission.* 1 & 2 P. & M. c. 13. s. 4.

And they shall have power to bind by recognizance (C) *all such as do declare any thing material to prove the offence, to appear at the next general gaol delivery, to be holden within the county where the trial shall*

be, then and there to give evidence against the party ; *and shall certify such recognizance in like manner*. s. 5.

And if they offend in any thing herein, thing shall be fined by the justices of gaol delivery. id.

In like manner, where the person is not bailed, but committed to ward, the justice or justices who commit him, shall before such commitment, take the like examination and information, and shall put the same in writing within two days after the said examination, and shall in like manner bind over the witnesses ; *and certify the whole as above*. 2 & 3 P. M. c. 10.

Shall take his examination]. And in order thereunto, if by some reasonable occasion, the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice, for further examination. And this detainer is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. 1 *H. H*. 585.

But the time of the detainer must be no longer than is necessary for such purpose ; for which it is said, that the space of three days is a reasonable time. 2 *Haw*. 119.

But the examination of the person accused, ought not to be upon oath. 1 *H. H*. 585.

But if upon his examination he shall confess the matter, if shall not be amiss that he subscribe his name, or mark to it. *Dalt. c*. 164.

Which examination being voluntary, and sworn by the justice or his clerk to be truly taken, may be given in evidence against the party confessing, but not against others. 1 *H. H*. 585. 2 *Haw*. 429.

Information of them that bring him] Or of other witnesses ; whom the justice may bring before him by his warrant (D) for that purpose. 1 *H. H*. 586. *Dalt. c*. 164.

And this information must be upon oath. *Dalt. c*. 164. 1 *H. H*. 586.

And therefore if a quaker is witness, his affirmation must not be taken in this case ; for by the 7 & 8 *W. c*. 34. *s*. 36. it is provided, that no quaker shall be examined for or against any person in any criminal cause, unless it be upon oath.

And the said information being upon the trial sworn to be truly taken, by the justice or his clerk, may be given in evidence against the prisoner, if the

witnesses be dead and not able to travel. 1 *H. H*. 586.

Or as much thereof as shall be material to prove the felony] Yet it seemeth also just and right, that the justices who take information against a felon, or person suspected of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as maketh against the prisoner : for such information, evidence, or proof so taken, is only to inform the king and his justices of the truth of the matter. *Dalt. c*. 165.

Shall certify at the next gaol delivery] And yet for petty larcenies, and small felonies, the offenders may be tried at the quarter sessions, and the examinations and informations may be certified thither. *Dalt. c*. 164.

To be holden within the limits of their commission] And yet examinations taken by justices of the peace in one county, may be by them certified in another county, and there read, and given in evidence against the prisoner. *Dalt. c*. 164.

To bind by recognizance] And upon refusal may commit the person refusing. 1 *H. H*. 586.

And the parties grieved ought to be bound, not only to give evidence, but also to prefer a bill of indictment against the prisoner. *Dalt. c*. 164.

A. EXAMINATION OF A FELON.

Westmorland. THE *examination of* A. O. *of ——— yeoman, taken before me* Henry Chaytor, *clerk, one of his majesty's justices of the peace for the said county* [or, in the case of bail, ——— *taken before us ——— two of his majesty's justices of the peace for the said county, and one of us of the* quorum] *the ——— day of ——— in the ——— year of the reign of ———*

The said A. O. *being charged before me* [or, *us*] *by* A. I. *of ——— yeoman, with the felonious stealing out of the house of the said* A. I. *at ——— on the ——— day of ——— the following goods, to wit ——— to the value of ——— be the said* A. O. *upon his examination now taken before me* [or *us*] *confesseth that ———* [or, *denieth that ———*] *&c.*

B. INFORMATION OF A WITNESS.

Westmorland. THE *information of* A. I. *of ——— yeoman, taken upon oath before me* [as before]

C. RECOGNIZANCE TO GIVE EVIDENCE.

Westmorland.} BE *it remembred, that on the ——— day of ——— in the ——— year of the reign of ———* A. I. *of ——— in the said county,*

yeoman, did come before me Henry Chaytor, *clerk, one of the justices of our said lord the king, assigned to keep the peace in the said county, and did ackowledge* [*sic;* acknowledge] *himself to owe to our said lord the king ten pounds of lawful money of* Great Britain, *under condition, that if he shall personally appear before the justices of our said lord the king, at the next general quarter sessions of the peace* [or, *gaol delivery*] *to be holden in and for the said county, then and there to given evidence in behalf of our said lord the king, against* A. O. *late of ——— who being attached, and suspected of felony, is now committed to the gaol of our said lord the king in the said county, then this recognizance to be void, otherwise of force.*

Or thus, to prefer a bill of indictment, and give evidence.

Westmorland. BE *it remembred, that on the ——— day of ——— in the ——— year of the reign of ——— A. I. of ——— in the said county yeoman, personally came before me* Henry Chaytor, *clerk, one of the justices of our said lord the king, assigned to keep the peace in the said county, and acknowledged himself to owe to our said lord the king, the sum of ——— of good and lawful money of* Great Britain, *to be made and levied of his goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, if he the said* A. I. *shall fail in the condition indorsed.*

H. C.

The condition of the within written recognizance is such, that whereas one A. O. *late of ——— was this present day brought before the justice within mentioned by the within bounden* A. I. *and was by him charged with the felonious taking and carrying away ——— of the goods of him the said* A. I. *and thereupon was committed by the said justice to the common gaol in and for the said county : If therefore he the said* A. I. *shall and do at the next general quarter sessions of the peace* [or, *gaol delivery*] *to be holden in and for the said county, prefer or cause to be preferred, one bill of indictment of the said felony against the said* A. O. *and shall then also give evidence there concerning the same, as well to the jurors that shall then inquire of the said felony, as also to them that shall pass upon the trial of the said* A. O. *that then the said recognizance to be void, or else to stand in full force for the king.*

D. WARRANT FOR A WITNESS.

Westmorland. {To the constable of ———

WHEREAS *oath hath been made before me ——— one of his majesty's justices of the peace in and for the said county, by* A. I. *of ——— yeoman,*

that he the said A. I. *was lately robbed at ——— and that he hath good cause to believe that* A. W. *of ——— is a material witness to prove by whom the said robbery was committed : These are therefore to require you to cause the said* A. I. *forthwith to come before me, to give such information and evidence as he knoweth concerning the said offence, that such further proceeding may be had therein, as to the law doth appertain. Given under my hand and seal at ——— in the said county, the ——— day of ——— .*

Burn Justice of the Peace, vol. 1, pp. 484–88.

9.3.2CASE LAW

9.3.2.1The King v. Dr. Purnell, 1748[39]

9.3.2.2Brownsword v. Edwards, 1751

Lord Chancellor, This appears a very plain case, in which defendant may protect herself from making a discovery of her marriage; and I am afraid, if the court should overrule such a plea, it would be setting up the oath *ex officio;* which then the parliament in the time of *Charles* I. would in vain have taken away, if the party might come into this court for it. The general rule is, that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical law of the land. (2 Ves. Sen. 389, 451; 1 Atk. 539; 2 Atk. 393; 1 Brown 97. In case of a bankrupt smuggler, the commissioners may examine him, but he may demur to the interrogatories, and have the opinion of the court. 2 Atk. 200; 1 vol. 247; 3 Wms. 376; 1 Vern. 109.) Incest is undoubtedly punishable in ecclesiastical court; and such a crime is generally excepted out of the acts of pardon. The ecclesiastical court has conusance of incest in two respects, *diverso intuitu:* first to judge of the legality of the marriage, and to pronounce sentence of nullity; and if they do so, proceeding lawfully and rightfully, it binds all parties, being the judgment of a court having proper jurisdiction of the cause. The other is to censure and punish persons guilty

by ecclesiastical censure, as for fornication, adultery, &c. Nor is it material what the nature of the punishment is. It is a punishment which must be performed or got rid of by commutation, which is like a fine. Then consider the present case. The discovery whether lawfully married takes in the whole, whether married in fact, and whether that marriage was lawful. Defendant has pleaded to it; which she may do; and in the plea it is proper to bring in facts and averments to support that plea; whereas a demurrer can be to nothing but what appears on the face of the bill, otherwise it would be a speaking demurrer. (Averments are necessary to exclude intendments which would be made against the pleader, for the court will always intend the matters charged against the pleader unless fully denied. 2 Atk. 241; Gilb. 185.) But here it was necessary to bring in such an averment, that testator was lawfully married before to her sister, and had issue; which is a fact necessary to shew; and that fact she has taken on herself to prove: the plea therefore is regular in form, and good in substance. The objection to the plea is, that one of the parties to the incestuous marriage being dead, there can be no proceeding afterward. I always took the distinction to be what is laid down in *Hicks v. Harris*, that by the law of the land the ecclesiastical court cannot proceed to judge of the marriage and to pronounce sentence of nullity after death of one of the married parties, especially where there is issue, because it tends to bastardise the issue; and none after death of one of the parties to that marriage is to be bastardised: but there is no rule of law standing to prevent either of the parties from punishment after death of the other. Suppose it was an offence of adultery or fornication, there is no rule of the civil or ecclesiastical law, that after death of one of the parties the survivor may not be punished for the offence: undoubtedly they may, either proceeding *ex officio*, by office of the ecclesiastical judge, or by promotion of a proper informant. Then why may not the ecclesiastical court do it in the case of incest, whether without the formality of marriage or attended with it? But it is said, *Hicks v. Harris* is no judicial determination in the point, and that all that was material before the court, was the joint jurisdiction; which is true: but there was a plain difference. If the court held, that the proceeding (and this is an answer to one part of the objection) even for the censure against the surviving party would have tended to affect the legitimacy of the marriage or the issue, the court of *B.R.* would have stopped there: but they went on this, that it could not be given in evidence against the issue or the plaintiff claiming under that issue: as was determined solemnly in *B.R.* on a long trial at bar, directed out of this court in *Hillyard v. Grantham*, in which I was counsel.

(See 3 Wooddeson, 318.) In that cause during life of the father and mother there had been a proceeding against both of them in the consistory court of *Lincoln* for living together in fornication, and sentence given against them. On the trial that sentence was offered in evidence to prove, that they were not married: the whole court were of opinion that it could not be given in evidence; because first, it was a criminal matter, and could not be given in evidence in a civil cause; next that it was *res inter alios acta*, and could not affect the issue: but they held, that if it had been a sentence on the point of the marriage on a question of the lawfulness of the marriage, it being a sentence of a court having proper jurisdiction, might have been given in evidence. If indeed there had been collusion that might be shewn on the part of the child to take off the force of it; because collusion affects every thing: but if no collusion, it binds all the world: but in a proceeding in a criminal way that could not be given in evidence: and that was the distinction the court went on in *Hicks v. Harris*. But if there had not been the authority, I should not have doubted on the nature of the thing, but that the ecclesiastical court might have proceeded after death of one of the party as well for incest as fornication; in which case there is no doubt they may. Thus far as to the merits of the plea. Some collateral arguments have been used, that it is not in every case the party shall protect himself against relief in this court upon an allegation, that it will subject him to a supposed crime. It is true, it never creates a defence against relief in this court, therefore in case of usury of forgery, if a proof can be made of it, the court will let the cause go on still to a hearing, but will not force the party by his own oath to subject himself to punishment for it (if plaintiff waves [*sic*] the penalty, defendant shall be obliged to discover, 1 Vern. 60, or whether the penalty arises from defendant's own particular agreement, he is obliged to discover. 2 Ver. [*sic*] 244. Or where the discovery sought is not of a fact which can subject defendant to any penalty, but connected with some other fact which may, 2 Ves. sen. 493). In a bill to inquire into the reality of deeds on suggestion of forgery, the court has entertained jurisdiction of the cause; though it does not oblige the party to a discovery, but directs an issue to try whether forged. I remember a case where there was a deed of rent-charge suggested to be forged: it was tried twice at law, and found for the deed: a bill was afterward brought to set it aside for forgery, and to have it delivered up to be cancelled. Lord *King*, notwithstanding the two trials, which has been in *Avowry* and *Replevin*, directed an issue: wherein it was found forged, and, I remember, was cancelled and cut to pieces in court. There are several instances of that: so that the relief the party may have is

no objection. As to the objection from the consequence of allowing this plea if the defendant should fail in the proof of it, that would be an objection to the allowing any plea to a discovery: though it would be no objection to a demurrer, because that must abide by the bill: but all pleas must suggest a fact (which fact must conduce to one single point, per Lord *Thurlow*, 1 Brown, 417. 1 Atk. 54): it must go to a hearing; and if the party does not prove that fact which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery: but the court may direct an examination on interrogatories in order to supply that. The plea therefore ought to be allowed.

28 Eng. Rep. 157 (Ch. 1751).

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

2 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

3 For the full reports of the House's discussion of its Eighth Amendment, *see* 8.2.1.2.a–d.

4 * If a small Felony, then to the Sessions.

5 † Tho' the Party is dead ; but then the Justice's Clerk should be sworn to the Examination, or the Justice himself.

6 2 And. 67.

7 H. P. C. 264.

8 a Dyer 49, 241. 2 H. H. P. C. 316, 317. H. P. C. 226. S. P. C. 150. Letter. E.

b Keilw. 70. a. Vide Bro. Coro. 22.

c Keilw. 70. a.

a Bro. Pain 2, 14, 15. S. P. C. 150 Lett. E. Bro. App. 93. 2 Inst. 178. H. P. C. 226. Fitz. Coro. 27, 30, 359. 4 E. 4. 11. pl. 18. 7 E. 4. 29. pl. 13. 14 E. 4. 7. pl. 10. 3 Inst. 227. Vide. Bro. Coro. 149. 8 E. 4. 3. pl. 6.

b Kely. 57.

c For this see Chapter of the Trial by Battle, and S. P. C. 81. Letter E.

9 d 2 Inst. 178.

e H. P. C. 259.

f H. P. C. 226.

g Kely. 36.

h 3 Inst. 227.

i 3 H. 7. 12. pl. 5. Abridged Fitz. Coro. 56. And Bro. Cor. 135. or 6. And Bro. Pain 5. And note, there is no other Authority cited for this Opinion by Coke, Hale, or Kelynge. 2 Inst. 178. H. P. C. 259. Kely. 36.

k Fitz. Coro. 359. 3 H. 7. 12. pl. 8. Abridged Fitz. Coro. 51. and Bro. Clergy, 27. And note that this Case is the more remarkable, because of the very same Year with the former, and subsequent to it. Vide Kely. 36. 3 H. 7. 2. pl. 5. the like is said to be adjudged by all the Justices but Keble ; and the Case is abridged Bro. Appeal, 82. Pain, 4. 2 H. H. P. C. 316.

10 l See the next [Chapter] sect. 5.

11 m S. P. C. 130. Lett. C. Same Point admitted, 3. H. 4. 3. pl. 5. Which is abridaged Bro. Pain 2. but in these Books it is incidentally holden, That where a Man does not confess, but pleads Not guilty, and after stands Mute, he shall be put to his Penance.

n Kely. 36, 37. H. P. C. 225, 226. 2 H. H. P. C. 316. 15 E. 4. 33. pl. 19. Abridged Bro. Penance, 9. and Bro. Coro. 51. Cont. 8 H. 4. 3. pl. 5. for which see the Note next above.

12 o H. P. C. 225. S. P. C. 150. Lett. C. 2 Inst. 177, 178. 8 H. 4. 1. pl. 2. Fitz. Coro. 71, 225. 43 Ass. pl. 30. Bro. Appeal, 24.

p Ra. Ent. 385. pl. 3.

q 8 H. 4. 1. pl. 2. Fitz. Coro. 71. Bro. Appeal, 24.

r S. P. C. 150. Lett. D. from the Authority of 8 H. 4. 3. for which see the Notes to the precedent section.

13 s Vide H. P. C. 225, 226. S.P.C. 150. Lett. D. 2 Inst. 177, 178.

14 t S. P. C. 150. Lett D. 2 Inst. 177, 178. H. P. C. 225. 2 H. H. P. C. 317.

a H. P. C. 225.

b S. P. C. 150. Lett. D.

c Fitz. Coro. 225. 43 Ass. pl. 30. 8 H. 4. 1. pl. 2. 2 H. H. P. C. 316, 317 accords.

15 d H. P. C. 226. 2 H. H. P. C. 315, 316. Kely. 36. S. P. C. 150. Lett. C. D. So adjudged 8 H. 4. 3. pl. 5. Abridged Bro. Pain, 2. Coro. 22. as to the Cause of Abjuration or any other Attainder after a Confession; but the contrary is insinuated as to other Attainders. But in 26. Ass. pl. 19. Abridged Fitz. Coro. 191. Bro. Pain. 12. Coro. 99. one who had abjured standing Mute, was put to his Penance and not hanged.

e S. P. C. 150. Lett. C. D. 10 E. 4. 19. pl. 26. Fitz. Coro. 36. Bro. Coro. 155.

f S. P. C. 150. Lett. C. D. 10 E. 4. 19. pl. 26. Fitz. Coro. 36. Bro. Coro. 155

16 a H. P. C. 226. 2 H. H. P. C. 317. Skin. 145. Savil. 56. pl. 121. Kely. 57. Dyer 205. pl. 4. 1 Inst. 177, 178. Bro. Pain, 19. Co. Litt. 391. 3 Inst. 14. S. P. C. 15. Letter C. Cont. Fitz. Coro. 283.

b Vide supra Sect. 5, 6. 18 E. 3. pl. 26. S. P. C. 150. Letter D.

c Vide supra Sect. 7. S. P. C. 150. Letter D.

17 d 2 Inst. 177.

18 e Dyer 241. pl. 49. 3 Inst. 114. 2 H. H. P. C. 320. St. Tr. v. 1. p. 367. B. 1. ch. 37. sect. 9. S. P. C. 150. Letter C. H. P. C. 226 2 H.H.P.C. 318, 319.

19 f H. P. C. 226.

g S. P. C. 150. Letter B.

h Bro. Pain, 8, 19.

i 2 Inst. 178, 179.

k Kely. 37.

l 8 H. 4. 1. pl. 2. Abrid. Bro. Pain, 1. Forfeiture, 11. Appeal, 24. Fitz. Coro. 71, 4 E. 4. 11. pl. 18. Abridg. Fitz. Coro. 71. Bro. Appeal, 93. Pain, 14. 43 Ass. pl. 30. Abridged Bro. Pain, 13. Appeal, 78. Coro. 123 or 124. Fitz. Coro. 225. 14 E. 4. 7. pl. 10. This Point is made a Quaere but in the very next Folio. pl. 17. Abridged Bro. Coro. 160 or 161 it is adjudged by all the Justices, That the Appellee in such Case should have his Penance.

m 21 E. 3. 18. pl. 26. Abridged Bro. Pain. 8. Appeal, 40. Coro. 43 But neither Fitz. Coro. 56. nor 3 H. 7. 2. pl. 5. nor 3 H. 7. 21. pl. 5. cited by Staundforde, seem to come up to this Point, but rather to be Authorities of the other Side. See Bro. Coro. 82.

n Vide supra Ch. 15. Sect. 41.

20 o Vide 2 Inst. 177, 178.

21 a 2 Inst 177.

b S. P. C. 159. Letter A. Vide H. P. C. 226. 2 H. H. P. C. 320, 321, 322.

c Ra. Ent. 385. pl. 2, 3. Keilw. 70. a. 7 E. 4. 29. pl. 13. 3 H. 7. 12. pl. 5. 8.

d 8 H. 4. 1. pl. 2. 4 E. 4. 11. pl. 18. 14 E. 4. 7. pl. 10. 43. Ass. pl. 30. 21 E. 3. 18. pl. 26. 3 H. 7. 2. pl. 5.

e S. P. C. 150. Letters B, C. 2 Inst. 177, 178, 179. And the Books cited, Sect. 12. under Lett. [illegible].

f S. P. C. 149. Letter F. 2 Inst. 178, 179.

22 g H. P. C. 227. 2 H. H. P. C. 319, 399, 400. S. P. C. 150. Letter E. Keilw. 70. a. 4 E. 4. 11. pl. 18. 14 E. 4. 8. pl. 17. Abridged Bro. Coro. 160. 2 Inst. 178. Ra. Ent. 385. pl. 17. 8 H. 4. 1. pl. 2.

h This Clause is omitted in Keilw. 70. a. 4 E. 4. 11. pl. 18. but it is mentioned in all the other Books above cited, but with this Difference, That 14 E. 4. 11. pl. 17. says only that he shall be put in a Chamber without adding that it shall be low or dark.

i In this all the Books above cited seem to agree. And 14 E. 4. 8. pl. 17. and S. P. C. 150. Letter E. and 2 Inst. 178. add, That he shall lie without any Litter or other Thing under him, and that one Arm shall be drawn to one Quarter of the Room with a Cord, and the other to another, and that his Feet shall be used in the same Manner. But these Clauses are wholly omitted in all the other Books above cited, except H. P. C. which takes Notice of the latter of them only. And Ra. Ent 385. pl. 2. adds, That an Hole shall be made for the Head, and Keil. 70. a. says, That the Head shall not touch the Earth; but none of the other mention either of these Clauses.

a In this all the Books above cited agree.

b But 14 E. 8. pl. 17. S. P. C. 150 Lett. E. and 2 Inst. 178. are, That he shall only have three Morsels of Barley Bread a Day. Keilw. 70. a. that he shall have only Rye Bread ; and Ra. Ent. 38. pl. 2. and 2 H. 4. 1. pl. 2. generally that he shall have of the worst Bread.

c 14. E. 4. 8. pl. 17. S. P. C. 150. Letter E. 2 Inst. 178. and 8 H. 4. 1. pl. 2. and Keilw. 70. are, That he shall have the Water next the Prison that it be not current; but Ra. Ent. 38. pl. 5 is general, That he shall

have the worst Water.

d This is omitted in Keilw. 70. a. and in 8 H. 4. 1. pl. 2.

e This is omitted in none of the Books above cited, except 14 E. 4. 11. and H. P. C. 227. but neither of these Books give the whole Judgment at Large.

f S. P. C. 150. Lett. F. 151. Letter E. Britton 11.

23 g 2 Inst. 177. 2 H. H. P. C 319.

24 h Kely. 27, 28.

25 i See the Books cited to Sect. 9.

k 14 E. 4. 7. pl. 10. H. P. C. 226, 227. 2 H. H. P. C. 319. Co. Lit. 391. Fitz. Esc. 10. Coro. 51. Ass. 421. S. P. C. 151. a. Bro. Forfeiture, 11, 64. Appeal, 24. 8 H. 4. 1. b. 2. a. b. 3 H. 7. 12. pl. 8.

26 l 8 H. 4. 2. a. Bro. Appeal, 24.

27 m Dy. 268. pl. 18. 8 H. 4. 2. a. b. Bro. Forfeiture, 11.

n Dy. 268. pl. 18. 8 H. 4. 2. a. b. Bro. Forfeit. 11.

28 o Vide supra ch. 23. sect. 53. Lett. F. 8 H. 4. 1. pl. 2. 3. Abridged Bro. Appeal, 24. S. P. C. 166.

p Vide ch. 23. sect. 50, 51, 52.

a Supra ch. 23. sect. 53.

b Supra ch. 23. sect. 57.

c Supra ch. 23. [sect.] 54.

d 21 E. 3. 18. pl. 26. Abrid. Bro. Appeal, 40. 43 Ass. pl. 30. Abrid. Bro. Appeal, 78. Coro. 123. 124. Fitz. Coro. 225. Vide 40 Ass. pl. 39. Abrid. Fitz. Coro. 217.

29 e Supra ch. 23. sect. 55, 56.

f Set forth more at large, ch. 23. sect. 55.

30 g Fitz. Coro. 233, 283. Ass. 421. 8 H. 4. 3. pl. 5. H. P. C. 231. 2 H. H. P. C. 320, 380. Moore 550. pl. 738. 3 H. 7. 12. pl. 8. Abrid. Bro. Clergy, 27. Fitz. Coro. 51. 3 H. 7. 12. pl. 10. Abrid. Fitz. Coro. 53. Fitz. Cor. 58. seems contrary, but I cannot find any thing in 3 H. 7. 1. which is the Year-Book cited to this Note to warrant this Opinion.

h See H. P. C. 232 to 238. 2 H. H. P. C. 345.

31 a Vide S. P. C. 142. Lett. C. Lamb. B. 4. ch. 9. Finch of Law 38.

b Kely. 11. Quaere if the Law be the same in Civil Actions. Affirmed Cro. E. 144. pl. 3. Denied 2 Jon. 156.

32 c 9 H. 6. 60. a. Fitz. Estopp. 24, 102. 11 H. 6. 65. pl. 21. Lamb. B. 4. ch. 9. Trial per Pais 25.

d S. P. C. 141. Letter C. 2 H. H. P. C. 225.

e 22 Ass. pl. 71. Abridged Fitz. Coro. 180. 27 Ass. pl. 40

33 f 9 H. 6. 60. a. Abridged Fitz. Estoppel, 24. 11 H. 4. 65. pl. 21. Lamb. B. 4. ch. 9. Far. 40.

g Supra § 2.

34 h 1 Salk. 77, 78. Far. 100.

i Finch of Law 226. 2 Danv. Abr. 252. 2 Lev. 223.

35 a Bro. Peremptory, 86.

b S. P. C. 150. Letter C.

c 2 Inst. 178.

d H. P. C. 243. 2 H. H. P. C. 315.

e Bro. Demurrer, 17.

f Bro. Peremptory, 86.

g Vide supra ch. 23. sect. 137.

36 h See the precedent Sect.

i Vide Bro. Peremptory, 86. Fitz Coro. 12.

k Vide Bro. Perempt. 86.

l Dyer 38. pl. 51. 39. pl. 65. Coro. Eliz. 196. pl. 13.

m As it was done in the Case of Smith and Bowen, Mich. 7. Ann. Vid. Salk. 59. pl. 2.

n As it was done in the Case of Widdrington and Charlion, Hill. 10 Ann.

o Smith and Bowen, Mic. 7 Annae ; In which case the Demurrer was continued on the Record with a Cesset triatio exitus, &c. and after the Demurrer was determined against the Defendant, a Venire was awarded.

p Dyer 38. pl. 51. Salk. 59, 60. Cro. E. 196. pl. 13.

37 q Vide Salk. 220.

r Salk. 218.

s Ra. Ent. 160. pl. 1, 2, 3. 611.

38 t Cro. E. 196. pl. 13.

u 1 Sid. 208. wherein the Precedent in Co. Ent. 363. b. to the contrary is denied to be Law.

39 *See* 6.3.2.1.

CHAPTER 10

AMENDMENT V

DUE PROCESS CLAUSE

10.1TEXTS

10.1.1DRAFTS IN FIRST CONGRESS

10.1.1.1Proposal by Madison in House, June 8, 1789

10.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Congressional Register, June 8, 1789, vol. 1, pp. 427–28.

10.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

10.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3and 4, be

inserted these clauses, to wit: …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

10.1.1.2House Committee of Eleven Report, July 28, 1789

ART. 1, SEC. 9 — Between PAR. 2 and 3 insert,

…

"No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Broadside Collection, DLC.

10.1.1.3House Consideration, August 17, 1789

10.1.1.3.a The 5th clause of the 4th proposition was taken up, *viz.* "no person shall be subject, [*sic;* except] in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Congressional Register, August 17, 1789, vol. 2, p. 224.

10.1.1.3.b Eighth Amendment — "No person shall be subject except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Daily Advertiser, August 18, 1789, p. 2, col. 4.

10.1.1.3.c Eighth Amendment — "No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be

deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

10.1.1.3.d 8th Amendment. "No person shall be subject, except in case of impeachment, to more than one trial for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

10.1.1.4Motion by Benson in House, August 17, 1789

10.1.1.4.a *Mr. Benson*

[H]e would move to amend it by striking out the words "one trial or."

Congressional Register, August 17, 1789, vol. 2, p. 224 ("was lost by a considerable majority").

10.1.1.4.b Mr. Benson moved to strike out the words "One trial or"

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("This was negatived").

10.1.1.4.c Mr. Benson moved to strike out the words "one trial or."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 ("This was negatived").

10.1.1.4.d Mr. Benson… moved to strike out the words "one trial or"

Gazette of the U.S., August 22, 1789, p. 249, col. 1 ("This was negatived.").

10.1.1.5Motion by Partridge in House, August 17, 1789

10.1.1.5.a Mr. Partridge moved to insert after "same offence," the words, "by any law of the United States;"… .

Congressional Register, August 17, 1789, vol. 2, p. 225 ("this amendment was lost also").

10.1.1.5.b Mr. Partridge moved to insert after the words "same offence," the

words “by any law of the United States,”

Daily Advertiser, August 18, 1789, p. 2, col. 3 (“Resolved in the negative”).

10.1.1.5.c Mr. Partridge moved to insert after the words “same offence,” the words “by any law of the United States.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“Resolved in the negative”).

10.1.1.5.d Mr. Partridge moved to insert after the words “same offence,” the words *“by any law of the United States,”*… .

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (“Negatived”).

10.1.1.6Motion by Lawrance in House, August 17, 1789

10.1.1.6.a *Mr. Lawrance*

[H]e thought it [the clause] ought to be confined to criminal cases, and moved an amendment for that purpose, …

Congressional Register, August 17, 1789, vol. 2, p. 225 (“which amendment being adopted, the clause as amended was unanimously agreed to by the committee”).

10.1.1.6.b Mr. Lawrance moved to insert after the words “nor shall” these words “in any criminal case.”

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“This amendment was agreed to”).

10.1.1.6.c Mr. Lawrance moved to insert after the words “nor shall,” these words, “in any criminal case.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“This amendment was agreed to”).

10.1.1.6.d Mr. Laurance moved to insert after the words “nor shall” these words *in any criminal case*.

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (“This amendment was agreed to”).

10.1.1.7Further House Consideration, August 21, 1789

Seventh. No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

HJ, p. 107 ("read and debated… agreed to by the House, … two-thirds of the members present concurring").[1]

10.1.1.8House Resolution, August 24, 1789

ARTICLE THE EIGHTH.

No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

House Pamphlet, RG 46, DNA.

10.1.1.9Senate Consideration, August 25, 1789

10.1.1.9.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth: …

Article the Eighth

> "No person shall be subject, except in case of Impeachment, to more than one Trial, or one punishment for the same offence, nor shall be compelled in any Criminal case, to be a witness against himself, nor be deprived to life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Rough SJ, p. 217.

10.1.1.9.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*Article the Eighth.*

> No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Smooth SJ, p. 195.

10.1.1.9.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*ARTICLE THE EIGHTH.*

> "No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Printed SJ, p. 105.

10.1.1.10Further Senate Consideration, September 4, 1789

10.1.1.10.a On Motion to adopt the eighth Article of amendments proposed by the House of Representatives, striking out these words "Except in case of impeachment to more than one trial or one punishment" and substitute the following words.

> "Be twice put in jeopardy of life or limb by any public prosecution."
>
> Rough SJ, p. 249 ("It passed in the affirmative.").

10.1.1.10.b On motion, To adopt the eighth article of Amendments proposed by the House of Representatives, striking out these words,

—“Except in case of impeachment to more than one trial or one punishment,” and substitute the following words—

“Be twice put in jeopardy of life or limb by any public prosecution”—

Smooth SJ, p. 222 (“It passed in the Affirmative.”).

10.1.1.10.c On motion, To adopt the eighth Article of Amendments proposed by the House of Representatives, striking out these words, —“Except in case of impeachment to more than one trial or one punishment,” and substitute the following words—

“Be twice put in jeopardy of life or limb by any public prosecution”—

Printed SJ, p. 119 (“It passed in the Affirmative.”).

10.1.1.10.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

~~by~~ striking out these words. “Except in cases of impeachment to more than one trial or one punishment,” and substitute ∧ ing the following words; “Be twice put in jeopardy of life or limb by any public prosecution.”

Senate MS, p. 3, RG 46, DNA.

10.1.1.11Further Senate Consideration, September 9, 1789

10.1.1.11.a On motion, To alter Article 6th so as to stand Article 5th, and Article 7th so as to stand Article 6th, and Article 8th so as to stand Article 7th

…

On motion, That this last mentioned Article be amended to read as follows: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; Nor shall private property be taken for public use without just compensation.”

Rough SJ, p. 275 (“It passed in the affirmative.”).

10.1.1.11.b On motion, To alter article the sixth so as to stand article the fifth, and article the seventh so as to stand article the sixth, and article the eighth so as to stand article the seventh —

…

On motion, That this last mentioned article be amended to read as follows:

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation” —

Smooth SJ, p. 244 (“It passed in the Affirmative.”).

10.1.1.11.c On motion, To alter Article the sixth so as to stand Article the fifth, and Article the seventh so as to stand Article the sixth, and Article the eighth so as to stand Article the seventh —

…

On motion, That this last mentioned Article be amended to read as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation" —

Printed SJ, pp. 129–30 ("It passed in the Affirmative.").

10.1.1.11.d To erase the word "Eighth" & insert Seventh —

To insert in the ~~Eighth~~ 8th [7th] ~~as~~ article after the word "shall" in the "1" line — be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual Service in time of War or publick danger, nor shall any person — &

To erase from the same article the words "except in case of impeachment, to more than one trial or one punishment" & insert — to be twice put in jeopardy of life or limb —

Ellsworth MS, p. 3, RG 46, DNA.

10.1.1.12 Senate Resolution, September 9, 1789

ARTICLE THE SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Senate Pamphlet, RG 46, DNA.

10.1.1.13 Further House Consideration, September 21, 1789

RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring

on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

10.1.1.14 Further Senate Consideration, September 21, 1789

10.1.1.14.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

10.1.1.14.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

10.1.1.15 Further Senate Consideration, September 21, 1789

10.1.1.15.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do

insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

10.1.1.15.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

10.1.1.16Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, &

to
& ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

10.1.1.17 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

10.1.1.18 Senate Consideration of Conference Committee Report, September 24, 1789

10.1.1.18.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the

Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

10.1.1.18.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Printed SJ, p. 145.

10.1.1.19 Further Senate Consideration of Conference Committee Report, September 24, 1789

10.1.1.19.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or

prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

10.1.1.19.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p.148.

10.1.1.20Further Senate Consideration of Conference Committee Report, September 25, 1789

10.1.1.20.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

RESOLVED, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

10.1.1.20.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the

Senate, to “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States” — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

10.1.1.21 Agreed Resolution, September 25, 1789

10.1.1.21.a Article the Seventh.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Smooth SJ, Appendix, p. 293.

10.1.1.21.b ARTICLE the SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Printed SJ, Appendix, p. 164.

10.1.1.22 Enrolled Resolution, September 28, 1789

Article the seventh… No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Enrolled Resolutions, RG 11, DNA.

10.1.1.23Printed Versions

10.1.1.23.a Art. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 21.

10.1.1.23.b Art. VII. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 98.

10.1.2PROPOSALS FROM THE STATE CONVENTIONS

10.1.2.1New York, July 26, 1788

That no Person ought to be taken imprisoned, or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law.

State Ratifications, RG 11, DNA.

10.1.2.2North Carolina, August 1, 1788

9th. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property but by the law of the land.

State Ratifications, RG 11, DNA.

10.1.2.3Pennsylvania Minority, December 12, 1787

3. That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation, as well in the federal courts, as in those of the several states; to be heard by himself or his counsel; to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial, by an impartial jury of the vicinage, without whose unanimous consent, he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Pennsylvania Packet, December 18, 1787.

10.1.2.4Virginia, June 27, 1788

Ninth, That no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the law of the land.

State Ratifications, RG 11, DNA.

10.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

10.1.3.1Connecticut

10.1.3.1.aNew Haven Code, 1655

> It is Ordered by this Court, and the Authority thereof, that no mans life, shall be taken away, no mans honour, or good name, shall be stained, no mans person shall be imprisoned, banished, or otherwise punished, no man shall be deprived of his wife, or children, no mans goods, or estate shall be taken from him, under colour of Law, or Countenance of Authority, unlesse it be by vertue, or equity of some expresse Law of this Jurisdiction, established by the Generall Court, and sufficiently published, or for want of a Law in any particular case, by the word of God, either in the Court of Magistrates, or some Plantation Court, according to the weight and valew of the cause, onely all Capitall causes, concerning life or banishment; where there is no expresse Law, shall be judged according to the word and Law of God, by the Generall Court.
>
> New Haven's Lawes, pp. 16–17.

10.1.3.1.bDeclaration of Rights, 1776

> [2] *And be it further Enacted and Declared, by the Authority aforesaid*, That no Man's Life shall be taken away: No Man's Honor or good Name shall be stained: No Man's Person shall be arrested, restrained, banished, dismembered, nor any ways punished: No Man shall be deprived of his Wife or Children: No Man's Goods or Estate shall be taken away from him, nor any ways indamaged under the colour of Law, or countenance of Authority; unless clearly warranted by the Laws of this State.
>
> Connecticut Acts, pp. 1–2.

10.1.3.2Maryland

10.1.3.2.aBAct for the Liberties of the People, 1639

> Be it Enacted By the Lord Proprietarie of this Province of and with the

advice and approbation of the ffreemen of the same that all the Inhabitants of this Province being Christians (Slaves excepted[)] Shall have and enjoy all such rights liberties immunities priviledges and free customs within this Province as any naturall born subject of England hath or ought to have or enjoy in the Realm of England by force or vertue of the common law or Statute Law of England (saveing in such Cases as the same are or may be altered or changed by the Laws and ordinances of this Province)

And Shall not be imprisoned nor disseissed or dispossessed of their freehold goods or Chattels or be out Lawed Exiled or otherwise destroyed fore judged or punished then according to the Laws of this province saveing to the Lord proprietarie and his heirs all his rights and prerogatives by reason of his domination and Seigniory over this Province and the people of the same This Act to Continue till the end of the next Generall Assembly

Liber C.K.W.H., p. 2, Archives of the State of Maryland (read twice, not passed).

10.1.3.2.bDeclaration of Rights, 1776

21. That no freeman ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land.

Maryland Laws, November 3, 1776.

10.1.3.3Massachusetts

10.1.3.3.aBody of Liberties, 1641

[1] No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under coulor of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published, or in case of the defect of a law in any parteculer case by the word of god. And in Capitall cases, or in cases concerning dismembring or banishment, according to that word to be judged by the Generall Court.

[2] Every person within this Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another without partialitie or delay.

Massachusetts Colonial Laws, p. 33.

10.1.3.3.bGeneral Laws of New-Plimouth, 1671 [1636]

4. It is also Enacted, that no person in this Government shall be endamaged in respect of Life, Limb, Liberty, Good name or Estate, under colour of Law, or countenance of Authority, but by virtue or equity of some express Law of the General Court of this Colony, the known Law of God, or the good and equitable Laws of our Nation suitable for us, being brought to Answer by due process thereof.

New-Plimouth Laws, p. 2.

10.1.3.3.cConstitution, 1780

[Part I, Article] XII. No subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favourable to him; to meet the witnesses against him, face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Massachusetts Perpetual Laws, pp. 6–7.

10.1.3.4New Hampshire: Constitution, 1783

[Part I, Article] XV. No subject shall be held to answer for any crime, or offence, until the same is fully and plainly, substantially and formally described to him; or be compelled to accuse or furnish evidence against

himself. And every subject shall have a right to produce all proofs that may be favorable to himself: To meet the witnesses against him face to face, and to be fully heard in his defence by himself and counsel. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or priviliges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

New Hampshire Laws, p. 25.

10.1.3.5New Jersey

10.1.3.5.a Concessions and Agreements of West New Jersey, 1676

CHAPTER XVII.

THAT no Proprietor, Freeholder or Inhabitant of the said Province of *West New-Jersey*, shall be deprived or condemned of Life, Limb, Liberty, Estate, Property or any ways hurt in his or their Privileges, Freedoms or Franchises, upon any account whatsoever, without a due Tryal, and Judgment passed by Twelve good and lawful Men of his Neighbourhood first had: And that in all Causes to be tryed, and in all Tryals, the Person or Persons, arraigned may except against any of the said Neighbourhood, without any Reason rendered, (not exceeding Thirty five) and in case of any valid reason alleged, against every Person nominated for that Service.

New Jersey Grants, p. 395.

10.1.3.5.bFundamental Constitutions for East New Jersey, 1683

XIX. That no Person or Persons within the said Province shall be taken and imprisoned, or be devised of his Freehold, free Custom or Liberty, or be outlawed or exiled, or any other Way destroyed; nor shall they be condemn’d or Judgment pass’d upon them, but by lawful Judgment of their Peers: Neither shall Justice nor Right be bought or sold, defered or delayed, to any Person whatsoever: In order to which by the Laws of the Land, all Tryals shall be by twelve Men, and as near as it may be, Peers and Equals, and of the Neighbourhood, and Men without just Exception. In Cases of Life there shall be at first Twenty four returned by the Sherriff for a Grand Inquest, of whom twelve at least shall be to find the Complaint to be true; and then the Twelve Men or Peers to be likewise returned, shall have the

final Judgment; but reasonable Challenges shall be always admitted against the Twelve Men, or any of them: But the Manner of returning Juries shall be thus, the Names of all the Freemen above five and Twenty Years of Age, within the District or Boroughs out of which the Jury is to be returned, shall be written on equal Pieces of Parchment and put into a Box, and then the Number of the Jury shall be drawn out by a Child under Ten Years of Age. And in all Courts Persons of all Perswasions may freely appear in their own Way, and according to their own Manner, and there personally plead their own Causes themselves, or if unable, by their Friends, no Person being allowed to take Money for pleading or advice in such Casas [*sic*]: And the first Process shall be the Exhibition of the Complaint in Court fourteen Days before the Tryal, and the Party complain'd against may be fitted for the same, he or she shall be summoned ten Days before, and a Copy of the Complaint delivered at their dwelling House: But before the Complaint of any Person be received, he shall solemnly declare in Court, that he believes in his Conscience his Cause is just. Moreover, every Man shall be first cited before the Court for the Place where he dwells, nor shall the Cause be brought before any other Court but by way of Appeal from Sentence of the first Court, for receiving of which Appeals, there shall be a Court consisting of eight Persons, and the Governor (protempore) President thereof, (*to wit*) four Proprietors and four Freemen, to be chosen out of the great Council in the following Manner, *viz*. the Names of Sixteen of the Proprietors shall be written on small pieces of Parchment and put into a Box, out of which by a Lad under Ten Years of Age, shall be drawn eight of them, the eight remaining in the Box shall choose four; and in like Manner shall be done for the choosing of four of the Freemen.

New Jersey Grants, pp. 163–64.

10.1.3.6New York

10.1.3.6.aAct Declaring… Rights & Priviledges, 1691

That no Freeman shall be taken or imprisoned, or be deprived of his Freehold or Liberty, or free Customs, or OutLawed, or Exiled, or any other wayes destroyed; nor shall be passed upon, adjudged or condemned, but by the lawful Judgment of his Peers, and by the Laws of this Province.

Justice nor Right shall be neither Sold, Denyed or Delayed to any Person within this Province.

…

That no Man, of what Estate or Condition soever, shall be put out of his Lands, Tenements, nor taken, nor imprisoned, nor disinherited, nor banished, nor any ways destroyed or molested, without first being brought to answer by due course of Law.

New York Acts, p. 17.

10.1.3.6.bConstitution, 1777

XIII. And this Convention doth further, in the Name, and by the Authority of the good People of this State, ORDAIN, DETERMINE, AND DECLARE, That no Member of this State shall be disfranchised, or deprived of any of the Rights or Privileges secured to the Subjects of this State by this Constitution, unless by the Law of the Land, or the Judgment of his Peers.

New York Laws, vol. 1, p. 8.

10.1.3.6.cBill of Rights, 1787

Second, That no Citizen of this State shall be taken or imprisoned, or be disseised of his or her Freehold, or Liberties, or Free-Customs; or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful Judgment of his or her Peers, or by due Process of Law.

Third, That no Citizen of this State shall be taken or imprisoned for any Offence, upon Petition or Suggestion, unless it be by indictment or Presentment of good and lawful Men of the same Neighbourhood where such Deeds be done, in due Manner, or by due Process of Law.

Fourth, That no Person shall be put to answer without Presentment before Justices, or Matter of Record, or due Process of Law, according to the Law of the Land; and if any Thing be done to the Contrary, it shall be void in Law, and holden for Error.

Fifth, That no Person, of what Estate or Condition soever, shall be taken, or imprisoned, or disinherited, or put to death, without being brought to answer by due Process of Law; and that no Person shall be put out of his or her Franchise or Freehold, or lose his or her Life or Limb, or Goods and Chattels, unless he or she be duly brought to answer, and be forejudged of the same, by due Course of Law; and if any Thing be done contrary to the same, it shall be void in Law, and holden for none.

New York Laws, vol. 2, p. 1.

10.1.3.7North Carolina: Declaration of Rights, 1776

Sect. XII. That no Freeman ought to be taken, imprisoned or disseissed of his Freehold, Liberties or Privileges, or outlawed or exiled, or in any manner destroyed or deprived of his Life, Liberty or Property, but by the Law of the Land.

North Carolina Laws, p. 275.

10.1.3.8Pennsylvania

10.1.3.8.aConstitution, 1776

CHAPTER I.

…

IX. That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.

Pennsylvania Acts, M'Kean, pp. ix–x.

10.1.3.8.bConstitution, 1790

ARTICLE IX.

…

SECT. IX. That, in all criminal prosecutions, the accused hath a right to be heard by himself and his council, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favour, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage: That he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Pennsylvania Acts, Dallas, p. xxxiv.

10.1.3.9Rhode Island: Code of Laws, 1647

1. That no person, in this Colony, shall be taken or imprisoned, or be disseized of his lands or liberties, or be exiled, or any otherwise molested or destroyed, but by the lawful judgment of his peers, or by some known law, and according to the letter of it, ratified and confirmed by the major part of the General Assembly, lawfully met and orderly managed.

Rhode Island Code, p. 12.

10.1.3.10South Carolina

10.1.3.10.aConstitution, 1778

XLI. That no Freeman of this State be taken, or imprisoned, or disseized of his Freehold, Liberties or Privileges, or outlawed, or exiled, or in any Manner destroyed, or deprived of his Life, Liberty, or Property, but by the Judgment of his Peers, or by the Law of the Land.

South Carolina Constitution, p. 15.

10.1.3.10.b Constitution, 1790

ARTICLE IX.

…

Section 2. No freeman of this state shall be taken, or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land; nor shall any bill of the attainder, ex post facto law or law impairing the obligation of contracts ever be passed by the legislature of this state.

…

Section 6. The trial by jury as heretofore used in this state, and the liberty of the press, shall be for ever inviolably preserved.

South Carolina Laws, App., pp. 41–42.

10.1.3.11Vermont: Declaration of Rights, 1777

CHAPTER I.

…

10. That, in all Prosecutions for criminal Offences, a Man hath a Right to be heard by himself and his Counsel,—to demand the Cause and Nature of his Accusation,—to be confronted with the Witnesses,—to call for Evidence in his Favor, and a speedy public Trial, by an impartial Jury of the Country, without the unanimous Consent of which Jury, he cannot be [fo]und guilty; nor can he be compelled to give Evidence against himself; nor can any man be justly deprived of his Liberty, except by the Laws of the Land, or the Judgment of his Peers.

Vermont Acts, p. 4.

10.1.3.12Virginia: Declaration of Rights, May 6, 1776

VIII. THAT in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Virginia Acts, p. 33.

10.1.4OTHER TEXTS

10.1.4.1Magna Carta, 1297

No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

25 Edw. 1, c. 29.

10.1.4.2Petition of Right, 1627

3. And where alsoe by the Statute called the Great Charter of the liberties of England, it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customes or be outlawed or exiled or in any manner destroyed, but by the lawfull judgment of his peeres or by the law of the land.

4. And in the eight and twentith yeere of the raigne of King Edward the Third it was declared and enacted by authoritie of Parliament, that no man of what estate or condicion that he be, should be put out of his land or tenemente nor taken nor imprisoned nor disherited nor put to death without being brought to aunswere by due pcesse of lawe.

3 Car. 1, c. 1.

10.1.4.3Declaration and Resolves of the First Continental Congress, October 14, 1774

Resolved, N.C.D. 1. That they are entitled to life, liberty and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.

Tansill, p. 2.

10.1.4.4Northwest Territory Ordinance, 1787

Article the Second. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law; all persons shall be bailable unless for Capital Offences, where the proof shall be evident, or the presumption great; all fines shall be moderate, and no cruel or unusual punishments shall be inflicted; no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it Necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared, that no

law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements bona fide and without fraud, previously formed.

Continental Congress Papers, DNA.

10.2DISCUSSION OF DRAFTS AND PROPOSALS

10.2.1THE FIRST CONGRESS

10.2.1.1June 8, 17892

10.2.1.2August 17, 1789

Discussion was limited to self-incrimination and double jeopardy issues.[3]

10.2.2STATE CONVENTIONS

None.

10.2.3PHILADELPHIA CONVENTION

None.

10.2.4NEWSPAPERS AND PAMPHLETS

10.2.4.1The Federal Farmer, No. 16, January 20, 1788

Security against ex post facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the course of the common law. These may be secured in general words, as in New-York, the Western Territory, &c. by declaring the people of the United States shall always be entitled to judicial proceedings according to the course of the common law, as used and established in the said states. Perhaps it would be better to enumerate the particular essential rights the people are entitled to in these proceedings, as has been done in many of the states, and as has been done in England. In this case, the people may proceed to declare, that no man shall be held to answer to any offence, till the same be fully described to him; nor to furnish evidence against himself: that, except in the government of the army and navy, no person shall be tried for any offence, whereby he may incur loss of life, or an infamous punishment, until he be first indicted by a grand jury: that every person shall have a right to produce all proofs that may be favourable to him, and to meet the witnesses against him face to face: that every person shall be entitled to obtain right and justice freely and without delay; that all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure: and that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land. A celebrated writer observes upon this last article, that in itself it may be said to comprehend the whole end of political society. These rights are not necessarily reserved, they are established, or enjoyed but in few countries: they are stipulated rights, almost peculiar to British and American laws. In the execution of those laws, individuals by long custom, by magna charta, bills of rights &c. have become entitled to them. A man, at first, by act of parliament, became entitled to the benefits of the writ of habeas corpus — men are entitled to these rights and benefits in the judicial proceedings of our state courts generally: but it will by no means follow, that they will be entitled to them in the federal courts, and have a right to assert them, unless secured and established by the constitution or federal laws. We certainly, in federal processes, might as well claim the benefits of the writ of habeas corpus, as

to claim trial by a jury — the right to have council — to have witnesses face to face — to be secure against unreasonable search warrants, &c. was the constitution silent as to the whole of them: — but the establishment of the former, will evince that we could not claim them without it; and the omission of the latter, implies they are relinquished, or deemed of no importance. These are rights and benefits individuals acquire by compact; they must claim them under compacts, or immemorial usage — it is doubtful, at least, whether they can be claimed under immemorial usage in this country; and it is, therefore, we generally claim them under compacts, as charters and constitutions.

Storing, vol. 2, pp. 327–28.

10.2.4.2The Impartial Examiner, No. 1, March 5, 1788

… For a system, which is to supersede the present different governments of the states, by ordaining that "laws made in pursuance thereof shall be supreme, and shall bind the judges in every state, any thing in the constitution or laws of any state to the contrary notwithstanding," must be alarming indeed! What cannot this omnipotence of power effect? How will your bill of rights avail you any thing? By this authority the Congress can make laws, which shall bind all, repugnant to your present constitution— repugnant to every article of your right; for they are a part of your constitution, — they are the basis of it. So that if you pass this new constitution, you will have a naked plan of government unlimited in its jurisdiction, which not only expunges your bill of rights by rendering ineffectual, all the state governments; but is proposed without any kind of stipulation for any of those natural rights, the security whereof ought to be the end of all governments. Such a stipulaton is so necessary, that it is an absurdity to suppose any civil liberty can exist without it. Because it cannot be alledged in any case whatsoever, that a breach has been committed — that a right has been violated; as there will be no standard to resort to — no criterion to ascertain the breach, or even to find whether there has been any violation at all. Hence it is evident that the most flagrant acts of oppression may be inflicted; yet, still there will be no apparent object injured: there will be no unconstitutional infringement. For instance, if Congress should pass a law that persons charged with capital crimes shall not have a *right to demand the cause or nature of the accusation*, shall not be *confronted with*

the accusers or witnesses, or call for evidence in their own favor; and a question should arise respecting their authority therein, — can it be said that they have exceeded the limits of their jurisdiction, when *that* has no limits; when no provision has been made for such a right? — When no responsibility on the part of Congress has been required by the constitution? The same observation may be made on any arbitrary or capricious imprisonments *contrary to the law of the land*. The same may be made, if *excessive bail should be required;* if *excessive fines should be imposed;* if *cruel and unusual punishments should be inflicted;* if *the liberty of the press should be restrained;* in a word — if laws should be made totally derogatory to the whole catalogue of rights, which are now secure under your present form of government.

Virginia Independent Chronicle, Kaminski & Saladino, vol. 8, p. 462.

10.2.5LETTERS AND DIARIES

None.

10.3DISCUSSION OF RIGHTS

10.3.1TREATISES

10.3.1.1Jacob, 1750

10.3.1.1.a.Liberty

Liberty, (*Libertas*) Is a Privilege held by Grant or Prescription, by which Men enjoy some Benefit beyond the ordinary Subject. *Bract*. But in a more general Signification; it is said to be a Power to do as one thinks fit; unless restrained by the Law of the Land: And it is well observed, that human Nature is ever an Advocate for this *Liberty*; it being the Gift of God to Man in his Creation, and therefore every Thing is desirous of it, as a Sort of Restitution to it’s Primitive State. *Fortescue* 96. ’Tis upon that Account the

Laws of *England* in all Cases favour *Liberty*, and which is counted very precious, not only in Respect of the Profit which every one obtains by his *Liberty*; but also in Respect of the Publick. 2 *Lill. Abr*. 169. The People of this Kingdom, are to enjoy their ancient *Liberties*, without Impeachment, by the Statute of *Magna Charta*. No Freeman shall be imprisoned or condemned, without Trial by his Peers, or the Law. *Magn. Chart. c*. 19. Likewise no Person is to be arrested, *&c*. without Process at Law: And Matters which concern *Liberty* are to be speedily determined, *&c*.

Jacob New-Law Dictionary, unpaginated.

10.3.1.1.bRight, Rights and Liberties

Right, (*Jus*) In general Signification, includes not only a *Right* for which a Writ of *Right* lies ; but also any Title or Claim for which no Action is given by Law but only an Entry. 1 *Inst*. 265. There is *Right* of *Entry*, and of *Action*, where a Man is put out of his Lands ; of *Property*, when one is disseised, *&c*. and of *Possession :* There are also a *Present*, and *future Right* ; a *Jus in Re*, which may be granted to a Stranger ; and what is called a naked *Right*, or *Jus ad Rem*, where an Estate is turned to a *Right*, on a Discontinuance, *&c*. *Co. Litt*. 345. A *Right* in Writs and Pleadings, is properly in one, when he is ousted of the Possession of his Estate by Disseisin or Wrong, and hath Remedy by Entry, or Action : But *Right* doth also include an Estate *in esse* in Conveyances ; and therefore if Tenant in Fee simple makes a Lease and Release of all his *Right* in the Land to another, the whole Estate in Fee passes. *Wood's Inst*. 115, 116. Sir *Edward Coke* tells us, That of such an high Estimation is *Right*, that the Law preserveth it from Death and Destruction ; trodden down it may be, but never trodden out : And there is such an extream Enmity between an Estate gained by Wrong and an ancient *Right*, that the *Right* cannot possibly incorporate itself with the Estate gained by Wrong, 1 *Inst*. 279. 8 *Rep*. 105. 6 *Rep*. 70. A *Right* may sometimes sleep, though it never dies ; a long Possession exceeding the Memory of Man, will make a *Right* ; and if two Persons are in Possession by divers Titles, the Law will adjudge the Possession in him that hath the *Right. Co, Litt*. 478. 6 *Litt. Sect*. 158. Where there is no Remedy, there is presumed to be no *Right* by Law. *Vaugh*. 38. No Commands shall be made under the great or little Seal, to disturb or delay common *Right*. Stat. 2 Ed. 3. c. 8. See *Recto*.

Rights and Liberties. The Declaration of *Rights and Liberties* against the Conduct of K. *James* 2d set forth, That he by the Assistance of divers

evil Counsellors, did indeavour to subvert the Laws and Liberties of this Kingdom ; by exercising a Power of dispensing with, and suspending of Laws ; by levying Money for the Use of the Crown by Pretence of Prerogative, without Consent of Parliament ; by raising and keeping a Standing Army, in Time of Peace ; by violating the Freedom of Election of Members to serve in Parliament ; by violent Prosecutions in the Court of *King's Bench* ; and causing partial and corrupt Jurors to be returned on Trials ; excessive Bail to be taken ; and excessive Fines to be imposed ; also cruel Punishments inflicted, *&c*. All which were declared to be illegal, and infringing upon the ancient *Rights and Liberties* of the People. *Stat*. 1 *W. & M. cap*. 2.

Jacob New-Law Dictionary, unpaginated.

10.3.1.2Wood, 1754

V. *Liberty*, consists in a Power to do as one thinks fit, unless restrained by Force, or the Law. [a] Imprisonment is a Restraint of a Man's Liberty under the Custody of another. One may be *lawfully* imprisoned by the King's Writ, *&c*. or *unlawfully*. [b] An *unlawful* Imprisonment is not only an unjust Imprisonment at the first, but when one is detained longer than he ought, though he was at first lawfully imprisoned. For if a Sheriff, or Gaoler detains a Prisoner in Gaol after his Acquittal (unless it be for his Fees, not for Meat, Drink, or Lodging) this is an unlawful Imprisonment. An Action of false Imprisonment doth lie against a Bailiff for Arresting One after the Return of the Writ is past, it being now without Writ. [c] He that is put into the Stocks, or is under an Arrest, is said to be in Prison. Unlawful Imprisonment is sometimes called *Duress of Imprisonment* (from *Durities*) [d] where one is wrongfully imprisoned or detained, 'till he seals a Bond, *&c*. But not where a Man is lawfully imprisoned for another Cause, and for his Delivery seals a Bond, &*c*. nor where being arrested at the Suit of another; and in Prison on such an Arrest, willingly seals a Bond to a Stranger. [e] A Son shall avoid the Action by Reason of the unlawful Imprisonment of His Father; a Husband by Reason of the unlawful Imprisonment of the Wife. So If One's Beasts are unlawfully imprisoned till He Seals a Deed, He may Avoid the Action. So if one is under a just [f] *Fear* of being imprisoned, killed, maimed, &*c*. and he seals a Bond to him that *menaces* him, it is *Duress per Minas*, and in both Cases he may plead the *Duress*, and avoid

the Action. If it be only a *Threatning* of a Battery, which may be light, or to take away my Goods, or to burn my House, &*c*. this will not make the Deed made upon that occasion to be by *Duress*; for there One may have Satisfaction by Recovery of Damages. There must be some Threatning of Life, or Member, or of Imprisonment, and to the End of obtaining the Deed, and thereupon the Deed must be made. To threaten another to kill or maim, or imprison him if he will not seal a Deed to a third Person, and thereupon he do it, this is as voidable as if it were made to the Party himself.[4]

Even *lawful* Imprisonment is so far pitied, that by several Statutes, as well as by Common Law, Defaults are saved on that Account.

The Law [g] favours Liberty, and the Freedom of a Man from Imprisonment; and therefore kind Interpretations shall be made on its Behalf. If a Man is unlawfully imprisoned, he may have an Action of Trespass for false Imprisonment, and recover Damages: [a] Or he may have the Writ of *Habeas Corpus*, and upon Return of this Writ by the Gaoler, setting forth by whom he was committed, and for what Cause, He ought to be discharged if it appears to be against Law. [See *Magna Charta*, *chap*. 29.] But if the Case be doubtful, he may be bailed. If the Imprisonment appears to be just, He shall be remanded to the Prison, or bailed. [See Of *Bail*, *Book* 4. *chap*. 4. and 5.][5]

The King cannot send any Subject of *England* [b] against his Will to serve him out of the Kingdom; for that would be Banishment: No, he cannot send one into *Ireland*, against his Will, to serve as his Deputy there. [See the 7 *Rep*. 7, 8. *Calvin*'s Case.][6]

By the 31 Car. 2. chap. 2. [*called the* Habeas Corpus *Act, and entituled*, An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond Seas.] *A Prisoner may have an* Habeas Corpus *from any* Judge, *returnable immediately* (*unless committed for* Treason *or* Felony, *plainly and specially expressed in the Warrant, or for other Offences not bailable*) *and upon Certificate of the Cause of his Imprisonment may be discharged upon Bail, to appear in the King's Bench next Term, or the next Assizes or Sessions, or General Gaol-Delivery, or in any other Court where the Offence is cognizable*.

And Persons committed for Treason *or* Felony, *plainly and specially expressed in the Warrant, upon Prayer in* open Court *the first Week of the Term, or Day of the* Sessions *of* Oyer *and* Terminer, *or* Gaol-Delivery, *to be brought to Trial: If not indicted the next Term, or Sessions, after such Commitment, shall upon Motion the last Day of the Term, or Sessions, be*

let out upon Bail; unless it appear upon Oath that the King's Witnesses could not be ready that Term, or Sessions: And if such Persons, upon such Prayer, shall not be indicted, or tried the second Term after Commitment, they shall be discharged.

A Subject committed for any Crime, shall not be removed into the Custody of any other Officer, unless by Writ, &c.

This Act shall not extend to any Person charged in any Civil *Cause*. [This Statute has been several Times suspended by Act of Parliament. The last Suspension was by 20 *Geo*. 2. *chap*. 1. See of *Praemunire, Book* 3. *chap*. 3. and see of *Habeas Corpus*, in the Catalogue of *Writs, Book*. 4. *chap*. 4.]

Wood Institute, book I, pp. 16–17.

10.3.1.3Blackstone, 1765

CHAPTER THE FIRST.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

THE objects of the laws of England are so very numerous and extensive, that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

NOW, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or, as Cicero [a] , and after him our Bracton [b] , has expressed it, *sanctio justa, jubens honesta et prohibens contraria*; it follows, that the primary and principal objects of the law are RIGHTS, and WRONGS. In the prosecution therefore of these commentaries, I shall follow this very simple and obvious division; and shall in the first place consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden by the laws of England.[7]

RIGHTS are however liable to another subdivision; being either, first, those which concern, and are annexed to the persons of men, and are then called *jura personarum* or the *rights of persons*; or they are, secondly, such as a man may acquire over external objects, or things unconnected with his person, which are stiled *jura rerum* or the *rights of things*. Wrongs also are

divisible into, first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemesnors.

THE objects of the laws of England falling into this fourfold division, the present commentaries will therefore consist of the four following parts: 1. *The rights of persons*; with the means whereby such rights may be either acquired or lost. 2. *The rights of things*; with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by law. 4. *Public wrongs*, or crimes and misdemesnors; with the means of prevention and punishment.

WE are now, first, to consider *the rights of persons*; with the means of acquiring and losing them.

Now the rights of persons that are commanded to be observed by the municipal law are of two sorts; first, such as are due *from* every citizen, which are usually called civil *duties*; and, secondly, such as belong *to* him, which is the more popular acceptation of *rights* or *jura*. Both may indeed be comprized in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy, to consider many of them as duties required from, rather than as rights belonging to, particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

PERSONS also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us: artificial are such as created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic.

THE rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

BY the absolute *rights* of individuals we mean those which are so in their

primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is intitled to enjoy whether out of society or in it. But with regard to the absolute *duties*, which man is bound to perform considered as a mere individual, it is not to be expected that any human municipal laws should at all explain or enforce them. For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no business or concern with any but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vitious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws: *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction. But, with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and, then, such rights as are relative, which arising from a variety of connexions, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for

their lasting security.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of freewill. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontroled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick [c]. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty: whereas if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state, of society, which alone can secure our independence. Thus the statute of king Edward IV [d], which forbad the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savoured of oppression; because, however ridiculous the fashion then in use might appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of king Charles II [e], which

prescribes a thing seemingly as indifferent; *viz.* a dress for the dead, who are all ordered to be buried in woollen; is a law consistent with public liberty, for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr Locke has well observed [f]) where there is no law, there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.[8]

THE idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of it's owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power of controlling the actions of the subject in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman[g].[9]

THE absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarassments, and, as soon as the convulsions consequent on the struggle have been over, the ballance of our rights and liberties has settled to it's proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

FIRST, by the great charter of liberties, which was obtained, sword in hand, from king John; and afterwards, with some alterations, confirmed in

parliament by king Henry the third, his son. Which charter contained very few new grants; but, as sir Edward Coke [h] observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum*[i], whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel act contrary thereto, or in any degree infringe it. Next by a multitude of subsequent corroborating statutes, (sir Edward Coke, I think, reckons thirty two[k],) from the first Edward to Henry the fourth. Then, after a long interval, by *the petition of right*; which was a parliamentary declaration of the liberties of the people, assented to by king Charles the first in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the second. To these succeeded *the bill of rights*, or declaration delivered by the lords and commons to the prince and princess of Orange 13 February 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words; "and they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself [l] recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, antient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century, in the *act of settlement*[m], whereby the crown is limited to his present majesty's illustrious house, and some new provisions were added at the same fortunate aera for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England;" according to the antient doctrine of the common law. [n],[10]

THUS much for the *declaration* of our rights and liberties. The rights themselves thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind ; but,

in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter [o]. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemesnor[p].[11]

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it [q]; and it is enabled to have an estate limited to it's use, and to take afterwards by such limitation, as if it were then actually born [r]. And in this point the civil law agrees with ours [s].[12]

2. A man's limbs, (by which for the present we only understand those members which may be useful to him in fight, and the loss of which only amounts to mayhem by the common law) are also the gift of the wise creator; to enable man to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or

mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, are totally void in law, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance [t]. And the same is also a sufficient excuse for the commission of many misdemesnors, as will appear in the fourth book.[13]

The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non,*" as Bracton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitae periculum, aut corporis cruciatum* [u]." A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burnt, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages[w] : but no suitable atonement can be made for the loss of life, or limb. And the indulgence shewn to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; *ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit* [x],[14]

THE law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine, commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprized in the Theodosian code [y], were rejected in Justinian's collection.[15]

THESE rights, of life and member, can only be determined by the death of the person; which is either a civil or natural death. The civil death commences

if any man be banished the realm [z] by the process of the common law, or enters into religion; that is, goes into a monastery, and becomes there a monk professed: in which cases he is absolutely dead in law, and his next heir shall have his estate. For, such banished man is entirely cut off from society; and such a monk, upon his profession, renounces solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life, and the commands of the temporal magistrate, the genius of the English law would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to it's regulations [a]. A monk is therefore accounted *civiliter mortuus*, and when he enters into religion may, like other dying men, make his testament and executors; or, if he makes none, the ordinary may grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators shall have the same power, and may bring the same actions for debts due *to* the religious, and are liable to the same actions for those due *from* him, as if he were naturally deceased [b]. Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due [c]. In short, a monk or religious is so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards becomes a monk, determines by such his entry into religion: for which reason leases, and other conveyances, for life, are usually made to have and to hold for the term of one's *natural* life[d]. [16]

THIS natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which, we may hereafter more conveniently enquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise

tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*, says the great charter [e], *aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terrae.*" Which words, "*aliquo modo destruatur,*" according to sir Edward Coke [f], include a prohibition not only of *killing*, and *maiming*, but also of *torturing* (to which our laws are strangers) and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law.[17]

3. Besides those limbs and members that may be necessary to man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled by the same natural right to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. The preservation of a man's health from such practices as may prejudice or annoy it, and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is intitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of persons; referring the more minute discussion of their several branches, to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it

without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter [g] is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes [h] expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king, or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I. c. 10. if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2. commonly called *the habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2. c. 2. that excessive bail ought not to be required.[18]

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown) there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state

is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing. As the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, nequid respublica detrimenti capiat,*" was called the *senatus consultum ultimae necessitatis*. In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it's liberty for a while, in order to preserve it for ever.

THE confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment [i]. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may alledge this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it [k]. To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the goaler is not bound to detain the prisoner [l]. For the law judges in this respect, saith sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.[19]

A NATURAL and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence [m]. This may be necessary for the public service, and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out of* the land

against his will; no not even a criminal. For exile, or transportation, is a punishment unknown to the common law; and, wherever it is now inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter [n] declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II. c. 2. (that second *magna carta*, and stable bulwark of our liberties) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas; (where they cannot have the benefit and protection of the common law) but that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a praemunire, and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.[20]

THE law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign embassador [o]. For this might in reality be no more than an honorable exile.[21]

III. THE third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter [p] has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs,

but by the judgment of his peers, or by the law of the land. And by a variety of antient statutes [q] it is enacted, that no man's lands or goods shall be seised into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.[22]

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I. c. 5 and 6. it is provided, that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I. st. 4. cap. 1. which enacts, that no talliage or aid shall be taken without assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen

of the land [r] : and again by 14. Edw. III. st. 2. c. 1. the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right 3 Car. I, that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. & M. st. 2. c. 2. it is declared, that levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament; or for longer time, or in other manner, than the same is or shall be granted, is illegal.[23]

IN the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

1. THE constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.
2. THE limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should exceed them without the consent of the people. Of this also I shall treat in it's proper place. The former of these keeps the legislative power in due health and vigour, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power, by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.
3. A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administred therein. The emphatical words of *magna carta* [s], spoken in the person of the king, who in judgment of law (says sir Edward Coke [t]) is ever present and repeating them in all his courts, are these; "*nulli vendemus, nulli*

negabimus, aut differemus rectum vel justitiam: and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona*, by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of parliament wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows; or may know if he pleases: for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament. I shall however just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *magna carta* [u], that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III. c. 8. and 11 Ric. II. c. 10. it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right. And by 1 W. & M. st. 2. c.2. it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority without consent of parliament, is illegal.[24]

Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament: for if once those outworks were demolished, there would be no inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old established forms of the common law. For which reason it is declared in the statute 16 Car. I. c. 10. upon the dissolution of the court of starchamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel (which were the course of proceeding in the starchamber, borrowed from the civil law) or by any other arbitrary way whatsoever, to examine, or draw into question, determine or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.

4. If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every

individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told [w] that the czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II. st. 1. c. 5. that no petition to the king, or either house of parliament, for any alterations in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace or the major part of the grand jury, in the country; and in London by the lord mayor, aldermen, and common council; nor shall any petition be presented by more than two persons at a time. But under these regulations, it is declared by the statute 1 W. & M. st. 2. c. 2. that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.[25]

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2. c. 2. and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties more generally talked of, than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon it is founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is

perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliaments be supported in it's full vigor; and limits certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and moderate, as will appear upon farther enquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow citizens. So that this review of our situation may fully justify the observation of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom [x] ; and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world, where political or civil liberty is the direct end of it's constitution. Recommending therefore to the student in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous father Paul to his country, "esto perpetua!"[26]

Blackstone Commentaries, book I, ch. 1; vol. I, pp. 117–41.

10.3.1.4Cunningham, 1765

Liberties and rights. *Magna Charta*, 9 *Hen*. 3. *cap*. 9. The city of *London* shall have all her ancient liberties and customs; and all other cities, boroughs and towns, and the barons of the five ports, and all ports, shall have all their liberties and free customs.

Magna Charta, 9 *Hen*. 3. *cap*. 29. No freeman shall be taken or imprisoned, or disseised of his freehold, or of his liberties or free customs, or be outlawed, banished or otherwise destroyed; nor shall the King pass or send upon him, but by the lawful judgment of his peers, or by the law of the

land. The King shall sell to none, or deny or delay to none, right or justice. See afterwards 25 *Ed*. 3. *st*. 5. *cap*. 4. and 42 *Ed*. 3. *cap*. 3.

Stat. *Marleb*. 52 *Hen*. 3. *cap*. 22. None may distrain his freeholders to answer for their freehold, or of any thing thereunto appertaining, nor make them swear against their will, without the King's command.

Stat. *Confirm. Chart*. 25 *Ed*. 1. *cap*. 2. If any judgment be given contrary to the great charters, it shall be undone and holden for nought.

Stat. *Confirm. Chart*. 25 *Ed*. 1. *cap*. 3. The same charters shall be sent under seal to cathedral churches, and shall be read before the people two times by the year.

Stat. *Confirm. Chart*. 25 *Ed*. 1. *cap*. 4. All archbishops and bishops shall pronounce sentence of excommunication against those that by word, deed or counsel, do contrary to the said charters, or that in any point break them; and the said curses shall be twice a year denounced; and if the prelates be remiss in the denunciation of the sentences, the archbishops of *Canterbury* and *York* shall compel them to the execution of their duties. See Excommunication.

Stat. *Confirm. Chart*. 25 *Ed*. 1. *cap*. 5. The aids and tasks which the people have given of their own good-will shall not be drawn into custom.

Stat. *Confirm. Chart*. 25 *Ed*. 1. *cap*. 6. The King shall not take such aids or tasks but by the common assent of the realm, and for the common profit thereof, saving the ancient aids and prises.

Artic. Super Chart. 28 *Ed*. 1. *stat*. 3. *cap*. 1. The great charter of liberties, and the charter of the forest, shall be delivered to every sheriff to be read four times in the year before the people in full county, *viz*. the next county after the feast of St. *Michael*, and the next after *Christmas*, and at the next after *Easter*, and the next after the feast of St. *John*; and there shall be chosen in every shire-court by the commonalty three substantial men, knights or other, which shall be justices sworn and assigned by the King's letters patent, to bear and determine (without any other writ but their commission), such plaints as shall be made upon those that offend against any point in the charters, and to hear the plaints from day to day without the delays allowed by the Common law; and the same knights shall have power to punish all such as shall be attainted of any trespass done contrary to the charters (where no remedy was by the Common law), by imprisonment, or by ransom or amercement; nevertheless the knights shall not hold plea where there hath been remedy provided after the course of the Common law by writ, nor shall any prejudice be done to the Common law, nor to the

charters aforesaid; and if all three cannot attend to do their office, two of them shall do it; and the King's sheriffs and bailiffs shall be attendant to do the commandments of the said justices.

Stat. *de Talleg. non concedend*. 34 *Ed*. 1. *stat*. 4. *cap*. 1. No tallage or aid shall be taken without the assent of archbishops, bishops, earls, barons, knights, burgesses and other freemen of the land.

Stat. 34 *Ed*. 1. *stat*. 4. *cap*. 4. Clerks and laymen shall have their laws, liberties and free customs, as they have used to have the same at any time when they had them best; and if any statutes have been made, or any customs brought in, contrary to them, such statutes and customs shall be void.

Stat. 34 *Ed*. 1. *stat*. 4. *cap*. 6. All archbishops and bishops for ever shall read this charter in their cathedral churches twice in the year, and in their parish churches shall openly denounce accursed all those that willingly procure to be done any thing contrary to this charter.

Stat. 1 *Ed*. 3. *stat*. 2. *cap*. 9. Cities, boroughs and franchised towns, shall enjoy their franchises, customs and usages.

Stat. 2 *Ed*. 3. *cap*. 8. It shall not be commanded by the Great seal or the Little seal, to disturb or delay common right; and tho' such commandments come, the justices shall not cease to do right.

Stat. 5 *Ed*. 3. *cap*. 9. No man shall be attached by any accusation, nor forejudged of life or limb, nor shall his lands or goods be seised into the King's hands, against the great charter and the law of the land.

Stat. 14 *Ed*. 3. *stat*. 1. *cap*. 1. Holy church shall have her liberties in quietness; and the city of *London*, and all other cities and boroughs, shall have all their franchises and customs which they have reasonably used in time past.

Stat. 14 *Ed*. 3. *st*. 2. *cap*. 1. The subsidy given to the King shall not be had in example, nor shall the prelates, earls, barons and commons, citizens, burgesses and merchants, be charged to make any aid, if it be not by the common assent of the great men and commons in parliament.

Stat. 14 *Ed*. 3. *st*. 5. The realm of *England* shall not be put in subjection of the King, his heirs or successors, as Kings of *France*.

Stat. 25 *Ed*. 3. *st*. 5. *cap*. 4. None shall be taken by petition or suggestion made to the King or his council, unless it be by indictment of lawful people of the neighbourhood, or by process made by writ original at the Common law. And none shall be put out of his franchises or freehold, unless he be

duly brought to answer, and forejudged by course of law; and if any thing be done to the contrary, it shall be redressed and holden for none.

Stat. 28 *Ed*. 3. *cap*. 3. No man shall be put out of land, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought in to answer by due process of law.

Stat. 42 *Ed*. 3. *cap*. 3. No man shall be put to answer without presentment before justices, or matter of record of due process, or writ original, according to the ancient law of the land. And if any thing be done to the contrary, it shall be void in law, and held for error.

Stat. 1 *Ric*. 2. *cap*. 2. Peace shall be firmly kept, so that all loyal subject may safely go, come and abide, according to the laws and usages of the realm; and good justice and equal right shall be done to every one.

Stat. 11 *Ric*. 2. *cap*. 10. Letters of the signet or privy seal shall not be sent in prejudice of the realm or disturbance of the law.

Stat. 15 *Ric*. 2. *cap*. 12. None of the King's subjects shall be constrained to appear before the council of any lord, to answer for his freehold, nor any other thing real or personal, which belongeth to the law of the land; and if any find himself grieved contrary to this ordinance, he shall sue to the Chancellor, who shall give remedy.

Stat. 16 *Ric*. 2. *cap*. 2. If any lord or other the King's subject do contrary to the statute 15 *Richard* 2. *cap*. 12. he shall incur the pain of 20 *l*. to the King.

Stat. 2 *Hen*. 4. *cap*. 1. Holy church shall have her rights and liberties; and all the Lords Spiritual and Temporal, and all cities, boroughs and towns enfranchised, shall enjoy their liberties which they have duly used; and all the lieges may in safe protection of the King, go and come to his courts; and full justice and right shall be done, as well to the poor as the rich, in the said courts.

Petition of Right, 3 *Car*. 1. *sect*. 10. No man shall be compelled to yield any gift, loan, benevolence, tax or such like charge, without common content by act of parliament; and none shall be called to make answer, or take oath, or to give attendance, or be confined, or otherwise disquieted concerning the same, or for refusal thereof, and no freeman shall be imprisoned or detained, without cause shewn, to which he may make answer according to law; and the people shall not be burthened to suffer soldiers and mariners to sojourn in their houses against their wills; and no commissions shall issue, to proceed within the land according to martial law.

Sect. 11. The late proceedings in the premisses shall not be drawn into consequence; and all the King's officers shall serve him according to the laws of the realm, as they tender the honour of his Majesty, and the prosperity of the Kingdom.

Stat. 16 *Car*. 1. *cap*. 10. *sect*. 3. The court called the *StarChamber* shall be dissolved, and neither the Lord Chancellor, Lord Treasurer, Keeper of the Privy seal, or President of the Council, nor any Bishop, Temporal Lord, Privy Counsellor or Judge, shall have power to hear or determine any matter in the court called the *StarChamber*, or to do any judicial or ministerial act in the said court; and all acts of parliament, by which any jurisdiction is given to the court called the *StarChamber*, shall, for so much, be repealed.

Sect. 4. The like jurisdiction used in the court before the President and council in the marches of *Wales*, and in the court before the President and council in the Northern parts, and also in the court of the dutchy of *Lancaster*, and in the court of *Exchequer* of the county palatine of *Chester*, held before the chamberlain and council of that court, shall be also repealed; and no court or place of judicature shall be erected within *England* or *Wales*, which shall have the like jurisdiction, as hath been used in the court of *Star–Chamber*.

Sect. 5. Neither his Majesty, nor his privy council, have any jurisdiction, power or authority, by English bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands or goods of any subjects of this kingdom; but the same ought to be tried and determined in the ordinary court of justice, as by course of law.

Sect. 6. If any Lord Chancellor, Lord Treasurer, Keeper of the Privy seal, President of the council, Bishop, Temporal Lord, Privy Counsellor, Judge or Justice, shall offend contrary to this law, they shall forfeit 500 *l*. unto any party grieved, his executors or administrators, who shall prosecute for the same, and first obtain judgment, to be recovered in any court of record at *Westminster*; and if any person against whom any such recovery shall be had, shall offend again in the same, he shall forfeit 1000 *l*. unto any party grieved, who shall prosecute, &*c*. and if any person against whom such second recovery shall be had, shall offend again in the same kind, and shall be convicted by indictment or information, or any other lawful way, such person shall be incapable to bear his office, and shall be likewise disabled to make any gift or disposition of his lands or goods, or to take any gift or

legacy to his own use.

Sect. 7. Every person so offending shall likewise pay unto the party grieved his treble damages, to be recovered in any of his Majesty's courts at *Westminster*.

Sect. 8. If any person shall be restrained of his liberty by order or decree of any such court as before, or by command of the King's Majesty in person, or by warrant of the council-board, or of any of his Majesty's Privy council; every person so restrained, upon demand, or motion made by counsel, or other employed by him, unto the judges of the King's Bench, or Common Pleas, in open court, shall without delay, for the ordinary fees, have a *habeas corpus* directed generally unto all and every sheriffs [*sic*], gaoler, minister, officer or other person, in whose custody the party shall be, and the sheriffs or other person shall at the return of the writ (upon due notion given, at the charge of the party who procureth such writ, and upon security by his own bond, to pay the charge of carrying back the prisoner, if he shall be remanded; such charges to be ordered by the court, if any difference shall arise) bring the body of the party before the judges in open court, and shall certify the cause of his detainer, and thereupon the court, within three court days after such return made, shall proceed to determine whether the cause of commitment be just, and shall thereupon do what to justice shall appertain. And if any thing shall be willfully done or omitted by any judge, officer, &*c*. contrary to the direction hereof, such person offending shall forfeit to the party grieved his treble damages, to be recovered as aforesaid.

Sect. 9. This act shall extend only to the court of Starchamber, and to the said courts holden before the President and council in the marches of *Wales*, and before the President and council in the northern parts, and to the court of the Dutchy of *Lancaster*, and the court of Exchequer of the county palatine of *Chester*, and all courts of like jurisdiction to be hereafter erected, and to the warrants and directions of the council-board, and to the commitments of any persons made by the King in person, or by the Privy council.

Sect. 10. No person shall be molested for any offence against this act, unless he be impleaded within two years after the offence committed.

Stat. 1 *Will. & Mar. St*. 2. *cap*. 2. *sect*. 1. Whereas the Lords spiritual and temporal and commens assembled at *Westminster*, representing all the estates of the people of this realm, did upon the 13th of *February* 1688. present unto their Majesties, then Prince and Princess of *Orange*, a

declaration, containing that,

The said Lords spiritual and temporal and commons, being assembled in a full and free representative of this nation, for the vindicating their ancient rights and liberties, declare,

That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal;

That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal;

That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious;

That having money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;

That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal;

That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent or parliament, is against law;

That the subjects which are protestants may have arms for their defence suitable to their conditions, and as allowed by law;

That election of members of parliament ought to be free;

That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament;

That excessive bail ought not do be required, nor excessive fines imposed, nor cruel and unusual punishments indicted;

That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders;

That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void;

And for redress of all grievances, and for the amending, strengthening and preserving of the laws, parliaments ought to be held frequently;

And they do claim, demand and insist upon all and singular the premisses, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premisses, ought in any wise to be drawn hereafter into

consequence or example;

Sect. 6. All and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged and taken to be; and all the particulars aforesaid shall be firmly holden as they are expressed in the said declaration; and all officers shall serve their Majesties according to the same in all times to come.

Sect. 12. No dispensation by *non obstanto* of any statute shall be allowed, except a dispensation be allowed of in such statute; and except in such cases as shall be specially provided for during this session of parliament.

Sect. 13. No charter granted before the 23d of *October* 1689. shall be invalidated by this act, but shall remain of the same force as if this act had never been made.

Stat. 12 & 13 *Will*. 3. *cap*. 2. *sect*. 3. Whereas it is necessary that further provision be made for securing our religion, laws and liberties, after the death of his Majesty and the Princess *Anne of Denmark*, and in default of issue of the body of the said Princess, and of his Majesty respectively; it is enacted.

That whosoever shall hereafter come to the possession of this crown, shall join in communion with the church of *England*, as by law established.

That in case the crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of *England*, this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of *England*, without consent of parliament.

That from the time that the further limitation of this act shall take effect, no person born out of the kingdoms of *England, Scotland* or *Ireland*, or the dominions thereunto belonging, although he be naturalized or made a denizen, (except such as are born of *English* parents) shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy 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 to any other in trust for him.

That no person who has an office or place of profit under the King, or receives a pension from the crown, shall be capable of serving as a member of the house of commons.

That after the said limitation shall take effect, judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and

established; but upon the address of both houses of parliament, it may be lawful to remove them.

That no pardon under the Great seal of *England* be pleadable to an impeachment by the commons in parliament.

Sect. 4. Whereas the laws of *England* are the birthright of the people thereof, and all the Kings and Queens who shall ascend the throne of this realm, ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them according to the same; all the laws and statutes of this realm for securing the established religion, and the rights and liberties of the people, and all other laws and statutes now in force, are by his Majesty, with the advice and consent of the lords spiritual and temporal, and commons, ratified and confirmed. See Habeas Corpus, King, Naturalization.

Cunningham Law Dictionary, book II, unpaginated.

10.3.2CASE LAW

10.3.2.1Ham v. M'Claws, 1789

It is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as *far as they are calculated to operate against those principles*.

1 S.C. (1 Bay) 93, 98 (C.P.).

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1 On August 22, 1789, the following motion was agreed to:

ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.

HJ, p. 112.

2 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

3 For the reports of the House's discussion of its Eighth Amendment, *see* 8.2.1.2.a–d.

4 a 1 Inst. 253. b. 2 Inst. 590.

b 2 Inst. 53, 482.

c 2 Inst. 492, 589. 2 Roll. Abr. 74.

d 2 Inst. 482, 483. 3 Inst. 91. 4 Inst. 97.

e 1 Roll. Abr. 687.

f 1 Inst. 162.a. 253. b. 2 Inst. 483. *Nemo tenetur exponere se infortuniis et periculis*. 1 Inst. 162. a. 253. b. *Talis debet esse metus, qui cadere potest in virum constantem, non meticulosum*. Ibid. *Qui non cadunt in constantem virum, vani timores sunt*. 2 Inst. 483. 7 Rep. 27.

5 g 1 Inst. 124. b. 2 Inst. 42, 115. 9 Rep. 56.

a 2 Inst. 55. 4 Inst. 182.

6 b 2 Inst. 47, 48. 2 Roll. Abr. 166.

7 a 11 *Philipp*. 12.

b *l*. 1. *c*. 3.

8 c *Facultas ejus, quod cuique facere libet, nisi quid jure prohibetur*. *Inst*. 1. 3. 1.

d 3 Edw. IV. c. 5.

e 30 Car. II. st. 1. c. 3.

f on Gov. p. 2. §. 57.

9 g Salk. 666.

10 h 2 Inst. proem.

i 25 Edw. I.

k 2 Inst. proem.

l 1 W. and M. st. 2. c. 2.

m 12 & 13 W. III. c. 2.

n Plowd. 55.

11 o *Si aliquis mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam*; *si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium*. Bracton. *l*. 3. *c*. 21.

p 3 Inst. 90.

12 q Stat. 12 Car. II. c. 24.

r Stat. 10 & 11 W. III. c. 16.

s *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur*. *Ff*. 1. 5. 26.

13 t 2 Inst. 483.

14 u *l*. 2. *c*. 5.

w 2 Inst. 483.

x *Ff*. 48. 21. 1.

15 y *l*. 11. *t*. 27.

16 z Co. Litt. 133.

a This was also a rule in the feodal law, *l.* 2. *t.* 21. *desiit esse miles seculi, qui factus est miles Christi*; *nec beneficium pertinet ad eum qui non debet gerere officium.*

b Litt. §. 200.

c Co. Litt. 133 *b.*

d 2 Rep. 48. Co. Litt. 132.

17 e c. 29.

f 2 Inst. 48.

18 g c. 29.

h 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. and 28 Edw. III. c. 3.

19 i 2 Inst. 589.

k 2 Inst. 482.

l 2 Inst. 52, 53.

20 m F. N. B. 85.

n cap. 29.

21 o 2 Inst. 47.

22 p c. 29.

q 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

23 r See the historical introduction to the great charter, &c, *sub anno* 1297; wherein it is shewn that this statute *de talliagio non concedendo*, supposed to have been made in 34 Edw. I, is in reality nothing more than a sort of translation into Latin of the *confirmatio cartarum*, 25 Edw. I, which was originally published in the Norman language.

24 s c. 29.

t 2 Inst. 55.

u c. 29.

25 w Montesq. Sp. L. 12. 26.

26 x Montesq. Sp. L. 11. 5.

CHAPTER 11

AMENDMENT V

TAKINGS CLAUSE

11.1TEXTS

11.1.1DRAFTS IN FIRST CONGRESS

11.1.1.1Proposal by Madison in House, June 8, 1789

11.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Congressional Register, June 8, 1789, vol. 1, pp. 427–28.

11.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

11.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4

[of the Constitution], be inserted these clauses, to wit: …

…

No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

11.1.1.2 House Committee of Eleven Report, July 28, 1789

ART. 1, SEC. 9—Between PAR. 2 and 3 insert,

…

"No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Broadside Collection, DLC.

11.1.1.3 Consideration by House, August 17, 1789

11.1.1.3.a The 5th clause of the 4th proposition was taken up, *viz.* "no person shall be subject, [*sic;* except] in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Congressional Register, August 17, 1789, vol. 2, p. 224.

11.1.1.3.b Eighth Amendment—"No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Daily Advertiser, August 18, 1789, p. 2, col. 4.

11.1.1.3.c Eighth Amendment—"No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same

offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

11.1.1.3.d 8th Amendment. "No person shall be subject, except in case of impeachment, to more than one trial for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation."

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

11.1.1.4Motion by Benson in House, August 17, 1789

11.1.1.4.a Mr. Benson

[H]e would move to amend it by striking out the words "one trial or."

Congressional Register, August 17, 1789, vol. 2, p. 224 ("was lost by a considerable majority").

11.1.1.4.b Mr. Benson moved to strike out the words "One trial or"

Daily Advertiser, August 18, 1789, p. 2, col. 4.

11.1.1.4.c Mr. Benson moved to strike out the words "one trial or."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 ("This was negatived").

11.1.1.4.d Mr. Benson… moved to strike out the words "one trial or"

Gazette of the U.S., August 22, 1789, p. 249, col. 3 ("This was negatived.").

11.1.1.5Motion by Partridge in House, August 17, 1789

11.1.1.5.a Mr. Partridge moved to insert after "same offence," the words, "by any law of the United States;"… .

Congressional Register, August 17, 1789, vol. 2, p. 225 ("this amendment was lost also").

11.1.1.5.b Mr. Partridge moved to insert after the words “same offence,” the words “by any law of the United States,”…

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“Resolved in the negative.”).

11.1.1.5.c Mr. Partridge moved to insert after the words “same offence,” the words “by any law of the United States.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“Resolved in the negative”).

11.1.1.5.d Mr. Partridge moved to insert after the words “same offence,” the words *“by any law of the United States,”*… .

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (“Negatived”).

11.1.1.6Motion by Lawrance in House, August 17, 1789

11.1.1.6.a Mr. Lawrance

[H]e thought it [the clause] ought to be confined to criminal cases, and moved an amendment for that purpose… .

Congressional Register, August 17, 1789, vol. 2, p. 225 (“which amendment being adopted, the clause as amended was unanimously agreed to by the committee”).

11.1.1.6.b Mr. Lawrance moved to insert after the words “nor shall” these words “in any criminal case.”

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“This amendment was agreed to.”).

11.1.1.6.c Mr. Lawrance moved to insert after the words “nor shall,” these words, “in any criminal case.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“This amendment was agreed to”).

11.1.1.6.d Mr. Laurance moved to insert after the words “nor shall” these words *in any criminal case*.

Gazette of the U.S., August 22, 1789, p. 249, col. 3 (“This amendment was agreed to”).

11.1.1.7Further House Consideration, August 21, 1789

Seventh. No person shall be subject, except in case of impeachment, to more than one trial or one punishment for the same offence; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

HJ, p. 107 ("read and debated… agreed to by the House, … two-thirds of the members present concurring").[1]

11.1.1.8House Resolution, August 24, 1789

ARTICLE THE EIGHTH.

No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

House Pamphlet, RG 46, DNA.

11.1.1.9Senate Consideration, August 25, 1789

11.1.1.9.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth:

…

Article the Eighth

> "No person shall be subject, except in case of Impeachment, to more than one Trial, or one punishment for the same offence, nor shall be compelled in any Criminal case, to be a witness against himself, nor be deprived to life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Rough SJ, p. 217.

11.1.1.9.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*Article the Eighth*.

> No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Smooth SJ, p. 195.

"*ARTICLE THE EIGHTH*.

11.1.1.9.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

> "No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offence, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived to life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.
>
> Printed SJ, p. 105.

11.1.1.10Further Consideration by Senate, September 4, 1789

11.1.1.10.a On Motion to adopt the eighth Article of amendments proposed by the House of Representatives, striking out these words "Except in case of impeachment to more than one trial or one punishment" and substitute the following words.

> "Be twice put in jeopardy of life or limb by any public prosecution."
>
> Rough SJ, p. 249 ("It passed in the affirmative.").

11.1.1.10.b On motion, To adopt the eighth article of Amendments proposed by the House of Representatives, striking out these words, —"Except in case of impeachment to more than one trial or one punishment," and substitute the following words—

"Be twice put in jeopardy of life or limb by any public prosecution"—

Smooth SJ, p. 222 ("It passed in the Affirmative.").

11.1.1.10.c On motion, To adopt the eighth Article of Amendments proposed by the House of Representatives, striking out these words, —"Except in case of impeachment to more than one trial or one punishment," and substitute the following words—

"Be twice put in jeopardy of life or limb by any public prosecution"—

Printed SJ, p. 119 ("It passed in the Affirmative.").

11.1.1.10.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

~~by~~ striking out these words. “Except in cases of impeachment to more than one trial or one punishment,” and substitute ∧ [ing] the following words;

“Be twice put in jeopardy of life or limb by any public prosecution.”

Senate MS, p. 3, RG 46, DNA.

11.1.1.11 Further Senate Consideration, September 9, 1789

11.1.1.11.a On motion, To alter Article 6th so as to stand Article 5th, and Article 7th so as to stand Article 6th, and Article 8th so as to stand Article 7th

…

On motion, That this last mentioned Article be amended to read as follows: “No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; Nor shall private property be taken for public use without just compensation.”

Rough SJ, p. 275 (“It passed in the affirmative.”).

11.1.1.11.b On motion, To alter article the sixth so as to stand article the fifth, and article the seventh so as to stand article the sixth, and article the eighth so as to stand article the seventh —

…

On motion, That this last mentioned article be amended to read as follows:

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation”—

Smooth SJ, p. 244 (“It passed in the Affirmative.”).

11.1.1.11.c On motion, To alter Article the sixth so as to stand Article the fifth, and Article the seventh so as to stand Article the sixth, and Article the eighth so as to stand Article the seventh—

…

On motion, That this last mentioned Article be amended to read as follows: “No person shall be held

to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject to be put in jeopardy of life or limb, for the same offence, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law: Nor shall private property be taken for public use without just compensation" —

Printed SJ, pp. 129–30 ("It passed in the Affirmative.").

11.1.1.11.d To erase the word "Eighth" & insert Seventh—

To insert in the ~~Eighth~~ 8th [7th] article ~~as~~ after the word "shall" in the "1" line — be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual Service in time of War or publick danger, nor shall any person — &

To erase from the same article the words "except in case of impeachment, to more than one trial or one punishment" & insert — to be twice put in jeopardy of life or limb —

Ellsworth MS, p. 3, RG 46, DNA.

11.1.1.12 Senate Resolution, September 9, 1789

ARTICLE THE SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Senate Pamphlet, RG 46, DNA.

11.1.1.13 Further House Consideration, September 21, 1789

RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring

on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

11.1.1.14 Further Senate Consideration, September 21, 1789

11.1.1.14.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

11.1.1.14.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

11.1.1.15 Further Senate Consideration, September 21, 1789

11.1.1.15.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do

insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

11.1.1.15.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

11.1.1.16 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, &

to
& ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

11.1.1.17 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

11.1.1.18 Senate Consideration of Conference Committee Report, September 24, 1789

11.1.1.18.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the

Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

11.1.1.18.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law RESPECTING AN ESTABLISHMENT OF RELIGION, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial BY AN IMPARTIAL JURY OF THE DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, AS THE DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Printed SJ, p. 145.

11.1.1.19 Further Senate Consideration of Conference Committee Report, September 24, 1789

11.1.1.19.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Smooth SJ, pp. 278–79.

11.1.1.19.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Printed SJ, p.148.

11.1.1.20 Further Senate Consideration of Conference Committee Report, September 25, 1789

11.1.1.20.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States” — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

11.1.1.20.b The Senate proceeded to consider the Message from the House

of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

RESOLVED, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

11.1.1.21 Agreed Resolution, September 25, 1789

11.1.1.21.a Article the Seventh.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Smooth SJ, Appendix, p. 293.

11.1.1.21.b ARTICLE THE SEVENTH.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Printed SJ, Appendix, p. 164.

11.1.1.22 Enrolled Resolution, September 28, 1789

Article the seventh… No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Enrolled Resolutions, RG 11, DNA.

11.1.1.23Printed Versions

11.1.1.23.a ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 21.

11.1.1.23.b ART. VII. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statutes at Large, vol. 1, p. 98.

11.1.2PROPOSALS FROM THE STATE CONVENTIONS

None.

11.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

11.1.3.1Massachusetts

11.1.3.1.aBody of Liberties, 1641

> [8] No mans Cattel [*sic*]or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently recompenced.
>
> Massachusetts Colonial Laws, p. 35.

11.1.3.1.bConstitution, 1780

> [Part I, Article] X. Each individual of the society, has a right to be protected by it, in the enjoyment of his life, liberty and property, according to standing laws. He is obliged consequently, to contribute his share to the expence of this protection; to give his personal service, or an equivalent, when necessary: But no part of the property of any individual, can, with justice, be taken from him, or applied to publick uses, without his own consent, or that of the representative body of the people: In fine, the people of this Commonwealth, are not controulable by any other laws, than those to which their constitutional representative body have given their consent. And whenever the publick exigencies require, that the property of any individual should be appropriated to publick uses, he shall receive a reasonable compensation therefor.
>
> Massachusetts Perpetual Laws, p. 6.

11.1.3.2Pennsylvania

11.1.3.2.a Constitution, 1776

…

VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent; nor are the people bound by any laws, but such as they have in like manner assented to, for their common good.

Pennsylvania Acts, p. ix.

11.1.3.2.b Constitution, 1790

ARTICLE IX.

SECT. X. That no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office. No person shall, for the same offence, be twice put in jeopardy of life or limb; nor shall any man's property be taken or applied to public use, without the consent of his representatives, and without just compensation being made.

Pennsylvania Acts, Dallas, p. xxxiv–xxxv.

11.1.3.3Vermont: Constitution, 1777

CHAPTER I.

…

2. THAT private Property ought to be subservient to public Uses when Necessity requires it; nevertheless, whenever any particular Man's Property is taken for the Use of the Public, the Owner ought to receive an Equivalent in Money.

…

9. THAT every Member of Society hath a Right to be protected in the Enjoyment of Life, Liberty and Property, and therefore is bound to Contribute his Proportion towards the Expence of that Protection, and yield

his Personal Service, when necessary, or an Equivalent thereto; but no Part of a Man's Property can be justly taken from him, or applied to public Uses, without his own Consent, or that of his legal Representatives: Nor can any Man, who is conscientiously scrupulous of bearing Arms, be justly compelled thereto, if he will pay such Equivalent: Nor are the People bound by any Law, but such as they have in like Manner assented to, for their common Good.

Vermont Acts, pp. 3, 4.

11.1.3.4Virginia: Declaration of Rights, 1776

VI. THAT elections of members to serve as representatives of the people, in Assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

Virginia Acts, p. 33.

11.1.4OTHER TEXTS

11.1.4.1Northwest Territory Ordinance, 1787

Article the Second. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law; all persons shall be bailable unless for Capital Offences, where the proof shall be evident, or the presumption great; all fines shall be moderate, and no cruel or unusual punishments shall be inflicted; no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it Necessary for the common preservation to take any persons property, or to demand his particular

services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements bona fide and without fraud, previously formed.

Continental Congress Papers, DNA.

11.2DISCUSSION OF DRAFTS AND PROPOSALS

11.2.1THE FIRST CONGRESS

11.2.1.1June 8, 17892

11.2.1.2August 17, 1789

Discussion was limited to self-incrimination and double jeopardy issues.[3]

11.2.2STATE CONVENTIONS

None.

11.2.3PHILADELPHIA CONVENTION

None.

11.2.4NEWSPAPERS AND PAMPHLETS

11.2.4.1The Federal Farmer, No. 6, December 25, 1787

The following, I think, will be allowed to be unalienable or fundamental rights in the United States: —

No man, demeaning himself peaceably, shall be molested on account of his religion or mode of worship — The people have a right to hold and enjoy their property according to known standing laws, and which cannot be taken from them without their consent, or the consent of their representatives; and whenever taken in the pressing urgencies of government, they are to receive a reasonable compensation for it — Individual security consists in having free recourse to the laws — The people are subject to no laws or taxes not assented to by their representatives constitutionally assembled — They are at all times intitled to the benefits of the writ of habeas corpus, the trial by jury in criminal and civil causes — They have a right, when charged, to a speedy trial in the vincinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge — No man is held to answer a crime charged upon him till it be substantially described to him; and he is subject to no unreasonable searches or seizures of his person, papers or effects — The people have a right to assemble in an orderly manner, and petition the government for a redress of wrongs — The freedom of the press ought not to be restrained — No emoluments, except for actual service — No hereditary honors, or orders of nobility, ought to be allowed — The military ought to be subordinate to the civil authority, and no soldier be quartered on the citizens without their consent — The militia ought always to be armed and disciplined, and the usual defence of the country — The supreme power is in the people, and power delegated ought to return to them at stated periods, and frequently — The legislative, executive, and judicial powers, ought always to be kept distinct — others perhaps might be added.

Storing, vol. 2, p. 262.

11.2.4.2Luther Martin, Genuine Information, No. 8, January 22, 1788

I considered, Sir, that there might be times of such *great public calamities* and *distress*, and of such *extreme scarcity* of *specie* as should render it the *duty* of a government for the *preservation* of even the *most valuable part* of its citizens in some measure to interfere in their favour, by passing laws *totally* or *partially stopping* the courts of justice — or authorising the debtor to pay by *instalments*, or by delivering up his property to his creditors at a *reasonable* and *honest* valuation. — The times have been such as to render regulations of this kind necessary in most, or all of the States, to prevent the *wealthy creditor* and the *monied* man from *totally* destroying the *poor* though even *industrious* debtor — *Such times* may *again* arrive. — I therefore, voted against depriving the States of this power, a power which I am decided they ought to possess, but which I admit ought only to be exercised on very important and urgent occasions. — I apprehended, Sir,

the principal cause of complaint among the people at large is, the public and private debt with which they are oppressed, and which, in the present scarcity of cash, threatens them with destruction, unless thay can obtain so much indulgence in point of time that by industry and frugality they may extricate themselves.

This *government proposed*, I apprehend so *far from removing* will greatly *encrease* those complaints, since grasping in its all powerful hand the citizens of the respective States, it will buy the imposition of the variety of *taxes, imposts, stamps, excises* and *other duties*, *squeeze* from them the little money they may acquire, the hard earnings of their industry, as you would squeeze the juice from an orange, till not a drop more can be extracted, and then let *loose* upon them, their *private creditors*, to whose *mercy* it *consigns* them, by *whom* their property is to be *seized upon* and *sold* in this *scarcity* of *specie at a sheriffs sale*, where nothing but *ready cash* can be received for a *tenth part* of its *value*, and *themselves* and their *families* to be consigned to *indigence* and *distress*, without *their governments* having a *power* to *give them a moment's indulgence*, however *necessary* it might be, and however *desirous* to grant them aid.

[Baltimore] Maryland Gazette, Kaminski & Saladino, vol. 15, p. 436.

11.2.5LETTERS AND DIARIES

None.

11.3DISCUSSION OF RIGHTS

11.3.1TREATISES

11.3.1.1Blackstone, 1765

III. THE third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the

land. The original of private property is probably founded in nature, as will be more fully explained in the second book of ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in its present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter [p] has declared that no freeman shall be disseised or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of antient statutes [q] it is enacted, that no man's lands or goods shall be seised into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if any thing be done to the contrary, it shall be redressed, and holden for none.[4]

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might be perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulge with caution, and which nothing but the legislature can perform.

Blackstone Commentaries, bk. 1, ch.1; vol. 1, pp. 134–35 (footnotes

Blackstone Commentaries, bk. 1, ch.1, vol. 1, pp. 134–35 (footnotes omitted).

11.3.2CASE LAW

11.3.2.1RESPUBLICA V. SPARHAWK, 1788

THIS was an appeal from the *Comptroller General's* decision, on the trial of which, by consent of the *Attorney General*, *Sparhawk* was considered as Plaintiff.

There was a verdict and judgment *nisi* for the Commonwealth, when *Ingersol* obtained a rule to shew cause why a new trial should not be granted.

The case was this:—Congress, perceiving that it was the intention of the *British* army to possess themselves of *Philadelphia*, and being informed that considerable deposits of provisions &c. were made in that city, entered into a resolution on the 11th of *April*, 1777, thats "a Committee should be appointed to examine into the truth of their information; and, if it was found true, to take effectual measures, in conjunction with the *Pennsylvania* Board of War, to prevent such provisions from falling into the hands of the enemy," [*sic*]

On the 13th of the same month, the *Pennsylvania* Board of War, in aid of this resolution, addressed a circular letter to a number of citizens in each ward of the city, requesting them "to obtain from every family a return of the provisions &c. then in possession, and the number of persons that composed the families respectively, in order that proper measures might be pursued for removing any unnecessary quantity of supplies to a place of security." At the same time, it was mentioned, that "this proceeding was not intended to alter or divest the property in the articles removed: but, on the contrary, that the same should be at all times liable to the order of the respective owners, provided they were not exposed to be taken by the enemy."

That no precaution might be omitted upon this occasion, the *Pennsylvania* Board of War, on the succeeding day, desired General *Schuyler* to prevent the introduction of further supplies, and to adopt the most effectual means for preventing the departure of the waggons which

were then in the city, and for procuring as many more as would be necessary to transport, not only the public stores, but also such private effects, as it might be thought expedient to remove.

Several intercepted letters having encreased the apprehensions of Congress, on the 16th of *April*, 1777, they resolved, "that it be recommended to the President and Members of the executive authority of this State, to request the commanding officer of the continental forces in this city, to take the most effectual means, that all provisions, and every other article, which, by falling into the hands of the enemy, may aid them in their operations of war against the *United States*, or the loss of which might distress the continental army, be immediately removed to such places, as shall be deemed most convenient and secure."

This recommendation was transmitted by the Executive Council to the *Pennsylvania* Board of War, who, on the 18th of *April*, passed an order, that "houses, barns, stores, &c. should be hired or seized, for the reception of such articles, as should be sent out of the city by their direction or that of Congress;" and, accordingly, a very considerable quantity of property was soon removed to *Chestnut-Hill*, and placed under the care of Messrs. *Loughead* and *Barnhill;* who gave receipts to the owners, promising "to restore what belonged to them respectively, or to deliver the same to their respective orders."

The enemy, not approaching so rapidly as was expected, a considerable part of this property had, accordingly, been re-delivered to the order of the owners, before the city was entered by the *British* troops; when, however, the depot at *Chestnut-Hill* fell, likewise, into their hands, and, with it, 227 barrels of flour, belonging to *Sparhawk;* being the remainder of 323 barrels that had been originally removed thither, in consequence of the above mentioned proceedings.

For the price of these 227 barrels of flour, with interest from the time of their being taken, *Sparhawk* exhibited an account, amounting to £919 6 6 against the public; upon which the *Comptroller-General* reported to the *Executive Council*, that "neither the principal, the interest, nor any part of either, could be allowed;" and against this decision the present appeal was entered.

The question, therefore, on the motion for a new trial, was, whether this claim, under all the circumstances, ought to be admitted? and it was argued on the 28th of *April*, by *Ingersol*, for the Appellant; and the *Attorney General*, for the Commonwealth.

On the part of the *Appellant*, it was premised, that, in a season of *peace*, the law had so great a regard for private property, that it would not authorize the least violation of it; no, not even for the general good of the whole community. 1 *Black. Com.* 139 [135?]. And, it was contended, that, although a state of *war* entitled one nation to seize and lay waste the property of another, and their respective subjects to molest the persons, and to seize the effects of their opponents, yet, as between a state and its own citizens, the principle, with respect to the rights or property, is immutably the same, in war as well as peace. Sometimes, indeed, the welfare of the public may be allowed to interfere with the immediate possessions of an individual; but these must be cases of absolute necessity, in which every good citizen ought chearfully [*sic*] to acquiesce: Yet, even then, justice requires, and the law declares, that an adequate compensation should be made for the wrong that is done. For, the burthen of the war ought to be equally borne by all who are interested in it, and not fall disproportionately heavy upon a few. These general principles are fortified by the explicit language of the *Declaration of Rights*, *Sect*. 8. which provides, that "no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal Representatives." In the present case the Appellant did not voluntarily surrender his property, nor was it taken from him by any legislative sanction.

That there are, however, some instances where an individual is not entitled to redress for injuries committed on his property in the prosecution of public objects, must be admitted; but these instances are carefully distinguished by the writers on the law of nations; *Vatt. B.* 3. *Sect* 232. and are in no degree analogous to the foundation of the Appellant's claim. If, indeed, the property in question had remained in *Philadelphia*, and had there been seized by the enemy, there could have been no reason to claim an indemnification from the public; but, when it was taken out of the possession of the owner by the executive authority of the State, and removed to a distant place, with a promise of restoring it on demand, the subsequent capture being clearly a consequence of this interference, the government is bound to indemnify the Appellant for his loss.

It is unnecessary to travel into an investigation of the various modes, by which an individual may seek for redress and compensation, where his property has been divested for the use of the public. The right is clear, and that every right must have a remedy, is a principle of general law, which the Legislature of *Pennsylvania* has expressly recognized; directing, by an early

Act of Assembly, the settlement of the accounts of the Committee and Council of Safety; and prescribing in what manner the claims of individuals should be settled and discharged. 2 *State Laws* 144. To these bodies, the *Pennsylvania* Board of War succeeded; the business of the Board was transacted in the same way; and there can be no good reason, why the obligations which they incurred, should not be as fairly and fully adjusted and satisfied. The Legislature, indeed, must have regarded the matter in the same light; for, finding that the former law was inadequate to its objects, another was enacted to appoint a *Comptroller General*, and to authorize him "to liquidate and settle, according to law and equity, all claims against *the Commonwealth*, for services performed, monies advanced, or articles furnished, by order of the legislative, or executive powers for the use of the same, or for any other purpose whatever."—This authority embraced the Appellant's claim, and the Comptroller General has erred in deciding against it.

The *Attorney General*, for the *Commonwealth*, stated the case to be breifly this; that the *Pennsylvania* Board of War, acting under the recommendations of *Congress*, removed, among other things, a quantity of flour belonging to the Appellant, in order to prevent its falling into the hands of the enemy: declaring, however, that the removal was not intended to divest the property, but that the flour should still be subject to the order of the owner, provided it was not exposed to a capture. The flour being afterwards seized by the *British* troops at the place where the *Pennsylvania* Board of War had deposed it, two questions arise:—1st. Whether this Court has power to grant relief to the Appellant, if any ought to be granted. And 2dly. Whether, on principles of the law and equity, he is entitled to be relieved.

I. Considering this as a case immediately between *Sparhawk* and the *Commonwealth*, it is clear, that a sovereign is not amenable in any Court, unless by his own consent; I *Black. Com*. 242. And, therefore, unless the Commonwealth has expressly consented, there is nothing in the constitution of this Court, which can warrant their sustaining the present proceeding. What then is the evidence of consent? We are refered [*sic*] to the law appointing the *Comptroller General*. Let us examine this law; and as the case comes by appeal from the Comptroller, if it appears that he had no authority to liquidate and settle *Sparhawk's* claim, it follows, as a necessary consequence, that this Court, also, has no jurisdiction for the purpose.

By the Act of Assembly which gives the appeal from the *Comptroller*

General's decision to the *Supreme Court*, 3 *State Laws* 444. this in restricted to such accounts as he shall settle in *pursuance* of the preceding Act, by which he was appointed; 3 *State Laws* 57. and there, we find, the specific object of his authority to be, the liquidation and settlement of all claims against the *Commonwealth*, "for services performed, monies advanced, or articles furnished, by order of the legislative, or executive powers, &c." In order, therefore, to found the jurisdiction of the Comptroller, two thing must concur—1st. that the claim be for services performed, movies advanced, or articles furnished; and 2dly. that the debt has been incurred by order of the legislative or executive power.

Now, in the present case, the Appellant makes no claim for services performed, or money advanced, and it is impossible for the most ingenious fancy to bring his demand within the description of articles furnished. It is conceded, indeed, that the law does not, *in peace*, acknowledge any authority to violate the rights of property, or to interfere with the possessions of individuals; but there is *in war* a transcendant power, which is connected with the fundamental principle of all governments, the preservation of the whole; and the interest of private persons may certainly, in that season, be sacrificed, *ne quid respublica detrimenti capiat*. The loss, of which the Appellant complains, was occasioned by the exercise of this power. As a *tort* it cannot be charged against the *Commonwealth;* for, a declaration stating it so would be cause of demurrer: And, therefore, as it is only in cases of contract, either express or implied, that the *Comptroller General* is authorized to act, there is no jurisdiction which can relieve him, but that of the Legislative.

But, in the next place, the claim does not originate upon any order of the legislative, or executive, power, agreeably to the terms of the act. The order for the removal of the provision, &c. to *Chestnut-Hill* was issued by the *Pennsylvania Board of war*, not in obedience to the Executive Council, but in pursuance of a recommendation from Congress, which the Executive Council merely transmitted to the Board. Even, indeed, if the Executive Council had undertaken to direct this proceeding, a question would still arise, whether they had a right to do so? for, the act of Assembly, providing for the settlement of claims against the public by order of the Executive Council, though not in express words, yet, by a necessary implication, must intend a legitimate order, founded upon the constitutional powers of that department, or issued under the authority of some law. The Executive Council cannot otherwise charge the public; without the legislative sanction

they cannot erect magazines, or any other public building; nor enter into the most trifling contract; of which, indeed, a recent proof apears, in the refusal of the General Assembly to pay for the arms of the State, that had been placed in the Supreme Court, or to discharge the additional expence of the Triumphal Arch, which had been incurred by the direction and upon the faith of the Executive Council.

II. But, it is further to be shewn; that, even supposing the *Comptroller General*, or this Court upon appeal, had the power of granting *Sparhawk's* claim, yet, that the claim itself is not founded in law or equity, and ought, therefore, to be rejected.—If the Appellant's claim is just, he ought either to urge it against the immediate agent in the wrong which he has sustained, or travel to the source, and demand reparation from Congress. The *Commonwealth* of *Pennsylvania* cannot be liable; for, the persons who took and kept the provisions, &c. at *Chestnut-Hill*, acted under the authority of the Board of war, who, it is true, were appointed by the Executive Council; but, in this instance, proceeded entirely upon the recommendation of Congress, which the Executive Council did not, and could not legally, enjoin or enforce. It is possible, however, that, in strict law, Messers. *Loughead* and *Barnhill* would have been liable as trespassers, had not the Legislature interfered to protect persons in their situation from vexatious prosecutions: 3 *State Laws*. 178. And this act, although it relates immediately to individuals, shews, generally, that the temporary bodies, by whose orders such individuals were governed, are, likewise, to be exempted from suits, on account of their conduct in the service of their country.

But, on what ground can redress be at all expected on this occasion? The removal of the Appellant's property arose from the necessity of the war; it was not done to convert the flour to the public use, nor to deprive the owner of the advantages of it, any farther than the paramount consideration of the public welfare required. The object was to secure it from the depredations of the enemy; and, that it, afterwards, fell into their hands, was an event involuntary, and merely accidental, in which case *Vattel* expressly says, no compensation shall be made. *Vatt. lib*. 3. *sect*. 232. If the Appellant is entitled to relief, every farmer whose cattle have been driven from his plantation to avoid the enemy; every man whose liquors have been staved, or provisions destroyed, upon the approach of the *British* troops; all the owners of *Tynicum* island, which was deluged by a military mandate; and, in short, every one whose interests have been affected by the chance of war, must also, in an equal distribution of justice, be effectually indemnified.—

What nation could sustain the enormous load of debt which so ruinous a doctrine would create!

Ingersoll, in reply. — With respect to the *first* point made on the part of the Commonwealth, it is not contended, for the Appellant, that, generally speaking, citizens may sue the State; but only that every Government, which is not absolutely despotic, has provided some means (in *England*, for instance, by petition in Chancery) to obtain a redress of injuries from the Sovereign.

As to the *second* point; — The Pennsylvania Board of war acted under the authority of the Executive Council; and the principal is responsible for the agent. When the Appellant's property was taken out of his own custody, the Government stood in his place, and undertook all the consequent risques. The individuals, who were charged with the care of it, are protected by the act of Assembly; but the State, upon every principle of justice, is still liable for the loss; and the authority of the *Comptroller General* was intended and has always been understood, to be competent for granting the satisfaction which is now claimed.

The Chief Justice, after stating the case, delivered the opinion of the Court as follows:

McKean, *Chief Justice*. — On the circumstances of this case, two points arise: 1st, Whether the Appellant ought to receive any compensation, or not? And 2dly, Whether this Court can grant the relief which is claimed?

Upon the *first* point we are to be governed by reason, by the law of nations, and by precedents analogous to the subject before us. The transaction, it must be remembered, happened *flagrante bello*; and many things are lawful in that season, which would not be permitted in a time of peace. The seizure of the property in question, can, indeed, only be justified under this distinction; for, otherwise, it would clearly have been a *trespass*; which, from the very nature of the term, *transgressio*, imports *to go beyond* what is right. 5 *Bac. Abr*. 150. It is a rule, however, that it is better to suffer a private mischief, than a public inconvenience; and *the rights of necessity*, form a part of our law.

Of this principle, there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure 2 *Black. Com*. 36. So, if a man is assaulted, he may fly through another's close. 5 *Bac. Abr*. 173. In time of war, bulwarks may be built on private ground. *Dyer*. 8. *Brook. trespass*. 213. 5 *Bac. Abr*. 175. and the reason assigned is particularly applicable to the present case, because it is for the *public safety*. 20 *Vin. Abr*. (*treaspass*) *B. a. sec*. 4. *fo*. 476. Thus, also, every man may, of common right, justify the going of his servants, or horses, upon the banks of navigable rivers, for towing barges, &c. to whomsoever the right of the soil belongs. I *Ld. Raym*. 725. The pursuit of *Foxes* through another's ground is allowed, because the destruction of such animals is for the *public good*, 2 *Buls*. 62. *Cro. I*. 321. And, as the safety of the people is a law above all others, it is lawful to part affrayers in the house of another man. *Keyl*. 46. *5 Bac. Abr*. 177. 20 *Vin Abr. fo*. 407. *sec*. 14. Houses may be razed to prevent the spreading of fire, because for the public good. *Dyer*. 36. *Rud. L. and E*. 312. See *Puff. lib*. 2. *c*. 6. *sec*. 8. *Hutch. Mor. Philos. lib*. 2. *c*. 16. We find, indeed, a memorable instance of folly recorded in the 3 *Vol. of Clarendon's History*, where it is

mentioned, that the *Lord Mayor* of *London*, in 1666, when that city was on fire, would not give directions for, or consent to, the pulling down forty wooden houses, or to the removing the furniture, &c. belonging to the Lawyers of the Temple, then on the Circuit, for fear he should be answerable for a trespass; and in consequence of this conduct half that great city was burnt.

We are clearly of opinion, that Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army, or useful to the enemy, and in danger of falling into their hands; for they were vested with the powers of peace and war, to which this was a natural and necessary incident: And, having done it lawfully, there is nothing in the circumstances of the case, which, we think, entitles the Appellant to a compensation for the consequent loss.

With respect to the *second* point;—This Court has authority to confirm, or alter, any proceedings, that come properly before the *Comptroller General*; but if he had no jurisdiction, we can have none. It appears then, that his power is expressly limited to claims "for services performed, monies advanced, or articles furnished," by order of the Legislature, or the Executive Council. And, as he has no right to adjudge a compensation from the State *for damages*, which individuals may have suffered in the course of our military operations, we are of opinion, that we could grant no relief, even if the Appellant was entitled to it.

By the Court:—Let the rule be discharged; and the Judgment for the Commonwealth be made absolute.

1 Dall. 357 (Pa.).

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

2 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

3 For the reports of the House's discussion of its Eighth Amendment, *see* 8.2.1.2.a–d.

4 p c. 29.

q 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. 28 Edw. III. c. 3.

CHAPTER 12

AMENDMENT VI

CRIMINAL TRIAL CLAUSES

12.1TEXTS

12.1.1DRAFTS IN FIRST CONGRESS

12.1.1.1Proposal by Madison in House, June 8, 1789

12.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

…

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

…

Seventhly. That in article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the

laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

Congressional Register, June 8, 1789, vol. 1, pp. 427–29.

12.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

…

Seventhly. That in article 3d, section 2 [of the Constitution], the third clause be struck out, and in its place be inserted the clauses following, to wit:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war, or public danger,) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

Daily Advertiser, June 12, 1789, p. 2, cols. 1–2.

12.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: …

…

Seventh. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war, or public danger,) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury, as one of

the best securities to the rights of the people, ought to remain inviolate.

New-York Daily Gazette, June 13, 1789, p. 575, cols. 3–4.

12.1.1.2Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 3 No person shall be tried for any crime whereby he may incur loss of life or any infamous punishment, without Indictment by a grand Jury, nor be convicted but by the unanimous verdict of a Petit Jury of good and lawful men Freeholders of the vicinage or district where the trial shall be had.

Madison Papers, DLC.

12.1.1.3House Committee of Eleven Report, July 28, 1789

Art. 3, Sec. 2—Strike out the whole of the 3d paragraph, and insert—"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State; and if it be committed in a place not within a State, the indictment and trial may be at such place or places as the law may have directed."

"In suits at common law the right of trial by jury shall be preserved."

Broadside Collection, DLC.

12.1.1.4House Consideration, August 17, 1789

12.1.1.4.a Art. 3, Sect. 2. Strike out the whole of the 3d paragraph, and insert, “In all criminal prosecutions, the accused, shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.”

Congressional Register, August 17, 1789, vol. 2, p. 228 (“adopted”).

12.1.1.4.b Fourteenth Amendment — Art. 2. Sec. 3 [*sic;* article 3, section 2], Strike out the whole of the 3d par. And insert — “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.”

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“passed”).

12.1.1.4.c Fourteenth amendment — Art. II, Sec. 3 [*sic;* article 3, section 2], strike out the whole of the 3d par. and insert — “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“passed”).

12.1.1.4.d 14th Amendment. Art. II Sec. 3d [*sic;* article 3, section 2], Strike out the whole of the 3d par. And insert: “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witness against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.”

Gazette of the U.S., August 22, 1789, p. 250, col. 1 (“adopted”).

12.1.1.5Motion by Burke in House, August 17, 1789

12.1.1.5.a Mr. Burke

Moved to amend this proposition in such a manner, as to leave it in the power of the accused to put off their trial to the next session, provided he made appear to the court, that the evidence of the witnesses, for whom process was granted, but not served, was material to his defence.

Congressional Register, August 17, 1789, vol. 2, p. 228 ("The question on mr. Burke's motion was taken, and lost. Affirmative 9, negative 41.").

12.1.1.5.b Several amendments to this article were proposed, some of them were withdrawn and others negatived; and one only obtained, which respected the place of trial, which was to be in the State where the supposed crime was committed.

This amendment was adopted.

Gazette of the U.S., August 22, 1789, p. 250, col. 1.

12.1.1.6Motion by Livermore in House, August 17, 1789

Mr. Livermore moved to alter the clause, so as to secure to the criminal the right of being tried in the state where the offence was committed.

Congressional Register, August 17, 1789, vol. 2, p. 228 ("On the question, Mr. Livermore's motion was adopted.").

12.1.1.7Motion by Burke in House, August 17, 1789

Mr. Burke

… proposed to add to the clause, that no criminal prosecution should be had by way of information.

Congressional Register, August 17, 1789, vol. 2, p. 228 ("Mr. Burke withdrew it for the present.").

12.1.1.8House Consideration, August 18, 1789

12.1.1.8.a The house now resolved itself into a committee of the whole on the subject of amendments, and took into consideration the 2d clause of the

7th proposition, in the words following, “The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war, or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment, by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed.”

Congressional Register, August 18, 1789, vol. 2, p. 233 (after the motions noted below, “[t]he clause was now adopted without amendment.” *Id*.).

12.1.1.8.b The committee took up the fifteenth amendment which is as follows:

“The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed.”

Daily Advertiser, August 19, 1789, p. 2, cols. 2–3 (“Some inconsiderable amendments to this amendment were moved and lost, and the main question was carried.”).

12.1.1.8.c The committee took up the fifteenth amendment, which is

“The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed.”

Gazette of the U.S., August 22, 1789, p. 250, col. 1 (reported as August 19, 1789); after the motions noted below, “And then the paragraph was adopted. *Id*.).

12.1.1.9Motion by Burke in House, August 18, 1789

12.1.1.9.a Mr. Burke

Moved to change the word "vicinage" into "district or county in which the offence has been committed,"…

Congressional Register, August 18, 1789, vol. 2, p. 233 ("[t]he question on Mr. Burke's motion being put was negatived").

12.1.1.9.b Mr. Burke moved to strike out "vicinage," and to insert *"county or district in which the offence has been committed."*

Gazette of the U.S., August 22, 1789, p. 250, col. 1 ("The motion was negatived.").

12.1.1.10Motion by Burke in House, August 18, 1789

12.1.1.10.a Mr. Burke then revived his motion for preventing prosecutions upon information, …

Congressional Register, August 18, 1789, vol. 2, p. 233 ("on the question this was also lost").

12.1.1.10.b Mr. Burketh n [*sic;* Burke then] proposed to add a clause to prevent prosecutions upon informations… .

Gazette of the U.S., August 22, 1789, p. 250, col. 1 ("This motion was lost.").

12.1.1.11Motion by Gerry in House, August 21, 1789

12.1.1.11.a Mr. Gerry

Then proposed to amend it by striking out these words, "public danger" and to insert foreign invasion, …

Congressional Register, August 21, 1789, vol. 2, p. 243 ("this being negatived").

12.1.1.11.b Mr. Gerry moved to strike out these words, "public danger," to insert *foreign invasion*,

New-York Daily Gazette, August 24, 1789, p. 818, col. 3 ("negatived").

12.1.1.11.c Mr. Gerry moved to strike out these words “public danger” to insert *foreign invasion*.

Gazette of the U. S., August 22, 1789, p. 250, col. 3 (“This was negatived.”).

12.1.1.12Motion by Gerry in House, August 21, 1789

12.1.1.12.a [I]t was then moved to strike out the last clause, “and if it be committed, &c.” to the end.

Congressional Register, August 21, 1789, vol. 2, p. 243 (“This motion was carried, and the amendment was adopted.”).

12.1.1.12.b It was then moved to strike out the last clause, “and if it be committed, &c,” to the end.

New-York Daily Gazette, August 24, 1789, p. 818, col. 3 (“This motion obtained, and the amendment as it then stood was adopted.”).

12.1.1.12.c It was then moved to strike out the last clause “and if it be committed, &c.” to the end.

Gazette of the U. S., August 22, 1789, p. 250, col. 3 (“This motion obtained, and the amendment as it then stood adopted.”).

12.1.1.13Further House Consideration, August 21, 1789

Thirteenth. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

Fourteenth. The trial of all crimes, (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the

possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same state.

HJ, p. 108 ("read and debated… agreed to by the House, … two-thirds of the members present concurring").[1]

12.1.1.14 House Resolution, August 24, 1789

ARTICLE THE NINTH.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE THE TENTH.

The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of War or public danger) shall be by an Impartial Jury of the Vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accostomed requisites; and no person shall be held to answer for a capital, or otherways infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.

House Pamphlet, RG 46, DNA.

12.1.1.15 Senate Consideration, August 25, 1789

12.1.1.15.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth:

…

"*Article the Ninth*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

"*Article the Tenth*

> [The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by] an impartial jury of the Vicinage, with the requisite of unanimity for conviction, the right of Challenge, and other accustomed requisites; and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an Enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.
>
> Rough SJ, pp. 217–18 [material in brackets not legible].

12.1.1.15.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*Article the Ninth.*

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

"*Article the Tenth.*

> "The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of

an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.

Smooth SJ, pp. 195–96.

12.1.1.15.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*ARTICLE THE NINTH.*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

"*ARTICLE THE TENTH.*

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherways infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same State.

Printed SJ, p. 105.

12.1.1.16Further Senate Consideration, September 4, 1789

12.1.1.16.a On Motion to adopt the ninth article of amendments proposed by the House of Representatives.

…

On Motion to adopt the tenth Article amended to read thus To strike out all the clauses in the Article, except the following:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury,"

Rough SJ, p. 249 (As to each motion, “It passed in the affirmative.”).

12.1.1.16.b On motion, To adopt the ninth article of Amendments proposed by the House of Representatives—

…

On motion, To adopt the tenth article amended by striking out all the clauses in the Article, except the following;

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury,”

Smooth SJ, pp. 222–23 (As to each motion, “It passed in the Affirmative.”).

12.1.1.16.c On motion, To adopt the ninth Article of Amendments proposed by the House of Representatives—

…

On motion, To adopt the tenth Article amended by striking out all the clauses in the Article, except the following;

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury,”

Printed SJ, p. 119 that the Senate do (As to each motion, “It passed in the Affirmative.”).

12.1.1.16.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

Article ninth

Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

Article tenth

with the following amendment, to wit:

To Strike out all the clauses in the Article, except the following:

"no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury."

Senate MS, p. 3, RG 46, DNA.

12.1.1.17 Further Senate Consideration, September 9, 1789

12.1.1.17.a On motion, To strike out from the ninth Article the word "Ninth," and insert "eighth"

…

On motion, to strike out the tenth and eleventh Articles

Rough SJ, p. 275 (As to each motion, "It passed in the Affirmative.").[2]

12.1.1.17.b On motion, To strike out from the ninth article the word "Ninth," and insert "Eighth" —

…

On motion, To strike out the tenth and eleventh articles —

Smooth SJ, pp. 244–45 (As to each motion, "It passed in the affirmative.").

12.1.1.17.c On motion, To strike out from the ninth Article the word "Ninth," and insert eighth—

…

On motion, To strike out the tenth and eleventh articles —

Printed SJ, p. 130 (As to each motion, "It passed in the Affirmative.").

12.1.1.17.d To erase the word "Ninth," and insert ~~the word~~ Eighth

To erase the 10th article, & the words "article the tenth"—

To erase the 11th article & the words "Article the Eleventh."

Ellsworth MS, p. 3, RG 46, DNA.

12.1.1.18 Further Senate Consideration, September 9, 1789

12.1.1.18.a On motion, To reconsider Article the tenth, and to restore these words, to wit:

"The trial of all crimes (except in case of impeachment, and in cases arising in the land or naval forces, or in the Militia when in actual service in time of war or public danger) shall be by an [impartial Jury] of the vicinage, with the [requisite of unanimity for conviction, the right of challenge, and other accustomed requisites" —]

Rough SJ, p. 276 ("Yeas… 8, Nays… 8, So the question was lost.") [material in brackets not legible].

12.1.1.18.b On motion, To reconsider Article the tenth, and to restore these words, to wit:

"The trial of all crimes (except in case of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war of public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites" —

Smooth SJ, p. 245 ("Yeas… 8, Nays… 8, So the question was lost.")

12.1.1.18.c On motion, To reconsider Article the tenth, and to restore these words, to wit: "The trial of all crimes (except in case of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial Jury of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites" —

Printed SJ, p. 130 ("Yeas… 8, Nays… 8, So the question was lost.")

12.1.1.19 Senate Resolution, September 9, 1789

ARTICLE THE EIGHTH.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

Senate Pamphlet, RG 46, DNA.

12.1.1.20 Further House Consideration, September 21, 1789

RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first,

twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

12.1.1.21 Further Senate Consideration, September 21, 1789

12.1.1.21.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

12.1.1.21.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives—

And he withdrew.

Printed SJ, pp. 141–42.

12.1.1.22 Further Senate Consideration, September 21, 1789

12.1.1.22.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as

Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

12.1.1.22.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

12.1.1.23 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have

compulsory process for obtaining witnesses ~~against him~~ in his favour, & to & ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

12.1.1.24 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

12.1.1.25 Senate Consideration of Conference Committee Report, September 24, 1789

12.1.1.25.a Mr. Ellsworth, on behalf of the managers of the conference on

"articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

12.1.1.25.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law RESPECTING AN ESTABLISHMENT OF RELIGION, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial BY AN IMPARTIAL JURY OF THE DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, AS THE DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Printed SJ, p. 145.

12.1.1.26 Further Senate Consideration of Conference Committee Report, September 24, 1789

12.1.1.26.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as

followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Smooth SJ, pp. 278–79.

12.1.1.26.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;” and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the “Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles,” shall be amended to read as followeth:

Article the Third. “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances.”

Article the Eighth. “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.”

Printed SJ, p. 148.

12.1.1.27 Further Senate Consideration of Conference Committee Report, September 25, 1789

12.1.1.27.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to “Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States” — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

12.1.1.27.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States"—And

RESOLVED, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

12.1.1.28 Agreed Resolution, September 25, 1789

Article the Eighth.

12.1.1.28.a In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

Smooth SJ, Appendix, p. 294.

ARTICLE THE EIGHTH.

12.1.1.28.b In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Printed SJ, Appendix, p. 164.

12.1.1.29 Enrolled Resolution, September 28, 1789

Article the eighth… In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall

have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Enrolled Resolutions, RG 11, DNA.

12.1.1.30Printed Versions

12.1.1.30.a ART. VI. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

Statutes at Large, vol. 1, p. 21

12.1.1.30.b ART. VIII. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

Statutes at Large, vol. 1, p. 98.

12.1.2PROPOSALS FROM THE STATE CONVENTIONS

12.1.2.1Maryland Minority, April 26, 1788

2. That there shall be a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is committed; and that

there be no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces.

Maryland Gazette, May 1, 1788 (committee majority).

12.1.2.2New York, July 26, 1788

That (except in the Government of the Land and Naval Forces, and of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such Trial should be speedy, public, and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such Jury. But in cases of Crimes not committed within any County of the United States, and in Cases of Crimes committed within any County in which a general Insurrection may prevail, or which may be in the possession of a foreign Enemy, the enquiry and trial may be in such County as ∧ [the] Congress shall by Law direct; which County in the two Cases last mentioned should be as near as conveniently may be to that County in which the Crime may have been committed. And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusations, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defence, and should not be compelled to give Evidence against himself.

That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.

State Ratifications, RG 11, DNA.

12.1.2.3North Carolina, August 1, 1788

8th. That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage,

without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

…

Amendments to the [Body of the] Constitution.

…

XVI That in criminal prosecutions, no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the jury.

State Ratifications, RG 11, DNA.

12.1.2.4Pennsylvania Minority, December 12, 1787

3. That in all capital and criminal prosecutions, a man has the right to demand the cause and nature of the accusation, as well in the federal courts, as those of the several states; to be heard by himself or his counsel; to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial, by an impartial jury of the vicinage, without whose unanimous consent, he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

Pennsylvania Packet, December 18, 1787.

12.1.2.5Rhode Island, May 29, 1790

8th. That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of the accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favour, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

State Ratifications, RG 11, DNA.

12.1.2.6Virginia, June 27, 1788

Eighth, That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence and be allowed counsel in his favor, and to a fair and speedy trial by an impartial Jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

…

Amendments to the Body of the Constitution.

…

Fifteenth, that in criminal prosecutions no man shall be restrained in the exercise of the usual and accustomed right of challenging or excepting to the Jury.

State Ratifications, RG 11, DNA.

12.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

12.1.3.1Delaware: Declaration of Rights, 1776

SECT. 14. That in all prosecutions for criminal offences, every man hath a right to be informed of the accusation against him, to be allowed counsel, to be confronted with the accusers or witnesses, to examine evidence on oath in his favour, and to a speedy trial by an impartial jury, without whose unanimous consent he ought not be found guilty.

Delaware Laws, vol. 1, App., p. 81.

12.1.3.2Georgia

12.1.3.2.aConstitution, 1777

LXI. Freedom of the press, and trial by jury, to remain inviolate *forever*.

Georgia Laws, p. 16.

12.1.3.2.b Constitution, 1789

ARTICLE IV.

…

Sect. 3. Freedom of the press, and trial by jury, shall remain inviolate.

Georgia Laws, p. 29.

12.1.3.3Maryland, Declaration of Rights, 1776

3. That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great-Britain, and have been introduced, used, and practised by the courts of law or equity; and also to all acts of assembly in force on the first of June seventeen hundred and seventy-four, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; subject nevertheless to the revision of, and amendment or repeal by, the legislature of this state; and the inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by his majesty Charles the first, to Caecilius Calvert, baron of Baltimore.

…

19. That in all criminal prosecutions, every man hath a right to be informed of the accusation against him, to have a copy of the indictment or charge in due time (if required) to prepare for his defence, to be allowed council, to be confronted with the witnesses against him, to have process for his witnesses, to examine the witnesses for and against him on oath, and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Maryland Laws, November 3, 1776.

12.1.3.4Massachusetts

12.1.3.4.aBody of Liberties, 1641

[26] Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.

…

[29] In all Actions at law it shall be the libertie of the plantife and defendant by mutual consent to choose whether they will be tryed by the Bench or by a Jurie, unlesse it be where the law upon just reason hath otherwise determined. The like libertie shall be granted to all persons in Criminall cases.

…

[36] It shall be in the libertie of every man cast condemed or sentenced in any cause in any Inferior Court, to make their Appeale to the Court of Assistants, provided they tender their appeale and put in securitie to prosecute it before the Court be ended wherein they were condemned, And within six dayes next ensuing put in good securitie before some Assistant to satisfie what his Adversarie shall recover against him; And if the cause be of a Criminall nature, for his good behaviour, and appearance, And everie man shall have libertie to complaine to the Generall Court of any Injustice done him in any Court of Assistants or other.

Massachusetts Colonial Laws, pp. 39–41.

12.1.3.4.bGeneral Laws of New-Plimouth, 1671 [1636]

4. It is also Enacted, that no person in this Government shall be endamaged in respect of Life, Limb, Liberty, Good name or Estate, under colour of Law, or countenance of Authority, but by virtue or equity of some express law of the General Court of this Colony, the known Law of God, or the good and equitable Laws of our Nation suitable for us, being brought to Answer by due process thereof.

5. That all Trials, whether Capital, Criminal, or between Man and Man, be tried by Jury of twelve good and lawful Men, according to the commendable custome of England; except the party or parties concerned, do refer it to the Bench, or some express Law doth refer it to their Judgement and Tryal, or the Tryal of some other Court where Jury is not, in

which case any party aggrieved, may appeal, and shall have Tryal by a Jury.

And it shall be in the liberty of both Plaintiffe and Defendant or any Delinquent, that is to be tryed by a Jury, to chalenge any of the Jurors, and if the chalenge be found just and reasonable by the Bench, it shall be allowed him, and others without just exception shall be impannelled in their room; And if it be in case of Life and Death, the Prisoner shall have liberty to except against six or eight of the Jury, without giving any reason for his exception.

6. That no Man be sentenced to Death without Testimony of two witnesses at least, or that which is equivalent thereunto, and that two or three Witnesses being of competent Age, Understanding and good Reputation, Testifying to the Case in question, shall be accounted and accepted as full Testimony in any Case, though they did not together see or hear, and so Witness to the same individual Act, in reference to circumstances of time and place; Provided and Bench and Jury be Satisfied with such Testimony.

New-Plimouth Laws, p. 2.

12.1.3.4.cConstitution, 1780

[Part I, Article] XII. No subject shall be held to answer for any crimes or offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favourable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

XIII. In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty and property of the citizen.

Massachusetts Perpetual Laws, pp. 6–7.

12.1.3.5New Hampshire: Constitution, 1783

[Part I, Article] XV. No subject shall be held to answer for any crime, or offence, until the same is fully and plainly, substantially and formally described to him; or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to himself: To meet the witnesses against him face to face, and to be fully heard in his defence by himself and counsel. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or priviliges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

New Hampshire Laws, p. 25.

12.1.3.6New Jersey

12.1.3.6.a Concessions and Agreements of West New Jersey, 1676

CHAPTER XVII.

THAT no Proprietor, Freeholder or Inhabitant of the said Province of *West New-Jersey*, shall be deprived or condemned of Life, Limb, Liberty, Estate, Property or any ways hurt in his or their Privileges, Freedoms or Franchises, upon any account whatsoever, without a due Tryal, and Judgment passed by Twelve good and lawful Men of his Neighbourhood first had: And that in all Causes to be tryed, and in all Tryals, the Person or Persons, arrained may except against any of the said Neighbourhood, without any Reason rendered, (not exceeding Thirty five) and in case of any valid reason alledged, against every Person nominated for that Service.

CHAPTER XVIII.

AND that no Proprietor, Freeholder, Freedenison, or Inhabitant in the said Province, shall be attached, arrested, or imprisoned, for or by reason of a Debt, Duty, or other Thing whatsoever (Cases Felonious, Criminal and Treasonable excepted) before he or she have personal Summon, or Summons, left at his or her last dwelling Place, if in the said Province, by some legal authorized Officer, constituted and appointed for that Purpose, to appear in some Court of Judicature for the said Province, with a full and plain account of the Cause or Thing in demand, as also the Name or Names of the Person or Persons at whose suit, and the Court where he is to appear,

and that he hath at least Fourteen Days Time to appear and answer the said suit, if he or she live or inhabit within Forty Miles *English* of the said Court, and if at a further distance, to have for every Twenty Miles, two Days more, for his and their appearance, and so proportionably for a larger distance of space.

That upon the Recording of the Summons, and non appearance of such Person and Persons, a Writ or attachment shall or may be issued out to arrest, or attach the Person or Persons of such defaulters, to cause his or their Appearance in such Court, returnable at a Day certain, to answer the Penalty or Penalties, in such Suit or Suits; and if he or they shall be condemned by legal Tryal and Judgment, the Penalty or Penalties shall be paid and satisfied out of his or their real or personal Estate so condemned, or cause the Person or Persons so condemned, to lie in execution till Satisfaction of the Debt and Damages be made. PROVIDED ALWAYS, if such Person or Persons so condemned, shall pay and deliver such Estate, Goods and Chattles which he or any other Person hath for his or their use, and shall solemnly declare and aver, that he or they have not any further Estate, Goods, or Chattles wheresoever, to satisfy the Person or Persons, (at whose Suit, he or they are condemned) their respective Judgments, and shall also bring and produce three other Persons as compurgators, who are well known and of honest Reputation, and approved of by the Commissioners of that Division, where they dwell or inhabit, which shall in such open Court, likewise solemnly declare and aver, that they believe in their Consciences, such Person and Persons so condemned, have not werewith [*sic*] further to pay the said Condemnation or Condemnations, he or they shall be thence forthwith discharged from their said imprisonment, any Law or Custom to the contrary thereof, heretofore in the said Province, notwithstanding. And upon such Summons and Default of appearance, recorded as aforesaid, and such Person and Persons not appearing within Forty Days after, it shall and may be lawful for such Court of Judicature to proceed to tryal, of twelve lawful Men to Judgment, against such Defaulters, and issue forth Execution against his or their Estate, real and personal, to satisfy such Penalty or Penalties, to such Debt and Damages so Recorded, as far as it shall or may extend.

CHAPTER XIX.

THAT there shall be in every Court, three Justices or Commissioners, who shall sit with the twelve Men of the Neighbourhood, with them to hear all Causes, and to assist the said Twelve Men of the Neighbourhood in Case of

Law; and that they the said Justices shall pronounce such Judgment as they shall receive from, and be directed by the said Twelve Men, in whom only the Judgment resides, and not otherwise.

And in Case of their neglect and refusal, that then one of the Twelve, by consent of the rest, pronounce their own Judgment as the Justices should have done.

And if any Judgment shall be past, in any Case Civil or Criminal, by any other Person or Persons, or any other way, then according to this Agreement and Appointment, it shall be held null and void, and such Person or Persons so presuming to give Judgment, shall be severely Fin'd, and upon complaint made to the General Assembly, by them be declared incapable of any Office or Trust within this Province.

CHAPTER XX.

THAT in all Matters and Causes, Civil and Criminal, Proof is to be made by the solemn and plain averment, of at least two honest and reputable Persons; and in Case that any Person or Persons shall bear false Witness, and bring in his or their Evidence, contrary to the Truth of the Matter as shall be made plainly to appear, that then every such Person or Persons, shall in Civil Causes, suffer the Penalty which would be due to the Person or Persons he or they bear Witness against. And in Case any Witness or Witnesses, on the behalf of any Person or Persons, Indicted in a Criminal Cause, shall be found to have born False Witness for Fear, Gain, Malice, or Favour, and thereby hinder the due Execution of the Law, and deprive the suffering Person or Persons of their due Satisfaction, that then and in all other Cases of false Evidence, such Person or Persons, shall be first severely Fined, and next that he or they shall forever be disabled from being admitted in evidence, or into any Publick Office, Employment, or Service within this Province.

CHAPTER XXI.

THAT all and every Person and Persons whatsoever, who shall prosecute or prefer any Indictment or Information against others for any personal Injuries, or Matter Criminal, or shall Prosecute for any other Criminal Cause, (Treason, Murther, and Felony, only excepted) shall and may be Master of his own Process, and have full Power to forgive and remit the Person or Persons offending against him or herself only, as well before as after Judgment, and Condemnation, and Pardon and Remit the Sentence, Fine, and Punishment of the Person or Persons Offending, be it personal or

other whatsoever.

CHAPTER XXII.

THAT the Tryals of all Causes, Civil and Criminal, shall be heard and decided by the Virdict or Judgment of Twelve honest Men of the Neighbourhood, only to be summoned and presented by the Sheriff of that Division, or Propriety where the Fact or Trespass is committed; and that no Person or Persons shall be compelled to Fee any Attorney or Counciller to plead his Cause, but that all Persons have free Liberty to plead his own Cause, if he please: And that no Person nor Persons imprisoned upon any account whatsoever within this Province, shall be obliged to pay any Fees to the Officer or Officers of the said Prison, either when committed or discharged.

CHAPTER XXIII.

THAT in all publick Courts of Justice for Tryals of Causes, Civil or Criminal, any Person or Persons, Inhabitants of the said Province, may freely come into, and attend the said Courts, and hear and be present, at all or any such Tryals as shall be there had or passed, that Justice may not be done in a Corner nor in any covert manner, being intended and resolved, by the help of the Lord, and by these our Concessions and Fundamentals, that all and every Person and Persons Inhabiting the said Province, shall, as far as in us lies, be free from Oppression and Slavery.

New Jersey Grants, pp. 395–98.

12.1.3.6.bFundamental Constitutions for East New Jersey, 1683

XIX. That no Person or Persons within the said Province shall be taken and imprisoned, or be devised of his Freehold, free Custom or Liberty, or be outlawed or exiled, or any other Way destroyed; nor shall they be condemn'd or Judgment pass'd upon them, but by lawful Judgment of their Peers: Neither shall Justice nor Right be bought or sold, defered or delayed, to any Person whatsoever: In order to which by the Laws of the Land, all Tryals shall be by twelve Men, and as near as it may be, Peers and Equals, and of the Neighbourhood, and Men without just Exception. In Cases of Life there shall be at first Twenty four returned by the Sherriff for a Grand Inquest, of whom twelve at least shall be to find the Complaint to be true; and then the Twelve Men or Peers to be likewise returned, shall have the final Judgment; but reasonable Challenges shall be always admitted against the Twelve Men, or any of them: But the Manner of returning Juries shall

be thus, the Names of all the Freemen above five and Twenty Years of Age, within the District or Boroughs out of which the Jury is to be returned, shall be written on equal Pieces of Parchment and put into a Box, and then the Number of the Jury shall be drawn out by a Child under Ten Years of Age. And in all Courts Persons of all Perswasions may freely appear in their own Way, and according to their own Manner, and there personally plead their own Causes themselves, or if unable, by their Friends, no Person being allowed to take Money for pleading or advice in such Casas [*sic*]: And the first Process shall be the Exhibition of the Complaint in Court fourteen Days before the Tryal, and the Party complain'd against may be fitted for the same, he or she shall be summoned ten Days before, and a Copy of the Complaint delivered at their dwelling House: But before the Complaint of any Person be received, he shall solemnly declare in Court, that he believes in his Conscience his Cause is just. Moreover, every Man shall be first cited before the Court for the Place where he dwells, nor shall the Cause be brought before any other Court but by way of Appeal from Sentence of the first Court, for receiving of which Appeals, there shall be a Court consisting of eight Persons, and the Governor (protempore) President thereof, (*to wit*) four Proprietors and four Freemen, to be chosen out of the great Council in the following Manner, *viz*. the Names of Sixteen of the Proprietors shall be written on small pieces of Parchment and put into a Box, out of which by a Lad under Ten Years of Age, shall be drawn eight of them, the eight remaining in the Box shall choose four; and in like Manner shall be done for the choosing of four of the Freemen.

New Jersey Grants, pp. 163–64.

12.1.3.6.cConstitution, 1776

XVI. That all criminals shall be admitted to the same Privileges of Witnesses and Council, as their Prosecutors are or shall be entitled to.

…

XXII. That the Common Law of *England*, as well as so much of the Statute Law, as have been heretofore practised in this Colony, shall still remain in Force, until they shall be altered by a future Law of the Legislature, such Parts only excepted as are repugnant to the Rights and Privileges contained in this Charter; and that of Trial by Jury shall remain confirmed, as a Part of the Law of this Colony, without Repeal forever.

New Jersey Acts, pp. viii–ix.

12.1.3.7New York

12.1.3.7.aAct Declaring… Rights & Priviledges, 1691

That no Freeman shall be taken or imprisoned, or be deprived of his Freehold or Liberty, or free Customs, or OutLawed, or Exiled, or any other wayes destroyed; nor shall be passed upon, adjudged or condemned, but by the lawful Judgment of his Peers, and by the Laws of this Province.

Justice nor Right shall be neither Sold, Denyed or Delayed to any Person within this Province.

…

That no Man, of what Estate or Condition soever, shall be put out of his Lands, Tenements, nor taken, nor imprisoned, nor disinherited, nor banished, nor any ways destroyed or molested, without first being brought to answer by due course of Law.

…

That in all Cases Capital and Criminal, there shall be a grand Inquest who shall first present the Offence, and then Twelve Good Men of the Neighbourhood to Try the Offender; who, after his Plea to the Indictment, shall be allowed his reasonable Challanges.

New York Acts, pp. 17–18.

12.1.3.7.bConstitution, 1777

XIII. And this Convention doth further, in the Name, and by the Authority of the good People of this State, ORDAIN, DETERMINE, AND DECLARE, That no Member of this State shall be disfranchised, or deprived of any the Rights or Privileges secured to the Subjects of this State by this Constitution, unless by the Law of the Land, or the Judgment of his Peers.

…

XXXIV. AND IT IS FURTHER ORDAINED, That in every Trial on Impeachment or Indictment for Crimes or Misdemeanors, the Party impeached or indicted, shall be allowed Counsel, as in civil Actions.

…

XLI. And this Convention doth further ORDAIN, DETERMINE, AND DECLARE, in the Name and by the Authority of the good People of this State, That Trial by Jury, in all Cases in which it hath heretofore been used in the Colony of *New-York*, shall be established, and remain inviolate for ever. And that no Acts of Attainder shall be passed by the Legislature of

this State, for Crimes other than those committed before the Termination of the present War; and that such Acts shall not work a Corruption of Blood. And further, that the Legislature of this State shall at no Time hereafter, Institute any new Court or Courts, but such as shall proceed according to the Course of the Common Law.

New York Laws, vol. 1, pp. 8, 12, 14.

12.1.3.7.cBill of Rights, 1787

Second, That no Citizen of this State shall be taken or imprisoned, or be disseised of his or her Freehold, or Liberties, or Free-Customs: or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful Judgment of his or her Peers, or by due Process of Law.

Third, That no Citizen of this State shall be taken or imprisoned for any Offence, upon Petition or Suggestion, unless it be by indictment or Presentment of good and lawful Men of the same Neighbourhood where such Deeds be done, in due Manner, or by due Process of Law.

Fourth, That no Person shall be put to answer without Presentment before Justices, or Matter of Record, or due Process of Law, according to the Law of the Land; and if any Thing be done to the Contrary, it shall be void in Law, and holden for Error.

Fifth, That no Person, of what Estate or Condition soever, shall be taken, or imprisoned, or disinherited, or put to death, without being brought to answer by due Process of Law; and that no Person shall be put out of his or her Franchise or Freehold, or lose his or her Life or Limb, or Goods and Chattels, unless he or she be duly brought to answer, and be forejudged of the same, by due Course of Law; and if any Thing be done contrary to the same, it shall be void in Law, and holden for none.

Sixth, That neither Justice nor Right shall be sold to any Person, nor denied, nor deferred; and that Writs and Process shall be granted freely and without Delay, to all Persons requiring the same; and nothing from henceforth shall be paid or taken for any Writ or Process, but the accustomed Fees for writing, and for the Seal of the same Writ or Process; and all Fines, Duties and Impositions whatsoever, heretofore taken or demanded, under what Name or Description soever, for, or upon granting any Writs, Inquests, Commissions, or Process to Suitors in their Causes, shall be, and hereby are abolished.

Seventh, That no Citizens of this State shall be fined or amerced without reasonable Cause, and such Fine or Amerciament shall always be according

to the Quantity of his or her Trespass or Offence, and saving to him or her his or her Contenement; *That is to say*, Every Freeholder saving his Freehold, a Merchant saving his Merchandize, and a mechanic saving the Implements of his Trade.

New York Laws, vol. 2, pp. 1–2.

12.1.3.8North Carolina

12.1.3.8.aFundamental Constitutions of Carolina, 1669

69th. Every jury shall consist of twelve men; and it shall not be necessary they should all agree, but the verdict shall be according to the consent of the majority.

…

111th. No cause whether civil or criminal, of any freeman, shall be tried in any court of judicature, without a jury of his peers.

North Carolina State Records, pp. 145, 149.

12.1.3.8.bDeclaration of Rights, 1776

Sect. VII. That in all criminal Prosecutions every Man has a Right to be informed of the Accusation against him, and to confront the Accusers and Witnesses with other Testimony, and shall not be compelled to give Evidence against himself.

Sect. VIII. That no Freeman shall be put to answer any criminal Charge, but by Indictment, Presentment, Impeachment.

Sect. IX. That no Freeman shall be convicted of any Crime, but by the unanimous Verdict of a Jury of good and lawful Men, in open Court as heretofore used.

North Carolina Laws, p. 275.

12.1.3.9Pennsylvania

12.1.3.9.aLaws Agreed Upon in England, 1682

VIII. That all **Tryals** shall be by **Twelve Men,** and as near as may be, *Peers* or *Equals*, and of the *Neighborhood*, and men without just Exception. In

cases of *Life*, there shall be first **Twenty Four** returned by the Sheriff for a **Grand Inquest,** of whom *Twelve* at least shall find the Complaint to be true, and then the **Twelve Men** or *Peers*, to be likewise returned by the Sheriff, shall have the *final Judgment*. But reasonable *Challenges* shall be alwayes admitted against the said *Twelve Men*, or any of them.

Pennsylvania Frame, p. 8.

12.1.3.9.bProvincial Laws, 1700

19. Noe F*reeman* to be *Imprisoned*, or Disseized, Outlaw'd or Exiled, or otherwise hurt, T*ryed*, or *Condemned*, but by the *judgement* of his *Twelve* Equalls, or *Laws* of this *Province*.

Pennsylvania Abstract, p. 5.

12.1.3.9.c Constitution, 1776

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

…

IX. That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.

…

CHAPTER II.

PLAN *or* FRAME *of* GOVERNMENT.

…

SECT. 25. Trial shall be by jury as heretofore: And it is recommended to the legislature of this state, to provide by law against every corruption or partiality in the choice, return, or appointment of juries.

Pennsylvania Acts, McKean, pp. ix–x, xvii.

12.1.3.9.d Constitution, 1790

ARTICLE IX.

… Sect. IX. That, in all criminal prosecutions, the accused hath a right to be heard by himself and his council, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favour, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage: That he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers, or the law of the land.

Pennsylvania Acts, Dallas, p. xxxiv.

12.1.3.10Rhode Island: Code of Laws, 1647

1. That no person, in this Colony, shall be taken or imprisoned, or be disseized of his lands or liberties, or be exiled, or any otherwise molested or destroyed, but by the lawful judgment of his peers, or by some known law, and according to the letter of it, ratified and confirmed by the major part of the General Assembly, lawfully met and orderly managed.

Rhode Island Code, p. 12.

12.1.3.11South Carolina

12.1.3.11.aFundamental Constitutions of Carolina, 1669

69th. Every jury shall consist of twelve men; and it shall not be necessary they should all agree, but the verdict shall be according to the consent of the majority.

…

111th. No cause whether civil or criminal, of any freeman, shall be tried in any court of judicature, without a jury of his peers.

North Carolina State Records, pp. 145, 149.

12.1.3.11.bConstitution, 1778

XLI. That no Freeman of this State be taken, or imprisoned or desseized of his Freehold, Liberties or Privileges, or outlawed, or exiled, or in any Manner destroyed, or deprived of his Life, Liberty, or Property, but by the Judgment of his Peers, or by the Law of the Land.

South Carolina Constitution, p. 15.

12.1.3.11.c Constitution, 1790

ARTICLE IX.

…

Section 2. No freeman of this state shall be taken, or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land; nor shall any bill of the attainder, ex post facto law or law impairing the obligation of contracts ever be passed by the legislature of this state.

…

Section 6. The trial by jury as heretofore used in this state, and the liberty of the press, shall be for ever inviolably preserved.

South Carolina Laws, App., pp. 41–42.

12.1.3.12Vermont: Constitution, 1777

CHAPTER I

…

10. That in all Prosecutions for criminal offences, a Man hath a Right to be heard by himself and his Counsel, — to demand the Cause and Nature of his Accusation, — to be confronted with the Witnesses, — to call for Evidence in his Favor, and a speedy public Trial, by an impartial Jury of the Country, without the unanimous Consent of which Jury, he cannot be [fo]und guilty; nor can he be compelled to give Evidence against himself; nor can any man be justly deprived of his Liberty, except by the Laws of the Land, or the Judgment of his Peers.

Vermont Acts, p. 4.

12.1.3.13Virginia: Declaration of Rights, 1776

VIII. THAT in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Virginia Acts, p. 33.

12.1.4OTHER TEXTS

12.1.4.1Statute of Westminster I, 1275

That notorious felons who are openly of evil fame and who refuse to put themselves upon inquests of felony at the suit of the King before his justices, shall be remanded to a hard and strong prison as befits those who refuse to abide by the common law of the land; but this is not to be

understood of persons who are taken upon light suspicion.

3 Edw. 1, c. 12.

12.1.4.2Magna Carta, 1297

No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

25 Edw. 1, c. 29.

12.1.4.3Petition of Right, 1627

3. And where alsoe by the Statute called the Great Charter of the liberties of England, it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customes or be outlawed or exiled or in any manner destroyed, but by the lawfull judgment of his peeres or by the law of the land.

4. And in the eight and twentith yeere of the raigne of King Edward the Third it was declared and enacted by authoritie of Parliament, that no man of what estate or condicion that he be, should be put out of his land or tenemente nor taken nor imprisoned nor disherited nor put to death without being brought to aunswere by due þcesse of lawe.

5. Neverthelesse against the tenor of the said statutes and other the good lawes and statutes of your realme to that end þvided, divers of your subjecte have of late been imprisoned without any cause shewed: And when for their deliverance they were brought before your justices by your Majesties writte of habeas corpus there to undergoe and receive as the court should order, and their keepers cōmaunded to certifie the causes of their detayner, no cause was certified, but that they were deteined by your Majesties speciall cōmaund signified by the lorde of your privie councell, and yet were returned backe to severall prisons without being charged with any thing to which they might make aunswere according to the lawe.

…

8. They doe therefore humblie pray your most excellent Majestie… that no freeman in any such manner as is before mencioned be imprisoned or deteined… .

3 Chas. 1, c. 1 (1628).

12.1.4.4English Bill of Rights, 1689

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

1 Will. & Mar., 2d sess., c. 2.

12.1.4.5Resolutions of the Stamp Act Congress, October 19, 1765

7th. That trial by jury is the inherent and invaluable right of every British subject in these colonies.

First Congress Journal, p. 28.

12.1.4.6Declaration and Resolves of the First Continental Congress, October 14, 1774

Resolved, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

Tansill, p. 3.

12.1.4.7Declaration of Independence, 1776

… For depriving us in many cases, of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offences… .

Continental Congress Papers, DNA.

12.1.4.8Northwest Territory Ordinance, 1787

Article the Second. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law; all persons shall be bailable unless for Capital Offences, where the proof shall be evident, or the presumption great; all fines shall be moderate, and no cruel or unusual punishments shall be inflicted; no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it Necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements bona fide and without fraud, previously formed.

Continental Congress Papers, DNA.

12.1.4.9Richard Henry Lee to Edmund Randolph, Proposed Amendments, October 16, 1787

… That the trial by jury in criminal and civil cases, and the modes prescribed by the common law for safety of life in criminal prosecutions shall be held sacred —… That such parts of the new constitution be amended as provide imperfectly for the trial of criminals by a jury of the vicinage, and to supply the omission of a jury trial in civil causes or disputes about property between individuals where by the common law is directed, and as generally it is secured by the several State constitutions. That such parts of the new constitution be amended, as permit the vexatious and oppressive calling of citizens from their own country, and all controversies between citizens of different states and between citizens and foreigners, to be tried in a far distant court, and as it may be without a jury, whereby in a multitude of cases, the circumstances of distance and expence may compel numbers to submit to the most unjust and illfounded demand… .

Virginia Gazette, December 22, 1787.

12.2DISCUSSION OF DRAFTS AND PROPOSALS

12.2.1THE FIRST CONGRESS

12.2.1.1June 8, 1789[3]

12.2.1.2August 15, 1789

Mr.Madison.

> [H]ave not the people been told that the rights of conscience, the freedom of speech, the liberty of the press, and trial by jury, were in jeopardy. That they ought not to adopt the constitution until those important rights were secured to them.
>
> Congressional Register, August 15, 1789, vol. 1, p. 216.

12.2.1.3August 17, 1789

12.2.1.3.a The committee then proceeded to consider the 7th proposition in the words following:

> Art. 3, Sect. 2. Strike out the whole of the 3d paragraph, and insert, “In all criminal prosecutions, the accused, shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.”

Mr.Burke

> Moved to amend this proposition in such a manner, as to leave it in the power of the accused to put off their trial to the next session, provided he made appear to the court, that the evidence of the witnesses, for whom process was granted, but not served, was material to his defence.

Mr.Hartley

> Said that in securing him the right of compulsatory process, the government did all it could, the remainder must lay in the discretion of the court.

Mr. Smith (of S.C.) Thought the regulation would come properly in, as part of the judicial system.

The question on mr. Burke's motion was taken, and lost. Affirmative 9, negative 41.

Mr. Livermore moved to alter the clause, so as to secure to the criminal the right of being tried in the state where the offence was committed.

Mr. Stone observed, that full provision was made on the subject in the subsequent clause.

On the question, mr. Livermore's motion was adopted.

Mr. Burke

Said he was not so much discouraged by the fate of his former motions, but what he would venture upon another, he therefore proposed to add to the clause, that no criminal prosecution should be had by way of information.

Mr. Hartley only requested the gentleman to look to the clause, and he would see the impropriety of inserting it in this place.

A desultory conversation rose, respecting the foregoing motion, and after some time mr. Burke withdrew it for the present.

The committee then arose, and reported progress, after which the house adjourned.

Congressional Register, August 17, 1789, vol. 2, pp. 228–29.

12.2.1.3.b Fourteenth Amendment — Art. 2 [3]. Sec. 3 [2], Strike out the whole of the 3d par. And insert — "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

This amendment passed.

The committee then rose and the house adjourned.

Daily Advertiser, August 18, 1789, p. 2, col. 4.

12.2.1.3.c Fourteenth amendment — Art, II [III]. Sec. 3 [2], strike out the whole of the 3d par. and insert — "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

This amendment passed.

The committee then rose and the house adjourned.

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

12.2.1.3.d 14th Amendment. Art. II [III]. Sec. 3d [2d], Strike out the whole of the 3d par. and insert: “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.”

Several amendments to this article were proposed, some of them were withdrawn and others negatived; and one only obtained, which respected the place of trial, which was to be in the State where the supposed crime was committed.

This amendment was then adopted.

The committee then arose and the house adjourned.

Gazette of the U.S., August 22, 1789, p. 250, col. 1.

12.2.1.4August 18, 1789

12.2.1.4.a The house again resolved itself into a committee of the whole on the subject of amendments, and took into consideration the 2d clause of the 7th proposition, in the words following, “The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment, or indictment, by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorised in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed.”

Mr. Burke

Moved to change the word “vicinage” into “district or county in which the

offence has been committed," he said this was conformable to the practice of the state of South Carolina, and he believed to most of the states in the union, it would have a tendency also to quiet the alarm entertained by the good citizens of many of the states for their personal security, they would no longer fear being dragged from one extremity of the state to the other for trial, at the distance of 3 or 400 miles.

Mr. Lee

Thought the word "vicinage" was more applicable than that of "district, or county," it being a term well understood by every gentleman of legal knowledge.

The question on mr. Burke's motion being put was negatived.

Mr. Burke then revived his motion for preventing prosecutions upon information, but on the question this was also lost.

The clause was now adopted without amendment.

Congressional Register, August 18, 1789, vol. 2, p. 233.

12.2.1.4.b The house then resolved inself into a committee of the whole on the subject of amendments.

Mr. Boudinot in the chair.

The committee took up the fifteenth amendment which is as follows.

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed."

Some inconsiderable amendments to this amendment were moved and lost, and the main question was carried.

Daily Advertiser, August 19, 1789, p. 2, cols. 2–3.

12.2.1.4.c Committee of the whole on the subject of amendments.

The committee took up the fifteenth amendment, which is

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right

of challenge, and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same state; and if it be committed in a place not within a state, the indictment and trial may be at such place or places as the law may have directed."

Mr. Burke moved to strike out "vicinage," and to insert "*county or district in which the offence has been committed.*" The gentleman enforced this motion by a variety of observations; and among others said that it was agreeable to the practice of the state he represented, and would give the constitution a more easy operation; that it was a matter of serious alarm to the good citizens of many of the States, the idea that they may be dragged from one part of the State perhaps 2 or 300 miles to the other for trial.

Mr. Gerry objected to the word "district" as too indefinite.

Mr. Sedgwick said, that he conceived that the proposed amendment is not so adequate to the gentleman's object as the word "vicinage"—the latter part of the clause is sufficient for the gentleman's purpose.

The motion was negatived.

Mr. Burketh [*sic;* then] proposed to add a clause to prevent prosecutions upon informations: This was objected to, as the object of the clause was to provide that high crime, &c. should be by presentment of a grand jury; but that other things should take the course heretofore practised. This motion was lost.

And then the paragraph was adopted.

Gazette of the U.S., August 22, 1789, p. 250, col. 1.

12.2.1.5August 21, 1789

12.2.1.5.a The house proceeded in its consideration of the amendments to the constitution reported by the committee of the whole, and took up the 2d clause of the 4th proposition.

Mr.Gerry

Then proposed to amend it by striking out these words, "public danger" and to insert foreign invasion; this being negatived, it was then moved to strike out the last clause, "and if it be committed, &c." to the end. This motion was carried, and the amendment was adopted.

Congressional Register, August 21, 1789, vol. 2, p. 243.

Congressional Register, August 21, 1789, Vol. I, p. 249.

12.2.1.5.b Mr. Gerry moved to strike out these words, “public danger,” to insert foreign invasion. This was negatived. It was then moved to strike out the last clause, “and if it be committed, &c.” to the end. This motion obtained, and the amendment as it then stood was adopted.

New-York Daily Gazette, August 24, 1789, p. 818, col. 3.

12.2.1.5.c 15th Amendment under consideration.

Mr. GERRY moved to strike out these words “public danger” to insert *foreign invasion*. This was negatived. It was then moved to strike out the last clause “and if it be committed, &c.” to the end. This motion obtained, and the amendment as it then stood adopted.

Gazette of the U.S., August 22, 1789, p. 250, col. 3.

12.2.2STATE CONVENTIONS

12.2.2.1Massachusetts, January 30, 1788

Mr. HOLMES… . It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of. Does the Constitution make provision for such a trial? I think not; for in a criminal process, a person shall not have a right to insist on a trial in the vicinity where the fact was committed, where a jury of the peers would, from their local situation, have an opportunity to form a judgment of the *character* of the person charged with the crime, and also to judge of the *credibility* of the witnesses. There a person must be tried by a jury of strangers; a jury who *may be* interested in his conviction; and where he *may*, by reason of the distance of his residence from the place of trial, be incapable of making such a defence, as he is, in justice, entitled to, and which he could avail himself of, if his trial was in the same county where the crime is said to have been committed.

…

But what makes the matter still more alarming is, that the mode of criminal process is to be pointed out by Congress, and they have no constitutional check on them, except that the trial is to be by *a jury:* but

who this jury is to be, how qualified, where to live, how appointed, or by what rules to regulate their procedure, we are ignorant of as yet: whether they are to live in the county where the trial is; whether they are to be chosen by certain districts, or whether they are to be appointed by the sheriff *ex officio;* whether they are to be for one session of the court only, or for a certain term of time, or for good behavior, or during pleasure, are matters which we are entirely ignorant of as yet.

The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet with his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told.

These are matters of by no means small consequence; yet we have not the smallest constitutional security that we shall be allowed the exercise of these privileges, neither is it made certain, in the Constitution, that a person charged with the crime shall have the privilege of appearing before the court or jury which is to try him.

…

Mr. GORE observed, in reply to Mr. Holmes, that it had been the uniform conduct of those in opposition to the proposed form of government, to determine, in every case where it is possible that the administrators thereof could do wrong, that they would do so, although it were demonstrable that such wrong would be against their own honor and interest, and productive of no advantage to themselves. On this principle alone have they determined that the trial by jury would be taken away in civil cases; when it had been clearly shown, that no words could be adopted, apt to the situation and customs of each state in this particular. Jurors are differently chosen in different states, and in point of qualification the laws of the several states are very diverse; not less so in the causes and disputes which are entitled to trial by jury. What is the result of this? That the laws of Congress may and will be conformable to the local laws in this particular, although the Constitution could not make a universal rule equally applying to the customs and statutes of the different states. Very few governments (certainly not this) can be interested in depriving the people of trial by jury, in questions of *meum et tuum*. In criminal cases alone are they interested to have the trial under their own control; and, in such cases, the Constitution expressly stipulates for trial by jury; but then, says the gentleman from Rochester, (Mr. Holmes,) to the safety of life it is

indispensably necessary the trial of crimes should be in the vicinity; and the vicinity is construed to mean county; this is very incorrect, and gentlemen will see the impropriety, by referring themselves to the different local divisions and districts of the several states. But further, said the gentleman, the idea that the jury coming from the neighborhood, and knowing the character and circumstances of the party in trial, is promotive of justice, on reflection will appear not founded in truth. If the jury judge from any other circumstances but what are part of the cause in question, they are not impartial. The great object is to determine on the real merits of the cause, uninfluenced by any personal considerations; if, therefore, the jury could be perfectly ignorant of the person in trial, a just decision would be more probable. From such motives did the wise Athenians so constitute the famed Areopagus, that, when in judgment, this court should sit at midnight, and in total darkness, that the decision might be on the thing, and not on the person… .

Mr. DAWES said, he did not see that the right of trial by jury was taken away by the article. The word *court* does not, either by a popular or technical construction, exclude the use of a jury to try facts. When people, in common language, talk of a trial at the *Court* of Common Pleas, or the Supreme Judicial *Court*, do they not include all the branches and members of such court — the *jurors* as well as the judges? They certainly do, whether they mention the jurors expressly or not. Our state legislators have construed the word *court* in the same way; for they have given appeals from a justice of peace to the Court of Common Pleas, and from thence to the Supreme Court, without saying any thing of the jury; but in cases which, almost time out of mind, have been tried without jury, there the jurisdiction is given expressly to the justices of a particular court, as may be instanced by suits upon the absconding act, so called.

Gentlemen have compared the article under consideration to that power which the British claimed, and we resisted, at the revolution; namely, the power of trying the Americans without a jury. But surely there was no parallel in the cases; it was criminal cases in which they attempted to make this abuse of power. Mr. D. mentioned one example of this, which, though young, he well remembered; and that was the case of Nickerson, the pirate, who was tried without a jury, and whose judges were the governors of Massachusetts and of some neighboring provinces, together with Admiral Montague, and some gentlemen of distinction. Although this trial was without a jury, yet, as it was a trial upon the civil law, there was not so

much clamor about it as otherwise there might have been; but still it was disagreeable to the people, and was one of the then complaints. But the trial by jury was not attempted to be taken from civil causes. It was no object of power, whether one subject's property was lessened, while another's was increased; nor can it be now an object with the federal legislature. What interest can they have in constituting a judiciary, to proceed in civil causes without a trial by jury? In criminal causes, by the proposed government, there must be a jury. It is asked, Why is not the Constitution as explicit in securing the right of jury in civil as in criminal cases? The answer is, Because it was out of the power of the Convention. The several states differ so widely in their modes of trial, some states using a jury in causes wherein other states employ only their judges, that the Convention have very wisely left it to the federal legislature to make such regulations as shall, as far as possible, accommodate the whole. Thus our own state constitution authorizes the General Court to erect judicatories, but leaves the nature, number, and extent of them, wholly to the discretion of the legislature… .

Elliot, vol. 2, pp. 109–14.

12.2.2.2New York, July 2, 1788

Mr. TREDWELL… . I could have wished, sir, that a greater caution had been used to secure to us the freedom of election, a sufficient and responsible representation, the freedom of the press, and the trial by jury both in civil and criminal cases.

… What better provisions have we made for mercy, when a man, for ignorantly passing a counterfeit continental note, or bill of credit, is liable to be dragged to a distant county, two or three hundred miles from home, deprived of the support and assistance of friends, to be tried by a strange jury, ignorant of his character, ignorant of the character of the witnesses, unable to contradict any false testimony brought against him by their own knowledge of facts, and with whom the prisoner being unacquainted, he must be deprived totally of the benefit of his challenge? and besides all that, he may be exposed to lose his life, merely for want of property to carry his witnesses to such a distance; and after all this solemn farce and mockery of a trial by jury, if they should acquit him, it will require more ingenuity than I am master of, to show that he does not hold his life at the will and pleasure of the Supreme Court, to which an appeal lies, and consequently

depend on the tender mercies, perhaps, of the wicked, (for judges may be wicked;) and what those tender mercies are, I need not tell you. You may read them in the history of the Star Chamber Court in England, and in the courts of Philip, and in your Bible.

Elliot, vol. 2, pp. 399–400.

12.2.2.3North Carolina

12.2.2.3.aJuly 28, 1788

Mr. IREDELL… . The greatest danger from ambition is in criminal cases. But here they have no option. The trial must be by jury, in the state wherein the offence is committed; and the writ of *habeas corpus* will in the mean time secure the citizen against arbitrary imprisonment, which has been the principal source of tyranny in all ages.

…

Mr. J. M'DOWALL. Mr. Chairman, the learned gentleman made use of several arguments to induce us to believe that the trial by jury, in civil cases, was not in danger, and observed that, in criminal cases, it is provided that the trial is to be in the state where the crime was committed. Suppose a crime is committed at the Mississippi; the man may be tried at Edenton. They ought to be tried by the people of the vicinage; for when the trial is at such an immense distance, the principal privilege attending the trial by jury is taken away; therefore the trial ought to be limited to a district or certain part of the state. It has been said, by the gentleman from Edenton, that our representatives will have virtue and wisdom to regulate all these things. But it would give me much satisfaction, in a matter of this importance, to see it absolutely secured. The depravity of mankind militates against such a degree of confidence. I wish to see every thing fixed.

Gov. JOHNSTON. Mr. Chairman, the observations of the gentleman last up confirm what the other gentleman said. I mean that, as there are dissimilar modes with respect to the trial by jury in different states, there could be no general rule fixed to accommodate all. He says that this clause is defective, because the trial is not to be by a jury of the vicinage. Let us look at the state of Virginia, where, as long as I have known it, the laws have been executed so as to satisfy the inhabitants, and, I believe, as well as in any part of the Union. In that country, juries are summoned every day

from the by-standers. We may expect less partiality when the trial is by strangers; and were I to be tried for my property or life, I would rather be tried by disinterested men, who were not biased, than by men who were perhaps intimate friends of my opponent. Our mode is different from theirs; but whether theirs be better than ours or not, is not the question. It would be improper for our delegates to impose our mode upon them, or for theirs to impose their mode upon us. The trial will probably be, in each state, as it has been hitherto used in such state, or otherwise regulated as conveniently as possible for the people. The delegates who are to meet in Congress will, I hope, be men of virtue and wisdom. If not, it will be our own fault. They will have it in their power to make necessary regulations to accommodate the inhabitants of each state. In the Constitution, the general principles only are laid down. It will be the object of the future legislation to Congress to make such laws as will be most convenient for the people… .

Mr. BLOODWORTH. Mr. Chairman, the footing on which the trial by jury is, in the Constitution, does not satisfy me. Perhaps I am mistaken; but if I understand the thing right, the trial by jury is taken away. If the Supreme Federal Court has jurisdiction both as to law and fact, it appears to me to be taken away. The honorable gentleman who was in the Convention told us that the clause, as it now stands, resulted from the difficulty of fixing the mode of trial. I think it was easy to have put it on a secure footing. But, if the genius of the people of the United States is so dissimilar that our liberties cannot be secured, we can never hang long together. Interest is the band of social union; and when this is taken away, the Union itself must dissolve.

Mr. MACLAINE. Mr. Chairman, I do not take the interest of the states to be so dissimilar; I take them to be all nearly alike, and inseparably connected. It is impossible to lay down any constitutional rule for the government of all the different states in each particular. But it will be easy for the legislature to make laws to accommodate the people in every part of the Union, as circumstances may arise. Jury trial is not taken away in such cases where it may be found necessary. Although the Supreme Court has cognizance of the appeal, it does not follow but that the trial by jury may be had in the court below, and the testimony transmitted to the Supreme Court, who will then finally determine, on a review of all the circumstances. This is well known to be the practice in some of the states. In our own state, indeed, when a cause is instituted in the county court, and afterwards there is an appeal upon it, a new trial is had in the superior court, as if no trial had

been before. In other countries, however, when a trial is had in an inferior court, and an appeal is taken, no testimony can be given in the court above, but the court determines upon the circumstances appearing upon the record. If I am right, the plain inference is, that there may be a trial in the inferior courts, and that the record, including the testimony, may be sent to the Supreme Court. But if there is a necessity for a jury in the Supreme Court, it will be a very easy matter to empanel a jury at the bar of the Supreme Court, which may save great expense, and be very convenient to the people. It is impossible to make every regulation at once. Congress, who are our own representatives, will undoubtedly make such regulations as will suit the convenience and secure the liberty of the people.

Mr. IREDELL declared it as his opinion that there might be juries in the Superior Court as well as in the inferior courts, and that it was in the power of Congress to regulate it so.

Elliot, vol. 4, pp. 145, 149–52.

12.2.2.3.bJuly 29, 1788

Mr. SPENCER… . The trial by jury has been also spoken of. Every person who is acquainted with the nature of liberty need not be informed of the importance of this trial. Juries are called the bulwarks of our rights and liberty; and no country can ever be enslaved as long as those cases which affect their lives and property are to be decided, in a great measure, by the consent of twelve honest, disinterested men, taken from the respectable body of yeomanry. It is highly improper that any clause which regards the security of the trial by jury should be any way doubtful. In the clause that has been read, it is ascertained that criminal cases are to be tried by jury in the states where they are committed. It has been objected to that clause, that it is not sufficiently explicit. I think that it is not. It was observed that one may be taken to a great distance. One reason of the resistance to the British government was, because they required that we should be carried to the country of Great Britain, to be tried by juries of that country. But we insisted on being tried by juries of the vicinage, in our own country. I think it therefore proper that something explicit should be said with respect to the vicinage.

With regard to that part, that the Supreme Court shall have appellate jurisdiction both as to law and fact, it has been observed that, though the federal court might decide without a jury, yet the court below, which tried it, might have a jury. I ask the gentleman what benefit would be received in

the suit by having a jury trial in the court below, when the verdict is set aside in the Supreme Court. It was intended by this clause that the trial by jury should be suppressed in the superior and inferior courts. It has been said, in defence of the omission concerning the trial by jury in civil cases, that one general regulation could not be made; that in several cases the constitution of several states did not require a trial by jury,—for instance, in cases of equity and admiralty,—whereas in others it did, and that, therefore, it was proper to leave this subject at large. I am sure that, for the security of liberty, they ought to have been at the pains of drawing some line. I think that the respectable body who formed the Constitution should have gone so far as to put matters on such a footing as that there should be no danger. They might have provided that all those cases which are now triable by a jury should be tried in each state by a jury, according to the mode usually practiced in such state. This would have been easily done, if they had been at the trouble of writing five or six lines. Had it been done, we should have been entitled to say that our rights and liberties were not endangered. If we adopt this clause as it is, I think, notwithstanding what gentlemen have said, that there will be danger. There ought to be some amendments to it, to put this matter on a sure footing. There does not appear to me to be any kind of necessity that the federal court should have jurisdiction in the body of the country. I am ready to give up that, in the cases expressly enumerated, an appellate jurisdiction (except in one or two instances) might be given. I wish them also to have jurisdiction in maritime affairs, and to try offences committed on the high seas… .

…

Mr. MACLAINE… . But the gentleman seems to be most tenacious of the judicial power of the states. The honorable gentleman must know, that the doctrine of reservation of power not relinquished, clearly demonstrates that the judicial power of the states is not impaired. He asks, with respect to the trial by jury, “When the cause has gone up to the superior court, and the verdict is set aside, what benefit arises from having had a jury trial in the inferior court?” I would ask the gentleman, “What is the reason, that, on a special verdict or case agreed, the decision is left to the court?” There are a number of cases where juries cannot decide. When a jury finds the fact specially, or when it is agreed upon by the parties, the decision is referred to the court. If the law be against the party, the court decides against him; if the law be for him, the court judges accordingly. He, as well as every gentleman here, must know that, under the Confederation, Congress set

aside juries. There was an appeal given to Congress: did Congress determine by a jury? Every party carried his testimony in writing to the judges of appeal, and Congress determined upon it.

…

Mr. SPENCER… . I contend that there should be a bill of rights, ascertaining and securing the great rights of the states and people. Besides my objection to the revision of facts by the federal court, and the insecurity of jury trial, I consider the concurrent jurisdiction of those courts with the state courts as extremely dangerous… .

…

Mr. IREDELL… . In criminal cases, however, no latitude ought to be allowed. In these the greatest danger from any government subsists, and accordingly it is provided that there shall be a trial by jury, in all such cases, in the state wherein the offence is committed. I thought the objection against the want of a bill of rights had been obviated unanswerably. It appears to me most extraordinary. Shall we give up anything but what is positively granted by that instrument? It would be the greatest absurdity for any man to pretend that, when a legislature is formed for a particular purpose, it can have any authority but what is so expressly given to it, any more than a man acting under a power of attorney could depart from the authority it conveyed to him, according to an instance which I stated when speaking on the subject before. As for example:—if I had three tracts of land, one in Orange, another in Caswell, and another in Chatham, and I gave a power of attorney to a man to sell the two tracts in Orange and Caswell, and he should attempt to sell my land in Chatham, would any man of common sense suppose he had authority to do so? In like manner, I say, the future Congress can have no right to exercise any power but what is contained in that paper. Negative words, in my opinion, could make the matter no plainer than it was before. The gentleman says that unalienable rights ought not to be given up. Those rights which are unalienable are not alienated. They still remain with the great body of the people. If any right be given up that ought not to be, let it be shown. Say it is a thing which affects your country, and that it ought not to be surrendered: this would be reasonable. But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without

usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

Mr. BLOODWORTH. Mr. Chairman, I have listened with attention to the gentleman's arguments; but whether it be for want of sufficient attention, or from the grossness of my ideas, I cannot be satisfied with his defence of the omission, with respect to the trial by jury. He says that it would be impossible to fall on any satisfactory mode of regulating the trial by jury, because there are various customs relative to it in the different states. Is this a satisfactory cause for the omission? Why did it not provide that the trial by jury should be preserved in civil cases? It has said that the trial should be by jury in criminal cases; and yet this trial is different in its manner in criminal cases in the different states. If it has been possible to secure it in criminal cases, notwithstanding the diversity concerning it, why has it not been possible to secure it in civil cases? I wish this to be cleared up… .

…

Mr. IREDELL. Mr. Chairman, I hope some other gentleman will answer what has been said by the gentlemen who have spoken last. I only rise to answer the question of the member from New Hanover—which was, if there was such a difficulty, in establishing the trial by jury in civil cases, that the Convention could not concur in any mode, why the difficulty did not extend to criminal cases? I beg leave to say, that the difficulty, in this case, does not depend so much on the mode of proceeding, as on the difference of the subjects of controversy, and the laws relative to them… .

We have been told, and I believe this was the real reason, why they could not concur in any general rule. I have great respect for the characters of those gentlemen who formed the Convention, and I believe they were not capable of overlooking the importance of the trial by jury, much less of designedly plotting against it. But I fully believe that the real difficulty of the thing was the cause of the omission. I trust sufficient reasons have been offered, to show that it is in no danger. As to criminal cases, I must observe that the great instrument of arbitrary power is criminal prosecutions. By the privileges of *habeas corpus*, no man can be confined without inquiry; and if it should appear that he has been committed contrary to law, he must be discharged. That diversity which is to be found in civil controversies, does not exist in criminal cases. That diversity which contributes to the security of property in civil cases, would have pernicious effects in criminal ones.

There is no other safe mode to try these but by a jury. If any man had the means of trying another his own way, or were it left to the control of arbitrary judges, no man would have that security for life and liberty which every freeman ought to have. I presume that in no state on the continent is a man tried on a criminal accusation but by a jury. It was necessary, therefore, that it should be fixed, in the Constitution, that the trial should be by jury in criminal cases; and such difficulties did not occur in this as in the other case… .

Elliot, vol. 4, pp. 154–55, 162, 163–64, 166–67, 170–71.

12.2.2.4Pennsylvania

12.2.2.4.aNovember 30, 1787

Mr. Hartley… . Even on that principle, however, it has occasionally been found necessary to make laws for the security of the subject — a necessity that has produced the writ of habeas corpus, which affords an easy and immediate redress for the unjust imprisonment of the person, and the trial by jury, which is the fundamental security for every enjoyment that is valuable in the contemplation of a freeman. These advantages have not been obtained by the influence of a bill of rights, which after all we find is an instrument that derives its validity only from the sanction and ratification of the prince. How different then is our situation from the circumstances of the British nation?

McMaster & Stone, p. 290.

12.2.2.4.bDecember 11, 1787

Mr. WILSON… . We have been told, sir, by the honorable member from Fayette, (Mr. Smilie,) “that the trial by jury was intended to be given up, and the civil law was intended to be introduced into its place, in civil cases.”

Before a sentiment of this kind was hazarded, I think, sir, the gentleman ought to be prepared with better proof in its support than any he has yet attempted to produce. It is a charge, sir, not only unwarrantable, but cruel: the idea of such a thing, I believe, never entered into the mind of a single member of that Convention; and I believe further, that they never suspected there would be found, within the United States, a single person that was

capable of making such a charge. If it should be well founded, sir, they must abide by the consequences; but if (as I trust it will fully appear) it is ill founded, then he or they who make it ought to abide by the consequences.

Trial by jury forms a large field for investigation, and numerous volumes are written on the subject; those who are well acquainted with it may employ much time in its discussion; but in a country where its excellences are so well understood, it may not be necessary to be very prolix in pointing them out. For my part, I shall confine myself to a few observations in reply to the objections that have been suggested.

The member from Fayette (Mr. Smilie) has labored to infer that, under the Articles of Confederation, the Congress possessed no appellate jurisdiction; but this being decided against him by the words of that instrument, by which is granted to Congress the power of "establishing courts for receiving, and determining finally, appeals in all cases of capture, he next attempts a distinction, and allows the power of appealing from the decisions of the judges, but not from the verdict of a jury; but this is determined against him also by the practice of the states; for, in every instance which has occurred, this power has been claimed by Congress, and exercised by the Courts of Appeals. But what would be the consequence of allowing the doctrine for which he contends? Would it not be in the power of a jury, by their verdict, to involve the whole Union in a war? They may condemn the property of a neutral, or otherwise infringe the law of nations, in this case, ought their verdict to be without revisal? Nothing can be inferred from this to prove that trials by jury were intended to be given up. In Massachusetts, and all the Eastern States, their causes are tried by juries, though they acknowledge the appellate jurisdiction of Congress.["]

I think I am not now to learn the advantages of a trial by jury. It has excellences that entitle it to a superiority over any other mode, in cases to which it is applicable.

Where jurors can be acquainted with the characters of the parties and the witnesses,—where the whole cause can be brought within their knowledge and their view, — I know no mode of investigation equal to that by a jury: they hear every thing that is alleged; they not only hear the words, but they see and mark the features of the countenance; they can judge of weight due to such testimony; and moreover, it is a cheap and expeditious manner of distributing justice. There is another advantage annexed to the trial by jury; the jurors may indeed return a mistaken or illfounded verdict, but their errors cannot be systematical.

Let us apply these observations to the objects of the judicial department, under this Constitution. I think it has been shown, already, that they all extend beyond the bounds of any particular state; but further, a great number of the civil causes there enumerated depend either upon the law of nations, or the marine law, that is, the general law of mercantile countries. Now, sir, in such cases, I presume it will not be pretended that this mode of decision ought to be adopted; for the law with regard to them is the same here as in every other country, and ought to be administered in the same manner. There are instances in which I think it highly probable that the trial by jury will be found proper; and if it is highly probable that it will be found proper, is it not equally probable that it will be adopted? There may be causes depending between citizens of different states; and as trial by jury is known and regarded in all the states, they will certainly prefer that mode of trial before any other. The Congress will have the power of making proper regulations on this subject, but it was impossible for the Convention to have gone minutely into it; but if they could, it must have been very improper, because alterations, as I observed before, might have been necessary; and whatever the Convention might have done would have continued unaltered, unless by an alteration of the Constitution. Besides, there was another difficulty with regard to this subject. In some of the states they have courts of chancery, and other appellate jurisdictions, and those states are as attached to that mode of distributing justice as those that have none are to theirs.

I have desired, repeatedly, that honorable gentlemen, who find fault, would be good enough to point out what they deem to be an improvement. The member from Westmoreland (Mr. Findley) tells us that the trial between citizens of different states ought to be by a jury of that state in which the cause of action rose. Now, it is easy to see that, in many instances, this would be very improper and very partial; for, besides the different manner of collecting and forming juries in the several states, the plaintiff comes from another state; he comes a stranger, unknown as to his character or mode of life, while the other party is in the midst of his friends, or perhaps his dependents. Would a trial by jury, in such a case, insure justice to the stranger? But again: I would ask that gentleman whether, if a great part of his fortune was in the hands of some person in Rhode Island, he would wish that his action to recover it should be determined by a jury of that country, under its present circumstances.

The gentleman from Fayette (Mr. Smilie) says that, if the Convention

found themselves embarrassed, at least they might have done thus much—they should have declared that the substance should be secured by Congress. This would be saying nothing unless the cases were particularized.

Mr. SMILIE. I said the Convention ought to have declared that the legislature should establish the trial by jury by proper regulations.

Mr. WILSON. The legislature shall establish it by proper regulations! So, after all, the gentleman has landed us at the very point from which we set out. He wishes them to do the very thing they have done—to leave it to the discretion of Congress. The fact, sir, is nothing more could be done.

It is well known that there are some cases that should not come before juries; there are others, that, in some of the states, never come before juries, and in those states where they do come before them, appeals are found necessary, the facts reexamined, and the verdict of the jury sometimes is set aside; but I think, in all cases where the cause has come originally before a jury, that the last examination ought to be before a jury likewise.

The power of having appellate jurisdiction, as to facts, has been insisted upon as a proof, "that the Convention *intended* to give up the trial by jury in civil cases, and to introduce the civil law." I have already declared my own opinion on this point, and have shown not merely that it is founded on reason and authority;—the express declaration of Congress (*Journals of Congress*, March 6, 1779) is to the same purpose. They insist upon this power, as requisite to preserve the peace of the Union; certainly, therefore, it ought always to be possessed by the head of the Confederacy. We are told, as an additional proof, that the trial by jury was intended to be given up; "that appeals are unknown to the common law; that the term is a civil-law term, and with it the civil law is intended to be introduced." I confess I was a good deal surprised at this observation being made; for Blackstone, in the very volume which the honorable member (Mr. Smilie) had in his hand, and read us several extracts from, has a chapter entitled "Of Proceeding in the Nature of Appeals," — and in that chapter says, that the principal method of redress for erroneous judgments, in the king's courts of record, is by writ of error to some superior "*court of appeal.*" (3 *Blackstone*, 406.) Now, it is well known that his book is a commentary upon the common law. Here, then, is a strong refutation of the assertion, "that appeals are unknown to the common law."

I think these were all the circumstances adduced to show the truth of the assertion, that, in this Constitution, the trial by jury was *intended* to be

given up by the late Convention in framing it. Has the assertion been proved? I say not: and the allegations offered, if they apply at all, apply in a contrary direction. I am glad that this objection has been stated, because it is a subject upon which the enemies of this Constitution have much insisted. We have now had an opportunity of investigating it fully; and the result is, that there is no foundation for the charge, but it must proceed from ignorance, or something worse.

Elliot, vol. 2, pp. 515–19.

12.2.2.4.c December 12, 1787

… Mr. Whitehill then read, and offered as the ground of a motion for adjourning to some remote day the consideration of the following articles, which, he said, might either be taken collectively, as a bill of rights, or, separately, as amendments to the general form of government proposed…

…

3. That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation, as well in the federal courts, as in those of the several States; to be heard by himself or his counsel; to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial, by an impartial jury of the vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

McMaster & Stone, p. 421.

12.2.2.4.d Address and Reasons of Dissent of the Minority of the Pennsylvania Convention, December 12, 1787

The first consideration that this review suggests, is the omission of a bill of rights, ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have the controul. The principal of which are the rights of conscience, personal liberty by the clear and unequivocal establishment of the writ of *habeas corpus*, jury trial in criminal and civil cases, by an impartial jury of the vicinage or county, with the common-law proceedings, for the safety of the accused in criminal prosecutions; and the liberty of the press, that scourge of tyrants, and the grand bulwark of every other liberty and

privilege. The stipulations heretofore made in favor of them in the state constitutions, are entirely superseded by this constitution.

…

The judicial power, under the proposed constitution, is founded on well-known principles of the *civil law*, by which the judge determines both on law and fact, and appeals are allowed from the inferior tribunals to the superior, upon the whole question; so that *facts* as well as *law*, would be reexamined, and even new facts brought forward in the court of appeals; and to use the words of a very eminent Civilian — "The cause is many times another thing before the court of appeals, than it was at the time of the first sentence."

That this mode of proceeding is the one which must be adopted under this constitution, is evident from the following circumstances: 1st. That the trial by jury, which is the grand characteristic of the common law, is secured by the constitution only in criminal cases. — 2d. That the appeal from both *law* and *fact* is expressly established, which is utterly inconsistent with the principles of the common law, and trials by jury. The only mode in which an appeal from law and fact can be established, is, by adopting the principles and practice of the civil law; unless the United States should be drawn into the absurdity of calling and swearing juries, merely for the purpose of contradicting their verdicts, which would render juries contemptible and worse than useless… .

Not to enlarge upon the loss of the invaluable right of trial by an unbiased jury, so dear to every friend of liberty, the monstrous expence and inconveniences of the mode of proceedings to be adopted, are such as will prove intolerable to the people of this country. The lengthy proceedings of the civil law courts in the chancery of England, and in the courts of Scotland and France, are such that few men of moderate fortune can endure the expence of; the poor man must therefore submit to the wealthy. Length of purse will too often prevail against right and justice. For instance, we are told by the learned judge *Blackstone*, that a question only on the property of an ox, of the value of *three* guineas, orginating under the civil law proceedings in Scotland, after many interlocutory orders and sentences below, was carried at length from the court of sessions, the highest court in that part of Great Britain, by way of *appeal* to the house of lords, *where* the question of law and fact was finally determined. He adds, that no pique or spirit could in the court of king's bench common pleas Westminster, have given continuance to such a cause for a tenth part of the time, nor have cost

a twentieth part of the expence. Yet the costs in the courts of king's bench and common pleas in England, are infinitely greater than those which the people of this country have ever experienced. We abhor the idea of losing the transcendant privilege of trial by jury, with the loss of which, it is remarked by the same learned author, that in Sweden, the liberties of the commons were extinguished by an aristocratic senate: and that *trial by jury* and the liberty of the people went out together. At the same time we regret the intolerable delay, the enormous expences and infinite vexation to which the people of this country will be exposed from the voluminous proceedings of the courts of civil law, and especially from the appellate jurisdiction, by means of which a man may be drawn from the utmost boundaries of this extensive country to the seat of the supreme court of the nation to contend, perhaps with a wealthy and powerful adversary. The consequence of this establishment will be an absolute confirmation of the power of aristocratical influence in the courts of justice: for the common people will not be able to contend or struggle against it.

Trial by jury in criminal cases may also be excluded by declaring that the libeller for instance shall be liable to an action of debt for a specified sum; thus evading the common law prosecution by indictment and trial by jury. And the common course of proceeding against a ship for breach of revenue laws by information (which will be classed among civil causes) will at the civil law be within the resort of a court, where no jury intervenes. Besides, the benefit of jury trial, in cases of a criminal nature, which cannot be evaded, will be rendered of little value, by calling the accused to answer far from home; there being no provision that the trial be by a jury of the neighbourhood or country. Thus an inhabitant of Pittsburgh, on a charge of crime committed on the banks of the Ohio, may be obliged to defend himself at the side of the Delaware, and so *vice versa*. To conclude this head: we observe that the judges of the courts of Congress would not be independent, as they are not debarred from holding other offices, during the pleasure of the president and senate, and as they may derive their support in part from fees, alterable by the legislature.

Storing, vol. 3, pp. 157, 159–61.

12.2.2.5South Carolina, January 17, 1788

Hon. RAWLINS LOWNDES… . It was true, no article of the Constitution

declared there should not be jury trials in civil cases; yet this must be implied, because it stated that all crimes, except in cases of impeachment, shall be tried by a jury. But even if trials by jury were allowed, could any person rest satisfied with a mode of trial which prevents the parties from being obliged to bring a cause for discussion before a jury of men chosen from the vicinage, in a manner conformable to the present administration of justice, which had stood the test of time and experience, and ever been highly approved of?…

…

Hon. ROBERT BARNWELL… . The honorable gentleman asks why the trial by jury was not established in every instance. Mr. Barnwell considered this right of trial as the birthright of every American, and the basis of our civil liberty; but still most certainly particular circumstances may arise, which would induce even the greatest advocates for this right to yield it for a time. In his opinion, the circumstances that would lead to this point were those which are specified by the Constitution. Mr. Barnwell said, Suffer me to state a case, and let every gentleman determine whether, in particular instances, he would not rather resign than retain this right of trial. A suit is depending between a citizen of Carolina and Georgia, and it becomes necessary to try it in Georgia. What is the consequence? Why, the citizen of this state must rest his cause upon the jury of his opponent's vicinage, where, unknown and unrelated, he stands a very poor chance for justice against one whose neighbors, whose friends and relations, compose the greater part of his judges. It is in this case, and only in cases of a similar nature with this, that the right of trial by jury is not established; and judging from myself, it is in this instance only that every man would wish to resign it, not to a jury with whom he is unacquainted, but to an impartial and responsible individual.

Elliot, vol. 4, pp. 290, 294–95.

12.2.2.6Virginia

12.2.2.6.aJune 5, 1788

Mr. HENRY… . Here is a resolution as radical as that which separated us from Great Britain. It is radical in this transition; our rights and privileges are endangered, and the sovereignty of the states will be relinquished: and cannot we plainly see that this is actually the case? The rights of

conscience, trial by jury, liberty of the press, all your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure, if not lost, by this change, so loudly talked of by some, and inconsiderately by others. Is this tame relinquishment of rights worthy of freemen? Is it worthy of that manly fortitude that ought to characterize republicans?…

Having premised these things, I shall, with the aid of my judgment and information, which, I confess, are not extensive, go into the discussion of this system more minutely. Is it necessary for your liberty that you should abandon those great rights by the adoption of this system? Is the relinquishment of the trial by jury and the liberty of the press necessary for your liberty?…

… In some parts of the plan before you, the great rights of freemen are endangered; in other parts, absolutely taken away. How does your trial by jury stand? In civil cases gone—not sufficiently secured in criminal — this best privilege is gone. But we are told that we need not fear; because those in power, being our representatives, will not abuse the powers we put in their hands. I am not well versed in history, but I will submit to your recollection, whether liberty has been destroyed most often by the licentiousness of the people, or by the tyranny of rulers… . My great objection to this government is, that it does not leave us the means of defending our rights… .

Elliot, vol. 3, pp. 44, 45, 47.

12.2.2.6.bJune 7, 1788

Mr. HENRY… . If we are to have one representative for every thirty thousand souls, it must be by implication. The Constitution does not positively secure it. Even say it is a natural implication, — why not give us a right to that proportion in express terms, in language that could not admit of evasions or subterfuges? If they can use implication for us, they can also use implication against us. We are giving power; they are getting power; judge, then, on which side the implication will be used! When we once put it in their option to assume constructive power, danger will follow. Trial by jury, and liberty of the press, are also on this foundation of implication. If they encroach on these rights, and you give your implication for a plea, you are cast; for they will be justified by the last part of it, which gives them full power “to make all laws which shall be necessary and proper to carry their power into execution.” Implication is dangerous, because it is unbounded: if

it be admitted at all, and no limits be prescribed, it admits of the utmost extension… .

Elliot, vol. 3, p. 149.

12.2.2.6.cJune 9, 1788

Gov. RANDOLPH… . Why have we been told that maxims can alone save nations; that our maxims are our bill of rights; and that the liberty of the press, trial by jury, and religion, are destroyed? Give me leave to say, that the maxims of Virginia are union and justice.

Elliot, vol. 3, p. 190.

12.2.2.6.dJune 10, 1788

Gov. RANDOLPH… . It is also objected that the trial by jury, the writ of *habeas corpus*, and the liberty of the press, are insecure. But I contend that the *habeas corpus* is at least on as secure and good a footing as it is in England. In that country, it depends on the will of the legislature. That privilege is secured here by the Constitution, and is only to be suspended in cases of extreme emergency. Is this not a fair footing? After agreeing that the government of England secures liberty, how do we distrust this government? Why distrust ourselves? The liberty of the press is supposed to be in danger. If this were the case, it would produce extreme repugnancy in my mind. If it ever will be suppressed in this country, the liberty of the people will not be far from being sacrificed. Where is the danger of it? He says that every power is given to the general government that is not reserved to the states. Pardon me if I say the reverse of the proposition is true. I defy any one to prove the contrary. Every power not given it by this system is left with the states. This being the principle, from what part of the Constitution can the liberty of the press be said to be in danger?

[Here his excellency read the 8th section of the 1st article, containing all the powers given to Congress.]

Go through these powers, examine every one, and tell me if the most exalted genius can prove that the liberty of the press is in danger. The trial by jury is supposed to be in danger also. It is secured in criminal cases, but supposed to be taken away in civil cases. It is not relinquished by the Constitution; it is only not provided for. Look at the interest of Congress to suppress it. Can it be in any manner advantageous for them to suppress it? In equitable cases, it ought not to prevail, nor with respect to admiralty

causes; because there will be an undue leaning against those characters, of whose business courts of admiralty will have cognizance. I will rest myself secure under this reflection — that it is impossible for the most suspicious or malignant mind to show that it is the interest of Congress to infringe on this trial by jury.

Elliot, vol. 3, pp. 203–04.

12.2.2.6.eJune 12, 1788

Mr. HENRY… . His amendments go to that despised thing, called *a bill of rights*, and all the rights which are dear to human nature — trial by jury, the liberty of religion and the press, &c. Do not gentlemen see that, if we adopt, under the idea of following Mr. Jefferson's opinion, we amuse ourselves with the shadow, while the substance is given away?

Elliot, vol. 3, p. 314.

12.2.2.6.fJune 14, 1788

Mr. HENRY… . By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? By the ancient common law, the trial of all facts is decided by a jury of impartial men from the immediate vicinage. This paper speaks of different juries from the common law in criminal cases; and in civil controversies excludes trial by jury altogether. There is, therefore, more occasion for the supplementary check of a bill of rights now than then. Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence — petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights? — "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. That paper tells you that the trial of crimes shall be by jury, and held in the state where the crime shall have been committed. Under this extensive provision, they may proceed in a manner extremely

dangerous to liberty: a person accused may be carried from one extremity of the state to another, and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both, and who may be biased against him. Is this not sufficient to alarm men? How different is this from the immemorial practice of your British ancestors, and your own! I need not tell you that, by the common law, a number of hundredors were required on a jury, and that afterwards it was sufficient if the jurors came from the same county. With less than this the people of England have never been satisfied. That paper ought to have declared the common law in force.

Elliot, vol. 3, pp. 446–47.

12.2.2.6.gJune 15, 1788

Gov. RANDOLPH… . But let me ask the gentleman where his favorite rights are violated… . Are they violated by the enumerated powers? [Here his excellency read from the 8th to the 12th article of the bill of rights.] Is there not provision made, in this Constitution, for the trial by jury in criminal cases? Does not the 3d article provide that the trial of all crimes shall be by jury, and held where the said crimes shall have been committed? Does it not follow that the cause and nature of the accusation must be produced? — because, otherwise, they cannot proceed on the cause. Every one knows that the witnesses must be brought before the jury, or else the prisoner will be discharged. Calling of evidence in his favor is coincident to his trial. There is no suspicion that less than twelve jurors will be thought sufficient. The only defect is, that there is no speedy trial. Consider how this could have been amended. We have heard complaints against it because it is supposed the jury is to come from the state at large. It will be in their power to have juries from the vicinage. And would not the complaints have been louder if they had appointed a federal court to be had in every county in the state? Criminals are brought, in this state, from every part of the country to the general court, and jurors from the vicinage are summoned to the trials. There can be no reason to prevent the general government from adopting a similar regulation.

…

Gentlemen have been misled, to a certain degree, by a general declaration that the trial by jury was gone. We see that, in the most valuable cases, it is reserved. Is it abolished in civil cases? Let him put his finger on the part where it is abolished. The Constitution is silent on it… .

Elliot, vol. 3, pp. 467–68.

12.2.2.6.hJune 20, 1788

Mr. MADISON… . It was objected, yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might happen that a trial would be impracticable in the country. Suppose a rebellion in a whole district; would it not be impossible to get a jury? The *trial by jury* is held as sacred in England as in America. There are deviations from it in England; yet greater deviations have happened here, since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary. It must be, therefore, left to the discretion of the legislature to modify it according to circumstances. This is a complete and satisfactory answer.

…

Mr. HENRY… . "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact… ." This will, in its operation, destroy the trial by jury. The verdict of an impartial jury will be reversed by judges unacquainted with the circumstances. But we are told that Congress are to make regulations to remedy this… . If Congress alter this part, they will repeal the Constitution… . When Congress, by virtue of this sweeping clause, will organize these courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void… . What then, Mr. Chairman? We are told that, if this does not satisfy every mind, they will yield. It is not satisfactory to my mind, whatever it may be to others… .

We are told of certain difficulties. I acknowledge it is difficult to form a constitution. But I have seen difficulties conquered which were as unconquerable as this. We are told that trial by jury is difficult to be had in certain cases. Do we not know the meaning of the term? We are also told it is a technical term. I see one thing in this Constitution; I made the observation before, and I am still of the same opinion, that everything with respect to privileges is so involved in darkness, it makes me suspicious—not of those gentlemen who formed it, but of its operations in its present form. Could not precise terms have been used? You find, by the

observations of the gentleman last up, that, when there is a plentitude of power, there is no difficulty; but when you come to a plain thing, understood by all America, there are contradictions, ambiguities, difficulties, and what not. Trial by jury is attended, it seems, with insuperable difficulties, and therefore omitted altogether in civil cases. But an idea is held out that it is secured in criminal cases. I had rather it had been left out altogether than have it so vaguely and equivocally provided for. Poor people do not understand technical terms. Their rights ought to be secured in language of which they know the meaning. As they do not know the meaning of such terms, they may be injured with impunity. If they dare oppose the hands of tyrannical power, you will see what has been practised elsewhere. They may be tried by the most partial powers, by their most implacable enemies, and be sentenced and put to death, with all the forms of a fair trial. I would rather be left to the judges. An abandoned juror would not dread the loss of character like a judge. From these, and a thousand other considerations, I would rather the trial by jury were struck out altogether. There is no right of challenging partial jurors. There is no common law of America, (as has been said,) nor constitution, but that on your table. If there be neither common law nor constitution, there can be no right to challenge partial jurors. Yet the right is as valuable as the trial by jury itself.

…

Mr. HENRY… . To hear gentlemen of such penetration make use of such arguments, to persuade us to part with that trial by jury, is very astonishing. We are told that we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air, and substitute visionary modes of decision for that noble palladium. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common-law suits. The unanimous verdict of twelve impartial men cannot be reversed. I shall take the liberty of reading to the committee the sentiments of the learned Judge Blackstone, so often quoted, on the subject.

[Here Mr. Henry read the eulogium of that writer on this trial, *Blackstone's Commentaries*, iii. 319.]

The opinion of this learned writer is more forcible and cogent than any thing I could say. Notwithstanding the transcendent excellency of this trial, its essentiality to the preservation of liberty, and the extreme danger of substituting any other mode, yet we are now about to alienate it.

But on this occasion, as on all others, we are admonished to rely on the wisdom and virtue of our rulers. We are told that the members from Georgia, New Hampshire, &c., will not dare to infringe this privilege; that, as it would excite the indignation of the people, they would not attempt it: that is, the enormity of the offence is urged as a security against its commission. It is so abominable that Congress will not exercise it. Shall we listen to arguments like these, when trial by jury is about to be relinquished? I beseech you to consider before you decide. I ask you, What is the value of that privilege? When Congress, in all the plentitude of their arrogance, magnificence, and power, can take it from you, will you be satisfied? Are we to go so far as to concede every thing to the virtue of Congress? Throw yourselves at once on their mercy; be no longer free than their virtue will predominate: if this will satisfy republican minds, there is an end of every thing. I disdain to hold any thing of any man. We ought to cherish that disdain. America viewed with indignation the idea of holding her rights in England. The Parliament gave you the most solemn assurances that they would not exercise this power. Were you satisfied with their promises? No. Did you trust any man on earth? No. You answered that you disdained to hold your innate, indefeasible rights of any one. Now, you are called upon to give an exorbitant and most alarming power. The genius of my countrymen is the same now that it was then. They have the same feelings. They are equally martial and bold. Will not their answer therefore be the same? I hope that gentlemen will, on a fair investigation, be candid, and not on every occasion recur to the virtue of our representatives.

When deliberating on the relinquishment of the sword and purse, we have a right to some other reason than the possible virtue of our rulers. We are informed that the strength and energy of the government call for the surrender of this right. Are we to make our country strong by giving up our privileges? I tell you that, if you judge from reason, or the experience of other nations, you will find that your country will be great and respectable according as you will preserve this great privilege. It is prostrated by that paper. Juries from the vicinage being not secured, this right is in reality sacrificed. All is gone. And why? Because a rebellion may arise. Resistance will come from certain countries, and juries will come from the same countries.

I trust the honorable gentleman, on a better recollection, will be sorry for this observation. Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. They may call any thing rebellion,

and deprive you of a fair trial by an impartial jury of your neighbors. Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years? Did she relinquish a jury of the vicinage because there was a possibility of resistance to oppression? She has been magnanimous enough to resist every attempt to take away this privilege. She has had magnanimity enough to rebel when her rights were infringed. That country had juries of hundredors for many generations. And shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind. There was a time when we should have spurned at it. This gives me comfort—that, as long as I have existence, my neighbors will protect me. Old as I am, it is probable I may yet have the appellation of *rebel*. I trust that I shall see congressional oppression crushed in embryo. As this government stands, I despise and abhor it. Gentlemen demand it, though it takes away the trial by jury in civil cases, and does worse than take it away in criminal cases. It is gone unless you preserve it now. I beg pardon for speaking so long. Many more observations will present themselves to the minds of gentlemen when they analyze this part. We find enough, from what has been said, to come to this conclusion—that it was not intended to have jury trials at all; because, difficult as it was, the name was known, and it might have been inserted. Seeing that appeals are given, in matters of fact, to the Supreme Court, we are led to believe that you must carry your witnesses an immense distance to the seat of government, or decide appeals according to the Roman law. I shall add no more, but that I hope that gentlemen will recollect what they are about to do, and consider that they are going to give up this last and best privilege.

Mr. PENDLETON. Mr. Chairman, before I enter upon the objections made to this part, I will observe that I should suppose, if there were any person in this audience who had not read this Constitution, or who had not heard what has been said, and should have been told that the trial by jury was intended to be taken away, he would be surprised to find, on examination, that there was no exclusion of it in civil cases, and that it was expressly provided for in criminal cases. I never could see such intention, or any tendency towards it. I have not heard any arguments of that kind used in favor of the Constitution. If there were any words in it which said that trial by jury should not be used, it would be dangerous. I find it secured in criminal cases, and that the trial is to be had in the state where the crime shall have been committed. It is strongly insisted that the privilege of challenging, or excepting to the jury, is not secured. When the Constitution

says that the trial shall be by jury, does it not say that every incident will go along with it? I think the honorable gentleman was mistaken yesterday in his reasoning on the propriety of a jury from the vicinage.

He supposed that a jury from the neighborhood is had from this view — that they should be acquainted with the personal character of the person accused. I thought it was with another view — that the jury should have some personal knowledge of the fact, and acquaintance with the witnesses, who will come from the neighborhood. How is it understood in this state? Suppose a man, who lives in Winchester, commits a crime at Norfolk; the jury to try him must come, not from Winchester, but from the neighborhood of Norfolk. *Trial by jury* is secured by this system in criminal cases, as are all the incidental circumstances relative to it. The honorable gentleman yesterday made an objection to that clause which says that the judicial power shall be vested in one Supreme Court, and such inferior courts as Congress may ordain and establish. He objects that there is an unlimited power of appointing inferior courts. I refer to that gentleman, whether it would have been proper to limit this power. Could those gentlemen who framed that instrument have extended their ideas to all the necessities of the United States, and seen every case in which it would be necessary to have an inferior tribunal? By the regulations of Congress, they may be accommodated to public convenience and utility. We may expect that there will be an inferior court in each state; each state will insist on it; and each, for that reason, will agree to it.

…

Mr. JOHN MARSHALL… . The exclusion of trial by jury, in this case, he [Patrick Henry] urged to prostrate our rights. Does the word *court* only mean the judges? Does not the determination of a jury necessarily lead to the judgment of the court? Is there any thing here which gives the judges exclusive jurisdiction of matters of fact? What is the object of a jury trial? To inform the court of the facts. When a court has cognizance of facts does it not follow that they can make inquiry by a jury? It is impossible to be otherwise. I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury. But, says the honorable gentleman, the juries in the ten miles square will be mere tools of parties, with which he would not trust his person or property; which, he says, he would rather leave to the court. Because the government may have a district of ten miles square, will no man stay there but the tools and officers of the government? Will nobody else be found there? Is it so in any

other part of the world, where a government has legislative power? Are there none but officers, and tools of the government of Virginia, in Richmond? Will there not be independent merchants, and respectable gentlemen of fortune, within the ten miles square? Will there not be worthy farmers and mechanics? Will not a good jury be found there, as well as anywhere else? Will the officers of the government become improper to be on a jury? What is it to the government whether this man or that man succeeds? It is all one thing. Does the Constitution say that juries shall consist of officers, or that the Supreme Court shall be held in the ten miles square? It was acknowledged, by the honorable member, that it was secure in England. What makes it secure there? Is it their constitution? What part of their constitution is there that the Parliament cannot change? As the preservation of this right is in the hands of Parliament, and it has ever been held sacred by them, will the government of America be less honest than that of Great Britain? Here a restriction is to be found. The jury is not to be brought out of the state. There is no such restriction in that government; for the laws of Parliament decide every thing respecting it. Yet gentlemen tell us that there is safety there, and nothing here but danger. It seems to me that the laws of the United States will generally secure trials by a jury of the vicinage, or in such manner as will be most safe and convenient for the people.

But it seems that the right of challenging the jurors is not secured in this Constitution. Is this done by our own Constitution, or by any provision of the English government? Is it done by their Magna Charta, or bill of rights? This privilege is founded on their laws. If so, why should it be objected to the American Constitution, that it is not inserted in it? If we are secure in Virginia without mentioning it in our Constitution, why should not this security be found in the federal court?

The honorable gentleman said much about the quitrents in the Northern Neck. I will refer it to the honorable gentleman himself. Has he not acknowledged that there was no complete title? Was he not satisfied that the right of the legal representatives of the proprietor did not exist at the time he mentioned? If so, it cannot exist now. I will leave it to those gentlemen who come from that quarter. I trust they will not be intimidated, on this account, in voting on this question. A law passed in 1782, which secures this. He says that many poor men may be harassed and injured by the representatives of Lord Fairfax. If he has no right, this cannot be done. If he has this right, and comes to Virginia, what laws will his claims be

determined by? By those of the state. By what tribunals will they be determined? By our state courts. Would not the poor man, who was oppressed by an unjust prosecution, be abundantly protected and satisfied by the temper of his neighbors, and would he not find ample justice? What reason has the honorable member to apprehend partiality or injustice? He supposes that, if the judges be judges of both the federal and state courts, they will incline in favor of one government. If such contests should arise, who could more properly decide them than those who are to swear to do justice? If we can expect a fair decision any where, may we not expect justice to be done by the judges of both the federal and state governments? But, says the honorable member, laws may be executed tyrannically. Where is the independency of your judges? If a law be exercised tyrannically in Virginia, to what can you trust? To your judiciary. What security have you for justice? Their independence. Will it not be so in the federal court?

Gentlemen ask, What is meant by law cases, and if they be not distinct from facts? Is there no law arising on cases of equity and admiralty? Look at the acts of Assembly. Have you not many cases where law and fact are blended? Does not the jurisdiction in point of law as well as fact, find itself completely satisfied in law and fact? The honorable gentleman says that no law of Congress can make any exception to the federal appellate jurisdiction of facts as well as law. He has frequently spoken of technical terms, and the meaning of them. What is the meaning of the term *exception*? Does it not mean alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people. Who can understand this word, *exception*, to extend to one case as well as the other? I am persuaded that a reconsideration of this case will convince the gentlemen that he was mistaken. This may go to the cure of the mischief apprehended. Gentlemen must be satisfied that this power will not be so much abused as they have said.

The honorable member says that he derives no consolation from the wisdom and integrity of the legislature, because we call them to rectify defects which it is our duty to remove. We ought well to weigh the good and evil before we determine. We ought to be well convinced that the evil will be really produced before we decide against it. If we be convinced that the good greatly preponderates, though there be small defects in it, shall we give up that which is really good, when we can remove the little mischief it

may contain, in the plain, easy method pointed out in the system itself?

I was astonished when I heard the honorable gentleman say that he wished the trial by jury to be struck out entirely. Is there no justice to be expected by a jury of our fellow citizens? Will any man prefer to be tried by a court, when the jury is to be of his countrymen, and probably of his vicinage? We have reason to believe the regulations with respect to juries will be such as shall be satisfactory. Because it does not contain all, does it contain nothing? But I conceive that this committee will see there is safety in the case, and that there is no mischief to be apprehended.

He states a case, that a man may be carried from a federal to an antifederal corner, (and *vice versa*) where men are ready to destroy him. Is this probable? Is it presumable that they will make a law to punish men who are of different opinions in politics from themselves? Is it presumable that they will do it in one single case, unless it be such a case as must satisfy the people at large? The good opinion of the people at large must be consulted by their representatives; otherwise, mischiefs would be produced which would shake the government to its foundation. As it is late, I shall not mention all the gentleman's argument, but some parts of it are so glaring that I cannot pass them over in silence. He says that the establishment of these tribunals, and more particularly in their jurisdiction of controversies between citizens of these states and foreign citizens and subjects, is like a retrospective law. Is there no difference between a tribunal which shall give justice and effect to an existing right, and creating a right that did not exist before? The debt or claim is created by the individual. He has bound himself to comply with it. Does the creation of a new court amount to a retrospective law?

We are satisfied with the provision made in this country on the subject of trial by jury. Does our Constitution direct trials to be by jury? It is required in our bill of rights, which is not a part of the Constitution. Does any security arise from hence? Have you a jury when a judgment is obtained on a replevin bond, or by default? Have you a jury when a motion is made for the commonwealth against an individual; or when a motion is made by one joint obligor against another, to recover sums paid as security? Our courts decide in all these cases, without the intervention of a jury; yet they are all civil cases. The bill of rights is merely recommendatory. Were it otherwise, the consequence would be that many laws which are found convenient would be unconstitutional. What does the government before you say? Does it exclude the legislature from giving a trial by jury in civil cases? If it

does not forbid its exclusion, it is on the same footing on which your state government stands now. The legislature of Virginia does not give a trial by jury where it is not necessary, but gives it wherever it is thought expedient. The federal legislature will do so too, as it is formed on the same principles.

The honorable gentleman says that unjust claims will be made, and the defendant had better pay them than go to the Supreme Court. Can you suppose such a disposition in one of your citizens, as that, to oppress another man, he will incur great expenses? What will he gain by an unjust demand? Does a claim establish a right? He must bring his witnesses to prove his claim. If he does not bring his witnesses, the expenses must fall upon him. Will he go on a calculation that the defendant will not defend it, or cannot produce a witness? Will he incur a great deal of expense, from a dependence on such a chance? Those who know human nature, black as it is, must know that mankind are too well attached to their interest to run such a risk. I conceive that this power is absolutely necessary, and not dangerous; that, should it be attended by little inconveniences, they will be altered, and that they can have no interest in not altering them. Is there any real danger? When I compare it to the exercise of the same power in the government of Virginia, I am persuaded there is not. The federal government has no other motive, and has every reason for doing right which the members of our state legislature have. Will a man on the eastern shore be sent to be tried in Kentucky, or a man from Kentucky be brought to the eastern shore to have his trial? A government, by doing this, would destroy itself. I am convinced the trial by jury will be regulated in the manner most advantageous to the community.

Elliot, vol. 3, pp. 537, 540–42, 544–47, 557–62.

12.2.2.6.iJune 23, 1788

He [Mr. Henry] then proceeded to state the appellate jurisdiction of the judicial power, both as to law and fact, with such exceptions and under such regulations as Congress shall make. He observed, that, as Congress had a right to organize the federal judiciary, they might or might not have recourse to a jury, as they pleased. He left it to the candor of the honorable gentleman to say whether those persons who were at the expense of taking witnesses to Philadelphia, or wherever the federal judiciary may sit, could be certain whether they were to be heard before a jury or not. An honorable gentleman (Mr. Marshall) the other day observed, that he conceived the trial by jury better secured under the plan on the table than in the British

government, or even in our bill of rights. I have the highest veneration and respect for the honorable gentleman, and I have experienced his candor on all occasions; but, Mr. Chairman, in this instance, he is so materially mistaken that I cannot but observe, he is much in error. I beg the clerk to read that part of the Constitution which relates to trial by jury. [*The clerk then read the 8th article of the bill of rights*.]

Mr. MARSHALL rose to explain what he had before said on this subject: he informed the committee that the honorable gentleman (Mr. Henry) must have misunderstood him. He said that he conceived the trial by jury was as well secured, and not better secured, in the proposed new Constitution as in our bill of rights. [*The clerk then read the* 11*th article of the bill of rights*.]

Mr. HENRY. Mr. Chairman: The gentleman's candor, sir, as I informed you before, I have the highest opinion of, and am happy to find he has so far explained what he meant; but, sir, has he mended the matter? Is not the ancient trial by jury preserved in the Virginia bill of rights? and is that the case in the new plan? No, sir; they can do it if they please. Will gentlemen tell me the trial by jury of the vicinage where the party resides is preserved? True, sir, there is to be a trial by the jury in the state where the fact was committed; but, sir, this state, for instance, is so large that your juries may be collected five hundred miles from where the party resides — no neighbors who are acquainted with their characters, their good or bad conduct in life, to judge of the unfortunate man who may be thus exposed to the rigor of that government. Compare this security, then, sir, in our bill of rights with that in the new plan of government; and in the first you have it, and in the other, in my opinion, not at all. But, sir, in what situation will our citizens be, who have made large contracts under our present government? They will be called to a federal court, and tried under the retrospective laws; for it is evident, to me at least, that the federal court must look back, and give better remedies, to compel individuals to fulfill them.

The whole history of human nature cannot produce a government like that before you. The manner in which the judiciary and other branches of the government are formed, seems to me calculated to lay prostrate the states, and the liberties of the people. But, sir, another circumstance ought totally to reject that plan, in my opinion; which is, that it cannot be understood, in many parts, even by the supporters of it. A constitution, sir, ought to be, like a beacon, held up to the public eye, so as to be understood by every man. Some gentlemen have observed that the word *jury* implies a

jury of the vicinage. There are so many inconsistencies in this, that, for my part, I cannot understand it. By the bill of rights of England, a subject has a right to a trial by his peers. What is meant by his peers? Those who reside near him, his neighbors, and who are well acquainted with his character and situation in life. Is this secured in the proposed plan before you? No, sir. As I have observed before, what is to become of the *purchases of the Indians?* — those unhappy nations who have given up their lands to private purchasers; who, by being made drunk, have given a thousand, nay, I might say, ten thousand acres, for the trifling sum of sixpence! It is with true concern, with grief, I tell you that I have waited with pain to come to this part of the plan; because I observed gentlemen admitted its being defective, and, I had my hopes, would have proposed amendments. But this part they have defended; and this convinces me of the necessity of obtaining amendments before it is adopted. They have defended it with ingenuity and perseverance, but by no means satisfactorily. If previous amendments are not obtained, the trial by jury is gone. British debtors will be ruined by being dragged to the federal court, and the liberty and happiness of our citizens gone, never again to be recovered.

Elliot, vol. 3, pp. 578–79.

12.2.2.6.jJune 24, 1788

Mr. HENRY… . The honorable member must forgive me for declaring my dissent from it; because, if I understand it rightly, it admits that the new system is defective, and most capitally; for, immediately after the proposed ratification, there comes a declaration that the paper before you is not intended to violate any of these three great rights — the liberty of religion, liberty of the press, and the trial by jury. What is the inference when you enumerate the rights which you are to enjoy? That those not enumerated are relinquished. There are only three things to be retained — religion, freedom of the press, and jury trial. Will not the ratification carry every thing, without excepting these three things? Will not all the world pronounce that we intended to give up all the rest? Every thing it speaks of, by way of rights, is comprised in these things. Your subsequent amendments only go to these three amendments.

…

… In my weak judgment, a government is strong when it applies to the most important end of all governments — the rights and privileges of the people. In the honorable member’s proposal, jury trial, the press and

religion, and other essential rights, are not to be given up. Other essential rights — what are they? The world will say that you intended to give them up. When you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered.

Elliot, vol. 3, pp. 587–88, 594.

12.2.3PHILADELPHIA CONVENTION

None.

12.2.4NEWSPAPERS AND PAMPHLETS

12.2.4.1Centinel, No. 1, October 5, 1787

Friends Countrymen and *Fellow Citizens:* Permit one of yourselves to put you in mind of certain *liberties* and *privileges* secured to you by the constitution of this commonwealth, and to beg your serious attention to his uninterested opinion upon the plan of federal government submitted to your consideration, before you surrender these great and valuable privileges up forever… . Whether the *trial by jury* is to continue as your birthright, the freemen of Pennsylvania, nay, of all America, are now called upon to declare.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, pp. 328–29.

12.2.4.2The Federal Farmer, No. 2, October 9, 1787

The essential parts of a free and good government are a full and equal representation of the people in the legislature, and the jury trial of the vicinage in the administration of justice — a full and equal representation, is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled — a fair representation,

therefore, should be so regulated, that every order of men in the community, according to the common course of elections, can have a share in it — in order to allow professional men, merchants, traders, farmers, mechanics, &c. to bring a just proportion of their best informed men respectively into the legislature, the representation must be considerably numerous — We have about 200 state senators in the United States, and a less number than that of federal representatives cannot, clearly, be a full representation of this people, in the affairs of internal taxation and police, were there but one legislature for the whole union. The representation cannot be equal, or the situation of the people proper for one government only — if the extreme parts of the society cannot be represented as fully as the central — It is apparently impracticable that this should be the case in this extensive country — it would be impossible to collect a representation of the parts of the country five, six, and seven hundred miles from the seat of government.

Under one general government alone, there could be but one judiciary, one supreme and a proper number of inferior courts. I think it would be totally impracticable in this case to preserve a due administration of justice, and the real benefits of the jury trial of the vicinage — there are now supreme courts in each state in the union, and a great number of county and other courts, subordinate to each supreme court — most of these supreme and inferior courts are itinerant, and hold their sessions in different parts every year of their respective states, counties and districts — with all these moving courts, our citizens, from the vast extent of the country, must travel very considerable distances from home to find the place where justice is administered. I am not for bringing justice to individuals as to afford them any temptation to engage in law suits; though I think it one of the greatest benefits in a good government, that each citizen should find a court of justice within a reasonable distance, perhaps, within a day’s travel of his home; so that without great inconveniences and enormous expense, he may have the advantages of his witnesses and jury — it would be impracticable to derive these advantages from one judiciary — the one supreme court at most could only set in the centre of the union, and move once a year into the centre of the eastern and southern extremes of it — and, in this case, each citizen, on an average, would travel 150 or 200 miles to find this court — that, however, inferior courts might be properly placed in the different counties, and districts of the union, the appellate jurisdiction would be intolerable and expensive.

If it were possible to consolidate the states, and preserve the features of a free government, still it is evident that the middle states, the parts of the union, about the seat of government, would enjoy great advantages, while the remote states would experience the many inconveniences of remote provinces. Wealth, offices, and the benefits of government would collect in the centre: and the extreme states; and their principal towns, become much less important.

There are other considerations which tend to prove that the idea of one consolidated whole, on free principles, is ill founded — the laws of a free government rest on the confidence of the people, and operate gently — and never can extend the influence very far — if they are executed on free principles, about the centre, where benefits of the government induce the people to support it voluntarily; yet they must be executed on the principles of fear and force in the extremes — This has been the case with every extensive republic of which we have any accurate account.

There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed — a free and enlightened people, in forming this compact, will not resign all their rights to those who govern, and they will fix limits to their legislators and rulers, which will soon be plainly seen by those who are governed, as well as by those who govern: and the latter will know they cannot be passed unperceived by the former, and without giving a general alarm — These rights should be made the basis of every constitution; and if a people be so situated, or have such different opinions that they cannot agree in ascertaining and fixing them, it is a very strong argument against their attempting to form one entire society, to live under one system of laws only. — I confess, I never thought the people of these states differed essentially in these respects; they having derived all these rights from one common source, the British systems; and having in the formation of their state constitutions, discovered that their ideas relative to these rights are very similar. However, it is now said that the states differ so essentially in these respects, and even in the important article of the trial by jury, that when assembled in convention, they can agree to no words by which to establish that trial, or by which to ascertain and establish many other of these rights, as fundamental articles in the social compact. If so, we proceed to consolidate the states on no solid basis whatever.

Kaminski & Saladino, vol. 14, pp. 25–27.

12.2.4.3The Federal Farmer, No. 3, October 10, 1787

… There are some powers proposed to be lodged in the general government in the judicial department, I think very unnecessarily, I mean powers respecting questions arising upon the internal laws of the respective states… . In almost all these cases, either party may have the trial by jury in the state courts;… justice may be obtained in these courts on reasonable terms; they must be more competent to proper decisions on the laws of their respective states, than the federal courts can possibly be… . It is true, those courts may be so organized by a wise and prudent legislature, as to make the obtaining of justice in them tolerably easy; they may in general be organized on the common law principles of the country: But this benefit is by no means secured by the constitution. The trial by jury is secured only in those few criminal cases, to which the federal laws will extend — as crimes committed on the seas against the law of nations, treason and counterfeiting the federal securities and coin: But even in these cases, the jury trial of the vicinage is not secured, particularly in the large states, a citizen may be tried for a crime committed in the state, and yet tried in some states 500 miles from the place where it was committed; but the jury trial is not secured at all in civil causes. Though the convention have not established this trial, it is to be hoped that congress, in putting the new system into execution, will do it by a legislative act, in all cases in which it can be done with propriety. Whether the jury trial is not excluded [in] the supreme judicial court, is an important question… .

Kaminski & Saladino, vol. 14, pp. 40–41.

12.2.4.4The Federal Farmer, No. 4, October 12, 1787

… If the federal constitution is to be construed so far in connection with the state constitutions, as to leave the trial by jury in civil causes, for instance, secured; on the same principles it would have left the trial by jury in criminal causes, the benefits of the writ of habeas corpus, &c. secured; they all stand on the same footing; they are the common rights of Americans, and have been recognized by the state constitutions: But the convention found it necessary to recognize or reestablish the benefits of that writ, and the jury trial in criminal cases… . The establishing of one right implies the necessity of establishing another and similar one.

On the whole, the position appears to me to be undeniable, that this bill of rights ought to be carried farther, and some other principles established, as a part of this fundamental compact between the people of the United States and their federal rulers.

… There are other essential rights, which we have justly understood to be the rights of freemen… . The trials by jury in civil causes, it is said, varies [*sic*] so much in the several states, that no words could be found for the uniform establishment of it. If so the federal legislation will not be able to establish it by any general laws. I confess I am of opinion it may be established, but not in that beneficial manner in which we may enjoy it, for the reasons beforementioned. When I speak of the jury trial of the vicinage, or the trial of the fact in the neighbourhood, — I do not lay so much stress upon the circumstance of our being tried by our neighbors: in this enlightened country men may be probably impartially tried by those who do not live very near them: but the trial of facts in the neighborhood is of great importance in other respects. Nothing can be more essential than the cross examining witnesses, and generally before the triers of the facts in question. The common people can establish facts with much more ease with oral than written evidence; when trials of fact are removed to a distance from the homes of the parties and witnesses, oral evidence becomes intolerably expensive, and the parties must depend on written evidence, which to the common people is expensive and almost useless; it must be frequently taken ex-parte, and but very seldom leads to the proper discovery of truth.

The trial by jury is very important in another point of view. It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. To hold open to them the offices of senators, judges, and offices to fill which an expensive education is required, cannot answer any valuable purposes for them; they are not in a situation to be brought forward and to fill those offices; these, and most other offices of any considerable importance, will be occupied by the few. The few, the well born, &c. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally disposed, and very naturally too, to favour those of their own description.

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives,

enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other. I am very sorry that even a few of our countrymen should consider jurors and representatives in a different point of view, as ignorant, troublesome bodies, which ought not to have any share in the concerns of government.

Kaminski & Saladino, vol. 14, pp. 45–47.

12.2.4.5One of the People, October 17, 1787

The… trials by jury are not infringed on. The Constitution is silent, and with propriety too, on these and every other subject relative to the internal government of the states. These are secured by the different state constitutions.

Pennsylvania Gazette, Jensen, vol. 2, p. 190.

12.2.4.6An Old Whig, No. 3, October 20, 1787

… As to the trial by jury, the question may be decided in a few words. Any future Congress sitting under the authority of the proposed new constitution, may, if they chuse, enact that there shall be no more trial by jury, in any of the United States; except in the trial of crimes; and this "supreme law" will at once annul the trial by jury, in all other cases. The author of the speech supposes that no danger "can possibly ensue, since the proceedings of the supreme court are to be regulated by the Congress, which is a faithful representation of the people; and the oppression of government is effectually barred; by declaring that in all criminal cases the trial by jury shall be preserved." Let us examine the last clause of this sentence first. — I know that an affected indifference to the trial by jury has been expressed, by some persons high in the confidence of the present ruling party in some of the states; — and yet for my own part I cannot change the opinion I had early formed of the excellence of this mode of trial even in civil causes. On the other hand I have no doubt that whenever a settled plan shall be formed for the extirpation of liberty, the banishment of jury trials will be one of the means adopted for the purpose. — But how is it that "the oppression of government is effectually barred by declaring that in all criminal cases the

trial by jury shall be preserved?" — Are there not a thousand civil cases in which the government is a party? — In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution[,] yet there are all of them civil causes. — These penalties, forfeitures and demands of public debts may be multiplied at the will and pleasure of government. — These modes of harassing the subject have perhaps been more effectual than direct criminal prosecutions… . No, Mr. Printer, we ought not to part with the trial by jury; we ought to guard this and many other privileges by a bill of rights, which cannot be invaded. The reason that is pretended in the speech why such a declaration; as a bill of rights requires, cannot be made for the protection of the trial by jury; — "that we cannot with any propriety say 'that the trial by jury shall be as heretofore' " in the case of a federal system of jurisprudence, is almost too contemptible to merit notice. — Is this the only form of words that language could afford on such an important occasion? Or if it were to what did these words refer when adopted in the constitutions of the states? — Plainly sir, to the trial by juries as established by the common law of England in the state of its purity; — That common law for which we contended so eagerly at the time of the revolution, and which now after the interval of a very few years, by the proposed new constitution we seem ready to abandon forever; at least in that article which is the most invaluable part of it; the trial by jury.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, pp. 427–28.

12.2.4.7An American Citizen, No. 4, October 21, 1787

… Both the old and new foederal constitutions, and indeed *the constitution of Pennsylvania*, admit of courts in which no use is made of a jury. The board of property, the court of admiralty, and the high court of errors and appeals, in the state of Pennsylvania, as also the court of appeals under the old confederation, exclude juries. *Tryal by jury will therefore be in the express words of the Pennsylvania constitution, "as heretofore,"* — almost always used, though sometimes omitted. Trials for lands lying in any state between persons residing in such state, for bonds, notes, book debts, contracts, trespasses, assumptions, and all other matters between two or more citizens of any state, will be held in the state courts by juries, *as now*.

In these cases, the foederal courts *cannot interfere*. But when a dispute arises between the citizens of any state about lands lying out of the bounds *thereof*, or when a trial is to be had between the citizens of any state and those of another, or the government of another, the private citizen will not be obliged to go into a court *constituted by the state*, with which, or with the citizens of which, *his dispute is. He can appeal to a disinterested foederal court*. This is surely a *great advantage*, and promises a *fair trial*, and an *impartial judgement*. The trial by jury is *not excluded* in these foederal courts. In all *criminal* cases, where the property or life of the citizen is at stake, he has the benefit of a jury. If convicted on impeachment, which is never done by a jury in any country, he cannot be fined, imprisoned or punished, but only may be *disqualified* from doing public mischief by losing his office, and his capacity to hold another. If the nature of his offence, besides its danger to his country, should be *criminal* in itself — should involve a charge of fraud, murder or treason — he may be tried for such crime, but cannot be convicted *without a jury*. In trials about property in the foederal courts, which can only be *as above stated*, there is nothing in the new constitution *to prevent a trial by jury*. No doubt it will be the mode in every case, wherein it is practicable. This will be adjusted by law, and it could not be done otherwise. In short, the sphere of jurisdiction for the foederal courts *is limited*, and that sphere only is subject to the regulations of our foederal government. The known principles of justice, the attachment to trial by jury whenever it can be used, the instructions of the state legislatures, the instructions of the people at large, the operation of the foederal regulations on the property of a president, a senator, a representative, a judge, as well as on that of a private citizen, will certainly render those regulations as favorable as possible to *property; for life and liberty are put more than ever into the hands of the juries*. Under the *present* constitution of all the states, a public officer may be condemned *to imprisonment or death* on impeachment, *without a jury;* but the new foederal constitution protects the accused, till he shall be convicted, from the hands of power, by rendering *a jury the indispensible judges of all crimes*.

Pennsylvania Gazette (October 24), Kaminski & Saladino, vol. 13, pp. 434–35.

12.2.4.8Centinel, No. 2, October 24, 1787

Mr. *Wilson* says, that it would have been impracticable to have made a general rule for jury trial in the civil cases assigned to the federal judiciary, because of the want of uniformity in the mode of jury trial, as practiced by the several states. This objection proves too much, and therefore amounts to nothing. If it precludes the mode of common law in civil cases, it certainly does in criminal. Yet in these we are told "the oppression of government is effectually barred by declaring that in all criminal cases *trial by jury* shall be preserved." Astonishing, that provision could not be made for a jury in civil controversies, of 12 men, whose verdict should be unanimous, *to be taken from the vicinage;* a precaution which is omitted as to trial of crimes, which may be any where in the state within which they have been committed. So that an inhabitant of *Kentucky* may be tried for treason at *Richmond*.

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 13, p. 462.

12.2.4.9Timothy Meanwell, October 29, 1787

… I was informed that the trial by jury, which was guaranteed to us by the constitution of Pennsylvania, was in many instances abolished; this I did not believe when I heard it — I could not entertain an opinion that men so enlightened as those of the convention, among whose names I saw friend — and friend —, could be inattentive to the preservation of the trial by jury. I immediately took the constitution in my hand, and began to search it from end to end, and was in hopes of finding some clause like that in the Bill of Rights in the constitution of Pennsylvania, that would secure the trial by juries in all cases whatsoever, but I was disappointed.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 14, p. 512.

12.2.4.10Cincinnatus, No. 1, November 1, 1787

Let us suppose then, that what has happened, may happen again: That a patriotic printer, like Peter Zenger, should incur the resentment of our new rulers, by publishing to the world, transactions which they wish to conceal. If he should be prosecuted, if his judges should be as desirous of punishing him, *at all events*, as the judges were to punish Peter Zenger, what would

his innocence or his virtue avail him? This constitution is so admirably framed for tyranny, that, by clear construction, the judges might put the verdict of a jury out of the question. Among the cases in which the court is to have appellate jurisdiction, are — controversies, to which the United States are a party: — In this appellate jurisdiction, the judges are to determine, *both law and fact*. That is, the court is both judge and jury. The attorney general then would have only to move a question of law in the court below, to ground an appeal to the supreme judicature, and the printer would be delivered up to the mercy of his judges. Peter Zenger's case will teach us, what mercy he might expect. Thus, if the president, vice-president, or any other officer, or favorite of state, should be censured in print, he might effectually deprive the printer, or author, of his trial by jury, and subject him to something, that will probably very much resemble the Star Chamber of former times. The freedom of the press, the sacred palladium of public liberty, would be pulled down; — all useful knowledge on the conduct of government would be withheld from the people — the press would become subservient to the purposes of bad and arbitrary rulers, and imposition, not information, would be its object.

… Yet it was the jury only, that saved Zenger, it was a jury only, that saved Woodfall, it can only be a jury that will save any future printer from the fangs of power.

New York Journal, Kaminski & Saladino, vol. 13, pp. 532–33.

12.2.4.11Timoleon, November 1, 1787

"… With as little ceremony, and similar constructive doctrine, the inestimable trial by jury can likewise be depraved and destroyed — because the Constitution in the 2d section of the 3d article, by expressly assuming the trial by jury in *criminal cases*, and being silent about it in *civil causes*, evidently declares it to be unnecessary in the latter. And more strongly so, by giving the supreme court jurisdiction in appeals, *'both as to law and fact.'* If this be added, that the trial by jury in criminal cases is only stipulated to be *'in the state,'* not in the county where the crime is supposed to have been committed; one excellent part of the jury trial, from the vicinage, or at least from the county, is even in criminal cases rendered precarious, and at the mercy of rulers under the new Constitution. — Yet the danger to liberty, peace, and property, from restraining and injuring this

excellent mode of trial, will clearly appear from the following observations of the learned Dr. Blackstone, in his commentaries on the laws of England, Art. Jury Trial Book 3. chap. 33. — 'The establishment of jury trial was always so highly esteemed and valued by the people, that no conquest, *no change of government*, could ever prevail to abolish it. In the magna charta it is more than once insisted upon *as the principle bulwark of our liberties* — And this is a species of knowledge most absolutely necessary for every gentleman; as well, because he may be frequently called upon to determine in this capacity the rights of others, his fellow subjects; as, *because his own property, his liberty, and his life, depend upon maintaining in its legal force the trial by jury*… And in every country as the trial by jury has been *gradually disused*, so the great have increased in power, until the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government; unless where the miserable people have taken shelter under absolute monarchy, as the lighter evil of the two… . *It is therefore upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable trial by jury in all its rights'.*" Thus far the learned Dr. Blackstone, — "Could the Doctor, if he were here, at this moment,"… "have condemned those parts of the new Constitution in stronger terms, which give the supreme court jurisdiction both as to law and *fact;* which have weakened the jury trial in criminal cases and which have discountenanced it in all civil causes? At first I wondered at the complaint that some people made of this new Constitution, because it led to the government of a few; but it is fairly to be concluded, from this injury to the trial by jury, that *some* who framed this new system, saw with Dr. Blackstone, how operative jury trial was in preventing the tyranny of the great ones, and therefore frowned upon it, as this new Constitution does… ."

New York Journal, Extraordinary, Kaminski & Saladino, vol. 13, pp. 536–38.

12.2.4.12Brutus, No. 2, November 1, 1787

For the security of life, in criminal prosecutions, the bill of rights of most of the states have declared, that no man shall be held to answer for a crime until he is made fully acquainted with the charge brought against him; he

shall not be compelled to accuse, or furnish evidence against himself — The witnesses against him shall be brought face to face, and he shall be fully heard by himself or counsel. That it is essential to the security of life and liberty, that trial of facts be in the vicinity where they happen. Are not provisions of this kind as necessary in the general government, as in that of a particular state? The powers vested in the new Congress extend in many cases to life; they are authorised to provide for the punishment of a variety of capital crimes, and no restraint is laid upon them in its exercise, save only, that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be in the state where the said crimes shall have been committed." No man is secure of a trial in the county where he is charged to have committed a crime; he may be brought from Niagara to New-York, or carried from Kentucky to Richmond for trial for an offence, supposed to be committed. What security is there, that a man shall be furnished with a full and plain description of the charges against him? That he shall be allowed to produce all proof he can in his favor? That he shall see the witnesses against him face to face, or that he shall be fully heard in his own defence by himself or counsel?

New York Journal, Kaminski & Saladino, vol. 13, p. 527.

12.2.4.13An Old Whig, No. 5, November 1, 1787

… It is needless to repeat the necessity of securing other personal rights in the forming a new government. The same argument which proves the necessity of securing one of them shews also the necessity of securing others. Without a bill of rights we are totally insecure in all of them; and no man can promise himself with any degree of certainty that his posterity will enjoy the inestimable blessings of liberty of conscience, of freedom of speech and of writing and publishing their thoughts on public matters, of trial by jury, of holding themselves, their houses and papers free from seizure and search upon general suspicion or general warrants; or in short that they will be secured in the enjoyment of life, liberty and property without depending on the will and pleasure of their rulers.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 541.

12.2.4.14A Son of Liberty, November 8, 1787

MR. GREENLEAF, Having observed in your paper of the 25th ult. that a writer under the signature of *A Slave*, has pointed out a number of advantages or blessings, which, he says, will result from an adoption of the new government, proposed by the Convention: — I have taken the liberty to request, that you will give the following a place in your next paper, it being an enumeration of a *few* of the *curses* which will be entailed on the people of America, by this preposterous and newfangled system, if they are ever so infatuated as to receive it… . 3d. A suppression of trial by jury of your peers, in all civil cases, and even in criminal cases, the loss of the trial in the vicinage, where the fact and the credibility of your witnesses are known, and where you can command their attendance without insupportable expence, or inconveniences.

New York Journal, Kaminski & Saladino, vol. 13, p. 481.

12.2.4.15Uncus, November 9, 1787

Mr. GODDARD, When you began publishing the *Centinel* in numbers, I expected we should have had one in each of your papers for some weeks, hoping, that after he had done finding fault with the doings of the late convention, the members of which were either too designing, — of too aristocratic principles, — too old, — or too ignorant, "inexperienced and fallible," for business of such magnitude; *he* would, by the *perfect rule* existing in his own mind, by which he has tried and condemned the proposed constitution, exhibit to the world a perfect model; which these States would have only to read, and invite "those who are competent to the task of developing the principles of government," to come forward, approve and adopt.

…

I believe, there is not a single article, wherein the *new plan* has proposed any amendment to the *old*, but what would be objected to by *Centinel*. To some he has objected, where they have made no amendment; as the power of Congress to try causes without a jury, which they have ever possessed.

Maryland Journal, Kaminski & Saladino, vol. 14, pp. 76, 79.

12.2.4.16Gentleman in New-York, November 14, 1787

"… I have not only no objection to, but am extremely desirous of, a strong and general government, provided the fundamental principles of liberty be well secured. These I take to be, trial by jury as has been and is practised… . In all these great points the proposed constitution requires amendment, before it can be adopted even with safety.

"In the constitution of the faederal court, where its jurisdiction is original, the securing jury trial in criminal, is, according to all legal reasoning, an exclusion of it in civil matters — and in its appellant function it is expressly said the court shall judge both of *law* and *fact*. This of course renders the finding of a jury below, totally nugatory.

Virginia Independent Chronicle, Kaminski & Saladino, vol. 14, p. 103.

12.2.4.17A Georgian, November 15, 1787

And now we come to the point which at once teems with numberless enormous innovations by introducing strange and new courts of almost any denomination into any of the states whereby our own courts will soon be annihilated, and abolishing the only pledge of liberty, the trial by jury, to tyrants only formidable, in all civil cases, countenancing the greatest injustice to be lawfully, nay constitutionally, committed by the rich against their brave fellow citizens whose only misfortune is to be, perhaps, not so rich as they, by dragging their lawsuits of any denomination and of any sum, however small, if they choose, before the GRAND TRIBUNAL OF APPEAL to which the poor will be unable to follow with their evidences and witnesses, and on account of the great expenses. Therefore, fellow citizens, pray restrain this encroachment so destructive to the inestimable rights the more numerous part of middle-circumstanced citizens now enjoy. With horror beware of the precipice before you; and, if you will, please join me in amending the third Article in the Federal Constitution thus:

…

"The trial of all civil and criminal causes, except in cases of impeachment (as provided for in Article I, section 3) shall be by jury, drawn by lot out of a box from among the freeholders of that state where Congress shall reside, and within five miles thereof; and, when a crime against the United States has been committed within no state, the Supreme Court of Congress shall have the trial of the same where Congress then resides.

Gazette of the State of Georgia, Kaminski & Saladino, vol. 3, pp. 241–42.

12.2.4.18A Countryman, No. 2, November 22, 1787

Of a very different nature, tho' only one degree better than the other reasoning, is all that sublimity of *nonsense* and *alarm*, that has been thundered against it in every shape of *metaphoric terror*, on the subject of a *bill of rights*, the *liberty of the press, rights of conscience, rights of taxation and election, trials in the vicinity, freedom of speech, trial by jury*, and a *standing army*. These last are undoubtedly important points, much too important to depend on mere paper protection. For, guard such privileges by the strongest expressions, still if you leave the legislative and executive power in the hands of those who are or may be disposed to deprive you of them — you are but slaves. Make an absolute monarch — give him the supreme authority, and guard as much as you will by bills of right, your liberty of the press, and trial by jury; — he will find means either to take them from you, or to render them useless.

Your General Assembly under your present constitution are supreme. They may keep troops on foot in the most profound peace, if they think proper. They have heretofore abridged the trial by jury in some cases, and they can again in all. They can restrain the press, and may lay the most burdensome taxes if they please, and who can forbid? But still the people are perfectly safe that not one of these events shall take place so long as the members of the General Assembly are as much interested, and interested in the same manner, as the other subjects.

On examining the new proposed constitution, there can not be a question, but that there is authority enough lodged in the proposed federal Congress, if abused, to do the greatest injury. And it is perfectly idle to object to it, that there is no bill of rights, or to propose to add to it a provision that a trial by jury shall in no case be omitted, or to patch it up by adding a stipulation in favor of the press, or to guard it by removing the paltry objection to the right of Congress to regulate the time and manner of elections.

New Haven Gazette, Kaminski & Saladino, vol. 14, pp. 172–74.

12.2.4.19A Well-Informed Correspondent, November 28, 1787

… "The judicial powers of the Faederal Courts have, also, been grossly misrepresented. It is said "that the trial by jury is to be abolished, and that the courts of the several states are to be annihilated." But these, Sir, are

mistaken notions, scandalous perversions of truth. The courts of judicature in each state will still continue in their present situation. The trial by jury in all disputes between man and man in each state will still remain inviolate, and in all cases of this description, there can be no appeal to the Faederal Courts. It is only in particular specified cases, of which each state cannot properly take cognizance, that the judicial authority of the Faederal Courts can be exercised. Even in the congressional courts of judicature, the trial of all crimes except in cases of impeachment, shall be by jury. How then can any man say that the trial by jury will be abolished, and that the courts of the several states will be annihilated by the adoption of the Faederal Government? Must not the man who makes this assertion be either consummately imprudent, or consummately ignorant? My God! what can he mean by such bareface representations? Can he be a friend to his country? Can he be the friend to the happiness of mankind? Is he not some insidious foe? Some emissary, hired by *British Gold* — plotting the ruin of both, by disseminating the seeds of suspicion and discontent among us?

Virginia Independent Chronicle, Kaminski & Saladino, vol. 14, pp. 244–45.

12.2.4.20 James McHenry, Speech to the Maryland House, November 29, 1787

… 1st. The judicial power of the United States underwent a full investigation — it is impossible for me to Detail the observations that were delivered on that subject — The right of tryal by Jury was left open and undefined from the difficulty attending any limitation to so valuable a priviledge, and from the persuasion that Congress might hereafter make provision more suitable to each respective State — To suppose that mode of Tryal intended to be abolished would be to suppose the Representatives in Convention to act contrary to the Will of their Constituents, and Contrary to their own Interest. —…

Kaminski & Saladino, vol. 14, p. 284.

12.2.4.21 A Countryman, No. 3, November 29, 1787

… Last week I endeavored to evince, that the only surety you could have for your liberties must be in the nature of your government; that you could

derive no security from bills of rights, or stipulations, on the subject of a standing army, the liberty of the press, trial by jury, or on any other subject. Did you ever hear of an absolute monarchy, where those rights which are proposed by the pigmy politicians of this day, to be secured by stipulation, were ever preserved? Would it not be mere trifling to make any such stipulations, in any absolute monarchy?

On the other hand, if your interest and that of your rulers are the same, your liberties are abundantly secure… .

No people can be more secure against tyranny and oppression in their rulers than you are at present; and no rulers can have more supreme and unlimited authority than your general assembly have.

New Haven Gazette, Kaminski & Saladino, vol. 4, p. 296.

12.2.4.22Philadelphiensis, No. 3, December 5, 1787

… The only thing in which a government should be efficient, is to protect the *liberties*, *lives*, and *property* of the people governed, from foreign and domestic violence. This, and this only is what every government should do effectually. For any government to do more than this is impossible, and every one that falls short of it is defective. Let us now compare the new constitution with this legitimate definition of an efficient government, and we shall find that it has scarce a particle of an efficient government in its whole composition.

In the first place then it does not protect the people in those liberties and privileges that all freemen should hold sacred — The *liberty of conscience*, the *liberty of the press*, the *liberty of trial by jury*, *&c*. are all unprotected by this constitution… .

[Philadelphia] Freeman’s Journal, Kaminski & Saladino, vol. 14, p. 351.

12.2.4.23Agrippa, No. 5, December 11, 1787

There is another sense in which the clause relating to causes between the state and individuals is to be understood, and it is more probable than the other, as it will be eternal in its duration, and increasing in its extent. This is the whole branch of the law relating to criminal prosecutions. In all such

cases the state is plaintiff, and the person accused is defendant. The process, therefore, will be, for the attorney-general of the state to commence his suit before a continental court. Considering the state as a party, the cause must be tried in another, and all of the expense of transporting witnesses incurred. The individual is to take his trial among strangers, friendless and unsupported, without its being known whether he is habitually a good or a bad man; and consequently with one essential circumstance wanting by which to determine whether the action was performed maliciously or accidentally. All these inconveniences are avoided by the present important restriction, that the cause shall be tried by a jury of the vicinity, and tried in the county where the offence was commited [*sic*]. But by the proposed *derangement*, I can call it by no softer name, a man must be ruined to prove his innocence. This is far from being a forced construction of the proposed form. The words appear to me not intelligible, upon the idea that it is to be a *system* of government, unless the construction now given, both for civil and criminal process, be admitted.

Massachusetts Gazette, Storing, vol. 4, pp. 78–79.

12.2.4.24Address and Reasons of Dissent of the Minority of the Pennsylvania Convention, December 12, 1787

The first consideration that this review suggests, is the omission of a BILL of RIGHTS ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have the controul. The principal of which are the rights of conscience, personal liberty by the clear and unequivocal establishment of the writ of *habeas corpus*, jury trial in criminal and civil cases, by an impartial jury of the vicinage or county; with the common law proceedings, for the safety of the accused in criminal prosecutions and the liberty of the press, that scourge of tyrants; and the grand bulwark of every other liberty and, privilege; the stipulations heretofore made in favor of them in the state constitutions, are entirely superceded by this constitution.

…

We have before noticed the judicial power as it would effect a consolidation of the states into one government; we will now examine it, as it would affect the liberties and welfare of the people, supposing such a

government were practicable and proper.

The judicial power, under the proposed constitution, is founded on the well-known principles of the *civil law*, by which the judge determines both on law and fact, and appeals are allowed from the inferior tribunals to the superior, upon the whole question; so that facts as well as law, would be reexamined, and even new facts brought forward in the court of appeals… .

That this mode of proceeding is the one which must be adopted under this constitution, is evident from the following circumstances: — 1st. That the trial by jury, which is the grand characteristic of the common law, is secured by the constitution, only in criminal cases. — 2d. That the appeal from both *law* and *fact* is expressly established, which is utterly inconsistent with the principles of the common law, and trials by jury. The only mode in which an appeal from law and fact can be established, is, by adopting the principles and practice of the civil law; unless the United States should be drawn into the absurdity of calling and swearing juries, merely for the purpose of contradicting their verdicts, which would render juries contemptible and worse than useless. — 3d. That the courts to be established would decide on all cases *of law and equity*, which is a well known characteristic of the civil law, …

Not to enlarge upon the loss of the invaluable right of trial by an unbiassed jury, so dear to every friend of liberty, the monstrous expence and inconveniences of the mode of proceeding to be adopted, are such as will prove intolerable to the people of this country… . We abhor the idea of losing the transcendent privilege of trial by jury, with the loss of which, it is remarked by the same learned author, that in Sweden, the liberties of the commons were extinguished by an aristocratic senate: and that *trial by jury* and the liberty of the people went out together.

Kaminski & Saladino, vol. 15, pp. 25, 27–28.

12.2.4.25A Countryman, No. 5, December 20, 1787

The great power and influence of an hereditary monarch of Britain has spread many alarms, from an apprehension that the commons would sacrifice the liberties of the people to the money or influence of the crown: But the influence of a powerful *hereditary monarch*, with the national Treasury — Army — and fleet at his command — and the whole executive government — and one third of the legislative in his hands, — constantly

operating on a house of commons, whose duration is never less than *seven years*, unless the same monarch should *end* it, (which he can do in an hour) has never yet been sufficient to obtain one vote of the house of commons which has taken from the people the *liberty of the press, — trial by jury, — the rights of conscience, or of private property*. — Can you then apprehend danger of oppression and tyranny from the too great duration of the power of *your* rulers.

New Haven Gazette, Kaminski & Saladino, vol. 15, p. 55.

12.2.4.26Richard Henry Lee to Edmund Randolph, December 22, 1787

… The rights of conscience, the freedom of the press, and the trial by jury are at mercy. It is there stated that in criminal cases, the trial shall be by jury. But how? In the state. What then becomes of the jury of the vicinage or at least from the county in the first instance, the states being from 50 to 700 miles in extent? This mode of trial even in criminal cases may be greatly impaired, and in civil cases the inference is strong, that it may be altogether omitted as the constitution positively assumes it in criminal, and is silent about it in civil causes. Nay it is more strongly discountenanced in civil cases by giving the supreme court in appeals, jurisdiction both as to law and fact.

Judge Blackstone in his learned commentaries (Art. Jury Trial) says, [“it] is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected either in his property, his liberty, his person, but by the unanimous consent of twelve of his neighbors and equals. A constitution, that I may venture to affirm, has under providence, secured the just liberties of this nation for a long succession of ages. The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices of the state, these decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. It is not to be expected from human nature, that the few should always be attentive to the good of the many.[”] The learned judge further says, that [“]every tribunal selected for the decision of facts is a step towards establishing aristocracy; the most

oppressive of all governments.[”] The answer to these objections is, that the new legislature may provide remedies! but as they may, so they may not, and if they did, a succeeding assembly may repeal the provisions. The evil is found resting upon constitutional bottom, and the remedy upon the mutable ground of legislation, revocable at any annual meeting. It is the more unfortunate that this great security of human rights, the trial by jury, should be weakened in this system, as power is unnecessarily given in the second section of the third article, to call people from their own country in all cases of controversy about property between citizens of different states and foreigners, with citizens of the United States, to be tried in a distant court where the congress meets. For although inferior congressional courts may for the above parties be instituted in the different states, yet this is a matter altogether in the pleasure of the new legislature, so that if they please not to institute them, or if they do not regulate the right of appeal reasonably, the people will be exposed to endless oppression, and the necessity of submitting in multitudes of cases, to pay unjust demands, rather than follow suitors, through great expence, to far distant tribunals, and to be determined upon there, as it may be, without a jury. In this congressional legislature a bare majority of votes, can enact commercial laws, so that the representatives of the seven northern states, as they will have a majority, can by law create the most oppressive monopoly upon the five southern states, whose circumstances and productions are essentially different from theirs, although not a single man of these voters are the representatives of, or amenable to the people of the southern states. Can such a set of men be, with the least colour of truth, called a representative of those they make laws for? It is supposed that the policy of the northern states, will prevent such abuses.

Virginia Gazette, Storing, vol. 5, pp. 114–15.

12.2.4.27The Federal Farmer, No. 6, December 25, 1787

Of rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; but the people, by express acts, may alter or abolish them — These, such as the trial by jury, the benefits of the writ of habeas corpus, &c. individuals claim under the solemn compacts of the people, as constitutions, or at least under laws so

strengthened by long usage as not to be repealable by the ordinary legislature — and some are common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.

…

The following, I think, will be allowed to be unalienable or fundamental rights in the United States: —… The people… are at all times intitled to the benefits of the writ of habeas corpus, the trial by jury in criminal and civil causes — They have a right, when charged, to a speedy trial in the vicinage; to be heard by themselves or counsel, not to be compelled to furnish evidence against themselves, to have witnesses face to face, and to confront their adversaries before the judge — No man is held to answer a crime charged upon him till it be substantially described to him… .

Storing, vol. 2, pp. 261–62.

12.2.4.28America, December 31, 1787

… But you will say, that trial by jury, is an unalienable right, that ought not to be trusted with our rulers. Why not? If it is such a darling privilege, will not Congress be as fond of it, as their constituents? An elevation into that Council, does not render a man insensible to his privileges, nor place him beyond the necessity of securing them. A member of Congress is liable to all the operations of law, except during his attendance on public business; and should he consent to a law, annihilating any right whatever, he deprives himself, his family and estate, of the benefit resulting from that right, as well as his constituents. This circumstance alone, is a sufficient security.

But, why this outcry about juries? If the people esteem them so highly, why do they ever neglect them, and suffer the trial by them to go into disuse? In some States, *Courts of Admiralty* have no juries — nor Courts of Chancery at all. In the City-Courts of some States, juries are rarely or never called, altho' the parties may demand them; and one State, at least, has lately passed an act, empowering the parties to submit both *law* and *fact* to the Court. It is found, that the judgment of a Court, gives as much satisfaction, as the verdict of a jury, as the Court are as good judges of fact, as juries, and much better judges of law. I have no desire to abolish trials by jury, although the original design and excellence of them, is in many cases superseded. — While the people remain attached to this mode of deciding

causes, I am confident, that no Congress can wrest the privilege from them.

[New York] Daily Advertiser, Kaminski & Saladino, vol. 15, p. 197.

12.2.4.29A Countryman, December 1787–January 1788

There is another thing our Congress told the people of Canada, in their letter, and I believe they were in earnest, “That the trial by jury, was one of the best securities in the world, for the life, liberty and property of the people.” — Now to be sure, I am very much of their opinion in this; for I would rather trust my life, liberty and property to a verdict of twelve of my honest neighbors, than to the opinion of any great man in the world, for great men are not always honest men, and they may be too proud, and not care to give themselves the trouble to enquire very narrowly into common people’s disputes; and if an honest farmer should happen to say any thing against a great man, tho’ it was ever so true, it would be in the power of the judge to punish him for it very severely—and I don’t doubt, but what he would do it; but I am sure a good honest jury of his neighbors would never punish him for speaking the truth; I know it is said that truth is not to be spoken at all times, but the best of us may be guilty of little acts of imprudence, for which however, we should not be too severely handled: I find the writers disagree about this matter; the one says this right of trial by jury is taken away by the new constitution, and the other says it is not. — Now, as they differ, I have been trying to find out the truth myself, and, it appears to me middling clear, that if it is not absolutely taken away; yet that this new General Congress, that we read of, may take it away whenever they please—now, if it is so good a thing that it never ought to be taken away, I think we ought not to give them power to do it; for I can’t see the reason of giving them power, which they never can make use of, without doing us a great deal of hurt: Now all parties may mean what is honest at present, but notwithstanding, there may be a time, when we have bad men to rule us, and I think it would be imprudent to give power, which every one allows there is no necessity for, and with which bad men, if so disposed, might do us a great deal of harm, and I am more confirmed in this belief, when I think of what the said Mr. Beccaria says about this desire, which has always prevailed in men of increasing their power. This is all I can say about the matter at present… .

New York Journal, Storing, vol. 6, p. 73

12.2.4.30Agrippa, No. 10, January 1, 1788

… For a more concise view of my proposal, I have thrown it into the form of a resolve to be passed by the [Massachusetts] convention which is shortly to set in this town.

"Commonwealth of Massachusetts

Resolved… .

"XIV. The United States shall have power to regulate the intercou[r]se between these states and foreign dominions, under the following restrictions… . [T]he United S[t]ates shall have authority to constitute judicatories, whether supreme or subordinate, with power to try all piracies and felonies done on the high seas… . They shall also have authority to try all causes in which ambassadours shall be concerned. All these trials shall be by jury and in some seaport town… .

Massachusettes Gazette, Storing, vol. 4, p. 89.

12.2.4.31The Federal Farmer, No. 15, January 18, 1788

… By the same section [article 3, section 2 of the Constitution], the jury trial, in criminal causes, except in cases of impeachment, is established; but not in civil causes, and the whole state may be considered as the vicinage in cases of crimes. These clauses present to view the constitutional features of the federal judiciary: this has been called a monster by some of the opponents, and some, even of the able advocates, have confessed they do not comprehend it. For myself, I confess, I see some good things in it, and some very extraordinary ones… . [T]he legislature will have full power to form and arrange judicial courts in the federal cases enumerated, at pleasure, with these eight exceptions only… . 6. There must be a jury trial in criminal causes. 7. The trial of crimes must be in the state where committed —… .

…

[T]he supreme court shall have jurisdiction both as to law and fact. What is meant by court? Is the jury included in the term, or is it not? I conceive it is not included: and so do the members of the convention, I am very sure, understand it.

Storing, vol. 2, pp. 316–17, 319.

12.2.4.32Curtiopolis, January 18, 1788

Fathers, Friends, Countrymen, Brethren and Fellow Citizens, The happiness and existence of America being now suspended upon your wise deliberations; three or four sly Aristocrats having lashed the public passions, like wild horses, to the car of Legislation, and driving us all in the midst of political clouds of error, into that ditch of despotism lately dug by the Convention: Such dismal circumstances have induced a private citizen to lay before you, in as concise a manner as possible, the objections that have been made, by the Pennsylvania Secession, Brutus, Cato, Cincinnatus, Farmer, An Officer, &c. &c. our best men.

…

26. It allows of other modes of trial besides that by jury, and of course this is *abolished:* such modes will be instituted under the direction of Congress, as will leave offenders, traitors, *malcontents*, or such of us as fall under the lash, *no chance at all*.

[New York] Daily Advertiser, Kaminski & Saladino, vol. 15, pp. 399–400, 402.

12.2.4.33The Federalist, No. 41, January 19, 1788

Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for the general welfare."

Kaminski & Saladino, vol. 15, p. 424.

12.2.4.34The Federal Farmer, No. 16, January 20, 1788

The trial by jury in criminal as well as in civil causes, has long been considered as one of our fundamental rights, and has been repeatedly recognized and confirmed by most of the state conventions. But the

constitution expressly establishes this trial in criminal, and wholly omits it in civil causes. The jury trial in criminal causes, and the benefit of the writ of habeas corpus, are already as effectually established as any of the fundamental or essential rights of the people in the United States… . [I]nstead of establishing it in criminal causes only; we ought to establish it generally; — instead of the clause of forty or fifty words relative to this subject, why not use the language that has always been used in this country, and say, "the people of the United States shall always be entitled to the trial by jury." This would shew the people still hold the right sacred, and enjoin it upon congress substantially to preserve the jury trial in all cases, according to the usage and custom of the country. I have observed before, that it is *the jury trial* we want; the little different appendages and modifications tacked to it in the different states, are no more than a drop in the ocean: the jury trial is a solid uniform feature in a free government; it is the substance we would save, not the little articles of form.

Security against expost [*sic*] facto laws, the trial by jury, and the benefits of the writs of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the course of the common law. These may be secured in general words, as in New-York, the Western Territory, &c. by declaring the people of the United States shall always be entitled to judicial proceedings according to the course of the common law, as used and established in the said states. Perhaps it would be better to enumerate the particular essential rights the people are entitled to in these proceedings, as has been done in many of the states, and as has been done in England… . We certainly, in federal processes, might as well claim the benefits of the writ of habeas corpus, as to claim trial by a jury — the right to have council — to have witnesses face to face — to be secure against unreasonable search warrrants, &c. was the constitution silent as to the whole of them: — but the establishment of the former, will evince that we could not claim them without it; and the omission of the latter, implies they are relinquished, or deemed of no importance. These are rights and benefits individuals acquire by compact; they must claim them under compacts, or immemorial usage — it is doubtful, at least, whether they can be claimed under immemorial usage in this country; and it is, therefore, we generally claim them under compacts, as charters and constitutions.

Storing, vol. 2, pp. 326–28.

12.2.4.35A Countryman, No. 5, January 22, 1788

… I could very easily imagine, that a gentleman of far less understanding than "Alexander Hamilton," is said to be, would have had modesty enough to wait for further authority, before he set his name to an instrument of such immense importance to the state which entrusted him, and honored him with its interests and commands.

What was this but setting the state and his colleagues at open defiance, and, tacitly, telling the legislature and them, "I want none of your instructions, advice, nor assistance. I better know than you or they what ought to be done, and how to do it. Yes, I know what will suit you all, much better than any body else in the state. I know, that trial by jury, of the vicinage, is a foolish custom, besides frequently embarrassing the judges, it often disappoints the lawyers, and therefore, as I may never have it in my power again, I will now contribute all I can to the abolition of it." If it be true, that actions may speak plainer than words, which, I believe, is a maxim pretty well established, must not the foregoing, or something like it, have been the language or ideas held by the gentleman?

New York Journal, Storing, vol. 6, pp. 61–62.

12.2.4.36Philadelphiensis, No. 8, January 23, 1788

… But the matter now in debate has no relation to that: the men opposed to the new constitution have the same cause to defend, that the people of America had during the period of a seven years war. Who is he so base, that will peaceably submit to a government that will eventually destroy his sacred *rights and privileges*? The liberty of conscience, the liberty of the press, the liberty of trial by jury, &c. must lie at the mercy of a few despots — an infernal junto, that are for changing our *free republican government* into a tyrannical and absolute monarchy. These are what roused the sons of America to oppose Britain, and from the nature of things, they must have a similar effect now.

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 15, p. 461.

12.2.4.37Hampden, January 26, 1788

Mr. Russell, … I am not contented with it [the proposed plan of government] as it now stands, my reasons are assigned: —

I am not satisfied with the provision for amendments, as it stands in that system, because the amendments I propose, are such as two thirds of the Senate will perhaps never agree to — the indictment by grand jury, and trial of fact by jury, is not so much set by in the southern States, as in the northern—the great men there, are too rich and important to serve on the juries, and the smaller are considered as not having consequence enough to try the others; in short, there can be no trial by peers there… .

…

THE AMENDMENTS PROPOSED.

…

5th. In the second clause of the same section, strike out the words, "Both as to law and fact," *and add to that clause these words* — Provided nevertheless, that all issues of fact shall be tried by a jury to be appointed according to standing laws made by Congress.

This will preserve the inestimable right of a trial by jury — This right is the democratical balance in the Judciary power; without it, in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens; without this the English Constitution would be a tyranny — See Judge Blackstone's excellent Commentary on this privilege, in his third volume, page [section 23].

6th. In the last clause in the same section next after the word State, insert these words, In, or near the County.

This keeps up the idea of trial in the vicinity. See the Massachusetts declaration of rights on this point — Also, that of other States, &c.

Massachusetts Centinel, Storing, vol. 4, pp. 198–200.

12.2.4.38Aristides, January 31, 1788

The institution of the trial by jury has been sanctified by the experience of ages. It has been recognised by the constitution of every state in the union. It is deemed the birthright of Americans; and it is imagined, that liberty cannot subsist without it. The proposed plan expressly adopts it, for the decision of all criminal accusations, except impeachment; and is silent with respect to the determination of facts in civil causes.

The inference, hence drawn by many, is not warranted by the premises. By recognising the jury trial in criminal cases, the constitution effectually provides, that it shall prevail, so long as the constitution itself shall remain unimpaired and unchanged. But, from the great variety of civil cases, arising under this plan of government, it would be unwise and impolitic to say ought [*sic*] about it, in regard to these. Is there not a great variety of cases, in which this trial is taken away in each of the states? Are there not many more cases, where it is denied in England? For the convention to ascertain in what cases it shall prevail, and in what others it may be expedient to prefer other modes, was impracticable. On this subject, a future congress is to decide; and I see no foundation under Heaven for the opinion, that congress will despise the known prejudices and inclination of their countrymen. A very ingenious writer of Philadelphia has mentioned the objections without deigning to refute that, which he conceives to have originated "in sheer malice." —

I proceed to attack the whole body of antifederalists in their strong hold. The proposed constitution contains no *bill of rights*.

Kaminski & Saladino, vol. 15, p. 536.

12.2.4.39A Farmer, No. 2, February 1, 1788

My friends and fellow farmers, I intended here to have made an end, and left Alfredus, with all his impudence to return peaceably to his cell, where I sent him in the first paragraph — But when I came to read over his piece a second time couched in such language, it made me shudder to see how abusively he has treated our juries, the grand palladium of liberty. I will for your observation copy his sentiment, it appears to be written with blood. These are his words — "*What are the advantages of this* boasted Trial by Jury, *and on which side do they lie, not certainly on the side of justice, for one unprincipled juror, secured in the interest of the opposite party, will frequently divert her course, and in four cases out of five, when injustice is done, it is by the ignorance or knavery of the jury.*" — This is a bold stroke, my friends, and shows you at once the disposition of Mr. Alfredus, that he is no friend to your liberties. I shall make no further observation on this particular, but when a leisure hour offers, I will give him a further combing for his insolence to the juries… .

New Hampshire Freeman's Oracle, Storing, vol. 4, p. 211.

12.2.4.40Luther Martin, Genuine Information, No. 10, February 1, 1788

Thus, Sir, *jury trials*, which have ever been the *boast* of the English constitution, which have been by our several *State constitutions* so *cautiously secured* to us, — jury trials which have so long been considered the *surest barrier* against *arbitrary power*, and the *palladium* of *liberty*, — with the *loss* of *which* the *loss* of our *freedom* may be dated, are *taken away* by the proposed form of government, not *only* in a *great variety* of questions between *individual* and *individual*, but in *every case* whether *civil* or *criminal* arising *under the laws of* the United States or the *execution* of those laws. — It is *taken away* in *those very cases* where of *all others* it is *most essential for our liberty*, to have it *sacredly guarded* and *preserved* — in *every case* whether *civil* or *criminal*, between *government* and *its officers* on the one part and the *subject or citizen* on the other. — Nor was this the effect of inattention, nor did it arise from any real difficulty in establishing and securing jury trials by the proposed constitution, if the convention had wished so to do—But the *same reason* influenced *here* as in the case of the establishment of inferior courts;—as they could not trust *State judges*, so would they not confide in *State juries*.—They alleged that the general government and the State governments would always be at variance—that the citizens of the different States would enter into the views and interests of their respective States, and therefore ought not to be trusted in determining causes in which the general government was any way interested, without giving the general government an opportunity, if it disapproved the verdict of the jury, to appeal, and to have the *facts examined* into *again* and *decided upon* by *its own judges*, on whom it was thought a reliance might be had by the general government, they being appointed under its authority.

Maryland Gazette, Kaminski & Saladino, vol. 16, pp. 9–10.

12.2.4.41Agrippa, No. 16, February 5, 1788

… If the new constitution means no more than the friends of it acknowledge, they certainly can have no objection to affixing a declaration of rights of states and of citizens, especially as a majority of the states have not yet voted upon it —

…

"14. In all those causes which are triable before the continental courts, the trial by jury shall be held sacred."

These at present appear to me the most important points to be guarded… .

Massachusetts Gazette, Storing, vol. 4, pp. 110, 112.

12.2.4.42Philadelphiensis, No. 9, February 6, 1788

To such lengths have these bold conspirators carried their scheme of despotism, that your most sacred rights and privileges are surrendered at discretion. When government thinks proper, under the pretence of writing a libel, &c. it may imprison, inflict the most cruel and unusual punishment, seize property, carry on prosecutions, &c. and the unfortunate citizen has no *magna charta*, no *bill of rights*, to protect him; nay, the prosecution may be carried on in such a manner that even a *jury* will not be allowed him… .

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 16, p. 59.

12.2.4.43An Old Whig, No. 8, February 6, 1788

First then, the general expectation seems to be that our future rulers will rectify all that is amiss. If a bill of rights is wanting, they will frame a bill of rights. If too much power is vested in them, they will not abuse it; nay, they will divest themselves of it. The very first thing they will do, will be to establish the liberties of the people by good and wholesome ordinances, on so solid a foundation as to baffle all future encroachments from themselves or their successors. Much good no doubt might be done in this way; if Congress should possess the most virtuous inclinations, yet there are some things which it will not be in their power to rectify. For instance; *the appellate jurisdiction as to law and fact*, which is given to the supreme court of the continent, and which annihilates the trial by jury in all civil causes, the Congress can only modify: — They cannot extinguish this power, so destructive of the principles of real liberty. It would not be by any means extravagant to say, that a new continental convention ought to be called, if it were only for the sake of preserving the sacred palladium — THE INESTIMABLE RIGHT OF TRIAL BY JURY.

…

… Again; how could the stripping people of the right of trial by jury conduce to the strength of the state? Do we find the government in England at all weakened by the people retaining the right of trial by jury? Far from it. Yet these things which merely tend to oppress the people, without conducing at all to the strength of the state, are the last which aristocratic rulers would consent to restore to the people; because they encrease the personal power and importance of the rulers. Judges, unincumbered by juries, have ever been found much better friends to government than to the people. Such judges will always be more desireable than juries to a self-created senate, upon the same principle that a large standing army, and the entire command of the militia and of the purse, is ever desireable to those who wish to enslave the people, and upon the same principle that a bill of rights is their aversion.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 16, pp. 53, 55.

12.2.4.44Deliberator, February 20, 1788

9. Congress may, in their courts of judicature, abolish trial by a jury, in civil cases, altogether; and even in criminal cases, trial by a jury of the vicinage is not secured by the constitution — A crime committed at Fort-Pitt may be tried by a jury of the citizens of Philadelphia.

[Philadelphia] Freeman’s Journal, Storing, vol. 3, p. 179.

12.2.4.45Hugh Williamson, Speech, February 25, 1788

It seems to be generally admitted, that the system of Government which has been proposed by the late Convention, is well calculated to relieve us from many of the grievances under which we have been laboring. If I might express my particular sentiments on this subject, I should describe it as more free and more perfect than any form of government that ever has been adopted by any nation; but I would not say it has no faults. Imperfection is inseparable from every human device. Several objections were made to this system by two or three very respectable characters in the Convention, which have been the subject of much conversation; and other objections, by

citizens of this State, have lately reached our ears. It is proper that you should consider of these objections. They are of two kinds; they respect the things that are in the system, and the things that are not in it. We are told that there… should also have been a Declaration of Rights. In the new system it is provided, that "*the Trial of all crimes*, except in cases of Impeachment," *shall be by Jury*, but this provision could not possibly be extended to all *Civil* cases. For it is well known that the Trial by Jury is not general and uniform throughout the United States, … hence it became necessary to submit the question to the General Legislature, who might accommodate their laws on this occasion to the desires and habits of the nation. Surely there is no prohibition in a case that is untouched.

[New York] Daily Advertiser, Kaminski & Saladino, vol. 16, p. 202.

12.2.4.46The Impartial Examiner, No. 1, February 27 and March 5, 1788

I believe, it is acknowledged that the establishment of excises has been one of the greatest grievances, under which the English nation has labored for almost a century and an half… . If this branch of revenue takes place, all the consequent rigour of excise laws will necessarily be introduced in order to enforce a due collection. On any charges or offence in this instance you will see yourselves deprived of your boasted trial by jury. The much admired common law process will give way to some quick and summary mode, by which the unhappy defendant will find himself reduced, perhaps to ruin, in less time than a charge could be exhibited against him in the usual course… .

And what is that "appellate jurisdiction both as to law and fact," but an establishment, which may in effect operate as original jurisdiction? — Or what is an appeal to enquire into facts after a solemn adjudication in any court below, but a trial de novo*?*… Add to all, that this high prerogative court establishes no fundamental rule of proceeding, except that the trial by jury is allowed in some criminal cases. All other cases are left open — and subject "to such regulations as the Congress shall make." — Under these circumstances I beseech you all, as citizens of Virginia, to consider seriously whether you will not endanger the solemn trial by jury, which you have long revered, as a sacred barrier against injustice — which has been established by your ancestors many centuries ago, and transmitted to you,

as one of the greatest bulwarks of civil liberty — which you have to this day maintained inviolate: — I beseech you, I say, as members of this commonwealth, to consider whether you will not be in danger of losing this inestimable mode of trial in all those cases, wherein the constitution does not provide for its security. Nay, does not that very provision, which is made, by being confined to a few particular cases, almost imply a total exclusion of the rest? Let it, then, be a reflection deeply impressed on your minds — that if this noble privilege, which by long experience has been found the most exquisite method of determining controversies according to the scale of equal liberty, should once be taken away, it is unknown what new species of trial may be substituted in its room. Perhaps you may be surprised with some strange piece of judicial polity, — some arbitrary method, perhaps confining all trials to the entire decision of the magistracy, and totally excluding the great body of the people from any share in the administration of public justice.

… For instance, if Congress should pass a law that persons charged with capital crimes shall not have a *right to demand the cause or nature of the accusation*, shall not be *confronted with the accusers or witnesses, or call for evidence in their favor;* and a question should arise respecting their authority therein, — can it be said that they have exceeded the limits of their jurisdiction, when *that* has no limits; when no provision has been made for such a right?

Virginia Independent Chronicle, Storing, vol. 5, pp. 181–83, 185.

12.2.4.47Brutus, No. 14, February 28, 1788

I believe it is a new and unusual thing to allow appeals in criminal matters. It is contrary to the sense of our laws, and dangerous to the lives and liberties of the citizen. As our law now stands, a person charged with a crime has a right to a fair and impartial trial by a jury of his country, and their verdict is final. If he is acquitted no other court can call upon him to answer for the same crime. But by this system, a man may have had ever so fair a trial, have been acquitted by ever so respectable a jury of his country; and still the officer of the government who prosecutes, may appeal to the supreme court. The whole matter may have a second hearing. By this means, persons who may have disobliged those who execute the general government, may be subjected to intolerable oppression. They may be kept

in long and ruinous confinement, and exposed to heavy and insupportable charges, to procure the attendance of witnesses, and provide the means of their defence, at a great distance from their places of residence.

I can scarcely believe there can be a considerate citizen of the United States, that will approve of this appellate jurisdiction, as extending to criminal cases, if they will give themselves time for reflection.

New York Journal, Storing, vol. 2, p. 432.

12.2.4.48The Landholder, No. 10, February 29, 1788

To the Honourable LUTHER MARTIN, Esq;

… Since the publication of the Constitution, every topic of vulgar declamation has been employed to persuade the people, that it will destroy the *trial by jury*, and is defective for being without a *bill of rights*. You, Sir, had more candour in the Convention than we can allow to those declaimers out of it; there you never signified by any motion or expression whatever, that it stood in need of a bill of rights, or in anywise endangered the trial by jury. In these respects the Constitution met your entire approbation: for had you believed it defective in these essentials, you ought to have mentioned it in the Convention, or had you thought it wanted further guards, it was your *indispensable duty to have proposed them*. I hope to hear that the same candour that influenced you on this occasion, has induced you to obviate any improper impressions such publications may have excited in your constituents, when you had the honour to appear before the General Assembly.

Maryland Journal, Kaminski & Saladino, vol. 16, pp. 267–68.

12.2.4.49Publicola, March 20, 1788

… The constitution of the respective states, and the rights of the people, are to remain as under the confederation, excepting such parts as interfere with the express powers given to Congress by the new constitution. All the clamour therefore, which has been raised about the trial by jury, and the liberty of the press, might have been spared, as altogether unfounded. To those who wish to trust themselves under separate state governments, which

may, as they have hitherto done, disregard the recommendations and requisitions of the union, I would recommend an attentive perusal of history, and as they do not seem to place any dependance on the reasoning of their fellow citizens, learn to be wise from the experience of past ages. They will find that in all countries, a strict union among the people, has been the only means of preserving liberty… .

State Gazette of North Carolina, Kaminski & Saladino, vol. 16, pp. 436–37.

12.2.4.50A Farmer, No. 4, March 21, 1788

… But moreover does not *Aristedes*, and every lawyer, know that in the interpretation of all political as well as civil laws, this fundamental maxim must be observed, *That where there are two objects in contemplation of any legislature, the express adoption of one, is the total exclusion of the other;* and that the adoption of juries in civil *criminal* cases, in every legal interpretation, amounts to be an absolute rejection in *civil* cases: — If the right of establishing juries, by a *Congressional* law is admitted at all, it must be admitted, as an *inherent legislative right*, paramount to the constitution, as it is not derived from it, and then the power that can make, can by law unmake; so that referring this power to a source of authority *superior* to the act of government, would leave us without any juries at all (even in *criminal* cases) if Congress should so please; which position can never be the object of either friends or enemies to the system at present. — If it is defective, it is still bad policy to make it worse; but still in every view, we must reflect, that the establishment of trials by jury, belongs to *political*, not to *civil* legislation. It includes the right of organizing government, not of regulating the conduct of individuals, as the following enquiry will prove; we must never give an assembly the power of giving itself power.

As the worth and excellence of this mode of trial, preserved and handed down from generation to generation for near two thousand years, has drawn down the enthusiastic encomiums of the most enlightened lawyers and statesmen of every age; as it has taken deep root in the breast of every freeman, encompassed by the defences of affection and veneration, a repetition of its praises would be as tedious as useless: Some remarks however, still remain to be made, which will place this subject in a more important and conspicuous view.

The trial by jury, is the only remaining power which the Commons of England have retained in their own hands, of all that plentitude of authority and freedom, which rendered their northern progenitors irresistible in war, and flourishing in peace. — The usurpations of *the few*, gradually effected by artifice and force, have robbed *the many*, of that power which once formed the basis of those governments, so celebrated by mankind. — The government of Sparta, the form of which, it is said, has continued from the days of Lycurgus to our age, preserving its model amidst those overwheming tides of revolution and shipwrecks of governments, which Greece has sustained for near three thousand years; the same form of government among the Saxons and other Germans, consisting of King, Lords and Commons, applauded by Tacitus and Machiavelli, were thus distinguished from the present government of England — The power of the Commons resided with them, not in representatives but in the body of the people. — *De minoribus rebus, principes consultant; de majoribus omnes*, are either the words of Tacitus or Caesar. The administration of *ordinary* affairs was committed to the select men; but all important subjects were deliberated on by the whole body of the people. — Such was the constitution of Sparta, and of England, when Machiavelli gives them as a model, for there can be no doubt but that the *folk-motes* of the Saxons were not formed by representation — The venerable remembrance of which assemblies, hung long about the affections of Englishmen, and it was to restore them that they offered such frequent libations of their noblest blood; but the usurpations of *the few* have been unwearied and irresistible, and the trial by jury is all that now remains to *the many*.

The trial by jury is — the democratic branch of the judiciary power— more necessary than representatives in the legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks; in the one case the treason is never discovered until liberty, and with it the power of defence is lost; the other is an open summons to arms, and then if the people will not defend their rights, they do not deserve to enjoy them.

The *judiciary* power, has generally been considered as a *branch* of the *executive*, because these two powers, have been so frequently united; — but where united, there is no liberty. — In every *free* State, the judiciary is kept separate, independent, and considered as an intermediate power; — and it certainly partakes more of a *legislative*, than an *executive* nature — The sound definition which Delolme applied to one branch may be justly

extended to the whole judiciary, — *That it is a subordinate legislation in most instances, supplying by analogy, and precedent in each particular case, the defects of general legislative acts*, — [W]ithout then the check of the *democratic branch — the jury*, to ascertain those facts, to which the judge is to apply the law, and even in many cases to determine the cause by a *general* verdict — the latitude of judicial power, combined with the various and uncertain nature of evidence, will render it impossible to convict a judge of corruption, and ascertain his guilt. — Remove the fear of punishment, give hopes of impunity, and vice and tyranny come scowling from their dark abodes in the human heart. — Destroy juries and every thing is prostrated to judges, who may easily disguise law, by suppressing and varying fact: — Whenever therefore the trial by juries has been abolished, the liberties of the people were soon lost — The judiciary power is immediately absorbed, or placed under the direction of the executive, as example teaches in most of the States of Europe. — So formidable an engine of power, defended only by the gown and the robe, is soon seized and engrossed by the power that wields the sword. — Thus we find the judiciary and executive branches united, or the *former* totally dependent on the *latter* in most of the governments in the world. — It is true, where the judges will put on the sword and wield it with success, they will subject both princes and legislature to their despotism, as was the case in the memorable usurpation of the Justizia of Arragon, where the judiciary erected themselves into a frightful tyranny.

Why then shall we risque this important check to judiciary usurpation, provided by the wisdom of antiquity? Why shall we rob the Commons of the only remaining power they have been able to preserve, for their personal exercise? Have they ever abused it? — I know it has and will be said — they have — that they are too ignorant — that they cannot distinguish between right and wrong—that decisions on property are submitted to chance; and that the last word, commonly determines the cause: — There is some truth in these allegations — but whence comes it — The Commons are much degraded in the powers of the mind: — They were deprived of the use of understanding, when they were robbed of the power of employing it. — Men no longer cultivate, what is no longer useful, — should every opportunity be taken away, of exercising their reason, you will reduce them to that state of mental baseness, in which they appear in nine-tenths of this globe — distinguished from brutes, only by form and the articulation of sound — *Give them power and they will find understanding to use it* — But taking juries with all their real and attributed

defects, it is not better to submit a cause to an impartial tribunal, who would at least, as soon do you right as wrong — than for every man to become subservient to government and those in power? — Would any man oppose government, where his property would be wholly at the mercy and decision of those that govern? — We know the influence that property has over the minds of men — they will risque their lives rather than their property; and a government, where there is no trial by jury, has an unlimited command over every man who has any thing to loose. — It is by the attacks on private property through the judiciary, that despotism becomes as irresistible as terrible. I could relate numerous examples of the greatest and best men in all countries, who have been driven to despair, by vexatious lawsuits, commenced at the instigation of the court, of favorites and of minions, and all *from the loss of juries*. — France was reduced to the brink of destruction in one instance. — The Queen mother Louise of Savoy, piqued at the constable of Bourbon, a young and amiable man, who refused to marry her, commenced a suit against him for all his estate — The judges were ready at the beck of the court, and without a shadow of justice deprived him by law of every shilling he was worth; and drove from this country an unfortunate hero, whose mad revenge carried desolation into her bosom. — In Denmark a despicable minion, who came in rags to the court, after the establishment of their new government, which they solicited Frederick the IIId to make for them, acquired an immense fortune by plunder, sheltered by the favour of the Sovereign. At last he fixed his eyes on a most delightful estate, and offered to buy it — The owner did not want money, and could not think of selling the patrimony of an ancient family; this wretch then spirited up lawsuits against him, and after the most cruel vexations obliged him to sell the estate for much less than he at first offered him. This unfortunate gentleman was driven from the country which gave him birth, and a once happy society of relations and friends. — Such would have been the fate of England, from those courts without juries, which took cognizance of causes arising in the revenues and imports in Charles the first's time, the court fortunately for the liberties of England, seized the bull by the horns, when they attacked that wonderful man John Hampden. He spent 20,000 *l*. rather than pay an illegal tax of twenty shillings, brought the case before the Parliament, roused the spirit of the nation, and finally overturned courts, King, and even the constitution for many years. These dreadful examples may teach us the importance of juries in *civil* cases — they may recal [*sic*] to my countrymen a maxim which their ancestors, as wise, and more virtuous than their posterity, held ever in view — *That if the people creep*

like tortoises, they will still find themselves too fast in giving away power.

[Baltimore] Maryland Gazette, Storing, vol. 5, pp. 37–40.

12.2.4.51 Luther Martin, Speech to Maryland General Assembly, March 30, 1788

[N]or is *trial by jury secured in criminal cases*; it is true, that in the first instance, in the inferior court the trial is to be by jury, in this and in this only, is the difference between criminal and civil cases; but, Sir, the *appellate jurisdiction extends*, as I have observed, to cases *criminal* as well as to civil, and on the *appeal* the *court* is to *decide not only* on the law but on the *fact*, if, therefore, *even* in *criminal* cases the general government is not satisfied with the verdict of the jury, its officer may remove the prosecution to the supreme court; and *there* the *verdict of the jury is to be of no effect*, but the *judges of this court* are to *decide upon the fact* as well as the law, the *same as in civil cases*.

Thus, Sir, *jury trials*, which have ever been the *boast* of the English constitution, which have been by our several *State constitutions* so *cautiously secured* to us — *jury trials* which have so long been considered the *surest barrier* against *arbitrary power*, and the *palladium* of *liberty*, — with the *loss* of *which* the *loss* of our *freedom* may be dated, are *taken away* by the proposed form of government, not *only* in a *great variety* of questions between *individual* and *individual*, but in *every case* whether *civil* or *criminal* arising *under the laws* of the United States, or the *execution* of those laws. — It is *taken away* in *those very cases* where of *all others* it is *most essential for our liberty*, to have it *sacredly guarded* and *preserved*, in *every case*, whether *civil* or *criminal*, between *government* and *its officers* on the one part, and the *subject* or *citizen* on the other. — Nor was this the effect of inattention, nor did it arise from any real difficulty in establishing and securing jury trials by the proposed constitution, if the convention had wished so to do: but the *same reason* influenced *here* as in the case of the establishment of inferior courts; as they could not trust *State Judges*, so would they not confide in *State juries*. — They alleged that the general government and the State governments would always be at variance; that the citizens of the different States would enter into the views and interests of their respective States, and therefore ought not to be trusted in determining causes in which the general government was any way

interested, without giving the general government an opportunity, if it disapproved the verdict of the jury, to appeal, and to have the *facts examined into again* and *decided upon* by *its own judges*, on whom it was thought a reliance might be had by the general government, they being appointed under its authority.

Storing, vol. 2, pp. 70–71.

12.2.4.52A Citizen of New-York, April 15, 1788

We are told, among other strange things, that the liberty of the press is left insecure by the proposed Constitution, and yet that Constitution says neither more nor less about it, than the Constitution of the State of New-York does. We are told that it deprives us of trial by jury, whereas the fact is, that it expresly [*sic*] secures it in certain cases, and takes it away in none — it is absurd to construe the silence of this, or of our own Constitution, relative to a great number of our rights, into a total extinction of them — silence and blank paper neither grant nor take away any thing. Complaints are also made that the proposed Constitution is not accompanied by a bill of rights; and yet they who make these complaints, know and are content that no bill of rights accompanied the Constitution of this State. In days and countries where Monarchs and their subjects were frequently disputing about prerogative and privileges, the latter often found it necessary, as it were to run out the line between them, and oblige the former to admit by solemn acts, called bills of rights, that certain enumerated rights belonged to the people, and were not comprehended in the royal prerogative. But thank God we have no such disputes — we have no Monarchs to contend with, or demand admissions from — the proposed Government is to be the government of the people — all its officers are to be their officers, and to exercise no rights but such as the people commit to them. The Constitution only serves to point out that part of the people's business, which they think proper by it to refer to the management of the persons therein designated — those persons are to receive that business to manage, not for themselves, and as their own, but as agents and overseers for the people to whom they are constantly responsible, and by whom only they are to be appointed.

Kaminski & Saladino, vol. 17, pp. 112–13.

12.2.4.53Fabius, No. 4, April 19, 1788

It seems highly probable, that those who would reject this labour of public love, would also have rejected the Heaven-taught institution of *trial by jury*, had they been consulted upon its establishment. Would they not have cried out, that there never was framed so detestable, so paltry, and so tyrannical a device for extinguishing freedom, and throwing unbounded domination into the hands of the king and barons, under a contemptible pretence of preserving it? What! Can *freedom* be preserved by *imprisoning* its *guardians*? Can *freedom* be preserved, by keeping *twelve* men *closely confined* without *meat, drink, fire,* or *candle*, until they *unanimously agree*, and this to be infinitely repeated? Can *freedom* be preserved, by thus delivering up *a number of freemen* to a monarch and an aristocracy, fortified by dependant and obedient judges and officers, to be shut up, *until under duress they speak as they are ordered*? Why can't the twelve jurors *separate*, after hearing the evidence, return to their *respective homes*, and there *take time*, and *think* of the matter *at their ease*? Is there not *a variety of ways*, in which causes have been, and can be tried, without this tremendous, *unprecedented inquisition*? Why then is it insisted on; but because the fabricators of it *know* that it *will*, and *intend* that it *shall* reduce the people to slavery? Away with it — Freemen will never be enthralled by so insolent, so execrable, so pitiful a contrivance.

…

Trial by jury and the dependance of taxation upon representation, those corner stones of liberty, were not obtained by a *bill* of *rights*, or any other records, and have not been and cannot be preserved by them. They and all other rights must be preserved, by soundness of sense and honesty of heart. Compared with *these*, what are a bill of rights, or any characters drawn upon paper or parchment, those frail remembrances? Do we want to be reminded, that the sun enlightens, warms, invigorates, and cheers? or how horrid it would be, to have his blessed beams intercepted, by our being thrust into mines or dungeons? Liberty is the sun of freemen, and the beams are their rights.

… Trial by Jury is our birthright; and tempted to his own ruin, by some seducing spirit, must be the man, who in opposition to the genius of United *America*, shall dare to attempt its subversion.

In the proposed confederation, it is preserved inviolable in criminal cases, and cannot be altered in other respects, but when United *America* demands it.

Pennsylvania Mercury, Kaminski & Saladino, vol. 17, p. 182–84.

12.2.4.54Aristocrotis, April 1788

… Another privilege which the people possesses at present, and which the new congress will find it their interest to deprive them of, is trial by jury — for of all the powers which the people have wrested from government, this is the most absurd; it is even a gross violation of common sense, and most destructive to energy. In the first place it is absurd, that twelve ignorant plebians, should be constituted judges of a law, which passed through so many learned hands; — first a learned legislature after many learned animadversions and criticisms have enacted it — Second, learned writers have explained and commented on it. — Third, lawyers twisted, turned and new modeled it — and lastly, a learned judge opened up and explained it. Yet after all these learned discussions, an illiterate jury (who have scarce a right to think for themselves instead of judging for others) must determine whether it applies to the fact or not; and by their verdict the learned judge must be governed in passing sentence; and perhaps a learned gentleman be cast in an action with an insignificant cottager.

Secondly. Common sense recoils at the very idea of such a pernicious practice as this, because it makes no difference between the virtuous and the vicious, the precious and the vile; between those of noble birth, and illustrious descent, and those of base blood, and ignoble obscure pedigree — for an ignorant stupid jury, cannot discern the merit of persons — it is the merits of the cause they examine; which is just reversing the question, and beginning at the wrong end. Thirdly. This custom is fatal to energy, for tho' a law should be expressed in the most pointed terms, a jury may soften and mitigate, and in a great measure destroy the spirit of it… .

Storing, vol. 3, pp. 204–05.

12.2.4.55Address of a Minority of the Maryland Convention, May 1, 1788

The great objects of these amendments were, 1st. To secure the trial by jury in all cases, the boasted birthright of Englishmen, and their descendants, and the palladium of civil liberty; and to prevent the *appeal from fact*,

which not only destroys that trial in civil cases, but by *construction*, may also elude it in criminal cases; a mode of proceeding both expensive and burthensome; and also by blending law with fact, will destroy all check on the judiciary authority, render it almost impossible to convict judges of corruption, and may lay the foundation of that gradual and silent attack on individuals, by which the approaches of tyranny become irresistable.

[Baltimore] Maryland Gazette, Kaminski & Saladino, vol. 17, p. 243.

12.2.4.56The Federalist, No. 81, May 28, 1788

… To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate puts it out of all doubt that the supposed abolition of the trial by jury by the operation of this provision is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the Supreme Court there should be no reexamination of facts where they had been tried in the original causes by juries. This would certainly be an authorised exception; but if for the reason already intimated it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this —… that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

Kaminski & Saladino, vol. 18, p. 110.

12.2.4.57The Federalist, No. 83, May 28, 1788

… The mere silence of the Constitution in regard to civil causes is represented as an abolition of the trial by jury, and the declamations to which it has afforded a pretext are artfully calculated to induce a persuasion that this pretended abolition is complete and universal, extending not only to every species of civil, but even to *criminal causes*. To argue with respect to the latter would be as vain and fruitless as to attempt the serious proof of the *existence* of *matter*, or to demonstrate any of those propositions which by their own internal evidence force conviction, when expressed in language adapted to convey their meaning.

Kaminski & Saladino, vol. 18, p. 115.

12.2.4.58The Federalist, No. 84, May 28, 1788

[T]he Constitution proposed by the convention contains, as well as the constitution of this state, a number of such provisions [in favor of rights and privileges].

Independent of those which relate to the structure of the government, we find the following: … Article 3, section 2, clause 3 "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

Kaminski & Saladino, vol. 18, p. 128.

12.2.4.59A [New Hampshire] Farmer, No. 3, June 6, 1788

I shall now make some observations on the unjust and illiberal sarcasms, passed by Mr. Alfredus, on our jurors: — And, as he has such a peculiar nack of leaping over important things, by saying "they are nothing to the purpose," or by stigmatizing them, "as impertinent observations, groundless assertions," *etc.* I shall copy his own words, and then follow, with the sentiments of the Hon. Justice Blackstone, who is one of the most celebrated Authors now extant.

Sir, in your publication of Friday, January 18th, ult. you say, "What are the advantages of this boasted trial by jury, and on which side do they lie?

Not certainly on the side of justice, for one unprincipled juror, secured in the interest of the opposite party, will frequently divert her course, and in four cases out of five where injustice is done, it is by *the ignorance or knavery of the jury."* This, I may venture to affirm, is an impudent and bold stroke; it attacks the whole community at once, and has a tendency to sap and undermine the best preservative of liberty, and therefore ought to be held in abhorrence by every freeman; it is totally repugnant to the sense of the best writers on the subject, and especially to the ideas of the renowned author above mentioned, whose sentiments I shall now quote, vol. 3, page 378. *"When the jury have delivered in their verdict, and it is recorded in court, that ends the trial by jury; a trial which besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap as it is convenient, equitable and certain: upon these accounts — the trial by jury has been, as I trust ever will be looked upon as the glory of the English law; and if it has so great an advantage over individuals in regulating civil property, how much must that advantage be heightened, when it is applied* to criminal cases; *it is the most transcendant privilege which any subject can enjoy or wish for; he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals; a Constitution that I may venture to affirm has, under Providence, secured the just liberties of the English nation for a long succession of ages; and therefore a celebrated French writer (Montesque) who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury*.

Great as this eulogium may seem, it is no more than this admirable Constitution, when traced to its principles, will be found, in sober reason, to deserve. The impartial administration of justice, which secures both our persons and properties, is the great end of civil society; but if that be entirely entrusted to the magistracy of a select body of men, and those generally selected by the Prince, or those who enjoy the highest offices in the state, their decision, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; here therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice; for the most powerful individual in the state, will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his

oppression, must be examined, and decided by twelve indifferent men, not appointed till near the hour of trial: and that, when once the fact is ascertained, the law must of course redress it — This therefore preserves, in the hands of the people, that share which they ought to have, in the administration of public justice; and prevents the encroachments of the more powerful and wealthy citizens.

Every new tribunal erected for the decision of facts, without the intervention of a jury, whether composed of justices of the peace; commissioners of the revenue; judges of a court of conscience; or any other standing magistrate, is a step towards establishing aristocracy, the most oppressive of absolute government. It is, therefore, upon the whole, the duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power, this valuable Constitution in all its rights, and above all to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY," — Added to this, there is a late law of this state, which puts the pay, and travel of our jurors upon a very respectable footing — And lest Mr. Alfredus should say, this is nothing to the purpose, because the trial, by jury, under the English Constitution, — may be very different from what it is in ours, I will just mention, wherein they differ, under the English Constitution, — The jurors are returned by the sheriff. — under ours they are draughted by lot, from each town, which, I think, is the most equitable method, and as to the modes of process through the trials, they are nearly the same, both endeavor to do justice to the parties.

[New Hampshire] Freeman's Oracle and New Hampshire Advertiser, Storing, vol. 4, pp. 213–14.

12.2.4.60Sydney, Address, June 13 & 14, 1788

By the 13th paragraph "no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of the State by this constitution, unless by the law of the land, or judgment of its peers."

…

The 41st provides "that the trial by jury remain inviolate forever; that no acts of attainder shall be passed by the legislature of this State for crimes

other than those committed before the termination of the present war… .”

There can be no doubt that if the new government be adopted in all its latitude, every one of these paragraphs will become a dead letter… .

New York Journal, Storing, vol. 6, p. 116.

12.2.5LETTERS AND DIARIES

12.2.5.1Thomas Jefferson to James Madison, December 20, 1787

… I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for… the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations. To say, as Mr. Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved might do for the Audience to whom it was addressed, but is surely gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. It was a hard conclusion to say because there has been no uniformity among the states as to the cases triable by jury, because some have been so incautious as to abandon this mode of trial, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just and wise to have concluded the other way that as most of the states had judiciously preserved this palladium, those who had wandered should be brought back to it, and to have established general right instead of general wrong.

Boyd, vol. 12, p. 440.

12.2.5.2Thomas Jefferson to Alexander Donald, February 7, 1788

I wish with all my soul that the nine first Conventions may accept the new Constitution, because this will secure to us the good it contains, which I think great and important. But I equally wish that the four latest

conventions, whichever they be, may refuse to accede to it till a declaration of rights be annexed… . By a declaration of rights… . I mean one which shall stipulate… trials by juries in all cases… .

Boyd, vol. 12, p. 571.

12.2.5.3Thomas Jefferson to C. W. F. Dumas, February 12, 1788

… With respect to the new government, 9. or 10. states will probably have accepted it by the end of this month. The others may oppose it… . Besides other objections of less moment, she [Virginia] will insist on annexing a bill of rights to the new constitution, *i.e.* a bill wherein the government shall declare that… 3. Trials by jury preserved in all cases.

Boyd, vol. 12, pp. 583–84.

12.2.5.4George Washington to Marquis de Lafayette, April 28, 1788

… For example, there was not a member of the convention, I believe, who had the least objection to what is contended for by the Advocates for a *Bill of Rights* and *Tryal by Jury*.… [A]s to the second, it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment.

Writings of George Washington, John C. Fitzpatrick, ed. (Washington: G.P.O.), vol. 29, pp. 478–79.

12.2.5.5James Madison to George Eve, January 2, 1789

[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it, ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants &c.

Rutland & Hobson, vol. 11, p. 405.

12.2.5.6Thomas Jefferson to Francis Hopkinson, March 13, 1789

… What I disapproved from the first moment also was the want of the bill of rights to guard liberty against the legislative as well as the executive branches of the government, that is to say to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury in all cases determinable by the laws of the land.

Boyd, vol. 14, p. 650.

12.2.5.7William R. Davie to James Madison, June 10, 1789

That farago of Amendments borrowed from Virginia is by no means to be considered as the sense of this Country; they were proposed amidst the violence and confusion of party heat, at a critical moment in our convention, and adopted by the opposition without one moment's consideration. I have collected with some attention the objections of the honest and serious… they also insist on the trial by jury being expressly secured to them in all cases… .

Veit, p. 246.

12.2.5.8Fisher Ames to Thomas Dwight, June 11, 1789

Mr. Madison has introduced his long expected Amendments. They are the fruit of much labour and research. He has hunted up all the grievances and complaints of newspapers — all the articles of Conventions — and the small talk of their debates. It contains a Bill of Rights — the right of enjoying property — of changing the govt. at pleasure — freedom of the press — of conscience — of juries — exemption from general Warrants gradual increase of representatives till the whole number at the rate of one to every 30,000 shall amount to and allowing two to every State, at least this is the substance. There is too much of it — O. I had forgot the right of the people to bear Arms.

Risum teneatis amici —

Upon the whole, it may do good towards quieting men who attend to sounds only, and may get the mover some popularity — which he wishes.

Veit, p. 247.

12.2.5.9Abraham Baldwin to Joel Barlow, June 14, 1789

A few days since, Madison brought before us propositions of amendment agreeably to his promise to his constituents… . “That what is not given is reserved, that liberty of the press & trial by jury shall remain *inviolable*.… [”]

Veit, p. 250.

12.2.5.10Tench Coxe to James Madison, June 18, 1789

I observe you have brought forward the amendments you proposed to the federal Constitution… . Those who are honest are well pleased at the footing on which the press, liberty of conscience, original right and power, trial by jury &c. are rested.

Hobson & Rutland, vol. 12, p. 239.

12.2.5.11Samuel Nasson to George Thatcher, July 9, 1789

I find that Ammendments are once again on the Carpet… anoather [*sic*] that I hope will be Established in the bill is tryals by Juryes in all Causes Excepting where the parties agree to be without… .

Veit, pp. 260–61.

12.2.5.12Henry Gibbs to Roger Sherman, July 16, 1789

… All Ambiguity of Expression certainly ought to be remov’d; Liberty of Conscience in religious matters, right of trial by Jury, Liberty of the Press &c. may perhaps be more explicitly secur’d to the Subject & a general reservation made to the States respectively of all the powers not expressly

delegated to the general Government.

Veit, p. 263.

12.2.5.13 Benjamin Goodhue to Samuel Phillips, September 13, 1789

… The Amendments have come from the Senate with amendments, such as striking out the word *vicinage* as applied to Jurors, and have struck out the limitations of sums for an appeal to the federal Court &c. Those two have been the darling objects with the Virginians who have been the great movers on amendments, and I am suspicious, it may mar the whole business, at least so far as to refer it to the next session.

Veit, p. 294.

12.2.5.14 James Madison to Edmund Pendleton, September 14, 1789

The Senate have sent back the plan of amendments with some alterations which strike in my opinion at the most salutary articles. In many of the States juries even in criminal cases are taken from the State at large — in others from districts of conside[rable] extent — in very few from the County alone. Hence a [dis]like to the restraint with respect to *vicinage*, which has produced a negative on that clause… . Several others have had a similar fate. The difficulty of uniting the minds of men accustomed to think and act differently can only be conceived by those who have witnessed it.

Hobson & Rutland, vol. 12, pp. 402–03.

12.2.5.15 James Madison to Edmund Pendleton, September 23, 1789

The pressure of unfinished business has suspended the adjournment of Congs. till saturday next. Among the articles which required it was the plan of amendments, on which the two Houses so far disagreed as to require conferences. It will be impossible I find to prevail on the Senate to concur

in the limitation on the *value* of appeals to the Supreme Court… They are equally inflexible in opposing a definition of the *locality* of Juries. The vicinage they contend is either too vague or too strict a term: too vague if depending on limits to be fixed by the pleasure of the law, too strict if limited to the County. It was proposed to insert after the word juries — "with the accustomed requisites" — leaving the definition to be construed according to the judgment of professional men. Even this could not be obtained. The truth is that in most of the States the practice is different, and hence the irreconcilable difference of ideas on the subject. In some States, jurors are drawn from the whole body of the community indiscrim[in]ately; In others, from large districts comprehending a number of Counties; and in a few only from a single County. The Senate suppose also that the provision for vicinage in the Judiciary bill, will sufficiently quiet the fears which called for an amendment on this point… .

Hobson & Rutland, vol. 12, pp. 418–19.

12.3DISCUSSION OF RIGHTS

12.3.1TREATISES

12.3.1.1Bacon, 1740

Juries.

THE Trial *per Pais*, or by a Jury of one's Country, is justly esteemed one of the chiefest Excellencies of our Constitution; for what greater Security can any Person have in his Life, Liberty, or Estate, than to be sure of not being devested of, or injured in any of these, without the Sense and Verdict of twelve honest and impartial Men of his Neighbourhood? And hence we find the Common Law herein confirmed by *Magna Charta, cap.* 29. *Nullus Liber Homo capiatur, vel imprisonetur, aut disseisietur de libero Tenemento suo, vel Libertatibus, vel Liberis Consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium Parium suorum, vel per Legem terrae*.[1]

Likewise the Antiquity of this Trial, and its being peculiar to us, have been taken Notice of, as Matters which reflect Honour on our Constitution; for tho' there were antiently several other Methods of Trial, such as by Battle, Ordeal, &*c*. yet have they, from the Inconveniencies attending them, been laid aside, and this alone cultivated and improved, as the best Method of investigating Truth.[2]

We shall consider this Head under the following Divisions.

(A) Of the several kinds of Juries and particular Inquests; and therein of the Number such Juries must consist of.

(B) Of the Jury Process, and Manner of convening the Jury: And herein,

1. Of the Necessity of such Process, and where a Panel may be returned by a bare Award without any Precept.
2. Of the several Kinds of Jury Process, and Manner of compelling a Jury to appear.
3. By whom such Processes are to be executed, and the Jury convened.
4. In what Time such Processes are returnable.
5. Where the Jury must appear.
6. What Number are to be returned.
7. Of awarding Process by *Proviso*.
8. Necessity of returning a Panel into Court, and where a Prisoner may demand a Copy of it.
9. Of the Trials going off *pro Defectu Juratorum*; and therein of drawing a Juror.

(C) In what Cases and in what Manner a Tales is grantable.

(D) In what Cases and in what Manner special Juries are appointed.

(E) Who are to be returned; and therein of the Qualifications and several Causes for which they may be challenged: And herein,

1. Of Challenges to the Array or to the Polls; and herein where the Insufficiency or Partiality of the Sheriff or Returning Officer is a principal Cause of Challenge, or to the Favour.
2. Where Insufficiency and not being *Liber Homo* is a good Cause of Challenge to the Polls.
3. Where the Want of Freehold, or a competent Estate, is a good Cause of Challenge.
4. Where the Jury's not being convened from a right Place is a good Cause of Challenge.

good Cause of Challenge.
5. Where Partiality in the Juror is a good Cause of Challenge; and therein where it shall be said a principal Cause of Challenge, or to the Favour.
6. Where the Quality of the Juror is a good Cause of Challenge; and herein who are exempt from serving on Juries.
7. Where from the Quality of either Party it is a good Cause of Challenge, that a Knight is not returned.
8. Of Trials *per Medietatem Linguae*, where an Alien is Party.
9. Of peremptory Challenges.
10. Of Challenges by the Crown.
11. At what Time a Challenge is to be taken.
12. How such a Challenge is to be tried.

(F) How Jurors are to be impanelled and sworn.

(G) How to be kept and discharged.

(H) In what Cases and in what Manner to have a view.

(I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors are amendable, and aided after Verdict.

(K) What Irregularities or Defects in convening, or in the Qualifications of the Jurors, are aided by Consent.

(L) When and by whom to be paid.

(M) For what Misdemeanors punishable: And herein,

1. Where punishable by Attaint.
2. How otherwise punishable.
3. Where Abuses by others in Relation to them are punishable; and therein of the Offence of Embracery.

(A) OF THE SEVERAL KINDS OF JURIES AND PARTICULAR INQUESTS; AND THEREIN OF THE NUMBER SUCH JURY MUST CONSIST OF.

JURIES are distinguished into Grand and Petit Juries; the Grand Jury may (a) consist of thirteen, or any greater Number; for these being the Grand Inquisitors of the County, every Indictment and Presentment by them must be found by twelve at least; but it is not necessary that all above that Number should concur in such Presentment or Indictment.[3]

Upon the Summons of any Session of the Peace, and in Cases of Commissions of Oyer and Terminer and Gaol-Delivery, there goes out a Precept either in the Name of the King, or of two of more Justices, directed to the Sheriff, upon which he is to return twenty-four, or more, out of the

whole County, namely, a considerable Number out of every Hundred, out of which the Grand Inquest at the Sessions of the Peace, Oyer and Terminer, or Gaol-Delivery are taken, and sworn *ad Inquirendum pro Domino Rege* & *Corpore Comitatus*.[4]

Those returned to serve on the Grand Jury must be (b) *Probi* & *Legales Homines*, and ought to be of the same County where the Crime was committed; and therefore it is a good Exception at Common Law to one returned on a Grand Jury, that he is an Alien or Villein, or that he is (c) outlawed for a Crime, or that he was not returned by the proper Officer, or that he was returned at the Instance of the Prosecutor; but these Exceptions must be taken before the Indictment found.[5]

It is laid down by my Lord Chief Justice *Hale*, that at Common Law every Person returned on the Grand Jury ought to be a Freeholder at least, and that the Statute of 2 *H*. 5. *cap*. 3. that requires Jurors that pass upon the Trial of a Man's Life to have 40 *s. per Annum* Freehold, hath been the Measure by which the Freehold of Grand Jurymen hath been measured in Precepts of Summons of Sessions.[6]

Also by several (a) Acts of Parliament it is provided, that those who serve on the Grand Jury be such as are duly qualified, the principal ones of which are the 11 *H*. 4. *cap*. 9. and 3 *H*. 8. *cap*. 12. the first whereof is as followeth: 'Because that now of late Enquests were taken at *Westminster* of Persons named to the Justices, without due Return of the Sheriff, of which Persons some were outlawed before the said Justices of Record, and some fled to Sanctuary for Treason, and some for Felony, there to have Refuge, by whom as well many Offenders were indicted, as other lawful liege People of our Lord the King, not guilty, by Conspiracy, Abetment, and false Imagination of other Persons, for their special Advantage and singular Lucre, against the Course of the Common Law used and accustomed before this Time; our said Lord the King, for the greater Ease and Quietness of his People, wills and granteth, that the same Indictment so made, with all the Dependance thereof, be revoked, annulled, void, and holden for none for ever, and that from henceforth no Indictment be made by any such Persons, but by Inquests of the King's lawful liege People, in the Manner it was used in the Time of his Noble Progenitors, returned by the Sheriffs or Bailiffs of Franchises, without any Denomination to the Sheriffs or Bailiffs of Franchises before made by any Person of the Names which by him should be impanelled, except it be by the Officers of the said Sheriffs or Bailiffs of Franchises sworn and known to make the same, and other Officers to whom

it pertaineth to make the same, according to the Law of *England*; and if any Indictment be made hereafter in any Point to the contrary, that the same Indictment be also void, revoked, and for ever holden for none.'

In the Construction of this Statute the following Points have been resolved;

That if a Person not returned on a Grand Jury procure his Name to be read among those that are returned, whereupon he is sworn, &*c*. he may be indicted for a Contempt of this Statute.[7]

That Indictments before (b) Justices of the Peace are clearly within this Statute[8].

That a Person, arraigned on an Indictment taken contrary to the Statute, may plead such Matter in Avoidance of the Indictment, and also plead over to the Felony.[9]

That he, who is outlawed on an Indictment without any Trial, may clearly shew in Avoidance of such Outlawry, that the Indictment was taken contrary to the Statute; but the Court needs not admit of the Plea of the Outlawry of an Indictor in Avoidance of any such Indictment, unless he who pleads it have the Record ready, unless it be an Outlawry of the same Court wherein the Indictment is depending; in which Case it is said, that any one as *Amicus Curiae* may inform the Court of it; also it seems the better Opinion, that no Exception against an Indictor is allowable, unless the Party takes it before Trial.[10]

That if any one of the Grand Jury, who find an Indictment, be within any of the Exceptions in the Statute, he vitiates the Whole, tho' never so many unexceptionable Persons joined with him in finding it.[11]

That if a Prisoner indicted of Felony offer to take any such Exception, he shall, upon his Prayer, have Counsel assigned him for his Assistance.

By the 3 *H*. 8. *cap*. 12. it is Enacted, 'That all Panels to be returned, which be not at the Suit of any Party that shall be made, and put in by every Sheriff, and their Ministers, before any Justice of Gaol-Delivery, or Justices of Peace, whereof one to be of the *Quorum*, in their open Sessions, to inquire for the King, shall be reformed by putting to and taking out of the Names of the Persons which so be impanelled by every Sheriff, and their Ministers, by the Discretion of the same Justices before whom such Panels shall be returned, and that the same Justice and Justices shall command every Sheriff, and their Ministers in his Absence, to put other Persons in the same Panel by their Discretions, and that the same Panels so reformed by the said Justices be good and lawful; and that if any Sheriff, or any other

Minister, at any Time do not return the same Panels so reformed, that then every such Sheriff and Minister so offending shall forfeit for every such Offence twenty Pounds, &*c*.'

This Act extends not only to Panels of Grand Inquests returned, but also to Panels of the Petty Jury, commonly called the Petty Jury of Life and Death, which may be reformed by the Justices according to this Act, and the Sheriff is bound to return the Panel so reformed.[12]

It hath been holden, that this Statute doth not take away the Force of 11 *H*. 4. as to any Point wherein both may consist together; and therefore if any Indictor be outlawed, or returned at the Nomination of any Person, contrary to 11 *H*. 4. except of the Justices authorised as abovementioned to reform the Panel, the Indictment may be avoided in the same Manner as before.[13]

The Grand Jury, as has been already observed, must consist of twelve at (a) least, the Petty Jury of twelve, and can be neither more nor less; but it is said, that particular (b) Inquests may consist of a more or less Number than twelve.[14]

But on a Writ of Error a Judgment out of an inferior Court was reversed, because being by Default, the Inquiry of Damages was only by two Jurors; and tho' a Custom was alledged to warrant it, yet it was resolved, that there could not be less than twelve, tho' the Writ of Inquiry saith only *per Sacramentum Proborum* & *Legalium Hominum*, and not *duodecim* as in a *Venire*.[15]

Also it hath been frequently held, that a Custom in an inferior Court to try by six Jurors is void; and that tho' such Custom is used in *Wales*, yet that that is by Force of the Statute 34 *H*. 8. which appoints that such Trials may be by six only where the Custom hath been so.[16]

(B) OF THE JURY PROCESS, AND MANNER OF CONVENING THE JURY: And herein,

1. OF THE NECESSITY OF SUCH PROCESS, AND WHERE A PANEL MAY BE RETURNED BY A BARE AWARD WITHOUT ANY PRECEPT.

IT seems agreed, that a Person not duly summoned and returned is not obliged to serve on a Jury; also hath been held, that if a Stranger cause himself to be sworn in the Name of one who was of the Jury, it is such a Misdemeanor for which he may be indicted, and for which also an Action on the Case lies at the Suit of the Party injured.[17]

But Justices of Gaol-Delivery may have a Panel returned by the Sheriff without any Precept or Writ; and the Reason given for it is, that before their

Coming they make a general Precept to the Sheriff in Parchment, under their Seals, to bring before them at the Day of their Sessions twenty-four out of every Hundred, &*c*. to do those Things which shall be enjoined them on the Part of the King, &*c*. and therefore it is said, that they need not make any other Precept for the Return of a Jury for the Trial of any Issue joined before them, but that their bare Award that the Jury shall come is sufficient, because there are enow for that Purpose supposed to be present in Court, whom the Sheriff may return immediately, whenever the Court shall demand their Service.[18]

Also it is said, that a Jury may be so returned before Justices of Peace at their Sessions, because the Precept for the Summons of the Sessions hath a Clause to the same Effect, for the Summons of twenty-four out of every Hundred: But it is (a) doubted whether this Matter does not rather depend on Practice, and the constant Course of Precedents, than any Argument from the Reason of the Thing; and even in the Case of Justices of Gaol-Delivery, the Law is otherwise, if they have a special Commission.[19]

Also the Precept to the Sheriff from Justices of Oyer and Terminer, in order for the holding of their Sessions, hath in Effect the very same Clause for the bringing of twenty-four before them out of each Hundred at the Day of their Sessions, &*c*. and yet it seems agreed, that they cannot have a Jury returned for the Trial of an Issue joined before them by Force of a bare Award, but ought to make a particular Precept to the Sheriff for that Purpose under their Seals.[20]

By the Course of the King's Bench no Jury can be returned into it from a foreign County, without Process under the Seal of the Chief Justice; but *Quaere* if it may not be returned for a Trial in the County where it fits by a bare *Praeceptum est?*[21]

*

6. WHAT NUMBER ARE TO BE RETURNED.

Altho' by the Words of the Writ of *Venire Facias* the Sheriff is only to return twelve, yet by antient Course he was obliged to return twenty-four; and this, says my Lord *Coke*, is for Expedition of Justice; for if twelve should only be returned, no Man should have a full Jury appear or be sworn in respect of Challenges without a *Tales*, which would be a great Delay of Trials.[22]

But tho' the Sheriff return a lesser Number, as where the Sheriff returned only twenty-three, and a sufficient Number appear, and try the Issue, this

will be aided by the Statutes of *Jeofail* as a Misreturn.[23]

The Precept that issues before a Sessions of Gaol-Delivery, Oyer and Terminer, and of the Peace, is to return twenty-four, and commonly the Sheriff returns upon that Precept forty-eight.[24]

But the Award or Precept to try the Prisoner after he hath pleaded, is only *Venire Facias* twelve, and (c) twenty-four are returned by the Sheriff on that Panel.[25]

At Common Law in Civil Causes, it seems the Sheriff might have returned above twenty-four if he pleased; and therefore by the Statute of (d) *Westminster* 2. *cap*. 38. it is recited, That whereas the Sheriffs were used to summon an unreasonable Multitude of Jurors, to the Grievance of the People, it is ordained, that from thenceforth in one Assise no more shall be returned than twenty-four.[26]

And now by the 3 *Georg*. 2. *cap*. 25. *sect*. 8. it is Enacted, ‘That every Sheriff or other Officer, to whom the Return of the *Venire Facias Juratores*, or other Process, for the Trial of Causes before Justices of Assise or *Nisi Prius*, in any County in (e) *England*, doth or shall belong, shall upon his Return of every such Writ of *Venire Facias*, (unless in Causes intended to be tried at Bar, or in Cases where a special Jury shall be struck by Order or Rule of Court,) annex a Panel to the said Writ, containing the Christian and Surnames, Additions, and Places of Abode of a competent Number of Jurors named in such Lists as qualified to serve on Juries, the Names of the Persons to be inserted in the Panel annexed to every *Venire Facias* for the Trial of all Issues at the same Assises in each respective County, which Number of Jurors shall be not less than forty-eight in any County, nor more than seventy-two, without Direction of the Judges appointed to go the Circuit and sit as Judges of Assise or *Nisi Prius* in such County, or one of them, who are respectively hereby impowered and required, if he or they see Cause, by Order under his or their respective Hand or Hands, to direct a greater or lesser Number; and then such Number, as shall be so directed, shall be the Number to serve on such Jury, and that the Writs of *Habeas Corpora Juratorum* or *Distringas*, subsequent to such Writ of *Venire Facias*, need not have inserted in the Bodies of such respective Writs the Names of all the Persons contained in such Panel; but it shall be sufficient to insert in the mandatory Part of such Writs respectively, *Corpora separalium Personarum in Panello huic Brevi annexo nominatorum*, or Words of the like Import, and to annex to such Writs respectively Panels containing the same Names as were returned in the Panel to such *Venire*

Facias, with their Additions and Places of Abode, that the Parties concerned in any such Trials may have timely Notice of the Jurors who are to serve at the next Assises, in order to make their Challenges to them, if there be Cause; and that for the making the Returns and Panels aforesaid, and annexing the same to the respective Writs, no other Fee or Fees shall be taken than what are now allowed by Law to be taken for the Return of the like Writs and Panels annexed to the same, and that the Persons named in such Panels shall be summoned to serve on Juries at the then next Assises or Sessions of *Nisi Prius* for the respective Counties to be named in such Writs, and no other.'[27]

7. OF AWARDING PROCESS BY PROVISO.

If the Plaintiff after Issue joined neglects to try his Cause the first Assises in the Country, or the first Term in *Middlesex* or *London*, the Defendant is at Liberty to bring down the Cause by *Proviso*, so called by the Clause in the *Venire Facias*, which says, *Proviso semper quod si duo Brevia inde tibi pervenerint unum eorundem tantum retorn' & exequaris*; for both Plaintiff and Defendant having put themselves upon their Country, the Plaintiff's Laches shall not prevent the Defendant's Discharging himself from the Action, and therefore the Process is as well open for him as for the Plaintiff.[28]

This Process by *Proviso*, (*i. e*. with a Clause that if two Writs come to the Sheriff, he shall execute one of them only,) may be taken out not only when the Plaintiff neglects to take out the *Venire* the same Term, but also upon his Neglect to get it returned; and in like Manner if the Plaintiff make the like Default in suing out an *Habeas Corpora*, or other subsequent Process, the Defendant may sue out the like Process by *Proviso*.[29]

But where the Defendant hath sued out any Process by *Proviso*, there are Authorities that the Plaintiff is to sue out the proper subsequent Process upon it in the same Manner as if he had sued out the first, and that it is irregular for a Defendant to take out any such subsequent Process till the Plaintiff has made a Default in respect of the same kind of Process, except only in such Actions wherein the Defendant is an Actor as well as the Plaintiff, as in Replevin, or Error, or *Quare Impedit* against a Patron only, or Prohibition, &*c*. in which Actions the Defendant may either take out Process by *Proviso*, without any Default in the Plaintiff, or may, if he think fit, take it out in the same Manner as the Plaintiff, without any Clause of *Proviso*.[30]

It seems agreed, that neither in Actions wherein the King is sole Party,

nor in Indictments, there can be any Process taken out by *Proviso*, because no Laches is imputable to the King; also it hath been questioned whether there can be any such Process in Informations *Qui tam*, because the King is in some sort a Party.[31]

But it seems agreed that it may be so awarded in any Appeal, whether Capital or not Capital, in the same Manner as in other Actions, after the Appellant hath made Default in Relation to the very same kind of Process.[32]

By the 7 & 8 *W*. 3. *cap*. 32. which gives a *Venire Facias de Novo* where the Cause is not tried the first Assises, it is Enacted, 'That if any Defendant or Tenant in any Action depending in any of the Courts of *Westminster* shall be minded to bring to Trial any Issue joined against him, when by the Course in any of the said Courts he may lawfully do the same by *Proviso*, such Defendant or Tenant shall or may, of the issuable Term next preceding such intended Trial to be had at the next Assizes, sue out a new *Venire Facias* to the Sheriff by *Proviso*, and prosecute the same by Writ of *Habeas Corpora* or *Distringas*, with a *Nisi Prius*, as tho' there had not been any former *Venire Facias* sued out or returned in that Cause; and so *toties quoties* as the Matter shall require.'

8. OF THE NECESSITY OF RETURNING A PANEL INTO COURT, AND WHERE A PRISONER MAY DEMAND A COPY OF IT.

By the 42 *E*. 3. *cap*. 11. it is recited, That divers Mischiefs had happened, because that the Panels of Inquests, which had been taken before Justices by Writ of *Scire Facias*, and other Writs, had not been returned before the Sessions of the Justices at the *Nisi Prius*, and otherwise, so that the Parties could not have Knowledge of the Names of the Persons which should pass in the Inquest; whereby divers of the People had been disherited and oppressed; and thereupon it is ordained, that no Inquest but (a) Assises and Deliverances of Gaols be taken by Writ of *Nisi Prius*, nor in any other Manner, at the Suit of the Great or Small, before the Names of all of them that shall pass in the Inquest be returned in the Court.

This Statute extends as well to Writs of *Nisi Prius* in Criminal Cases as in Civil, and to Jurors returned upon a *Tales* as well as to those returned upon a principal Panel.[33]

But it seems that in Trials before the Justices of Gaol-Delivery the Prisoner has not Right to a Copy of the Panel before the Time of his Trial, except only in Cases within the Purview of 7 & 8 *W*. 3. *cap*. 3. which Enacts, 'That every Person indicted and tried for High Treason, or Misprision thereof, (except it be for counterfeiting the Coin, &*c*.) shall have a Copy of the Panel of the Jurors who are to try him duly returned by the

Sheriff, and delivered unto him two Days at least before he shall be tried.'

It hath been adjudged to be sufficient, within the Intent of this Act, to deliver to the Prisoner a Copy of a Panel arrayed by the Sheriff before it is returned into Court, if the very same Panel be afterwards returned.[34]

9. OF THE TRIALS GOING OFF PRO DEFECTU JURATORUM; AND THEREIN OF DRAWING A JUROR.

If a *Venire* is awarded, and the Parties do not go to Trial the next Assises, but it lies for several Terms, the Continuance may be made by a *Vic' non misit Breve* ; but if a *Nisi Prius* be awarded, and some of the Jury appear, and the Panel be not full, so that the Trial is not carried on, they enter those of the Jury that appeared, and *alii non venerunt, ideo respectuentur* to the next Term *pro Defectu Jurat'*, and at the Day in the next Term they award an *Alias Discringas* to the next Assises, with a *Nisi Prius* until the next Term.[35]

It is held by the Opinions of some, that in a Criminal Case not Capital, after a Jury sworn and impanelled, and all the Evidence given, the King's Counsel may, without the Party's Consent, withdraw a Juror, and have the Cause tried over again.[36]

But herein the better Opinion seems to be; 1*st*, That in Capital Cases a Juror cannot be withdrawn, tho' all Parties consent to it. 2*dly*, That in Criminal Cases not Capital a Juror may be withdrawn, if both Parties consent; but not otherwise. 3*dly*, That in all (a) Civil Causes a Juror cannot be withdrawn, but by Consent of all Parties.[37]

It hath been held, that a Juror withdrawn from the Panel by Consent of both Parties, to the Intent the Trial might for that Time go off *pro Defectu Juratorum*, it being necessary for the Jury to have a View, may be of the Jury, when the Cause comes to be tried at a subsequent Time, and that this being neither a principal Cause of Challenge, nor to the Favour, cannot be Error.[38]

(C) IN WHAT CASES AND IN WHAT MANNER A TALES IS GRANTABLE.

SINCE the (b) 3 *Georg*. 2. for the Regulation of Juries, and by which the Sheriff cannot return less than forty-eight Jurors, the Use of a *Tales* seems to be taken away; but as the Statute herein extends only to Civil Causes, it will still be necessary to consider the Manner of awarding a *Tales*, especially in Criminal Cases.[39]

If all the Jury did not attend on the *Habeas Corpus* or *Distringas* whether by reason of the Death of some of the Persons returned, or for any other Cause; or if so many be challenged and drawn, that there do not remain a

sufficient Number to make a Jury; or if after the Jury is charged one or more of them die, there are at Common Law the Writs of *Undecim*, *Decem*, or *Octo Tales*, according as the Number was deficient, to force others into Court to try the Issue, or by (c) Statute the Plaintiff may pray a *Tales de Circumstantibus* to prevent the Delay of the *Decem Tales*.[40]

A *Tales* may be granted as well on the Application of the Defendant as Plaintiff; but it seems that a Defendant cannot regularly pray it till there has been a Default in the Plaintiff.[41]

In Capital Cases the *Tales* may be granted for a larger Number than the first Process; as for sixty, or forty, or any other even Number, in order to prevent Delays from peremptory Challenges; and in this Respect a *Tales* in Capital Cases is different from what it is in any other Case; it being an allowed Rule, that in all (d) other Cases the *Tales* must be for a less Number than the first Process.[42]

Every subsequent *Tales* in Capital, as well as in all other Cases, must be for a less Number than the former, except the former were quashed, in which Case the next may be for the fame Number.[43]

The Quashing the Array of the principal Panel doth not quash that of the *Tales*, but the Inquest shall be taken by those returned on the *Tales*, if there be a sufficient Number, otherwise more shall be added to them by a new *Tales*; but if all the Persons returned on a *Habeas Corpora* be challenged and drawn, there shall not be a *Tales* awarded, but a new *Venire*; for the Word *Tales* plainly refers to some others, to whom the Persons returned are to be like; also if the first *Habeas Corpora* be quashed, the second with a *Tales* cannot but be quashed with it, and the Party must go on as if the *Venire* had only been returned, and nothing done upon it; for where a Process is quashed, all that follows and depends upon it falls with it.[44]

It seems, that a *Tales* is not grantable on the Return of a *Venire*, but only on the Return of a *Habeas Corpora* or *Distringas*, because it appears not before such Return, but that a full Jury may appear.[45]

A *Distringas* or *Habeas Corpora*, with a Command to add so many more to those summoned on the *Venire*, is the first Process against the *Tales*.[46]

If a Juror be withdrawn after a Trial commenced, whereon a *Tales de circumstantibus* was awarded, and afterwards a new *Habeas Corpora* be taken out with a *Tales*, it shall appoint the *Tales* to be added to the Jurors first returned, and also to those returned on the *Tales de circumstantibus*.[47]

The Statutes, which authorize Justices of *Nisi Prius* to award a *Tales de circumstantibus*, extend as well to all Capital Cases as to others; but it

seems that such a *Tales* cannot be prayed for the King upon an Indictment, or Criminal Information, without a Warrant from the Attorney General, or an express Assignment from the Court, before which the Inquest is taken.[48]

It seems not to be clear that a *Tales* is grantable by Justices of *Oyer, &c.* or of (a) Gaol-Delivery; but if a Trial be put off before Justices of Gaol-Delivery for want of a full Jury, they may, without Doubt, order a larger Panel, whereon the former Jurors should be returned in the same Order as before, and called to be sworn as they stand, without any more Regard to those who were sworn before, than to the others; and the like Method is to be observed as to a Jury returned with a *Tales*.[49]

On a Writ of Error of a Judgment given in the Court of *Bristol*, it was solemnly adjudged, that a Custom in an inferior Court to try by a *Tales de circumstantibus* was void, as it breaks down that important Rule, that Trials must be *per Pares*, and admits an unlimited extravagant Latitude of gleaning together any Set of Men for Jurors, however profligate and unfit for the Office, and intirely deprives the Parties of their Challenges.[50]

(d) in what cases and in what manner special juries are appointed.

SPECIAL Juries are appointed on Motion and Application to the Court for that Purpose, on which, if the Court think it reasonable, the Sheriff is to attend the Secondary or Master with his Book of Freeholders, who, in the Presence of the Attornies on both Sides, names Forty-eight Freeholders, and then each Party strikes out twelve, by one at a Time, the Plaintiff or his Attorney beginning first, and the remaining Twenty-four are returned by the Secondary, as the Jury, to try the Cause.[51]

If the Rule was entered into by Consent, it is said to be a Contempt in the Attorney not to be present; but to remedy any Inconveniency, from hence, a Rule was made, that when a Master is to strike a Jury, *viz.* Forty-eight out of the Freeholders Book, he shall give Notice to the Attornies of both Sides to be present; and if the one comes, and the other does not, he that appears shall, according to the ancient Course, strike out twelve, and the Master shall strike out other twelve for him that is absent.[52]

And it is said, that if by Rule of Court the Master is ordered to strike a Jury, in case it be not expressed in such Rule that the Master shall strike Forty-eight, and each of the Parties shall strike out twelve, the Master is to strike Twenty-four, and the Parties have no Liberty to strike out any.[53]

It is said, that a Special Jury may be granted to try a Cause at Bar without the Consent of the Parties, but never at *Nisi Prius*, unless for good Cause shewn, such as Partiality of the Sheriff, *&c.*[54]

Also it is said to be contrary to the Course of the Court of *B. R.* in Capital Cases, to order the Clerk of the Crown to strike a Special Jury, as is done by the Secondary in Civil Causes upon Trials at Bar.[55]

By the 3 *Georg*. 2. *cap*. 25. *Sect*. 15. reciting, that whereas some Doubt had been conceived touching the Power of his Majesty's Courts of Law at *Westminster*, to appoint Juries to be struck before the Clerk of the Crown, Master of the Office, Prothonotaries, or other proper Officer of such respective Courts, for the Trial of Issues depending in the said Courts, without the Consent of the Prosecutor or Parties concerned in the Prosecution or Suit then depending, unless such Issues are to be tried at the Bar of the same Courts, it is enacted, 'That it shall and may be lawful to and for his Majesty's Courts of King's Bench, Common Pleas and Exchequer at *Westminster*, respectively, upon Motion made on Behalf of his Majesty, or on the Motion of any Prosecutor or Defendant in any Indictment or Information for any Misdemeanor or Information in Nature of a *Quo Warranto*, depending or to be brought or prosecuted in the said Court of Exchequer, or on the Motion of any Plaintiff or Plaintiffs, Defendant or Defendants, in any Action, Cause or Suit whatsoever depending, or to be brought and carried on in the said Courts of King's Bench, *&c*. or in any of them; and the said Courts are hereby respectively authorized and required, upon Motion aforesaid, in any of the Cases beforementioned, to order and appoint a Jury to be struck before the proper Officer of each respective Court, for the Trial of any Issue joined in any of the said Cases, and triable by a Jury of twelve Men, in such Manner as Special Juries have been, and are usually struck in such Courts respectively, upon Trials at Bar had in the said Courts, which said Jury, so struck as aforesaid, shall be the Jury returned for the Trial of the said Issue.'

And *Sect*. 16. it is further enacted by the said Statute, 'That the Person or Party, who shall apply for such Jury to be struck as aforesaid, shall bear and pay the Fees for the Striking such Jury, and shall not have any Allowance for the same upon Taxation of Costs.'

Sect. 17. *Provided*, 'That where any Special Jury shall be ordered, by Rule of any of the said Courts, to be struck by the proper Officer of such Court, in the Manner aforesaid, in any Cause arising in any City or County of a City or Town, the Sheriff or Sheriffs, or UnderSheriff of such City, or County of a City or Town, shall be ordered by such Rule to bring, or cause to be brought before the said Officer, the Books or Lists of Persons qualified to serve on Juries within the same; out of which Juries ought to be

returned by such Sheriff or Sheriffs, in like Manner as the Freeholders Book hath been usually ordered to be brought, in order to the Striking of Juries for Trials at the Bar in Causes arising in Counties at large; and in every such Case the Jury shall be taken and struck out of such Books or Lists respectively.'

A Rule was made for a Special Jury, which was entered into by Consent; and afterwards when the Parties attended the Master, the Defendant struck out some Hundredors, and at the Trial challenged the Array for want of Hundredors, which the Judge of Assise allowed a good Challenge; and this was held such a Breach and Contempt of the Rule, for which an Attachment was granted.[56]

But where in the Trial of a *Quo Warranto*, the Defendant challenged the Array of a Special Jury, that had been struck at his Request, for Partiality in the Sheriff; and an Attachment being moved for, and the Case next above relied on, it was denied, and said *per Curiam*, that the Attachment in the Case *supra* was granted by Reason of the Abuse of the Rule; but here the only Foundation is the Jury's being so struck at his Request, which is not alone sufficient; for he had a Right to challenge the Array on the Process's being directed to a wrong Officer; and the Rule might have been fulfilled another way, *viz*. as the Sheriff was partial, a proper Entry might have been made, and Process directed to the Coroner.[57]

(e) who are to be returned; and therein of the qualifications and several causes for which they may be challenged: And herein,

1. OF CHALLENGES TO THE ARRAY, OR TO THE POLLS; AND HEREIN WHERE THE INSUFFICIENCY OR PARTIALITY OF THE SHERIFF OR RETURNING OFFICER IS A PRINCIPAL CAUSE OF CHALLENGE, OR TO THE FAVOUR.

A Challenge (a) to Jurors is twofold, either to the Array, or to the Polls, *i. e*. to the particular Jurors, to the Array of the principal Panel, and to the Array of the *Tales*; and herein my Lord *Coke* observes, that the Jurors Names are ranked in the Panel one under another, which Order or Ranking the Jury is called the Array; as in common Speech we say *Battail Array* for the Order of the Battle; so as to challenge the Array of the Panel, is at once to challenge or except against all the Persons so arrayed or impanelled, in respect of the Partiality or Default of the Sheriff, Coroner, or other Officer who made the Return.[58]

This kind of Challenge is twofold, either a principal Cause of Challenge, or to the Favour, like that to the Polls or particular Jurors; for they thought there could be no better Rule to ascertain what should be a proper Challenge to their Officer, than what was a proper Challenge to each Juror's Partiality; for they did not suppose that they had a Jury *per quos rei*

veritas melius sciri poterit, unless they were settled by a Person absolutely indifferent.[59]

A Principal is grounded on such a manifest Presumption of Partiality, that if it be found true it unquestionably sets aside the Array or the Juror, but a Challenge to the Favour leaves it to the Discretion of the Triers.[60]

There are many principal Causes of Challenge to the Array; as if the Officer return any Juror at the Party's Denomination, or that he may be more favourable to one Party than the other; or if the Array be returned by a Bailiff of a Franchise, and the Sheriff return it as of himself; in which Case the Party should lose his Challenges in a Default in the Bailiff, because the Return on Record is in the Sheriff's Name; but if the Sheriff return one within a Liberty, this is good, and the Lord of the Franchise is put to his Action against him.[61]

If the Sheriff be liable to the Distress of either of the Parties mediately or immediately, or if he be his Servant or Officer in Fee, or of Robes, or his (a) Counsellor or Attorney, or have Part of the Land depending on the same Title; or if he has been Godfather to a Child of either of the Parties, or either of them to his; or if either of them have an Action of Debt against him; or if an Action of Battery, or such like, which imply Malice, are depending between them, these are principal Challenges to the Array.[62]

But if either of the Parties be subject to the Distress of the Sheriff, *&c*. or if the Sheriff, *&c*. have an Action of Debt against either of the Parties, these are Causes of Challenge to the Favour only; for the Sheriff, *&c*. thereby is not under the Party's Influence, but the Party under his.[63]

Consanguinity, how remote soever between the Sheriff or Juror, and either of the Parties, or Affinity by Marriage of either Party himself with the Cousin of the Sheriff or the Juror, or *e converso*, are principal Causes of Challenge to the Array, or to the Polls; but if the Marriage be between the Son of the one and Daughter of the other, it is a Cause of Challenge to the Favour only; and he, that challenges the Array or a Juror for a Cousinage, must shew how the Party is Cousin; but if it be found that he is Cousin it is (b) sufficient, whether it be found in the Manner alledged or not; and here my Lord *Coke* notes, that a Bastard can have no Kindred.[64]

That the Sheriff and one of the Parties are Fellow-Servants, not a principal Cause of Challenge, but only to the Favour.[65]

It has been doubted, whether the (c) Lessor in Ejectment, being of kin to the Sheriff in such a Manner as to make it a principal Cause of Challenge, in case he had been Plaintiff or Defendant; it has been held by some to be a

principal Cause of Challenge, for that this is but a fictitious Action, the Lessor being only concerned in Interest, and the Plaintiff a fictitious Person; and that the Courts take Notice of the Lessor as the real Plaintiff, by ordering him in certain Cases to pay Costs, *&c*. but the better Opinion is, that it is no principal Cause of Challenge; that he not being Party to the Record, the Judges *ex officio* are not obliged to take Notice of him, and that to do it in this Case would tend to Delay, which the Courts always avoid.[66]

The Array of a Panel was challenged *ore tenus*, because it was returned by the Sheriff two Days after he had received a Writ of Discharge; and it was said *per Cur*. that it could not be challenged for that Cause, because it would be a direct Averment against the Record, for it is returned by him as Sheriff, and the Return accepted; but by the Advice of the Court the Party made his Challenge to the Array, because it was favourably made and returned in Favour of the Party, *&c*. and Issue being joined thereupon, and all this Matter given in Evidence, the Court directed the Triers, that it was not duly made and returned, for it was without Warrant; whereupon the Array was quashed.[67]

But where a Challenge to the Array was taken, because the Sheriff who made the Return had continued in his Office for more than three Months, and not taken the Oaths, and subscribed the Declaration required by the Act 25 *Car*. 2. made for preventing the Dangers by Popish Recusants; and so his Office, by that Act, was void to all Intents and Purposes before he made his Return of the Jury; but the Challenge was disallowed by the Court, for he must be taken here as Sheriff *de facto*; and if such a Challenge should be allowed, no Trial could be had, but should be put off, unless the Party were ready to shew that the Sheriff had taken the Test.[68]

The Plaintiff for his Expedition surmised that he was Servant to the Sheriff of the County where the Action was brought and triable, and prayed a *Venire fac*. to the Coroners, and the Defendant *non dedixit*; whereupon Process was awarded to the Coroners; and after Trial, and Verdict for the Plaintiff, it was moved that this Process was misawarded, and a Mistrial, for Process ought not to be awarded to the Coroners but where the Challenge is Principal; and here to say that he was Servant to the Sheriff, is no principal Challenge, but only to the Favour, wherefore, *&c*. but the Court held, for as much as if the Sheriff had returned this Panel, it had been a good Cause to quash the Array for Favour, (a) that the Plaintiff to avoid that Delay might well shew it, and have Process to the Coroners; and the rather, this being a (b) judicial and not an original Writ; and the Clerks said there were many

Precedents accordingly.[69]

If the Challenge to the Array be found against the Party, he shall have his Challenge to the Polls; but neither Party shall take a Challenge to the Polls, which they might have had to the Array.[70]

2. WHERE INSUFFICIENCY AND NOT BEING LIBER HOMO IS A GOOD CAUSE OF CHALLENGE TO THE POLLS.

A Challenge to the Polls is, as has been observed, a Challenge to the particular Jurors, who, it seems, of old could not be challenged; for these by the feudal Law, as the *Pares Curtis*, were the Judges; and therein the Rule was *Partes qui Ordinariam Jurisdictionem habent recusari non possunt*; but tho' those Suitors, as Judges of the Court, could not be challenged, yet the *Pares*, when brought up by Writ, were subject to be challenged; and the Reason is, that there are several Qualifications required by the Writ, *viz*. that they be *Liberos & Legales Hominos [Homines?] de vicineto* (of the Place laid in the Declaration) *quorum quilibet habeat decem Libras terrar', tenementor 'vel reddit' per ann' ad minus, per quos rei veritas melius sciri Poterit, & qui nec* (of the Plaintiff nor Defendant) *aliqua affinitate attingunt, ad faciend' quand' Jurat' Patriae inter partes Praedict'*. These Qualifications were inserted, because this Manner of Trial was different from below; for there the Trial being by all the *Pares*, if there was a Majority amounting to twelve, the Cause was decided by such a Number as were necessary; but here, because they brought up but twelve, and they were all to be of one Mind, in order to make the Verdict, therefore it was necessary there should be several Qualifications mentioned in such Persons who are to give in the Verdict in that Cause; and if any of the Qualifications were wanting in any one, it was a sufficient Reason to reject such Person.[71]

The first Qualification is, that they should be *Liberi & Legales Homines*; hence it has been always clearly held, that Aliens, Minors or Villeins, cannot be Jurors.[72]

Also Infamy is a good Cause of Challenge to a Juror; as that he is outlawed, or that he hath been adjudged to any Corporal Punishment whereby he becomes infamous, or that he hath been convicted of Treason or Felony, or Perjury or Conspiracy, or of Forgery on 5 *Eliz*. or attainted in Attaint for giving a false Verdict; and it hath been holden, that such Exceptions are not solved by a Pardon; and it was anciently holden, that Excommunication was also a good Challenge, yet it seems that none of the above cited Challenges are principal ones, but only to the Favour, unless the Record of the Outlawry, Judgment or Conviction be produced, if it be a Record of another Court, or the Term, *&c*. be shewn, if it be a Record of the

same Court.[73]

The *Venire facias* was *Probos & Legales Homines*; and it was objected, that it ought to have been (a) *Liberos & Legales Homines*, there being a Difference between *Probus*, *Liber & Legalis*; for that *Legalis* is he who is not outlawed, and against whom no Exception can be taken in this Behalf; that *Probus* is not taken Notice of in Law; and *Liber Homo* is not only one that hath Freehold Land, but that hath Freedom of Mind, and stands indifferent, no more inclining to the one than to the other; but it was adjudged that *Probos & Liberos* are of one Sense, and that the Statute of *Westminster* 2. which gives the *Venire*, does not tie the Writ to the very Words.[74]

3. WHERE THE WANT OF A FREEHOLD, OR COMPETENT ESTATE, IS A GOOD CAUSE OF CHALLENGE.

It seems to be admitted by the Statute of 21 *E*. 1. *de his qui Ponendi sunt in Assisis*, and also by the Register, that at Common Law there was no Necessity that Jurors should have any Freehold as to Inquests before Justices in *Eyre*, or in Cities or Burghs; for it seems, that in Corporations the Freedom, and not the Freehold, made them *Liberos Homines*.[75]

Also it seems agreed that the Common Law doth not require that a Juror should in any Case have a Freehold of any certain Value; and upon this Ground it hath been adjudged, that a Freehold worth but 20 *s*. or 5 *s*. or even 1 *d*. is still a sufficient Qualification for a Juror in such Cases as are not within the Statutes, which require a Freehold of a greater Value.[76]

Also by some Opinions it is holden, that the Common Law did not require that a Juror should in any Case have a Freehold; but this is not only contrary to what seems implied by the Books, which in saying that the Common Law did not require a Freehold of any certain Value, plainly suppose that it required some Freehold, but hath been also contradicted by many express Authorities; agreeably to which it seems to be settled at this Day, that the Want of a Freehold is a good Challenge of a Juror in all Cases not otherwise provided for by Statute, and consequently in a Trial for High Treason in *London* as well as in any other County.[77]

But it seems agreed, that wherever the Letter of the Common or Statute Law require that a Juror should have a Freehold, the Meaning is fully satisfied by his having the Use of a Freehold, and that it is not material whether he have it in his own or his Wife’s Right, or whether it be absolute or upon Condition, or an Estate of Inheritance, or only for Term of one’s own or another’s Life, so that it be in the same County wherein the Suit is brought, and actually continue in the Juror till the Time when he is sworn.[78]

But this Matter, as to the Freehold and Value of Jurors, has been regulated and settled by divers Statutes; to which Purpose, by the Statutes of *Westm*. 2. *cap*. 38. and 21 *E*. 1. *de his qui Ponendi sunt in Assisis*, it is enacted, 'That none shall be (a) put in Assises or Juries, except in Cities, Burghs, or Trading Towns, who have not Tenements to the yearly Value of 40 *s*.'

By the 2 *H*. 5. *cap*. 3. it is enacted, 'That no Person shall be admitted to pass in any Inquest upon Trial of the Death of a Man, nor in any Inquest betwixt Party or Party, in Plea Real or Plea Personal, whereof the Debt or the Damage declared amount to forty Marks, if the same Person have not Lands or Tenements of the yearly Value of 40 *s*. above all Charges of the same, so that it be challenged by the Party, *&c*.'

It hath been(b) held, that this Statute extends as well to collateral Issues as to the general one, but(c) that it doth not extend to an Indictment or Information for a Crime not Capital.

It has been held, that a Feoffee to the Use of another, or one who has only a dry Remainder, are not qualified to be Jurors within the Meaning of these Statutes, because whatsoever the Value of the Lands may be, they have no Income from them.[79]

By the 23 *H*. 8. *cap*. 13. 'Every Natural-born Subject, who doth enjoy and use the Liberties and Privileges of any City, Borough or Town Corporate, where he dwells and makes his Abode, being worth in moveable Goods and Substance to the clear Value of 40 *l*. shall be admitted in Trial of Felonies in every Sessions and Gaol-Delivery to be holden in and for the Liberty of such City, *&c*. albeit he have no Freehold; but this Act shall not extend to any Knight or Esquire in such City, *&c*.'

Special Provision is made by 11 *H*. 7. *cap*. 21. and 4 *H*. 8. *cap*. 3. for Jurors in *London* in Real and Personal Actions above the Value of forty Marks[80].

By the 4 & 5 *W. & M. cap*. 24. it is enacted, 'That all Jurors (other than Strangers upon Trials *per Medietatem Linguae*) who are to be returned for Trials of Issues joined in any of the Courts of King's Bench, Common Pleas or Exchequer, or before Justices of Assise or *Nisi Prius, Oyer* and *Terminer*, Gaol-Delivery, or General Quarter-Sessions of the Peace in any County of this Realm of *England*, shall every of them have in their own Name, or in Trust for them, within the same County, ten Pounds by the Year, at least, above Reprises, of Freehold or Copyhold Lands or Tenements, or of Lands or Tenements of (a) Ancient Demesne, or in Rents,

or in all or any of the said Lands, Tenements or Rents in Fee-simple, Fee-tail, or for the Life of themselves, or some other Person; and that in every County in *Wales*, every such Juror shall have in the same County six Pounds by the Year, at least, in Manner aforesaid, above Reprises.'

Provided that it shall be lawful to return any Person on a *Tales* in *England* who shall have 5 *l.* by the Year, or in *Wales* who shall have 3 *l.* by the Year, in Manner aforesaid.

In this Statute, as also in the Statutes 27 *Eliz. cap*. 6. and 16 & 17 *Car*. 2. *cap*. 3. *sect*. 2. there is a Saving to all Cities, Boroughs and Towns Corporate, of their Ancient Usages; from whence it hath been settled, that Trials in those Places continue as before, or as prescribed by the 23 *H*. 8. *cap*. 13. which requires Jurors to be worth 40 *l.* in Goods, *&c*. lest there should be a Failure of Justice, it being generally impracticable to get a sufficient Number of such Freeholders as the Statutes require in Towns; but it hath been agreed, that for Trials in *London* for (b) High Treason, every Juror ought to have such Freehold or Copyhold as is required by 4 & 5 *W. & M*.[81]

By the 3 *Geo*. 2. *cap*. 25. *sect*. 18. it is enacted, 'That any Person or Persons having an Estate in Possession in Land, in their own Right, of the yearly Value of 20 *l.* or upwards, over and above the reserved Rent payable thereout, such Lands being held by Lease or Leases for the absolute Term of 500 Years, or more, or for 99 Years, or any other Term, determinable on one or more Life or Lives; the Names of every such Person or Persons shall and may, and are hereby directed and required to be inserted in the respective Lists, in order to their being inserted in the Freeholders Book; and the Persons appointed to make such Lists, are hereby directed to insert them accordingly; and such Leaseholder, or Leaseholders, shall and may be summoned or impanelled to serve on Juries, in like Manner as Freeholders may be summoned and impanelled, by Virtue of this or any other Act or Acts of Parliament for that Purpose, and be subject to the like Penalties for Non-appearance, any Law, *&c*.'

And *Sect*. 19. it is further enacted, 'That the Sheriffs of the City of *London* for the Time being, shall not impanel or return any Person or Persons to try any Issue joined in any of his Majesty's Courts of King's Bench, Common Pleas and Exchequer, or to be or serve on any Jury at the Sessions of *Oyer* and *Terminer*, Gaol-Delivery, or Sessions of the Peace, to be had or held for the said City of *London*, who shall not be a Housholder within the said City, and have Lands, Tenements, or Personal Estate, to the

Value of 100 *l.* and the same Matter and Cause alledged by way of Challenge, and so found, shall be taken and admitted as a principal Challenge; and the Person or Persons so challenged shall and may be examined, on Oath, of the Truth of the said Matter.'

And *Sect.* 20. it is further enacted, 'That the Sheriffs, or other Officers, to whom the Returning of Juries doth or shall belong, for any County, City, or Place respectively, shall not impanel or return any Person or Persons to serve on any Jury, for the Trial of any Capital Offence, who at the Time of such Return would not be qualified in such respective County, City, or Place, to serve as Jurors in Civil Causes for that Purpose; and the same Matter and Cause, alledged by way of Challenge, and so found, shall be admitted and taken as a principal Challenge; and the Person or Persons so challenged shall and may be examined, on Oath, of the Truth of the said Matter.'

By the 4 *Geor.* 2. *cap.* 7. reciting, 'That whereas by the very frequent Occasions there are for Juries in the County of *Middlesex*,' and by the small Number of Freeholders that are in the said County the Sheriffs of the said County may be under Difficulties in procuring Juries; for Remedy whereof it is Enacted, 'That all Leaseholders upon Leases, where the improved Rents or Value shall amount to fifty Pounds or upwards *per Annum*, over and above, all Ground-Rents, or other Reservations, payable by Virtue of the said Leases, shall be liable and obliged to serve upon Juries, when they shall be legally summoned for that Purpose; any Thing in this or any former Act to the contrary, *&c.*'

4. WHERE THE JURY'S NOT BEING CONVENED FROM A RIGHT PLACE IS A GOOD CAUSE OF CHALLENGE.

The Jury is regularly to come from that County in which the Matter is alledged to arise and antiently from the Vicinity or very Hundred, pursuant to that Maxim, *Vicini Vicinorum Facta praesumuntur scire*, Persons living in the Neighbourhood being esteemed the most proper Judges of the Facts done within its Limits, as being most likely to be proved by Witnesses, and charged upon Persons with whose Integrity and Reputation they are best acquainted.[82]

But if a Declaration contain Matters lying in two Counties that join, the Jury may come out of both Counties, because the Sheriffs may be supposed to meet on the Bounds of each County, and impanel the *Pares* there; but if the Counties cannot join, and consequently the Sheriffs cannot meet each other in order to impanel, as if the Issue were, whether a Road from *London* to *York*, and from *York* to *London, &c.* this may be tried in either County.[83]

So it is said, that if a Man forge a Deed in one County, and publish it in another, the Trial shall be by a Jury of both Counties; for that the Writing, as well as the Publication of that Writing, is material.[84]

A Party Jury of the Counties of *Bedford* and *Hereford* came to the Bar, and first was sworn one of one County, and another of the other County, and so on in Order, till one of the County of *Bedford* was challenged, and then the Court proceeded to the next of that County till one was sworn, and so of the other County, until six of each County were sworn; for if there should be six sworn of one County first, and six of the other afterwards, it were disorderly and (a) erroneous.[85]

If the Jury did not come from the Hundred, it was a good Cause of Challenge to the Array, and it seems that originally they were (b) all obliged to be of the Hundred; this was changed by Statute, and they were settled first at (c) six, afterwards at (d) two, from the Difficulty of getting Hundredors, and the Partiality they found amongst them, Neighbours having generally a particular Attachment to one Party more than the other.[86]

And as the Jury was to come from the Hundred, it was necessary to lay the *Venue* from some known place where the Fact is supposed to be done; as in a Vill, Castle, Manor, Forest; because if it was not a known Place, there could be no proper Direction to the Sheriff who were the *Pares* that were to try the Fact there: It has been held, that a Street or Lane is no proper Place for a *Venue*, because it is not supposed to be sufficiently known to the Sheriff in what Hundred it is; but a Street in a Parish is a proper *Venue*, because it is sufficiently known in what Hundred the Parish is.[87]

If the Lord of the Hundred be a Party, then it is sufficient they should come from the next Hundred.[88]

So if an Action be brought on the Statute of *Winton* there, from the apparent Partiality, the Jury must come from the next Hundred where the Robbery was committed; for the proper *Pares* for the Trial of every Fact are the nearest (a) impartial Men to the Place where the Fact was done.[89]

He that takes such a Challenge must shew in what Hundred the Visne lies, and he must take it before so many are sworn as will serve for the Hundred, and he that is challenged for the Hundred shall not be drawn absolutely, but shall remain *propter Hundredum*.[90]

If a Person dwell in the Hundred, whether he have any Freehold there or not, or if he had a Freehold there when he was returned, and sell it before he appear, he is a good Hundredor; but if he sell as his Freehold, he may be challenged absolutely.[91]

If divers Hundreds are in a Leet, or if the Cause of Action arose in divers Hundreds, the Hundredors may come from any of them.[92]

And now by the 4 & 5 *Annae, cap*. 16. no Hundredors are required, except in Prosecutions criminal, and on penal Statutes, because in other Cases the *Venire* shall be *de Corpore Comitatus*.

5. WHERE PARTIALITY IN THE JUROR IS A GOOD CAUSE OF CHALLENGE; AND THEREIN WHERE IT SHALL BE SAID A PRINCIPAL CAUSE OF CHALLENGE, OR TO THE FAVOUR.

Jurors ought to be *omni Exceptione Majores*, and by the Words of the Writ such *per quos Rei Veritas melius sciri poterit, & qui nec* the Plaintiff, *nec* the Defendant, *aliqua Affinitate attingunt*; which Words contain all Causes of Objection from Impartiality or Incapacity, Consanguinity and Affinity; therefore if the Juror be under the Power of either Party, as if Counsel, Servant of the Robes, or Tenant, they are expresly within the Intent of the Writ; so if he has declared his Opinion touching the Matter, or has been chosen Arbitrator by one Side, or is a Parishioner of the Parish whereof the other Party is Parson, and the Right of the Church comes in Question, or has done any Act by which it appears that he cannot be impartial, as if he has eat or drank at the Expence of either Party, or taken Money to give his Verdict, these are principal Causes of Challenge.[93]

But tho' a Juror is not under the Distress of either Side, or has not given apparent Marks of Partiality, yet there may be sufficient Reason to suspect he may be more favourable to one Side than the other; and this is a Challenge to the Favour; as if the Juror's Son has married the Plaintiff's Daughter; because this is not contained within the Words of the Writ, and therefore no principal Cause of Challenge, but only to the Favour, because such Juror is not within the Power of the Party; and in these Inducements to Suspicion of Favour the Question is, whether the Juryman is indifferent as he stands unsworn; for a Juryman ought to be perfectly impartial to either Side; for otherwise his Affection will give Weight to the Evidence of one Party, and an honest but weak Man may be so much biassed, as to think he goes by his Evidence, when his Affections add Weight to the Evidence; now since the Writ expects those by whom the Truth may be best known, it excludes all those who are apparently partial without any Trial, because they are not under the Qualifications in the Writ, since the Truth cannot be known by them; but where the Partiality is not apparent, but only suspicious, then the Juror is to be tried whether favourable or not, that is, whether he comes within the Description of the Writ; and if the Triers think he does, then he is to be set aside.[94]

If an Action be brought (a) by a Corporation, and the Juror be of Kin to any Member, it is a principal Challenge.[95]

If a Juror be challenged for being of Kin to one Party, it is no CounterPlea that he is of Kin also to the other; for the *Venire* commands the Sheriff to return those who are of Kin to neither.[96]

An Arbitrator chosen by both Parties, whether he have treated of the Matter or not, or chosen by one Party, if he has never treated thereof, or a Commissioner chosen by one Party for Examination of Witnesses, and appointed under the Great Seal, cannot be challenged principally; but for such Cause one may be challenged for Favour.[97]

If a Juror be Cousin to him in Reversion, it is only a Challenge to the Favour, because he in Reversion is not Party to the Record; but it would be a principal Challenge if he be Party by Voucher, Aid, or Receipt.[98]

It is a principal Cause of Challenge, that the Juror is a Witness named in the Deed, or hath formerly given a Verdict on the same Cause, whether between the same Parties, or others; but this is only a Challenge to the Favour if the Record be of another Court, and not shewn forth; but if it be of the same Court, it is sufficient to shew the Day and the Term.[99]

By the 25 *E*. 3. *cap*. 3. it is Enacted, That no Indictor shall be put on Inquests upon Deliverance of the Indictees of Felony or Trespass, if he be challenged for the same Cause by him who is so indicted; and this hath been adjudged a good Exception not only on the Trial of the same Indictment, but also on 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.[100]

It is a good Cause of Challenge, that a Juror hath a Claim to the Forfeiture to be caused by the Conviction, or that he hath declared his Opinion beforehand; yet this hath been adjudged to be no Cause of Challenge where it has appeared to proceed not from any Ill Will, but from a Knowledge of the Cause.[101]

But it is no good Cause of Challenge, that the Juror has found others guilty on the same Indictment; for the Indictment in Judgment of Law is several against each Defendant, and every one must be convicted by particular Evidence against himself.[102]

It hath been ruled to be a good Challenge on the Part of the King, that the Juror hath given his Dogs the Names of the King’s Witnesses.[103]

Tho’ the King may take either a principal Challenge, or to the Favour, yet it is said that the Subject cannot take a Challenge to the Favour against

the King, because every one is bound by his Allegiance to favour the King: It is said to be a principal Challenge against the King, that the Jury is of his Livery, or his immediate Tenant.[104]

In an Information of Forgery the Defendant challenged one of the Jury, for that the Prosecutor had been lately entertained at his House; and this was admitted to the Favour, tho' against the King.[105]

A Juror was challenged because he was Tenant of a Manor to which there was a Court-Leet, of which the Plaintiff was Steward; and it was held that this was no principal Challenge, but only to the Favour.[106]

Upon a Trial at Bar the Question was, whether the Fair called *Waybill Fair* should be kept at *Waybill*, or at *Anderry*, and one of the Jury was challenged because he lived at *Waybill*; and the Objection was, that the Fair occasioned Manure to improve the Ground; on the other Side it was considered, that the Fair occasioned Trampling of the Grass; and this being a Challenge to the Favour, two of the Jurors were sworn to be Triers; and their Oath was, *You shall well and truly try whether* A. (*the Juryman challenged*,) *stand indifferent between the Parties to this Issue*.[107]

Either Party labouring a Juror to appear, is no Cause of Challenge at all, but a lawful Act.[108]

6. WHERE THE DEGREE AND QUALITY OF THE JUROR IS A GOOD CAUSE OF CHALLENGE; AND HEREIN WHO ARE EXEMPT FROM SERVING ON JURIES.

It seems to be agreed, that all Persons, whose Attendance is required in the superior Courts of Justice, such as Serjeants at Law, Counsellors, Attornies, and other Officers of the Courts, are so far privileged as not to be summoned on Juries; also Peers of the Realm are excluded, as not coming within the Qualifications mentioned in the Writ, *viz. Ad faciendum quand' Jurat' Patriae*; for they are not *Pares Patriae*, but *Pares* of an higher Rank; and therefore it is clearly (a) agreed, that if a Peer be returned on a Jury, and bring a Writ of Privilege, he shall be discharged; also it seems to be the (b) better Opinion, that even without such a Writ he may challenge himself, or be challenged by either Party.[109]

But Members of the House of Commons seem not to have any Privilege to be exempt from serving on Juries; yet in the Case of Sir *Edward Bainton*, who being returned on a Jury in *B. R.* the Court would not force him to be sworn against his Will, he being a Parliament-Man, and the Parliament then sitting.[110]

Tenants in Ancient Demesne are not to be impanelled to appear at *Westminster*, or elsewhere in any other Court, upon any Inquest or Trial of

any Cause.[111]

It seems agreed, that the King by his Grant or Charter may exempt one, two, or more from serving on Juries; but he cannot exempt a whole County or Hundred, because in such Case there would be a Failure of Justice; also it seems that such Exemption does not extend to Jurors returned into the King's Bench, unless there be express Words including that Court; also by the better Opinion, the Sheriff cannot return such Privilege of Exemption, but each particular Juror must come in and demand it.[112]

By the Statute of *Westminster* 2. *cap*. 38. it is expresly provided, That neither Old Men above the Age of seventy Years, nor Persons perpetually sick, nor those who are infirm at the Time of their Summons, nor those who do not reside in the County, shall be put in Juries, or in the lesser Assizes: In the Construction of which it hath been held, that tho' 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 serving, if there be not a sufficient Number without them.[113]

Clerks or Persons in (a) Holy Orders, Coroners, Ministers of the Forest, Officers of the Army, and other Officers and Ministers belonging to the King, are exempt from serving on Juries.[114]

By the 6 *W*. 3. *cap*. 4. 'Every Person using and exercising the Art of an Apothecary in the City of *London*, or within seven Miles thereof, being free of the Society of Apothecaries in the said City, and who shall have been duly examined and approved, *&c*. for so long Time as he shall exercise the said Mystery, and no longer, shall be exempted from serving on any Jury or Inquest; and other Persons exercising the said Art of an Apothecary in any other Parts of this Kingdom, who have served as Apprentices seven Years, according to the Statute 5 *Eliz*. shall likewise be exempted from serving on Juries for so long Time as they shall use and exercise the said Art, unless such Person voluntarily consent to serve.'

By the 7 & 8 *W*. 3. *cap*. 21. all registered Seamen are exempted from serving on Juries.

By the 7 & 8 *W*. 3. *cap*. 34. it is Enacted, that no Quaker, or reputed Quaker, shall serve on Juries.

7. WHERE FROM THE QUALITY OF EITHER PARTY IT IS A GOOD CAUSE OF CHALLENGE, THAT A KNIGHT IS NOT RETURNED.

Here we must observe, that if a Peer be impleaded by a Commoner, yet such Case shall not be tried by Peers, but by a Jury of the Country; for tho'

the Peers are the proper *Pares* to a Lord of Parliament in (b) Capital Matters, where the Life and Nobility of a Peer is concerned, yet in Matter of Property the Trial of Facts is not by them, but by the Inhabitants of those Counties where the Facts arise, since such Peers living thro' the whole Kingdom, could not be generally cognisant of Facts arising in several Counties, as the Inhabitants themselves where they are done; but this Want of having Noblemen for their Jury was compensated as much as possible, by returning Persons of the best Quality.

And therefore if a Peer of the Realm or Lord of Parliament be Demandant or Plaintiff, Tenant or Defendant, there must be a Knight returned of his Jury, be he Lord (c) Spiritual or Temporal, or else the Array may be quashed; but (d) if he be returned, altho' he appear not, yet the Jury may be taken of the Residue; and if others be joined with the Lord of Parliament, yet if there be no Knight returned, the Array shall be quashed against all.[115]

But tho' a Peer may be concerned in the Event of a Cause, as if he have the Reversion upon an Estate for Life, and an Action is brought against the Tenant for Life, yet it is no Cause of Challenge if a Knight be not returned.[116]

Upon an Issue between a Peer of the Realm and another, if the *Venire Facias* be *quod summoneat* 12 *Liberos & Legales Homines*, and does not say *tam Milites quam alios*, as the Register is, (a) tho' the Peer of the Realm may assign it for Error, yet the other cannot, because it does not concern him.[117]

If there be no other Knights in the County, a Serjeant at Law that is a Knight may be returned, and his Privilege shall not excuse him.[118]

A Challenge to the Array *quia nullo Milite in eodem Panello existente returnat*', is not good; but it must be averred, that such a one and such a one returned upon the Panel are not Knights, and then it may be tried.[119]

It hath been settled, that the Lessor of the Plaintiff being a Nobleman, it was no Cause of Challenge to the Array, that a Knight was not returned, tho' there be an Averment that the Ejectment is brought to try the Peer's Title; because the Lessor does not appear as a Party to the Record.[120]

Also in an Attaint there ought to be a Knight returned of the Jury, and in a Writ of Right four Knights were to be returned.[121]

8. OF TRIALS PER MEDIETATEM LINGUAE, WHERE AN ALIEN IS PARTY.

By the 28 *E*. 3. *cap*. 13. *sect*. 2. it is Enacted, 'That in all manner of

Inquests and Proofs which be to be taken or made against Aliens and Denizens, be they Merchants or others, as well before the Mayor of the Staple as before any other Justices or Ministers, altho' the King be Party, the one Half of the Inquest 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; and if there be not so many Aliens, then shall 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 aforesaid, and the Remnant of Denizens which be good Men, and not suspicious to the one Party nor to the other.'

In the Construction of this Statute it hath been agreed, that the Statutes which require that the Jurors shall have Tenements to a certain Value, do not (b) extend to Aliens returned by Virtue of this Statute, but only to Denizens, who are to have Lands or Tenements to the same Value as in other Cases.[122]

Also it is settled, that those on the Grand Jury, or who find an Indictment against an Alien, need not be Aliens.[123]

Neither is it necessary that the Petit Jury in an Action or Appeal by an Alien against an Alien, should be Half Aliens, and Half *English*; for the Words are, *All Inquests*, &c. *between Aliens and Denizens*.[124]

If an Alien neglect to pray the Benefit of the Statute (a) before the Return of a common *Venire*, he can neither except to such *Venire*, nor pray a subsequent Process *de Medietate Linguae*.[125]

The Return of a *Venire de Medietate Linguae* ought to (b) shew which of the Jurors are Denizens, and which Aliens, and a full Number of each must appear to be sworn; if there be not enow to make up a full Number of six Denizens and six Aliens, the Justices of *Nisi Prius* (c) may, by Construction of the Statutes which give a *Tales de Circumstantibus*, award such a *Tales* for so many Denizens and Aliens as shall be wanting.[126]

If on a *Venire* of Half Denizens and Half Aliens the Sheriff return twelve all Aliens, and among them some who in Truth are not such, the Party shall not be concluded by such Return, but may notwithstanding challenge the Array for Want of a sufficient Number of Aliens.[127]

Some of the Precedents of Awards of *Venire's de Medietate Linguae* mention, that the Aliens to be returned shall be of the same Country whereof the Party alledges himself; but others direct generally, that one

Half of the Jury shall be Aliens, without specifying any particular Country; and these last seem most agreeable to the Statute, and to be confirmed by the late Practice, and greater Number of Authorities.[128]

It hath been held, that Denizens so made by Letters Patent are Denizens within the Intent of this Statute; also that before the Union of *England* and *Scotland* under *James* I. a *Scot* was not an Alien within the Meaning of this Statute.[129]

It hath been held, that as to Treason this Statute is repealed by 1 & 2 *Ph. & Mar. cap*. 10. which requires that Trials of Treason shall be according to the Common Law.[130]

By the 2 & 3 *Ph. & Mar*. and 4 & 5 *Eliz*. Persons made Felons, as *Egyptians*, are to be tried by the Inhabitants of the County or Place where they shall be taken, and not *per Medietatem Linguae*.

9. OF PEREMPTORY CHALLENGES.

By the Common Law, in all Capital Cases (in which only peremptory Challenges were allowed,) the Prisoner could challenge thirty-five peremptorily; and this was because the Trial by the Petty Jury came instead of the Ordeal, and the Petty Jury of twelve being after the Manner of the Canonical Purgation, and because the whole *Pares* were not on his Jury, but only a select Number was chosen by the Criminal himself, as was usual among the Canonists, therefore they took a middle Way, and gave the Defendant Liberty to challenge peremptorily any Number under three Juries, four Juries being as many as generally appeared, to make the total *Pares* of the County.[131]

This Kind of Challenge, as has been observed, was allowable by the Common Law in all Capital Cases, both upon Indictments and Appeals, and also in Misprision of High Treason; but it was Enacted by 33 *H*. 8. *cap*. 23. *sect*. 3. *That it should not be allowed in any Cases of High Treason, nor Misprision of High Treason*; which Statute being repealed by 1 *Ph. & Mar. cap*. 10. the antient Course of the Common Law, as to Trials of Treason, is restored, and consequently such Challenge revived; but it is made a Doubt, whether by any Statute it is revived in case of Misprision of Treason, the Statute 1 *Ph. & Ma*. not extending, as it is said, to Misprision of High Treason.[132]

It is enacted by 22 *H*. 8. *cap*. 14. *sect*. 7. made perpetual by 32 *H*. 8. *cap*. That no Person arraigned for any Petit Treason, Murder or Felony, be admitted to any peremptory Challenge above the Number of twenty; but it

has been held, that 1 & 2 *Ph. & Mar*. which restores the Course of the Common Law as to Trials of Treason, has revived the old Challenge of Thirty-five in Trials of Petit Treason; and therefore it is agreed, that at this Day, in Cases of High Treason and Petit Treason, the Prisoner may challenge Thirty-five peremptorily, and twenty in all other Capital Offences.[133]

This peremptory Challenge seems, by the better Opinion, to be only allowable when the Prisoner pleads the General Issue; therefore by the Common Law, if a Man were outlawed of Felony or Treason, and brought a Writ of Error upon the Outlawry, and assigned some Error in Fact, whereupon Issue was joined, he could not challenge peremptorily; the like Law if he had pleaded any foreign Plea in Bar or in Abatement, which went not to the Trial of the Felony, but of some collateral Matter only.[134]

There seems to be some Diversity of Opinions in case of a Prisoner's Challenging peremptorily more than he is allowed by Law; and herein my Lord *Hale* lays down the Law to be, that at Common Law if the Prisoner peremptorily challenged above Thirty-five Persons, and insisted upon it, and would not leave his Challenge, then in case of an Indictment of High Treason it amounted to *Nihil dicit*, and Judgment of Death should be given against him; but in case of Petit Treason, or Felony, the Prisoner anciently was put to *Peine fort & dure*, as declining the Trial the Law appointed; the Consequence whereof was only the Forfeiture of his Goods, but it amounted to no Attainder, and consequently no Escheat of his Lands; and thus, says he, the Practice was until the Beginning of the Reign of *H*. 7. but afterwards, by the Advice of all the Judges of both Benches, it was resolved, that the Party so peremptorily challenging above Thirty-five, should have Judgment of Death, and that it amounted to an Attainder; for having pleaded to the Felony, and put himself upon the Country, here could be no standing Mute; and therefore the Judges resolved on this Course, as most consonant to Law, to be practised in all Circuits; but for all this, adds he, the better Opinion of later Times, as well as of former, is, that the Judgment in the Case of such a peremptory Challenge of above Thirty-five at the Common Law, in case of Felony, was not an Attainder, but only Penance, to which the Party was awarded without having any Jury impanelled.[135]

There seems also some Diversity of Opinions, as to what is to be done with a Prisoner who, since the Statute of 22 *H*. 8. challenges above twenty in Felony; and herein the better Opinion seems to be, that he shall neither

forfeit his Goods, nor have Judgment of Death, nor of *Peine fort & dure*, but shall only be overruled as to his Challenges, so far as they exceed twenty, and put upon his Trial; and herewith agrees my Lord *Hale*, and that, he says, for two Reasons; 1. Because the Statute hath made no Provision to attaint the Felon, if he challenge above the Number of twenty. 2. Because the Words of the Statute of 22 *H*. 8. are, *That he be not admitted to challenge above the Number of twenty*; so that if he challenge above twenty peremptorily, his Challenge shall only be disallowed.[136]

If twenty Men are indicted for the same Offence, tho' by one Indictment, yet every Prisoner is allowed his peremptory Challenge; and if there be but one *Venire fac*. awarded to try them, the Persons challenged by any one shall be withdrawn against them all.[137]

If *A*. be indicted and plead Not guilty, the Jury appears, he challengeth six of the Jury for Cause, and the Causes found insufficient, and the six are sworn, and the Rest of the Jury challenged off, whereby the Inquest remains *pro defectu Juratorum*; a *Tales* granted, and the Jury appear, the Prisoner may challenge peremptorily any of the six that were before challenged, for Cause allowed and sworn, for it is possible a new Cause of Challenge may intervene after the former Swearing; but if a Man challenge him for Cause, he must shew a Cause happened after the former Swearing.[138]

But if the Prisoner, upon the first Panel, had challenged, for Instance, fifteen peremptorily, and then the Jury remains for Default of Jurors, and a *Distringas* with a forty *Tales* is granted, he shall challenge peremptorily no more than will fill up his Number, *viz*. in case of Felony, at this Day, five more, and in case of Treason, or Petit Treason, twenty more, to make up his full Number of twenty peremptory Challenges in the first Case, and Thirty-five in the last.[139]

10. OF CHALLENGES BY THE KING.

The King, or any one on his Behalf, may, on sufficient Cause, challenge either the Array, or the Polls, in the same Manner as a private Person may; also by the Common Law, the King, without assigning any Reason, but barely alledging *quod non sunt boni pro Rege*, might have challenged peremptorily as many as he thought proper.

But this is remedied by 33 *E*. 1. commonly called *Ordinatio de Inquisitionibus*, which enacteth as follows; '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 Counsel, 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; 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.'[140]

In the Construction of this Statute it hath been clearly settled, that the Words thereof being general, it extends to all Causes, as well Criminal as Civil, whereto the King is Party.[141]

It hath also been agreed, and is now the established Practice of the Courts, that if the King challenge a Juror before the Panel is perused, he needs not shew any Cause of his Challenge till the whole Panel be gone thro', and it appear that there will not be a full Jury without the Person so challenged; and if the Defendant, in order to oblige the King to shew Cause presently, challenge *touts paravaile*, yet it hath been adjudged, that the Defendant shall be first put to shew all his Causes of Challenge before the King need to shew any.[142]

11. AT WHAT TIME A CHALLENGE IS TO BE TAKEN.

It is laid down as a Rule, that there can be no Challenge either to the Array, or Polls, before a full Jury appears; and therefore in a Case where the Plaintiff, after he had prayed a *Tales*, challenged the Array thereof for Partiality in the Sheriff; tho' it was objected, that this being by his own Desire; he was afterwards estoped to take any Exceptions to the Sheriff; yet the Challenge was allowed good, and the *Venire* directed to the Sheriffs; for if he had not prayed a *Tales*, there could not have been a full Jury, and then there could be no Challenges.[143]

Also it is laid down as a Rule, that no Juror can be challenged without Consent after he hath been sworn, either in a Criminal or Civil Case, or either at the Suit of the King or Subject, whether on the same Day, or, according to the better Opinion, on a former on the same Trial, unless it be for some Cause which happened since he was sworn.[144]

He who hath several Causes of Challenge against a Juror must take them all at once[145].

If a Juror be challenged by one Party and found indifferent, the other Party may challenge him afterwards.[146]

In case of Treason, or Felony, if the Prisoner challenge a Juror for Cause which is held insufficient, he may afterwards challenge him peremptorily.[147]

A Challenge for the Hundred must be taken before so many be sworn as

will serve for Hundredors, or else the Party loseth the Advantage thereof.[148]

After a Challenge to the Array, the Party may challenge the Polls; but after a Challenge to the Polls, there can be no Challenge to the Array.[149]

12. HOW SUCH CHALLENGE IS TO BE TRIED.

Here we must take Notice, that a principal Cause of Challenge being grounded on such a manifest Presumption of Partiality, that if it be found true, it unquestionably sets aside the Array, or the Juror, without any other Trial than its being made out to the Satisfaction of the Court, before which the Panel is returned; but a Challenge to the Favour, where the Partiality is not apparent, must be left to the Discretion of the Triers.[150]

If the Array be challenged, it lies in the Discretion of the Court how it shall be tried; sometimes it is done by two Attornies, sometimes by two Coroners, and sometimes by two of the Jury; with this Difference, that if the Challenge be for Kindred in the Sheriff, it is most fit to be tried by two of the Jurors returned; if the Challenge found in Favour of Partiality, then by any other two assigned thereunto by the Court.[151]

As to a Challenge to the Polls, if a Juror be challenged before any Juror sworn, two Triers shall be appointed by the Court; and if he be found indifferent, and sworn, he and the two Triers shall try the next Challenge; and if he be tried, and found indifferent, then the two first Triers shall be discharged, and the two Jurors tried and found indifferent shall try the Rest.[152]

If the Plaintiff challenge ten, and the Prisoner one, then he that remains shall have added to him one chosen by the Plaintiff and another by the Prisoner, and they three shall try the Challenge; if six be sworn, and the Rest challenged, the Court may assign any two of the six sworn to try the Challenges.[153]

The Triers cannot exceed two, unless it be by Consent; which was taken up in Imitation of the Trial of the Summons of the Party, which was by two Persons; this being, (a) whether such a Juror, as was described in the Writ, was warned, *viz*. one *per qu' rei verit' melius sciri Poterit, &c*.[154]

The Triers, as far as they act herein, are Officers of the Court, and liable to be punishable for any Misdemeanor; also it is said, (a) that if they find against Law, and the Direction of the Court, they may be fined and imprisoned.[155]

The Truth of the Matter alledged as Cause of Challenge, must be made out, by (b) Witnesses, to the Satisfaction of the Triers; also the Juror

challenged may, on a *Voir dire*, be asked such Questions as do not tend to Infamy or Disgrace; such as, whether he hath a Freehold, whether he hath an Interest in the Cause; and in a Civil Cause, whether he hath given his Opinion beforehand upon the Right, which he might have done as Arbitrator between the Parties.[156]

But in no Case can a Juror be asked, whether he hath been whipped for Larceny, or convict of Felony, or whether ever he was committed to *Bridewell* for a Pilferer, or to *Newgate* for clipping and coining, or whether he is a Villein or outlawed; because these kind of Questions tend to make a Man discover that of himself which tends to Shame, Infamy and Disgrace; also it was held in (c) a Trial for High Treason, that the Prisoner, in order to challenge a Juror, could not ask him, whether he had not declared his Opinion beforehand that he was guilty, or would be hanged, because these Questions tend to Reproach, as charging him with a Misdemeanor.[157]

If a Challenge be taken, and the other Side demur, and it be debated, and the Judge overrule it, it is entered upon the original Record; and if at *Nisi Prius* it appears upon the *Postea* what the Judge hath done; but if the Judge overruled the Challenge upon Debate without a Demurrer, then it is proper for (d) a Bill of Exceptions.[158]

It is said, that a Demurrer upon a Challenge is not like to a Demurrer upon a Plea; for in Case of a Demurrer upon a Challenge, as soon as the Demurrer is agreed on at the Bar, it is good enough, without other Circumstances, such as Counsel's Hand, *&c.* and the Prothonotaries of Right ought to enter such Demurrer.[159]

(F) HOW JURORS ARE TO BE IMPANELLED AND SWORN.

BY the 3 *Georg. cap*. 25. *sect*. 11. it is enacted, 'That the Name of each and every Person who shall be summoned and impanelled, with his Addition and the Place of his Abode, shall be written in several and distinct Pieces of Parchment, or Paper, being all, as near as may be, of equal Size and Bigness, and shall be delivered to the Marshal of such Judge of Assise or *Nisi Prius*, or of the said Great Sessions, or of the Sessions of the said Counties Palatine, who is to try the Causes in the said County, by the UnderSheriff of the said County, or some Agent of his, and shall, by Direction and Care of such Marshal, be rolled up all, as near as may be, in the same Manner, and put into a Box or Glass to be provided for that Purpose; and when any Cause shall be brought on to be tried, some indifferent Person, by Direction of the Court, may and shall, in open Court,

draw out twelve of the said Parchments, or Papers, one after another; and if any of the Persons, whose Names shall be so drawn, shall not appear, or be challenged and set aside, then such further Number, until twelve Persons be drawn, who shall appear, and after all Causes of Challenge shall be allowed as fair and indifferent; and the said twelve Persons so first drawn and appearing, and approved as indifferent, their Names being marked in the Panel, and they being sworn, shall be the Jury to try the said Cause; and the Names of the Persons so drawn and sworn shall be kept apart by themseves, in some other Box or Glass to be kept for that Purpose, till such Jury shall have given in their Verdict, and the same is recorded; or until such Jury shall, by Consent of the Parties, or Leave of the Court, be discharged; and then the same Names shall be rolled up again and returned to the former Box or Glass, there to be kept with the other Names remaining at that Time undrawn; and so *toties quoties*, as long as any Cause remains then to be tried.'

Sect. 12. Provided, 'That if any Cause shall be brought on to be tried in any of the said Courts respectively, before the Jury in any other Cause shall have brought in their Verdict, or be discharged, it shall and may be lawful for the Court to order twelve of the Residue of the said Parchments, or Papers, not containing the Names of any of the Jurors who shall not have so brought in their Verdict, or be discharged, to be drawn in such Manner as is aforesaid, for the Trial of the Cause which shall be so brought on to be tried.'

In Capital Cases the Sheriff returns the Panel of the Jury, who being called, and appearing, the Prisoners are told by the Clerk, that these good Men now called, and appearing, are to pass on their Lives and Deaths; therefore if they will Challenge any of them, they are to do it before they are sworn; and if no Challenge hinder, the Jury are commanded to look on the Prisoners, and then severally twelve of them, (a) neither more nor less, are sworn.[160]

Altho' there be twenty Prisoners at the Bar for several Felonies, and the Oath is general to try between the King and the Prisoners at the Bar, yet the Jury is to inquire of no (b) more than what they are particularly charged with; and therefore tho' twenty have pleaded, and stand at the Bar when the Jury is sworn, yet the Court may stay any Number of the Prisoners, and so the Jury stand charged with no more than what are thus particularly charged upon them; and when they go from the Bar, and have brought in their Verdict couching these Particulars charged upon them, then if the same Jury

pass upon the remaining Prisoners, yet they are to be called over again, the Prisoners reminded of their Challenges, and the Jury sworn *de novo* upon the Trial of the Rest of the Prisoners.[161]

(G) HOW TO BE KEPT AND DISCHARGED.

WHEN the Jurors depart from the Bar (a) a Bailiff ought to be sworn to keep them together, and not to suffer any to speak with them.[162]

After their Departure they may desire to hear one of the Witnesses again, and it shall be granted, so he deliver his Testimony in (b) open Court; and also they may desire to propound Questions to the Court, for their Satisfaction, and it shall be granted, so it be in open Court.[163]

The Jury must be kept together without Meat, Drink, Fire or Candle, till they are agreed.[164]

So in an inferior Court, if the Jury will not agree on their Verdict, the way is, as in other Courts, to keep them without Meat, Drink, Fire or Candle, till they agree; and the Steward may from Time to Time adjourn the Court till such Agreement.[165]

If they agree not before the Departure of the Justices of Gaol-Delivery into another County, the Sheriff must send them along in Carts, and the Judge may take and record their Verdict in a foreign County.[166]

If there be eleven agreed, and but one dissenting, who says he will rather die in Prison, yet the Verdict shall not be taken by eleven, no nor yet the Refuser fined or imprisoned; and therefore where such a Verdict was taken by eleven, and the twelfth fined and imprisoned, it was, upon great Advice, ruled the Verdict was void, and the twelfth Man delivered, and a new *Venire* awarded; for Men are not forced to give their Verdict against their Judgment.[167]

If the Jury say they are agreed, the Court may examine them by Poll; and if in Truth they are not agreed, they are fineable.[168]

It seems to have been anciently an uncontroverted Rule, and hath been allowed even by those of the contrary Opinion, to have been the general Tradition of the Law, that a Jury sworn and charged in a Capital Case cannot be discharged, (without the Prisoner’s Consent) till they have given a Verdict; and notwithstanding some Authorities to the contrary in the Reign of King *Charles* the Second, this hath been holden for clear Law, both in the Reign of King *James* the Second, and since the Revolution.[169]

(H) IN WHAT CASES AND IN WHAT MANNER TO HAVE A VIEW.

AT Common Law, in (a) most Real Actions, after the Demandant had counted, the Tenant might have demanded the (b) View of the Land; or if it were a Rent, or other Thing, View of the Land out of which it issued; and this was, that Things might be reduced to a greater Certainty; but because this was used often by the Tenant for Delay, and thereby the Demandant greatly prejudiced,[170]

By (b) [*sic*] *Westm*. 2. *cap*. 48. it is ordained and provided, 'That from thenceforth View shall not be granted but in case when View of Land is necessary; and if one lose Land by Default, and he that loseth moveth a Writ to demand the same Land, and in case when one by an Exception dilatory abateth a Writ after View of the Land, as by Nontenure, or Misnaming of the Town, or such like, if he purchase another Writ, in this Case, and in the Case beforementioned, from henceforth, the View shall not be granted, if he had View in the first Writ; in a Writ of Dower, where the Dower in Demand is of Land, that the Husband aliened to the Tenant, or his Ancestors, where the Tenant ought not to be ignorant what Land the Husband did alien to him or his Ancestor, tho' the Husband died not seised, yet from henceforth View shall not be granted to the Tenant. In a Writ of Entry also that is abated, because the Demandant misnamed the Entry; if the Demandant purchase another Writ of Entry, if the Tenant had View in the first Writ, he shall not have it in the second. In all Writs also where Lands be demanded, by reason of a Lease made by the Demandant, or his Ancestor, unto the Tenant, and not to his Ancestor; as that which he leased to him, being within Age, not whole of Mind, being in Prison, and such like, View shall not be granted hereafter; but if the Demise were made to his Ancestor, the View shall lie as it hath done before.'

Since this Statute, the Demandant, as to any of the Cases within the Statute, may counterplead the View, *i. e*. alledge Matter in Pleading which ousts him of View; as where he that loseth Land by Default brings a *Quod ei deforciat* for the Recovery of it, the Tenant shall not have View, because he is well enough ascertained of the Land by the former Record; so where View was had in a former Writ, and that Writ was abated after View for some Mistake that appeared upon the View, as Nontenure, Misnaming of the Town; so in Dower, when it is brought against the same Tenant that purchased the Land of the Husband; so if the Husband died seised, it is a good (c) Counterplea of View in Dower.[171]

In an Action of Waste, in which it was agreed, that a View should have been awarded, and that six at (d) least, of the Jurors should have viewed the

Place, it was resolved, that if a View be awarded, tho' not returned by the Officer, and the Trial goes on, and a Verdict had, that the Omission of the Officer in not Returning the View is not Error; for it was the Duty of the Court to examine whether the Jury had a View or not; and if they found they had not, the Trial ought to have been stayed.[172]

So in an Assise in which it was likewise agreed, that a View was requisite in the same Manner, if the Officer does not return the View, it is not Error; for the Words of the Writ are, *& interim videant*, and not *& interim haberi fac' Visum* ; so that the Jurors might have had the View when the Officer was not present; and if it were otherwise, the Party might have challenged the Jury for this Cause; and tho' the Officer had returned, that the Jurors had had the View, yet if upon Examination in Court it appeared otherwise, the Parties could not be concluded by such Return.[173]

If the Court make a Rule, that the Jury shall have a View, and that they shall not hear any Evidence thereupon, and they notwithstanding hear Evidence, this is a good Cause of Challenge, and likewise a Misdemeanor, for which, it is said, they may be punished by the Court.[174]

In an Action of Waste it was agreed; 1. That if six of the Jury are examined on a *Voir dire*, if they have seen the Place wasted, that it is sufficient, and the rest of the Jury need not be examined upon a *Voir dire*, but only to the Principal. 2. It was agreed, if the Jury be sworn that they know the Place, it is sufficient, altho' they be not sworn that they saw it ; and altho' that the Place wasted be shewed to the Jury by the Plaintiff's Servants, yet if it be by Command of the Sheriff, it is as sufficient as if the same had been shewn them by the Sheriff himself.[175]

At the Trial of a Cause, for Want of a full Jury upon the principal Panel, some *Talesmen* were sworn, and had the View, but the *Distringas* was returnable as an original *Distringas*, and so many of the original panel left out who were not at the View; of which the Defendant complained; and would have set aside the Trial for Irregularity; but because no *Venire* appeared to the Court, and the Matter stood upon Record as an original Trial, and the Want of a *Venire* was helped by Verdict, and because the Cause was tried by those that were fittest, *viz*. those who had the View, the Court would do nothing in it.[176]

But it was ordered, that for the future, when in order to a View the last Juror is (a) withdrawn, the Plaintiff shall take out a new *Distringas*, *amoto* the last Man of the Panel, to distrain the other twenty-three, with an *Apponas etiam decem Tales*.[177]

It is said, that before the Court makes a Rule for a View, the *Venire Facias* must be (b) returned; and then the Court may make a Rule, that so many of the Panel shall view the Premisses.[178]

A View is grantable in such Cases where the Title is in Question; and in such Cases it may be granted on Motion, on a bare Suggestion, without any Affidavit.[179]

And to this Purpose it is Enacted by 4 & 5 *Annae*, *cap*. 16. ‘That in any Actions brought in any of her Majesty’s Courts of Record in *Westminster*, where it shall appear to the Courts 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 on the Trial 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 on the same, certify that the View hath been had according to the Command of the said Writs.’

And by the 3 *Georg*. 2. *cap*. 25. a Provision is made for a View, in the following Words; ‘That where a View shall be allowed in any Cause, that in such Case six of the Jurors named in such Panel, or more, who shall be mutually consented to by the Parties or their Agents on both Sides, or, if they cannot agree, shall be named by the proper Officer of the respective Courts of King’s Bench, Common Pleas, or Exchequer at *Westminster*, or the Grand Sessions in *Wales*, and the Counties Palatine, for the Causes in their respective Courts, or, if Need be, by a Judge of the respective Courts where the Cause is depending, or by the Judge or Judges before whom the Cause shall be brought on to Trial respectively, shall have the View, and shall be first sworn, or such of them as appear upon the Jury, to try the said Cause, before any Drawing as aforesaid; and so many only shall be drawn, to be added to the Viewers who appear, as shall, after all Defaulters and Challenges allowed, make up the Number of twelve to be sworn for the Trial of such Cause.’

(I) WHAT IRREGULARITIES AND DEFECTS IN CONVENING, OR IN THE QUALIFICATIONS OF THE JURORS ARE AMENDABLE, AND AIDED AFTER VERDICT.

HERE we may lay it down in general, that by the express Words and Intent of the several Statutes of Jeofail and Amendments all Irregularities as to the Number, Qualifications, and Returns of the Jurors are aided after Verdict, so that the *Venire* be of the same Place, and in the same Action, and between the same Parties.[180]

So if there be no *Venire Facias*, or if there be such a Fault in the *Venire* as makes it a perfect Nullity, so that it has no Relation to the Cause, yet if there be a good *Distringas*, that being one of the Jury Process, the Omission of the former is cured ; for the Omission of any judicial Writ is aided by the Statutes, and a *Venire*, that is a Nullity, and has no Relation to the Cause, is as if there had not been any, and so of a *Distringas* where there is a proper *Venire*.[181]

So if the Award of a *Venire Facias* upon the Roll be well, and the Writ of *Venire Facias* wrong, yet this shall be amended by the Roll, being the (a) Warrant of the Writ, which is the Act of the Court, and the Default is only the Mistake of the Clerk.[182]

So if the Writ of *Venire Facias* out of the King's Bench be *Venire Facias* 12 *Liberos & Legales Homines coram nobis apud Westmonasterium ubicunque fuerimus in Anglia*; but the Roll is well, (the Words *apud Westmonasterium* being omitted therein,) this being in *B. R.* the Writ shall be amended by the Roll; for this is but Matter of Form.[183]

If the Return of the *Venire* be mistaken, this may be amended by the Roll, and if the *Teste* of the *Venire* be out of Term, or before Plea pleaded, it is no Error; for the *Teste* of Judicial Writs being only Matter of Form, if mistaken, shall not vitiate, since they have the proper Judges of the Fact by such Process.[184]

Therefore if a *Venire Facias* be dated 7 *July*, and made returnable 6 *July*, a Day before the Date of the Writ, this after Verdict is amendable, because a Judicial Process, and the Default of the Clerk.[185]

So if a *Venire Facias* be awarded upon the Roll, to be returned *Octabis Trinitatis*, and the Writ is made returnable six Days after, *scilicet*, a Day out of Term, but the *Distringas* is well without any Fault, and after the Jury impanelled find for the Plaintiff, this Writ of *Venire Facias* shall be amended by the Roll; for this was the Default of the Clerk only; for the Roll is the Warrant of the Writ.[186]

The Award of the *Venire* must be to a Day in the same Term, or to the next Term, but it must be in Term, otherwise it is erroneous; because this is

not such (b) a Discontinuance as is aided by the Statute, since it is an Error in the Court by awarding the Process, which makes it utterly incertain when or where the Parties should appear to receive Judgment, and it is an Act of the Court, which is erroneous, and not a Mis-entry of the Clerk, which the Statutes do not intend to aid.[187]

If the Place be totally (c) misawarded, this is not helped by any Statute, because they have not the proper *Judices Facti*, unless they have them from the Place where the Fact arises; but if it is only misawarded in Part, this is helped by the express Words of (d) 21 *Jac*. 1. *cap*. 13. because it is supposed that the Persons that were near any Part of the Place might know the Fact in Issue between the Parties; and by the Statute of (e) 16 & 17 *Car*. 2. *cap*. 8. the Want of a right *Venue* is aided, so as the Trial was by a Jury of the proper County or Place where the Action is laid.

If there be a Blank left for the County to the Sheriff whereof the Writ should be awarded, yet it will be amended, because it cannot be awarded to the Sheriff of any other County, and therefore it is the Omission of the Officer in entering the Award of the Court; but if there were a local Plea into another County, so that there are two Counties mentioned in the Pleadings, there the Blank cannot be amended, because there is originally no Award of the Court to whom the Process shall go; but where the Plea carries the Matter into another County, there the *Venire* must be from the last Place, because the Declaration by such Plea stands confessed.[188]

After Issue joined, if upon the Roll a *Venire Facias* be awarded to the Sheriff of the County of *Somerset*, *&c*. and upon this a *Venire Facias* is made in this Manner, *Carolus Dei Gratia Somerset salutem*, *&c*. leaving out the Word (*Vicecomiti*); and upon this the Sheriff of *Somerset* returns a Jury, and upon this a Verdict, *&c*. this shall be amended by the Roll, because this was the Fault of the Clerk meerly, having the Roll before him when he made the Writ, by which he was directed to direct the Writ to the Sheriff of *Somerset*.[189]

If the Court on an insufficient Suggestion awards the Process to an improper Officer, yet this is aided after Verdict; for that only makes an Insufficiency in the Return of the Jury, and insufficient Returns are aided; for it was the Design of the (a) Statute, that if the Cause was tried by a right Jury, that it should not be material what Officer got them together.

But if on a Suggestion on the Roll Process be awarded to the Coroner, and the Sheriff returns either the Panel or *Tales*, it is said to be erroneous, because not collected by the proper Officer, and therefore they are not the

Judices Facti of that Cause, and it appears on the Record that the Return is otherwise than the Court hath directed.[190]

But the latest Resolution is, that the Returns of Ministerial Officers are to be challenged at the Day of the Return; for if the Court then admits them to be their Officers, and the Parties do not except against them, they are concluded, since the proper *Judices Facti* are admitted by them to be returned.[191]

If a *Venire* is awarded to the Coroners, and returned by two of them only, whereas at the Time of the Award and Return thereof there were two more, this is only a Misreturn, and aided.[192]

But it is said, that if one Sheriff of (b) *London* makes a Return without the other, this is not helped, being no Return at all; for they make but one Officer, and the Court knows that one Sheriff there is two Persons.

If upon the Return of the *Habeas Corpora* the Surname of the Sheriff be omitted, as where his Name is *Bartholomaeus Michel*, and it is returned *Bartholomaeus Miles*, Sheriff, this shall be amended.[193]

It was held, that if before the Statute of 21 *Jac*. 1. *cap*. 13. the Sheriff did not return the Writ of *Venire*, nor set his Name on the Back thereof, or omitted inserting *quod Executio istius Brevis patet in quodam Panello huic Brevi annexo*, but it was *album Breve*, it could not be amended upon Examination of the Sheriff, being the (c) principal Process; but this is now helped by that Statute, so that a Panel of the Jurors be returned and annexed to the Writ.

If the Sheriff that returns his *Venire* be discharged before the *Teste* of the *Venire*, it is Error, and shall be tried by the Record of his Discharge; because if the legal Officer did not return the Writ, the proper *Judices Facti* did not try the Cause, and so the Verdict is ill.[194]

But if he be Sheriff at the Time of the Award of the *Venire*, and after his Discharge he returns the Panel to the *Venire*, this is no (a) principal Cause of Challenge; for the Sheriff having returned the *Nomina Jurat'* to the Court above on the *Venire*, on which they have awarded a *Distringas* with a *Nisi Prius*, the Sufficiency of that Return is not to be controverted before the Judge of *Nisi Prius*, but above, since the Judges of *Nisi Prius* are bound down by a Record of a superior Court, on whose Records it appears he is Sheriff.[195]

The Jury must come in the same Action, and between the same Parties, otherwise they are not Judges in that Cause; therefore in Ejectment where the *Venire* was *de Placito Transgressionis*, omitting *& Ejection' firmae*, the

Court held the *Venire* to be ill, because it was not in the same Action; for an Action of Trespass and Ejectment are different, and there might be an Action of Trespass between the same Parties; but if the *Distringas* had been right, they would have adjudged this *Venire* to be null, and the Want of a *Venire* is aided by the Statute.[196]

If in an Action of Trespass Issue is joined between the Plaintiff and two Defendants, and one dies, and the *Venire* is awarded between the Plaintiff and both Defendants after such Defendant's Death, and Verdict is taken for the Plaintiff, and the Death suggested on the Roll, and Judgment against the Survivor, the *Venire* being only a Judicial Process, and pursuing the Award on the Roll, it plainly appears to be the same Cause, and that the Trial was had by proper Judges, and Judgment being given against the Defendant, who is charged with the whole Action, is good.[197]

If the *Jurata* mentions the Issue to be *de Placito Transgressionis*, where the Action is Debt, and the Award of the *Venire* and *Distringas* Debt, this shall be amended; for the *Jurata* is an Award of the *Distringas*, in Pursuance of the Award of the *Venire*, and the *Venire* being right, the (b) secondary Process ought to be made accordingly, and there is a sufficient Authority by the Writ of *Distringas* for the Judge of Assise to try the Cause[198].

So if the Sheriff return *Nomina Jurat' inter Partes praedict' de Placito Transgressionis*, where the *Venire* is *de Placito Debit'*, this shall be amended; for *in Dorso Brevis* he says, *Executio istius Brevis patet, &c.* which could not be, if it was not in the same Action.[199]

If the Day when, and Place where the Assise was to be held, is not mentioned in the *Distringas*, it shall be amended by the Roll; for if there had been no *Distringas*, the Trial had been good, because the *Jurata* is the Warrant to try the Cause, and that was right.[200]

In Ejectment against seven Defendants, who entered into the common Rule, and pleaded to Issue, the Plea Roll, *Venire, Distringas*, and *Jurata* were right, but the Issue on the *Nisi Prius* Roll was between the Plaintiff and five Defendants only; after Verdict for the Plaintiff this was amended; for the Lessor's Title was the Gift of the Action, and the only Thing inquirable of by the Jury.[201]

If the (a) Number or (b) Qualifications of the Jury, as has been said, be omitted, it may be amended; for it is but Form to award the particular Number and Qualifications in each Roll, which is directed by the Law in all Cases.

The *Nomina Juratorum* on the *Venire* are the proper Parties to try the Action; and if there be a Mistake in the (c) Christian Name, it is incurable; for the Statute does not extend to it, but it extends to cure Surnames and Additions; for there can be but one Name of Baptism, but there may be various Surnames and Additions; and therefore if it can be proved what Person the Sheriff meant by his Surname or Addition, it may be amended and set right.

Also if the Names of either Christian or Surname be wrong in the Body of the *Distringas*, or in the Panel returned, or in the Panel of the Jury sworn, yet if it can be proved to be the same Man that was intended to be returned in the *Venire*, having there his right Christian Name, he is the proper *Judex Facti*, and it may be amended by the Statute[202].

As if *Tippett* be returned in the *Venire Facias*, and in the *Habeas Corpora* and *Distringas Juratores* he is named *Typper*, yet if his true Name be *Tippett* according to the *Venire Facias*, and *Tippet* is sworn, and tries the Issue, it shall be amended.[203]

If the Sheriff returns but twenty-three on the *Venire*, and twenty-four on the *Habeas Corpora*, and the twenty-fourth omitted on the *Venire* appears, and is sworn, the Verdict is ill, because he is not returned according to the Award of the Court, in Pursuance of the *Venire*, and therefore has no Authority to try the Cause; for the Award to distrain one not summoned is void, and he is not returned of the *Tales de Circumstantibus*, so that he is not a proper Juror by the Writ nor Statute.[204]

So if twenty-five are returned, and the twenty-fifth is sworn, and tries the Cause, it is not helped.[205]

But if the twenty-fourth Man had not been of the twelve that tried the Issue, it would be aided by the Statute; or if the Trial had been by eleven of the twenty-three, and one of the *Tales de Circumstantibus*, it had been good.[206]

(K) WHAT IRREGULARITIES OR DEFECTS IN CONVENING, OR IN THE QUALIFICATIONS OF THE JURORS, ARE AIDED BY CONSENT.

HERE we may lay it down as a general Rule, that all Defects in convening, or in the Qualifications of the Jurors, are aided by Consent of the Parties; for the Rule herein is, that *omnis Consensus tollit Errorem*.[207]

Therefore if a *Venire Facias* be awarded to the Coroners, where it ought to be to the Sheriff, or the Visne cometh out of a wrong Place, if it be *per Assensum Partium*, and so entered of Record, it will stand good.[208]

One of the Jury, after he had been sworn, and after he had heard Part of the Evidence, fell sick, and another being sworn in his Place by Consent of Plaintiff and Defendant, it was held a good Verdict.

*

(M) FOR WHAT MISDEMEANORS PUNISHABLE: And herein,

1. WHERE PUNISHABLE BY ATTAINT.

THE Jury when impanelled judged under the Penalty of an Attaint by the old Law, which was the only Curb they had over Juries; but this Method, from the Difficulty of attainting the Jury, and Severity of the Punishment, has been seldom used of late, and the Practice of granting new Trials, where the Jury find against Evidence and the Direction of the Court, introduced in the Room thereof; but since the Attaint is only disused, and not taken away, we shall here set down the most considerable Matters relating thereto.[209]

But herein, first, we must observe, that the Judgment in Attaint being so severe, all manner of Evidence was admitted in Support of the Verdict; but against the Verdict they admitted none that was not given at the former Trial; because the Jury might give in their Verdict, not only on the Evidence given in Court, but on their own Knowledge; and therefore (a) whatever otherwise they came to the Knowledge of, they might give in Evidence for the Support of their Verdict; but the Evidence not offered on the Trial can never be brought against them, because such Evidence might have altered their Judgment, had it been given; and the Want of that Light, which the Party neglected to offer, cannot convict them of a Falsity, which, if it had been offered, might have founded a different Verdict.[210]

The Jury may be attainted two Ways; 1 *st*, Where they find contrary to Evidence. 2*dly*, When they find out of the Compass of the *Allegata:* But to attaint them for finding contrary to Evidence is not so easy, because they may have Evidence of their own Conuzance of the Matter before them, or they may find on (b) Distrust of the Witnesses, on their (c) own proper Knowledge.[211]

But if they find upon Evidence that does not prove the *Allegata*, there it is easy to subject them to an Attaint, because it is manifest that what is so found is on Evidence not corresponding to their Issue; and hence it is necessary that the Matters in Issue should be set forth with all convenient Certainty, that it may be seen how far and when the Jury are mistaken; as in

Trespass, the Quantity and Value of the Thing demanded must be so conveniently described, that if the Jury find Damages beyond such Quantity and Value, it may be apparently excessive, and they subject to the Attaint; and so on special Contracts they must be set forth so precisely, that if Evidence be given of another Contract, and not that in the Allegations, and yet the Jury find for the Plaintiff, they may be subject to an Attaint.[212]

An Attaint does not lie in a Criminal Case, as it does in a Civil; and the Reason of the Difference, according to *Hawkins*, is, that in the last Case a Man's Property only is brought into Question a second Time, and not his Liberty or Life; also, says he, it may be generally presumed that a Jury is likely to be equally influenced with the Fear of an Attaint from either of the contending Parties; whereas if any such Examinations of their Proceedings were allowed in Criminal Causes, they might be often in great Danger of one Side, by incurring the Resentment of a powerful Prosecutor, and provoking him to call their Conduct in Question, for their supposed Partiality; but they could have little to fear from an injured Criminal, who would seldom be in Circumstances to make his Prosecution formidable.[213]

Where the King is sole Party against the Subject, and the Jury find for the King, no Attaint lies; but it is otherwise where the Suit is *tam pro Domino Rege quam pro seipso*.[214]

No Attaint lies upon an Inquest of Office; therefore if a Recovery be in a *Quare Impedit* by Default, and a Writ issues to the Sheriff to (a) inquire of the Damages and Plenarty, no Attaint lies upon this Inquest; for it is but an Inquest of Office.

But if the Inquiry be by the same Inquest that inquired of the Issue in the *Quare Impedit*, an Attaint lies.[215]

So in an Assise, if they are at Issue upon the Plea in Bar, and that is found for the Plaintiff, and it is inquired over of the Seisin and Disseisin, if the Disseisin be found by a false Verdict, an Attaint lies thereupon.[216]

In an Action against Tenant in Tail, if he makes Default, and he in the Reversion prays to be received, supposing him to be Tenant for Life, which is counterpleaded, upon which they are at Issue, and it is found against him in Reversion, and the same Inquest taxes the Damages against the Lessee, no Attaint lies upon this Verdict; because the Judgment against the Lessee is given upon the Default; and so this is but an Inquest of Office for the Damages.

An Attaint lies upon a Verdict before the Sheriff in a Writ of Inquiry of Waste, because by the Statute the Sheriff is made Judge in this Case.[217]

No Attaint lies upon a Verdict given by twenty-four Jurors, nor does it lie upon a Verdict given in an Attaint for the Thing of which the Jury is attainted; but if they find any collateral Matter *praeter* the Attaint, it lies thereupon, and they shall be attainted.[218]

In a Writ of (b) Right, if the Grand Assise be taken upon the meer Right, no Attaint lies thereupon; but if the Issue be taken upon a collateral Matter, and not upon the meer Right, an Attaint lies thereof.[219]

If a Deed with Witnesses be pleaded, and the Inquest passes in the Affirmative, no Attaint lies thereof; because the Witnesses have adjudged this to be true; but otherwise it is if it passes in the Negative, and Disaffirmance of the Deed; (c) for the Witnesses ought to testify nothing but what they see or hear.[220]

In an Assise, if the Jury find a Special Verdict, and refer it to the Court, whether upon the Matter the Tenant be a Disseisor, and upon the Matter the Court adjudge him to be a Disseisor, tho' in Law he be no Disseisor, yet no Attaint lies against the Jury, (a) because it is not their Fault, but the Fault of the Court.[221]

An Attaint lies before Execution sued, for the Danger of the Death of the Petit Jury in the mean Time; for after the Death of any of the Petit Jury, no Attaint lies.[222]

An Attaint lies for excessive Damages, as also where the Jury give too little; but if the Jury give excessive Damages, and the Court abridge them, and make them reasonable, no Attaint lies against the Jury, tho' they have made a false Oath; for such Abridgment is made upon the Prayer of the Party, and therefore he shall not have an Attaint also.[223]

So if the Court increases the Damages, and makes them reasonable, whereas before they were too small, no Attaint lies.[224]

So if the Jury give excessive Damages, and after the Plaintiff, to whom they are given, releases Part of the Damages, by which the Rest of the Damages which remain are reasonable enough, no Attaint lies; for hereby the Defendant's Cause of Grievance is taken away.[225]

In an Attaint, if the Plaintiff assigns the false Oath in excessive Damages, he ought to assign it in this Manner, *scilicet*, that the Goods for which the Damages were given were but of the Value of 40 *s*. and that in the Damages given over this Sum they made a false Oath.[226]

If in Trespass against two one pleads Not guilty, and this found against him, and excessive Damages given, and after the other Defendant comes and pleads Not guilty, and this is found against him also, he may have an

Attaint upon the first Verdict, because bound by the Damages given thereby; and tho' he is a Stranger to the Issue, yet he is privy in Charge.[227]

In a *Quare Impedit* against two, they make several Titles; and it is found for one Defendant, and that the other disturbed him, the other may have an Attaint upon this; for by this he loses the Presentation.[228]

He who is Party to the Recovery shall have an Attaint, altho' he was not Tenant at the Time of the first Writ brought, nor when the Judgment was given.[229]

If an Action of Joint-tenancy be pleaded with a Stranger, and the Stranger joins with the Tenant in the Maintenance thereof, and this is found against them, yet the Stranger shall not have an Attaint, because he is not Party to the Writ.[230]

So in an Action against *A.* and *B.* if it is found against them upon several Issues, *A.* shall not have an Attaint upon a false Verdict against *B.* because he was not Party to this Issue.[231]

So in Trespass against two, if one pleads a Release, upon which they are at Issue, and the other pleads the same Plea as Servant to him, if it be found against the Master, the Servant shall not have an Attaint thereupon, for he is not Party to his Issue.[232]

So in Waste against two, if one makes Default, and the other pleads, and it is found against him, the other who made Default shall not have an Attaint thereupon, because he is not Party to the Issue.[233]

If a Villein, be found free in a *Homine Replegiando* against the Lord, and after the Lord dies, the Heir shall have an Attaint; so if the Villein were found free by a false Verdict, in an Action of Trespass brought by him against the Lord, and after the Lord dies, his Heir shall have an Attaint, because hereby he loses his Inheritance in the Villein; but he cannot have an Attaint for the Damages, but the Executors may, because they belong to them.[234]

The Petit Jury can plead no Plea but such as may excuse them of the false Oath; and by the 23 *H.* 8. *cap.* 3. it is enacted, that after the Plaintiff hath assigned the false Oath, the Petit Jury, if they be the same Persons, and the Writ, Process, Return and Assignment good, shall have no Answer, but only that they made a true Oath; unless the Plaintiff, in an Attaint upon the same Verdict, hath before Nonsuit discontinued, or had Judgment against the Petit Jury.[235]

In an Attaint upon a Verdict in Trespass, one of the Petit Jury pleaded an Award between the Plaintiff and Defendant, and whether this was a good

Plea *dubitatur*. *Kelw*. 130.[236]

In an Attaint brought by the Issue in Tail, upon a Verdict in a *Formedon* against his Ancestor, the Release of the Ancestor is not any Bar, for the Attaint is intailed as well as the Land itself.[237]

By the 23 *H*. 8. *cap*. 3. all Attaints must be taken (a) in the King's Bench or Common Pleas, and not elsewhere; but a *Nisi Prius* may be granted.

The Judgment at Common Law was very (b) severe; and, according to my Lord *Coke*, importeth eight great and grievous Punishments; 1. *Quod amittant Liberam Legem imperpetuum*; that is, he shall be so infamous as never to be received as a Witness, or to be of any Jury. 2. *Quod forisfaciant omnia bona & Catalla sua*. 3. *Quod terrae & Tenementa in manus Domini Regis Capiantur*. 4. *Quod uxores & Liberi extra Domus suas ejicerentur*. 5. *Quod Domus suae Prostrentur*. 6. *Quod arbores suae extirpentur*. 7. *Quod Prata sua arentur*. 8. *Quod Corpora sua Carceri mancipentur*.[238]

But the Severity of this Punishment was mitigated by the Statute 23 *H*. 8. *cap*. 3. which prescribes the Methods of Proceeding in Attaint, and inflicts certain Pecuniary Punishments on the Jurors, in Proportion to the Damages sustained by the Party by the false Verdict, in which the (c) Party recovering is to be joined.[239]

If a Man recover in an Attaint, he shall be (d) restored to all that he hath lost by the Verdict, as well his Lands as the Mesne Profits; as also his Damage, if he lost in a Personal Action.[240]

So if a Man brings Debt and is barred, and he brings an Attaint, and it is found for him, he shall recover his Debt.[241]

So if the Issue in Tail recovers the Land in an Attaint upon a Recovery against his Ancestor, he shall recover the Issues of the Land from the Death of the Ancestor.[242]

2. HOW OTHERWISE PUNISHABLE.

And herein we must consider Jurors either in a Ministerial Capacity, as Persons bound to attend the Court, to do the Business for which they are returned till they are discharged; or in a Judicial Capacity, as Judges of the Fact to be tried.

In the former Capacity they are liable to be punished in several Instances; as for refusing to appear, withdrawing themselves before they are sworn, or refusing to be sworn; for which every Court of Record may, of common Right, impose such a reasonable Fine on any one returned on a Grand or Petit Jury, as shall seem convenient.[243]

So if after they are sworn they refuse to give any Verdict at all[244].

So if they endeavour to impose upon the Court; as where a Petit Jury offer a Verdict to the Court as agreed by their whole Number, where in Truth some of them have not agreed to it, or where they agree upon two Verdicts; and first, to offer one of them to the Court, and to stand to it, if the Court shall express no Dissatisfaction to it; but if the Court shall dislike it, then to give the other.

So for misbehaving themselves after their Departure from the Bar; as where they do not all keep together till they have given their Verdict, or where any of them carry any Thing [(a)] eatable with them in their Pockets, or eat or drink, or otherwise refresh themselves, without Leave from the Court, before they have given their Verdict, tho' they were agreed on it, and were also all the Time in the Custody of the Bailiff appointed to take care of them.[245]

Also where a Jury, after they departed from the Bar, being late on *Saturday* Night, separated and went every one to his own House without giving a privy Verdict, or without consulting upon the Evidence, and gave a Verdict according to the Direction of the Court; but for this Misdemeanor they were fined each forty Shillings, and a new Trial granted; and herein the Chief Justice said, that by such Trial both Parties may be prejudiced; for the Jurors going at large, without consulting together, may well forget the Evidence; and it is the Right of the King's Subjects to have their Issues determined when the Evidence is fresh in the Memory of the Jurors; and the suffering the Jurors to go to their Houses after a privy Verdict is only by Connivance, but by the strict Rules of Law ought not to be suffered.[246]

Also where the Jury have been divided, or in Doubt, about the Evidence, and have agreed to determine the Matter by throwing Cross or Pile, *&c*. and to give their Verdict as the Chance happened; this has been held such a Misdemeanor, for which they have been ordered to attend, and for which they are punishable, and for which a new Trial will be granted on the common Rule of *Juratores male se gesserunt*.[247]

Jurors are likewise punishable for sending for or receiving Instructions from either of the Parties concerning the Matter in Question[248].

So if a Juryman have a Piece of Evidence in his Pocket, and after the Jury sworn and gone together he (a) sheweth it to them, this is a Misdemeanor finable in the Jury; but it avoids not the Verdict, tho' the Case appear upon Examination.[249]

As to the Punishment of Jurors in their Judicial Capacity, there are

several Instances where Jurors acquitting great and notorious Offenders, contrary to clear and manifest Evidence, and contrary to the Judge's Directions, have been punished in the StarChamber, and have also, not only in the King's Bench, but also by Justices of *Oyer* and *Terminer* and Gaol-Delivery, been fined and imprisoned, and bound over to their good Behaviour; but these Methods were thought to be contrary to the Opinions in the old Books, and contrary to the general Reason of the Law; and being fully considered in (a) *Bushel*'s Case, it was there settled, and hath been ever since agreed to, that Jurors are no way punishable, except by Attaint, for giving a Verdict contrary to a Judge's Directions, and against what may seem to others clear and manifest Evidence, for that they are the proper Judges of the Fact to be tried, and may be reasonably influenced by Matters known only to themselves; as their own Personal Knowledge of the Fact, or of the Credit of the Witnesses, or of the Parties.[250]

And herewith my Lord *Hale* seems to agree, and shews the Unreasonableness of punishing a Jury for going contrary to the Direction of the Court in Matters of Law, because it is impossible any Matter of Law could come in Question till the Matter of Fact were settled and stated and agreed by the Jury, and of such Matter of Fact they were the only competent Judges; also, says he, it were the most unhappy Case that could be to the Judge, if he, at his Peril, must take upon him the Guilt or Innocence of the Prisoner; and if the Judge's Opinion must rule the Matter of Fact, the Trial by a Jury would be useless.[251]

But he seems to admit, that the long Use of fining Jurors in the King's Bench in Criminal Causes, may give possibly a Jurisdiction to fine in these Cases, yet that it can by no Means be extended to other Courts of Sessions, of Gaol-Delivery, *Oyer* and *Terminer*, or of the Peace, or other inferior Jurisdictions.[252]

Also by *Hawkins*, if it shall plainly appear in any Case, that Jurors are perfectly satisfied of the Truth of a Fact, whereupon they declare to the Court, that they find it in such a particular Manner; and the Court directly tell them, that upon the Fact so found, as they have agreed it to be, the Judgment of the Law is such or such, and therefore that they ought to give a Verdict accordingly, yet they obstinately insist upon a Verdict contrary to such a Direction; it seems agreeable to the general Reason of the Law, that the Jurors are finable by the Court in such a Case, unless an Attaint lies against them; for otherwise they would not be punishable for so palpable a Partiality in taking upon them to judge of Matters of Law, which they have

nothing to do with, and are presumed to be ignorant of, contrary to the express Direction of one, who by the Law is appointed to direct them in such Matters, and is to be presumed of Ability to do it.[253]

Also if a Judge, for the better Direction and Information of a Jury, shall ask them their Opinions concerning such a particular Fact, and they shall refuse to answer him, and obstinately insist to deliver in their Verdict, as they think fit, contrary to his Direction, it seems questionable whether they may not be fined in such a Case also, unless an Attaint lie against them; for that it is the Duty of Jurors to take the Advice and Information of the Court, in order to be governed by it, as far as shall be consistent with their Consciences.[254]

3. HOW ABUSES BY OTHERS IN RELATION TO THEM ARE PUNISHABLE; AND THEREIN OF THE OFFENCE OF EMBRACERY.

Embracery is defined in general to be any Attempt by either Party; or a Stranger, to corrupt or influence a Jury, or to incline them to favour one Side by Gifts or Promises, Threats or Persuasions, or by instructing them in the Cause, or any other way, except by opening and enforcing the Evidence by Council at the Trial, whether the Jurors give any Verdict or not, and whether the Verdict be true or false.[255]

Also it is an Offence of this Kind for a Stranger barely to labour a Juror to appear and act according to his Conscience, or for any Person to labour a Juror not to appear; but it is no Offence for the Party himself, or for any Person, who can justify an act of Maintenance, to labour a Juror to appear and give a Verdict according to his Conscience.[256]

Also it is an Offence to give Money to a Juror after the Verdict, unless it be openly and fairly given to all alike, in Consideration of the Expences of their Journey and Trouble of their Attendance.[257]

So the bare giving of Money to another, to be distributed among Jurors, favours of Embracery, whether any of it be distributed or not; and it is an Offence of the like Kind for a Person, by indirect Means, to procure himself, or another, to be sworn of a *Tales*, in order to serve one Side; also it is as Criminal in a Juror, as in any other Person, to endeavour to prevail on his Companions to give a Verdict on one Side, by any other Arguments besides the Evidence produced, and the general Obligations of Conscience.[258]

The Offence of Embracery is punishable at (a) Common Law by Indictment or Action; and if it were not known before the Trial, it will be a good Cause to set aside the Verdict.[259]

Abuses by others, in Relation to Juries, are punishable by Fine and

Imprisonment; as if a Man assault or threaten a Juror for having given a Verdict against him, he may be indicted as a Disturber of the Administration of Justice, and one who is guilty of a Contempt to the King's Courts.[260]

Also the Court of King's Bench granted an Information against a Town-Clerk, for publishing an Order of the Court against Jurors who had found a Person guilty of Manslaughter only, upon an Indictment of Murder, by which Order the said Jurors were declared to be justly suspected of Bribery.[261]

Bacon Abridgment, vol. 3, pp. 230–35, 245–84.

12.3.1.2Jacob, 1750

Jury, (from the *Latin*) signifies a certain Number of Men, who are sworn to make Inquiry of, and try the Matter of Fact in Dispute, and to declare the Truth upon such Evidence as shall be given them in a Cause. The Privilege of Trial by a *Jury* is said to be of great Antiquity it taking Place among the *Britains* as well as *Saxons. Juries* are not only used in the Circuits of our Judges, but also in other Courts, *&c*. as where a Coroner by *Jury* inquires of the Death of a Person; and the Justices of Peace, at their Quarter-Sessions, the Sheriff in the County Court, the Steward of a Court-Leet, or Court-Baron, *&c*. where they make Inquiry of any Offence, or decide any Controversy, they do it by a *Jury*. At the general Assises there are usually many *Juries*, on Account of the great Number of Causes both Civil and Criminal that are there to be tried, whereof one is termed the *Grand Jury*, and the rest are called *Petit Juries*, concerning whom it has been held there should be one for every Hundred. *Lamb. Eiren*. 384. The *Juries* anciently as well in the *King's Bench* as *Common Pleas* were twelve Knights, which we learn from *Bracton* and to make a *Jury* on a Writ of Right called the Grand Assise, there must be sixteen, thus made up, *viz*. four Knights and twelve others. A *Grand Jury* most commonly consists of twenty-four Men of greater Note and worth than those of the Petit *Jury*, and who are indifferently chosen out of the whole County by the Sheriff. A *Petit Jury* consisting of twelve Men impanelled in Criminal Cases, are called the *Jury of Life and Death*: Here the *Grand Jury* finds the Indictments against the Criminals; after which the *Petit Jury* convicts or acquits them by Verdict, in the giving of which all the twelve must agree. *Finch* 412. 3 *Inst*. 30.

JuryMen must be Freemen, indifferent, and not outlawed, or infamous; neither ought they to be Aliens, nor Men attainted of any Crime: And Infants, Persons seventy Years of Age, or upwards, Clergymen, Apothecaries, *&c*. are exempted from serving upon *Juries*. Likewise Barons, and all above them, are not to serve in any ordinary *Jury*. 3 *Inst*. 221. Our Common Law requires that Jurors shall be returned from the County wherein the Fact was done; and by 28 *Ed*. 1. *c*. 9. Jurors impanelled are to be the next Neighbours, and such as are most sufficient, and least suspicious; otherwise the Officer returning them is to forfeit double Damages. *S. P. C*. 154. The Qualification of a JuryMan for a County is 10 *l. per Annum*, either in Freehold or Copyhold Estate within the same County; Cities, Boroughs, and Corporate Towns, are excepted out of the Statutes. *JuryMen* that are summoned for not appearing, shall forfeit Issues, if they have no reasonable Excuse for their Defaults; the Issues to be forfeited are 5 *s*. on the first Writ, 10 *s*. upon the second, and upon the third 13 *s*. 4 *d*. by the 35 *H*. 8. But no *Jury* is obliged to appear at *Westminster* upon a Trial, where the Offence was committed thirty Miles off, except it be required by the King's Attorney General. 18 *Eliz. c*. 5. According to Usage, the Sheriff should return twenty-four *Jurors*, in Order to Speed the Trial in Case of Challenge, or Sickness, *&c*. and should he only return twelve, pursuant to the Writ, he is liable to be amerced. *Jenk. Cent*. 172. By 4 & 5 *W. & M*. No Sheriff, Bailiff, *&c*. under the Penalty of 10 *l*. shall return any Person to serve on a *Jury*, who has not been duly summoned six Days before the Day of Appearance; nor under the like Penalty, shall he accept of Money, or other Reward for excusing the Appearance of a *JuryMan*. Where a Trial relates to any Thing that concerns a Sheriff or UnderSheriff, the *Jury* must be returned by the Coroner. And in the *King's Bench*, the Process to bring in a *Jury* is called *Distringas Juratores*; and in the *Common Pleas*, it is *Venire facias* and *Habeas Corpora Juratorum:* Upon the *Venire*, the Sheriff returns the *Jury* in a Panel, or small Piece of Parchment which is annexed to the Writ; after which the *Habeas Corpora* issues for the bringing in of the *Jury*. In all Cases where, after Issue is joined, the suit is continued on the Roll, the Process from Time to Time must be continued against the Jurors. Lists of *Jurors* according to the Statutes 4 & 5 *W. & M.* & 7 & 8 *W*. 3. are now to be made from the Rates of each Parish, and fixed on the Doors of Churches, *&c*. twenty Days before *Michaelmas*, that publick Notice may be given of Persons omitted, who are qualified, for of Persons inserted that are not so: After which, the Lists being settled by the Justices of the Peace at the Quarter-Sessions, Duplicates are to be delivered to the Sheriffs by the

Clerks of the Peace: And the Names contained in these Lists must be entered alphabetically by Sheriffs in a Book to be kept for that Purpose, together with their Additions, and places of Abode. The Sheriffs are liable to be fined for returning other Persons, or if they return *Jurors*, that have served two Years betore. Sheriffs, on the Return of Writs of *Venire facias*, are to annex a Panel of the Names of a competent Number of the *Jurors* mentioned in the Lists, not being less than forty-eight in any County, nor more than seventy-two, unless they are otherwise directed by the Judges, which *Jurors* shall be summoned to serve at the Assises, *&c*. The Names of the Persons impaneled shall be then wrote on several distinct Pieces of Paper of equal Size, and be delivered by the UnderSheriff to the Judge's Marshal, who causes them to be rolled up, all in the same Manner, and put together in a Box; and when any Cause is brought on to Trial, some indifferent Person is to draw out twelve of these Papers of Names, who, if not challenged, shall be the *Jury* to try the Cause; in Case any of them are challenged, and set aside, or do not appear, then a further Number is to be drawn 'till there is a full *Jury*; And *Jurors* neglecting to appear shall be fined in a Sum not exceeding 5 *l*. nor under 40 *s*. *Jurors* in *London* must not only be Housekeepers, but have Lands or Goods worth 100 *l*. and they may be examined on Oath as to that Point. 3 *Geo*. 2. *c*. 25. The Plaintiff and Defendant are both at Liberty to use their Endeavours for a JuryMan to appear; yet a Person who is not a Party to the Suit must not do it: In Case a JuryMan doth appear, but refuses to be sworn, or to give a Verdict, or if he endeavours to impose upon the Court, or is guilty of any Misbehaviour after his Departure from the Bar, he may be fined, and Attachment shall issue against him. 2 *Hawk*. 145. When a JuryMan is sworn, he must not depart from the Bar upon any Account whatsoever, until the Evidence is given, without Leave of the Court; and if that be obtained, he must have a Keeper with him. It is said, that the *Jury*, with the Leave of the Court, may eat or Drink at the Bar, but not out of Court; for as soon as the whole Evidence given is summed up, the *Jury* are to be kept together 'till they bring in their Verdict, without being admitted to the Speech of any, and without either Meat, Drink, Fire or Candle. 1 *Inst*. 227. 2 *Lill. Abr*. 123. They are fineable, if they agree to cast Lots for their Verdict; and likewise for being tamper'd with, in Relation to the giving it: 'Tis held they are not so for giving a Verdict contrary to Evidence, or against the Court's Direction; for this Reason, that the Law presumes the *Jury* may have some other Evidence than what is given in Court, and they may find Things of their own Knowledge, as well as go according to their Conscience; yet they shall not

meddle with any Thing that is not in Issue. 2 *Lev*. 205. *Vaugh*. 153. 3 *Leon*. 147. Attaint will lie against a *Jury* for giving contrary to Evidence, where any Corruption appears: They shall not be punished for giving their Verdicts, unless by Attaint for a false Verdict, in the Case of which, if convicted, they are to lose their Lands and Goods, and their Houses to be rased, also their Bodies thrown into Prison; but how far this Punishment is altered, you may see in 23 *H*. 8. *c*. 3. Where a *Juror* is guilty of Bribery, he becomes disabled to be of any Assises or *Juries*, and is to be imprisoned, and ransomed at the King's Pleasure. 5 *Ed*. 3. *c*. 10. Also if a *Juror* takes any Thing, either of the Plaintiff or Defendant, to give a Verdict, he shall pay ten times as much as he has taken, or suffer a Year's Imprisonment, by 38 *Ed*. 3 *c*. 12. Yet JuryMen, when they try a Cause, are to have their Charges allowed them. 2 *Lill*. 125. In all Cases of Difficulty, it is safest for the *Jury* to find the special Matter, and leave it to the Judges to determine how the Law stands upon the Fact. 1 *Inst*. 30. If the *Jury* find any Thing against Law, or Sense, *&c*. it will be void: Nevertheless a *Jury* has been permitted to recall their Verdict; as where a Person was indicted of Felony, the *Jury* found him Not guilty; tho' immediately before they went from the Bar said they were mistaken, and found him Guilty, which last was recorded for their Verdict. *Plowd*. 211. In Cvil [*sic*] Cases a *Jury* may be discharged before they give a Verdict, on Nonsuits had, *&c*. 1 *Inst*. 155. There is a *Special Jury*, where it is conceived, that in indifferent and between the Parties by the Sheriff; in which Case the Court, upon Motion, will Order the Sheriff to attend the *Secondary* of the *King's Bench* with his Book of Freeholders of the County, and the *Secondary* in the Presence of the *Attornies* on both Sides, is to strike a *Jury:* And if there happens a Cause of Consequence to be tried at the Bar, the Court of *King's Bench*, on Motion upon an Affidavit made, will make a Rule for the *Secondary* to Name forty-eight Freeholders, whereout each Party is to strike twelve, one at a Time, the Plaintiff's Attorney beginning first, and the Remainder of the *Jurors* shall be the *Jury* for the Trial. 2 *Lill*. 123. The Nomination of a *special Jury* ought to be in Presence of the Attornies on each Side; but in Case either of them neglect or refuse to attend, the *Secondary* may proceed *ex parte*, and then he strikes twelve for the Attorney that makes Default. See 1 *Salk*. 405. By 3 *Geo*. 2. *c*. 25. In Trials of Issues on Indictments, *&c*. and in all Actions of what Kind soever, on the Motion of the Prosecutor, Plaintiff or Defendant, *&c*. the Courts at *Westminster* are authorized to Order a special *Jury* to be struck, in the like Manner as upon Trials at Bar. Where a special *Jury* is ordered by Rule of Court, in any Cause arising in a

City, Corporation, *&c*. the *Jury* is to be taken out of Lists or Books of Persons qualified, which are to be produced by Sheriffs, *&c*. before the proper Officer. A Rule has been made for a good *Jury*, and that a special Verdict shall be found, *&c*. and where two Merchants are Plaintiff and Defendant in a Cause, the Court may be moved for a *Jury* of Merchants to be returned to try the Issue between them: Likewise if either of the Parties in a Suit be an Alien, the *Jury* ought to be half Foreigners, and *English*, at the Prayer of the Party. *Mod. Cas. L. & E*. 221. 2 *Lill*. 125. See *Challenge* and *Verdict*.

Jacob New-Law Dictionary, 1743.

12.3.1.3Hawkins, 1762

CHAP. XXXIX.

Where a Prisoner shall be allowed Counsel, and a Copy of the Indictment, &c.

A Person having pleaded Not guilty is to be tried either,

1. By his Country, or
2. By his Peers, or
3. By Battle.

But before I consider what is proper to each of these in their Order, I shall endeavour to shew,

1. In what Cases a Prisoner may have Counsel to assist him in his Defence.
2. Where he may have a Copy of the Indictment.

Sect. 1. As to the first of these Particulars, I take it to be a settled [a] Rule at Common Law, that no Counsel shall be allowed a Prisoner, whether he be a [b] Peer or Commoner, upon the General Issue, on an Indictment of Treason or Felony, unless some Point of Law arise, proper to be debated.[262]

Sect. 2. This indeed many have complained of as very unreasonable, yet if it be considered, that generally every one of Common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer; and that it requires no manner of Skill to make a plain and honest Defence, which in Cases of this Kind is always the best; the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own. And if it be farther considered that it is the [c] Duty of the Court to be indifferent

between the King and Prisoner, and to see that the Indictment be good in Law, and the Proceedings, regular, and the Evidence legal, and such as fully proves the Point in Issue, there seems no great Reason to fear but that, generally speaking, the Innocent, for whose safety alone the Law is concerned, have rather an Advantage than Prejudice in having the Court their only Counsel. Whereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defence of those who are guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defence of other speaking for them.

Sect. 3. But the Law allows a Defendant the same Benefit of Counsel, in an [a] Appeal, whether Capital or not Capital, as in any other Action. Perhaps for this Reason among [b] others, because Appeals are presumed to be generally carried on with greater Heat and Spleen than Indictments, and yet are not so much to be favoured as being for the most part rather grounded on a Desire of private Revenge than of publick Justice; and therefore the Defendant shall have at least the same Advantage in them as in Common Actions.[263]

Sect. 4. Also upon Indictments, the Court will never refuse to assign a Prisoner Counsel to argue a doubtful Point of Law, happening to arise at or after his Trial; as where it shall appear questionable whether the Facts proved, if true, fully [c] amount to the Crime charged against him; or whether the Persons offered to be Evidence against him be [d] legal Witnesses in Respect of such or such Exceptions against them; or whether certain Persons returned [e] of his Jury can be lawful Jurors, in Respect of certain Objections against them; or whether the [f] Indictment or [g] Process, *&c.* be strictly legal: In all which Cases the Prisoner must [h] propose the Point, and [i] if the Court think it will bear a Debate, they will assign him Counsel to argue it.

Sect. 5. Also where-ever a Prisoner hath a [k] Pardon or other [l] Special Matter to plead to an Indictment, or an [m] Error to assign in Order to reverse an Outlawry, the Court will of Course assign him Counsel. And it is [n] said, That for such collateral Matters any one may be of Counsel for a Prisoner without any Assignment.

Sect. 6. But if a Question arise on the Trial of a Peer concerning the Course of Parliamentary Proceedings, the Lords will not [o] suffer it to be argued by Counsel, but will debate it among themselves.

Sect. 7. There is a Case in the *Year-Book* of [p] *H.* 4. Where a Serjeant at

Law, as *amicus Curiae*, offered his Opinion to the Court, concerning the Trial of an Indictment of Death, That it was not proper to proceed in it till the Year and Day were passed, nor doth he appear to have been any Way reprehended for it. [q] But it is not safe for any one to be either Counsel or Solicitor to one in Prison for a Capital Crime, in Order to prepare him for his Trial, without an Assignment from the Court. But by Leave of the Court Prisoners have sometimes been indulged the Assistance of Counsel, not only [r] advise them in Prison, but [s] also to stand by them at the Bar: But it is said, [t] That in Strictness they ought not be prompted by them as to Matters of Fact, [u] nor to have the Assistance of any Papers drawn up by Counsel to prepare them for their Trial.

Sect. 8. After a Prisoner hath had Counsel assigned him, the Court will not [x] discharge them without his Consent, though they desire it, but will sometimes add others to them.

Sect. 9. It is [y] said, That the Court cannot assign an Appellee any of the King's Counsel; but that if they will they may be either for or against him.

Sect. 10. It having been found by Experience that Prisoners have been often under great Disadvantages from the Want of Counsel, in Prosecutions of High Treason against the King's Person, which are generally managed for the Crown with greater Skill and Zeal than ordinary Prosecutions, it is enacted by 7 *W.* 3. 3. *That all and every Person and Persons whatsoever, that shall be accused and indicted for High Treason, whereby any Corruption of Blood may or shall be made to any such Offender or Offenders, or to any the Heir or Heirs of any such Offender of Offenders, or for Misprision of such Treason, shall be received and admitted to make his and their full Defence by Counsel learned in the Law: And in Case any Person or Persons so accused or indicted shall desire Counsel, the Court, before whom such Person or Persons shall be tried, or some Judge of that Court is authorised and required, immediately upon his or their Request, to assign to such Person and Persons, such and so many Counsel, not exceeding two, as the Person or Persons shall desire, to whom such Counsel shall have free Access at all seasonable Hours; any Law or Usage to the contrary notwithstanding.*

Sect. 11. But it is provided, *S.* 3. *That any Person being indicted of such Treason may be outlawed*, &c. *and where by the Law, after such Outlawry, he may come in and be tried, he shall upon such Trial have the Benefit of the said Act.*

Sect. 12. And it is farther provided, *S.* 12, 13. *That nothing in the said Act*

shall extend, or be construed to extend to any Impeachment or other Proceedings in Parliament whatsoever. And also that it shall not any Ways extend to any Indictment of high Treason, nor to any Proceedings thereupon, for counterfeiting his Majesty's Coin, his Great of Privy Seal, his Sign Manual, or Privy Signet.

Sect. 13. As to the second Particular, *viz.* Where a Prisoner may have a Copy of the Indictment against him: It is said, [a] That by the Common Law it is always denied in Case of Treason or Felony. Yet if a Prisoner take a legal Exception to an Indictment, it is said, [b] That the Court will grant him a Copy of so much as concerns his Exception. Also if he have such Matter to plead which cannot well be put into Form without Knowledge of the Charge against him as laid in the Indictment, as *Autrefoits acquit, &c.* it is [c] said, That the Court will give him the Heads of the Indictment, to enable him to have his Plea so drawn as to suit the charge against him.[264]

Sect. 14. But it is enacted by 7 *W.* 3. *That every Person and Persons indicted for High Treason, except for counterfeiting the Coin, or the Great or Privy Seal, or Sign Manual or Privy Signet, shall have a true Copy of the whole Indictment, but not the Names of the Witnesses, five Days at the least before Trial, to advise with Counsel thereupon, to plead and make their Defence, his or their Attorney, or Agent, requiring the same, and paying the Officer his reasonable Fees for writing thereof not exceeding five Shillings for the Copy of every such Indictment.*

Sect. 15. What Exceptions may be taken to such Indictment, and when, hath been shewn, *Ch.* 25. *Sect.* 146, 147, 148, 149.

CHAP. XL.

From what County the Jury is to be returned, &c.

FOR the better Understanding what more particularly relates to a Trial by the Country in Capital Cases, having shewn, *Ch.* 5. *Sect.* 18. That by Virtue of a special Commission, Justices of *Oyer* and *Terminer* may sit in one County, for the Trial of a Fact in another by the proper Jurors. And having also shewn, *Ch.* 23. *Sect.* 92, 93. what is a proper Place from Whence a *Visne* may come, I shall in this Place only consider,

1. From what County the Jury is to be returned.
2. By Virtue of what Process.
3. Before what Court.
4. How they may be challenged.

As to the first of these Particulars, *viz.* From what County the Jury is to

be returned: I shall endeavour to shew,
1. From what County they are to be returned for the Trial of the General Issue.
2. From what County for the Trial of a Foreign Plea.

Sect. 1. As to the first Point, *viz*. From what County a Jury is to be returned for the Trial of the General Issue: I take it to be [a] agreed, That [b] regularly by the Common Law they must be returned in all cases, for the Trial of the General Issue from the same County wherein the Fact was committed. And it is said, That in an Appeal of Death, where the Wound was given in one County, and the Party died in another, the Jury [c] ought to be returned from each County before the Statute of 2 & 3 *Ed*. 6. 24. since which the whole may be tried either upon an [d] Indictment or Appeal, in the County wherein the Death happens.[265]

Sect. 2. But it is enacted by 33 *H*. 8. 23. *That if any Person being examined by the King's Council, or three of them upon any Manner of Treasons, Misprisions of Treasons, or Murders, do confess any such Offences, or that the said Council, or three of them, upon such Examination, shall think any Person so examined, to be vehemently suspected of any Treason, Misprisions of Treasons or Murder, that then in every such Case by the King's Commandment his Majesty's Commission of* Oyer *and* Terminer *under the Great Seal, shall be made by the Chancellor of* England *to such Persons and into such Vills and Places as shall be named and appointed by the King, for the speedy Trial, Conviction or Delivery of such offenders; which Commissioners shall have Power to enquire, hear and determine all such Treasons, Misprisions of Treasons and Murders, within the Places limited by their Commissions by such good and lawful Persons as shall be returned before them by Sheriff, or his Minister, or any other having Power to return Writs and Process for that Purpose, in whatsoever other Shire or Place within the King's Dominions, or without, such Offences were done or committed, and that in such Case, no Challenge for the Shire or Hundred shall be allowed*.

Sect. 3. It hath been [a] adjudged, That this Statute as far as it relates to Treason done within the Realm, is repealed by 1 & 2 *P*. & *M*. 10. which enacts, That all Trials for Treason shall be according to the Common Law. But as to [b] Murder and[c] Misprision of Treason, it still seems to continue in Force.[d] And as to High Treason done without the Realm, it doth not seem material whether it be in Force or not, because that is fully provided for by 35. *H*. 8. 2. as hath been more fully shewn *Ch*. 25. *Sect*. 49, 50, 51, 52, 53.

Sect. 4. It hath been [e] adjudged, That the Word *Murder* in this Statute shall have the same strict Construction as in the [f] Statutes which take away the Benefit of Clergy from Murder, and consequently shall not extend to one examined before the Council as Accessary only, and not as Principal; for Murder is one Offence, and the being Accessaary to it is another.

Sect. 5. Having shewn already that he, who steals [g] Goods in one County, and carries them into another, or does a Fact in one County which proves a [h] Nusance to another, may be indicted or appealed in either; from whence it follows, That he may be also tried in either: Having also [i] shewn, That he who marries two Wives, the first in a Foreign Country, and the second in *England*, may be indicted and tried in *England*; and that he who takes a Woman by Force out of one County, and carries her into another and there marries her, [k] may be indicted and tried in the second County: And that Felonies in [l] *Wales* may by Force of 26 *H.* 8. 6. be indicted and tried in the next adjoining *English* County: And that Treasons upon the Seas, [m] or in any Foreign [n] Country, and Felonies [o] and Piracies upon the Sea, may be indicted and tried in any County in *England*; and that an [p] Accessary in one County to Murder in another, may be appealed and tried in the County wherein the Stroke was given; and that an Accessary to Murder, or any other Felony in one County, may be indicted [q] and tried in the County wherein he was Accessary; I shall refer to the Places cited in the Margin for the farther Consideration of these Matters.

Sect. 6. As to the second Point, *viz.* From what County the Jury is to be returned for the Trial of a Foreign Plea, That is, the Plea of issuable Matter alledged in a different County from that wherein the Party is indicted or appealed; as where a Man indicted in the County of *A.*[r] pleads, That he was taken out of a Sanctuary in the County of *B.* or where one appealed by a Woman for the Death of her Husband in one County, [s] pleads, That since the Death of her Husband she hath married *J. S.* in another County; it is [t] agreed, That by the Common Law such Pleas can only be tried by Juries returned from the Counties wherein they are alledged: And therefore if Issue be joined on such Matters before a Court which has no Jurisdiction out of the County wherein it sits, there seems to be [u] no Remedy by the Common Law, but to remove the Proceedings by *Certiorari* into the King's Bench, which having a Jurisdiction throughout the whole Kingdom, will award proper Process for the Trial.

Sect. 7. But *for the more speedy Trials of Murders and Felonies, it is enacted by* 23 H. 8. 14. Par. 5. *That all Manner of Foreign Pleas triable by*

the Country, upon any Indictment for any Petit Treason, Murder of Felony, shall be forthwith tried before the same Justices afore whom the Party shall be arraigned, and by the Jurors of the same County that shall try the Petit Treason, Murder or Felony, whereof be shall be so arraigned, without any further Respite or Delay, in whatsoever County or Counties, Place or Places of this Realm, the Matter of the same Pleas be supposed or alledged.

Sect. 8. But this Statute extending neither to Indictments of High Treason, nor to Appeals, it [a] is said, That a Foreign Issue therein must still be tried by the Jury of the County wherein it is alledged.

…

CHAP. XLVI.
Of Evidence.

Sect. 1. AS to the Nature of Evidence, so far as it more particularly concerns Criminal Cases, having premised that it is a settled Rule, That in Cases of Life no [a] Evidence is to be given against a Prisoner but in his Presence; and that it hath been [b] adjudged, That no Bill of Exceptions is grantable on an Indictment of Treason or Felony, the Statute of *Westm.* 2. 3. *cum aliquis implacitatus. &c. proponat exceptionem, &c.* having been never thought to extend to any such Case, it being plain that it could not but cause an infinite Delay of Justice, if it should; I shall more fully consider the following Points.

1. How many Witnesses are required in Criminal Cases.
2. What is to be allowed as Evidence.
3. Who may be Witnesses.
4. In what Manner the Witnesses for the Defendant are to give their Evidence.
5. Whether a Defendant have Right to Process to bring in his Witnesses.
6. What Evidence maintains an Indictment, *&c.*
7. What may be given in Evidence on the Part of the Defendant.

Sect. 2. As to the first Point, *viz.* How may Witnesses are required in Criminal Cases: Having already endeavoured to shew that the Common Law did [c] not require any certain Number of Witnesses for the Trial of any Crime whatsoever, I shall only add in this Place, That it seems to have been the more [d] prevailing Opinion, That 1 [e] *E.* 6. 12. and 5 & 6 *E.* 6. 11. which required two Witnesses in Treason, were not repealed by 1 & 2 *P. & M.* 10. which ordered that all Trials of Treason should be according to the Course of the Common Law; and therefore that it was still necessary in all Trials of

High Treason, not concerning the Coin, to have either two Witnesses to the [f] same Overt-Act, or one Witness to one, and another [g] Witness to another Overt-Act, of the same Kind of Treason, or at least one Witness to an Overt-Act, and [h] another to a material Circumstance to prove it. In Relation to which Matters the Law seeming to be settled by 7 [i] *W.* 3. which is express, *That no Person shall be indicted, tried or attainted for High Treason, but upon the Oaths of two lawful Witnesses, either both of them to the same Overt-Act, or one of them to one, and the other of them to another Overt-Act of the same Treason*; it will be needless at this Day to examine how far these Opinions were reconcileable with 1 *Ph. & Ma.*

As to the second Point, *viz.* What is to be allowed as Evidence in Criminal Cases: I shall consider,

1. Where the Confession of the Defendant or the Depositions of others out of Court may be allowed as Evidence.
2. How far Hearsay is Evidence.
3. Whether Similitude of Hands be any Evidence in Criminal Cases.

Sect. 3. As to the first Particular, *viz.* Where the Confession of the Defendant, or the Depositions of others, out of Court, may be allowed as Evidence: It seems that the Confession of the Defendant himself, whether taken upon an [a] Examination before Justices or Peace, in Pursuance of 1 & 2 *Ph. & M.* 13. or of 2 & 3 *Ph. & Ma.* 10. upon [b] a Bailment or [c] Commitment for Felony, or taken by the Common Law upon an Examination before a Secretary of State, or other Magistrates for [d] Treason, or [e] other Crimes, not within those Statues, or in [f] Discourse with private Persons, hath always been allowed to be given in Evidence against the Party confessing, but [g] not against others.

Sect. 4. Also it was [h] holden, That two Witnesses of a Confession of High Treason, upon an Examination before a Justice of Peace, were sufficient to convict the Person so confessing, within the Meaning of 1 *E.* 6. 12. and 5 & 6 *E.* 6. 11. which required two Witnesses in High Treason, *unless the Offender should willingly without Violence confess the same:* But this is remedied by 7 *W.* 3. 3. which requires two Witnesses, *unless the Party shall willingly, without Violence, in open Court confess, &c.*

Sect. 5. It [i] seems an established Rule, that where-ever a Man's Confession is made Use of against him, it must all be taken together, and not by Parcels.

Sect. 6. It seems [k] settled, that the Examination of an Informer taken upon [l] Oath, and [m] subscribed by him either before a [n] Coroner upon an

Inquisition of Death in Pursuance of 1 & 2 *Ph. & M.* 13. or before [o] Justices of Peace in Pursuance of 1 & 2 *Ph. & M.* 13. and 2 & 3 *P. & M.* 10. upon a [p] Bailment or [q] Commitment for any Felony, may be given in Evidence at the Trial of such Inquisition, or of an Indictment for the same Felony, if it be made out by Oath to the Satisfaction of the Court, that such Informer is [r] dead, or unable to [s] Travel, or kept [t] away by the Means or Procurement of the Prisoner, and that the Examination offered in Evidence is the very same [u] that was sworn before the Coroner or Justice, without any Alteration whatsoever.

Sect. 7. But it hath been [a] adjudged, that it is not sufficient to authorize the Reading such an Examination, to make Oath that the Prosecutors have used all their Endeavours to find the Witness, but cannot find him.

Sect. 8. Also it hath been [b] adjudged, that Depositions taken before a Coroner upon an Inquisition of Death *super visum corporis*, cannot be given in Evidence upon an Appeal for the same Death, because it is a different Prosecution from that wherein they were taken.

Sect. 9. There are many[c] Instances in the Reigns of Queen *Elizabeth* and King *James* I. wherein the Depositions of absent Witnesses were allowed as Evidence in Treason and Felony, even where it did not appear but that the Witnesses might have been produced *viva voce*. And it was adjudged [d] the Earl of *Strafford*'s Trail, that where Witnesses could not be produced *viva voce*, by Reason of Sickness, *&c.* their Depositions might be read for or against the Prisoner on a Trial of High Treason, but not where they might have been produced in Person. And it was admitted [e] in the Lord *Stafford*'s Trial, that the Depositions taken by a Witness before a Justice of the Peace might at the Prisoner's Desire be read at the Trial, in order to take off the Credit of the Witness by shewing a Variance between such Depositions and the Evidence given in Court *viva voce*. And for the same Reason it seems [f] agreed, That where a Witness at one Trial varies from his own Evidence at another, in Relation to the same Matter, such Variance may also be given in Evidence to invalidate his Testimony at the second Trial.

Sect. 10. But it is [g] said to have been adjudged in the seventh Year of *Will.* 3. by the Court of King's Bench upon Advice with the Justices of the Common Pleas, upon an Indictment for a Libel, that Depositions taken before a Justice of Peace relating to the Fact, could not be given in Evidence, tho' the Deponent were dead; and that the Reason why such Depositions may be given in Evidence in Felony depends upon the Statutes of *Ph. & Ma.* And that this cannot be extended farther than the particular

Case of Felony. But in the Report of this Case in 5 [h] *Mod*. it is said that the Reason why such depositions could not be read, was because the Defendant was not present, when they were taken, and therefore had not the Benefit of a Cross Examination.

Sect. 11. However it was [i] agreed in Sir *John Fenwick*'s Case, that the Information of a Witness taken upon Oath before a Justice of Peace, being joined with the Evidence of one other Witness only *viva voce*, could not in the ordinary Course of Justice, amount to sufficient Evidence within the 7th of *W*. 3. which requires two Witnesses in High Treason; and therefore it was thought necessary to proceed in that Case by Bill of Attainder in Parliament, whose Power can be restrained by no Rules but those of natural Justice.

Sect. 12. And in the same Case it was [k] agreed, that the Evidence given by a Witness at one Trial, could not in the ordinary Course of Justice be made Use of against a Defendant on the Death of such Witness, at another Trial.

Sect. 13. Also it seems clear that Depositions taken in the Spriritual Court in a Cause of Divorce for a Forcible Marriage cannot [a] be given in Evidence upon an Indictment for such Marriage on the [b] Statute of 3 *H*. 7. 2.

Sect. 14. As to the second Particular, *viz*. How far Hearsay is Evidence: It seems [c] agreed, That what a [d] Stranger has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner, not only because it is not upon Oath, but also because the other Side hath no Opportunity of a cross Examination; and therefore it seems a settled Rule, that it shall never be made use of but only by way of Inducement[e] or Illustration of what is properly Evidence; yet it seems [f] that what the Prisoner hath been heard to say at another Time, may be given in Evidence for him, as well as against [g] him, and also what a [h] Witness hath been heard to say at another Time, may be given in Evidence in order either to invalidate or confirm the Testimony which he gives in Court.

Sect. 15. As to the third Particular, *viz*. Whether Similitude of Hands be any Evidence in Criminal Cases: It is observable that this with other Circumstances in [i] *Algernoon Sidney*'s Case was ruled to be good Evidence of his having written a Paper charged against him as an Overt-Act of High Treason: Yet in the Trial of the seven [k] Bishops, the Court was divided in Opinion, whether Similitude of Hands were Evidence of the Defendants having signed the Paper charged against them as a Libel; and the Parliament having declared an Opinion in the Reversal of *Algernoon Sidney*'s

Attainder, that Comparison of Hands is no Evidence of a Man's HandWriting in Criminal Cases; It seems to have been generally holden [l] since that Time, that it is not Evidence in any Criminal Case, whether capital or not capital.

As to the third Point, *viz*. Who may be Witnesses in Criminal Cases, I shall endeavour to shew,

1. Whether a Husband or Wife may be Witnesses for or against one another.
2. Whether a Judge or Juror may be a Witness.
3. Where an Accomplice in the Crime charged against a Prisoner may be a Witness against him or for him.
4. Where a Person shall be disabled to be a Witness in Respect of his having been attainted or convicted of a Crime.
5. Where it is a good Exception against a Witness that his Interest is concerned.
6. What other Exceptions are good against a Witness.

Sect. 16. As to the first of these Particulars, *viz*. Whether a Husband or Wife may be Witnesses for or against one another: It seems, [m] agreed, That the Husband and Wife being as one and the same Person in Affection and Interest, can no more give Evidence for one another in any Case whatsoever than for themselves; and that regularly the one shall not be admitted to give Evidence against the other, nor the Examination of the one be made Use of against the other, by Reason of the implacable Dissension which might be caused by it, and the great Danger of Perjury from taking the Oaths of Persons under so great a Biass, and the extreme Hardship of the Case: And therefore it hath been [a] adjudged, That the Husband cannot be a Witness against the Wife, nor the Wife against the Husband, to prove the first Marriage on an Indictment on the Statute of 1 [b] *Jac*. 1. 11. for a second Marriage. Yet [c] some Exceptions have been allowed to this general Rule in Cases of evident Necessity, as in the Lord [d] *Audley*'s Case who held his Wife's Hands and Legs while his Servant, by his Command, ravished her; or where a Man in indicted for a [e] forcible Marriage against the [f] Purport of 3 *H*. 7. or where either a Husband or Wife have Cause to demand [g] Sureties of the Peace against the other, *&c*.

Sect. 17. As to the second Particular, *viz*. Whether a Judge or Juror may be a Witness: It seems [h] agreed, that it is no Exception against a Person's giving Evidence either for or against a Prisoner, that he is one of the Judges or Jurors who are to try him. And in the Case of [i] *Hacker*, two of the

Persons in the commission for the Trial came off from the Bench, and were sworn and gave Evidence, and did not go up to the Bench again during his Trial.

Sect. 18. As to the third Particular, *viz*. Where an Accomplice in the Crime charged against a Prisoner may be a Witness against him or for him: It has been long settled [k], That it is no Exception against a Witness that he hath confessed himself guilty of the same Crime, if he have not been [l] indicted for it; for if no Accomplices were to be admitted as Witnesses, it would be generally impossible to find Evidence to convict the greatest Offenders. Also it hath been often [m] ruled, That Accomplices who are indicted, are good Witnesses for the King, until they be convicted. Also it hath been [n] adjudged, That such of the Defendants in an Information against whom no Evidence is given, may be Witnesses for the others. It hath been also [o] adjudged that where *A. B.* and *C.* are sued in three several Actions on the Statute for a supposed Perjury in their Evidence concerning the same Thing, they may be good Witnesses in such Actions for one another.

Sect. 19. As to the fourth Particular, *viz*. Where a Person shall be disabled to be a Witness in Respect of his having been attainted, or convicted of a Crime: It seems agreed, That a Conviction, and therefore *a fortiori* an Attainder, or Judgment of [p] Treason, [q] Felony, [r] Piracy, [s] *Praemunire* or [t] Perjury, or of Forgery [u] on 5 *Eliz*. and also a Judgment in Attaint for giving a false Verdict, or in Conspiracy at the Suit of [v] the King, and also [z] Judgment for any [aa] Crime whatsoever to stand in the Pillory, or to be whipt or branded, being in a Court which had a [bb] Jurisdiction, are good Causes of Exception against a Witness, while they continue in Force.

Sect. 20. Bt [*sic*; But] it is [a] agreed, That no such Conviction or Judgment can be made Use of to this Purpose, unless the Record be actually produced in Court. Also it is a general Rule, That a [b] Witness shall not be asked any Question the Answering to which might oblige him to accuse himself of a Crime; and that his Credit is to [c] be impeached only by general Accounts of his Character and Reputation, and not by Proofs of particular Crimes, whereof he never was convicted.

Sect. 21. It seems clear [d] at this Day, That Outlawry in a personal Action is not a good Exception against a Witness, as it is against a Juror. And that a Person convicted of Felony, who is admitted to his Clergy and [e] burnt in the Hand, is thereby re-enabled to be a Witness.

Sect. 22. It seems [f] agreed, That the King's Pardon of Treason or Felony after a Conviction or Attainder, restores the Party to his Credit: Also it was

holden by the late Chief Justice [g] *Holt*, That the King's Pardon will remove a Man's Disability to be a Witness in all Cases whatsoever, wherein it is only the Consequence of the Conviction or Judgment against him, and not an express Part of the Judgment, as it is in Conspiracy [h] at the Suit of the King, and in Perjury on the Statute. But this Matter [i] seems not to be fully settled.

Sect. 23. It hath been [k] ruled, That a Conviction of Perjury doth not disable a Man from making an Affidavit in Relation to the Irregularity of a Judgment.

Sect. 24. As to the fifth Particular, *viz*. Where it is a good Exception against a Witness that his Interest is concerned: It seems an uncontested [l] Rule, in all Cases whatsoever, That it is a good Exception against a Witness, that he is either to be a Gainer or Loser by the Event of the Cause; whether such Advantage be direct and immediate, or consequential only. And this seems to be the Reason why he who is Bail for the Defendant, [m] cannot be an Evidence for him without Consent. Also upon the same Ground it is [n] agreed, That he who borrows Money upon an usurious Contract, cannot be a Witness upon an Information for the Usury (unless he [o] hath paid the Money) whether such Information be brought by himself or any other; for if in such Case a Man might be a Witness, he would in Effect swear for himself, by proving a Matter which may avoid his own Contract. And upon the like Reason it hath been [p] ruled, That he who by a Slight hath been imposed upon to set his Hand to a Note for more Money than he intended, is no good Witness on an Information for the Cheat; because a Conviction may be a Means to avoid the Note, by being made Use of by the Party when sued upon it, as a Motive to influence the Jury, which cannot well be prevented, tho' in Law it be no [q] Evidence. And for the like Reason I take it to be generally [r] agreed, That he whose Property may be prejudiced by a Forgery, is no Evidence to prove it on an Indictment or Information. And if it be a Forgery within 5 *Eliz*. a farther Reason may be offered why such a Person cannot be an Evidence because he may have an Action on the Statute; and upon this Reason alone it hath been [s] adjudged, That he against whom a Verdict is given, cannot be a Witness to prove Perjury in the Evidence. And yet it appears from daily Experience, That [t] a Person beaten, and generally any other Person to whose [u] Damage a criminal Information concludes, is a good Evidence to prove such Battery or other Misdemeanor, nowithstanding the Objection that he may have an Action. And therefore, upon the Whole, the Rules of Evidence concerning this Matter seem not to

be clearly settled.

Sect. 25. It seems [a] agreed, That it is no good Exception against a Witness, That he has a Maintenance from the King; for every one may maintain his own Witnesses. Also it hath been [b] adjudged to be no good Exception against a Witness, That he has received a Reward for having made a Discovery of the Crime to be proved against the Prisoner. Also it hath been [c] ruled to be no good Exception, That a Witness hath the Promise of a Pardon or other Reward on Condition of giving his Evidence, unless such Reward be promised by Way of Contract for giving such and such particular Evidence, or full Evidence, or any way in the least to biass him to go beyond the Truth; which not being easily avoided in Promises or Threats of this Kind, it is certain that too great Caution cannot be used in making them.

Sect. 26. As to the sixth Particular, *viz*. What other Exceptions are good against a Witness: It seems [d] agreed to be a good Exception, That a Witness is an Infidel; That is, as I [e] take it, That he believes neither the Old nor New Testament to be the Word of God; on one of which our Laws require the Oath should be administred.

Sect. 27. Also it is [f] certain, That Want of Discretion is a good Exception against a Witness; on which Account alone [g] it seems, That an Infant may be excepted against; for in some Cases an Infant of nine Years of Age has been allowed to give Evidence.

Sect. 28. But it seems agreed, That it is no good [h] Exception against a Witness that he is an Alien, or Villein, or Bondman, *&c*.

Sect. 29. As to the fourth Point, *viz*. In what Manner the Witnesses for the Defendant are to give their Evidence: It hath always been [i] agreed, That the Evidence for the King must in all Cases be upon Oath, and also that the Evidence for the Defendant in an [k] Appeal, whether capital or not capital, or in an Indictment or Information for a [l] Misdemeanor, must also be upon Oath. And it is said by Sir *Edward* [m] *Coke*, *That we never read in any Statute, ancient Author, Book-Case or Record, that in Criminal Cases the Party accused should not have Witnesses sworn for him, and therefore that there is not so much as* scintilla juris *against it*. And it is said by Sir [n] *Matthew Hale*, That there is no known Law, against it. However there having been a constant immemorial [o] Practice not to suffer Witnesses to be sworn against the King upon Indictments or capital Crimes [p] except in some Cases specially provided for by Statute; and the Judges being always tender of departing from the settled Practice of their Predecessors, and generally

choosing rather to presume it originally sounded on some Statute or other good Foundation, than to suffer the Reasonableness of it to be nicely inquired into, which might be an Inlet to endless Uncertainties, it was thought necessary to enact by 1 *Annae*, 9. *Par*. 3. *That after the twelfth of* February 1702, *every Person who shall be produced or appear as a Witness on the Behalf of the Prisoner, before he or she be admitted to depose, or give any Manner of Evidence, shall first take an Oath to depose the Truth, the whole Truth, and nothing but the Truth, in such Manner as the Witnesses for the Queen are by Law obliged to do; and if convicted of any willful Perjury in such Evidence, shall suffer all the Punishments, Penalties, Forfeitures and Disabilities, which by any of the Laws and Statutes of this Realm, are or may be inflicted upon Persons convicted of wilful [sic] Perjury*.

Sect. 30. As to the fifth Point, *viz*. Whether a Defendant in criminal Cases have Right to Process to bring in his Witnesses: I take it that in Prosecutions for [a] Misdemeanors the Defendant may take out *Subpoenas* of Course, but that in capital Cases he hath no [b] Right by the Common Law to any Process against his Witnesses without a [c] special Order of the Court. But it is enacted by 7 *W*. 3. 3. *Par*. 7. *That all Persons accused and indicted for any High Treason, whereby any Corruption of Blood may ensue, shall have the like Process of the Court where they shall be tried, to compel their Witnesses to appear for them at any such Trial or Trials, as is usually granted to compel Witnesses to appear against them*. And it seems that since the Statute of 1 *Annae*, 9. set forth more at large in the precedent Section, which ordains, That the Witnesses for the Prisoner shall be sworn, Process may be taken out against them of Course in any Case whatsoever.

Sect. 31. As to the sixth Point, *viz*. What Evidence maintains an Indictment, *&c*. Having already shewn, *Ch*. 25. *Sect*. 115. and *Book* 1. *Ch*. 30. *Sect*. 9. That according to the later Opinions, where one is indicted upon a Statute, and the Evidence doth not bring the Case within the Statute, but yet proves the Offence in the Indictment as it is an Offence at the Common Law, the Defendant may be found guilty at the Common Law, and the Words *contra formam Statuti* rejected as Surplus: Having also shewn, *Ch*. 35. *Sect*. 11. That it is strongly holden that a Man cannot be found guilty of an Indictment against him as Principal, upon Evidence which only proves him to have been Accessary before, but shall be difcharged of the Indictment; I shall in this Place take Notice only of the following Particulars.

Sect. 32. *First*, That it is a settled Rule [d] in all Cases, whether capital or not capital, That the Day laid in the Indictment or [e] Appeal is not material upon Evidence, but that the Defendant may be convicted upon Proof of a Fact at any other Time, whether before or after the Day laid; so [f] that it were before the Time when the Indictment or Appeal were preferred. And agreeably hereto Sir [g] *Henry Vane* was found guilty of an Indictment of High Treason laid on the 30th of *May*, 11 *Car*. 2. upon Evidence of a Fact done the 30th of *January*, 1 *Car*. 2.

Sect. 33. *Secondly*, That where the Time proved varies from that laid in the Indictment or Appeal, the Jury may either find the Defendant guilty generally, in which Case the Forfeiture shall relate to the Time laid, till the Verdict be falsifyed by the Party interested, (as it may be in this [h] Respect, tho' not as to the Point of the Offence,) or they may [i] specially find him Guilty on the Day on which the Fact is proved, whether before or after the Day laid in the Indictment or Appeal, in which Case the Forfeiture shall relate to the Day so specially found. But where a Verdict expresly finds a Defendant guilty before the Time laid in the Indictment or Appeal, whether it may be falsifyed, as to the Time, by the Party interested, as it may be where it finds him guilty generally of the Offence in the Indictment of Appeal, upon Evidence of a Fact after the Time laid, may deserve to be considered.

Sect. 34. *Thirdly*, That where a certain [k] Place is made Part of the Description of the Fact which is charged against the Defendant, the least Variance as to such Place between the Evidence and Indictment is fatal; as where a Trespass in Taking away Goods, or any other Offence is alledged in such a Parish in the House of *J. S.* or in such a Parish in a Play-House in *Lincoln's-Inn-Fields*, and upon Evidence it appear to have been done at the House of a different Person, or that there is no Play-House in *Lincoln's-Inn-Fields*. But it is a settled[l] Rule, That a Place laid only for a Venue in an Indictment or Appeal is no Way material upon Evidence; but that a Proof of the same Crime at any other Place in the [a] same County, maintains the Indictment or Appeal as well as if it had been proved in the very same Place. Also it hath been [b] adjudged, That after a Crime hath been proved in the County in which it is laid, Evidence may be given of other Instances of the same Crime in another County, in Order to satisfy the Jury. Also it was [c] adjudged, in Sir *Henry Vane*'s Case, That where one is indicted for High Treason in compassing the King's Death in the County of *M.* and the Levying of War in the same County is laid as an Overt-Act of such

Treason, and [d] proved in the same County by one Witness, the Levying of War in another County may also be proved by another Witness. But it seems to have been [e] agreed at the same Time, That where the Levying of War is the Treason for which the Party is indicted, it must be fully proved in the County in which it is laid. Also it seems, That at this Day the Levying of War can in no Case be given in Evidence as an Overt-Act in any County in which it is not laid, unless it tend to prove some Overt-Act that is expressly laid; for it is enacted by 7 *Wil*. 3. 3. *Par*. 8. *That no* [f] *Evidence shall be admitted or given of any Overt-Act that is not expresly laid in the Indictment against any Person or Persons whatsoever*. In the Construction whereof it hath been [g] adjudged, That where one is indicted for High Treason in adhering to the King's Enemies, and certain Acts of Hostility done by him in a certain Ship called the *Clencarty*, are laid as the Overt-Acts of such Adherence, no Evidence can be given of any other distinct Act of Adherence, having no Relation to, nor any Way tending to prove, what was done in the *Clencarty*, tho' it conduce to prove that same Species of Treason; and therefore that on such an Indictment no Evidence can be given of the Prisoner's having run away to the Enemy in a Custom-House-Boat, *&c*. But it hath been [h] adjudged, That where one is indicted for High Treason in compassing the King's Death, and a Consult and Agreement to assassinate the King is laid as one of the Overt-Acts of such Treason, the Defendant's giving about among the Conspirators a List of the Persons Names who were intended to be employed in the Assassination, may be given in Evidence against him upon such Indictment, because it naturally tends to prove his Agreement to the intended Assassination, which Agreement is one of the Overt-Acts laid in the Indictment. Also it hath been [i] adjudged, That where the Writing of several treasonable Letters is laid as an Overt-Act of High Treason in Compassing the King's Death, and the Purport of such Letters is only set forth in the Indictment without a particular Recital or Description of any of them, the particular Letters making good such Charge may be read at the Trial.

Sect. 35. *Fourthly*, That where several Overt-Acts, are laid in an Indictment of High Treason, the Proof of any [k] of them maintains the Indictment as much as if every one of them were proved.

Sect. 36. *Fifthly*, That where one is indicted for writing a [l] Libel *secundum tenorem sequentem*, or for forging a Deed so and so described, any the least Variance between the Libel recited, or Deed described, and those given in Evidence, is fatal; but that where the Substance only of a

Libel is set forth in *Latin*, it is sufficient if the Libel be proved to have the same Sense as is set forth. Yet it seems [m] agreed, That it is no Evidence in any criminal Case, that the Defendant said so and so, or Words to the like Effect; because the Court must know the very Words to judge of their Force and Effect.

Sect. 37. *Sixthly*, That a Variance between an Indictment or Appeal of Death, and the Evidence, as to the Instrumental Cause mentioned in such Indictment or Appeal, is no [a] way material, so that the Party be proved to have died by the same Kind of Death as is alledged in the Indictment or Appeal. And therefore it is [b] agreed, That if one be indicted or appealed for killing another with a Sword, and upon Evidence it appear that he killed him with a Staff, Hatchet, Bill or Hook, or any other Weapon with which a Wound may be given, he ought to be found guilty, for the Substance of the Matter is, whether he gave the Party a Wound of which he died; and it is not material with what Weapon he gave it, tho' for Form's sake it be [c] necessary to set forth a particular Weapon. And on the same Ground it hath been also [d] adjudged that an Indictment, or Appeal for poisoning a Man with one Kind of Poison, may be maintained by Evidence of a different Kind of Poison; for the Substance of the Matter is whether the Defendant did poison the Deceased or not. [e] Yet it seems clear, That Evidence of poisoning, burning, or famishing, or any other Kind of killing wherein no Weapon is used, will not maintain an Indictment or Appeal of Death by killing with a Weapon; and that Evidence of killing with a Weapon will not maintain an Indictment or Appeal of Poisoning, *&c.* because they are different Kinds of Deaths; and in like Manner that an Indictment of Treason could [f] never be maintained by Evidence of Treason of a different Species.

Sect. 38. *Seventhly*, That it seems a [g] general Rule, That where-ever a Variance between an Indictment or Appeal, and the Evidence brought to support them, is material or immaterial in Respect of the Principal; in the same Cases also it will be material or immaterial in Respect of the Accessary.

Sect. 39. *Eighthly*, That it is [h] settled at this [i] Day, That if an Indictment or Appeal against *A. B.* and *C.* for the Death of *D.* charge *A.* as having given the mortal Blow, and *B.* and *C.* as having been present, procuring and abetting, and the Evidence prove that *B.* and *C.* gave the Blow, and that *A.* was only present procuring and abetting; yet it maintains the Indictment, because in such a Case in the [k] Judgment of Law, the Act of any of them is the Act of all.

Sect. 40. *Ninthly*, That it hath been [l] resolved, That if one be indicted as Accessary to two, and upon Evidence appear to have been Accessary to one of them only, yet he shall be found guilty. But it is [m] holden by Sir *Edward Coke*, That if an Appeal be brought against two as Principals and against another as Accessary to them, and one of those charged as Principals be found Not guilty, the Accessary is discharged, for which he gives this Reason, That because the Plaintiff made him Accessary to two, he cannot be found Accessary to one. But no Authority is cited for the Maintenance of this Opinion; neither doth it seem easy to reconcile it with the Resolution abovementioned, unless the Rules of Evidence on an Appeal differ from those on an Indictment, which I do not [n] find that they do as to other Variances.

Sect. 41. *Tenthly*, That it hath been [a] agreed, That if a Person be generally indicted for the Murder of another *ex malitia praecogitata*, and no express Malice appear upon the Evidence but only [b] Malice implied by Law, yet he shall be found guilty. Also it hath been [c] adjudged, That where an Indictment sets forth all the special Matter in Respect whereof the Law implies Malice, a Variance between the Indictment and Evidence as to the Circumstances doth no Hurt, so that the Substance of the Matter be found. As [d] where an Indictment for the Murder of a Serjeant upon an Arrest, supposes that the Sheriff made a Precept to such Serjeant for the Arrest, and upon the Evidence it appears that there was not any such Precept, but that the Serjeant made the Arrest *ex officio* at the Plaintiff's Request upon the Entry of the Plaint, according to the Custom of the City; for the Substance of the Matter is whether the Defendant killed an Officer in the lawful Execution of legal Process.

Sect. 42. *Eleventhly*, That violent [e] Presumption from plain Circumstances is in some Cases taken for full Proof; as where a Man is stabbed in a House, and another runs out with a bloody Knife in his Hand, and no one else is in the House at the Time; also it is [f] said, That a probable Presumption is of some Weight, but that a light one is not to be regarded at all.

Sect. 43. *Twelfthly*, That it is enacted by 21 *Jac.* 27. *That if any Woman be delivered of any Issue of her Body, Male or Female, which being born alive should by the Laws of this Realm be a Bastard, and that she endeavour privately, either by drowning, or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the Death thereof, as it may not come to light, whether it were born alive or*

not, but be concealed; in every such Case, the said Mother so offending shall suffer Death as in Case of Murder, except such Mother can make Proof by one Witness at the least, that the Child whose Death was by her so intended to be concealed was born dead. In the Construction whereof it hath been [g] adjudged, That in order to convict a Woman by Force of this Statute, there is no need that the Indictment be drawn specially, or conclude *contra formam Statuti*; but that it is the better Way to set forth only that the Defendant *infantem masculum vivum parturiit, qui quidem infans masculus adtunc & ibidem vivus existens natus per legem hujus regni Angliae Spurius fuit, Anglice* a Bastard, and then to go on in the ordinary Way to shew that she murdered him, *&c. contra pacem, &c.* for the Statute doth not make a new Offence, but only makes such Concealment an undeniable Evidence of Murder. Also it hath been [h] agreed, That where a Woman appears to have endeavoured to conceal the Death of such Child within the Statute, there is no Need of any Proof that the Child was born alive, or that there were any Signs of Hurt upon the Body, but it shall be undeniably taken that the Child was born alive, and murdered by the Mother. But it hath been [i] adjudged, That where a Woman lay in a Chamber by herself, and went to Bed without Pain, and waked in the Night, and knocked for Help but could get none, and was delivered of a Child and put it in a Trunk, and did not discover it till the following Night, yet she was not within the Statute, because she knocked for Help. Also it hath been [k] agreed, that if a Woman confess herself with Child beforehand, and afterwards be surprised and delivered, no Body being with her, she is not within the Statute, because there was no Intent of Concealment. And therefore in such Cases it must appear by Signs of Hurt upon the Body, or some other way, that the Child was born alive.

Sect. 44. As to the seventh Point, *viz.* What may be given in Evidence on the Part of the Defendant: It seems [a] agreed, that *son assault Demesne* may be given in Evidence on the General Issue in an Indictment, but not in an Action of Battery. Also it seems to have been always [b] agreed, that the Defendant in an information on a Penal Statute may give in Evidence any Exception in his Favour in the Body of the Act. And it hath also been [c] holden that he may give in Evidence any such Exception in a *Proviso* of the Act, (because any such Exception shews that he did not act against the Form of the Statute;) but that he cannot [d] give in Evidence any Clause of Exemption in a latter Statute, but ought to plead it.

CHAP. XLVII.

Of Verdict.

FOR the general Learning of Verdicts I shall refer to other Books, and in this Place take Notice only of the following Particulars;

Sect. 1. 1st, That it seems to have been [a] anciently an uncontroverted Rule, and hath been allowed, even by those [b] of the contrary Opinion, to have been the general Tradition of the Law, that a Jury sworn and charged in a capital [c] Case, cannot be discharged (without the [d] Prisoner's Consent) till they have given a Verdict. And notwithstanding some [e] Authorities to the contrary in the Reign of King *Charles* II. this hath been holden for clear Law both in the Reign of King[f] *James* II. and [g] since the Revolution.

Sect. 2. 2dly, That it seems to have been [h] always agreed, that in all [i] capital Cases the Jury must give their Verdict openly in Court, and cannot give a privy Verdict.

Sect. 3. 3dly, That it is settled, [k] that the Jury may give a special Verdict in any criminal Case, whether Capital or not Capital, as well as in a Civil.

Sect. 4. 4thly, That it hath been [l] adjudged, that where the Jury find a Man not guilty of an Indictment or Appeal of Murder, they are not bound to make any Inquiry, whether he be guilty of Manslaughter, *&c.* But that if they will they may, according to the Nature of the Evidence, find him guilty of [m] Manslaughter or [n] Homicide *se defendendo*, or *per infortunium*; for the Killing is the Substance, and the Malice but a Circumstance, a [a] Variance as to which hurts not the Verdict. Yet the Books seem to make this Difference that where the Jury find the Defendant guilty of Manslaughter on an Indictment of Murder, they may give their Verdict [b] generally, without setting out any of the Circumstances of the Fact: But that they shall not [c] be received to find him guilty generally of Homicide *se defendendo*, or *per infortunium*, but must set out the whole Circumstances of the Facts, and in the[d] Conclusion shew of what Crime they find the Defendant guilty, wherein if they be mistaken, it is [e] said, that the Court may notwithstanding give such Judgment as shall appear to be proper from the Circumstances of the Fact specially set forth.

Sect. 5. 5thly, That it hath been [f] adjudged, That if the Jury on an Indictment or Appeal of Murder find the Defendant guilty of Manslaughter, without saying any thing expresly as to the Murder, it is insufficient and void, as being only a Verdict for Part. And *Quaere* if the Law be not the same where the Jury upon such an Indictment find that the Defendant killed the Deceased *se defendendo* or *per infortunium*, and do not expressly find that he did not murder him, according to the Generality of the ancient [g]

Authorities.

Sect. 6. 6thly, That it is agreed, that on an Indictment for stealing Goods of a certain Value above 12 *d.* the [h] Jury may find the Defendant guilty, but that the Goods are but of the Value of 10 *d. &c.* But it seems that if a Man be indicted for Felony generally, and upon the Evidence it [i] plainly appear that the Fact amounts to no more than a bare Trespass, he cannot be found guilty of the Trespass, but ought to be indicted anew. Yet if the special Circumstances of the Case be set forth in an Indictment for an Offence laid as Felony, and the Defendant be found guilty generally, and afterwards the Court be of Opinion that the Fact doth not amount to Felony, but only to an enormous Trespass, it seems [k] agreed, That Judgment may by given as for a Trespass only. Also if the Jury find a special Verdict on a general Indictment for Felony; and the Crime be adjudged upon such Verdict to be but a Trespass, [l] Judgment may be give upon it as for a Trespass only. Also if on an Indictment of Trespass the Fact appear to have been felonious, it hath been [m] adjudged, That the Defendant may be found guilty of the Indictment as it is laid, because the King may proceed against the Offender as he thinks fit, either as a Trespasser or Felon. But the contrary is [n] said to have been holden by the late Chief Justice *Holt*; and it hath been [o] adjudged, that if it appear in an Action of Trespass that the Taking was felonious, no Verdict ought to be taken unless the Defendant have been before tried for the Felony, because the Suffering such Actions might be a Means to prevent Prosecutions for Felonies.

Sect. 7. *Seventhly*, That it hath been holden, That a Verdict acquitting a Defendant of the Death of a Man found against him by the Coroner's Inquest, ought not to be received unless it shew what other Person did the Fact; but for this I shall refer to *Ch.* 9. *Sect.* 33.[266]

Sect. 8. *Eighthly*, That on an Indictment for a Riot against three or more, if a Verdict acquit all but two, and find them guilty; or on an Indictment for a Conspiracy, if the Verdict acquit all but one, and find him guilty, it is repugnant and [a] void as to the two found guilty in the first Case, and as to the one found guilty in the second, unless the Indictment charge them with having made such Riot or Conspiracy, *simul cum aliis juratoribus ignotis*; for otherwise it appears that the Defendants are found guilty of an Offence whereof it is impossible that they should be guilty; for there can be no Riot where there are no more Persons than two, nor can there be a Conspiracy where there is no Partner. Yet it seems [b] agreed, That if twenty Persons are indicted for a Riot or Conspiracy, and any three found guilty of the Riot, or

any two of the Conspiracy, the Verdict is good: And that [c] where several are indicted for Treason or Felony, or other Crime, which may be as well done by one only, as by more, a Verdict [d] may find one of the Defendants only guilty, and acquit all the rest. And in like Manner it seems [e] agreed, That a Verdict on an Information on a penal Statute against several Persons jointly charged with the Offence against the Statute, may acquit some and find others guilty; because tho' the Word of the Information be joint, yet in Judgment of Law, each Defendant is severally charged for his own Offence. And in like Manner [f] it seems, That the Defendant in such Information may be found guilty for a less Time or Degree than is laid, unless the Offence consist in the Doing some entire Thing, which must be precisely proved in the same Manner as it is laid.

Sect. 9. *Ninthly*, That the Court in judging upon a special Verdict is confined to the Fact expresly found, and cannot supply the Want thereof, as to any material Part by any Argument or Implication from what is expresly found; and therefore where an Indictment set forth that the Defendant discharged a Gun against *J. S.* and thereby gave him a mortal Wound, *&c.* and the special Verdict found that he discharged a Gun and thereby killed *J. S.* but did not expresly say, that he discharged it against *J. S.* it was [g] adjudged, That the Court could not take it from the other Circumstances of the Fact, which were expresly found, tho' they were as full to the Purpose as possibly they could well be, that the Defendant discharged the Gun against *J. S.*

Sect. 10. *Tenthly*, That it hath been [h] adjudged, That where an Indictment found at the Assises is removed into the King's Bench by *Certiorari*, and there the Defendant pleads Not guilty, *& de hoc ponit se super patriam, &* T. F. *Miles Coronator & attornatus Dom' Regis, &c. similiter*, and thereupon the Defendant is found guilty of the Offence in *Indictamento praedict' interius ei imposit' prout praedict'* T. F. *interius versus eum queritur*, the Verdict is good; for these Words *prout praedict'* T. F. *interius versus eum queritur* shall be rejected as Surplus, [i] repugnant and void, and the Verdict is compleat without them.

Sect. 11. *Eleventhly*, That it hath been [a] adjudged, That if the Jury acquit a Prisoner of an Indictment of Felony against manifest Evidence, the Court may, before the Verdict is recorded, but [b] not after, order them to go out again and reconsider the Matter; but this is by many thought hard, and seems not of late Years to have been so frequently practised as formerly. Also there are [c] Instances where Defendants acquitted against plain

Evidence, of Felonies and other enormous Crimes, have been bound to their Good Behaviour. However it is settled, That the Court cannot set aside a Verdict which [d] acquits a Defendant of a Prosecution properly criminal, as it seems that they may a Verdict that [e] convicts him for having been given contrary to Evidence, and the Direction of the Judge, or any Verdict whatever for [f] Mistrial.

Hawkins Pleas of the Crown, book II, chapters 39–40, 46–47, pp. 400–05, 428–42.

12.3.1.4Cunningham, 1765

Jury, (*Jurata*,) May be derived from the Latin *jurare*, to swear, and signifies either twenty-four or twelve men, sworn to inquire of the matter of fact, and declare the truth upon such evidence as shall be delivered to them, touching the matter in question. And observe, that in *England* there are three sorts of trials, *viz*, one by parliament, another by battle, and the third by assise of *jury*. *Smith de Rep. Ang. lib*. 2. *cap*. 5, 6, 7. Of the two former read him, and see *Battle*, *Combat*, and *Parliament*. The trial by assise, (be the action civil or criminal, publick or private, personal or real); is referred for the fact to a *jury*, and as they find it, so passeth the judgment; and the great favour that by this the King shews to his subjects, more than the Princes of other nations, you may read in *Glanvil*, *lib*. 2. *cap*. 7. where he calls it, *Regale beneficium elementis principis de consilio procerum populis indultum, quo vitae hominum & status integritati tam salubriter consulitur, ut in jure, quod quis in libero soli tenemento possidet, retinendo, duelli casum declinare possint homines ambiguum, &c*. This *jury* is not only used in circuits of justices errant, but also in other courts and matters of office, as if the *escheator* make inquisition in any thing touching his office, he doth it by *jury* or inquest. If the coroner enquire how a subject found dead, came to his end, he useth an inquest. The justices of peace in their quarter-sessions, the sheriff in his county and turn, the bailiff of a hundred, the steward of a court leet or court baron, if they inquire of any offence, or decide any cause between party and party, they do it in the same manner: So that where it is said, all things are triable by parliament, battle or assise, assise in this place is taken for a *jury* or inquest, impaneled upon any cause in a court where this kind of trial is used; and though it be commonly supposed that this custom of ending and deciding causes proceeded from the *Saxons* and

Britons, and was of favour permitted to us by the Conqueror; yet we find by the *Grand Custumary of Normandy, cap*. 24. that this course was likewise used in that country; for assise is in that chapter defined to be an assembly of wise men, with the bailiff, in a place certain, at a time assigned forty days before, whereby justice may be done in causes heard in that court; of this custom also, and these knights of *Normandy, Johannes Taber* maketh mention in the *Rubrick* of the title *De Militari Testamento, in Institut*. This jury, though it appertains to most courts of the Common law, yet it is most notorious in the half-year courts of the justices errant, commonly called the *Great Assises*; and in the quarter-sessions, and in them it is must ordinarily called a *jury*, and that in civil causes; whereas in other courts it is termed oftner an inquest, and in the court-baron, a jury of the homage: In the general assise, there are usually many *juries*, because there are store of causes both civil and criminal, commonly to be tried; whereof one is called *The grand jury*, and the rest *Petit juries*, whereof it seemeth there should be one for every hundred. *Lamb. Eirenarch. lib*. 4. *cap*. 3. *pag*. 384. The *grand jury* consists ordinarily of twenty-four grave substantial gentlemen or some of the better sort of yeomen, chosen indifferently by the sheriff out of the whole shire to consider of all bills of indictment preferred to the court, which they do either approve by writing upon them *Billa vera*, or disallow by indorsing *Ignoramus:* Such as they do approve, if they touch life and death, are farther referred to another *jury* to be considered of, because the case is of such importance; but others of lighter moment are, upon their allowance, without more work, fined by the Bench, except the party traverse the indictment, or challenge it for insufficiency, or remove the cause to a higher court by *certiorari*; in which two former cases it is referred to another *jury*, and in the latter transmitted to a higher court. *Lamb. Eir. lib*. 4. *cap*. 7. And presently upon the allowance of this bill by the grand inquest, a man is said to be indicted; such as they disallow, are delivered to the Bench, by whom they are forthwith cancelled or torn. The *petit jury* consists of twelve men, impanelled as well upon criminal as upon civil causes: Those that pass upon offences of life and death, do bring in their verdict either Guilty or Not guilty; whereupon the prisoner, if he be found guilty, is said to be convicted, and so afterwards receiveth his judgment and condemnation, or otherwise is acquitted, and set free. Of this read *Fortescue, cap*. 47. Those that pass upon civil causes real, are all, or so many as can conveniently be had, of the same hundred, where the land or tenement in question doth lie, being four at least, and they upon due examination bring in their verdict either for the demandant or tenant. Of

this also see *Fortescue, cap*. 25, 26. According to which, judgment passeth afterward in the court, where the cause began: And the reason hereof is, because these justices of assise are in this case, for the ease of the country only, to make the verdict of the *jury* by virtue of the writ called *nisi prius*, and so return it to the court where the cause is depending. See *Nisi prius*, and *Lambard* in his *Explication of Saxon words* verbo *Centuria*; his words are these, *In singulis centuriis comitia sunto, atque liberae conditionis viri duodeni aetate superiores, una cum praeposito sacra tenentes, juranto, se adeo virum aliquem innocentem haud condemnaturos, sontemve absoluturos*. See also the Custumory of Normandy, cap. 69. See *Twelve men*, and *Lambard's Eiren. b*. 4. *c*. 3. *pag*. 384. Mr. *Sheringham*, in his *De Anglorum Gentis Origine*, derives the origin of our jury from great antiquity: *Quod autem Wodenus (Asgardiae Rex) dicitur duodecim regni proceres sibi assumpsisse, iisdemque jurisdicendi in populum provinciam dedisse, hinc forte illa nunquam apud nos satis laudanda consuetudo invaluit, qua duodecim juratis viris, quos patrio sermone* a jury *idcirco vocamus, tota juris decernendi & litium expediendi potestas concessa est. f. 272. This trial by jury was anciently called Duedecim virale judicium*. We read it likewise in the laws of King *AEthelred*, made by him at *Wantage*, a town in Berkshire *viz. Habeantur placita in singulis wapentakiis ut exeunt seniores duodecim Thayni & praepositus cum eis jurent super sanctuarium quod eis dabatur in manus, quod neminem innocentum velint accusare vel noxium concelare*. 'Tis true, this may seem to intend the number of the judges, and not of the *jury:* But the jury themselves in some cases are judges, that is, they are judges of the fact, and the judge is bound to give sentence according to their verdict of the fact. *Cowell, edit*. 1727.

The trial *per pais*, or by a jury of one's country, is justly esteemed one of the chiefest excellencies of our constitution; for what greater security can any person have in his life, liberty or estate, than to be sure of not being devested of, or injured in any of these, without the sense and verdict of twelve honest and impartial men of his neighbourhood? Hence we find the Common law herein confirmed by *Magna Charta, cap*. 29. *Nullus liber homo capiatur, &c. Fortesc. de Laud. Leg. Ang. cap. 25. Co. Lit*. 155. *Co. Preface to* 3*d and* 8*th Report*.

Likewise the authority of this trial, and its being peculiar to us, have been taken notice of, as matters which reflect honour on our constitution; for tho' there were anciently several other methods of trial, such as by battle, ordeal, *&c*. yet have they, from the inconveniencies attending them, been laid

aside; and this alone cultivated and improved, as the best method of investigating truth. *Spelm. Gloss*. verbo *Jurate. Glan. lib*. 2. *cap*. 7.

1. *Statutes concerning juries*.
2. *Who are exempted from serving on juries*.
3. *Of the several kinds of juries, and jury process; and manner of compelling a jury to appear*.
4. *By whom the jury processes are to be executed, and the jury convened; in what time such processes, and what number of jurors, are to be returned.*
5. *In what cases and in what manner special juries are appointed.*
6. *For what misdemeanors: jurors are punishable*.

1. STATUTES CONCERNING JURIES.

Stat. *Marleber*. 52 *Hen*. 3. *cap*. 14. Concerning charters of exemption, and liberties, that the purchasers shall not be impanelled in assises, juries and inquests, if their oaths be so requisite that without them justice cannot be ministred, as in great assises, perambulations, and in deeds where they be named for witnesses, or in attaints, and in other cases like, they shall be compelled to swear, saving to them at another time their exemption.

Stat. *Westm*. 2. 13 *Edw*. 1. *cap*. 38. In one assise no more shall be summoned than twenty-four; and old men above seventy years, and such as be sick at the time of the summons, or not dwelling in that country, shall not be put in juries or petty assises; and if such assises and juries be taken out of the shire, none shall pass in them but those that may dispend 40 *s*. yearly at least, except such as be witnesses in writings; neither shall this statute extend to great assises; and if the sheriff or bailiffs offend in any point of this statute, and thereupon be convict, damages shall be awarded to the parties grieved, and they shall nevertheless be amerced to the King; and justices assigned to take assises shall have power to hear plaints as to the articles in this statute.

Stat. 21 *Ed*. 1. *stat*. 1. No sheriff nor bailiff shall put in any recognizance that shall pass out of their proper bailiwicks any, except they have lands to the yearly value of an 100 *s*. at least. And this statute shall not restrain the last statute of *Westminster*, *cap*. 38. so that within the county before justices of the King, assigned to the taking of inquests or other recognizances, none shall be impanelled except he have lands to the yearly value of 40 *s*. and likewise saving that before justices errant, and also in cities, boroughs and other market-towns, it shall be done as it hath been accustomed.

Stat. 28 *Edw*. 1. *stat*. 3. *cap*. 9. No sheriff nor bailiff shall impanel in juries too many persons, nor otherwise than is ordained by the statute, and

they shall put in the jury such as be next neighbours, most sufficient and least suspicious; and he that otherwise doth, and is attainted thereupon, shall pay the plaintiff his damages double, and be grievously amerced to the King.

Stat. 33 *Edw*. 1. *stat*. 4. Of inquests to be taken wherein the King is party, notwithstanding it be alleged that the jurors or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of those jurors, they shall assign a cause, and the truth of the challenge shall be inquired of.

Stat. 5 *Edw*. 3. *cap*. 10. If any juror in assises, juries or inquests, take of the one party or the other, and be thereof attainted, he shall not be put in any assises, juries or inquests, and nevertheless he shall be commanded to prison, and further ransomed at the King's will; and the justices before whom such assises, *&c*. shall pass, shall have power to inquire and determine according to this statute.

Stat. 25 *Edw*. 3. *stat*. 5. *cap*. 3. No indictor shall be put in inquests upon the deliverances of the indictees of felony or trespasses, if he be challenged for the same cause.

Stat. 34 *Edw*. 3. *cap*. 4. Panels shall be made of the next people not suspected nor procured; and the sheriffs, coroners and other ministers, which do against the same, shall be punished, before the justices take the inquest, according to their trespass, as well against the King as against the party.

Stat. 34 *Edw*. 3. *cap*. 8. 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 their verdict, he shall have his plaint by bill presently before the justices before whom they did swear, and if the juror plead to the country, the inquest shall be taken forthwith; and if any other than the party will sue for the King against the juror; it shall be heard; and if the jurors be attainted at the suit of other than the party, he that sueth shall have half the fine; and the parties to the plea shall recover their damages by the taxing of the inquest; and the juror so attainted shall have imprisonment one year, which shall not be pardoned; and if the party will sue by writ before other justices, he shall have the suit in the form aforesaid.

Stat. 38 *Edw*. 3. *stat*. 1. *cap*. 12. If any jurors do take any thing of the plaintiff or defendant to say their verdict, and thereof be attainted by the process contained in stat. 34 *Edw*. 3. *cap*. 8. be it at the suit of the party that

will sue for himself or for the King, or at the suit of any other, every of the said jurors shall pay ten times as much as he hath taken; and he that will sue shall have the one half, and the King the other; and all imbraceors to procure such inquest for gain shall be punished as the jurors; or if the juror or imbraceor have not whereof to make gree, he shall have imprisonment for one year; and no justice or other minister shall inquire of office upon the points of this article, but only at the suit of the party or of other.

Stat. 42 *Edw*. 3. *cap*. 11. No inquest but assises and deliverances of gaols shall be taken by writ of *nisi prius*, nor in other manner, before that the names of all that shall pass in the inquests be returned in court; and the sheriffs shall array the panels in assises four days at least before the sessions of the justices; upon pain of 20 *l*. and bailiffs of franchises shall make their answer to the sheriffs six days before the sessions, upon the same pain; and in all panels arrayed by the sheriffs or bailiffs shall be put the most substantial people and worthy of faith, and not suspect, and the nighest.

Stat. 11 *Hen*. 4. *cap*. 9. No indictment shall be made but by inquest of lawful people, returned by the sheriffs or bailiffs or franchises, without any denomination beforehand made according to law; and if any indictment be made to the contrary, the same shall be void.

Stat. 2. *Hen*. 5. *stat*. 2. *cap*. 3. No person shall pass in any inquest upon trial of the death of a man, not betwixt party and party in plea real or personal whereof the debt or damage amounts to forty marks, if he have not lands of the yearly value of 40 *s*. so that it be challenged by the party.

Stat. 8 *Edw*. 4. *cap*. 3. Every juror that shall be impanelled and returned within the county of *Middlesex* in the King's courts, at every fourth day of the return shall be demanded; and all persons impanelled in those courts, that appear at the said day, their appearance shall be recorded; and every default, essoin and other delay of any plaintiff or defendant in any personal action shall be adjudged, adjourned and allowed, as before this statute.

Stat. 1 *Ric*. 3. *cap*. 4. No bailiff, nor other officer, shall return in any panel any person in any the sheriff's turns, but such as be of good same, and having lands of freehold within the counties, to the yearly value of 20 *s*. at least, or copyhold, to the yearly value of 26 *s*. 8 *d*. and if any bailiff or other officer return any person contrary to the statute, he shall lose of every person so returned 40 *s*. and the sheriff other 40 *s*. the one half to the King, and the other half to the party that will sue by action of debt, *&c*. and every indictment before any sheriff in his turn otherwise taken shall be void.

Stat. 11 *Hen*. 7. *cap*. 21. *sect*. 1. No person shall be impanelled in any jury in *London*, except he be of lands or chattels to the value of forty marks; and no person shall be impanelled in any jury in the said city for lands or tenements, or action personal wherein the debt or damages amount to forty marks, except he be in lands and goods to the value of a hundred marks, and the same cause of challenge shall be admitted as a principal challenge; and every such person summoned to appear in any jury before any of the judges of the same city, making default at first summons, shall lose in issues 12 *d*. and at the second default 2. *s*. and so at every such default the issues to be doubled; and all such issues lost in the mayor's court shall be levied to the use of the mayor and commonalty; and all such issues lost in the sheriff's courts shall be levied to the use of the sheriffs toward their fee-farm. *See the rest of this act* in Attaint.

Stat. 3 *Hen*. 8. *cap*. 12. All panels returned, which be not at the suit of any party, that shall be made by every sheriff and their ministers afore any justices of gaol-delivery, or justices of peace in their sessions, to inquire for the King, shall be reformed by putting to and taking out of names, by the discretion of the justices; and the same justices shall command every sheriff and their ministers to put other persons in the panel by their discretions; and if any sheriff or other ministers do not return the panels so reformed, such sheriff or minister shall forfeit 20 *l*. the one half to the King, and the other half to him that will sue for the same by action of debt, *&c*. and the King's pardon shall be no bar against the parties that shall sue.

Stat. 4. *Hen*. 8. *cap*. 3. *sect*. 2. For all issues to be lost in the mayor's court, according to sat. 11 *Hen*. 7. *cap*. 21. it shall be lawful to the mayor to distrain; and in like manner it shall be lawful to the sheriffs to distrain for such issues lost in their courts.

Sect. 4. The sheriffs of *London* shall have power to return in panels or arrays of all actions in the courts of King's Bench and Common Pleas, or Exchequer, persons being citizens, having goods to the value of 100 marks, to try the issues joined in such action, as other persons having lands of the yearly value of 40 *s*.

Sect. 5. The sheriffs of the said city shall return upon the first distress upon every of the jurors 20 *d*. and upon the second distress 40 *d*. and upon every distress after that the double, till a full jury appear; and the sheriffs that shall make any return contrary to the form aforesaid shall forfeit 10 *l*. the one half to the King, and the other half to the party that will sue.

Stat. 5. *Hen*. 8. *cap*. 5. *sect*. 3. The act 4 *Hen*. 8. *cap*. 3. shall be

expounded, that the sheriffs be bound to return at every first distress of *nisi prius*, to be had at St. *Martins* upon every of the jurors, 20 *d*. and upon the second distress of *nisi prius*, 40 *d*. and upon every distress of *nisi prius* after that the double, till a full jury appear; and no sheriff shall forfeit by force of the said statute for any return, except only upon writs of distresses before justices of *nisi prius* within the said city; and upon all other processes awarded out of the said court or Exchequer, it shall be lawful to the sheriffs to make their returns as they were wont to do.

Stat. 23 *Hen*. 8. *cap*. 13. *sect*. 1. Every person being the King's natural subject, who do enjoy the liberties of any city, borough or town corporate, where he dwelleth, being worth in goods to the value of 40 *l*. shall be admitted in trial of murders and felonies in every sessions and gaol-delivery for the liberty of such cities, *&c*. albeit they have no freehold.

Sect. 2. Provided that this act do not extend to any knight or esquire dwelling in any such city. *&c*.

Stat. 35. *Hen*. 8. *cap*. 6. *sect*. 3. In every case where such persons, as should pass upon the trial of any issue joined in the King's courts at *Westminster*, ought by law to dispend 40 *s*. by the year of freehold, the writs of *venire facias* shall be in this form: *Rex, &c. Praecipimus, &c. quod venire facias coram, &c*. 12 *liberos et legales homines de visn. de* B. *quorum quilibet habeat quadraginta solid' terrae, tenementorum vel reddituum per annum ad minus, per quos rei veritas melius sciri poterit. Et qui nec. &c*. And where it is not requisite that the persons shall dispend 40 *s*. by the year of freehold, the writs of *venire* shall be made after the form aforesaid, omitting this clause, *quorum quilibet, &c*. and upon every *venire* that shall have the said clause, *quorum quilibet, &c*. the sheriff shall not return any person unless he may dispend 40 *s*. by the year of freehold, out of ancient demesne, within the country; and also shall return in every such panel six hundredors, if there be so many within the hundred, where the venue lieth; upon pain to forfeit for every person that cannot dispend 40 *s*. by the year, 20 *s*. and for every hundred or omitted in such return, 20 *s*. and in every *venire* wherein the clause *quorum quilibet, &c*. shall be omitted, the sheriff shall not return any person, unless he may dispend some lands or tenements of freehold, out of ancient demesne, within the county, and also shall return in every such panel six hundredors, if there be so many, upon like pain.

Sect. 4. Upon every first writ of *habeas corpora* or *distringas* with a *nisi prius*, delivered of record, the sheriffs shall return in issues upon every

person impanelled at least 5 *s*. and at the second *habeas corpora* or *distringas*, 10 *s*. and at the third writ, 13 *s*. 4 *d*. and upon every writ further, to double the issues until a full jury be sworn; on pain to forfeit 5 *l*.

Sect. 6. In every such *habeas corpora* or *distringas* with a *nisi prius*, where the jury is like to remain untaken for default of jurors, the justices upon request made by the plaintiff or demandant shall have authority to command the sheriff to name so many other able persons of the county then present as shall make up a full jury, which persons shall be added to the former panel.

Sect. 7. The parties shall have their challenge to the jurors so added as if they had been impanelled upon the *venire*.

Sect. 9. In case such persons as the sheriff shall name as aforesaid be present and do not appear, or do wilfully withdraw themselves, the justices shall set such fine upon such juror as they shall think good, to be levied as issues lost by jurors.

Sect. 10. Where any jury shall be made full by the command of the justices, such persons as were returned in the panel that shall make default shall lose issues as tho' the jury had remained for default of jurors.

Sect. 11. Upon a reasonable excuse for the default of any juror proved before the justices of assise or *nisi prius*, at the day of their appearance, by the oaths of two witnesses, the justices shall have authority to discharge such juror of such forfeiture of issues; and the sheriff shall be therein discharged of the issues.

Sect. 12. If the assise of *nisi prius* be discontinued for not coming of the justices, or any other occasion, other than by default of jurors, the jurors shall be discharged of any issues, and the sheriff shall be likewise discharged of the penalties for the non-returning of such issues.

Sect. 13. If upon any such *habeas corpora* or *distringas* with a *nisi prins*, issues be returned upon any hundredors or jurors where the same hundredors and jurors shall not be lawfully summoned, the sheriff or minister shall lose double so much as the issues returned upon such hundredors or jurors shall amount unto; the moiety of all which forfeitures, other than the issues to be returned upon the jurors, shall be to the King, and the other half to him that will sue for the same; saving to all persons all such right as they should have to such issues.

Sect. 14. This act shall not extend to any city or towns corporate, or to any sheriff or ministers in the same, but that they may return such persons as they have been accustomed to do, so that they return like issues as are

mentioned in this act.

Made perpetual, 2. Edw. 6. cap. 32.

Stat. 4 & 5 *Phil. & Mar. cap*. 7. *sect*. 2. Justices of assise and *nisi prius*, before whom any trial shall be made by virtue of any writ of *habeas corpora* or *distringas* with a *nisi prius* (where the jury is like to remain for default of jurors) shall have authority, upon request made for the King, or by the party that followeth as well for the King as for himself upon any penal statute, or his attorney, to command the sheriff to name so many able persons of the county then present, and to add the names to the former panel as shall make a full jury.

Sect. 3. Every clause in the act 35 *Hen*. 8. *cap*. 6. shall be taken to give the same advantage to the King, and all such persons as shall pursue any action, *&c*. for the King and the party, as the plaintiff in any other action might have.

Stat. 14 *Eliz. cap*. 9. *sect*. 1. Where the plaintiff or demandant may have upon his request to the justices of *nisi prius* in *England*, or to the justices of *oyer*, or of assises, of the twelve shires of *Wales* and the counties palatines of *Lancaster, Chester* and *Durham*, a *tales de circumstantibus*, in all such cases the tenants, actors, avowants and defendants (if the plaintiffs or demandants shall forbear to pray the same) may upon their request have by the same justices the *tales* unto them granted in like manner as the plaintiff or demandant may.

Sect. 2. In all popular actions in the Queen's courts of record upon penal laws, wherein any person shall sue as well for the Queen as himself, the defendants shall he admitted to pray a *tales de circumstantibus*.

Stat. 27 *Eliz. cap*. 6. *sect*. 1. Where jurors returned for trial of any issues in the courts of King's Bench, Common Pleas or Exchequer, or before justices of assise, by the laws now in force ought to have freehold of the yearly value of 40 *s*. in every such case the jurors shall have estate of freehold to the yearly value of 4 *l*. at least; and the writs of *venire facias* shall be in this form: *Regina, &c. Praecipimus, &c. quod venire facias coram, &c. duodecim liberos et legales homines de vicineto de* B. *quorum quilibet habeat quatuor libres terrae, tenementorum vel reddituum per annum ad minus, per quos rei veritas melius sciri poterit. Et qui nec. &c*. And upon such writ the sheriff shall not return any person unless he may dispend 4 *l*. in the year of freehold, not of ancient demesne, within the county; upon pain to forfeit for every person 20 *s*.

Sect. 2. Upon every first writ of *habeas corpora* or *distringas* with a *nisi*

prius delivered of record, the sheriff shall return in issues upon every person impanelled at least, 10 *s*. and at the second writ, 20 *s*. and the third writ, 30 *s*. and upon every writ further to double the issues, until a full jury be sworn; upon pain to forfeit for every return contrary to the form aforesaid, 5 *l*.

Sect. 3. If any sheriff or other minister return any person in any jury, wherein he shall for default of appearance lose any issues, where in truth such person shall not be summoned, the same sheriff, *&c*. shall forfeit to the person so returned double the value of the issues lost.

Sect. 4. If any sheriff, undersheriff, *&c*. or bailiff of franchise, shall take any money or other profit, or any agreement to have any profit for the not returning of any person to be sworn as juror for the trial of any issue joined before any justices, every sheriff, *&c*. so offending shall forfeit 5 *l*. the one moiety to the Queen, and the other moiety to such person as will sue for the same in any court of record.

Sect. 5. Upon the trial of any issue in any personal action, no challenge for the hundred shall be admitted if two hundredors appear.

Sect. 6. All other challenges principal, or for other cause, shall be admitted as if this act had never been.

Sect. 7. This act shall not extend to any juries or issues to be returned in any city or town corporate, or other place privileged to hold plea, or in the twelve shires of *Wales*.

Stat. 27 *Eliz. cap*. 7. *sect*. 2. No sheriff or other person shall return any juror dwelling out of any liberty, without the addition of the place of his abode, at the time of the return, or within one year next before, or some other addition by which the party may be known; nor any juror within any liberty, with other addition than such as shall be delivered to him by the bailiff of the liberty; nor any bailiff of liberty shall return any juror, or deliver to the sheriff the names of any persons to be returned, without the addition of the place of abode, *&c*. and no extract of issues against any juror shall be delivered out without such addition as is put in the original panel or *tales* wherein such juror shall be returned; and no undersheriff, bailiff or other person, shall levy any issues of any other persons than of such as by the said estreat is of right charged with the said issues; upon pain that every clerk that shall write or deliver any such estreat, and every other person offending contrary to this act, shall forfeit to the Queen five marks, and to the party grieved five marks.

Sect. 3. Justices of *oyer* and *terminer*, justices of assise and justices of

peace, as well within liberties as without, shall have power to hear and determine the offences aforesaid.

Made perpetual, 39 Eliz. cap. 18. sect. 32.

Stat. 4 *Will. & Mar. cap.* 24. *sect.* 15. All jurors (other than strangers upon trials *per medietatem linguae*) to be returned for trials of issues joined in the courts of King's Bench, Common Pleas or Exchequer, or before justices of assise or *nisi prius*, *oyer* and *terminer*, gaol-delivery or quarter-sessions in any county of *England*, shall have within the county 10 *l.* by the year of freehold or copyhold, or ancient demesne, or in rents, in fee-simple, fee-tail or for life; and in every county of *Wales* every such juror shall have 6 *l.* by the year as aforesaid; and if any of a lesser estate be returned, it shall be a good cause of challenge, and the party returned shall be discharged upon the said challenge, or upon his own oath; and no juryman's issues shall be saved but by order of court, for some reasonable cause proved upon oath; and all issues shall be duly estreated and levied; and the writ of *venire facias* for impanelling of juries in cases aforesaid in *England* shall be after this form: *Rex, &c. Praecipimus, &c. quod venire fac' coram, &c. duodecim liberos & legales homines de vicineto de* A. *quor' quilibet habeat decem librat' terrae, tenementor' vel reddituum per annum ad minus per quos, &c. & qui nec, &c.* and the writs for returning of juries in *Wales*, shall be in the same manner, altering only the word *decem* for *sex*; and the sheriff shall not return any person, unless he have 10 *l.* or 6 *l.* respectively, by the year, at least, in the county; upon pain to forfeit for every person 5 *l.* to their Majesties.

Sect. 16. No sheriff or bailiff of liberty shall return any person to have been summoned, unless such person shall have been duly summoned six days before the day of appearance, nor shall take money or reward to excuse any juror; upon pain to forfeit 10 *l.* to their Majesties.

Sect. 17. Saving to all cities, boroughs and towns corporate, their ancient usage of returning jurors.

Sect. 18. It shall be lawful to return any person upon the *tales* in *England*, who shall have within the county 5 *l.* by the year, and not otherwise.

Sect. 19. It shall be lawful to return any person upon the *tales* in *Wales*, who shall have within the county 3 *l.* by the year.

Sect. 20. No fee shall be taken by any sheriff, clerk of assises or other person, upon account of any *tales* returned; upon pain of 10 *l.* one moiety to the prosecutor, and the other moiety to their Majesties, to be recovered by action of debt, *&c.*

Sect. 21. No writ *de non ponendis in assisis & juratis* shall be granted, unless upon oath made that the suggestions are true.

Sect. 22. So much of this act, as relates to the returning of jurors, shall be in force for three years, *&c*.

Continued by 7 Will. 3. cap. 32. *together with that act, for* 7 *years from the first of* May 1696, *and to the end of the next session of parliament; and afterward continued along with the act* 7 Will. 3. cap. 32.

Stat. 7 *Will*. 3. *cap*. 32. *sect*. 1[.] If any plaintiff or demandant in any cause in the courts at *Westminster*, which shall be at issue, shall sue forth a *venire facias*, upon which any *habeas corpora* or *distringas* with a *nisi prius* shall issue, in order to the trial of such issue at the assizes, and such plaintiff, *&c*. shall not proceed to trial at the first assizes; in all such cases (other than where views by jurors shall be directed) the plaintiff, *&c*. whensoever he shall think fit to try the issue, shall sue forth a new *venire* in the form: *Quod de novo venire facias coram, &c. duodecim liberos & legales homines de vicineto de* A. *quorum quilibet habeat decem librat' terrae, tenementor' vel reddituum per annum ad minus, per quos, &c. & qui nec, &c*. which writ being returned and filed, a *habeas corpora* or *distringas* with a *nisi prius* shall issue thereupon (for which the ancient fees shall be taken, as in case of the *pluries habeas corpora* or *distringas*), upon which the plaintiff, *&c*. may proceed to trial, as if no former *venire facias* had been filed, and so *toties quoties*; and if any defendant or tenant, in any action in the said courts, shall be minded to bring to trial any issue, when by the course of the court he may do the same by *proviso*, such defendant, *&c*. shall of the issuable term, next preceding such intended trial, sue out a new *venire* by *proviso*, and prosecute the same by *habeas corpora* or *distringas*, with a *nisi prius*, as though there had not been any former *venire* sued out or returned, and so *toties quoties*.

Sect. 3. In every writ of *habeas corpora* or *distringes*, with a *nisi prius*, where a full jury shall not appear, or where the jury is like to remain untaken for default of jurors, the sheriff shall upon the awarding the *tales*, return freeholders or copyholders of the county, who shall be returned upon some other panel to serve at the same assises, and not others, if so many of the other panels be present; and either of the parties shall have his challenge; and in case any such freeholder or copyholder, as the sheriff shall return upon the *tales*, being present, shall be called, and not appear, or shall wilfully withdraw himself, the judge of assise shall set fine upon such person.

Sect. 4. That sheriffs may be the better informed of persons to be returned for trials of issues joined in the courts of Chancery, King's Bench, Common Pleas or Exchequer, or to serve upon juries at assises, sessions of *oyer* and *terminer*, general gaol-delivery and sessions of the peace; all constables, tithingmen and headboroughs, shall yearly, at the quarter-sessions, in the week after St. *Michael*, upon the first day of the sessions, or upon the first day that the session shall be held by adjournment at any particular division, return a list of the names and places of abode of all persons within the places for which they serve, qualified to serve upon such juries, with their additions, between the age of one and twenty years and seventy years, to the justices; which justices, or two of them at the said sessions, shall cause to be delivered a duplicate of the list, by the clerks of the peace to the sheriffs, on or before the first of *January*, and cause the lists to be entred by the clerk of the peace, amongst the records of the sessions; and no sheriff shall impanel any persons to try issues joined in the said courts, or to serve in any jury at the assises, sessions of *oyer* and *terminer*, gaol-delivery or sessions of the peace, that shall not be named in the list; and any constable, tithingman or headborough, failing to make the return aforesaid, shall forfeit 5 *l.* to his Majesty.

Sect. 5. Every summons of any person qualified to the aforesaid services, shall be made by the sheriff, his officer or deputy, six days before at least, showing to every person so summoned, the warrant under the seal of the office; and in case any juror be absent from his habitation, notice of such summons shall be given, by having a note in writing under the hand of such officer, at the dwelling-house of such juror, with some person there inhabiting.

Sect. 6. The said return to the justices shall be a good excuse for the sheriff, for such summons and returns; and if any action shall be brought against any sheriff for such return, the sheriff may plead the general issue; and if the plaintiff be nonsuited, *&c.* the plaintiff or informer shall pay treble costs; and if the sheriff, his deputy or bailiffs, shall summons any freeholder or copyholder otherwise than as aforesaid, or neglect their duty in the services required by this act, or excuse any person for favour or reward, or allow of any writ of *non ponendis in assizis & juratis*, or other writ, to excuse any person from the service of any jury, under the age of seventy years; such sheriff, *&c.* shall forfeit 20 *l.* to be recoveed [*sic*] by such party grieved, or whom else shall sue for the same, in any of the courts at *Westminster*.

Sect. 7. No person shall be returned to serve upon any jury at the assises or general gaol-delivery for the county of *York*, or at any sessions of the peace for any part thereof (the city of *York* and town of *Kingston* upon *Hull* excepted) above once in four years; and every sheriff of the said county shall keep a register, wherein the names of all who have served as jurors, with their addition and places of abode, and the times and places of such their services shall be alphabetically entred, which register shall be delivered over to the succeeding sheriff within ten days after he shall be sworn into his office; and every juror who shall serve at any the said assises, gaol-delivery or sessions may, at the end of such assise, *&c.* repair to the sheriff to have his name entred, of which he shall have a certificate, upon request, *gratis*.

Sect. 8. Only one panel, consisting of forty-eight (each person having fourscore pounds land *per annum*) shall be returned to serve on the grand inquest, and no more than ten panels, consisting of twenty-four jurors each, shall be returned to serve upon trials in civil causes, at any assises for the county of *York* (except where special juries are directed by rule of court); and at no one quarter-sessions of the peace for the said county, or within any of the ridings within the same, or in any place where such sessions shall be holden by adjournment within the county, shall be returned above forty persons, to serve either upon the grand inquest or other service there.

Sect. 9. The inhabitants of the city of *Westminster* shall be exempted from serving in any jury at the sessions of the peace for *Middlesex*.

Sect. 10. The act 4 *Will. & Mar. cap.* 24, as to so much as doth relate to the returning of jurors, shall be a force, together with this act, for seven years, from the first of *May* 1696, and to the end of the next session of parliament.

Sect. 11. This act, or the said act, shall not give any longer time for the summoning of juries, to try any issues that are triable by jurors of *London* or *Middlesex*, than was required before; nor shall give any longer time of the return of any writ, precept or process of *venire facias*, *habeas corpora* or *destringas*; but where there shall not be six days between the awarding of such writ and return thereof, every juror may be summoned, attached or distrained, as he might have been before the said act.

Sect. 12. This act shall not extend to the city of *London*, nor to any county of any city or town, nor to any town corporate that have power by charter to hold sessions of gaol-delivery or sessions of the peace.

Farther continued by 1 Ano. st. 2. cap. 13. *for seven years, and to the*

end of the next session, and continued farther for 11 *years, &c. by* 10 Ann. cap. 14. *and continued farther for* 7 *years, &c. by* 9 Geo. 1. cap. 8. *and referred to by* 3 Geo. 2. cap. 25, *which act of* 3 Geo. 2. cap. 25. *is made perpetual by* 6 Geo. 2. cap. 37.

Stat. 8 *Will*. 3. *cap*. 10. All justices of peace are required at their sessions next before the feast of St. *Michael* yearly, to issue precepts to the constables, requiring them to make such return of persons to serve upon juries, as by the act 7 *Will*. 3. *cap*. 32. is directed.

Stat. 1 *Ann. st.* 2. *cap*. 13. *sect.* 3. No person interested in such estate as will qualify him to serve on juries of the yearly value of 150 *l*. or of greater value, shall be returned to serve upon any jury, at any sessions of the peace for any part of the county of *York*, upon the penalty of 20 *l*. to be forfeited by any sheriff, or other officer making such return and summons, to be recovered for the use of any person that will sue for the same, in any of the courts of record at *Westminster*, by action of debt, *&c*.

Stat. 3 *Ann. cap*. 18. *sect*. 3. If any sheriff of the county of *York* shall, during the continuance of the act 7 *Will*. 3. *cap*. 32, neglect to keep such register, as in the act is directed, or shall neglect to enter the names of the jurors in any assises or quarter-sessions, as in the said act is directed, or shall neglect, within ten days after the succeeding sheriff shall be sworn into his office, to deliver over as well the registers that shall be made in the year wherein he shall have served sheriff, as also all such other registers as were prepared in the sheriffwick of any of his predecessors, within four years next before, and which were delivered over to him, or shall neglect to deliver such certificate *gratis*, as in the said act is mentioned; every such sheriff of the county of *York* shall forfeit 100 *l*. one moiety to her Majesty, and the other moiety to such person as shall sue for the same, in any of her Majesty's courts at *Westminster*.

Sect. 4. If any such sheriff of the said county, his deputy or bailiff, during the continuance of the said act, shall knowingly summon or return any person to serve on any jury at the assises or sessions of the peace, who shall within four years before such summons or return, have served on any jury at any assises or sessions within the county, and shall not, upon producing of such certificate, discharge the summons or return, and thereof give notice to the party summoned, six days before such assises or sessions of the peace; the said sheriff, *&c*. shall forfeit to the party so summoned 20 *l*. to be recovered as beforementioned, with costs.

Sect. 5. The justices of peace for all counties within *England* or *Wales*,

shall yearly during the continuance of the said act, at the quarter-sessions next after the 24th of *June*, issue their warrants to the headconstables of every hundred, lathe or wapentake, requiring them to issue their precepts to the constables, tithingmen and headboroughs, requiring them to meet together with the headconstables, within fourteen days next after, at some usual place, where the constables, *&c*. shall prepare a list signed by them, of the names and places of abode of all the persons within the places for which they serve, qualified to serve on juries, according to the said act 4 *Will. & Mar. cap.* 24. with their additions, between the age of 21 years and 70 years, as by the said act 7 *Will*. 3. *cap*. 32. is directed; which list the constable, *&c*. yearly at the quarter-sessions in the week after St. *Michael*, upon the first day of the sessions, or upon the first day that the sessions shall be held by adjournment at any particular place, shall return to the justices; and any headconstable failing to issue his precept to meet with the constables, *&c*. shall forfeit 10 *l*. and any constable, *&c*. failing to meet the headconstable, and failing to prepare a list, and to return the same to the justices as aforesaid, shall forfeit 5 *l*. and every such high constable, constable and tithingman so offending, shall be prosecuted at the assises, sessions of *oyer* and *terminer*, or general gaol-delivery, or sessions of the peace, and the justices of peace at the quarter-sessions, after the 24th of *June* yearly, shall cause the said several acts to the read in court.

Continued by 10 Ann. cap. 14. *along with* 7 Will. 3. cap. 32.

Stat. 10 *Ann. cap*. 14. *sect*. 5. The stat. 7 *Will*. 3. *cap*. 32. shall be construed to extend, not only to any sessions of the peace to be holden for any of the ridings within the county of *York*, but also to any sessions that shall be holden by adjournment for any part of the said ridings.

Sect. 6. If any person interested in such estate as will qualify him to serve on juries of the yearly value of 150 *l*. shall serve as a juror at any of the said sessions or adjournments, he shall not be thereby exempted from serving at the assises for the county of *York*.

Stat. 3 *Geo*. 2. *cap*. 25. *sect*. 1. The persons required by 7 & 8 *Will*. 3. *cap*. 32. and by a clause in 3 & 4 *Ann. cap*. 18. to give in, or who are by this act to make up, lists of the names of persons qualified to serve on juries, shall (on request to any parish-officer, who shall have in his custody any of the rates for the poor, or land-tax) have liberty to inspect such rates, and take the names of such persons qualified dwelling within their precincts; and shall yearly, twenty days at least before *Michaelmas*, upon two *Sundays*, fix upon the door of the church, within their precincts, a list of all

such persons intended to be returned to the quarter-sessions, and leave a duplicate of such list with a churchwarden or overseer of the poor; and if any person not qualified shall find his name mentioned in such list, and the person required to make such list, shall refuse to omit him, the justices at their quarter-sessions, on satisfaction from the oath of the party complaining, or other proof, shall order his name to be struck out.

Sect. 2. If any person, required to give in or make up any such list, shall wilfully omit any person whose name ought to be inserted, or insert any who ought to be omitted, or shall take any reward for omitting or inserting any person, he shall, for every person, so omitted or inserted, forfeit 20 *s*. on conviction before one justice of the county, *&c*. where the offender shall dwell, on the confession of the offender, or proof by one witness on oath; one half to the informer, the other half to the poor of the parish, *&c*. for which the list is returned; and if the penalty shall not be paid within five days, it shall be levied by distress and sale of goods, by warrant from one justice; and the justices before whom such person shall be convicted shall certify the same to the next quarter-sessions, which shall direct the clerk of the peace to insert or strike out the name; and duplicates of the lists, when delivered at the sessions and entred by the clerk of the peace, shall, during the sessions, or within ten days after, be transmitted by the clerk of the peace to the sheriff; and the sheriff shall take care that the names be entred alphabetically, with their additions and places of abode; and every clerk of the peace neglecting his duty therein, shall forfeit 20 *l*. to such person who shall prosecute for the same, till the party be convicted upon an indictment at the quarter-sessions.

Sect. 3. If any sheriff or officer shall summon and return any persons to serve on any jury before the justices of assise, *nisi prius*, or judges of the great sessions in *Wales*, or of the sessions for the counties palatine, whose name is not inserted in the duplicates transmitted to him by the clerk of the peace; or if any clerk of assise, judge's associate, or other officer, shall record the appearance of any person so summoned and returned, who did not really appear; then any judge of assise, *nisi prius*, *&c*. shall, upon examination in a summary way, set such fines upon such sheriff, *&c*. for every person so summoned and returned, and for every person whose appearance shall be so falsly recorded, as the said judge shall think meet, not exceeding 10 *l*. nor less than 40 *s*.

Sect. 4. No persons shall be returned as jurors at any assises, or *nisi prius*, *&c*. who have served within one year before in the county of *Rutland*, or

four years in the county of *York*, or within two years in any other county, not being a county of a city or town; and if any sheriff shall wilfully transgress therein, any judge of assise, *&c*. is required, on examination and proof of such offence, in a summary way, to set a fine upon such offender, not exceeding 5 *l*.

Sect. 5. Every sheriff, *&c*. shall register the names of such persons, as shall be summoned and serve as jurors at any assises, *&c*. alphabetically, and the times of their services; and every person so summoned and serving shall, upon application to the sheriff, *&c*. have a certificate testifying his attendance, which the sheriff, *&c*. is to give without fee; and the book shall be transmitted by the sheriff, *&c*. to his successor.

Sect. 6. No sheriff or other person shall take any reward, to excuse any person from serving on juries; and no officer appointed to summon juries, shall summon any person other than such whose name is specified in a mandate signed by the sheriff, *&c*. And if any sheriff or officer shall wilfully transgress in the said cases, any judge of assise, *&c*. may, on examination and proof of such offence, in a summary way, set a fine on any person so offending, not exceeding 10 *l*.

Sect. 7. It shall be sufficient for any constables, tithingmen or headboroughs, after they have completed the lists for their precincts, according to 7 & 8 *Will*. 3. *cap*. 32. and 3 & 4 *Ann. cap*. 18. and this act, to subscribe the same in the presence of one justice for each county, *&c*. and at the same time to attest the truth of such lists, upon oath, to the best of their knowledge or belief; and the lists shall (being signed by the justices) be delivered by the constables, *&c*. to the high constables, who are to deliver in such lists to the quarter-sessions, attesting upon oath the receipt of such lists from the constable, *&c*. and that no alteration hath been made since their receipt thereof.

Sect. 8. Every sheriff, *&c*. in *England*, shall, upon the return of every *venire facias* (unless in causes intended to be tried at bar, or where a special jury shall be struck by rule of court) annex a panel to the writ, containing the names, additions and places of abode, of a competent number of jurors named in such lists, the names of the same persons to be inserted in the panel annexed to every *venire facias*, for the trial of issues at the same assises; which number of jurors shall not be less than forty-eight, nor more than seventy-two, without direction of the judges appointed to go the circuit, or one of them, by order under their hands; and the writs of *habeas corpora* or *distringas*, subsequent to such *venire*, need not have inserted in

the bodies of such writs the names of the persons contained in such panel; but it shall be sufficient to insert in such writs, *corpora separalium personarum in panello huic brevi annexo nominatarum*, or words of like import, and to annex to such writs panels containing the names returned in the panel to the *venire*; and for making the said returns and panels, and annexing the same, no other fees shall be taken than what are now allowed.

Sect. 9. Every sheriff or officer, to whom the return of juries in the court of grand sessions in any county of *Wales* shall belong, shall, at least eight days before every grand sessions, summon a competent number of persons qualified out of every hundred and commote within such county, so as such number be not less than ten, or more than fifteen, without the direction of the judge of the grand sessions, by rule of court; and the officer shall return a list, containing the names of the persons so summoned the first court of the second day of every grand sessions; and the persons so summoned, or a competent number of them as the judges shall direct, and no other, shall be named in every panel to be annexed to every *venire, habeas corpora* and *distringas*, for the trial of causes in such grand sessions.

Sect. 10. Every sheriff or officer, to whom the return of the *venire* for the trial of causes before the justices of the sessions for the counties palatine of *Chester*, *Lancaster* or *Durham*, doth belong, shall, 14 days at least before the sessions, summon a competent number of persons qualified, so as such number be not less than 48, not more than 72, without the direction of the judges; and shall, eight days at least before such sessions, make a list of the persons so summoned; and such lists shall be hung up in the sheriff's office; and the persons named in such lists, and no others, shall be summoned to serve on juries at the next sessions; and the sheriff is to return such list on the first day of the sessions; and the persons so summoned, or a competent number of them, as the judges shall direct, and no other, shall be named in every panel to be annexed to every *venire, habeas corpora* and *distringas* in such sessions.

Sect. 11. The name of each person summoned and impanelled, with his addition and place of abode, shall be written in distinct pieces of parchment or paper of equal size, and shall be delivered to the marshal of the judge, *&c.* by the undersheriff, and shall, by the direction of the marshal, be rolled up all in the same manner and put into a box or glass; and when a cause is brought to be tried, some indifferent person shall in open court draw out twelve of the papers; and if any of the persons drawn shall not appear, or be challenged and set aside then a further number, 'till twelve be drawn who

shall appear; and the said twelve persons so first drawn and approved, their names being marked in the panel, and they being sworn, shall be the jury to try the cause; and the names of the persons sworn shall be kept apart in some other box, *&c*. ’till the jury have given in their verdict, and the same is recorded, or ’till the jury be discharged; and then the same names shall be rolled up again and returned to the former box, *&c*. and so *toties quoties*.

Sect. 12. If a cause shall be brought on to be tried before the jury in any other cause shall have brought in their verdict, or be discharged, the court may order 12 of the residue to be drawn as before, for trial of the cause.

Sect. 13. Every person whose name shall be drawn, and who shall not appear, being called three times, on oath made that such person had been summoned, shall forfeit for every default (unless some reasonable cause of absence be proved by oath to the satisfaction of the judge) such fine, not exceeding 5 *l*. nor less than 40 *s*. as the judge shall think reasonable.

Sect. 14. Where a view shall be allowed, six of the jurors or more (who shall be consented to on both sides; or if they cannot agree shall be named by the proper officer of the court; or, if need be, by a judge, or by the judge before whom the cause shall be brought on to trial) shall have the view, and shall be first sworn, or such of them as appear on the jury, before any drawing; and so many only shall be drawn to be added to the viewers as shall make up the number of twelve.

Sect. 15. His Majesty’s courts of King’s Bench, Common Pleas and Exchequer at *Westminster* (upon motion made in behalf of his Majesty, or on the motion of any prosecutor or defendant in an indictment or information for any misdemeanor, or information in the nature of a *quo warranto* in the King’s Bench, or in an information in the Exchequer, or on motion of any plaintiff or defendant in any cause depending in the said courts) are required to order a jury to be struck before the proper officer for the trial of any issue, in such manner as special juries are usually struck in such court upon trials at bar.

Sect. 16. The person who shall apply for such jury shall pay the fees for striking it, and shall have no allowance for the same on taxation of costs.

Sect. 17. Where a special jury shall be ordered by rule of court in any cause arising in a county of a city or town, the sheriff shall be ordered by such rule to bring the books of persons qualified to serve on juries within the same, in like manner as the freeholders book hath been usually ordered to be brought in order to the striking of juries for trials at bar, and the jury shall be struck out of such book.

Sect. 18. Any person having land in his own right of the yearly value of 20 *l.* over and above the reserved rent, being held by least for the absolute term of 500 years or more, or for 99 years or any other term determinable on one or more lives; the name of every such person shall be inserted in the lists and in the freeholders book; and such leaseholder may be summoned to serve on juries as freeholders may.

Sect. 19. The sheriffs of *London* shall not return any person to try any issue joined in any of his Majesty's courts of King's Bench, Common Pleas or Exchequer, or to serve on a jury at the sessions of *oyer* and *terminer* or sessions of the peace to be held for the city, who shall not be a house-keeper within the city, and have lands, *&c.* or personal estate to the value of 100 *l.* and the same cause alleged by way of challenge, and found, shall be admitted as a principal challenge; and the person challenged may be examined on oath of the truth of the matter.

Sect. 20. The sheriffs or other officers shall not return any person to serve on a jury for the trial any capital offence, who would not be qualified to serve as a juror in civil causes; and the same matter shall be a principal challenge; and the person so challenged may be examined as oath of the truth of the matter.

Sect. 21. This act shall be read once in every year at the quarter-sessions to be held for every county or place within *England* and *Wales* next after the 24th of *June*.

Sect. 22. This act shall continue till the first of *September* 1723, *&c. Made perpetual by* 6 Geo. 2. cap. 37.

Sect. 4 *Geo.* 2 *cap.* 7. *sect.* 1. The clause of 3 *Geo.* 2. *cap.* 25. *Sect.* 4. shall not extend to the county of *Middlesex*.

Sect. 2. No person shall be returned to serve as a juror at *nisi prius* in *Middlesex* who has been returned at *nisi prius* in the said county in the two terms or vacations next preceding, under such penalty upon the sheriff, *&c.* as might have been inflicted for any offence against the said clause.

Sect. 3. All leaseholders upon leases where the improved rents shall amount to 50 *l. per ann.* over and above ground-rents or other reservations, shall be liable to serve upon juries.

Stat. 6 *Geo.* 2. *cap.* 37. *sect.* 2. The justices of the session or assises for the counties palatine of *Chester, Lancaster* and *Durham*, upon motion on behalf of his Majesty, or of any prosecutor or defendant in any indictment or information for misdemeanor, or on the motion of any plaintiff or defendant may, in case they think fit, order a jury to be struck before the

proper officer of each court, in such manner as special juries have been usually struck in the courts at *Westminster* upon trials at bar.

Stat. 24 *Geo*. 2. *cap*. 18. *sect*. 1. The party who shall by virtue of 3 *Geo*. 2. *cap*. 25. or 6 *Geo*. 2. *cap*. 37. apply for a special jury, shall not only pay the fees for striking such jury, but shall also pay all the expences occasioned by the trial of the cause by such special jury, and shall not have any other allowance for the same upon taxation of costs, than such party would be intitled unto in case the cause had been tried by a common jury; unless the judge before whom the cause is tried immediately after the trial certify in open court under his hand upon the back of the record, that the same was a cause proper to be tried by a special jury.

Sect. 2. No person who serves upon any jury appointed by the authority of the said acts, shall take for serving on such jury more than the sum which the judge who tries the issue thinks reasonable, not exceeding 1 *l*. 1 *s*. except in causes wherein a view is directed.

Sect. 4. To prevent delays, where a peer is party, by challenges to the array for want of a knight returned on the panel, no challenge shall be taken to any panel of jurors, for want of a knight's being returned in such panel, nor any array quashed by reason of any such challenge.

Stat. 29 *Geo*. 2. *cap*. 19. *sect*. 1. Every person duly impanelled and summoned to serve upon any jury for the trial of any cause to be tried in any court of record within the city of *London*, or in any other city or town corporate, liberties or franchises within *England*, who shall not appear and serve on such jury (after being called three times, and on proof on oath of the person so making default, having been duly summoned) shall forfeit for every such default, such fine not exceeding 40 *s*. nor less than 20 *s*. as the judge of the respective court wherein such default is made shall impose, unless some just cause for such defaulter's absence be made appear by oath or affidavit to the satisfaction of the judge.

Sect. 2. If any person on whom any fine is imposed in pursuance of this act, refuse to pay the same to the person authorized by the judge to receive the same, it shall be lawful for the judge who imposed such fine, by warrant under his hand and seal, to cause such fine to be levied by distress and sale of the goods of the person on whom such fine was imposed, and the overplus, if any, after payment of such fine and the charges of such distress and sale, shall be rendered to the person whose goods were so destrained and sold.

Sect. 3. Every fine imposed in pursuance of this act, shall be paid by the

person who receives or levies the same, to the proper officer of the city or town corporate, liberty or franchise, in which the court was holden; to be applied to such uses, as issues set on jurors, or other fines set in courts within such city, *&c*. are by charter, prescription, or usage applicable.

Sect 4. If any action be brought for any thing done in pursuance of this act, such suit shall be brought within six calendar months next after the matter complained of is committed; and the defendant may plead the general issue; and if a verdict be found for the defendant, *&c*. the defendant shall recover double costs.

2. WHO ARE EXEMPTED FROM SERVING ON JURIES.

It seems to be agreed, that all persons whose attendance is required in the superior courts of justice, such as serjeants at law, counsellors, attornies and other officers of the courts, are so far privileged as not to be summoned on juries; all peers of the realm are excluded, as to coming within the qualifications mentioned in the writ, *viz. Ad faciendum quand' jurat' patriae*; for they are not *pares patriae*, but *pares* of an higher rank; and therefore it is clearly agreed, that if a peer be returned on a jury, and bring a writ of privilege, he shall be discharged; also it seems to be the better opinion, that even without such a writ he may challenge himself, or be challenged by either party. *Dyer* 314. *Moor* 167. 2 *Rol. Abr*. 646. *Co. Lit*. 157. 9 *Co*. 49. 6 *Co*. 53. 1 *Jones* 153.

But members of the house of commons seem not to have any privilege to be exempt from serving on juries; yet in the case of Sir *Edward Bainton*, who being returned on a jury in *B. R.* the court would not force him to be sworn against his will, he being a parliament-man, and the parliament then sitting. *Pasch*. 17 *Car*. 2. Sir *Edward Bainton*'s case.

Tenants in ancient demesne are not to be impanelled to appear at *Westminster*, or elsewhere in any other court, upon any inquest or trial of any cause. 4 *Inst*. 269.

It seems agreed, that the King by his grant or charter may exempt one, two or more from serving on juries; but he cannot exempt a whole county or hundred, because in such case there would be a failure of justice; also it seems that such exemption does not extend to jurors returned into the King's Bench, unless there be express words including that court; also by the better opinion, the sheriff cannot return such privilege of exemption, but each particular juror must come in, and demand it. 1 *Sid*. 127, 243. *Raym*. 113. *Hard*. 389. *&c*.

By the statute of *Westm*. 2. *cap*. 38. it is expressly provided, that neither old men above the age of seventy years, nor persons perpetually sick, nor those who are infirm at the time of their summons, nor those who do not reside in the county, shall be put in juries or in the lesser assizes: In the construction of which it hath been held, that though 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 serving, if there be not a sufficient number without them. 2 *Inst*. 446. *F. N. B.* 165.

Clerks or persons in holy orders, coroners, ministers of the forest, officers of the army, and other officers and ministers belonging to the King, are exempt from serving on juries. *Dalt. Sher*. 121. *Trials per Pais* 86.

By the 6 *W*. 3. *cap*. 4. “Every person using and exercising the art of an apothecary in the city of *London*, or within seven miles thereof being free of the society of apothecaries in the said city, and who shall have been duly examined and approved, *&c*. for so long time as he shall exercise the said mystery, and no longer, shall be exempted from serving on any jury or inquest; and other persons exercising the said art of an apothecary in any other parts of this kingdom, who have served as apprentices seven years, according to the statute 5 *Eliz*. shall likewise be exempted from serving on juries for so long time as they shall use and exercise the said art, unless such person voluntarily consent to serve.”

By the 7 *&* 8 *W*. 3. *cap*. 21. all registered seamen are exempted front serving on juries.

By the 7 *&* 8 *W*. 3. *cap*. 34. it is enacted, That no quaker, or reputed quaker, shall serve on juries.

3. OF THE SEVERAL KINDS OF JURIES, AND JURY PROCESS; AND MANNER OF COMPELLING A JURY TO APPEAR.

Juries are distinguished into grand and petit juries; the grand jury may consist of thirteen, or any greater number; for these being the grand inquisitors of the county, every indictment and presentment by them must be sound by twelve at least; but it is not necessary that all above that number should concur in such presentment or indictment, *Cro. Eliz*. 654. 3 *Inst*. 30. 2 *Inst*. 387. 2 *Hal. Hist. P. C*. 154.

Upon the summons of any sessions of the peace, and in cases of commissions of oyer and terminer and gaol-delivery, there goes out a precept either in the name of the King, or of two or more justices, directed to the sheriff, upon which he is to return twenty-four or more out of the

whole county, namely, a considerable number out of every hundred, out of which the grand inquest at the session of the peace, oyer and terminer, or gaol-delivery are taken, and sworn *ad inquirendum pro domino rege & corpore comitatus*. 2 *Hal. Hist*. P. C. 154.

Those returned to serve on the grand jury must be *probi & legales homines*, and ought to be of the same county where the crime was committed; and therefore it is a good exception at Common law to one returned on a grand jury, that he is an alien or villain, or that he is outlawed for a crime, or that he was not returned by the proper officer, or that he was returned at the instance of the prosecutor; but these exceptions must be taken before the indictment found. *Cro. Eliz*. 654. 3 *Inst*. 30. 12 *Co*. 99. 2 *Rol. Rep*. 82. 2 *Hal. Hist. P.C*. 154-5.

It is laid down by my Lord Chief Justice *Hale*, that at Common law every person returned on the grand jury ought to be a freeholder at least, and that the statute 2 *Hen*. 5. *cap*. 3. that requires jurors that pass upon the trial of a man's life to have 40 *s. per ann*. freehold, hath been the measure by which the freehold of grand jurymen hath been measured in precepts of summons of sessions. *Hale Hist. P. C*. 155. but for this *vide* 2 *Hawk. P. C*. 216.

Also by several acts of parliament it is provided, That those who serve on the grand jury be such as are duly qualified. *See the first division, and particularly the acts* 11 Hen. 4. cap. 9. *and* 3 H. 8. cap. 12.

In the construction of the said act 11 *Hen*. 4. *c*. 9. the following points have been resolved.

That if a person not returned on a grand jury procure his name to be read among those that are returned, whereupon he is sworn, &*c*. he may be indicted for a contempt of this statute. 12 *Co*. 99. 3 *Inst*. 33.

That indictments before justices of the peace are clearly within this stature. 12 *Co*. 98. 3 *Inst*. 33. *Cro. Car*. 134.

That a person arraigned on an indictment taken contrary to the statute, may plead such matter in avoidance of the indictment, and also plead over to the felony. 3 *Inst*. 34. *Cro. Car*. 134. 1 *Jones* 198.

That he who is outlawed on an indictment without any trial, may clearly shew in avoidance of such outlawry, that the indictment was taken contrary to the statute; but the court needs not admit of the plea of the outlawry of an indictor in avoidance of any such indictment, unless he who pleads it have the record ready, unless it be an outlawry of the same court wherein the indictment is depending; in which case it is said, that any one as *amicus curiae* may inform the court of it; also it seems the better opinion, that no

exception against an indictor is allowable, unless the party takes it before trial. 3 *Inst*. 34. *Cro. Car*. 147.

That if any one of the grand jury who find an indictment, be within any of the exceptions in the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it. 11 *H* 4. 41. *pl*. 8. *S. P. C*. 88. 3 *Inst*. 33.

That if a prisoner indicted of felony offer to take any such exceptions, he shall, upon his prayer, have counsel assigned him for his assistance. *Cro. Car*. 134, 147. 1 *Jones* 198.

The said act 3 *Hen*. 8, *c*. 12. extends not only to panel of grand inquests returned, but to all panels of the petty jury, commonly called the petty jury of life and death which may be reformed by the justices according to this act; and the sheriff is bound to return the panel so reformed. 2 *Hal. Hist. P. C*. 156, 265.

It hath been holden, that this statute doth not take away the force of 11 *H*. 4. as to any point wherein both may consist together; and therefore if any indictor be outlawed, or returned at the nomination of any person, contrary to 11 *H*. 4. except of the justices authorized as abovementioned to reform the panel, the indictment may be avoided in the same manner as before. 3 *Inst*. 33. 2 *Hawk. P. C*. 219.

The grand jury, as has been already observed, must consist of twelve at least, the petty jury of twelve, and can be neither more nor less; but it is said, that particular inquests may consist of a more or less number than twelve. *Trials per Pais* 80. *F. N. B*. 107. *Finch of Law* 400, 464. A writ of inquiry of waste by thirteen was holden good. *Cro. Car*. 414.

But on a writ of error a judgment out of an inferior court was reversed, because being by default, the inquiry of damages was only by two jurors; and though a custom was alleged to warrant it, yet it was resolved, that there could not be less than twelve, though the writ of inquiry saith only *per sacramentum proborum & legalium hominum*, and not *duodecim* as in a *venire*. 2 Vent. 113.

Also it hath been frequently held, that a custom in an inferior court to try by six jurors is void; and that tho' such custom is used in *Wales*, yet that is by force of the statute 34 *Hen*. 8. which appoints that such trials may by six only where the custom hath been so. *Cro. Car*. 259. 1 *Sid*. 233. 1 *Keb*. 326.

The first process for convening the jury is the *venire facias* which must be awarded on the roll, and thereupon in the Common Pleas there issue the *habeas corpora* and *distringas juratores*; but in the King's Bench and

Exchequer after the *venire*, they proceed on the *distringas*; for the *venire* being in the nature of a summons, if the jury did not appear thereon in those courts in which the King as a more immediate concern, they proceed on the strongest process, *viz*. the *distringas*. Trials per Pais 64.

If all the jury did not attend on the *habeas corpora* or *distringas*, which was to bring them into court, there was an *undecim*, *decem*, or *octo tales*, according as the number was deficient, to force others to the King's court to try the issue; this was without a new summons or *venire*, because it was supposed that the first *habeas corpora* and *distringas* had given notice to the vicinity that they ought to appear; and therefore the supplement of a jury were forced in without a particular summons to them. But if the whole jury be challenged off, then a new *venire facias*, and if none of the jury appear, then a *distringas juratores* shall issue, and no *tales*. 2 Hal. Hist P. C. 265.

Jurors being duly served with process are compellable to appear; and therefore where more than one appear but not enough to take the inquest, but some of the others come within view, or into the town where the court is holden, but refuse to come into court; in these cases the courts may order those who appear to inquire of the yearly value of such defaulters lands; which being done, the court may either summon them to appear, on pain of the sum found, or some lesser sum, or may fine them in like sum without more ado; but such juror shall only lose his issues, and not the yearly value of the lands, unless the party pray it; but one who makes default after appearance is liable to such forfeiture without any prayer; yet the court in discretion will sometimes only impose a small fine; also a juror who comes not to town where the court is holden, shall only lose his issues, or be amerced, but not fined; and it is said, that a juror is not amerceable at all at the returns of the first *venire*, except before justices of *oyer* and *terminer*. 2 *Hawk*, *P*. *C*. 146. and several authorities there cited. *Trials per Pais* 200.

See the stat. 27 Eliz. c. 6. sect. 2. *and* 3 Geo. 2. c. 25. sect, 13. *in the first division of this title*.

4. BY WHOM THE JURY PROCESSES ARE TO BE EXECUTED, AND THE JURY CONVENED; IN WHAT TIME SUCH PROCESSES ARE RETURNABLE, AND WHAT NUMBER TO BE RETURNED.

The sheriff is the proper officer by whom the jury process is to be executed, unless he be partial, that is, such a one, as from his consanguinity or affinity, his being under the power of either party, *&c*. cannot be presumed to be an indifferent person, as every officer who hath any way to do with the administration of justices ought to be; and in every such case the

process shall be directed to the coroners, if they are impartial, or to those of them who are so, in case some of them lie under the aforementioned prejudices; and in case all the coroners are partial or not indifferent, then the *venire* shall be directed to two elizors named by the court, and against whom, for that reason, no challenge can be taken. *Co. Lit.* 158. *a. Bro. Challenge* 153.

When process is once awarded to the coroners, *&c*. for the sheiff's actual partiality, the entry is *vicecomes se non intromittat*, and in such case process shall not afterwards be awarded to any new sheriff, but where it was awarded to the coroners for that the sheriff is tenant, *&c*. it may be awarded to a new sheriff. *Co. Lit*. 158. 2 *Roll. Abr*. 670.

So if a *venire facias* is awarded to the coroner for partiality in the sheriff, and afterwards a *tales* is awarded, which is returned by the sheriff, this has been held error. *Cro. Eliz.* 574. *Morgan v. Wyes*; and see *Cro. Eliz.* 586.

See the statute 3 Geo. 2. *c*. 25. sect. 1—6. *in the first division of this title*.

Process against jurors may be returnable immediately into the King's Bench for the trial of an indictment found in the country where it sits; whether for a crime in such county, or for a treason beyond sea; but for the trial of an indictment removed by a *certiorari* from a different county, there must be fifteen days between the *teste* and return of every process. 2 *Roll. Abr*. 626. 9 *Co*. 118. *b*. 2 *Inst*. 568. 2 *Hawk. P. C*. 406.

Justices in eyre, or of gaol-delivery, may order a jury to be returned immediately for the trial of a prisoner; also it hath been adjudged, that justices of *oyer* and *terminer*, or of the peace, might for the trial of an issue joined before them, award a *venire* returnable the same day on which the party is arraigned; but it is said, that there are strong authorities to the contrary, unless the prisoner consent, or the crime amount to felony. 2 *Hawk. P. C*. 406. and several authorities there cited.

A *venire* before justices of *oyer* and *terminer*, returnable at a day certain, is erroneous, unless the sessions appear to be adjourned to the same day, because otherwise it shall not be intended that their commission contained so long; but such *venire* may be returnable at the next assizes, and there tried by virtue of 1 *Ed*. 6. *cap*. 7. 2 *Hal. Hist. P. C*. 261. 2 *Hawk. P. C*. 406.

See the stat. 7 & 8 Will. 3. c. 32. *in the first division of this title*.

Altho' by the words of the writ of *venire facias* the sheriff is only to return twelve, yet by ancient course he was obliged to return twenty-four; and this, says my Lord *Coke*, is for expedition of justice; for if 12 should only be returned, no man should have a full jury appear or to be sworn in

respect of challenges without *tales*, which would be a great delay of trials. *Co. Lit.* 155. *a*.

But tho' the sheriff return a lesser member, as where the sheriff return only 23, and a sufficient number appear, and try the issue, this will be aided by the statute of Jeofails as a misreturn. 5 *Co*. 36. *Cro. Eliz*. 587. *Cro. Car*. 223.

The precept that issues before a sessions of gaol-delivery, *oyer* and *terminer*, and of the peace, is to return 24, and commonly the sheriff returns upon that precept 48. 2 *Hal. Hist. P. C*. 263.

But the award or precept to try the prisoner after he hath pleaded, is only *venire facias* 12, and 24 are returned by the sheriff on that panel. 2 *Hal. Hist. P. C*. 263.

At Common law in civil causes, it seems the sheriff might have returned above 24 if he pleased; and therefore by the statute of *Westm* 2. *c*. 28, it is recited, that whereas the sheriffs were used to summon an unreasonable multitude of jurors, to the grievance of the people, it is ordained, that from thenceforth in one assize no more shall be returned than 24. *Godb*. 370. 1 *Keb*. 310. *See the stat*. 3 Geo. 2. c. 25. sect. 8, *in the first division of this title*.

5. IN WHAT CASES AND IN WHAT MANNER SPECIAL JURIES ARE APPOINTED.

Special juries are appointed on motion and application to the court for that purpose, on which, if the court think it reasonable, the sheriff is to attend the secondary or master with his book of freeholders, who, in the presence of the attornies on both sides, names 48 freeholders, and then each party strikes out twelve, by one at a time, the plaintiff or his attorney beginning first, and the remaining 24 are returned by the secondary, as the jury, to try the cause. 2 *Lil. Regist*. 123. That the court may order a jury of merchants if they think convenient. 2 *Lil. Regist*. 122.

If the rule was entered into by consent, it is said to be a contempt in the attorney not to be present; but to remedy any inconveniency from hence, a rule was made, that when a master is to strike a jury, *viz*. forty-eight out of the freeholders book, he shall give notice to the attornies of both sides to be present; and if the one comes, and the other does not, he that appears shall, according to the ancient course, strike out twelve, and the master shall strike out other twelve for him that is absent. 2 *Lil. Regist*. 127. 1 *Salk*. 405.

And it is said, that it by rule of court the master is ordered to strike a jury, in case it be not expressed in such rule that the master shall strike 48, and

each of the parties shall strike out twelve, the master is to strike 24, and the parties have no liberty to strike out any. 1 *Salk*. 405.

It is said, that a special jury may be granted to try a cause at bar without the consent of the parties, but never at *nisi prius*, unless for good cause shewn. 1 *Mod. Ca. Law and Equity* 248.

Also it is said, to be contrary to the course of the court of *B. R.* in capital case, to order the clerk of the crown to strike a special jury, as is done by the secondary in civil causes upon trials at bar. 2 *Jon*. 222.

See the statute 3 Geo. 2. c. 25. sect. 15. *and* 24 & 29 Geo. 2. *in the first division of this title*.

A rule was made for a special jury, which was entered into by consent; and afterwards when the parties attended the master, the defendant struck out some hundredors, and at the trial challenged the array for want of hundredors, which the judge of assise allowed a good challenge; and this was held such a breach and contempt of the rule, for which an attachment was granted. 1 *Mod. Ca. Law and Eq*. 245. *The King* v. *Burridge*.

But where in the trial of a *quo warranto*, the defendant challenged the array of a special jury, that had been struck at his request, for partiality in the sheriff; and an attachment being moved for, and the case next above relied on, it was denied; and said *per curiam*, That the attachment in the case *supra* was granted by reason of the abuse of the rule; but here the only foundation is the jury's being so struck at his request, which is not alone sufficient, for he had a right to challenge the array on the process's being directed to a wrong officer; and the rule might have been fulfilled another way, *viz*. as the sheriff was partial, a proper entry might have been made, and process directed to the coroner. *The King* v. *Johnson, Mich*. 8 *Geo*. 2. *in B. R.*

6. FOR WHAT MISDEMEANORS JURORS ARE PUNISHABLE.

In what case juries are punishable by attaint, see Attaint. And as to the case where they are otherwise punishable, we must consider jurors either in a ministerial capacity, as persons bound to attend the court, to do the business for which they are returned till they are discharged; or in a judicial capacity, as judges of the fact to be tried. In the former capacity they are liable to be punished to several instances; as for refusing to appear, withdrawing themselves before they are sworn, or refusing to be sworn; for which every court of record may, of common right, impose such a reasonable fine on any one returned on a grand or petit jury, as shall seem convenient. 8 *Co*.

38. *b*. 41. *a*. 2 *Inst*. 242. 2 *Hal. Hist. P. C*. 309.

So if after they are sworn they refuse to give any verdict at all. *Noy* 49. 3 *Buls*. 173. *Vaugh*. 152.

So if they endeavour to impose upon the court; as where a petit jury offer a verdict to the court as agreed by their whole number, where in truth some of them have not agreed to it, or where they agree upon two verdicts; and first, to offer one of them to the court, and so stand to it, if the court shall express, no dissatisfaction to it; but if the court shall dislike it, then to give the other. 1 *Rol. Abr*. 219. *Cro. Eliz*. 779. 2 *Hawk. P. C*. 146. 2 *Hal. Hist. P. C*. 309. S. P. and that in such case they shall be fined every, one a-part.

So for misbehaving themselves after their departure from the bar; where they do not all keep together till they have given their verdict; or where any of them carry any thing eatable with them in their pockets, of eat or drink, or otherwise refresh themselves, without leave from the court, before they have given their verdict, tho' they were agreed on it, and were also all the time in the custody of the bailiff appointed to take care or them. *Dyer* 78. *pl*. 41. 218. *pl*. 4. *Cro. Jac*. 221. *Vaugh*. 21. 2 *Hawk. P. C*. 146.

Also where a jury, after they departed from the bar, being late on *Saturday* night, separated and went every one to his own house, without giving a privy verdict, or without consulting upon the evidence, and gave a verdict according to the direction of the court; but for this misdemeanor they were fined each forty shillings, and a new trial granted; and herein the Chief Justice said, that by such trial both parties may be prejudiced; for the jurors going at large without consulting together, may well forget the evidence; and it is the right of the King's subject to have their issues determined when the evidence is fresh in the memory of the jurors; and the suffering the jurors to go to their houses after a privy verdict is only by connivance, but by the strict rules of law ought not to be suffered. *Pasch*. 27. *Car*. 2. in *B. R*.

Also where the jury have been divided or in doubt about the evidence, and have agreed to determine the matter by throwing cross or pile, &c. and to give their verdict as the chance happens; this has been held such a misdemeanor for which they have been ordered to attend, and for which they are punishable, and for which a new trial will be granted on the common rule *of juratores male se gesserunt*. 2. Lev. 140, 205. 3 Jon. 83. 3 Keb. 805.

Jurors are punishable for sending for or receiving instructions from either of the parties concerning the matter in question. 2. *Hawk. P. C*. 147.

So if a juryman have a piece of evidence in his pocket, and after the jury sworn and gone together he sheweth it to them, this is a misdemeanor fineable in the jury; but it avoids not the verdict, tho' the case appear upon examination. *Cro. Eliz.* 616. 2 *Hal. Hist. P. C.* 306.

As to the punishment of jurors in their judicial capacity, there are several instances where jurors acquitting great and notorious offenders, contrary to clear and manifest evidence, that contrary to the judge's directions, having been punished in the StarChamber, and have also, not only in the King's Bench, but also by justices of *oyer* and *terminer* and gaol-delivery, been fined and imprisoned, and bound over to their good behaviors; but these methods were thought to be contrary to the opinions in the old books, and contrary to the general reason of the law, and being fully consider'd in *Bushel's* case, it was there settled, and hath been ever since agreed to, that jurors are no way punishable, except by attaint, for giving a verdict contrary to a judge's directions, and against what may seem to others clear and manifest evidence, for that they are the proper judges of the fact to be tried, and may be reasonably influenced by matters known only to themselves, as their own personal knowledge of the fact, or of the credit of the witness, or of the parties. 2 *Hawk. P. C.* 147-8, and several authorities there cited. *Vaugh.* 143. 2 *Jon.* 16, 17.

And herewith my Lord *Hale* seems to agree, and shews the unreasonableness of punishing a jury for going contrary to the direction of the court in matters of law, because it is impossible any matter of law could come in question till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they were the only competent judges; also, says he, it were the most unhappy case that could be to the judge, if he, at his peril, must take upon him the guilt or innocence of the prisoner, and if the judge's opinion must rule the matter of fact, the trial by a jury would be useless. 2 *Hal. Hist. P. C.* 160, 161, 211, &c.

But he seems to admit, that the long use of fining jurors in the King's Bench in criminal causes, may give possibly a jurisdiction to fine in these cases; yet that it can by no means be extended to other courts of sessions, of gaol-delivery, *oyer* and *terminer*, or of the peace, or other inferior jurisdictions. 2. *Hal. Hist. P. C.* 313.

Also by *Hawkins*, if it shall plainly appear in any case, that jurors are perfectly satisfied of the truth of a fact, whereupon they declare to the court, that they find it in such a particular manner; and the court directly tell them, that upon the fact so found, as they have agreed it to be, the judgment of the

law is such or such, yet they obstinately insist upon a verdict contrary to such direction; it seems agreeable to the general reason of the law, that the jurors are finable by the court in such a case, unless an attaint lies against them; for otherwise they would not be punishable for so palpable a partiality in taking upon them to judge of matters of law which they have nothing to do with, and are presumed to be ignorant of, contrary to the express direction of one, who by the law is appointed to direct them in such matters, and is to be presumed of ability to do it. 2 *Hawk. P. C.* 148. for which is cited 2 *Jon*. 15, 16. *Vaugh*. 114-5. *Palm*. 363. and see *Kel*. 50.

Also if a judge, for the better direction and information of a jury, shall ask them their opinions concerning such a particular fact, and they shall refuse to answer him, and obstinately insist to deliver in their verdict, as they think fit, contrary to his direction, it seems questionable, whether they may not be fined in such case also, unless an attaint lie against, them; for that it is the duty of jurors to take the advice and information of the court, in order to be governed by it, as far as shall be consistent with their consciences. 2 *Hawk. P. C.* 149.

For more learning on this subject, see 3 Bac. Abr. *tit*. Juries, *and* 21 Vin. Abr. *tit.* Trial.

Cunningham Law Dictionary, book II, unpaginated.

12.3.1.5Blackstone, 1769

V. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter[e], "*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terrae.*"

The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large[f]. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving

the admirable ballance [*sic*] of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits; indictments, informations, and appeals: which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way to treating it.

When therefore a prisoner on this arraignment has pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is, freeholders, without just exception, and of the *visne* or neighbourhood; which is interpreted to be of the county where the

fact is committed[g]. If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be impanelled by writ of *venire facias* to the sheriff, as in civil causes: and the trial in case of a misdemesnor is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence. But, before commissioners of *oyer* and *terminer* and gaol delivery, the sheriff by virtue of a general precept directed to him beforehand, returns to the court a panel of forty eight jurors, to try all felons that may be called upon their trial at that session: and therefore it is there usual to try all felons immediately, or soon, after their arraignment. But it is not customary, nor agreeable to the general course of proceedings, unless by consent of parties, to try persons indicted of smaller misdemesnors at the same court in which they have pleaded *not guilty*, or *traversed* the indictment. But they usually give security to the court, to appear at the next assises or sessions, and then and there to try the traverse, giving notice to the prosecutor of the same.

In cases of high treason, whereby corruption of blood may ensue, or misprision of such treason, it is enacted by statute 7 W. III. c. 3. first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indictment, but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment[h]; for then is his time to take any exceptions thereto, by way of pleas or demurrer: thirdly, that he shall also have a copy of the panel of jurors two days before his trial: and, lastly, that he shall have the same compulsive process to bring in his witnesses *for* him. And, by statute 7 Ann. c. 21. (which did not take place till after the decease of the late pretender) all persons, indicted for high treason or misprision thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53. else it had been impossible to have tried those offences in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of *oyer* and *terminer*[i]. And no person

indicted for felony is, or (as the law stands) ever can be, entitled to such copies, before the time of this trial[k].

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

Challenges may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes[l]. For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; that where an alien is indicted, the jury should be *de medietate*, or half foreigners; (which does not indeed hold in treasons[m], aliens being very improper judges of the breach of allegiance to the king) that on every panel there should be a competent number of hundredors; and that the particular jurors should be *omni exceptione majores*; not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum*.

Challenges upon any of the foregoing accounts are stiled [*sic*] challenges *for cause*; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he had conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4. which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However it is held, that the king need not assign his

cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn[n].

The peremptory challenges of the prisoner must however have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the common law to be the number of thirty five; that is, one under the number of three full juries. For the law judges that five and thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has not intention to be tried at all. And therefore it dealt with one, who peremptorily challenges above thirty five, and will not retract his challenge, as with one who stands mute or refuses his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason[o]. And so the law stands at this day with regard to treason, of any kind.

But by statute 22 Hen. VIII. c. 14. (which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & Mar. c. 10.) by this statute, I say, no person, arraigned for felony, can be admitted to make any more than *twenty* peremptory challenges. But how if the prisoner will peremptorily challenge twenty one? What shall be done? The old opinion was, that judgments of *peine forte et dure* should be given, as where he challenged thirty six at the common law[p]: but the better opinion seems to be[q], that such challenge shall only be disregarded and overruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty one, neither doth the statute inflict it; and so heavy a judgment shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge more than twenty;" the evident construction of which is, that any farther challenge shall be disallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes[r], till the number of twelve is sworn, "well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give, according to their evidence."

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by

the counsel for the crown, or prosecution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated[s]. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proccedings against him are legal and strictly regular[t]) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it strictly speaking a part of our antient law: for the mirrour[u], having observed the necessity of counsel in civil suits, "who know how to forward and defend the cause, by the rules of law and customs of the realm," immediately afterwards subjoins; "and more necessary are they for defence upon indictments and appeals of felony, than upon other venial causes[w]." And, to say that truth, the judges themselves are so sensible of this defect in our modern practice, that they seldom scruple to allow a prisoner counsel to stand by him at the bar, and instruct him what questions to ask, or even to ask questions for him, and with respect to matters of fact: for as to matters of law, arising on the trial, they are *intitled* to the assistance of counsel. But still this is a matter of too much importance to be left to the good pleasure of any judge, and is worthy the interposition of the legislature; which has shewn it's inclination to indulge prisoners with this reasonable assistance, by enacting in statute 7 W. III. c. 3. that persons *indicted* for such high treason, as works a corruption of the blood, or misprision thereof, may make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge: and this indulgence, by statute 20 Geo. II. c. 30. is extended to parliamentary *impeachments* for high treason, which were excepted in the former act.

The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are however a few leading points, wherein, by several statutes and resolutions, a difference is made between civil and criminal evidence.

First, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI. c. 12. 5 &6 Edw. VI. c. 11. and 1 & 2 Ph. & Mar. c. 10. *two* lawful witnesses are required to convict a prisoner; except in cases of coining[x], and counterfeiting the seals; or unless the party shall willingly and without violence confess the same. By statute 7 W. III. c. 3. in prosecutions

for those treasons to which that act extends, the same rule is again enforced, with this addition, that the confessions of the prisoner, which shall countervail the necessity of such proof, must be in open court; and it is declared that both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act of the same species of treason[y], and not of distinct heads or kinds: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. And therefore in sir John Fenwick's case, in king William's time, where there was but one witness, an act of parliament[z] was made on purpose to attaint him of treason, and he was executed[a]. But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule[b], that those laws which condemn a man to death *in any case* on the deposition of a single witness, are fatal to liberty: and he adds this reason[c], that the witness who affirms, and the accused who denies, makes an equal ballance; there is a necessity therefore to call in a third man to incline the scale. But this seems to be carrying matters too far: for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness: must these therefore escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another[d]. In cases of treason also there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him: though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

Secondly, though from the reversal of colonel Sidney's attainder by act of parliament in 1689[e] it may be collected[f], that the mere similitude of handwriting in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury[g].

Thirdly, by the statute 21 Jac. I. c. 27. a mother of a bastard child, concealing it's death, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it[h].

Fourthly, all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And sir Matthew Hale in particular[j] lays down two rules, most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

Lastly, it was an antient and commonly received practice[i] (derived from the civil law, and which also to this day obtains in the kingdom of France[k]) that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered, to the honour of Mary I, (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous[l]) that when she appointed sir Richard Morgan chief justice of the common-pleas, she injoined him, "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness' pleasure was, that whatsoever could be brought in favour of the subject should be admitted to be heard: and moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject."[m] Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4.) it was provided that any person, impeached for such felony, "should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence:" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath[n]: the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke[o] protests very strongly against this tyrannical practice: declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as *scintilla juris* against it[p]. And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland, when felonies committed by Englishmen in

Scotland[q] were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it[r] against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland[s], "that in all such trials, for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced for his clearing and justification." At length by the statute 7 W. III. c. 3. the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. st. 2. c. 9. that in all cases of treason and felony, all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him.

When the evidence on both sides is closed, the jury cannot be discharged till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case, give a *privy* verdict[t]. But an open verdict may be either general, guilty, or not guilty; of special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *chuse* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths: and, if their verdict be notoriously wrong, they may be punished and the verdict set aside by attaint at the suit of the king; but not at the suit of the prisoner[u]. But the practice, heretofore in use, of fining, inprisoning [*sic*], or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional and illegal: and is treated as such by sir Thomas Smith, two hundred years ago; who accounted "such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England[w]." For, as sir Matthew Hale well observes[x], it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions:—unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances[y], where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench; for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial, where the prisoner was *acquitted* upon the first[z].

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation[a]; except he be appealed of felony within the time limited by law. But if the jury find him guilty[b], he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offence and pleading guilty, or by his being found so by the verdict of this country.

When the offender is thus convicted, there are two collateral circumstances that immediately arise. 1. On a conviction, in general, for any felony, the reasonable expenses of prosecution are by statute 25 Geo. II. c. 36. to be allowed to the prosecutor out of the county stock, if he petitions the judge for that purpose; and by statute 27 Geo. II. c. 3. poor persons, bound over to give evidence, are likewise entitled to be paid their charges, as well without conviction as with it. 2. On a conviction of larciny [*sic*] in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11. For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again[c]. But, it being considered that the party, prosecuting the offender by indictment, deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts, that if any person be convicted of larciny by the evidence of the party robbed, he shall have a full restitution of his money, goods, and chattels; or the value of them out of the offender's goods, if [he] has any, by a writ to be granted by the justices. And this writ of restitution shall reach the goods so stolen, notwithstanding the property[d] of them is endeavoured to be altered by sale in market overt[e]. And, though this may seem somewhat hard upon the buyer, yet the rule of law is that "*spoliatus debet, ante omnia, restitui;*" especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer; the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them[f], unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But such action lies not, before prosecution; for so felonies would be made up and healed[g]: and also recaption is unlawful, if it

be done with intention to smother or compound the larciny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter[h].

It is not uncommon, when a person is convicted of a misdemesnor, which principally and more immeidately affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to *speak with the prosecutor*, before any judgment is pronounced; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done, to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice: and, though it may be intrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter-sessions; where prosecutions for assaults are by this means too frequently commenced, rather for private lucre than for the great ends of public justice. Above all, it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant: for by this means, the rules of evidence are intirely subverted; the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. “This,” says an elegant writer[i], (who pleads with equal strength for the *certainty* as for the *lenity* of punishment) “may be an act of good-nature and humanity, but it is contrary to the good of the public. For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others.”

Blackstone Commentaries, bk. 4, ch. 27; vol. 4, pp. 342–57.

SEE ALSO 13.3.1

12.3.2CASE LAW

12.3.2.1Earl of Shaftesbury’s Trial, 1681

[Then a Bill of High-Treason was offered against the Earl of Shaftesbury; and Sir Francis Withins moved, That the evidence might be heard in court.]

Foreman. My Lord Chief Justice, it is the opinion of the jury, that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it; and they insist upon it as their right to examine in private, because they are bound to keep the king’s secrets, which they cannot do, if it be done in court.

[Pemberton,] L.C.J. Look ye, gentlemen of the jury, it may very probably be, that some late usage has brought you into this error, that it is your right, but it is not your right in truth… . What you say concerning keeping your counsels, that is quite of another nature, that is, your debates, and those things, there you shall be in private, for to consider of what you hear publicly. But certainly it is the best way, both for the king, and for you, that there should, in a case of this nature, be an open and plain examination of the witnesses, that all the world may see what they say.

Foreman. My lord, if your lordship pleases, I must beg your lordship’s pardon, if I mistake in anything, it is contrary to the sense of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, “That they shall keep the counsel’s, and their own secrets:” Now, my lord, there can be no secret in public; the very intimation of that doth imply, that the examination should be secret; besides, my lord, I beg your lordship’s pardon if we mistake, we do not understand any thing of law.

Mr. *Papillon* [a juror]… . If it be the ancient usage and custom of England, that hath never been altered from time to time, and hath continued so, we desire your lordship’s opinion upon that; as we would not do any that may be prejudicial to the king, so we would not do the least that should be prejudicial to the liberties of the people; if it be the ancient custom of the kingdom to examine in private, then there is something may be very prejudicial to the king in this public examination; for sometimes in examining witnesses in private, there come to be discovered some persons guilty of treason, and misprision of treason, that were not known, nor thought on before. Then the jury sends down to the court, and gives them intimation, and these men are presently secured; whereas, my lord, in case they be examined in open court publicly, then presently there is intimation given and these men are gone away. Another thing that may be prejudicial to the king, is, that all the evidences here, will be foreknown before they

come to the main trial upon issue by the petty jury; then if there be not a very great deal of care, these witnesses may be confronted by raising up witnesses to prejudice them, as in some cases it has been: Then besides, the jury do apprehend, that in private they are more free to examine things in particular, for the satisfying their own consciences, and that without favour or affection; and we hope we shall do our duty.

[Pemberton,] L.C.J… . [T]he king's counsel have examined whether he hath cause to accuse these persons, or not; and, gentlemen, they understand very well, that it will be no prejudice to the king to have the evidence heard openly in court; or else the king would never desire it.

Foreman. My lord, the gentlemen of the jury desire that it may be recorded, that we insisted upon it as our right; but if the court overrule, we must submit to it.

Howell's State Trials, vol. 8, pp. 759, 771–74.

12.3.2.2Respublica v. Shaffer, 1788

AFTER some conversation with the Grand Inquest, the Attorney General informed the court, that a list of eleven persons had been presented to him by the Foreman, with a request, that they might be qualified and sent to the jury, as witnesses upon a bill then depending before them. He stated that the list had been made out by the defendant's bail: that the persons named were intended to furnish testimony in favor of the party charged, upon facts with which the Inquest, of their own knowledge, were unacquainted; and he concluded with requesting, that the opinion of the court might be given upon this application. The Chief Justice, accordingly, addressed the Grand Jury to the following effect:

M'Kean, *Chief Justice*.—Were the proposed examination of witnesses, on the part of the Defendant, to be allowed, the long-established rules of law and justice would be at an end. It is a matter well known, and well understood, that by the laws of our country, every question which affects a man's life, reputation, or property, must be tried by *twelve* of his peers; and that their *unanimous* verdict is, alone, competent to determine the fact in issue. If, then, you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the Petit Jury, you will supersede the legal authority of the court, in judging of the competency and admissibility

of witnesses, and, having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the law of the land. This point has, I believe, excited some doubts upon former occasions; but those doubts have never arisen in the mind of any lawyer, and they may easily be removed by a proper consideration of the subject. For, the bills, or presentments, found by a grand Jury, amount to nothing more than an official accusation, in order to put the party accused upon his trial; 'till the bill is returned, there is, therefore, no charge from which he can be required to exculpate himself; and we know that many persons, against whom bills were returned, have been afterwards acquitted by a verdict of their country. Here, then, is the just line of discrimination: It is the duty of the Grand-Jury to enquire into the nature and probable grounds of the charge; but it is the exclusive province of the Petit Jury, to hear and determine, with the assistance, and under the direction of the court, upon points of law, whether the Defendant is, or is not guilty, on the whole evidence, for, as well as against, him. —— You will therefore, readily perceive, that if you examine the witnesses on both sides, you do not confine your consideration to the probable grounds of charge, but engage completely in the trial of the cause; and your return must, consequently, be tantamount to a verdict of acquittal or condemnation. But this would involve us in another difficulty; for, by the law, it is declared, that no man shall be twice put in jeopardy for the same offence: and, yet, it is certain, that the enquiry now proposed by the Grand Jury, would necessarily introduce the oppression of a double trial. Nor is it merely upon maxims of law, but, I think, likewise, upon principles of humanity, that this innovation should be opposed. Considering the bill as an accusation grounded entirely upon the testimony in support of the prosecution, the Petit Jury receive no biass [*sic*] from the sanction which the indorsement of the Grand Jury has conferred upon it.—But, on the other hand, would it not, in some degree, prejudice the most upright mind against the Defendant, that on a full hearing of his defence, another tribunal had pronounced it insufficient?—which would then be the natural inference from every *true bill*. Upon the whole, the court is of opinion, that it would be improper and illegal to examine the witnesses, on behalf of the Defendant, while the charge against him lies before the Grand-Jury.

One of the Grand Inquest then observed to the court, that "there was a clause in the qualifications of the Jurors, upon which he, and some of his brethren, wished to hear the interpretation of the Judges—to wit—what is the legal acceptation of the words *"diligently to enquire?"["]* To this the Chief

Justice replied, that "the expression meant, *diligently to enquire* into the circumstances of the charge, the credibility of the witnesses who support it, and, from the whole, to judge whether the person accused ought to be put upon his trial. For, (he added), though it would be improper to determine the merits of the cause, it is incumbent upon the Grand Jury to satisfy their minds, by a *diligent enquiry*, that there is a probable ground for the accusation, before they give it their authority, and call upon the Defendant to make a public defence."

1 Dall. 236 (Pa. O. & T., 1788).

12.3.2.3Holmes v. Comegys, 1789

… Shippen, *President:*—It would be of very dangerous consequence, if it was established, that a commercial agent was not amenable as a witness in a Court of Justice, in a cause against his constituent. It is straining the matter of privilege too far. And, if the law makes him a witness, we are too fond of getting at the truth, to permit him to excuse himself from declaring it, because he conceives, that, in point of delicacy, it would be a breach of confidence.

1 Dall. 439 (Pa. C.P. 1789).

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

2 Earlier, on September 9, the Senate took the following language from the tenth Article and added it to the seventh Article; *see* 7.1.1.13, "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury… .

3 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

1 *Fortesc. de Laud. Leg. Ang. cap*. 25. *Co. Lit*. 155. *Co. Preface to* 3*d and* 8*th Report*.

2 *Spelm. Gloss. verbo* Jurata. *Glan. lib*. 2. *cap*. 7.

3 *Cro. Eliz*. 654. 3 *Inst*. 30. 2 *Inst*. 387. 2 *Hal. Hist. P. C*. 154.

(a) That in *Middlesex* three Grand Juries are returned every Term to serve in *B. R*. every Jury consisting of sixteen, seventeen, or more, to inquire of Offences criminal committed in the several Parts of the County of *Middlesex* thro' the whole County; the Reason hereof is, that in *Middlesex* there are three Hundreds, and for

every several Hundred there is a particular Jury returned to serve for that Hundred only. 2 *Lil. Reg*. 124. — That in some Counties which consist of Guildable, and such Franchise where antiently several Justices of Gaol-Delivery sat, as in *Suffolk*, there are two Grand Juries, one for the Guildable, another for the Franchise, because there are two several Commissions of Gaol-Delivery. 2 *Hal. Hist. P. C*. 26, 154.

4 2 *Hal. Hist. P. C*. 154.

5 *Cro. Eliz*. 654. 3 *Inst*. 30. 12 *Co*. 99. 2 *Rol. Rep*. 82. 2 *Hal. Hist. P. C*. 154-5.

(b) Where Indictments found in inferior Courts have been quashed for Want of the Words *Proborum* & *Legalium Hominum* in the Caption. *Cro. Eliz*. 751. *Cro. Jac*. 635. *Palm*. 282. 2 *Rol. Rep*. 400 2 *Rol. Abr*. 82. *Poph*. 202. 1 *Keb*. 629. 2 *Keb*. 471. 3 *Mod*. 122. 1 *Lev*. 208. — But this Exception has been often overruled, because *Prima Facie* all Men shall be intended honest and lawful: 1 *Keb*. 50. 2 *Keb*. 135, 284. *Cro. Jac*. 41. 1 *Sid*. 106, 367.

(c) Tho' in a personal Action. 2 *Hal. Hist. P. C*. 155. But for this *vide* 3 *Inst*. 32. 21 *H*. 6. 30. *pl*. 17. *Fitz*. Tit. *Process* 208. *Cro. Car*. 134, 147. 1 *Jones* 198. 12 *Co*. 99.

6 2 *Hal. Hist. P. C*. 155. But for this *vide* 2 *Hawk. P. C*. 216.

(a) *Viz. Westminst*. 2. *cap*. 28. that old Men above the Age of seventy shall not be put on Juries. — By *Westm*. 2. *cap*. 38. shall not have less than 20 *s*. yearly. — By 31 *E*. 1. commonly called the Statute *de his qui ponendi sunt in Assisis*, shall have Tenements to the Value of 40*s*. yearly. — By 28 *E*. 1. commonly called the Statute of *Articuli super Chartas*, none are to be put on Inquests and Juries but such as be next Neighbours, most sufficient, and least suspicious; and the like is enacted by 42 *E*. 3. *cap*. 11. And to the same Purpose are the 23 *E*. 3. *cap*. 6. and 34 *E*. 3 *cap*. 4.

7 12 *Co*. 99. 3 *Inst*. 33.

8 12 *Co*. 98. 3 *Inst*. 33. *Cro. Car*. 134.

(b) But it seems doubtful whether a Coroner's Inquest be within it. 1 *Jones* 198.

9 3 *Inst*. 34. *Cro. Car*. 134. 1 *Jones* 198.

10 3 *Inst*. 34. *Cro. Car*. 147.

11 11 *H* 4. 41. *pl*. 8. *S. P. C*. 88. 3 *Inst*. 33. *Cro. Car*. 134, 147. 1 *Jones* 198.

12 2 *Hal. Hist. P. C*. 156, 265.

13 3 *Inst*. 33. 2 *Hawk. P. C*. 219.

14 *Trials per Pais* 80. *F. N. B*. 107. *Finch of Law* 400, 484. — A Writ of Inquiry of Waste by thirteen was holden good. *Cro. Car*. 414.

(a) That to make a Jury in a Writ of Right, which is called the Grand Assise, there must be sixteen, *viz*. four Knights, and twelve others. *Trials per Pais* 82. Or it may consist of a greater Number. 2 *Rol. Abr*. 674. — The Jury in Attaint, called the Grand Jury, must be twenty-four; but if the Issue be upon a Matter out of the Point of the Attaint, as upon a Plea of Nontenure, the Trial shall be by twelve. *Trials per Pais* 82.

(b) That a Juror can be excepted against on an Inquest of Office. 6 *Mod*. 43. — That a Jury cannot be attainted on an Inquest of Office. *Carth*. 362.

15 1 *Vent*. 113.

16 *Cro. Car*. 259. 1 *Sid*. 233. 3 *Keb*. 326.

17 *March* 31.

18 2 *Inst*. 568. 3 *Inst*. 168. 2 *Hawk. P. C*. 405.

19 2 *Inst*. 568. 1 *Sid*. 364.

(a) 2 *Hawk P. C*. 406.

20 2 *Hal. Hist. P. C*. 260 1. 2 *Hawk. P. C*. 406.

21 *Dyer* 118. 2 Hal. Hist. 260. 2 Hawk. P. C. 406.

22 *Co. Lit*. 155. *a*.

23 5 *Co*. 36. *Cro. Eliz*. 1587. *Cro. Car*. 223.

24 2 *Hal. Hist. P. C*. 263.

25 2 *Hal. Hist. P. C*. 263.

(c) But it has been held, that in Trials on the Crown Side for Criminals the Sheriff may be commanded to return any Number the Court pleased, and accordingly in Sir *H. Vane*'s Trial the Sheriff returned sixty. *Keling* 16.

26 *Godb*. 370. 1 *Keb*. 310.

(d) This Statute extends not to Jurors returned for Trial of criminal Persons. *Kel*. 16.

27 (e) By the 9th *Sect*. of this Statute the Number in *Wales* for the Grand Sessions not to be less than ten, nor more than fifteen out of every Hundred, and to be summoned eight Days before. — By the 10th *Sect*. the Number in the Counties Palatine the same as in other Parts of *England*, and to be summoned fourteen Days before.

28 *Trials per Pais* 60, 61.

29 *Dyer* 215. *pl*. 51, 284. *pl*. 34. *Cro. Car*. 484. 2 *Rol. Abr*. 665-6. *Keilw*. 176. *pl*. 11. 2 *Jon*. 34.

30 *Dyer* 193. *pl*. 28, 284. *pl*. 34. 2 *Lev*. 5, 6. 2 *Sand*. 336. 6 *Mod*. 246.

31 2 *Leon*. 110. 1 *Keb*. 195. 6 *Mod*. 246. cont. 1 *Sid*. 316.

32 *Keilw* 176. *pl*. 70.

(a) The Statute of 6 *H*. 6. *cap*. 2. provides also for Assises. 3 Inst. 175.

33 2 *Hawk. P. C*. 410.

34 2 *Hawk. P. C*. 410.

35 *Vide* the Statute 7 & 8 *W*. 3 *cap*. 32. which gives a *Venire Facias de Novo*, in Case the Cause be not tried the first Assises.

36 1 *Vent*. 28. *Raym*. 84.

37 *Carth*. 465.

(a) Where the Jurors lying all Night could not agree, a Juror by Consent was drawn. *Cro. Car*. 484.

38 *Ca. Law and Eq*. 390. *Huet* and *Bainard*.

39 (b) It hath been held since this Statute, that a *Tales de Circumstantibus* was allowable upon special Juries, by *Raymond* C. J. in the Case of *The King* versus *Franklin, Trin. 5 Georg*. 2.

40 10 *Co*. 104. *Dyer* 359.*pl*. 2. 2 *Rol. Abr*. 671. *Plow*. 100. 2 *Hal. Hist. P. C*. 266.

(c) For this Purpose, with the Statutes 35 *H*. 8. *cap*. 6. made perpetual by 2 & 3 *E*. 6. *cap*. 32. 4 & 5 *Ph. & Mar*. *cap*. 7. 5 *Eliz. cap*. 25. 14 *Eliz. cap*. 9. 7 & 8 *W*. 3. *cap*. 32.

41 *Cro. Car*. 484. 10 *Co*. 104. 2 *Rol. Abr*. 671. and in *Dyer* 359.*pl*.2. it is said, that if a full Jury do not appear, and the Plaintiff pray a *Distringas* without praying any *Tales*, the Court ought to grant it at the Prayer of the Defendant.

42 1 *Buls*. 121. *Dyer* 213. *pl*. 41.

(d) But a *Tales de Circumstantibus* may be of any uncertain Number. 10 *Co*. 105 *a*.

43 10 *Co*. 105. *a*. *Keilw*. 176.

44 10 *Co*. 104*; Dyer* 245. *pl*. 64.

45 *Cro. Eliz*. 502. 2 *Rol. Abr*. 671.

46 1 *Rol. Abr*. 798.

47 *Cro. Jac*. 677.

48 1 *Lev*. 223. *Raym*. 367. 1 *Keb*. 490. 6 *Mod*. 246.

49 *Keilw*. 176. *p*. 10. *Plow*. 100. *Yelv*. 23. *Jenk*. 340.

(a) That before Justices of Gaol-Delivery this Learning of *Tales* is not of much Use, because there is no particular Precept to the Sheriff, to return either Jury or *Tales*, but the general Precept before the Sessions, and the Award or Command of the Court upon the Plea of the Prisoner. 2 *Hal. Hist. P. C*. 266.

50 *Mich*. 6 *Geo*. 2. in *B. R. Bell* ver. *Knight*, *vide* 2 *Rol. Abr*. 672. *Styl*. 16.

51 2. *Lil. Regist*. 123. that the Court may order a Jury of Merchants if they think it convenient. 2 *Lil. Regist*. 122.

52 2 *Lil. Regist*. 127. 1 *Salk* 405.

53 1 *Salk*. 405.

54 1 *Mod. Ca. Law and Eq*. 248.

55 2 *Jon*. 222.

56 1 *Mod. Ca. Law and Eq*. 245. *The King* ver. *Burridge*.

57 *The King* ver. *Johnson. Mich*. 8 *Geo*. 2. in *B. R*.

58 *Co. Lit*. 156 a.

(a) For the several Significations of the Word Challenge *vide Co. Lit*. 155. *b*.

59 *Co. Lit*. 156.

60 *Co. Lit*. 156.

61 *Co. Lit*. 156.

62 *Co. Lit*. 156.

(a) But by *Finch of Law* 402. these are Challenges to the Favour only.

63 *Co. Lit*. 156.

64 *Co. Lit*. 156. 1 *Leon*. 88.

(b) That being Cousin, tho' in 8th or 9th Degree, is sufficient, *Dyer* 319. *a. pl*. 13. —— The Array of a Panel, because the Sheriff was Cousin to the Plaintiff; and upon a Traverse it was found that they were Cousins, but not in such Manner as the Defendant had alledged; and *per Cur*. the Array was quashed, for the Manner is not material, but whether Cousin or not. *Owen* 44.

65 *Dyer* 367. *pl*. 40.

66 1 *Rol. Rep*. 328. *Hutt*. 25. *Cro. Jac*. 21. *Moor* 894. *Eyre* ver. *Banister*.

(c) It is said, that where the Defendant justifies as Servant to *J. S*. and that the Land is the Freehold of *J. S*. it is a principal Challenge, that a Juror is within the Distress of *J. S*. for that the Title is to be tried. *Hutt*. 25. —— But in this Case of an Ejectment it has been held, in the House of Lords, in the Case of *Holborn* ver. *Banningtun* 1719. that the Lessor of Plaintiff, being a Peer, and no Knight returned, was no Cause of Challenge, because he did not appear to be Party to the Record. —— And the S. P. was resolved *Mich*. 9 *Georg*. 2. between *Grimston*, Lessee of Lord *Gower*, and *Gardner; & vide Skin*. 229. S. P.

67 *Cro. Eliz*. 363 *Hore* ver. *Broom*.

68 2 *Vent*. 58. in the Case of the Sheriff of *Bucks*.

69 *Cro. Eliz*. 581; *Cham* ver. *Matthew*.

(a) But *Cro. Jac*. 547. S.P. seems to have been adjudeed *contra*.

(b) *Vid. Plow*, 74.

70 *Co. Lit*. 156 *b*. 157 *b*.

71 *Fortes. de Laud. Leg. Ang. cap*. 23. 2 *Inst*. 27.

72 *Co. Lit*. 156. *b*. 157. *b*. 172. *b*. 7 *Co*. 18. in *Calvin*'s Case. 2 *Rol. Abr*. 656.

73 *Co. Lit*. 6. *b*. 155. *b*. 158 *a. Cro. Car*. 134. 2 *Buls*. 158. 2 *Rol. Abr*. 949. 2 *Lev*. 263. *Raym*. 380. 1 *Hal. Hist. P. C*. 303. 2 *Hawk. P. C*. 417-8.

74 *Raym*. 417. *Attorn. Gen*. ver. *Blood & al*. 1 *Keb*. 563. S. C.

(a) *Libros* for *Liberos* in the *Venire* amended after Verdict. *Cro. Eliz*. 618.

75 *Raym*. 485. 1 *Vent*. 366.

76 *Keilw*. 46. *Cro. Eliz*. 413. 2 *Hawk. P. C*. 415. 2 *Hal. Hist. P. C*. 272.

77 2 *Hawk. P. C*. 415. and the Authorities there cited. *State Trials, Vol*. 6. 58. *Francia*'s Case, *fol*. 245. *Ibid. Layer*'s Case.

78 *Keilw*. 46. *p*. 2. 92. *pl* 5. *Dyer* 9. *pl* 26. *Co. Lit*. 156. *b*. 157. *a*. 272. *Plow*. 85. *a*. 2 *Rol. Abr*. 648.

(a) In the Construction hereof it has been held, that a Juror can neither be challenged by the Parties for being returned contrary to these Acts, nor alledge such Matter himself for his Discharge, but must take his Remedy by Action against the Sheriff, or by Writ of Privilege, for his Discharge. 2 *Inst*. 448.

(b) *Keilw*. 92.

(c) *Cro. Eliz*. 413.

79 2 *Rol. Abr*. 647. *Keilw*. 92. 3 *Mod*. 149.

80 By the 1 *R*. 3. *cap*. 4. a Juror in the Torn was to have 20 *s*. Freehold, and 1 *l*. 6 *s*. 8 *d*. Copyhold. — By the 27 *Eliz. cap*. 6. the 40 *s*. by 2 *H*. 5 *cap*. 3. was extended to 4 *l*.

(a) But by the Common Law a Freehold in Ancient Demesne was not sufficient. *Co. Lit*. 156. *b*.

81 1 *Vent*. 366. *Skin*. 91.

(b) *Stat. Tri. Vol*. 6. *sol*. 58. *Franchia*'s Trial.

82 *Vide* 2 *Hawk P. C*. 182-3. 403. *Vide* Tit. *Actions Local and Transitory*, 5 *Mod*. 405.

83 2 *Rol. Abr*. 601, 603.

84 5 *Mod*. 223.

85 *Hob*. 330. 2 *Brownl*. 272.

(a) If the Issue be to be tried by two Counties, and one full Inquest appear of one County, but the Inquest remain for Default of Jurors of the other County, a *Tales* shall be awarded to the County where the Default is, not to the other. *Trials per Pais* 69.

86 *Co. Lit*. 157. *a. Hard*. 228.

(b) It is said, that upon Indictments of Treason or Felonies, the Prisoner pleading Not guilty, there ought at Common Law to be four Hundredors returned, the Statutes requiring six, and two Hundredors, not extending to Treason or Felony, — But my Lord *Hale* says, that he never knew any Challenge for Default of Hundredors upon a Trial of an Indictment for Felony or Treason. 2 *Hal. Hist. P. C*. 272.

(c) By 35 *H*. 8. *cap*. 6.

(d) By 27 *Eliz. cap*. 6.

87 For this *vide* 2 *Hawk. P. C*. 182.

88 *Co. Lit*. 157. *a*.

89 2 *Rol. Abr*. 596.

(a) It is said, that no Inhabitant of a County ought to be a Juror for the Trial of an Issue, whether the County be bound to repair a Bridge or not. 6 *Mod*. 307.

90 *Co. Lit*. 158. *a. Dyer* 231. *pl*. 3.

91 *Co. Lit*. 157. *a*.

92 *Co. Lit*. 157. *a*.

93 *Co. Lit*. 158. *a*.

94 *Co. Lit*. 158. *a*.

95 *Co. Lit*. 157. *b*.

(a) Challenges are allowed where the Issue concerns a City or Corporation, and they are to make the Panel, or where any of their Body be to go on the Jury, or any of Kin unto them, tho' the Body Corporate be not directly Party to the Suit. *Hob*. 87. 1 *Sand*. 344. — So where a Dean and Chapter bringing an Assise, a Juror was challenged because he was Brother to one of the Prebendaries. *Hob*. 87.

96 *Co. Lit*. 157.

97 *Co. Lit*. 158. 9 *Co*. 71. *a*.

98 *Co. Lit*. 158.

99 *Co. Lit*. 157. *Cro. Eliz*. 33. *pl*. 13.

100 1 *Sid*. 244. 2 *Hawk. P. C*. 418.

101 2 *Hawk. P. C*. 418.

102 2 *Hawk. P. C*. 418.

103 2 *Hawk. P. C*. 418.

104 2 *Hawk. P. C*. 418.

105 1 *Vent*. 309. which seems cont. to *Cro. Eliz*. 663.

106 *Allen* 29.

107 1 *Salk*. 152.

108 *Dyer* 45. *a. pl*. 27.

109 *Vide* Tit. *Privilege*.

(a) *Dyer* 314. *Moor* 167.

(b) 2 *Rol. Abr*. 646. *Co. Lit*. 157. 9 *Co*. 49. 6 *Co*. 53. 1 *Jones* 153.

110 *Pasch*. 17. *Car*. 2. Sir *Edw. Bainton*'s Case.

111 4 *Inst*. 269. — And it is said, that they may have a Writ *De non ponendis in Assisis & Juratis* against the Sheriff, or any one who hath Return of Writs; and if notwithstanding such Writ the Sheriff will return them, they may have an Attachment. 1 *Co*. 105. — A Juror surmised at the Bar, that he was a Tenant in Antient Demesne, and had his Charter in his Hand, and prayed to be exempted from the Jury, and discharged; but the Court did not regard it, but caused him to be sworn; and it was held, that his proper Remedy was against the Sheriff, and that if he had made Default and lost Issues, he might shew his Charter in the Exchequer upon the Amercement estreated, and there he should be discharged. 1 *Leon*. 207. — By the Common Law a Freehold in Antient Demesne was not a sufficient Qualification for a Juror. 9 *H*. 7. 1. *pl*. 2. *Bro. Challenge* 157. *Co. Lit*. 156. *b*. But it is made so by 4 & 5 *W*. 3.

112 1 *Sid*. 127, 243. *Raym*. 113. *Hard*. 389, &*c*.

113 2 Inst. 446. *F. N. B*. 165.

114 Dalt. Sher. 121. Trials per Pais 86.

(a) Where before the Return the Party became a Minister of the Church, and at the Day of the Return he appeared, and prayed to be discharged, according to the Privilege of those of the Ministry; but the Court would not allow of his Prayer, because that at the Time of the Panel made he was a Layman. 4 *Leon*. 190. *Beecher*'s Case.

(b) In which Case a Peer cannot challenge any of his Peers, because the whole Peers sit upon him, who are his proper Judges. *Moor* 621. *Co. Lit*. 156.

115 *Co. Lit*. 156. *a*. 6 *Co*. 53.

(c) That a Bishop being indicted for a Trespass, a Knight ought to be returned. 1 *Leon*. 5.

(d) That if a Knight be but returned on a Jury when a Nobleman is concerned, it is not material whether he appear and give his Verdict or no. 1 *Mod*. 226.

116 *Skin*. 229.

117 1 *Rol. Abr*. 37. between the Earl of *Worcester* and *Frade*.

(a) Yet this being the Error of the Court, it is said it may be assigned by either. 2 *Sand*. 258. — and it is said, that the other Party may take Advantage of a Knight's not being returned, as well as the Peer. 2 *Show*. 423.

118 1 *Mod*. 226. 2 *Mod*. 182. Countess of *Northumberland*'s Case.

119 *Skin*. 229. Countess of *Conway*'s Case. 2 *Show*. 422-3.

120 *Mich*. 9 *Georg*. 2. in *B. R*. in the Case of *Grinston* and *Gardner*; & *vide supra* of Challenges to the Array.

121 *Co. Lit*. 156. *a*. 1 *Leon*. 303. *Dals*. 68. *Jenk*. 11, 89.

122 2 *Hawk. P. C*. 419.

(b) And therefore it hath been adjudged, *quorum quilibet habeat quatuor Libratas terrae, &c*. shall be applied to the *English* only. *Cro. Eliz*. 272, 841.

123 2 *Hawk P. C*. 419.

124 2 *Hawk. P. C*. 419.

125 *Dyer* 28. *pl*. 180 145. *pl*. 60. 304. *pl*. 51. 357. *pl*. 45. 2 *Rol. Abr*. 643. *Cro. Eliz*. 869.

(a) If upon an Indictment of Felony against an Alien he plead Not guilty, and a common Jury be returned, if he doth not surmise his being an Alien, before any of the Jury sworn, he hath lost that Advantage; but if he alledge that he is an Alien, he may challenge the Array for that Cause, and thereupon a new Precept or *Venire* shall issue, or an Award be made of a Jury *de Medietate Linguae*; but it is more proper for him to surmise it upon his Plea pleaded, and thereupon to pray it. 2 *Hal. Hist. P. C*. 272.

126 *Cro. Eliz*. 818.

(b) But this being only a Misreturn, is helped by Verdict in Cases within the Statutes of Jeofail. *Cro. Eliz*. 84.

(c) 10 *Co*. 104. *Cro. Eliz*. 305.

127 2 *Rol. Abr*. 643.

128 2 *Hawk. P. C*. 420.

129 2 *Hawk. P. C*. 420.

130 2 *Hal. Hist. P. C*. 271. 2 *Hawk. P. C*. 420.

131 *Lamb*. 4 *cap*. 14.

132 2 *Hal. Hist. P. C*. 268. 2 *Hawk. P. C*. 413.

133 2 *Hal. Hist. P. C*. 267. 2 *Hawk. P. C*. 413.

134 2 *Hal. Hist*. 267. 2 *Hawk. P. C*. 411. and several Authorities there cited.

135 2 *Hal. Hist. P. C*. 268.

136 2 *Hal. Hist. P. C*. 296, 270. 2 *Hawk. P. C*. 414.

137 2 *Hal. Hist. P. C*. 268.

138 2 *Hal. Hist. P. C*. 270.

139 2 *Hal. Hist. P. C*. 270.

140 *Co. Lit*. 156. 2 *Inst*. 431. 2 *Hal. Hist. P. C*. 271.

141 *Moor* 595. *Co. Lit*. 159.

142 *Co. Lit*. 156. 1 *Vent*. 309. *Raym*. 473. *Skin*. 82. 2 *Hal. Hist*. 271.

143 *Hob*. 235. *Vicars* ver. *Langham*

144 *Co. Lit*. 158. *a. Yelv*. 23. *Cro. Car*. 291. *Hob*. 235. 2 *Rol. Abr*. 658. *Jenk*. 310. 2 *Brownl*. 275. 2 *Hal. Hist. P. C*. 274.

145 *Co. Lit*. 158.*a*.

146 *Co. Lit*. 158. *a*.

147 *Co. Lit*. 158. *a*.

148 *Co. Lit*. 158. *a*.

149 *Co. Lit*. 158. *a*.

150 *Co. Lit*. 155. 157. *b*.

151 2 *Rol. Rep*. 363. *Co. Lit*. 158. 2 *Hal. Hist. P. C*. 275.

152 *Co. Lit*. 158. 2 *Hal. Hist. P. C*. 275.

153 2 *Hal. Hist. P. C*. 275.

154 *Co. Lit*. 158.

(a) And his Oath is, you shall well and truly try whether *A*. the Juryman challenged, stand indifferent between the Parties to this Issue. 1 *Salk*. 152. —— Where a Challenge is to the Array for Favour, the Plaintiff may either confess it, or plead to it; if he pleads, the Judges assign Triers to try the Array, which seldom exceed two, who being chose and sworn, the Associate, or Clerk in Court, doth declare and rehearse unto them the Matter and Cause of the Challenge, and after he hath so done, concludes to them thus; and so your Charge is to inquire, whether it be an impartial Array or a favourable one; and if they affirm it, the Clerk enters underneath the Challenge *Affirmatur*; but if the Triers find it favourable, then thus, *Calumpnia vera. Trials per Pais* 165.

155 *Palm*. 363.

(a) But *Q*. whether they are not in this respect to be considered as Jurors, and acting in a Judicial Capacity.

156 *Co. Lit*. 158. *Trials per Pais* 158. 1 *Salk*. 153.

(b) That one Witness to prove the Challenge is sufficient. 1 *Show*. 173.

157 *Keling* 9. *Trials per Pais* 158.

(c) 1 *Salk*. 153. *Coke*'s Trial.

158 *Skin*. 101. *Hutt*. 24.

(d) That such Bill must be, that he overruled the Challenge, not *quod recus'* the Challenge. *Skin*. 101.

159 3 *Leon*. 222.

160 2 *Hal. Hist. P. C*. 293.

(a) But if thirteen are by Mistake sworn, the Swearing of the last by Mistake is void, and the other twelve

shall serve. — But if eleven be sworn by Mistake, no Verdict can be taken of the eleven; and if it be, it is Error; and so in a Presentment; but if twelve be recorded sworn, no Averment lies that one was unsworn. — Upon Not guilty pleaded, twelve are sworn to try the Issue; after their Departure one of the twelve leaves his Companions, which being discovered to the Court, by Consent of all Parties, *B.* another of the Panel, is sworn in the Place of *A.* and afterwards *A.* returns to his Companions, which being made known to the Court, *A.* is called and examined, why he departed; he answered, to drink; and being examined whether he had spoken with the Defendant, denied it upon his Oath; whereupon *B.* was discharged from giving any Verdict, and the Verdict taken of *A.* and the other eleven, and *A.* fined for his Contempt. 2 *Hal. Hist. P. C.* 296.

161 2 *Hal. Hist. P. C.* 294.

(b) An Exception was taken to a Judgment in an inferior Court, that it was twelve *Probi electi, triati, Jurati, &c.* without saying *ad veritat' de praemissis dicend'*; and this was held Error, for they might be sworn in another Cause at the same Court; and the Difference was said to be betwixt a Jury in Criminal and Civil Matters; for the Oath which the Jury take in Criminal Matters is, that they shall truly try and true Deliverance make of the Prisoners at the Bar, *&c.* so the Court may charge them with as many Prisoners as they think fit; but in Civil Matters the Jury must be sworn anew in every several Case. *Mich.* 29 *Car.* 2. in *C. B. Watson* and *Goodman*.

162 2 *Hal. Hist. P. C.* 296.

(a) That a Bailiff is to be sworn in a Civil as well as Criminal Case. *Palm.* 380.

163 2 *Hal. Hist. P. C.* 296.

(b) Therefore in a Civil Case, where the Jury withdrew to confer about their Verdict, one of the Witnesses, that was before sworn, on the Part of the Defendant, was called by the Jurors, and he recited again his Evidence to them, and they gave their Verdict for the Defendant; and Complaint being made to the Judge of Assise of this Misdemeanor, he examined the Jury, who confessed all the Matter, and that the Evidence was the same in Effect that was given before, *& non alia nec diversa* ; and this Matter being returned upon the *Postea*, the Opinion of the Court was, that the Verdict was not good, and a *Venire fac. de novo* was awarded. *Cro. Eliz.* 189. *Metcalffe* and *Dean*.

164 *Co. Lit.* 227. *b.* 2 *Hal. Hist. P. C.* 297.

165 1 *Salk.* 201. *Farest.* 1.

166 1 *Vent.* 97. 2 *Hal. Hist. P. C.* 297. But it is made a *Quaere*, whether in such Cases the Session may be adjourned before the Verdict taken.

167 2 *Hal. Hist. P. C.* 297.

168 2 *Hal. Hist. P. C.* 299.

169 2 *Hawk. P. C.* 439. and several Authorities there cited; *& vide* 2 *Hal. Hist. P. C.* 294-5.

170 2 *Rol. Abr.* 725. Tit. *View*. 2 *Inst.* 480. *Bro.* Tit. *View*. *Fitz.* Tit. *View*.

(a) But it is said, that at Common Law View did not lie in a Writ of Dower *unde nihil habet, Intrusion, Breve d'entry en le quibus, Nuper obiit, Rationabili Parte*. 2 *Rol. Abr.* 725. *Booth, Real Actions*, 38.

(b) That there are two Sorts of Views in Real Actions; 1. View by the Party. 2. View by the Jurors, as in an Assise of Novel Disseisin, Waste, Assise of Nusance, the Party shall not have View, because the Jurors shall have View. *Booth* 38.

(b) 13 *E.* 1. *cap.* 28.

171 *Booth* 37. 2 *Rol. Abr*. 726.

(c) For this *vide Dower*, Letter (I).

172 2 *Sand*. 254.

(d) Whereever the Plaintiff is to recover *per visum Juratorum*, there ought to be six of the Jury that have had the View, or know the Land in Question, so as to be able to put the Plaintiff in Possession, if he recover. *Co. Lit*. 158. *b*.

173 2 *Sand*. 254 f.

174 *Palm*. 569.

175 *Godb*. 209. Sir *John Gage* versus *Smith; & v*. 2 *Lutw*. 1558. 1 *Leon*. 259.

176 2 *Salk*. 665.

177 2 *Salk*. 665.

(a) At the Assises, if a View is demanded, it must be after the Jury is sworn, and then by Consent a Juror may be withdrawn. *6 Mod*. 211. — *& Holt* C. J. it may be without Consent; and notwithstanding such View, a Juror may be challenged when he comes to be sworn. 6 *Mod*. 211.

178 2 *Salk*. 665. *per Holt* C. J.

(b) That a Jury is never ordered to view before their Appearance, unless in an Assise. 1 *Mod*. 41.

179 2 *Salk*. 665.

180 *Vide* Tit. *Amendment* and *Jeofail*.

181 Where the Want of a *Venire, Distringas, &c*. is aided, but not a vicious one, and where a vicious one shall be taken as none, *vide Cro. Eliz*. 483. *Owen* 59. *Moor* 465. *Noy* 57. *Moor* 684. *pl*. 535. 623. *pl*. 852. 696. *pl*. 967. *Godb*. 194. 1 *Leon*. 329. 1 *Buls*. 130. 3 *Buls*. 180. 1 *Brownl*. 78. 97. *Yelv*. 69. 1 *Rol. Rep*. 22. 1 *Jon*. 304. *Latch* 116. *Yelv*. 109.

182 1 *Rol. Abr*. 201. *Moor* 599. *pl*. 826. S. P.

(a) So where the Award upon the Roll was in a Cause against two Defendants, but the *Venire* against one, and amended. 3 *Bults*. 311. — & *vide Winch* 73. *Cro. Jac*. 78. — But if by the Roll the *Venire* be awarded *de Vicineto* of the right Place, but the *Venire* itself is of a Wrong, and thereupon a Jury is returned, and tries the Cause, it shall not be amended; for it appears, that the Trial was not had by such a Jury as the Roll and Law require. *Hob*. 76. & *vide Lit. Rep*. 253. — So if there be no Place on the Roll to warrant the *Venire*. *Latch* 194. — Also in Criminal Cases, to which the Statutes of Amendment do not extend, the *Venire's* omitting any of the Parties is Error. 2 *Hawk. P. C*. 299.

183 *Cro. Eliz*. 467. *Noy* 57. *Owen* 59.

184 *Yelv*. 64. *Moor* 699. *Cro. Car*. 9.

185 *Cro. Eliz*. 203, 467. *Cro. Car*. 38. *Moor* 465. *pl*. 657.

186 *Cro. Car*. 38. *Lit. Rep*. 54. *Cro. Jac*. 64. *Cro. Eliz*. 760. *Moor* 696. *pl*. 967. 711. *pl*. 998.

187 *Moor* 465. *pl*. 657.

(b) *Venire* returnable on the 23d of *January*, and *Distringas* tested on the 24th, held a Discontinuance, and that being in a Criminal Case, not amendable. 1 *Buls*. 141, 142. *Yelv*. 204. *Cro. Jac*. 283. 6 *Mod*. 281. 1 *Salk*. 51.

(c) Where Mistrials by the *Venue* not being awarded of a right Place, were not aided by any of the Statutes of Amendment before 21 *Jac*. 1. *vide Cro. Eliz*. 468. *Gouls*. 38, 47. *Winch* 69. 4 *Leon*. 84. *Cro. Jac*. 647. *Moor* 91. *pl*. 212. *Lit. Rep*. 365. *Kelw*. 212. 5 *Co*. 36.

(d) For this *vide Cro. Car*. 17, 162, 284, 480. 1 *Jon*. 395. *Styl*. 201, 206. *Raym*. 67. — That this Statute aids not unless the *Venue* arises from several Places, and one of those Places is truly named. 1 *Sid* 20. — But if it arise from several Places, tho' in several Counties, and it is tried by one only, it is helped. 2 *Lev*. 122. *per Hale*. — By the Opinion of the greater Part of the Judges, where by particular Custom a Trial was to be *de Vicinete* of the four Wards next adjoining, and the *Venire* is awarded *de Vieineto* of two of them only, it is helped by the Statute. 2 *Sand*. 258. But *Sanders dubitavit*, whether it should extend to aid any Proceedings except such which were according to the Course of the Common Law.

(e) That this Statute does not extend to any Trial in an improper County. 1 *Mod*. 37, 199. 2 *Mod*. 24. — But for the Exposition of this Statute as to this Point, *vide* 1 *Lev*. 207. 1 *Sid*. 326, 2 *Lev*. 122, 164 1 *Sand*. 247. *Raym*. 181, 392. 1 *Vent*. 263, 272 2 *Keb*. 496. 2 *Jon*. 82.

188 *Yelv*. 169. *Cro. Eliz*. 261. 468.

189 1 *Rol. Abr*. 205. *Child* and *Sloper. Cro. Car*. 595. S. C. *Yelv*. 64. S. P. cited.

(a) Büt where before the Statute of 21 *Jac*. 1. the Award of a *Venire* to a wrong Officer, and his Return thereupon, was Error, *vide* 1 *Brownl*. 134. *Cro. Eliz*. 574, 586. *Moor* 356. *pl*. 482. *Yelv*. 15. 5 *Co*. 36. *b*.

190 *Cro. Eliz*. 181, 674, 586.

191 1 *Salk*. 265. *Andrews* ver. *Lynton*.

192 *Cro. Jac*. 383. *Hob*. 70. *Lamb* and *Wiseman*, adjudged. *Hob*. 70.

(b) In an Action, if the *Venire Facias* be *Vicecomiti London', salutem, &c. Praecipimus tibi quod, &c*. where it should be *Praecipimus vobis*, after Verdict this shall be amended; for it is the Default of the Clerk. *Owen* 62. *Cro. Eliz*. 543. 1 *Rol. Abr*. 200.

193 *Hob*. 113. 1 *Rol. Abr*. 204. *Cro. Eliz*. 310. 3 *Buls*. 220. *Cro. Jac*. 528. *Noy* 115. 5 *Co*. 41. *Cro. Eliz*. 587. 1 *Brownl*. 43.

(c) But even before the Statute 21 *Jac*. 1. it was held, that the *Venire* being well returned, tho' the Issue be tried on the *Habeas Corpora* or *Distringas*, which are not returned, or irregularly returned, in Manner aforesaid, the *Venire* being the principal Process, and right, the others should be amended. *Moor* 868. *pl*. 1203. *Hob*. 130. *Yelv*. 110. *Cro. Jac*. 188, 443. *Cro. Eliz*. 466. 704. 2 *Rol. Rep*. 111, 210.

194 Cro. Car. 421.

195 *Cro. Eliz*. 369. *Hore* and *Broom*.

(a) But this may be challenged for Favour, and the Illegality of the Officer will be admitted as strong Evidence of a Partial Array, since a Person who had nothing to do with the Return has intermeddled therewith; and accordingly the Array in this Case was challenged for Favour, and the Array quashed.

196 *Cro. Car*. 32. *Hutt*. 81. 1 *Jon*. 302. *Godb*. 194. *Cro. Jac*. 528. *Cro. Eliz*. 259.

197 *Cro. Car*. 426. 1 *Jon*. 367. *Piffin* versus *Fenton*.

198 *Cro. Car*. 275.

(b) That the Award on the Roll being right shall amend the *Venire*, and the *Venire* being right shall amend the *Distringas*, which is the proper Process for convening the Jurors in the *King's Bench*; so of the *Habeas Corpora*, which is the *Common Pleas* Process, *Lit. Rep*. 252, 253. — Also if a *Distringas* is awarded where

it should be a *Habeas Corpora*, this is aided, *Savil*. 37.

199 *Cro. Car*. 275. 2 *Rol. Abr*. 202.

200 3 *Mod*. 78. *Jackson* and *Warren*.

201 1 *Salk*. 48.

(a) If a *Venire Facias* be &c. *habeas ibi hoc Breve*, without these Words, *Nomina Juratorum*, this will be aided after Verdict, being a Judicial Writ; tho' objected, that these Words were of Necessity, and without which the Court could not know who are the Jurors, nor whom to demand to be sworn. 3 *Buls*. 208. 1 *Rol. Abr*. 200, 204. *Cro. Eliz*. 467. *Moor* 465, 657. *Noy* 57. 2 *Brownl*. 167. — So if the Word *duodecim* be left out of the *Venire Facias*, it shall be amended after Verdict. 1 *Rol. Abr*. 204.

(b) If a *Venire Facias* be *quorum quilibet quatuor Libras Terra*, omitting the Word *habeat*, this shall be amended after Verdict. 1 *Rol. Abr*. 204. — So if the Words *quorum quilibet* are omitted out of the *Venire Facias*, it shall be amended after Verdict. 1 *Rol. Abr*. 204. — So if the Words *qui nulla Affinitate attingunt* are left out of the *Venire Facias*, it shall be amended. 1 *Rol. Abr*. 204.

(c) For the Diversity, where the Christian and where the Surname is mistaken, *vide Cro. Eliz*. 57, 222. *Cro. Car*. 203. *Cro. Jac*. 116.

202 1 *Rol. Abr*. 196, 197. 3 *Buls*. 18. *Hob*. 64. 1 *Brownl*. 174.

203 1 *Rol. Abr*. 196, & *vide* 1 *Dan*. 330–1. several Cases to this Purpose.

204 1 *Jon*. 302. *Fines* and *North. Cro. Jac*. 278. S. C. adjudged.

205 *Cro. Jac*. 647.

206 *Cro. Car*. 223, 278. 5 *Co*. 36. *b*. 37. *a*. *Cro. Eliz* 194. 1 *Brownl*. 274. 1 *Jon*. 357. 1 *Sid*. 66. *Latch* 54.

207 *Co. Lit*. 125. *b*. *Dyer* 367. *b. pl*. 40.

208 5 *Co* 36. *b. Co.Lit*. 125. *b*. 2 *Rol. Rep*. 21. *Godb*. 428. *Noy* 107. *Palm*. 411.

209 *Glan. lib*. 8. *cap*. 9. 2 *Inst*. 130. *Co. Lit*. 394.

210 1 *Rol. Abr*. 285. *Bro. Attaint* 87. *Dyer* 53. *pl*. 14. *Dyer* 369. *Godb*. 271. *Hob*. 227.

(a) But then the Plaintiff in Attaint may have an Answer thereto, and disprove it as well as he can; but he cannot give other Evidence, nor inforce the first Evidence with more Matter than was given and disclosed before. *Dyer* 212. *pl*. 34.

211 1 *Rol. Abr*. 281, 282.

(b) Where the Evidence of a Witness is false in an immaterial Part, the Jury need not give him Credit in any other Part. *Cro. Eliz*. 310.

(c) If a Jury give a Verdict on their own Knowledge, they ought to tell the Court so; but they may be sworn as Witnesses; and the fair Way is to tell the Court, before they are sworn, that they have Evidence to give. 1 *Salk*. 405.

212 1 *Rol. Abr*. 282.

213 *Vaugh*. 146. 1 *Hawk. P. C*. 191. — But by *Hal. Hist. P C*. 310. the King may have an Attaint; for altho' a Man convicted upon an Indictment can have no Attaint, because the Guilt is affirmed by two Inquests, the Grand Inquest that present the Offence on their Oaths, and the Petit Jury that agrees with them; yet where the Petit Jury acquits, they stand as a single Verdict; for they disaffirm what the Grand Inquest of twelve Men have upon their Oaths presented.

214 4 *Leon*. 46. But for this *vide Cro. Eliz*. 309. 2 *Jon*. 14. *Co. Lit*. 355. *b. Vaugh*. 153. 11 *Co*. 6. *a*. 1 *Rol. Abr*. 280. and several Year-Books there cited. 10 *Co*. 119. S. P.

(a) Therefore where the Matter omitted to be inquired by the principal Jury is such as goes to the very Point of the Issue, and upon which, if it be found by the Jury, an Attaint will lie against them by the Party, if they have given a false Verdict, there such Matter cannot be supplied by a Writ of Inquiry, because thereby the Plaintiff may lose his Action of Attaint, which will not lie upon an Inquest of Office. *Carth*. 362.

215 1 *Rol. Abr*. 280. 10 *Co*. 119.

216 *Fitz. Attaint* 15. 1 *Rol. Abr*. 28. 10 *Co*. 119. 1 *Rol. Abr*. 280.

217 *Co. Lit*. 355. *a*. 1 *Rol. Abr*. 280

218 2 *Rol. Abr*. 280.

219 12 *H*. 6. 6.

(b) Whether an Attaint lay in a Plea real because he might have falsified in an Action of an higher Nature, *vide* 2 *Inst*. 237.

220 1 *Rol. Abr*. 280 2 *Inst*. 662. *Co. Lit*. 6. *b*. S. P. because Witnesses cannot testify a Negative, but an Affirmative.

(c) An Attaint does not lie for not finding a Divorce, because that does not lie in their Conuzance, being a Record. 1 *Rol. Abr*. 281. — If the Jury find a special Matter which is not Part of their Charge, nor pertinent to the Issue, no Attaint lies for this. 11 *Co*. 13 — Where it lies for finding falsly a Matter of Form only, the principal Matter being true. Keilw. 67.

221 43 *Ass*. 41. *Bro. Attaint* 82. *Cro. Eliz*. 309. S. P. *per Cur*.

(a) But following the Direction of the Court will not bar an Attaint; for if the Judge declares the Law to the Jury erroneously, and they find accordingly, tho' this may excuse them from the Forfeitures, yet however upon the Attaint the Judgment is to be reversed, and a Man shall not lose his Right by the Judge's Mistake of the Law. *Vaugh*. 145.

222 1 *Rol. Abr*. 282.

223 9 *H*. 6. 2. 1 *Rol. Abr*. 284.

224 1 *Rol. Abr*. 284.

225 1 *Rol. Abr*. 284.

226 12 *E*. 4. 5. *Bro. Attaint* 90.

227 11 *Co*. 5. *b*. Sir *John Heydon*'s Case. *Hob*. 66. *Cro. Jac*. 351. 10 *Co*. 119. 1 *Rol. Rep*. 31. S. P.

228 1 *Rol. Abr*. 282.

229 1 *Rol. Abr*. 282. —— The Reversioner (by the Common Law) after the Death of Tenant for Life. *Dyer* 1. *pl*. 5. 3 *Co*. 4. —— And during the Life of the particular Tenant, *per* 9 *Rich*. 2. *cap*. 3.

230 48 *E*. 3. 17. *Godb*. 378.

231 11 *H*. 4. 27. 1 *Rol. Abr*. 283.

232 11 *H*. 4. 30. 1 *Rol. Abr*. 283.

233 1 *Rol. Abr*. 283.

234 1 *Rol. Abr.* 283.

235 12 *H.* 6. 6 *Fitz. Attaint* 61, 65. *Kelw.* 130. same Rule *arguendo*.

236 *Vide* 6 *Co.* 44. *a.* S. P. where it is said to be a good Plea, yet *Q. & vide Dyer* 75. *pl.* 27.

237 1 *Rol. Abr.* 286. *Co. Lit.* 20. *a.* S. P.

(a) And therefore no Conusance can be granted upon any Attaint, because all Attaints are to be taken either before the King in his Bench, or before the Justices of the Common Pleas, and in no other Courts, *&c. Co. Lit.* 294 *b.* —— Where a Verdict and Judgment given in the Exchequer was removed by *Certiorari* into the Common Pleas, and an Attaint. *Vide Dyer* 201. *pl.* 65. *Moor* 17. *pl.* 60. *N. Bendl. pl.* 132. *Kelw.* 210. & *vide Dyer* 81. *pl.* 65. *Cro. Eliz.* 645. in which Book, because the Record was not removed *in Banco*, it was adjudged against the Plaintiff, and the Court would not grant him a Day to bring in the Record, and said, the Plaintiff, at his Peril, ought to have brought it in before; & *vide Cro. Eliz.* 371, 372. ——— How to be removed, *vide* 1 *Rol. Abr.* 394. —— But if an Attaint be brought on a Judgment *in Banco*, and thereupon the Plaintiff assigns the false Oath, and the Defendant pleads *Bonum & Legale fecerunt Sacramentum*, and thereupon they are at Issue, and after the first Record is removed by a Writ of Error, yet the Process against the Grand Jury and the Party shall not be stayed, but the Court may proceed. *Dyer* 284. *pl.* 35.

238 *Co. Lit.* 294. 1 *Rol. Abr.* 286.

(b) And was severe, that few or no Juries upon just Cause were convicted. 3 *Inst.* 163.

239 *Vide Co. Lit.* 294.

(c) And by the Equity of the Statute it lies against the Executors of the Party for whom Judgment was given. *Moor* 17. *pl.* 60. *N. Bendl.* 132. *Kelw.* 210. *a.* 1 *And.* 24. *Dyer* 201. *pl* 65.

240 1 *Rol. Abr.* 286.

(d) If during the Life of the Tenant for Life the Reversioner recovers in an Attaint, the Tenant shall be restored to the Possession and Mesne Profits, and the Reversioner to his Arrearages of Rent; but if the Tenant be dead, or of Covin with the Demandant, the Reversioner shall, *&c. per* 9 *Rich.* 2. *cap.* 3.

241 1 *Rol. Abr.* 286.

242 41 *Ass.* 18. 286. 1 *Rol. Abr.* 286.

243 3 *Co.* 38. *b.* 41. *a.* 2 *Inst.* 242. 2 *Hal. Hist. P. C.* 309.

244 *Noy* 49. 3 *Buls.* 173. *Vaugh.* 152. 1 *Rol. Abr.* 219. *Cro. Eliz.* 779. 1 *Hawk. P. C.* 146. 2 *Hal. Hist. P. C.* 309. S. P. and that in such Case they shall be fined every one a-part.

245 *Dyer* 78. *pl.* 41. 218. *pl.* 4. *Cro. Jac.* 21. *Vaugh.* 21.2 *Hawk. P. C.* 146.

[(a)] Which, if it be at the Charge of him for whom they give a Verdict, avoids the Verdict; otherwise if they eat or drink at their own Charge, or the Charge of him against whom they give their Verdict. 2 *Hal. Hist. P. C.* 306.

246 *Pasch.* 27 *Car.* 2. in *B. R.*

247 2 *Lev.* 140, 205. 2 *Jon.* 83. 3 *Keb.* 805.

248 2 *Hawk. P.C.* 147.

249 *Cro. Eliz.* 616. 2 *Hal. Hist. P. C.* 306.

(a) But it is no Offence in a Juror to exhort his Companions to join with him in such Verdict as he thinks right. 1 *Hawk. P. C.* 250.

250 2 *Hawk. P. C.* 147-8. and several Authorities there cited.

(a) *Vaugh.* 143. 2 *Jon.* 16, 17.

251 2 *Hal. Hist. P. C.* 160, 161, 211, &*c.*

252 2 *Hal. Hist. P. C.* 313.

253 2 *Hawk. P.C.* 148 for which is cited 2 *Jon.* 15, 16. *Vaug.* 144-5. *Palm.* 363. & *vide Kel.* 50.

254 2 *Hawk. P. C.* 149.

255 *Co. Lit.* 369. *Moor* 815. 2 *Hawk. P. C.* 259.

256 2 *Hawk. P. C.* 259, 260.

257 2 *Hawk. P. C.* 259, 260.

258 2 *Hawk. P. C.* 260.

259 2 *Hawk. P. C.* 260.

(a) How it is further restrained and punished by Statute, *vide* 5 *E.* 3. *cap.* 10. 34 *E.* 3. *cap.* 8. 38 *E.* 3. *cap.* 12. and 1 *Hawk. P. C.* 260, *&c.*

260 1 *Hawk. P. C.* 58-9.

261 *Hill.* 10 *Ann. The Queen* ver. *Wakefield.*

262 a 3 Inst. 29. 137. 7 H. 4. 35. b. 2 Bulst. 147. Bro. Coro. 54. Fitz. Coro. 31. Cro. Ca. 147. S. P. C. 151. B. 9 E. 4. 2. pl. 4. 1 Lev. 86. Dr. and Stud. B. 2. ch. 48. State Trials, Vol. 1. fol. 70. V. 2 f. 1002. See the Books cited to the other Parts of this Chapter.

b State Trials, Vol. 1. f. 70, 265, 614. Vol. 1. f. 70. 265. 614. Vol. 4. f. 355. 3 Inst. 29. Rushw. Col. Part 2. Vol. 1. f. 94.

c 2 Bulst. 147. 3 Inst. 29.

263 a S. P. C. 151. B. Dr. & Stud. B. 2. ch. 48. Dy. 296. pl. 20. Keilw. 176.b. Finch of Law 386. 1 Bulst. 85. 9 E.4. 2. pl. 4. Bro. Coro. 54. Fitz. Coro. 31.

b Dr. & Stud. B. 2. ch. 48.

c 3 Inst. 137. State Trials, Vol. 1. f. 569. Rushworth's Stafford 671.

d State Trials, Vol. 2. f. 520.

e State Trials, Vol. 3. f. 135.

f 3 Inst. 29. 1 Lev. 68. Cro. Ca. 147. 2 H. H. P. C. 236.

g 3 Inst. 29. 137. 6 Co. 14.

h 3 Inst. 137. State Trials, Vol. 2. f. 762.

i State Trials, Vol. 2. f. 694, 701, 709, 763, 764. Vol. 3. f. 867.

k 3 Inst. 29. 137. Vide 26 Ass. pl. 46. Fitz. Office de Court. 34.

l 1 H.7. 23.a. Bro. Coro. 128, 129. Finch of Law 386.

m 2 Jo. 180. Cro. Ca. 365. Yet in the Year-Book of 1 H. 7. 13. the Court refused it, because the Party was of very bad Fame.

n 2 Jo. 180.

o State Trials, Vol. 2. f. 694, 699.

p 7 H. 4. 36. a. S. P. C. 151. B. 3 Inst. 29, 137.

q State Trials, Vol. 2. f. 272, 273, 712, 743, 763, 768.

r State Trials, Vol. 3. f. 133.

s State Trials, Vol. 2. f. 614.

t State Trials, Vol. 2. f. 614.

u State Trials, Vol. 1. f. 732. Vol. 2. f. 743, 762, 763, 770.

x State Trials, Vol. 2. f. 711, 712.

y 1 Bulst. 85.

264 a 1 Lev. 68. Moor 666. State Trials, Vol. 1. f. 644. Vol. 2. f. 711. 763. Vol. 3. f. 861, 862, 863, 864. Show. 131. 1 Sid. 85. 2 H. H. P. C. 236.

b Lev. 68. 1 Sid. 85.

c State Trials, Vol. 2. f. 711.

265 a S. P. C. 154. Dy. 132. pl. 75. 286. pl. 5.

b Vide infra sect. 5.

c Book 1. ch. 31. sect. 13. Supra ch. 23. sect. 35. Fitz. Coro. 59, 60. Fitz. Coro. 194. 3 Inst. 27. Vide supra ch. 5. sect. 19.

d Vide supra ch. 25. sect. 35. 2 H. H. P. C. 262.

a 1 And. 104, 105.

b 1 And. 194, 195.

c Vide supra ch. 25. sect. 143. Bro. Coro. 220. 3 Inst. 24.

d Vide Dyer 286. pl. 45.

e 1 And. 194, 195.

f Supra ch. 33. sect. 26. B. 1. ch. 31. sect. 11.

g B. 1. ch. 33. sect. 9. Supra ch. 23. sect. 47. ch. 25. sect. 38.

h Supra ch. 25. sect. 37.

i B. 1. ch. 43. sect. 7. Supra ch. 25. sect. 39.

k B. 1. ch. 42. sect. 10. Supra ch. 25. sect. 40

l B. 1. ch 31. sect. 14. Supra ch. 25. sect. 41, 42.

m Supra ch. 25. sect. 43, 44, 45.

n Supra ch. 25. sect. 43 to 54.

o B. 1. ch. 37. sect. 12, 13, 14, 15. Supra ch. 25. sect. 43 to 48.

p Supra ch. 29. sect. 49.

q Supra ch. 25. sect. 54. and ch. 29. sect. 50, 51, &c.

r Keilw. 175. pl. 10,

s Dyer 296. pl. 20.

t 3 Inst. 27. S. P. C. 154. Keilw. 175, pl. 10. Dyer 296. pl. 20. H. P. C. 255. Vide 23 H. 8. 14. sect. 5.

u Keilw. 175. pl. 10. Dy. 296. pl. 20. Vide Dy. 286. pl. 5.

a 3 Inst. 27. S. P. C. 154. H. P. C. 255. Vide Dyer 296. pl. 20.

a State Trials, Vol. 4. f. 277. 310.

b Sir Henry Vane's Case, State Trials, Vol. 1. f. 938. wherein it is said that such Bill never was nor ought to be allowed in any Capital Case, and as this Case is reported in 1 Sid. 85. 1 Keb. 384. it seems to have been holden that it is not grantable on any Indictment; and as it is reported in 1 Lev. 68. and Kely. 15. That it is not grantable in any Criminal Case whatsoever. Vide 2 Inst. 427.

c Ch. 25. sect. 129.

d H. P. C. 262. and the Authorities cited to the other Parts of this Section. Cont. State Trials, Vol. 1. f. 180, 181. 636. Vol. 2. f. 408. and supra ch. 25. sect. 129.

e For these Statutes, and their Exposition, See ch. 25. sect. 130 to 146.

f Raym. 407, 408. State Trials, Vol 2. f. 533. Vol. 3. fol. 688, 689.

g State Trials, Vol. 1. f. 697, 723, 724. Vol. 2. f. 317, 695, 785, 829, 830. Vol. 3. f. 149, 156, 228, Vol. 4. f. 86, 87, 88, 117. Raym. 407, 408. Kely. 9.

h State Trials, Vol. 2. f. 408. Vol. 3. f. 228, 229, 688, 689, 894 to 901, 928, 929, 930. Vide State Trials, Vol 1. fol. 636. But State Trials, Vol. 1. f. 180, 181. 'tis holden that Circumstantial Evidence alone is sufficient.

i Vide ch. 25 sect. 134 to 146.

a H. P. C. 102, 262, 263, 264. 1 H. H. P. C. 304. State Trials. Vol. 1. fol. 265. Vol. 3. fol. 8, 9.

b Supra ch. 15. Sect. 58, 59, 60, 61.

c Supra ch. 15. sect. 11, 12.

d State Trials, Vol. 1. f. 87, 181, 963. Francia's Trial. Kely. 18.

e 5 Mod. 164, 165. State Trials, Vol. 2. fol. 426. Vol. 3. fol. 131, 132.

f Dyer 215, pl. 50. H. P. C. 102, 193. 1 H. H. P. C. 306.

g Kely. 18, 19. State Trials, Vol. 3. fol. 8, 9. Vol. 4. f. 33. See the contrary practised State Trials, Vol. 1. in Sir Jerv. Ellis's Trial, and in Throgmorton's Trial, fol. 49 to 56. Duke of Norfolk's Trial, fol. 73 to 85. and 97, 98. Other Trials from fol. 118 to 122. Earl of Essex's Trial, 167, 168. Sir Walter Raleigh's Trial. fol. 177, 178, 181.

h Kely. 18. Supra ch. 25. sect. 140.

i 5 Mod. 165. Cont. State Trials, Vol. 1. fol. 53. Throgmorton's Trial.

k Kely. 55. H. P. C. 262, 263. 1 Lev. 180. Salk. 281. pl. 8. 2 Keb. 19. Vide Cro. El. 901. Dalt. ch. 111, 112, 113.

l State Trials, Vol. 1. fol. 265. H. P. C. 262, 263.

m H. P. C. 262, 263.

n Supra ch. 9. sect. 31. 2 Jon. 53.

o See the Books abovecited; but 2 Jon. 53. 'tis adjudged that Depositions before a Coroner may be read, but said that those taken before a Justice of Peace can in no Case be read.

p Supra ch. 15. sect. 59, 60, 61.

q Supra ch. 16. sect. 11.

r Kely. 55. 1 Lev. 180. 2 Keb. 19. pl. 39. H. P. C. 263.

s Kely. 55.

t Kely. 55. In Harrison's Case, State Trials, Vol. 3. fol. 941. such an Examination was read in Evidence, upon Proof that the Witness had been enticed away, tho' it did not directly appear to have been done by the Procurement of the Prisoner.

u Kely. 55. 2 Keb. 19. pl. 39. H. P. C 263. 2 H. H. P. C. 284, 285.

a Kely. 55.

b 2 Rol. Rep. 460, 461. Vide 1 Sid. 325. 2 Keb. 384. pl. 54.

c State Trials, Vol. 1. Duke of Norfolk's Trial, f. 84. Abington's Trial, f. 118, 119. Udal's Trial, fol. 148, 149. Earl of Essex's Trial, fol. 166. Sir Walter Raleigh's Trial, fol. 181. 182. and the like was admitted in the Lord Audley's Case on an Indictment for a Rape on his own Lady. State Trials, Vol. 1. fol. 268, 269.

d Rushw. Strafford, fol. 231, 526 to 531.

e State Trials, Vol. 2. fol. 622 to 627, 644, 647, 651. See Vol. 1. f. 911.

f State Trials, Vol. 2. f. 343, 344, 528, 529. See sect. 12.

g Salk. 281. Vide supra sect. 3.

h 5 Mod. 165. Vide Rushw. Strafford. 524 to 531. and State Trials, Vol. 2. fol. 420. and Vol. 4. fol. 261. and 2 Rol. Rep. 460, 461.

i State Trials, Vol. 4. f. 237, &c.

k State Trials, Vol. 4. fol. 265 to 272. Vide supra sect. 9. 1 Sid. 325. 2 Keb. 384. pl. 54.

a H. P. C. 263. 2 H. H. P. C. 285.

b Vide B. 1. ch. 42.

c State Trials, Vol. 2. f. 332, 414, 415, 761, 802, 803. Vol. 3. fol. 145, 210, 252. Vol. 4. f. 33.

d Vide supra sect. 3.

e State Trials, Vol. 2. f. 325, 328, 332, 328, 332, 333, 414, 415. Vol. 3. fol. 144, 145, 209, 210. Vol. 4. f. 33.

f State Trials, Vol. 3. f. 254, 255.

g Vide supra sect. 3.

h State Trials, Vol. 2. fol. 529, 802, 803 Vol. 3. fol. 218 to 222, 428, 429. Vol. 4. fol. 51, 52, 53. Vide supra sect. 9. & 12.

i State Trials, Vol. 3. f. 213, 216, 217, 226, 230.

k State Trials, Vol. 3. fol. 762 to 767.

l Vide State Trials, Vol. 3. fol. 892, 893. Vol. 4. fol. 271, 272. and Francia's Trial. Ld. Raym. 39.

m Co. Litt. 6. b. 2 Rol. Abr. 686. pl. 4. H. P. C. 263. 1 H. H. P. C. 301. 2 H. H. P. C. 279. 1 Brownl. 47. Hutton 116. Raym. 1. 2 Keb. 403. pl. 12. State Trials, Vol. 4. fol. 608.

a Raym. 1. and the same Point was admitted in Fielding's Trial. State Trials, Vol. 4. f. 754.

b Vide B. 1. ch. 43.

c In Raym. 1. There is an Opinion that a Husband and Wife may be Witnesses against one another in Treason, but the contrary is adjudged, 1 Brownl. 47. See 2 Keb. 403. 1 H. H. P. C. 301.

d State Trials, Vol. 1. f. 265, 269. Hutt. 116. Rushw. Collections, Part 2. Vol. 1. f. 94, 99. But this Case is denied to be Law, Raym. 1.

e Cro. Ca. 488. State Trials, Vol. 4. fol. 588. 3 Keb. 193. pl. 43.

f See B. 1. ch. 42.

g See B. 1. ch. 60. sect. 4. Hutt. 116.

h State Trials, Vol. 2. fol. 257, 632, 674. Kely. 12. 1 Sid. 133. pl. 6.

i Kely. 12.

k State Trials, Vol. 1. f. 96, 696, 697, 723. Vol. 2. fol. 334, 501. Vol. 3. fol. 161, 217. &c 595, 668, 669. Vol. 4. fol. 12, 33. 1 H. H. P. C. 303, 304. See Hale's Opinion to the contrary arguendo. State Trials, Vol. 1. fol. 724. and Bracton 118. b.

l State Trials, Vol. 1. fol. 96. Vol. 2. fol. 501.

m State Trials, Vol. 1. fol. 966. Vol. 4. fol. 12. Kely. 17, 18. 3 Keb. 136. pl. 70. Vide Vol. 1. fol. 697.

n Sid. 237. pl. 4. Vide Trials per pais, 148. Style 401. 12 Ass. 12. Savil. 34.

o 2 Rol. Abr. 685. pl. 3.

p 5 Mod. 16, Kely. 33.

q Raym. 369. Co. Litt. 6. b. 2 Bulst. 154.

r 2 Rol. Abr. 686. H. 2, 3.

s Co. Litt. 6. b.

t Raym. 32. infra. Sect. 22, 23. Supra ch. 37, sect. 52. Co. Litt. 6. b. H. P. C. 263.

u Co. Litt. 6. b. Vide supra ch. 43. Sect. 25. 33 H. 6. 55. pl. 45. 2 H. H. P. C. 277. But H. P. C. 263 'tis said in general, that one attaint of Forgery cannot be a Witness. x Co. Litt. 6. b. 2 Roll. 684. pl. 4.

y 33 H. 6. 55. pl. 45. 24 E. 3. 34. pl. 34. Vide supra ch. 43. sect. 25. B. 1. ch. 72. sect. 9. Co. Litt. 6. b. 2 H. H. P. C. 277. But H. P. C. 263. 'tis said in general that one attaint of Conspiracy cannot be a Witness.

z That it is not material whether such Judgment were actually executed. 2 Salk. 689. 3 Inst. 219. 3 Lev. 426. But Co. Litt. 6. b. Kely. 37, 38. H. P. C. 263. 2 H. H. P. C. 277. 5 Mod. 75, 76. seem to make the Execution of the Judgment material.

aa 2 Salk. 689. 3 Lev. 426. This Point is made a Quaere, 5 Mod. 15, 16, 75, 76. Skin. 578, 579. And it is

said that by the Civil and Canon Law no such Judgment disables a Witness, unless the Nature of the Crime be infamous. 3 Lev. 426, 427.

bb 1 Sid. 51. pl. 16. Raym. 32.

a State Trials, Vol. 1. f. 268, Vol. 2. f. 307, 436, 445. Vol. 3. f. 425. Vol. 4. f. 130.

b State Trials, Vol. 2. f. 268, 472. Vol. 3. f. 387, 1010. Vol. 4. f. 44. Cont. Rushw. Strafford, 605. & ibid. 558. one was not admitted to speak to clear himself.

c State Trials, Vol. 3. f. 256, 257, 680. Vol. 4. f. 129, 130. Vide Vol. 2. f. 151, 267, 297.

d Co. Lit. 6. b. 1 H. H. P. C. 303. But 33 H. 6. 32. pl. 2. taken Notice of 2 Rol. Abr. 675. pl. 4. seems contrary.

e Supra ch. 33. sect. 129. ch. 37. sect. 49.

f Supra ch. 37, sect. 48, 49, 50.

g 2 Salk. 514, 689. But see 2 Brow. 47.

h B. 1. ch. 72. sect. 9.

i Vide supra ch. 37. sect. 52.

k 2 Salk. 461. pl. 3. 1 Co. Lit. 6. 1 Sid. 237. pl. 5. 1 Keb. 836. pl. 17.

l 1 H. H. P. C. 302, 303. 2 H. H. P. C. 279.

m State Trials, Vol. 3. f. 253.

n Co. Lit. 6 b. 2 Rol. Abr. 688. pl. 2. 1 H. H. P. C. 302.

o Raym. 191. Vide 2 Keb. 384. pl. 54.

p 1 Salk. 283. Yet between the King and Paris, 1 Sid, 431. 2 Keb. 572. pl. 84. 1 Vent. 49. the contrary was ruled in a stronger Case, by three Judges against the Opinion of Twisden.

q Salk. 283. pl. 12. 1 Sid. 325.

r Salk. 283. pl. 12.

s 2 Rol. Ab. 685. pl. 4. and the same Point is taken for granted. 1 Sid. 237. pl. 5. 1 Keb. 836. pl. 17. Vide 1 Salk. 283. pl. 12.

t 2 Rol. Abr. 685. pl. 5. 2 Keb. 572. pl. 84.

u 1 Sid. 237. pl. 5. 2 Keb. 384, pl. 54. 572. pl. 84. 1 Keb. 836. pl. 17. 1 Salk. 286. pl. 20. 1 Sid. 211. pl. 8.

a State Trials, Vol. 2. f. 334, 335, 691, 693.

b State Trials, Vol. 1. f. 723, 724 Vol. 2. f. 334, 335. Vol. 4. f. 121. Kely. 18.

c Kely. 18. State Trials. Vol. 2. f. 334, 335, 693. Vol. 3. f. 221, 222. But Sir Matthew Hale is of a different Opinion, 1. H. H. P. C. 304. 2 H. H. P. C. 280. Kely. 18. Vide State Trials, Vol. 4. f. 121.

d Co. Lit. 6. 2 H. H. P. C. 279. State Trials, Vol. 4. f. 131.

e Vide Trials per pais 165. 2 Keb. 314. pl. 23.

f Co. Lit. 6.

g H. P. C. 263. 2 H. H. P. C. 278, 1 Brownl. 47.

h State Trials, Vol. 1. f. 253.

i H. P. C. 264. 2 H. H. P. C. 283. 2 Bulst. 147.

k State Trials, Vol. 2. f. 737. 1 Sid. 325.

l 1 Sid. 211.

m 3 Inst. 79.

n H. P. C. 264. 2 H. H. P. C. 283.

o Cro. Ca. 292. 2 Bulst. 147. State Trials. Vol. 1. f. 55, 148. Vol. 2. f. 296, 737. H.P.C. 264.

p Vide 31 El. ch. 4. 4 Jac. ch. 1.

a State Trials, Vol. 1. f. 969. Vol. 3. f. 238, 252, 420.

b Vide State Trials, Vol. 1. f. 969. Vol. 3. f. 1002, 1003.

c But in Turner's Case. State Trials, Vol. 1. f. 995. 'Tis said that the Court can't grant the Prisoner any Precept to bring in his Witnesses, &c.

d H. P. C. 264. 1 H. H. P. C. 361. 2 H. H. P. C. 291. 3 Inst. 230. 1 Salk. 288, Kely. 16. 2 Inst. 318, 319. State Trials, Vol. 4. f. 9.

e H. P. C. 187.

f 1 Salk. 288. State Trials, Vol. 4. f. 9. 3 Kely. 16.

g H. P. C. 264. 2 Inst. 318. 3 Inst. 230.

h H. P. C. 264, 270. 3 Inst. 230. and infra in Capter 51.

i 1 Kely. 16. H. P. C. 264. 1 H. H. P. C. 361. 2 Inst. 318. 3 Inst. 230.

k Salk. 385. 661.

l H. P. C. 264, 265. Salk. 288. State Trials, Vol. 4. f. 9. Kely. 15, 33.

a 2 H. H. P. C. 291. See the Books above cited and supra ch. 25. sect. 35 to 54. and Cro. El. 911.

b Kely, 33.

c Kely, 14, 15. State Trials, Vol. 1. f. 932, Vol. 2. f. 317, 776, 785. Vide Vol. 1. f. 843. Vol. 4. f. 78.

d For it is necessary that some Overt-Act be proved in the same County; for otherwise the compassing could no Way be said to be proved in the County wherein it is laid. See the Books above cited.

e Kely. 15.

f Vide State Trials, Vol. 1. f. 843.

g State Trials, Vol. 4. f. 331, 332, 333.

h State Trials, Vol. 4. f. 124, 125, 132, 133, 134.

i Francia's Trial, Vide Vol. 1. f. 617, 950. Vol. 2. f. 98, 99, 112. &c. 322, 323. Vol. 3. f, 857, 1009. Yet in some Indictments the very Words charged to have been treasonable have been set forth. State Trials, Vol. 2. f. 746. Vol. 3. f. 204, 219.

k State Trials, Vol. 1. f. 843, 851. Vol. 2. f. 430. Vol. 4. f. 159.

l Salk. 660, 661. Hob. 272.

m Hob. 294.

a 9 Co. 67. 2 Inst. 319. 3 Inst. 135. H. P. C. 265.

b See the Books abovecited, and supra ch. 23. sect. 84.

c Vide supra ch. 23. f. 84.

d 2 H. H. P. C. 291.

e 2 Inst. 319.

f State Trials, Vol. 4. f. 9. 2 H. H. P. C. 291.

g H. P. C. 265. 2 H. H. P. C. 292. 3 Inst. 165.

h But there were anciently some Opinions to the contrary. Supra ch. 29. sect. 7. Lett. x. S. P. C. 41. Letter A. B.

i Plow. Com. 98, 100. a. 1 Salk. 334, 335. 3 Mod. 12t. 9 Co. 67. b. 4 H. 7. 18. pl. 10. Abridged. Fitz. Coro. 60. Bro. Appeal 85. Coro. 140 or 141. S. P. C. 41. Letters A. B. 1 H. H. P. C. 437, 438. 2 H. P. C. 292. Supra ch. 23. sect. 76, ch. 25, sect. 64.

k See the Books above cited, and B. 1. ch. 32. sect. 6. ch. 31. sect. 31, and 50. ch. 34. sect. 7. ch. 38. sect. 8, 9. ch. 41. sect. 6.

l 9 Co. 119. a. H. P. C. 222, 265. 2 H. H. P. C. 292. Vide Keilw. 107, and supra ch. 29. sect. 46, 47.

m 2 Inst. 183.

n Vide supra sect. 32, 34, 37, 38, 39.

a 9 Co. 67. b. Cro. Jac. 280. H. P. C. 266.

b See B. 1. ch. 31. sect. 18, 19. and f. 40 to 43.

c 9 Co. 67.

d 9 Co. 62, 63, 67.

e Co. Litt. 6. b. S. P. C. 179. Letter A. Vide supra ch. 45. sect. 10. and State Trials, Vol. 1. fol. 181, 636, Vol. 2. fol. 408, Vol. 3. f. 228, 229, 688, 689, 894 to 901, 928, 929, 930.

f Co. Litt. 6. b.

g Kely. 32. 2 H. H. P. C. 288, 289.

h Kely. 32, 33.

i Kely. 32.

k Kely. 33.

a B. 1. ch. 62. sect. 3.

b Savil. 32. pl. 75. 1 Jon. 157. 2 Rol. Abr. 683. pl. 11.

c 2 Roll. Ab. 683. pl. 10, 12. But this is left a Quaere Savil. 32. pl. 75. Bro. General Issue, 3. Vide supra ch. 25. sect. 113.

d 2 Roll. Abr. 683. pl. 13.

a Co. Lit. 227. b. 3 Inst, 110. 1 And. 103, 104. H.P.C. 267. 2 H. H. P. C. 294, 295.

b Raym. 84.

c And the same is holden by Coke as to Larceny, and any Case of Member. 3 Inst. 110. Co. Litt. 227. b. but as to Case of an Inferior Nature, the contrary hath been adjudged, Raym. 84.

d 1 And. 103, 104.

e Kely. 47, 52. State Trials, Vol. 1. fol. 978. Vol. 2. fol. 155, 277, 389. Raym. 84.

f State Trials, Vol. 3. f. 678. Vide supra ch. 44. sect. 22.

g State Trials, Vol. 4. fol. 110, 178, 179.

h Co. Litt. 227. b. 3 Inst. 110. Raym. 193. 2 H. H. P. C. 300.

i The same is holden by Sir Edward Coke, as to Larceny, and any Case of Member, 3 Inst. 110. Co. Lit. 227. b. And it is said in Raym. 193. That no privy Verdict can be given in any Case where the Jury are to look upon the Prisoner when they give it.

k S. P. C. 165. Letter C. H. P. C. 267. 2 H. P. C. 301, 302. 9 Co. 12. b. 63. 1 Bulst. 87. Vide infra sect. 6. But it is said, Kely. 29, 30. That it is dishonourable for the Court to suffer a special Verdict in a plain Case.

l Cro. Eliz. 276. pl. 5. 296. pl. 2. 464. pl. 13.

m Dyer 261. pl. 26. 4 Co. 43. b. 9 Co. 81. Dalis. 14. H. P. C. 267. Latch 126. Pl. Com. 101. Cro. Eliz. 276. pl. 5. 296. pl. 2. 464. pl. 13. Moor 407. pl. 546. Bro. Coro. 121 or 122. But 2 Roll. Rep. 461. this was questioned as to an Appeal of Death.

n Bro. Co. 1 H. P. C. 267. 2 H. H. P. C. 302. Dalis. 14. S. P. C. 165. Letter A. See the Book cited to the following Section.

a 1 Bulst. 87. ’Tis holden by two Judges against one, That where the Appeal mentioned three Wounds, and the Verdict found but one, yet the Variance was immaterial. Vide ch. 46. sect. 37.

b See the books cited sect. 4. under Lett. [T].

c H. P. C. 267. 2 H. H. P. C 302. S. P. C. 15. Lett. B. 165. Lett. A. 3 Inst. 56. 26 H. 8. 5. a. Aleyn 12.

d Fitz. Coro. 264, 286, 287, 305. Vide Benl. 47. 1 And. 41.

e 43 Ass. pl. 31. Fitz. Coro. 226. Cromp. Just. 114. pl. 1. S. P. C. 165. Lett. A. Vide Benl. 47. 1 And. 41.

f 1 And. 103, 104. and Note, That in all the Books cited under the fourth Section to Letter p, where the Defendant is found guilty of Manslaughter on an Indictment of Murder, he is expressly acquitted of the Murder; but other Books, which speak of this Matter, say in general that the Defendant may be found guilty of Manslaughter on an Indictment of Murder, without saying any thing as to the Necessity of giving an express Verdict upon the Murder. 9 Co. 67. b. Crompt. Just. 114. pl. 5. H. P. C. 267. 2 H. P. C. 302. See 4 Co. 40. a. 46. b.

g Fitz. Coro. 284, 286, 287. Sed Vide 44 E. 3. 44. pl. 55. Fitz. Coro. 94. Benl. 47. 1 And. 41.

h Fitz. Coro. 115, 177, 451. 18 Ass. pl. 14. H. P. C. 267. 2 H. H. P. C. 302. S. P. C. 165. Letter B. Cromp. Just. 114. pl. 2. B. 1. ch. 35. sect. 4.

i Kely. 29, 30. Cro. Ca. 332.’Tis made a Quaere, 2 H. 7. pl. 22. and 10. pl. 6. whether where an Indictment of Larceny is insufficient as to the Felony, the Party may by found guilty of the same taking as for a Trespass.

k Kely. 29, 30. Cro. Ca. 376, 377. 1 Jon. 351.

l Cro. Ja. 497, 498.

m 18 Ed. 4. 10. pl. 28. 2 Lev. 208. Vide supra ch. 35. sect. 5. and ch. 36. sect. 6. That an Acquittal of Judgment against a Man in an Action or Indictment or Trespass is no Bar on an Indictment or Appeal of Larceny. Kely. 30.

n 6 Mod. 77.

o 2 Roll. Abr. 556. pl. 19. 557. pl. 20, 21, 22, 23. 24. Noy 18. Vide 1 Jon. 147. Noy 82. Latch 145. 1 Mod. 283. Cont. Bract. cited S. P. C. 28. a. 83. b.

266 2 H. H. P. C. 301, 305.

a Poph. 202. 1 Salk. 385. State Trials, Vol. 2. f. 60, 61. Vol. 4. f. 160, 161. In the Year-Book of 11 H. 4. 2. pl. 3. Abridged Fitz., Verdict, 18. It is agreed, That such a Verdict is repugnant, and therefore the Court would not receive it, but sent the Jury back again, whereupon they found both the Defendants guilty.

b State Trials, Vol, 4. f. 160, 161.

c State Trials, Vol. 4. f. 160, 161.

d Yet it hath been holden, That on an Indictment of Burglary and other Felony against A and B. the Jury cannot, upon the very same Evidence against both, find A. guilty of the Burglary, and B. of the Felony only, 1 Sid. 171. pl. 4.

e Vide supra ch. 26. sect. 75.

f Vide supra ch. 26. sect. 75 and State Trials, Vol 4. f. 160, 161.

g Kely. 111.

h 2 Saund. 308.

i See B. 1. ch. 30. sect. 9. What is a good Verdict on an indictment of Forgery, B. 1. ch. 70. sect. 27.

a 1 And. 104. Crompt. Just. 114. pl. 6. Aleyn 12. Vide State Trials Vol. 2. f. 60, 61.

b Crompt. Just. 114. pl. 6. Fitz. Coro. 108. 2 H. H. P. C. 299, 300, 310.

c Cro. Ca. 292. against the Opinion of Cro. and Berkely, and Cro. Jac. 507. Vide State Trials, Vol. 2. fol. 60, 61. where the Court, upon the Acquittal of the Defendants of the Indictment against them for a Riot, committed them for their Contempt to the Court, during the Trial.

d Agreed in the Case of the King and Bennet, Hill. 4 Georg. 1. wherein it was holden by six of the Judges against six, That a new Trial was not grantable upon an Acquittal on an Information in the Nature of a Quo Warranto, because it founds in the Criminalty. 1 Keb. 124. pl. 33. 2 Keb. 403. pl. 14. 104. pl. 18. Whether it be grantable for a corrupt Practice in obtaining a Verdict. 1 Lev. 9, 10, 124. 1 Sid. 153, 154. 1 Keb. 546. pl. 47. 568. pl. 16. 590. pl. 54. 3 Keb. 179. pl. 2. 409. pl. 31. Shower 336. That it is not grantable where the Acquittal was occasioned by a Slip in an Indictment of Perjury in varying from the Original Record. 2 Keb. 409. pl. 31.

e Adjudged 2 Jon. 163. 3 Keb. 525. 1 Lev. 9. But it is doubted, 1 Keb. 124. pl. 33. 127. pl. 43. 5 Mod. 350. 1 Sid. 49. pl. 12. and the contrary is ruled, 2 Keb. 396. pl. 81. 403. pl. 14.

f See Co, 14. b. 1 Keb. 546. Supra ch. 23. sect. 92. and ch. 36. sect. 15.

e 9 Hen III. c. 29.

f See Vol. III. pag. 379.

g 2 Hal. P. C. 264. 2 Hawk. P. C. 403.

h Fost. 230.

i Fost. 250.

k 2 Hawk. P. C. 410.

l See Vol. III. pag. 359.

m 2 Hawk. P. C. 420. 2 Hal. P. C. 271.

n 2 Hawk. C. P. 413. 2 Hal. P. C. 271.

o 2 Hal. P. C. 268.

p 2 Hawk. P. C. 414.

q 3 Inst. 227. 2 Hal. P. C. 270.

r See Vol. III. pag. 364.

s 2 Hawk. P. C. 400.

t Sir Edward Coke (3 Inst. 137.) gives another additional reason for this refusal, "because the evidence to convict a prisoner should be so manifest, as it could not be contradicted." It was therefore thought too dangerous an experiment, to let an advocate try, whether it could be contradicted or no.

u c. 3. §. 1.

w Father Parsons the jesuit, and after him bishop Ellys, (of English liberty, ii.26.) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Henry I, meaning (I presume) chapters 47 and 48 of the code which is usually attributed to that prince. *De causis criminalibus vel capitalibus nemo quaerat consilium; quin implacitatus statim perneget, sine omni petitione consilii. —— In aliis omnibus potest et debet uti consilio."* But this consilium, I conceive, signifies only an *imparlance*, and the *petitio consilii* is *craving leave to imparl*; (See Vol. III. pag. 298.) which is not allowable in any criminal prosecution. This will be manifest by comparing this law with a co-temporary passage in the *grand coustumier* of Normandy, (ch. 85.) which speaks of imparlances in personal actions. *"Apres ce, est tend le querelle a respondre; et aura congie de soy conseiller, s'il le demande: et, quand il sera conseille, il peut nyer le faict dont il est accuse."* Or, as it stands in the Latin text, *(edit.* 1539.) "Querelatus autem postea tenetur respondere; *et habebit licentiam consulendi, si requirat: habito autem consilio, debet factum negare quo accusatus est."*

x 1 Hal. P. C. 297.

y See St. Tr. II. 144. Foster. 235.

z Stat. 8 W. III. c 4.

a St. Tr. V. 40.

b p. L. b. 12. c. 3.

c Beccar. c. 13.

d 10 Mod. 194.

e St. Tr. VIII. 472.

f 2 Hawk. P. C. 431.

g Lord Preston's case. *A. D*. 1690. St. Tr. IV. 453. Francia's case. *A. D*. 1716. St. Tr. VI. 69. Layer's case. *A. D*. 1722. *ibid*. 279. Henzey's case. *A. D*. 1758. 4 Burr. 644.

h See pag. 198.

l St. Tr. I. *passim*.

j 2 Hal. P. C. 290. [*sic*; footnote j before i].

i 2 Hal. P. C. 290.

k Domat. publ. law. b.3. t.1. Montesq. Sp. L. b. 29. c. 11.

l See pag. 17.

m Holingsh. 1112. St. Tr. I. 72.

n 2 Bulstr. 147. Cro. Car. 292.

o 3 Inst. 79.

p See also 2 Hal. P. C.283. and his summary. 264.

q Stat. 4 Jac. I. c. 1.

r Com. Journ. 4, 5, 12, 13, 15, 29, 30 Jun. 1607.

s *Ibid*. 4 Jun. 1607.

t 2 Hal. P. C. 300. 2 Hawk. P. C. 439.

u 2 Hal. P. C. 310.

w Smith's common. l. 3. c. 1.

x 2 Hal. P. C. 313.

y 1 Lev. 9. T. Jones. 163. St. Tr. X. 416.

z 2 Hawk. P. C. 442.

a The civil law in such case only discharges him from the same accuser, but not from the same accusation. (*Ff*. 48. 2. 7. §. 2.)

b In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something peculiarly delicate: not that he was guilty, but that he had not been enough upon his guard; *"parum cavisse videtur."* (*Festus*. 325.)

c 3 Inst. 242.

d See Vol. II. pag. 450.

e 1 Hal. P. C. 543.

f See Vol. III. pag. 4.

g 1 Hal. P. C. 546.

h See pag. 133.

i Becc. ch. 46.

CHAPTER 13

AMENDMENT VII

CIVIL JURY TRIAL CLAUSES

13.1TEXTS

13.1.1DRAFTS IN FIRST CONGRESS

13.1.1.1Proposal by Madison in House, June 8, 1789

13.1.1.1.a Sixthly. That article 3d, section 2 [of the Constitution], be annexed to the end of clause 2d, these words to wit: but no appeal to such court shall be allowed where the value in controversy shall not amount to dollars: nor shall any fact triable by jury, according to the course of common law, be otherwise reexaminable than may consist with the principles of common law.

Seventhly. That in article 3d, section 2 [of the Constitution], the third clause be struck out, and in its place be inserted the clauses following, to wit:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or

in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

Congressional Register, June 8, 1789, vol. 1, pp. 428–29.

13.1.1.1.b *Sixthly*. That article 3d, section 2 [of the Constitution], be annexed to the end of clause 2d, these words, to wit: but no appeal to such court shall be allowed where the value in controversy shall not amount to dollars: nor shall any fact triable by jury, according to the course of common law, be otherwise reexaminable than may consist with the principles of common law.

Seventhly. That in article 3d, section 2 [of the Constitution], the third clause be struck out, and in its place be inserted the clauses following, to wit:

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war, or public danger,) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate.

Daily Advertiser, June 12, 1789, p. 2, col. 2.

13.1.1.1.c *Sixth*. That article 3d, section 2 [of the Constitution], be annexed to the end of clause 2d, these words, to wit, But no appeal to such court shall be allowed where the value in controversy shall not amount to dollars: nor shall any fact triable by jury, according to the course of common law, be otherwise reexaminable than may consist with the principles of common law.

Seventh. That in article 3d, section 1 [2] [of the Constitution], the third clause be struck out, and in its place be inserted the clauses following, to wit,

The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces,

or the militia when on actual service in time of war, or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorised in some other county of the same state, as near as may be to the seat of the offence.

In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

New-York Daily Gazette, June 13, 1789, p. 575, col. 4.

13.1.1.2Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 9 In Suits at common law in courts acting under the authority of the united States, issues of fact Shall be tried by a Jury if either party, request it.

Madison Papers, DLC.

13.1.1.3House Committee of Eleven Report, July 28, 1789

Art. 3, Sec. 2, add to the 2d Par. "But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a Jury according to the course of the common law, be otherwise reexaminable than according to the rules of the common law."

Art. 3, Sec. 2—Strike out the whole of the 3d paragraph, and insert—"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

"The trial of all crimes (except in cases of impeachment, and in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, the right of

challenge and other accustomed requisites; and no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury; but if a crime be committed in a place in the possession of an enemy, or in which an insurrection may prevail, the indictment and trial may by law be authorized in some other place within the same State; and if it be committed in a place not within a State, the indictment and trial may be at such place or places as the law may have directed."

"In suits at common law the right of trial by jury shall be preserved."

Broadside Collection, DLC.

13.1.1.4 House Consideration, August 17, 1789

13.1.1.4.a The 6th proposition, art. 3, sect. 2. add to the 2d paragraph "But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a jury according to the course of the common law, be otherwise reexaminable than according to the rules of common law."

Congressional Register, August 17, 1789, vol. 2, p. 227.

13.1.1.4.b Thirteenth Amendment — Art. 3. Sec. 2, add to the 2d par. "But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact triable by a jury, according to the course of the common law, be otherwise re examinable than according to the rules of common law."

Daily Advertiser, August 18, 1789, col. 4.

13.1.1.4.c Thirteenth Amendment — "Art. III. Sec. 2, add to the 2d par. "But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact triable by a jury, according to the course of the common law, be otherwise re examinable than according to the rules of common law."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

13.1.1.4.d 13th Amendment. Art. 3. Sec. 2, add to the 2d par. "But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact triable by jury, according to the course of common law, be otherwise reexaminable than

according to the rules of common law."

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

13.1.1.5Motion by Benson in House, August 17, 1789

13.1.1.5.a Mr. Benson Moved to strike out the first part of the paragraph respecting the limitations of appeals, because the question in controversy might be an important one, though the action was not to the amount of a thousand dollars.

Congressional Register, August 17, 1789, vol. 2, p. 227 (no recording of disposition).

13.1.1.5.b Mr. Benson moved to strike out the first part of the paragraph, respecting the limitation of appeals.

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("This motion was negatived.").

13.1.1.5.c Mr Benson moved to strike out the first part of the paragraph, respecting the limitation of appeals.

New-York Daily Gazette, August 18, 1789, p. 802, col. 4 ("This motion was negatived.").

13.1.1.5.d Mr. Benson moved to strike out the first part of the paragraph, respecting the limitation of appeals.

Gazette of the U.S., August 22, 1789, p. 249, col. 3, and p. 250, col. 1 ("The motion was negatived.").

13.1.1.6Motion by Sedgwick in House, August 17, 1789

13.1.1.6.a Mr. Sedgwick Moved to insert 3,000 dollars, in lieu of 1,000. …

Congressional Register, August 17, 1789, vol. 2, p. 228 ("On the question, this motion was rejected, and the proposition accepted in its original form.").

13.1.1.6.b Mr. Sedgwick moved to strike out the words "one thousand" and inset "three thousand."

Daily Advertiser, August 18, 1789, p. 2, col. 4 (“Negatived.”).

13.1.1.6.c Mr. Sedgwick moved to strike out the words “one thousand” and insert “three thousand.”

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 (“Negatived.”).

13.1.1.6.d Mr. Sedgwick, to strengthen the clause, moved to strike out 1,000 dollars, and to insert 3,000.

Gazette of U.S., August 22, 1789, p. 250, col. 1 (“This motion was seconded and supported by Mr. Livermore, but was negatived, and the amendment accepted.”).[1]

13.1.1.7Further House Consideration, August 21, 1789

Twelfth. No appeal to the supreme court of the United States shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by a jury according to the course of the common law, be otherwise reexaminable than according to the rules of common law.

…

Fifteenth. In suits at common law, the right of trial by jury shall be preserved.

HJ, p. 108 (“read and debated … agreed to by the House, … two-thirds of the members present concurring”).[2]

13.1.1.8House Resolution, August 24, 1789

ARTICLE THE ELEVENTH.

No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars, nor shall any fact, triable by a Jury according to the course of the common law, be otherwise reexaminable, than according to the rules of common law.

ARTICLE THE TWELFTH.

In suits at common law, the right of trial by Jury shall be preserved.

House Pamphlet, RG 46, DNA.

13.1.1.9Senate Consideration, August 25, 1789

13.1.1.9.a Article the eleventh

No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars, nor shall any fact, triable by a jury according to the course of the common law, be otherwise reexaminable, than according to the rules of common law.

Article the twelfth

In suits at common law, the right of trial by jury shall be preserved.

Rough SJ, p. 218.

13.1.1.9.b "Article the Eleventh.

"No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars, nor shall any fact, triable by a Jury according to the course of the common law, be otherwise reexaminable, than according to the rules of common law.

"*ARTICLE THE Twelfth.*

"In suits at common law, the right of trial by Jury shall be preserved.

Smooth SJ, p. 196.

13.1.1.9.c "ARTICLE the ELEVENTH.

"No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars, nor shall any fact, triable by a Jury according to the course of the common law, be otherwise reexaminable, than according to the rules of common law.

"*ARTICLE THE TWELFTH*.

"In suits at common law, the right of trial by Jury shall be preserved.

Printed SJ, p. 105.

13.1.1.10Further Senate Consideration, September 4, 1789

13.1.1.10.a On Motion to insert in lieu of the eleventh article

"The supreme judicial federal Court, shall have no jurisdiction of causes between Citizens of different States, unless the matter in dispute whether it concerns the realty or personalty, be of value of three thousand dollars, at the least: Nor shall the federal judicial powers extend to any actions between Citizens of different States, where the matter in dispute, whether it concerns the realty or personalty is not of the value of fifteen hundred dollars, at the least — And no part, triable by a jury according to the course of the common law, shall be otherwise reexaminable, than according to the rules of common law."

Rough SJ, p. 249 ("It passed in the Negative.").

13.1.1.10.b On motion, To insert in lieu of the eleventh Article —

"The Supreme Judicial Federal Court, shall have no jurisdiction of causes between Citizens of different States, unless the matter in dispute, whether it concerns the realty or personalty, be of value of three thousand dollars, at the least: Nor shall the Federal Judicial Powers extend to any actions between Citizens of different States, where the matter in dispute, whether it concerns the realty or personalty, is not of the value of fifteen hundred dollars, at the least — And no part, triable by a jury according to the course of the common law, shall be otherwise reexaminable, than according to the rules of common law" —

Smooth SJ, p. 223 ("It passed in the Negative.").

13.1.1.10.c On motion, To insert in lieu of the eleventh Article —

"The Supreme Judicial Federal Court, shall have no jurisdiction of causes between citizens of different States, unless the matter in dispute, whether it concerns the realty or personalty, be of value of three thousand dollars, at the least: Nor shall the Federal Judicial Powers extend to any actions between citizens of different States, where the matter in dispute, whether it concerns the realty or personalty is not of the value of fifteen hundred dollars, at the least — And no part, triable by a jury according to the course of the common law, shall be otherwise reexaminable, than according to the rules of common law" —

Printed SJ, p. 119 ("It passed in the Negative.").

13.1.1.11 Further Senate Consideration, September 4, 1789

13.1.1.11.a On Motion to adopt the eleventh Article amended to read as follows

"No fact, triable by a jury according to the course of common law, shall be otherwise reexaminable in any Court of the United States, than according to the rules of common law."

Rough SJ, p. 249 ("It passed in the affirmative.").

13.1.1.11.b On motion, To adopt the eleventh Article amended to read as follows —

"No fact, triable by a Jury according to the course of common law, shall be otherwise reexaminable in any Court of the United States, than according to the rules of common law" —

Smooth SJ, p. 223 ("It passed in the affirmative.").

13.1.1.11.c On motion, To adopt the eleventh Article amended to read as follows —

"No fact, triable by a Jury according to the course of common law, shall be otherwise reexaminable in any Court of the United States, than according to the rules of common law" —

Printed SJ, p. 119 ("It passed in the Affirmative.").

13.1.1.12Further Senate Consideration, September 7, 1789

13.1.1.12.a On Motion to adopt the twelfth Article of the Amendments, proposed by the House of Representatives, amended by the addition of these words to the Article, to wit: “Where the consideration exceeds twenty dollars,”

Rough SJ, p. 256 (“It passed in the affirmative.”).

13.1.1.12.b On motion, To adopt the twelfth Article of the Amendments, proposed by the House of Representatives, amended by the addition of these words to the Article, to wit: “Where the consideration exceeds twenty dollars,”

Smooth SJ, p. 228 (“It passed in the Affirmative.”).

13.1.1.12.c On motion, To adopt the twelfth Article of the Amendments, proposed by the House of Representatives, amended by the addition of these words to the Article, to wit: “Where the consideration exceeds twenty dollars,”

Printed SJ, p. 121 (“It passed in the Affirmative.”).

13.1.1.13Further Senate Consideration, September 9, 1789

13.1.1.13.a On motion, To strike out the tenth and the eleventh Articles.

Rough SJ, p. 275 (“It passed in the affirmative.”).

13.1.1.13.b On motion, To strike out the tenth and the eleventh articles —

Smooth SJ, p. 245 (“It passed in the affirmative.”).

13.1.1.13.c On motion, To strike out the tenth and the eleventh Articles —

Printed SJ, p. 130 (“It passed in the Affirmative.”).

13.1.1.14Further Senate Consideration, September 9, 1789

13.1.1.14.a On motion, To strike out of the twelfth article the word “twelfth,” and insert “ninth.”

Rough SJ, p. 275 (“It passed in the affirmative.”).

13.1.1.14.b On motion, To strike out of the twelfth article the word "Twelfth," and insert "ninth"—

Smooth SJ, p. 245 ("It passed in the Affirmative.").

13.1.1.14.c On motion, To strike out of the twelfth Article the word "Twelfth," and insert ninth—

Printed SJ, p. 130 ("It passed in the Affirmative.").

13.1.1.15 Further Senate Consideration, September 9, 1789

13.1.1.15.a And on motion to amend this article to read as follows:

"In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by Jury shall be preserved, and no fact tried by a Jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rough SJ, p. 276 ("It passed in the affirmative.").

13.1.1.15.b And on motion, To amend this article, to read as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact tried by a Jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law" —

Smooth SJ, p. 245 ("It passed in the Affirmative.").

13.1.1.15.c And on motion, To amend this Article, to read as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact tried by a Jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law" —

Printed SJ, p. 130 ("It passed in the Affirmative.").

13.1.1.15.d [Fifteenth Amendment] To erase the 10th. article, & the words "article the Tenth."

[Sixteenth Amendment] To erase the 11th. article & the words "Article the Eleventh."

[Seventeenth Amendment] To ~~insert~~ erase the word "twelfth" & insert — Ninth.

[Eighteenth Amendment] To insert in the twelfth article after the word "law," where the value in controversy ∧ shall exceed~~s~~ twenty dollars — &

[Nineteenth Amendment] To insert at the end of the same article — And no fact tried by a Jury shall be otherwise reexamined, in any court of the United States, than according to the rules of the common law.

Ellsworth MS, RG 46, DNA.

13.1.1.16Senate Resolution, September 9, 1789

ARTICLE THE NINTH.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact, tried by a Jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Senate Pamphlet, RG 46, DNA.

13.1.1.17Further House Consideration, September 21, 1789

RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

RESOLVED, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

13.1.1.18Further Senate Consideration, September 21, 1789

13.1.1.18.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

13.1.1.18.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

13.1.1.19 Further Senate Consideration, September 21, 1789

13.1.1.19.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

13.1.1.19.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

13.1.1.20Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: “Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances;” And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows “In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to have the assistance of counsel for his defence.”

Conference MS, RG 46, DNA (Ellsworth’s handwriting).

13.1.1.21House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Article the eighth. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

13.1.1.22 Senate Consideration of Conference Committee Report, September 24, 1789

13.1.1.22.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

13.1.1.22.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and

to have the assistance of Counsel for defence."

Printed SJ, p. 145.

13.1.1.23 Further Senate Consideration of Conference Committee Report, September 24, 1789

13.1.1.23.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

13.1.1.23.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p. 148.

13.1.1.24 Further Senate Consideration of Conference Committee Report, September 25, 1789

13.1.1.24.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

RESOLVED, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

13.1.1.24.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

RESOLVED, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

13.1.1.25 Agreed Resolution, September 25, 1789

13.1.1.25.a Article the Ninth.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact, tried by a Jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Smooth SJ, Appendix, p. 294, DNA.

13.1.1.25.b ARTICLE THE NINTH.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact, tried by a Jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Printed SJ, Appendix, p. 164.

13.1.1.26Enrolled Resolution, September 28, 1789

Article the Ninth … In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Enrolled Resolutions, RG 11, DNA.

13.1.1.27Printed Versions

13.1.1.27.a ART. VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

Statutes at Large, vol. 1, p. 21.

13.1.1.27.b ART. IX. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Statutes at Large, vol. 1, p. 98.

13.1.2PROPOSALS FROM THE STATE CONVENTIONS

13.1.2.1Maryland Minority, April 26, 1788

3. That in all actions on debts or contracts, and in all other controversies respecting property, of which the inferior federal courts have jurisdiction, the trial of facts shall be by jury, if required by either party; and that it be expressly declared, that the state courts, in such cases, have a concurrent jurisdiction with the federal courts, with an appeal from either, only as to matter of law, to the supreme federal court, if the matter in dispute be of the value of — dollars.

4. That the inferior federal courts shall not have jurisdiction of less than — dollars; and there may be an appeal in all cases of revenue, as well to matter of fact as law, and congress may give the state courts jurisdiction of revenue cases, for such sums, and in such manner, as they may think proper.

5. That in all cases of trespasses within the body of a county, and within the inferior federal jurisdiction, the party injured shall be entitled to trial by jury in the state where the injury shall be committed; and that it be expressly declared, that the state courts, in such cases, shall have concurrent jurisdiction with the federal courts; and there shall be no appeal from either, except on matter of law; and that no person be exempt from such jurisdiction and trial but ambassadors and ministers privileged by the law of nations.

Maryland Gazette, May 1, 1788 (committee majority).

13.1.2.2Massachusetts, February 6, 1788

Seventhly, The Supreme Judicial Federal Court shall have no jurisdiction of Causes between Citizens of different States unless the matter in dispute whether it concerns the realty or personalty be of the value of three thousand dollars at the least. nor [*sic*] shall the Federal Judicial Powers extend to any actions between Citizens of different States where the matter in dispute whether it concerns the Realty or personalty is not of the value of Fifteen hundred dollars at the least.

Eighthly, In civil actions between Citizens of different States every issue of fact arising in Actions at common law shall be tried by a Jury if the parties or either of them request it.

State Ratifications, RG 11, DNA.

13.1.2.3New Hampshire, June 21, 1788

Seventhly All Common Law Cases between Citizens of different States shall be commenced in the Common Law-Courts of the respective States & no appeal shall be allowed to the Federal Court in such Cases unless the sum or value of the thing in Controversy amount to three Thousand Dollars

—

Eighthly In Civil Actions between Citizens of different States every Issue of Fact arising in Actions at Common Law shall be Tryed by Jury, if the Parties, or either of them request it —

State Ratifications, RG 11, DNA.

13.1.2.4New York, July 26, 1788

That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.

State Ratifications, RG 11, DNA.

13.1.2.5North Carolina, August 1, 1788

11th. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.

State Ratifications, RG 11, DNA.

13.1.2.6Pennsylvania Minority, December 12, 1787

2. That in controversies respecting property, and in suits between man and man, trial by jury shall remain as heretofore, as well in the federal courts, as in those of the several states.

Pennsylvania Packet, December 18, 1787.

13.1.2.7Rhode Island, May 29, 1790

11th. That in controversies respecting property, and in suits between man and man the antient trial by jury, as hath been exercised by us and our ancestors, from the time whereof the memory of man is not to the contrary, is one of the greatest securities to the rights of the people, and ought to

remain sacred and inviolate.

State Ratifications, RG 11, DNA.

13.1.2.8Virginia, June 27, 1788

Eleventh. That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is one of the greatest Securities to the rights of the people, and ought to remain sacred and inviolable.

State Ratifications, RG 11, DNA.

13.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

13.1.3.1Delaware: Declaration of Rights, 1776

Sect. 13. That trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people.

Delaware Laws, vol. 1, App., p. 81.

13.1.3.2Georgia

13.1.3.2.aConstitution, 1777

LXI. Freedom of the press, and trial by jury, to remain inviolate *forever*.

Georgia Laws, p. 16.

13.1.3.2.b Constitution, 1789

ARTICLE IV.

…

Sect. 3. Freedom of the press, and trial by jury, shall remain inviolate.

Georgia Laws, p. 29.

13.1.3.3Maryland: Declaration of Rights, 1776

3. That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great-Britain, and have been introduced, used, and practised by the courts of law or equity; and also to all acts of assembly in force on the first of June seventeen hundred and seventy-four, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; subject nevertheless to the revision of, and amendment or repeal by, the legislature of this state; and the inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by his majesty Charles the first, to Caecilius Calvert, baron of Baltimore.

…

18. That the trial of facts where they arise, is one of the greatest securities of the lives, liberties, and estate of the people.

Maryland Laws, November 3, 1776.

13.1.3.4Massachusetts

13.1.3.4.aBody of Liberties, 1641

[26] Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.

…

[29] In all Actions at law it shall be the libertie of the plantife and defendant by mutual consent to choose whether they will be tryed by the Bensh [or Bench] or by a Jurie, unlesse it be where the law upon just reason hath otherwise determined. The like libertie shall be granted to all persons in Criminall cases.

Massachusetts Colonial Laws, p. 39.

13.1.3.4.bGeneral Laws of New-Plimouth, 1671 [1636]

4. It is also Enacted, that no person in this Government shall be endamaged in respect of Life, Limb, Liberty, Good name or Estate, under colour of Law, or countenance of Authority, but by virtue or equity of some express law of the General Court of this Colony, the known Law of God, or the good and equitable Laws of our Nation suitable for us, being brought to Answer by due process thereof.

5. That all Trials, whether Capital, Criminal, or between Man and Man, be tried by Jury of Twelve good and lawful Men, according to the commendable custome of England; except the party or parties concerned, do refer it to the Bench, or some express Law doth refer it to their Judgement and Tryal, or the Tryal of some other Court where Jury is not, in which case any party aggrieved, may appeal, and shall have Tryal by a Jury.

And it shall be in the liberty of both Plaintiffe and Defendant or any Delinquent, that is to be tryed by a Jury, to chalenge any of the Jurors, and if the chalenge be found just and reasonable by the Bench, it shall be allowed him, and others without just exception shall be impannelled in their room; And if it be in case of Life and Death, the Prisoner shall have liberty to except against six or eight of the Jury, without giving any reason for his exception.

New-Plimouth Laws, p. 2.

13.1.3.4.cConstitution, 1780

[Part I, Article] XV. In all controversies concerning property, and in suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by a jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariner’s wages, the legislature shall thereafter find it necessary to alter it.

Massachusetts Perpetual Laws, p. 7.

13.1.3.5New Hampshire: Constitution, 1784

[Part I, Article] XX. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in causes on

the high seas, and such as relate to mariners wages, the legislature shall think it necessary hereafter to alter it.

New Hampshire Laws, p. 26.

13.1.3.6New Jersey

13.1.3.6.a Concessions and Agreements of West New Jersey, 1676

CHAPTER XVII.

THAT no Proprietor, Freeholder or Inhabitant of the said Province of *West New-Jersey*, shall be deprived or condemned of Life, Limb, Liberty, Estate, Property or any ways hurt in his or their Privileges, Freedoms or Franchises, upon any account whatsoever, without a due Tryal, and Judgment passed by Twelve good and lawful Men of his Neighbourhood first had: And that in all Causes to be tryed, and in all Tryals, the Person or Persons, arrained may except against any of the said Neighbourhood, without any Reason rendered, (not exceeding Thirty five) and in case of any valid reason alledged, against every Person nominated for that Service.

CHAPTER XVIII.

AND that no Proprietor, Freeholder, Freedenison, or Inhabitant in the said Province, shall be attached, arrested, or imprisoned, for or by reason of a Debt, Duty, or other Thing whatsoever (Cases Felonious, Criminal and Treasonable excepted) before he or she have personal Summon, or Summons, left at his or her last dwelling Place, if in the said Province, by some legal authorized Officer, constituted and appointed for that Purpose, to appear in some Court of Judicature for the said Province, with a full and plain account of the Cause or Thing in demand, as also the Name or Names of the Person or Persons at whose suit, and the Court where he is to appear, and that he hath at least Fourteen Days Time to appear and answer the said suit, if he or she live or inhabit within Forty Miles *English* of the said Court, and if at a further distance, to have for every Twenty Miles, two Days more, for his and their appearance, and so proportionably for a larger distance of space.

That upon the Recording of the Summons, and non appearance of such Person and Persons, a Writ or attachment shall or may be issued out to arrest, or attach the Person or Persons of such defaulters, to cause his or

their Appearance in such Court, returnable at a Day certain, to answer the Penalty or Penalties, in such Suit or Suits; and if he or they shall be condemned by legal Tryal and Judgment, the Penalty or Penalties shall be paid and satisfied out of his or their real or personal Estate so condemned, or cause the Person or Persons so condemned, to lie in execution till Satisfaction of the Debt and Damages be made, PROVIDED ALWAYS, if such Person or Persons so condemned, shall pay and deliver such Estate, Goods and Chattles which he or any other Person hath for his or their use, and shall solemnly declare and aver, that he or they have not any further Estate, Goods, or Chattles wheresoever, to satisfy the Person or Persons, (at whose Suit, he or they are condemned) their respective Judgments, and shall also bring and produce three other Persons as compurgators, who are well known and of honest Reputation, and approved of by the Commissioners of that Division, where they dwell or inhabit, which shall in such open Court, likewise solemnly declare and aver, that they believe in their Consciences, such Person and Persons so condemned, have not werewith [*sic*] further to pay the said Condemnation or Condemnations, he or they shall be thence forthwith discharged from their said imprisonment, any Law or Custom to the contrary thereof, heretofore in the said Province, notwithstanding. And upon such Summons and Default of appearance, recorded as aforesaid, and such Person and Persons not appearing within Forty Days after, it shall and may be lawful for such Court of Judicature to proceed to tryal, of twelve lawful Men to Judgment, against such Defaulters, and issue forth Execution against his or their Estate, real and personal, to satisfy such Penalty or Penalties, to such Debt and Damages so Recorded, as far as it shall or may extend.

CHAPTER XIX.

THAT there shall be in every Court, three Justices or Commissioners, who shall sit with the twelve Men of the Neighbourhood, with them to hear all Causes, and to assist the said Twelve Men of the Neighbourhood in Case of Law; and that they the said Justices shall pronounce such Judgment as they shall receive from, and be directed by the said Twelve Men, in whom only the Judgment resides, and not otherwise.

And in Case of their neglect and refusal, that then one of the Twelve, by consent of the rest, pronounce their own Judgment as the Justices should have done.

And if any Judgment shall be past, in any Case Civil or Criminal, by any other Person or Persons, or any other way, then according to this

Agreement and Appointment, it shall be held null and void, and such Person or Persons so presuming to give Judgment, shall be severely Fin'd, and upon complaint made to the General Assembly, by them be declared incapable of any Office or Trust within this Province.

CHAPTER XX.

THAT in all Matters and Causes, Civil and Criminal, Proof is to be made by the solemn and plain averment, of at least two honest and reputable Persons; and in Case that any Person or Persons shall bear false Witness, and bring in his or their Evidence, contrary to the Truth of the Matter as shall be made plainly to appear, that then every such Person or Persons, shall in Civil Causes, suffer the Penalty which would be due to the Person or Persons he or they bear Witness against. And in Case any Witness or Witnesses, on the behalf of any Person or Persons, Indicted in a Criminal Cause, shall be found to have born False Witness for Fear, Gain, Malice, or Favour, and thereby hinder the due Execution of the Law, and deprive the suffering Person or Persons of their due Satisfaction, that then and in all other Cases of false Evidence, such Person or Persons, shall be first severely Fined, and next that he or they shall forever be disabled from being admitted in evidence, or into any Publick Office, Employment, or Service within this Province.

CHAPTER XXI.

THAT all and every Person and Persons whatsoever, who shall prosecute or prefer any Indictment or Information against others for any personal Injuries, or Matter Criminal, or shall Prosecute for any other Criminal Cause, (Treason, Murther, and Felony, only excepted) shall and may be Master of his own Process, and have full Power to forgive and remit the Person or Persons offending against him or herself only, as well before as after Judgment, and Condemnation, and Pardon and Remit the Sentence, Fine, and Punishment of the Person or Persons Offending, be it personal or other whatsoever.

CHAPTER XXII.

THAT the Tryals of all Causes, Civil and Criminal, shall be heard and decided by the Virdict or Judgment of Twelve honest Men of the Neighbourhood, only to be summoned and presented by the Sheriff of that Division, or Propriety where the Fact or Trespass is committed; and that no Person or Persons shall be compelled to Fee any Attorney or Counciller to plead his Cause, but that all Persons have free Liberty to plead his own

Cause, if he please: And that no Person nor Persons imprisoned upon any account whatsoever within this Province, shall be obliged to pay any Fees to the Officer or Officers of the said Prison, either when committed or discharged.

CHAPTER XXIII.

That in all publick Courts of Justice for Tryals of Causes, Civil or Criminal, any Person or Persons, Inhabitants of the said Province, may freely come into, and attend the said Courts, and hear and be present, at all or any such Tryals as shall be there had or passed, that Justice may not be done in a Corner nor in any covert manner, being intended and resolved, by the help of the Lord, and by these our Concessions and Fundamentals, that all and every Person and Persons Inhabiting the said Province, shall, as far as in us lies, be free from Oppression and Slavery.

New Jersey Grants, pp. 395–98.

13.1.3.6.bFundamental Constitutions for East New Jersey, 1683

XIX. That no Person or Persons within the said Province shall be taken and imprisoned, or be devised of his Freehold, free Custom or Liberty, or be outlawed or exiled, or any other Way destroyed; nor shall they be condemn'd or Judgment pass'd upon them, but by lawful Judgment of their Peers: Neither shall Justice nor Right be bought or sold, defered or delayed, to any Person whatsoever: In order to which by the Laws of the Land, all Tryals shall be by twelve Men, and as near as it may be, Peers and Equals, and of the Neighbourhood, and Men without just Exception. In Cases of Life there shall be at first Twenty four returned by the Sherriff for a Grand Inquest, of whom twelve at least shall be to find the Complaint to be true; and then the Twelve Men or Peers to be likewise returned, shall have the final Judgment; but reasonable Challenges shall be always admitted against the Twelve Men, or any of them: But the Manner of returning Juries shall be thus, the Names of all the Freemen above five and Twenty Years of Age, within the District or Boroughs out of which the Jury is to be returned, shall be written on equal Pieces of Parchment and put into a Box, and then the Number of the Jury shall be drawn out by a Child under Ten Years of Age. And in all Courts Persons of all Perswasions may freely appear in their own Way, and according to their own Manner, and there personally plead their own Causes themselves, or if unable, by their Friends, no Person being allowed to take Money for pleading or advice in such Casas: [*sic*] And the first Process shall be the Exhibition of the Complaint in Court fourteen

Days before the Tryal, and the Party complain'd against may be fitted for the same, he or she shall be summoned ten Days before, and a Copy of the Complaint delivered at their dwelling House: But before the Complaint of any Person be received, he shall solemnly declare in Court, that he believes in his Conscience his Cause is just. Moreover, every Man shall be first cited before the Court for the Place where he dwells, nor shall the Cause be brought before any other Court but by way of Appeal from Sentence of the first Court, for receiving of which Appeals, there shall be a Court consisting of eight Persons, and the Governor (protempore) President thereof, (*to wit*) four Proprietors and four Freemen, to be chosen out of the great Council in the following Manner, *viz*. the Names of Sixteen of the Proprietors shall be written on small pieces of Parchment and put into a Box, out of which by a Lad under Ten Years of Age, shall be drawn eight of them, the eight remaining in the Box shall choose four; and in like Manner shall be done for the choosing of four of the Freemen.

New Jersey Grants, pp. 163–64.

13.1.3.6.cConstitution, 1776

XXII. That the Common Law of *England*, as well as so much of the Statute Law, as have been heretofore practised in this Colony, shall still remain in Force, until they shall be altered by a future Law of the Legislature, such Parts only excepted as are repugnant to the Rights and Privileges contained in this Charter; and that the inestimable Right of Trial by Jury shall remain confirmed, as a Part of the Law of this Colony, without Repeal forever.

New Jersey Acts, p. ix.

13.1.3.7New York

13.1.3.7.aAct Declaring … Rights & Priviledges, 1691

That no Freeman shall be taken or imprisoned, or be deprived of his Freehold or Liberty, or free Customs, or OutLawed, or Exiled, or any other wayes destroyed; nor shall be passed upon, adjudged or condemned, but by the lawful Judgment of his *P*eers, and by the Laws of this Province.

Justice nor Right shall be neither Sold, Denyed or Delayed to any Person within this Province.

…

That no Man, of what Estate or Condition soever, shall be put out of his Lands, Tenements, nor taken, nor imprisoned, nor disinherited, nor banished, nor any ways destroyed or molested, without first being brought to answer by due course of Law.

New York Acts, p. 17.

13.1.3.7.bConstitution, 1777

XIII. And this Convention doth further, in the Name, and by the Authority of the good People of this State, ORDAIN, DETERMINE, AND DECLARE, That no Member of this State shall be disfranchised, or deprived of any of the Rights or Privileges secured to the Subjects of this State by this Constitution, unless by the Law of the Land, or the Judgment of his Peers.

…

XLI. And this Convention doth further ORDAIN, DETERMINE, AND DECLARE, in the Name and by the Authority of the good People of this State, That Trial by Jury, in all Cases in which it hath heretofore been used in the Colony of *New-York*, shall be established, and remain inviolate for ever. And that no Acts of Attainder shall be passed by the Legislature of this State, for Crimes other than those committed before the Termination of the present War; and that such Acts shall not work a Corruption of Blood. And further, that the Legislature of this State shall at no Time hereafter, Institute any new Court or Courts, but such as shall proceed according to the Course of the Common Law.

New York Laws, vol. 1, pp. 8, 14.

13.1.3.7.cBill of Rights, 1787

Second, That no Citizen of this State shall be taken or imprisoned, or be disseised of his or her Freehold, or Liberties, or Free-Customs: or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful Judgment of his or her Peers, or by due Process of Law.

…

Fourth, That no Person shall be put to answer without Presentment before Justices, or Matter of Record, or due Process of Law, according to the Law of the Land; and if any Thing be done to the Contrary, it shall be void in Law, and holden for Error.

Fifth, That no Person, of what Estate or Condition soever, shall be taken, or imprisoned, or disinherited, or put to death, without being brought to

answer by due Process of Law; and that no Person shall be put out of his or her Franchise or Freehold, or lose his or her Life or Limb, or Goods and Chattels, unless he or she be duly brought to answer, and be forejudged of the same, by due Course of Law; and if any Thing be done contrary to the same, it shall be void in Law, and holden for none.

Sixth, That neither Justice nor Right shall be sold to any Person, nor denied, nor deferred; and that Writs and Process shall be granted freely and without Delay, to all Persons requiring the same; and nothing from henceforth shall be paid or taken for any Writ or Process, but the accustomed Fees for writing, and for the Seal of the same Writ or Process; and all Fines Duties and Impositions whatsoever, heretofore taken or demanded, under what Name or Description soever, for, or upon granting any Writs, Inquests, Commissions, or Process to Suitors in their Causes, shall be, and hereby are abolished.

Seventh, That no Citizens of this State shall be fined or amerced without reasonable Cause, and such Fine or Amerciament shall always be according to the Quantity of his or her Trespass or Offence, and saving to him or her his or her Contenement; *That is to say*, Every Freeholder saving his Freehold, a Merchant saving his Merchandize, and a Mechanic saving the Implements of his Trade.

New York Laws, vol. 2, pp. 1–2.

13.1.3.8North Carolina

13.1.3.8.aFundamental Constitutions of Carolina, 1669

69th. Every jury shall consist of twelve men; and it shall not be necessary they should all agree, but the verdict shall be according to the consent of the majority.

…

111th. No cause whether civil or criminal, of any freeman, shall be tried in any court of judicature, without a jury of his peers.

North Carolina State Records, pp. 145, 149.

13.1.3.8.bDeclaration of Rights, 1776

Sect. XIV. That in all Controversies at Law respecting Property, the ancient Mode of Trial by Jury is one of the best Securities of the Rights of the

People, and ought to remain sacred and inviolable.

North Carolina Laws, p. 275.

13.1.3.9Pennsylvania

13.1.3.9.aLaws Agreed Upon in England, 1682

VIII. That all Tryals shall be by **Twelve Men,** and as near as may be, *Peers* or *Equals*, and of the *Neighbourhood*, and men without just Exception. In cases of *Life*, there shall be first **Twenty Four** returned by the Sheriff for a **Grand Inquest,** of whom *Twelve* at least shall find the Complaint to be true, and then the **Twelve Men** or *Peers*, to be likewise returned by the Sheriff, shall have the *final Judgment:* But reasonable *Challenges* shall be alwayes admitted against the said *Twelve Men*, or any of them.

Pennsylvania Frame, p. 8.

13.1.3.9.bProvincial Laws, 1700

19 Noe F*reeman* to be I*mprisoned*, or Disseized, Outlaw'd, or Exiled, or otherwise hurt; Tryed, or C*ondemned*, but by the J*udgement* of his T*welve* Equalls, or L*aws* of this P*rovince*.

Penn Abstract, p. 5.

13.1.3.9.c Constitution, 1776

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

…

XI. That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.

…

CHAPTER II.
PLAN *OR* FRAME *OF* GOVERNMENT.

…

SECT. 25. Trial shall be by jury as heretofore: And it is recommended to the legislature of this state, to provide by law against every corruption or partiality in the choice, return, or appointment of juries.

Pennsylvania Acts, McKean, pp. x, xvii.

13.1.3.9.d Constitution, 1790

ARTICLE IX.

Sect. VI. That trial by jury shall be as heretofore, and the right thereof remain inviolate.

Pennsylvania Acts, Dallas, p. xxxiv.

13.1.3.10Rhode Island: Code of Laws, 1647

1. That no person, in this Colony, shall be taken or imprisoned, or be disseized of his lands or liberties, or be exiled, or any otherwise molested or destroyed, but by the lawful judgment of his peers, or by some known law, and according to the letter of it, ratified and confirmed by the major part of the General Assembly, lawfully met and orderly managed.

Rhode Island Code, p. 12.

13.1.3.11South Carolina

13.1.3.11.aFundamental Constitutions of Carolina, 1669

69th. Every jury shall consist of twelve men; and it shall not be necessary they should all agree, but the verdict shall be according to the consent of the majority.

…

111th. No cause whether civil or criminal, of any freeman, shall be tried in any court of judicature, without a jury of his peers.

North Carolina State Records, pp. 145, 149.

13.1.3.11.bConstitution, 1778

XLI. That no Freeman of this State be taken, or imprisoned, or desseized of his Freehold, Liberties or Privileges, or outlawed, or exiled, or in any Manner destroyed, or deprived of his Life, Liberty, or Property, but by the Judgement of his Peers, or by the Law of the Land.

South Carolina Constitution, p. 15.

13.1.3.11.c Constitution, 1790

ARTICLE IX.

…

Section 2. No freeman of this state shall be taken, or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the law of the land; nor shall any bill or the attainder, ex post facto law or law impairing the obligation of contracts ever be passed by the legislature of this state.

…

Section 6. The trial by jury as heretofore used in this state, and the liberty of the press, shall be for ever inviolably preserved.

South Carolina Laws, App., pp. 41–42.

13.1.3.12Vermont

13.1.3.12.a Constitution, 1777

CHAPTER I.

…

13. THAT in Controversies respecting Property, and in Suits between Man and Man, the Parties have a Right to a Trial by Jury, which ought to be held sacred.

…

CHAPTER II.

…

SECTION XXII.

TRIALS shall be by Jury; and it is recommended to the Legislature of this State, to provide by Law against every Corruption or Partiality in the Choice, and Return, or Appointment of Juries.

Vermont Acts, pp. 4, 9.

13.1.3.12.bDeclaration of Rights, 1786

IV: That when an issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to a trial by jury; which ought to

be held sacred.

13.1.3.13Virginia: Declaration of Rights, 1776

XI. THAT in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

Virginia Acts, p. 33.

13.1.4OTHER TEXTS

13.1.4.1Magna Carta, 1297

No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

25 Edw. 1, c. 29.

13.1.4.2Petition of Right, 1627

3. And where alsoe by the Statute called the Great Charter of the liberties of England, it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customes or be outlawed or exiled or in any manner destroyed, but by the lawfull judgment of his peeres or by the law of the land.

4. And in the eight and twentith yeere of the raigne of King Edward the Third it was declared and enacted by authoritie of Parliament, that no man of what estate or condicion that he be, should be put out of his land or tenemente nor taken nor imprisoned nor disherited nor put to death without being brought to aunswere by due pcesse of lawe.

5. Neverthelesse against the tenor of the said statutes and other the good lawes and statutes of your realme to that end pvided, divers of your subjecte have of late been imprisoned without any cause shewed: And when for their deliverance they were brought before your justices by your Majesties writte of habeas corpus there to undergoe and receive as the court should order, and their keepers cōmaunded to certifie the causes of their detayner, no cause was certified, but that they were deteined by your Majesties speciall cōmaund signified by the lorde of your privie councell, and yet were returned backe to severall prisons without being charged with any thing to which they might make aunswere according to the lawe.

…

8. They doe therefore humblie pray your most excellent Majestie … that no freeman in any such manner as is before mencioned be imprisoned or deteined. …

3 Chas. 1, c. 1 (1628).

13.1.4.3Declaration of Independence, 1776

… For depriving us in many cases, of the benefits of Trial by Jury. …

Continental Congress Papers, DNA.

13.1.4.4Northwest Territory Ordinance, 1787

Article the Second. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law; all persons shall be bailable unless for Capital Offences, where the proof shall be evident, or the presumption great; all fines shall be moderate, and no cruel or unusual punishments shall be inflicted; no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it Necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared, that no

law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements bona fide and without fraud, previously formed.

Continental Congress Papers, DNA.

13.1.4.5Richard Henry Lee to Edmund Randolph, Proposed Amendments, October 16, 1787

… That the trial by jury in criminal and civil cases, and the modes prescribed by the common law for safety of life in criminal prosecutions shall be held sacred — … That such parts of the new constitution be amended as provide imperfectly for the trial of criminals by a jury of the vicinage, and to supply the omission of a jury trial in civil causes or disputes about property between individuals where by the common law is directed, and as generally it is secured by the several State constitutions. That such parts of the new constitution be amended, as permit the vexatious and oppressive calling of citizens from their own country, and all controversies between citizens of different states and between citizens and foreigners, to be tried in a far distant court, and as it may be without a jury, whereby in a multitude of cases, the circumstances of distance and expence may compel numbers to submit to the most unjust and illfounded demand. …

Virginia Gazette, December 22, 1787.

13.2DISCUSSION OF DRAFTS AND PROPOSALS

13.2.1THE FIRST CONGRESS

13.2.1.1June 8, 17893

13.2.1.2August 17, 1789

13.2.1.2.a The 6th proposition, art. 3. sect. 2. add to the 2d paragraph “But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact, triable by jury according to the course of common law, be otherwise reexaminable than according to the rules of common law.”

Mr. Benson

Moved to strike out the first part of the paragraph respecting the limitation of appeals, because the question in controversy might be an important one, though the action was not to the amount of a thousand dollars.

Mr. Madison.

If the gentleman will propose any restriction to answer his purpose, and for avoiding the inconvenience he apprehends, I am willing to agree to it, but it will be improper to strike out the clause without a substitute.

There is little danger that any court in the United States will admit an appeal where the matter in dispute does not amount to a thousand dollars, but as the possibility of such an event has excited in the minds of many citizens, the greatest apprehension that persons of opulence would carry a cause from the extremities of the union to the supreme court, and therefore prevent the due administration of justice, it ought to be guarded against.

Mr. Livermore thought the clause was objectionable, because it comprehended nothing more than the value.

Mr. Sedgwick

Moved to insert 3,000 dollars, in lieu of 1,000, but on the question, this motion was rejected, and the proposition accepted in its original form.

Congressional Register, August 17, 1789, vol. 2, pp. 227–28.

13.2.1.2.b Thirteenth Amendment. — Art. 3. Sec. 2, add to the 2d par. “But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact triable by a jury, according to the course of the common law, be otherwise re examinable than according to the rules of common law.”

Mr. Benson moved to strike out the first part of the paragraph, respecting the limitation of appeals. This motion was negatived.

Mr. Sedgwick moved to strike out the words “one thousand” and insert “three thousand.” Negatived.

The amendment was accepted.

Daily Advertiser, August 18, 1789, p. 2, col. 4.

13.2.1.2.c Thirteenth amendmen: [*sic*] — “Art. III. Sec. 2, add to the 2d par. “But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact triable by a jury, according to the course of the common law, be otherwise re examinable than according to the rules of common law.”

Mr Benson moved to strike out the first part of the paragraph, respecting the limitation of appeals. This motion was negatived.

Mr. Sedgwick moved to strike out the words “one thousand” and insert “three thousand.” Negatived.

The amendment was accepted.

New-York Daily Gazette, August 19, 1789, p. 802, col. 4.

13.2.1.2.d 13th Amendment. Art. 3. Sec. 2, add to the 2d par. But no appeal to such court shall be allowed, where the value in controversy shall not amount to one thousand dollars; nor shall any fact triable by jury, according to the course of common law, be otherwise reexaminable than according to the rules of common law.

Mr. Benson moved to strike out the first part of the paragraph, respecting the limitation of appeals.

Mr. Madison observed, that except some adequate substitute was proposed, he thought it would be necessary to retain the clause: There is, said he, perhaps no danger of any court in the United States, granting an appeal where the value in dispute does not amount to 1,000 dollars; still the possibility of such an event has excited the greatest apprehensions in the minds of many citizens of the United States: The idea that opulent persons might carry a cause from one end of the continent to another has caused serious fears in the minds of the people: I think it best to retain the clause.

The motion was negatived.

Mr. Sedgwick, to strengthen the clause, moved to strike out 1,000 dollars and to insert 3,000 dollars.—This motion was seconded and supported by Mr. Livermore, but was negatived, and the amendment accepted.

Gazette of the U.S., August 22, 1789, p. 249, col. 3, and p. 250, col. 1.

13.2.1.3August 18, 1789

The 3d clause of the 7th proposition as follows, “In suits at common law, the right of trial by jury shall be preserved,” was considered and adopted.

Congressional Register, August 18, 1789, vol. 2, p. 233.

13.2.1.4August 21, 1789

The house then took into consideration the 3d clause of the 7th proposition, which was adopted without debate.

Congressional Register, August 21, 1789, vol. 2, p. 243.

13.2.1.5Petition of John Fitch Read in the Senate, March 22, 1790

The petition of John Fitch, was read; praying that a clause, providing for the trial by jury, might be inserted in a Bill before Congress, “To promote the progress of useful arts.”

Ordered, That this petition be referred to the Committee who have under consideration the last mentioned Bill.

Senate Legislative Journal, Documentary History of the First Federal Congress, Linda Grant De Pauw, ed. (Baltimore: Johns Hopkins U. Pr., 1972), pp. 264–65.

13.2.2STATE CONVENTIONS

13.2.2.1Massachusetts

13.2.2.1.aJanuary 30, 1788

Mr. GORE observed, … that it had been the uniform conduct of those in opposition to the proposed form of government, to determine, in every case where it was possible that the administrators thereof could do wrong, that they would do so, although it were demonstrable that such wrong would be

against their own honor and interest, and productive of no advantage to themselves. On this principle alone have they determined that the trial by jury would be taken away in civil cases; when it had been clearly shown, that no words could be adopted, apt to the situation and customs of each state in this particular. Jurors are differently chosen in different states, and in point of qualification the laws of the several states are very diverse; not less so in causes and disputes which are entitled to trial by jury. What is the result of this? That the laws of Congress may and will be conformable to the local laws in this particular, although the Constitution could not make a universal rule equally applying to the customs and statutes of the different states. Very few governments (certainly not this) can be interested in depriving the people of trial by jury, in questions of *meum et tuum*.…

Mr. DAWES said, he did not see that the right of trial by jury was taken away by the article. The word *court* does not, either by popular or technical construction, exclude the use of a jury to try facts. When people, in common language, talk of a trial at the *Court* of Common Pleas, or the Supreme Judicial *Court*, do they not include all the branches and members of such court — the *jurors* as well as the judges? They certainly do, whether they mention the jurors expressly or not. Our state legislators have construed the word *court* in the same way; for they have given appeals from a justice of peace to the Court of Common Pleas, and from thence to the Supreme Court, without saying any thing of the jury; but in cases which, almost time out of mind, have been tried without jury, there the jurisdiction is given expressly to the justices of a particular court, as may be instanced by suits upon the absconding act, so called.

Gentlemen have compared the article under consideration to that power which the British claimed, and we resisted, at the revolution; namely, the power of trying the Americans without a jury. But surely there was no parallel in the cases; it was criminal cases in which they attempted to make this abuse of power. Mr. D. mentioned one example of this, which, though young, he well remembered; and that was the case of Nickerson, the pirate, who was tried without a jury, and whose judges were the governors of Massachusetts and of some neighboring provinces, together with Admiral Montague, and some gentlemen of distinction. Although this trial was without a jury, yet, as it was a trial upon the civil law, there was not so much clamor about it as otherwise there might have been; but still it was disagreeable to the people, and was one of the then complaints. But the trial by jury was not attempted to be taken from civil causes. It was no object of

power, whether one subject's property was lessened, while another's was increased; nor can it be now an object with the federal legislature. What interest can they have in constituting a judiciary, to proceed in civil causes without a trial by jury? In criminal causes, by the proposed government, there must be a jury. It is asked, Why is not the Constitution as explicit in securing the right of jury in civil as in criminal cases? The answer is, Because it was out of the power of the Convention. The several states differ so widely in their modes of trial, some states using a jury in causes wherein other states employ only their judges, that the Convention have very wisely left it to the federal legislature to make such regulations as shall, as far as possible, accommodate the whole. Thus our own state constitution authorizes the General Court to erect judicatories, but leaves the nature, number, and extent of them, wholly to the discretion of the legislature. The bill of rights, indeed, secures the trial by jury, in civil causes, except in cases where a contrary practice has obtained. Such a clause as this some gentlemen wish were inserted in the proposed Constitution, but such a clause would be abused in that Constitution, as has been clearly been stated by the honorable gentleman from Charlestown, (Mr. Gorham,) because the "exception of all cases where a jury have not heretofore been used," would include almost all cases that could be mentioned, when applied to all the states, for they have severally differed in the kinds of causes where they have tried without a jury.

Elliot, vol. 2, pp. 112–14.

13.2.2.1.bFebruary 1, 1788

Hon. Mr. ADAMS. … Your excellency's next proposition … recommends a trial by jury in civil actions between citizens of different states, if either of the parties shall request it. These, and several others which I have mentioned, are so evidently beneficial as to need no comment of mine. And they are all, in every particular, of so general a nature, and so equally interesting to every state, that I cannot but persuade myself to think they would all readily join with us in the measure proposed by your excellency, if we should now adopt it.

Elliot, vol. 2, pp. 132–33.

13.2.2.2New York, July 2, 1788

Mr. TREDWELL. … I could have wished, sir, that a greater caution had been used to secure to us the freedom of election, a sufficient and responsible representation, the freedom of the press, and the trial by jury both in civil and criminal cases.

These, sir, are the rocks on which the Constitution should have rested. …

Elliot, vol. 2, p. 399.

13.2.2.3North Carolina

13.2.2.3.aJuly 28, 1788

Mr. BLOODWORTH. … The honorable gentleman has said that the state courts and the courts of the United States would have concurrent jurisdiction. I beg the committee to reflect what would be the consequence of such measures. It has ever been considered that the trial by jury was one of the greatest rights of the people. I ask whether, if such causes go into the federal court, the trial by jury is not cut off, and whether there is any security that we shall have justice done us. I ask if there be any security that we shall have juries in civil causes. In criminal cases there are to be juries, but there is no provision made for having civil causes tried by jury. This concurrent jurisdiction is inconsistent with the security of that great right. If it be not, I would wish to hear how it is secured. I have listened with attention to what the learned gentlemen have said, and have endeavored to see whether their arguments had any weight; but I found none in them. Many words have been spoken, and long time taken up; but with me they have gone in at one ear, and out at the other. It would give me much pleasure to hear that the trial by jury was secured.

Mr. J. M'DOWALL. … We know that the trial by a jury of the vicinage is one of the greatest securities for property. If causes are to be decided at such a great distance, the poor will be oppressed; in land affairs, particularly, the wealthy suitor will prevail. A poor man, who has a just claim on a piece of land, has not substance to stand it. Can it be supposed that any man, of common circumstances, can stand the expense and trouble of going from Georgia to Philadelphia, there to have a suit tried? And can it be justly determined without the benefit of a trial by jury? These are things that have justly alarmed the people. What made the people revolt from Great Britain? The trial by jury, that great safeguard of liberty, was taken

away, and a stamp duty was laid upon them. This alarmed them, and led them to fear that great oppressions would take place. We then resisted. It involved us in a war, and caused us to relinquish a government which made us happy in every thing else. The war as very bloody, but we got our independence. We are now giving away our dear-bought rights. We ought to consider what we are about to do before we determine.

Mr. SPAIGHT. Mr. Chairman, the trial by jury was not forgotten in the Convention; the subject took up a considerable time to investigate it. It was impossible to make any one uniform regulation for all the states, or that would include all cases where it would be necessary. It was impossible, by one expression, to embrace the whole. There are a number of equity and maritime cases, in some of the states, in which jury trials are not used. Had the Convention said that all causes should be tried by a jury, equity and maritime cases would have been included. It was therefore left to the legislature to say in what cases it should be used; and as the trial by jury is in full force in the state courts, we have the fullest security.

Mr. IREDELL. … I am by no means surprised at the anxiety which is expressed by gentlemen on this subject. Of all the trials that ever were instituted in the world, this, in my opinion, is the best, and that which I hope will continue the longest. … But I have been told that the omission of it arose from the difficulty of establishing one uniform, unexceptionable mode: this mode of trial being different, in many particulars, in the several states. Gentlemen will be pleased to consider that there is a material difference between an article fixed in the Constitution, and a regulation by law. An article in the Constitution, however inconvenient it may prove by experience, can only be altered by altering the Constitution itself, which manifestly is a thing that ought not to be done often. When regulated by law, it can easily be occasionally altered so as best to suit the conveniences of the people. Had there been an article in the Constitution taking away that trial, it would justly have excited the public indignation. It is not taken away by the Constitution. Though that does not provide expressly for a trial by jury in civil cases, it does not say that there shall not be such a trial. The reasons of the omission have been mentioned by a member of the late General Convention, (Mr. Spaight.) There are different practices in regard to this trial in different states. … I beg leave to say, that if any gentleman of ability and knowledge of the subject will only endeavor to fix upon any one rule that would be pleasing to all the states under the impression of their present different habits, he will be convinced that it is impracticable. … It is

not to be presumed that the Congress would dare to deprive the people of this valuable privilege. …

…

… In respect to the trial by jury, its being taken away, in certain cases, was, to be sure, one of the causes assigned in the Declaration of Independence. … But this Constitution has not taken it away, and it is left to the discretion of our own legislature to act, in this respect, as their wisdom shall direct. In Great Britain, the people speak of the trial by jury with admiration. No monarch, or minister, however arbitrary in his principles, would dare to attack that noble palladium of liberty. The enthusiasm of the people in its favor would, in such a case, produce general resistance. That trial remains unimpaired there, although they have a considerable standing army, and their Parliament has authority to abolish it, if they please. But wo to those who should attempt it! If it be secure in that country, under these circumstances, can we believe that Congress either would or could take it away in this? Were they to attempt it, their authority would be instantly resisted. They would draw down on themselves the resentment and detestation of the people. They and their families, so long as any remained in being, would be held in eternal infamy, and the attempt prove as unsuccessful as it was wicked.

…

Gov. JOHNSTON. Mr. Chairman, the observations of the gentleman last up confirm what the other gentleman said. I mean that, as there are dissimilar modes with respect to the trial by jury in different states, there could be no general rule fixed to accommodate all. He says that this clause is defective, because the trial is not to be by a jury of the vicinage. Let us look at the state of Virginia, where, as long as I have known it, the laws have been executed so as to satisfy the inhabitants, and, I believe, as well as in any part of the Union. In that country, juries are summoned every day from the by-standers. We may expect less partiality when the trial is by strangers; and were I to be tried for my property or life, I would rather be tried by disinterested men, who were not biased, than by men who were perhaps intimate friends of my opponent. Our mode is different from theirs; but whether theirs be better than ours or not, is not the question. It would be improper for our delegates to impose our mode upon them, or for theirs to impose their mode upon us. The trial will probably be, in each state, as it has been hitherto used in such state, or otherwise regulated as conveniently as possible for the people. The delegates who are to meet in Congress will, I

hope, be men of virtue and wisdom. If not, it will be our own fault. They will have it in their power to make necessary regulations to accommodate the inhabitants of each state. In the Constitution, the general principles only are laid down. It will be the object of the future legislation to Congress to make such laws as will be most convenient for the people. …

Mr. BLOODWORTH. Mr. Chairman, the footing on which the trial by jury is, in the Constitution, does not satisfy me. Perhaps I am mistaken; but if I understand the thing right, the trial by jury is taken away. If the Supreme Federal Court has jurisdiction both as to law and fact, it appears to me to be taken away. The honorable gentleman who was in the Convention told us that the clause, as it now stands, resulted from the difficulty of fixing the mode of trial. I think it was easy to have put it on a secure footing. But, if the genius of the people of the United States is so dissimilar that our liberties cannot be secured, we can never hang long together. Interest is the band of social union; and when this is taken away, the Union itself must dissolve.

Mr. MACLAINE. Mr. Chairman, I do not take the interest of the states to be so dissimilar; I take them to be all nearly alike, and inseparably connected. It is impossible to lay down any constitutional rule for the government of all the different states in each particular. But it will be easy for the legislature to make laws to accommodate the people in every part of the Union, as circumstances may arise. Jury trial is not taken away in such cases where it may be found necessary. Although the Supreme Court has cognizance of the appeal, it does not follow but that the trial by jury may be had in the court below, and the testimony transmitted to the Supreme Court, who will then finally determine, on a review of all the circumstances. This is well known to be the practice in some of the states. In our own state, indeed, when a cause is instituted in the county court, and afterwards there is an appeal upon it, a new trial is had in the superior court, as if no trial had been before. In other countries, however, when a trial is had in an inferior court, and an appeal is taken, no testimony can be given in the court above, but the court determines upon the circumstances appearing upon the record. If I am right, the plain inference is, that there may be a trial in the inferior courts, and that the record, including the testimony, may be sent to the Supreme Court. But if there is a necessity for a jury in the Supreme Court, it will be a very easy matter to empanel a jury at the bar of the Supreme Court, which may save great expense, and be very convenient to the people. It is impossible to make every regulation at once. Congress, who are our

own representatives, will undoubtedly make such regulations as will suit the convenience and secure the liberty of the people.

Mr. IREDELL declared it as his opinion that there might be juries in the Superior Court as well as in the inferior courts, and that it was in the power of Congress to regulate it so.

Elliot, vol. 4, pp. 142–48, 150–52.

13.2.2.3.bJuly 29, 1788

Mr. SPENCER. … The trial by jury has been also spoken of. Every person who is acquainted with the nature of liberty need not be informed of the importance of this trial. Juries are called the bulwarks of our rights and liberty; and no country can ever be enslaved as long as those cases which affect their lives and property are to be decided, in a great measure, by the consent of twelve honest, disinterested men, taken from the respectable body of yeomanry. It is highly improper that any clause which regards the security of the trial by jury should be any way doubtful. In the clause that has been read, it is ascertained that criminal cases are to be tried by jury in the states where they are committed. It has been objected to that clause, that it is not sufficiently explicit. I think that it is not. It was observed that one may be taken to a great distance. One reason of the resistance to the British government was, because they required that we should be carried to the country of Great Britain, to be tried by juries of that country. But we insisted on being tried by juries of the vicinage, in our own country. I think it therefore proper that something explicit should be said with respect to the vicinage.

With regard to that part, that the Supreme Court shall have appellate jurisdiction both as to law and fact, it has been observed that, though the federal court might decide without a jury, yet the court below, which tried it, might have a jury. I ask the gentleman what benefit would be received in the suit by having a jury trial in the court below, when the verdict is set aside in the Supreme Court. It was intended by this clause that the trial by jury should be suppressed in the superior and inferior courts. It has been said, in defence of the omission concerning the trial by jury in civil cases, that one general regulation could not be made; that in several cases the constitution of several states did not require a trial by jury, — for instance, in cases of equity and admiralty, — whereas in others it did, and that, therefore, it was proper to leave this subject at large. I am sure that, for the security of liberty, they ought to have been at the pains of drawing some

line. I think that the respectable body who formed the Constitution should have gone so far as to put matters on such a footing as that there should be no danger. They might have provided that all those cases which are now triable by a jury should be tried in each state by a jury, according to the mode usually practiced in such state. This would have been easily done, if they had been at the trouble of writing five or six lines. Had it been done, we should have been entitled to say that our rights and liberties were not endangered. If we adopt this clause as it is, I think, notwithstanding what gentlemen have said, that there will be danger. There ought to be some amendments to it, to put this matter on a sure footing. There does not appear to me to be any kind of necessity that the federal court should have jurisdiction in the body of the country. I am ready to give up that, in the cases expressly enumerated, an appellate jurisdiction (except in one or two instances) might be given. I wish them also to have jurisdiction in maritime affairs, and to try offences committed on the high seas. …

…

Mr. MACLAINE. … But the gentleman seems to be most tenacious of the judicial power of the states. The honorable gentleman must know, that the doctrine of reservation of power not relinquished, clearly demonstrates that the judicial power of the states is not impaired. He asks, with respect to the trial by jury, “When the cause has gone up to the superior court, and the verdict is set aside, what benefit arises from having had a jury trial in the inferior court?” I would ask the gentleman, “What is the reason, that, on a special verdict or case agreed, the decision is left to the court?” There are a number of cases where juries cannot decide. When a jury finds the fact specially, or when it is agreed upon by the parties, the decision is referred to the court. If the law be against the party, the court decides against him; if the law be for him, the court judges accordingly. He, as well as every gentleman here, must know that, under the Confederation, Congress set aside juries. There was an appeal given to Congress: did Congress determine by a jury? Every party carried his testimony in writing to the judges of appeal, and Congress determined upon it.

…

Mr. SPENCER. … I contend that there should be a bill of rights, ascertaining and securing the great rights of the states and people. Besides my objection to the revision of facts by the federal court, and the insecurity of jury trial, I consider the concurrent jurisdiction of those courts with the state courts as extremely dangerous. …

…

Mr. IREDELL. … In criminal cases, however, no latitude ought to be allowed. In these the greatest danger from any government subsists, and accordingly it is provided that there shall be a trial by jury, in all such cases, in the state wherein the offence is committed. I thought the objection against the want of a bill of rights had been obviated unanswerably. It appears to me most extraordinary. Shall we give up anything but what is positively granted by that instrument? It would be the greatest absurdity for any man to pretend that, when a legislature is formed for a particular purpose, it can have any authority but what is so expressly given to it, any more than a man acting under a power of attorney could depart from the authority it conveyed to him, according to an instance which I stated when speaking on the subject before. As for example:—if I had three tracts of land, one in Orange, another in Caswell, and another in Chatham, and I gave a power of attorney to a man to sell the two tracts in Orange and Caswell, and he should attempt to sell my land in Chatham, would any man of common sense suppose he had authority to do so? In like manner, I say, the future Congress can have no right to exercise any power but what is contained in that paper. Negative words, in my opinion, could make the matter no plainer than it was before. The gentleman says that unalienable rights ought not to be given up. Those rights which are unalienable are not alienated. They still remain with the great body of the people. If any right be given up that ought not to be, let it be shown. Say it is a thing which affects your country, and that it ought not to be surrendered: this would be reasonable. But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

Mr. BLOODWORTH. Mr. Chairman, I have listened with attention to the gentleman’s arguments; but whether it be for want of sufficient attention, or from the grossness of my ideas, I cannot be satisfied with his defence of the omission, with respect to the trial by jury. He says that it would be impossible to fall on any satisfactory mode of regulating the trial by jury, because there are various customs relative to it in the different

states. Is this a satisfactory cause for the omission? Why did it not provide that the trial by jury should be preserved in civil cases? It has said that the trial should be by jury in criminal cases; and yet this trial is different in its manner in criminal cases in the different states. If it has been possible to secure it in criminal cases, notwithstanding the diversity concerning it, why has it not been possible to secure it in civil cases? I wish this to be cleared up. …

…

Mr. IREDELL. Mr. Chairman, I hope some other gentleman will answer what has been said by the gentlemen who have spoken last. I only rise to answer the question of the member from New Hanover—which was, if there was such a difficulty, in establishing the trial by jury in civil cases, that the Convention could not concur in any mode, why the difficulty did not extend to criminal cases? I beg leave to say, that the difficulty, in this case, does not depend so much on the mode of proceeding, as on the difference of the subjects of controversy, and the laws relative to them. …

We have been told, and I believe this was the real reason, why they could not concur in any general rule. I have great respect for the characters of those gentlemen who formed the Convention, and I believe they were not capable of overlooking the importance of the trial by jury, much less of designedly plotting against it. But I fully believe that the real difficulty of the thing was the cause of the omission. I trust sufficient reasons have been offered, to show that it is in no danger. As to criminal cases, I must observe that the great instrument of arbitrary power is criminal prosecutions. By the privileges of *habeas corpus*, no man can be confined without inquiry; and if it should appear that he has been committed contrary to law, he must be discharged. That diversity which is to be found in civil controversies, does not exist in criminal cases. That diversity which contributes to the security of property in civil cases, would have pernicious effects in criminal ones. There is no other safe mode to try these but by a jury. If any man had the means of trying another his own way, or were it left to the control of arbitrary judges, no man would have that security for life and liberty which every freeman ought to have. I presume that in no state on the continent is a man tried on a criminal accusation but by a jury. It was necessary, therefore, that it should be fixed, in the Constitution, that the trial should be by jury in criminal cases; and such difficulties did not occur in this as in the other case. …

Elliot, vol. 4, pp. 154–55, 162, 163–64, 166–67, 170–71.

13.2.2.3.cJuly 30, 1788

Mr. SPAIGHT. … The gentleman has again brought on the trial by jury. The Federal Convention, sir, had no wish to destroy the trial by jury. It was three or four days before them. There were a variety of objections to any one mode. It was thought impossible to fall upon any one mode but what would produce some inconveniences. … I should suppose that, if the representatives of twelve states, with many able lawyers among them, could not form any unexceptionable mode, this Convention could hardly be able to do it. …

…

Mr. J. M'DOWALL. … Trial by jury is not secured. The objections against this want of security have not been cleared up in a satisfactory manner. It is neither secured in civil nor criminal cases. The federal appellate cognizance of law and fact puts it in the power of the wealthy to recover unjustly of the poor man, who is not able to attend at such extreme distance, and bear such enormous expense as it must produce.

Elliot, vol. 4, pp. 208, 211.

13.2.2.4Pennsylvania

13.2.2.4.aSeptember 29, 1787

Address of the Seceding Assemblymen

Gentlemen: When in consequence of your suffrages at the last election we were chosen to represent you in the General Assembly of this Commonwealth, we accepted of the important trust, with a determination to execute it in the best manner we were able, and we flatter ourselves we acted in such a manner as to convince you, that your interests with that of the good of the state has been the object of our measures.

…

… You will be able likewise to determine, whether in a free government there ought or ought not to be any provision … whether the trial by jury in civil causes is become dangerous and ought to be abolished and whether the judiciary of the United States is not so constructed as to absorb and destroy the judiciaries of the several states?

Jensen, vol. 2, pp. 112, 116.

13.2.2.4.bDecember 5, 1787

… Findley: Contends for a bill of rights, the liberty of the *press*, trial by *jury*. When I was proposed as a member of the late Convention, I declined it as I thought it too great an undertaking *for me* to *represent* and *guard* all the rights and liberties of the people of Pennsylvania.

Jensen, vol. 2, p. 504.

13.2.2.4.cDecember 7, 1787

Mr. WILSON. … It is very true that trial by jury is not mentioned in civil cases; but I take it that it is very improper to infer from hence that it was not meant to exist under this government. Where the people are represented, where the interest of government cannot be separate from that of the people, (and this is the case in trial between citizen and citizen,) the power of making regulations with respect to the mode of trial may certainly be placed in the legislature; for I apprehend that the legislature will not do wrong in an instance from which they can derive no advantage. These were not all the reasons that influenced the Convention to leave it to the future Congress to make regulations on this head.

By the Constitution of the different states, it will be found that no particular mode of trial by jury could be discovered that would suit them all. The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings, are all different in the different states; and I presume it will be allowed a good general principle, that, in carrying into effect the laws of the general government by the judicial department, it will be proper to make the regulations as agreeable to the habits and wishes of the particular states as possible; and it is easily discovered that it would have been impracticable, by any general regulation, to give satisfaction to all. We must have thwarted the custom of eleven or twelve to have accommodated any one. Why do this when there was no danger to be apprehended from the omission? We could not go into a particular detail of the manner that would have suited each state.

Time, reflection, and experience, will be necessary to suggest and mature the proper regulations on the subject; time and experience were not possessed by the Convention; they left it therefore to be particularly organized by the legislature — the representatives of the United States — from time to time, as should be most eligible and proper. Could they have done better?

I know, in every part where opposition has risen, what a handle has been made to this objection; but I trust, upon examination, it will be seen that more could not have been done with propriety. Gentlemen talk of bills of rights. What is the meaning of this continual clamor, after what has been urged? Though it may be proper, in a single state, whose legislature calls itself the sovereign and supreme power, yet it would be absurd in the body of the people, when they are delegating from among themselves persons to transact certain business, to add an enumeration of those things which they are not to do. "But trial by jury is secured in the bill of rights of Pennsylvania; the parties have a right to trials by jury, which *ought* to be held sacred." And what is the consequence? There have been more violations of this right in Pennsylvania, since the revolution, than are to be found in England in the course of a century.

*

Robert Whitehill…

(171) The trial of *crimes* is to be by jury; therefore the trial of civil causes is supposed not to be by jury.

(172) We preserved the trial by jury against the attempts of the British Crown.

(173) I wish, for the honor of the Convention, this had not been omitted.

…

John Smilie: (179) In common law cases there ought not to be an appeal as to facts. Facts found by a jury should never be reexamined.

…

Jury trials may be superseded in civil cases. Appellate jurisdiction is a civil law term. There can be no appeal after jury trials. I fear there is an intention to substitute the civil law in the room of the common law. Think of the expense of the different courts and of the federal system at large.

…

William Findley: …

(185) The judges are better for the guard of juries in all possible cases. The mistakes of juries are never systematical. The laws can never be so enacted as to prevent the judge's from doing wrong.

(186) I admit that it would have been impossible to accommodate the trial by jury to all the states; but power ought not to have been given applying to such *internal* objects.

(187) There might have been a declaration that the trial by jury in civil cases as it hath hitherto been in the several states; or in the state, where the cause arose.

(188) The jurisdiction will, I believe, be chiefly appellate; and therefore, chiefly without jury.

…

John Smilie: (193) I cannot see the great difficulty of securing at least the substance of jury [trial] in civil cases. It might have been said that the legislature should make regulations for the trial by jury in them.

(194) Whatever is not given is reserved. The trial by jury is given in criminal cases therefore reserved in civil cases.

Elliot, vol. 2, pp. 488–89; Jensen, vol. 2, pp. 513, 521–23.

13.2.2.4.dDecember 8, 1787

John Smilie:…

(198) It was the design and intention of the Convention to divest us of the liberty of trial by jury in civil cases; and to deprive us of the benefits of the common law.

(199) The word “appeal” is a civil law term; and therefore the Convention meant to introduce the *civil* law.

(200) On an appeal the judges may set aside the verdict of a jury.

(201) Appeals are not admitted in the common law.

(202) If a jury give a false verdict, a writ of attaint lies or the verdict may be set aside. A writ of error lies as to matters of law; but on that writ the fact are not reexamined.

…

(212) The Convention might have said, that Congress should establish trials by jury in civil cases.

…

Robert Whitehill: (213) Are we to trust to all judges, who will have their favorites?

…

(226) Our greatest liberties will, by this Constitution, be sacrificed to the will of men.

(227) The trial by jury is given up to the will of Congress.

…

William Findley: …

(229) Trial by jury is not secured in civil cases as in criminal ones. It is at the mercy of the legislature.

(230) By the appellate clause, an appeal lies from the verdict of a jury, a thing hitherto unknown.

(231) Personal liberty cannot be enjoyed without trial by jury.

(232) All the northern countries have been zealous of freedom. Sweden till lately had trials by jury—and certainly a free government well-balanced, consisting of four branches.

Findley: On Saturday last, in the course of an argument to prove the dissolution of the trial by jury, if the proposed system was adopted, and the consequent sacrifice of the liberties of the people, Mr. Findley observed, that when the trial by jury, which was known in Sweden so late as the middle of the last century, fell into disuse, the commons of that nation lost their freedom and a tyrannical aristocracy prevailed.

James Wilson and Thomas Mckean interrupted Mr. Findley and called warmly for his authority to prove that the trial by jury existed in Sweden, Mr. Wilson declaring that he had never met with such an idea in the course of his reading; and Mr. M'Kean asserting that the trial by jury was never known in any other country than England and the governments descended from that kingdom. Mr. Findley answered that he did not, at that moment, recollect his authority, but having formerly read histories of Sweden, he had received and retained the opinion which he now advanced, and would on a future occasion, perhaps, refer immediately to the book.

William Findley: (233) Trial by jury is inconsistent with a complete aristocracy.

(234) The lower class of people will be oppressed without trial by jury.

(235) This part is explanatory of other parts of the plan.

(236) The people never expressed a wish to give up the trial by jury.

(237) In Pennsylvania the trial by jury must be by a jury of the proper county.

Jensen, vol. 2, pp. 525–28.

13.2.2.4.eDecember 10, 1787

Findley: … Trials by jury are in disuse in Sweden except in the lower courts. … Every new tribunal without a jury is an introduction of aristocracy, the worst of all tyrannies. Trials by jury in Sweden have been in disuse for near

a century past.

Jensen, vol. 2, p. 532.

13.2.2.4.fDecember 11, 1787

Mr. WILSON. I shall now proceed, Mr. President, to notice the remainder of the objections that have been suggested by the honorable gentlemen who oppose the system now before you.

We have been told, sir, by the honorable member from Fayette (Mr. Smilie,) "that the trial by jury was intended to be given up, and the civil law was intended to be introduced into its place, in civil cases."

Before a sentiment of this kind was hazarded, I think, sir, the gentleman ought to be prepared with better proof in its support than any he has yet attempted to produce. It is a charge, sir, not only unwarrantable, but cruel: the idea of such a thing, I believe, never entered into the mind of a single member of that Convention; and I believe further, that they never suspected there would be found, within the United States, a single person that was capable of making such a charge. If it should be well founded, sir, they must abide by the consequences; but if (as I trust it will fully appear) it is ill founded, then he or they who make it ought to abide by the consequences.

Trial by jury forms a large field for investigation, and numerous volumes are written on the subject; those who are well acquainted with it may employ much time in its discussion; but in a country where its excellences are so well understood, it may not be necessary to be very prolix in pointing them out. For my part, I shall confine myself to a few observations in reply to the objections that have been suggested.

The member from Fayette (Mr. Smilie) has labored to infer that, under the Articles of Confederation, the Congress possessed no appellate jurisdiction; but this being decided against him by the words of that instrument, by which is granted to Congress the power of "establishing courts for receiving, and determining finally, appeals in all cases of capture," he next attempts a distinction, and allows the power of appealing from the decisions of the judges, but not from the verdict of a jury; but this is determined against him also by the practice of the states; for, in every instance which has occurred, this power has been claimed by Congress, and exercised by the Courts of Appeals. But what would be the consequence of allowing the doctrine for which he contends? Would it not be in the power of a jury, by their verdict, to involve the whole Union in a war? They may condemn the property of a neutral, or otherwise infringe the law of nations,

in this case, ought their verdict to be without revisal? Nothing can be inferred from this to prove that trials by jury were intended to be given up. In Massachusetts, and all the Eastern States, their causes are tried by juries, though they acknowledge the appellate jurisdiction of Congress.

I think I am not now to learn the advantages of a trial by jury. It has excellences that entitle it to a superiority over any other mode, in cases to which it is applicable.

Where jurors can be acquainted with the characters of the parties and the witnesses, — where the whole cause can be brought within their knowledge and their view, — I know no mode of investigation equal to that by a jury: they hear everything that is alleged; they not only hear the words, but they see and mark the features of the countenance; they can judge of weight due to such testimony; and moreover, it is a cheap and expeditious manner of distributing justice. There is another advantage annexed to the trial by jury; the jurors may indeed return a mistaken or illfounded verdict, but their errors cannot be systematical.

Let us apply these observations to the objects of the judicial department, under this Constitution. I think it has been shown, already, that they all extend beyond the bounds of any particular state; but further, a great number of the civil causes there enumerated depend either upon the law of nations, or the marine law, that is, the general law of mercantile countries. Now, sir, in such cases, I presume it will not be pretended that this mode of decision ought to be adopted; for the law with regard to them is the same here as in every other country, and ought to be administered in the same manner. There are instances in which I think it highly probable that the trial by jury will be found proper; and if it is highly probable that it will be found proper, is it not equally probable that it will be adopted? There may be causes depending between citizens of different states; and as trial by jury is known and regarded in all the states, they will certainly prefer that mode of trial before any other. The Congress will have the power of making proper regulations on this subject, but it was impossible for the Convention to have gone minutely into it; but if they could, it must have been very improper, because alterations, as I observed before, might have been necessary; and whatever Convention might have done would have continued unaltered, unless by an alteration of the Constitution. Besides, there was another difficulty with regard to this subject. In some of the states they have courts of chancery, and other appellate jurisdictions, and those states are as attached to that mode of distributing justice as those that have

none are to theirs.

I have desired, repeatedly, that honorable gentlemen, who find fault, would be good enough to point out what they deem to be an improvement. The member from Westmoreland (Mr. Findley) tells us that the trial between citizens of different states ought to be by a jury of that state in which the cause of action arose. Now, it is easy to see that, in many instances, this would be very improper and very partial; for, besides the different manner of collecting and forming juries in the several states, the plaintiff comes from another state; he comes a stranger, unknown as to his character or mode of life, while the other party is in the midst of his friends, or perhaps his dependents. Would a trial by jury, in such a case, insure justice to the stranger? But again: I would ask that gentleman whether, if a great part of his fortune was in the hands of some person in Rhode Island, he would wish that his action to recover it should be determined by a jury of that country, under its present circumstances.

The gentleman from Fayette (Mr. Smilie) says that, if the Convention found themselves embarrassed, at least they might have done thus much — they should have declared that the substance should be secured by Congress. This would be saying nothing unless the cases were particularized.

Mr. SMILIE. I said the Convention ought to have declared that the legislature should establish the trial by jury by proper regulations.

Mr. WILSON. The legislature shall establish it by proper regulations! … He wishes them to do the very thing that they have done—to leave it to the discretion of Congress. The fact, sir, is, nothing more could be done.

It is well known that there are some cases that should not come before juries; there are others, that, in some of the states, never come before juries, and in those states where they do come before them, appeals are found necessary, the facts reexamined, and the verdict of the jury sometimes is set aside; but I think, in all cases where the cause has come originally before a jury, that the last examination ought to be before a jury likewise.

The power of having appellate jurisdiction, as to facts, has been insisted upon as a proof, “that the Convention *intended* to give up the trial by jury in civil cases, and to introduce the civil law.” I have already declared my own opinion on this point, and have shown that not merely that it is founded on reason and authority; — the express declaration of Congress (*Journals of Congress*, March 6, 1779) is to the same purpose. They insist upon this power, as requisite to preserve the peace of the Union; certainly, therefore,

it ought always to be possessed by the head of the confederacy. We are told, as an additional proof, that the trial by jury was intended to be given up; "that appeals are unknown to the common law; that the term is a civil-law term, and with it the civil law is intended to be introduced." I confess I was a good deal surprised at this observation being made; for Blackstone, … has a chapter entitled "Of Proceeding in the Nature of Appeals," — and in that chapter says, that the principal method of redress for erroneous judgements, in the king's courts of record, is by writ of error to some superior *"court of appeal."* (3 *Blackstone*, 406.) Now, it is well known that his book is a commentary upon the common law. Here, then, is a strong refutation of the assertion, "that appeals are unknown to the common law."

I think these were all the circumstances adduced to show the truth of the assertion, that, in this Constitution, the trial by jury was *intended* to be given up by the late Convention in framing it. Has the assertion been proved? I say not; and the allegations offered, if they apply at all, apply in a contrary direction. I am glad that this objection has been stated, because it is a subject upon which the enemies of this Constitution have much insisted. We have now had an opportunity of investigating it fully; and the result is, that there is no foundation for the charge, but it must proceed from ignorance, or something worse.

Elliot, vol. 2, pp. 515–19.

13.2.2.4.gDecember 12, 1787

Thomas McKean: … Mr. M'Kean pronounced an animated eulogism on the character, information and abilities of Mr. George Mason, but concluded that the exclusion of juries in civil causes was not among the objections which had governed his [Mason's] conduct.

Robert Whitehill: On this assertion Mr. Whitehill quoted the following passage from Mr. Mason's objections: "There is no declaration of any kind for preserving the liberty of the press, *the trial by jury in civil causes*, nor against the danger of standing armies in time of peace."

Mr. Whitehill then read, and offered as the ground of a motion … the consideration of the following articles, …

2. That in controversies respecting property, and in suits between man and man, trial by jury shall remain as heretofore, as well in the federal courts, and in those of the several states.

Jensen, vol. 2, pp. 596–97.

13.2.2.5South Carolina

13.2.2.5.aJanuary 16, 1788

Hon. CHARLES PINCKNEY. … Though at first he considered some declaration on the subject of trial by jury in civil causes, and the freedom of the press, necessary, and still thinks it would have been as well to have had it inserted, yet he fully acquiesced in the reasoning which was used to show that the insertion of them was not essential. …

On the subject of juries, in civil cases, the Convention were anxious to make some declaration; but when they reflected that all courts of admiralty and appeals, being governed in their propriety by the civil law and the laws of nations, never had, or ought to have, juries, they found it impossible to make any precise declaration upon the subject; they therefore left it as it was, trusting that the good sense of their constituents would never induce them to suppose that it could be the interest or intention of the general government to abuse one of the most invaluable privileges a free country can boast; in the loss of which, themselves, their fortunes and connections, must be so materially involved, and to the deprivation of which, except in the cases alluded to, the people of this country would never submit.

Elliot, vol. 4, p. 259.

13.2.2.5.bJanuary 17, 1788

Hon. RAWLINS LOWNDES. … It was true, no article of the Constitution declared there should not be jury trials in civil cases; yet this must be implied, because it stated that all crimes, except in cases of impeachment, shall be tried by a jury. But even if trials by jury were allowed, could any person rest satisfied with a mode of trial which prevents the parties from being obliged to bring a cause for discussion before a jury of men chosen from the vicinage, in a manner conformable to the present administration of justice, which had stood the test of time and experience, and ever been highly approved of? …

…

Hon. ROBERT BARNWELL. … The honorable gentleman asks why the trial by jury was not established in every instance. Mr. Barnwell considered this right of trial as the birthright of every American, and the basis of our civil liberty; but still most certainly particular circumstances may arise, which would induce even the greatest advocates for this right to yield it for

a time. In his opinion, the circumstances that would lead to this point were those which are specified by the Constitution. Mr. Barnwell said, Suffer me to state a case, and let every gentleman determine whether, in particular instances, he would not rather resign than retain this right of trial. A suit is depending between a citizen of Carolina and Georgia, and it becomes necessary to try it in Georgia. What is the consequence? Why, the citizen of this state must rest his cause upon the jury of his opponent's vicinage, where, unknown and unrelated, he stands a very poor chance for justice against one whose neighbors, whose friends and relations, compose the greater part of his judges. It is in this case, and only in cases of a similar nature with this, that the right of trial by jury is not established; and judging from myself, it is in this instance only that every man would wish to resign it, not to a jury with whom he is unacquainted, but to an impartial and responsible individual.

Elliot, vol. 4, pp. 290, 294–95.

13.2.2.6Virginia

13.2.2.6.aJune 5, 1788

Mr. HENRY. … Here is a resolution as radical as that which separated us from Great Britain. It is radical in this transition; our rights and privileges are endangered, and the sovereignty of the states will be relinquished: and cannot we plainly see that this is actually the case? The rights of conscience, trial by jury, liberty of the press, all your immunities and franchises, all pretensions to human rights and privileges, are rendered insecure, if not lost, by this change, so loudly talked of by some, and inconsiderately by others. Is this tame relinquishment of rights worthy of freemen? Is it worthy of that manly fortitude that ought to characterize republicans? …

Having premised these things, I shall, with the aid of my judgment and information, which, I confess, are not extensive, go into the discussion of this system more minutely. Is it necessary for your liberty that you should abandon those great rights by the adoption of this system? Is the relinquishment of the trial by jury and the liberty of the press necessary for your liberty? …

… In some parts of the plan before you, the great rights of freemen are

endangered; in other parts, absolutely taken away. How does your trial by jury stand? In civil cases gone — not sufficiently secured in criminal — this best privilege is gone. But we are told that we need not fear; because those in power, being our representatives, will not abuse the powers we put in their hands. I am not well versed in history, but I will submit to your recollection, whether liberty has been destroyed most often by the licentiousness of the people, or by the tyranny of rulers. … My great objection to this government is, that it does not leave us the means of defending our rights. …

Elliot, vol. 3, pp. 44, 45, 47.

13.2.2.6.bJune 6, 1788

Gov. RANDOLPH. … Let us argue with unprejudiced minds. They say that the trial by jury is gone. Is this so? Although I have declared my determination to give my vote for it, yet I shall freely censure those parts which appear to me reprehensible.

The trial by jury in criminal cases is secured; in civil cases it is not so expressly secured as I should wish it; but it does not follow that Congress has the power of taking away this privilege, which is secured by the constitution of each state, and not given away by this Constitution. I have no fear on this subject. Congress must regulate it so as to suit every state. I will risk my property on the certainty that they will institute the trial by jury in such manner as shall accommodate the conveniences of the inhabitants in every state. The difficulty of ascertaining this accommodation was the principal cause of its not being provided for. It will be the interest of the individuals composing Congress to put it on this convenient footing.

Elliot, vol. 3, p. 68 [mistakenly dated June 16].

13.2.2.6.cJune 7, 1788

Mr. HENRY. … If we are to have one representative for every thirty thousand souls, it must be by implication. The Constitution does not positively secure it. Even say it is a natural implication, — why not give us a right to that proportion in express terms, in language that could not admit of evasions or subterfuges? If they can use implication for us, they can also use implication against us. We are giving power; they are getting power; judge, then, on which side the implication will be used! When we once put it in their option to assume constructive power, danger will follow. Trial by jury, and liberty of the press, are also on this foundation of implication. If

they encroach on these rights, and you give your implication for a plea, you are cast; for they will be justified by the last part of it, which gives them full power "to make all laws which shall be necessary and proper to carry their power into execution." Implication is dangerous, because it is unbounded: if it be admitted at all, and no limits be prescribed, it admits of the utmost extension. …

Elliot, vol. 3, p. 149.

13.2.2.6.dJune 9, 1788

Gov. RANDOLPH. … Why have we been told that maxims can alone save nations; that our maxims are our bill of rights; and that the liberty of the press, trial by jury, and religion, are destroyed? Give me leave to say, that the maxims of Virginia are union and justice.

Elliot, vol. 3, p. 190.

13.2.2.6.eJune 10, 1788

Gov. RANDOLPH. … It is also objected that the trial by jury, the writ of *habeas corpus*, and the liberty of the press, are insecure. But I contend that the *habeas corpus* is at least on as secure and good a footing as it is in England. In that country, it depends on the will of the legislature. That privilege is secured here by the Constitution, and is only to be suspended in cases of extreme emergency. Is this not a fair footing? After agreeing that the government of England secures liberty, how do we distrust this government? Why distrust ourselves? The liberty of the press is supposed to be in danger. If this were the case, it would produce extreme repugnancy in my mind. If it ever will be suppressed in this country, the liberty of the people will not be far from being sacrificed. Where is the danger of it? He says that every power is given to the general government that is not reserved to the states. Pardon me if I say the reverse of the proposition is true. I defy any one to prove the contrary. Every power not given it by this system is left with the states. This being the principle, from what part of the Constitution can the liberty of the press be said to be in danger?

[Here his excellency read the 8th section of the 1st article, containing all the powers given to Congress.]

Go through these powers, examine every one, and tell me if the most exalted genius can prove that the liberty of the press is in danger. The trial by jury is supposed to be in danger also. It is secured in criminal cases, but

supposed to be taken away in civil cases. It is not relinquished by the Constitution; it is only not provided for. Look at the interest of Congress to suppress it. Can it be in any manner advantageous for them to suppress it? In equitable cases, it ought not to prevail, nor with respect to admiralty causes; because there will be an undue leaning against those characters, of whose business courts of admiralty will have cognizance. I will rest myself secure under this reflection — that it is impossible for the most suspicious or malignant mind to show that it is the interest of Congress to infringe on this trial by jury.

Elliot, vol. 3, pp. 203–04.

13.2.2.6.fJune 12, 1788

Mr. HENRY. … His amendments go to that despised thing, called *a bill of rights*, and all the rights which are dear to human nature—trial by jury, the liberty of religion and the press, &c. Do not gentlemen see that, if we adopt, under the idea of following Mr. Jefferson's opinion, we amuse ourselves with the shadow, while the substance is given away?

Elliot, vol. 3, p. 314.

13.2.2.6.gJune 14, 1788

Mr. HENRY. … By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? By the ancient common law, the trial of all facts is decided by a jury of impartial men from the immediate vicinage. This paper speaks of different juries from the common law in criminal cases; and in civil controversies excludes trial by jury altogether. There is, therefore, more occasion for the supplementary check of a bill of rights now than then.

Elliot, vol. 3, pp. 446–47.

13.2.2.6.hJune 15, 1788

Gov. RANDOLPH. … Gentlemen have been misled, to a certain degree, by a general declaration that the trial by jury was gone. We see that, in the most valuable cases, it is reserved. Is it abolished in civil cases? Let him put his finger on the part where it is abolished. The Constitution is silent on it. What expression would you wish the Constitution to use, to establish it? Remember we are not making a constitution for Virginia alone, or we might have taken Virginia for our directory. But we were forming a constitution

for thirteen states. The trial by jury is different in the different states. In some states it is excluded in cases in which it is admitted to others. In admiralty causes it is not used. Would you have a jury to determine the case of a capture? The Virginia legislature thought proper to make an exception of that case. These depend on the law of nations, and no twelve men that could be picked up could be equal to the decision of such a matter.

Elliot, vol. 3, pp. 468–69.

13.2.2.6.iJune 20, 1788

Mr. MADISON. … It was objected, yesterday, that there was no provision for a jury from the vicinage. If it could have been done with safety, it would not have been opposed. It might happen that a trial would be impracticable in the country. Suppose a rebellion in a whole district; would it not be impossible to get a jury? The *trial by jury* is held as sacred in England as in America. There are deviations from it in England; yet greater deviations have happened here, since we established our independence, than have taken place there for a long time, though it be left to the legislative discretion. It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary. It must be, therefore, left to the discretion of the legislature to modify it according to circumstances. This is a complete and satisfactory answer.

…

Mr. HENRY. … "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact. …" This will, in its operation, destroy the trial by jury. The verdict of an impartial jury will be reversed by judges unacquainted with the circumstances. But we are told that Congress are to make regulations to remedy this. … If Congress alter this part, they will repeal the Constitution. … When Congress, by virtue of this sweeping clause, will organize these courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution would be void. … What then, Mr. Chairman? We are told that, if this does not satisfy every mind, they will yield. It is not satisfactory to my mind, whatever it may be to others. …

We are told of certain difficulties. I acknowledge it is difficult to form a constitution. But I have seen difficulties conquered which were as unconquerable as this. We are told that trial by jury is difficult to be had in

certain cases. Do we not know the meaning of the term? We are also told it is a technical term. I see one thing in this Constitution; I made the observation before, and I am still of the same opinion, that everything with respect to privileges is so involved in darkness, it makes me suspicious — not of those gentlemen who formed it, but of its operations in its present form. Could not precise terms have been used? You find, by the observations of the gentleman last up, that, when there is a plentitude of power, there is no difficulty; but when you come to a plain thing, understood by all America, there are contradictions, ambiguities, difficulties, and what not. Trial by jury is attended, it seems, with insuperable difficulties, and therefore omitted altogether in civil cases. But an idea is held out that it is secured in criminal cases. I had rather it had been left out altogether than have it so vaguely and equivocally provided for. Poor people do not understand technical terms. Their rights ought to be secured in language of which they know the meaning. As they do not know the meaning of such terms, they may be injured with impunity. If they dare oppose the hands of tyrannical power, you will see what has been practised elsewhere. They may be tried by the most partial powers, by their most implacable enemies, and be sentenced and put to death, with all the forms of a fair trial. I would rather be left to the judges. An abandoned juror would not dread the loss of character like a judge. From these, and a thousand other considerations, I would rather the trial by jury were struck out altogether. There is no right of challenging partial jurors. There is no common law of America, (as has been said,) nor constitution, but that on your table. If there be neither common law nor constitution, there can be no right to challenge partial jurors. Yet the right is as valuable as the trial by jury itself.

…

Mr. HENRY. … To hear gentlemen of such penetration make use of such arguments, to persuade us to part with that trial by jury, is very astonishing. We are told that we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air, and substitute visionary modes of decision for that noble palladium. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common-law suits. The unanimous verdict of twelve impartial men cannot be reversed. I shall take the liberty of reading to the committee the sentiments of the learned Judge Blackstone, so often quoted, on the subject.

[Here Mr. Henry read the eulogium of that writer on this trial, *Blackstone's Commentaries*, iii. 319.]

The opinion of this learned writer is more forcible and cogent than any thing I could say. Notwithstanding the transcendent excellency of this trial, its essentiality to the preservation of liberty, and the extreme danger of substituting any other mode, yet we are now about to alienate it.

But on this occasion, as on all others, we are admonished to rely on the wisdom and virtue of our rulers. We are told that the members from Georgia, New Hampshire, &c., will not dare to infringe this privilege; that, as it would excite the indignation of the people, they would not attempt it: that is, the enormity of the offence is urged as a security against its commission. It is so abominable that Congress will not exercise it. Shall we listen to arguments like these, when trial by jury is about to be relinquished? I beseech you to consider before you decide. I ask you, What is the value of that privilege? When Congress, in all the plentitude of their arrogance, magnificence, and power, can take it from you, will you be satisfied? Are we to go so far as to concede every thing to the virtue of Congress? Throw yourselves at once on their mercy; be no longer free than their virtue will predominate: if this will satisfy republican minds, there is an end of every thing. I disdain to hold any thing of any man. We ought to cherish that disdain. America viewed with indignation the idea of holding her rights in England. The Parliament gave you the most solemn assurances that they would not exercise this power. Were you satisfied with their promises? No. Did you trust any man on earth? No. You answered that you disdained to hold your innate, indefeasible rights of any one. Now, you are called upon to give an exorbitant and most alarming power. The genius of my countrymen is the same now that it was then. They have the same feelings. They are equally martial and bold. Will not their answer therefore be the same? I hope that gentlemen will, on a fair investigation, be candid, and not on every occasion recur to the virtue of our representatives.

When deliberating on the relinquishment of the sword and purse, we have a right to some other reason than the possible virtue of our rulers. We are informed that the strength and energy of the government call for the surrender of this right. Are we to make our country strong by giving up our privileges? I tell you that, if you judge from reason, or the experience of other nations, you will find that your country will be great and respectable according as you will preserve this great privilege. It is prostrated by that paper. Juries from the vicinage being not secured, this right is in reality

sacrificed. All is gone. And why? Because a rebellion may arise. Resistance will come from certain countries, and juries will come from the same countries.

I trust the honorable gentleman, on a better recollection, will be sorry for this observation. Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. They may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors. Has not your mother country magnanimously preserved this noble privilege upwards of a thousand years? Did she relinquish a jury of the vicinage because there was a possibility of resistance to oppression? She has been magnanimous enough to resist every attempt to take away this privilege. She has had magnanimity enough to rebel when her rights were infringed. That country had juries of hundredors for many generations. And shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind. There was a time when we should have spurned at it. This gives me comfort — that, as long as I have existence, my neighbors will protect me. Old as I am, it is probable I may yet have the appellation of *rebel*. I trust that I shall see congressional oppression crushed in embryo. As this government stands, I despise and abhor it. Gentlemen demand it, though it takes away the trial by jury in civil cases, and does worse than take it away in criminal cases. It is gone unless you preserve it now. I beg pardon for speaking so long. Many more observations will present themselves to the minds of gentlemen when they analyze this part. We find enough, from what has been said, to come to this conclusion — that it was not intended to have jury trials at all; because, difficult as it was, the name was known, and it might have been inserted. Seeing that appeals are given, in matters of fact, to the Supreme Court, we are led to believe that you must carry your witnesses an immense distance to the seat of government, or decide appeals according to the Roman law. I shall add no more, but that I hope that gentlemen will recollect what they are about to do, and consider that they are going to give up this last and best privilege.

Mr. PENDLETON. Mr. Chairman, before I enter upon the objections made to this part, I will observe that I should suppose, if there were any person in this audience who had not read this Constitution, or who had not heard what has been said, and should have been told that the trial by jury was intended to be taken away, he would be surprised to find, on examination, that there was no exclusion of it in civil cases, and that it was

expressly provided for in criminal cases. I never could see such intention, or any tendency towards it. I have not heard any arguments of that kind used in favor of the Constitution. If there were any words in it which said that trial by jury should not be used, it would be dangerous. I find it secured in criminal cases, and that the trial is to be had in the state where the crime shall have been committed. It is strongly insisted that the privilege of challenging, or excepting to the jury, is not secured. When the Constitution says that the trial shall be by jury, does it not say that every incident will go along with it? I think the honorable gentleman was mistaken yesterday in his reasoning on the propriety of a jury from the vicinage.

He supposed that a jury from the neighborhood is had from this view — that they should be acquainted with the personal character of the person accused. I thought it was with another view — that the jury should have some personal knowledge of the fact, and acquaintance with the witnesses, who will come from the neighborhood. How is it understood in this state? Suppose a man, who lives in Winchester, commits a crime at Norfolk; the jury to try him must come, not from Winchester, but from the neighborhood of Norfolk. *Trial by jury* is secured by this system in criminal cases, as are all the incidental circumstances relative to it. The honorable gentleman yesterday made an objection to that clause which says that the judicial power shall be vested in one Supreme Court, and such inferior courts as Congress may ordain and establish. He objects that there is an unlimited power of appointing inferior courts. I refer to that gentleman, whether it would have been proper to limit this power. Could those gentlemen who framed that instrument have extended their ideas to all the necessities of the United States, and seen every case in which it would be necessary to have an inferior tribunal? By the regulations of Congress, they may be accommodated to public convenience and utility. We may expect that there will be an inferior court in each state; each state will insist on it; and each, for that reason, will agree to it.

…

Mr. JOHN MARSHALL. … The exclusion of trial by jury, in this case, he [Patrick Henry] urged to prostrate our rights. Does the word *court* only mean the judges? Does not the determination of a jury necessarily lead to the judgment of the court? Is there any thing here which gives the judges exclusive jurisdiction of matters of fact? What is the object of a jury trial? To inform the court of the facts. When a court has cognizance of facts does it not follow that they can make inquiry by a jury? It is impossible to be

otherwise. I hope that in this country, where impartiality is so much admired, the laws will direct facts to be ascertained by a jury. But, says the honorable gentleman, the juries in the ten miles square will be mere tools of parties, with which he would not trust his person or property; which, he says, he would rather leave to the court. Because the government may have a district of ten miles square, will no man stay there but the tools and officers of the government? Will nobody else be found there? Is it so in any other part of the world, where a government has legislative power? Are there none but officers, and tools of the government of Virginia, in Richmond? Will there not be independent merchants, and respectable gentlemen of fortune, within the ten miles square? Will there not be worthy farmers and mechanics? Will not a good jury be found there, as well as anywhere else? Will the officers of the government become improper to be on a jury? What is it to the government whether this man or that man succeeds? It is all one thing. Does the Constitution say that juries shall consist of officers, or that the Supreme Court shall be held in the ten miles square? It was acknowledged, by the honorable member, that it was secure in England. What makes it secure there? Is it their constitution? What part of their constitution is there that the Parliament cannot change? As the preservation of this right is in the hands of Parliament, and it has ever been held sacred by them, will the government of America be less honest than that of Great Britain? Here a restriction is to be found. The jury is not to be brought out of the state. There is no such restriction in that government; for the laws of Parliament decide every thing respecting it. Yet gentlemen tell us that there is safety there, and nothing here but danger. It seems to me that the laws of the United States will generally secure trials by a jury of the vicinage, or in such manner as will be most safe and convenient for the people.

But it seems that the right of challenging the jurors is not secured in this Constitution. Is this done by our own Constitution, or by any provision of the English government? Is it done by their Magna Charta, or bill of rights? This privilege is founded on their laws. If so, why should it be objected to the American Constitution, that it is not inserted in it? If we are secure in Virginia without mentioning it in our Constitution, why should not this security be found in the federal court?

The honorable gentleman said much about the quitrents in the Northern Neck. I will refer it to the honorable gentleman himself. Has he not acknowledged that there was no complete title? Was he not satisfied that

the right of the legal representatives of the proprietor did not exist at the time he mentioned? If so, it cannot exist now. I will leave it to those gentlemen who come from that quarter. I trust they will not be intimidated, on this account, in voting on this question. A law passed in 1782, which secures this. He says that many poor men may be harassed and injured by the representatives of Lord Fairfax. If he has no right, this cannot be done. If he has this right, and comes to Virginia, what laws will his claims be determined by? By those of the state. By what tribunals will they be determined? By our state courts. Would not the poor man, who was oppressed by an unjust prosecution, be abundantly protected and satisfied by the temper of his neighbors, and would he not find ample justice? What reason has the honorable member to apprehend partiality or injustice? He supposes that, if the judges be judges of both the federal and state courts, they will incline in favor of one government. If such contests should arise, who could more properly decide them than those who are to swear to do justice? If we can expect a fair decision any where, may we not expect justice to be done by the judges of both the federal and state governments? But, says the honorable member, laws may be executed tyrannically. Where is the independency of your judges? If a law be exercised tyrannically in Virginia, to what can you trust? To your judiciary. What security have you for justice? Their independence. Will it not be so in the federal court?

Gentlemen ask, What is meant by law cases, and if they be not distinct from facts? Is there no law arising on cases of equity and admiralty? Look at the acts of Assembly. Have you not many cases where law and fact are blended? Does not the jurisdiction in point of law as well as fact, find itself completely satisfied in law and fact? The honorable gentleman says that no law of Congress can make any exception to the federal appellate jurisdiction of facts as well as law. He has frequently spoken of technical terms, and the meaning of them. What is the meaning of the term *exception?* Does it not mean alteration and diminution? Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court. These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people. Who can understand this word, *exception*, to extend to one case as well as the other? I am persuaded that a reconsideration of this case will convince the gentlemen that he was mistaken. This may go to the cure of the mischief apprehended. Gentlemen must be satisfied that this power will not be so much abused as they have said.

The honorable member says that he derives no consolation from the wisdom and integrity of the legislature, because we call them to rectify defects which it is our duty to remove. We ought well to weigh the good and evil before we determine. We ought to be well convinced that the evil will be really produced before we decide against it. If we be convinced that the good greatly preponderates, though there be small defects in it, shall we give up that which is really good, when we can remove the little mischief it may contain, in the plain, easy method pointed out in the system itself?

I was astonished when I heard the honorable gentleman say that he wished the trial by jury to be struck out entirely. Is there no justice to be expected by a jury of our fellow citizens? Will any man prefer to be tried by a court, when the jury is to be of his countrymen, and probably of his vicinage? We have reason to believe the regulations with respect to juries will be such as shall be satisfactory. Because it does not contain all, does it contain nothing? But I conceive that this committee will see there is safety in the case, and that there is no mischief to be apprehended.

He states a case, that a man may be carried from a federal to an antifederal corner, (and *vice versa*) where men are ready to destroy him. Is this probable? Is it presumable that they will make a law to punish men who are of different opinions in politics from themselves? Is it presumable that they will do it in one single case, unless it be such a case as must satisfy the people at large? The good opinion of the people at large must be consulted by their representatives; otherwise, mischiefs would be produced which would shake the government to its foundation. As it is late, I shall not mention all the gentleman’s argument, but some parts of it are so glaring that I cannot pass them over in silence. He says that the establishment of these tribunals, and more particularly in their jurisdiction of controversies between citizens of these states and foreign citizens and subjects, is like a retrospective law. Is there no difference between a tribunal which shall give justice and effect to an existing right, and creating a right that did not exist before? The debt or claim is created by the individual. He has bound himself to comply with it. Does the creation of a new court amount to a retrospective law?

We are satisfied with the provision made in this country on the subject of trial by jury. Does our Constitution direct trials to be by jury? It is required in our bill of rights, which is not a part of the Constitution. Does any security arise from hence? Have you a jury when a judgment is obtained on a replevin bond, or by default? Have you a jury when a motion is made for

the commonwealth against an individual; or when a motion is made by one joint obligor against another, to recover sums paid as security? Our courts decide in all these cases, without the intervention of a jury; yet they are all civil cases. The bill of rights is merely recommendatory. Were it otherwise, the consequence would be that many laws which are found convenient would be unconstitutional. What does the government before you say? Does it exclude the legislature from giving a trial by jury in civil cases? If it does not forbid its exclusion, it is on the same footing on which your state government stands now. The legislature of Virginia does not give a trial by jury where it is not necessary, but gives it wherever it is thought expedient. The federal legislature will do so too, as it is formed on the same principles.

The honorable gentleman says that unjust claims will be made, and the defendant had better pay them than go to the Supreme Court. Can you suppose such a disposition in one of your citizens, as that, to oppress another man, he will incur great expenses? What will he gain by an unjust demand? Does a claim establish a right? He must bring his witnesses to prove his claim. If he does not bring his witnesses, the expenses must fall upon him. Will he go on a calculation that the defendant will not defend it, or cannot produce a witness? Will he incur a great deal of expense, from a dependence on such a chance? Those who know human nature, black as it is, must know that mankind are too well attached to their interest to run such a risk. I conceive that this power is absolutely necessary, and not dangerous; that, should it be attended by little inconveniences, they will be altered, and that they can have no interest in not altering them. Is there any real danger? When I compare it to the exercise of the same power in the government of Virginia, I am persuaded there is not. The federal government has no other motive, and has every reason for doing right which the members of our state legislature have. Will a man on the eastern shore be sent to be tried in Kentucky, or a man from Kentucky be brought to the eastern shore to have his trial? A government, by doing this, would destroy itself. I am convinced the trial by jury will be regulated in the manner most advantageous to the community.

Elliot, vol. 3, pp. 537, 540–42, 544–47, 557–62.

13.2.2.6.jJune 23, 1788

He [Mr. Henry] then proceeded to state the appellate jurisdiction of the judicial power, both as to law and fact, with such exceptions and under such regulations as Congress shall make. He observed, that, as Congress had a

right to organize the federal judiciary, they might or might not have recourse to a jury, as they pleased. He left it to the candor of the honorable gentleman to say whether those persons who were at the expense of taking witnesses to Philadelphia, or wherever the federal judiciary may sit, could be certain whether they were to be heard before a jury or not. An honorable gentleman (Mr. Marshall) the other day observed, that he conceived the trial by jury better secured under the plan on the table than in the British government, or even in our bill of rights. I have the highest veneration and respect for the honorable gentleman, and I have experienced his candor on all occasions; but, Mr. Chairman, in this instance, he is so materially mistaken that I cannot but observe, he is much in error. I beg the clerk to read that part of the Constitution which relates to trial by jury. [*The clerk then read the 8th article of the bill of rights*.]

Mr. MARSHALL rose to explain what he had before said on this subject: he informed the committee that the honorable gentleman (Mr. Henry) must have misunderstood him. He said that he conceived the trial by jury was as well secured, and not better secured, in the proposed new Constitution as in our bill of rights. [*The clerk then read the* 11*th article of the bill of rights*.]

Mr. HENRY. Mr. Chairman: The gentleman's candor, sir, as I informed you before, I have the highest opinion of, and am happy to find he has so far explained what he meant; but, sir, has he mended the matter? Is not the ancient trial by jury preserved in the Virginia bill of rights? and is that the case in the new plan? No, sir; they can do it if they please. Will gentlemen tell me the trial by jury of the vicinage where the party resides is preserved? True, sir, there is to be a trial by the jury in the state where the fact was committed; but, sir, this state, for instance, is so large that your juries may be collected five hundred miles from where the party resides — no neighbors who are acquainted with their characters, their good or bad conduct in life, to judge of the unfortunate man who may be thus exposed to the rigor of that government. Compare this security, then, sir, in our bill of rights with that in the new plan of government; and in the first you have it, and in the other, in my opinion, not at all. But, sir, in what situation will our citizens be, who have made large contracts under our present government? They will be called to a federal court, and tried under the retrospective laws; for it is evident, to me at least, that the federal court must look back, and give better remedies, to compel individuals to fulfill them.

The whole history of human nature cannot produce a government like

that before you. The manner in which the judiciary and other branches of the government are formed, seems to me calculated to lay prostrate the states, and the liberties of the people. But, sir, another circumstance ought totally to reject that plan, in my opinion; which is, that it cannot be understood, in many parts, even by the supporters of it. A constitution, sir, ought to be, like a beacon, held up to the public eye, so as to be understood by every man. Some gentlemen have observed that the word *jury* implies a jury of the vicinage. There are so many inconsistencies in this, that, for my part, I cannot understand it. By the bill of rights of England, a subject has a right to a trial by his peers. What is meant by his peers? Those who reside near him, his neighbors, and who are well acquainted with his character and situation in life. Is this secured in the proposed plan before you? No, sir. As I have observed before, what is to become of the *purchases of the Indians?* — those unhappy nations who have given up their lands to private purchasers; who, by being made drunk, have given a thousand, nay, I might say, ten thousand acres, for the trifling sum of sixpence! It is with true concern, with grief, I tell you that I have waited with pain to come to this part of the plan; because I observed gentlemen admitted its being defective, and, I had my hopes, would have proposed amendments. But this part they have defended; and this convinces me of the necessity of obtaining amendments before it is adopted. They have defended it with ingenuity and perseverance, but by no means satisfactorily. If previous amendments are not obtained, the trial by jury is gone. British debtors will be ruined by being dragged to the federal court, and the liberty and happiness of our citizens gone, never again to be recovered.

Elliot, vol. 3, pp. 578–79.

13.2.2.6.kJune 24, 1788

Mr. HENRY. … The honorable member must forgive me for declaring my dissent from it; because, if I understand it rightly, it admits that the new system is defective, and most capitally; for, immediately after the proposed ratification, there comes a declaration that the paper before you is not intended to violate any of these three great rights — the liberty of religion, liberty of the press, and the trial by jury. What is the inference when you enumerate the rights which you are to enjoy? That those not enumerated are relinquished. There are only three things to be retained — religion, freedom of the press, and jury trial. Will not the ratification carry every thing, without excepting these three things? Will not all the world pronounce that

we intended to give up all the rest? Every thing it speaks of, by way of rights, is comprised in these things. Your subsequent amendments only go to these three amendments.

…

… In my weak judgment, a government is strong when it applies to the most important end of all governments — the rights and privileges of the people. In the honorable member's proposal, jury trial, the press and religion, and other essential rights, are not to be given up. Other essential rights — what are they? The world will say that you intended to give them up. When you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered.

Elliot, vol. 3, pp. 587–88, 594.

13.2.3PHILADELPHIA CONVENTION

13.2.3.1September 12, 1787

Mr. WILLIAMSON observed to the House, that no provision was yet made for juries in civil cases, and suggested the necessity of it.

Mr. GORHAM. It is not possible to discriminate equity cases from those in which juries are proper. The representatives of the people may be safely trusted in this matter.

Mr. GERRY urged the necessity of juries to guard against corrupt judges. He proposed that the committee last appointed should be directed to provide a clause for securing the trial by juries.

Col. MASON perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down, on this and some other points, would be sufficient. …

Mr. SHERMAN … There are many cases, where juries are proper, which cannot be discriminated. The Legislature may be safely trusted.

Elliot, vol. 5, p. 538.

13.2.3.2September 15, 1787

Article 3, sect. 2, (the third paragraph,) Mr. PINCKNEY and Mr. GERRY moved to annex to the end, "and a trial by jury shall be preserved as usual in civil cases."

Mr. GORHAM. The constitution of juries is different in different states, and the trial itself is *usual* in different cases, in different states.

Mr. KING urged the same objections.

Gen. PINCKNEY also. He thought such a clause in the Constitution would be pregnant with embarrassments.

The motion was disagreed to, *nem. con*.

*

Mr. Gerry. Stated the objections which determined him to withhold his name from the Constitution. … He could however he said get over all these, if the rights of the Citizens were not rendered insecure … to establish a tribunal without juries, which will be a StarChamber as to Civil cases. Under such a view of the Constitution, the best that could be done he conceived was to provide for a second general Convention.

Elliot, vol. 5, p. 550; Kaminski & Saladino, vol. 13, p. 199.

13.2.4NEWSPAPERS AND PAMPHLETS

13.2.4.1Address of the Seceding Assemblymen, October 2, 1787

… You will be able likewise to determine, whether in a free government there ought or ought not to be any provision against a standing army in time of peace? or whether the trial by jury in civil causes is become dangerous and ought to be abolished? …

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 296.

13.2.4.2Centinel, No. 1, October 5, 1787

Friends, Countrymen and Fellow Citizens, Permit one of yourselves to put you in mind of certain *liberties* and *privileges* secured to you by the constitution of this commonwealth, and to beg your serious attention to his uninterested opinion upon the plan of federal government submitted to your consideration, before you surrender these great and valuable privileges up forever. … Your constitution further provides "that in controversies respecting property, and in suits between man and man, the parties have a right *to trial by jury, which ought to be held sacred."* … Whether the *trial by jury* is to continue as your birthright, the freemen of Pennsylvania, nay, of all America, are now called upon to declare.

…

… And it is worthy of remark, that there is no declaration of personal rights, premised in most free constitutions; and that trial by *jury* in *civil* cases is taken away; for what other construction can be put on the following, *viz.* Article III. Sect. 2d. "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have *original* jurisdiction. In all other cases above mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to *law and fact?"* It would be a novelty in jurisprudence, as well as evidently improper to allow an appeal from the verdict of a jury, on the matter of fact; therefore, it implies and allows of a dismission of the jury in civil cases, and especially when it is considered, that the jury trial in criminal cases is expresly [*sic*] stipulated for, but not in civil cases.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, pp. 328–29, 336.

13.2.4.3Blessings of the New Government, October 6, 1787

Another correspondent observes, that although the tide seems to run so high at present in favor of the new constitution, there is no doubt but the people will soon change their minds, when they have time to examine it with coolness and impartiality.

Among the *blessings* of the new-proposed government our correspondent enumerates the following: — … 6. No trial by jury in civil cases. … 13. And *death* if we dare to complain.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, pp. 345.

13.2.4.4James Wilson, Address to the Citizens of Philadelphia, October 6, 1787

… Another objection that has been fabricated against the new Constitution, is expressed in disingenuous form — "the trial by jury is abolished in civil cases." … Let it be remembered then, that the business of the Fœderal Convention was not local, but general; not limited to the views and establishments of a single state, but co-extensive with the continent, and comprehending the views and establishments of thirteen independent sovereignties. When therefore, this subject was in discussion, we were involved in difficulties which pressed on all sides, and no precedent could be discovered to direct our course. The cases open to a trial by jury, differed in the different states, it was therefore impracticable on that ground to have made a general rule. The want of uniformity would have rendered any reference to the practice of the states idle and useless; and it could not, with any propriety, be said that "the trial by jury shall be as heretofore," since there has never existed any federal system of jurisprudence, to which the declaration could relate. Besides, it is not in all civil cases that the trial by jury is adopted in civil questions, for causes depending in courts of admiralty, such as relate to maritime captures, and such as are agitated in courts of equity, do not require the intervention of that tribunal. How then, was the line of discrimination to be drawn? The convention found the task too difficult for them, and they left the business as it stands, in the fullest confidence that no danger could possibly ensue, since the proceedings of the supreme court are to be regulated by the congress, which is a faithful representation of the people; …

Pennsylvania Herald, October 9, 1787, Kaminski & Saladino, vol. 13, pp. 340–41.

13.2.4.5George Mason, Objections to the Constitution, October 7, 1787

There is no Declaration of Rights; and the Laws of the general Government being paramount to the Laws & Constitutions of the several States, the Declarations of Rights in the separate States are no Security.

…

There is no Declaration of any kind for preserving the Liberty of the Press, the Tryal by jury in civil Causes; nor against the Danger of standing Armys in time of peace.

…

This Government will commence in a moderate Aristocracy; it is at present impossible to foresee whether it will, in it's Operation, produce a Monarchy, or a corrupt oppressive Aristocracy; it will most probably vibrate some years between the two, and then terminate in the one or the other.

Kaminski & Saladino, vol. 13, pp. 348–50.

13.2.4.6The Federal Farmer, No. 2, October 9, 1787

The essential parts of a free and good government are a full and equal representation of the people in the legislature, and the jury trial of the vicinage in the administration of justice — a full and equal representation, is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled — a fair representation, therefore, should be so regulated, that every order of men in the community, according to the common course of elections, can have a share in it — in order to allow professional men, merchants, traders, farmers, mechanics, &c. to bring a just proportion of their best informed men respectively into the legislature, the representation must be considerably numerous — We have about 200 state senators in the United States, and a less number than that of federal representatives cannot, clearly, be a full representation of this people, in the affairs of internal taxation and police, were there but one legislature for the whole union. The representation cannot be equal, or the situation of the people proper for one government only — if the extreme parts of the society cannot be represented as fully as the central — It is apparently impracticable that this should be the case in this extensive country — it would be impossible to collect a representation of the parts of the country five, six, and seven hundred miles from the seat of government.

Under one general government alone, there could be but one judiciary, one supreme and a proper number of inferior courts. I think it would be totally impracticable in this case to preserve a due administration of justice,

and the real benefits of the jury trial of the vicinage — there are now supreme courts in each state in the union, and a great number of county and other courts, subordinate to each supreme court — most of these supreme and inferior courts are itinerant, and hold their sessions in different parts every year of their respective states, counties and districts — with all these moving courts, our citizens, from the vast extent of the country, must travel very considerable distances from home to find the place where justice is administered. I am not for bringing justice to individuals as to afford them any temptation to engage in law suits; though I think it one of the greatest benefits in a good government, that each citizen should find a court of justice within a reasonable distance, perhaps, within a day's travel of his home; so that without great inconveniences and enormous expense, he may have the advantages of his witnesses and jury — it would be impracticable to derive these advantages from one judiciary — the one supreme court at most could only set in the centre of the union, and move once a year into the centre of the eastern and southern extremes of it — and, in this case, each citizen, on an average, would travel 150 or 200 miles to find this court — that, however, inferior courts might be properly placed in the different counties, and districts of the union, the appellate jurisdiction would be intolerable and expensive.

If it were possible to consolidate the states, and preserve the features of a free government, still it is evident that the middle states, the parts of the union, about the seat of government, would enjoy great advantages, while the remote states would experience the many inconveniences of remote provinces. Wealth, offices, and the benefits of government would collect in the centre: and the extreme states; and their principal towns, become much less important.

There are other considerations which tend to prove that the idea of one consolidated whole, on free principles, is ill founded — the laws of a free government rest on the confidence of the people, and operate gently — and never can extend the influence very far — if they are executed on free principles, about the centre, where benefits of the government induce the people to support it voluntarily; yet they must be executed on the principles of fear and force in the extremes — This has been the case with every extensive republic of which we have any accurate account.

There are certain unalienable and fundamental rights, which in forming the social compact, ought to be explicitly ascertained and fixed — a free and enlightened people, in forming this compact, will not resign all their

rights to those who govern, and they will fix limits to their legislators and rulers, which will soon be plainly seen by those who are governed, as well as by those who govern: and the latter will know they cannot be passed unperceived by the former, and without giving a general alarm — These rights should be made the basis of every constitution; and if a people be so situated, or have such different opinions that they cannot agree in ascertaining and fixing them, it is a very strong argument against their attempting to form one entire society, to live under one system of laws only. — I confess, I never thought the people of these states differed essentially in these respects; they having derived all these rights from one common source, the British systems; and having in the formation of their state constitutions, discovered that their ideas relative to these rights are very similar. However, it is now said that the states differ so essentially in these respects, and even in the important article of the trial by jury, that when assembled in convention, they can agree to no words by which to establish that trial, or by which to ascertain and establish many other of these rights, as fundamental articles in the social compact. If so, we proceed to consolidate the states on no solid basis whatever.

Kaminski & Saladino, vol. 14, pp. 25–27.

13.2.4.7The Federal Farmer, No. 3, October 10, 1787

… There are some powers proposed to be lodged in the general government in the judicial department, I think very unnecessarily, I mean powers respecting questions arising upon the internal laws of the respective states. … In almost all these cases, either party may have the trial by jury in the state courts; … justice may be obtained in these courts on reasonable terms; they must be more competent to proper decisions on the laws of their respective states, than the federal courts can possibly be. … It is true, those courts may be so organized by a wise and prudent legislature, as to make the obtaining of justice in them tolerably easy; they may in general be organized on the common law principles of the country: But this benefit is by no means secured by the constitution. The trial by jury is secured only in those few criminal cases, to which the federal laws will extend — as crimes committed on the seas against the law of nations, treason and counterfeiting the federal securities and coin: But even in these cases, the jury trial of the vicinage is not secured, particularly in the large states, a citizen may be

tried for a crime committed in the state, and yet tried in some states 500 miles from the place where it was committed; but the jury trial is not secured at all in civil causes. Though the convention have not established this trial, it is to be hoped that congress, in putting the new system into execution, will do it by a legislative act, in all cases in which it can be done with propriety. Whether the jury trial is not excluded [in] the supreme judicial court, is an important question. …

Kaminski & Saladino, vol. 14, pp. 40–41.

13.2.4.8 The Federal Farmer, No. 4, October 12, 1787

… If the federal constitution is to be construed so far in connection with the state constitutions, as to leave the trial by jury in civil causes, for instance, secured; on the same principles it would have left the trial by jury in criminal causes, the benefits of the writ of habeas corpus, &c. secured; they all stand on the same footing; they are the common rights of Americans, and have been recognized by the state constitutions: But the convention found it necessary to recognize or reestablish the benefits of that writ, and the jury trial in criminal cases. … The establishing of one right implies the necessity of establishing another and similar one.

On the whole, the position appears to me to be undeniable, that this bill of rights ought to be carried farther, and some other principles established, as a part of this fundamental compact between the people of the United States and their federal rulers.

… There are other essential rights, which we have justly understood to be the rights of freemen. … The trials by jury in civil causes, it is said, varies [*sic*] so much in the several states, that no words could be found for the uniform establishment of it. If so the federal legislation will not be able to establish it by any general laws. I confess I am of opinion it may be established, but not in that beneficial manner in which we may enjoy it, for the reasons beforementioned. When I speak of the jury trial of the vicinage, or the trial of the fact in the neighbourhood, — I do not lay so much stress upon the circumstance of our being tried by our neighbors: in this enlightened country men may be probably impartially tried by those who do not live very near them: but the trial of facts in the neighborhood is of great importance in other respects. Nothing can be more essential than the cross examining witnesses, and generally before the triers of the facts in question.

The common people can establish facts with much more ease with oral than written evidence; when trials of fact are removed to a distance from the homes of the parties and witnesses, oral evidence becomes intolerably expensive, and the parties must depend on written evidence, which to the common people is expensive and almost useless; it must be frequently taken ex-parte, and but very seldom leads to the proper discovery of truth.

The trial by jury is very important in another point of view. It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department. To hold open to them the offices of senators, judges, and offices to fill which an expensive education is required, cannot answer any valuable purposes for them; they are not in a situation to be brought forward and to fill those offices; these, and most other offices of any considerable importance, will be occupied by the few. The few, the well born, &c. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally disposed, and very naturally too, to favour those of their own description.

The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other. I am very sorry that even a few of our countrymen should consider jurors and representatives in a different point of view, as ignorant, troublesome bodies, which ought not to have any share in the concerns of government.

Kaminski & Saladino, vol. 14, pp. 45–47.

13.2.4.9A Democratic Federalist, October 17, 1787

The second and most important objection to the federal plan, which Mr. Wilson pretends to be made *in a disingenuous form*, is the entire *abolition of the trial by jury in civil cases*. It seems to me that Mr. Wilson's pretended answer, is much more *disingenuous* than the objection itself, which I maintain to be strictly founded in fact. He says "that the cases open to trial by jury differing in the different States, it was therefore

impracticable to have made a general rule." This answer is extremely futile, because a reference might easily have been made to the *common law of England*, which obtains through every State, and cases in the maritime and civil law courts would of course have been excepted. I must also directly contradict Mr. Wilson when he asserts that there is no trial by jury in the courts of chancery — It cannot be unknown to a man of his high professional learning, that whenever a difference arises about a matter of fact in the courts of equity in America or England, the fact is sent down to the courts of common law to be tried by a jury, and it is what the lawyers call a *feigned issue*. This method will be impracticable under the proposed form of judicial jurisdiction for the United States.

But setting aside the equivocal answers of Mr. Wilson, I have it in my power to prove that under the proposed Federal Constitution, *the trial of facts in civil cases by a jury of the Vicinage* is entirely and effectually abolished, and will be absolutely impracticable. I wish the learned gentleman had explained to us what is meant by the *appellate* jurisdiction as to law and *fact* which is vested in the superior court of the United States? As he has not thought proper to do it, I shall endeavour to explain it to my fellow citizens, regretting at the same time that it has not been done by a man whose abilities are so much superior to mine. The word *appeal*, if I understand it right, in its proper legal signification includes the *fact* as well as the *law*, and precludes every idea of a trial by jury — It is a word of *foreign growth*, and is only known in England and America in those courts which are governed by the civil or ecclesiastical law of the *Romans*. Those courts have always been considered in England as a grievance, and have all been established by the usurpations of the *ecclesiastical* over the *civil* power. It is well known that the courts of chancery in England were formerly entirely in the hands of *ecclesiastics*, who took advantage of the strict forms of the common law, to introduce a foreign mode of jurisprudence under the specious name of *Equity*. Pennsylvania, the freest of the American States[,] has wisely rejected this establishment, and knows not even the name of a court of chancery — And in fact, there can not be any thing more absurd than a distinction between LAW and EQUITY. It might perhaps have suited those barbarous times when the law of England, like almost every other science, was perplexed with quibbles and *Aristotelian* distinctions, but it would be shameful to keep it up in these more enlightened days. At any rate, it seems to me that there is much more *equity* in a trial by jury, than in an appellate jurisdiction from the fact.

An *appeal* therefore is a thing unknown to the common law. Instead of an appeal from facts, it admits of a second, or even third trial by different juries, and mistakes in points of *law*, are rectified by superior courts in the form of a *writ of error* — and to a mere common lawyer, unskilled in the forms of the *civil law* courts, the words *appeal from law and fact*, are mere nonsense, and unintelligible absurdity.

But even supposing that the superior court of the United States had the authority to try facts by *juries of the vicinage*, it would be impossible for them to carry it into execution. It is well known that the supreme courts of the different states, at stated times in every year, go round the different counties of their respective states to try issues of fact, which is called *riding the circuits*. Now, how is it possible that the supreme continental court, which we will suppose to consist at most of five or six judges, can travel at least twice in every year, through the different counties of America, from New-Hampshire to Kentuckey [*sic*] and from Kentuckey to Georgia, to try facts by juries of the vicinage. Common sense will not admit of such a supposition. I am therefore right in my assertion, that *trial by jury in civil cases, is, by the proposed constitution entirely done away, and effectually abolished*.

Pennsylvania Herald, Storing, vol. 3, pp. 59–61.

13.2.4.10One of the People, October 17, 1787

The … trials by jury are not infringed on. The Constitution is silent, and with propriety too, on these and every other subject relative to the internal government of the states. These are secured by the different state constitutions.

Pennsylvania Gazette, Jensen, vol. 2, p. 190.

13.2.4.11A Citizen of Philadelphia, October 18, 1787

… Another objection is, that the new constitution *abolishes tryals by jury in civil causes*. I answer, I don’t see one word in the constitution, which by any candid construction can support even the remotest suspicion that this ever entered the heart of one member of the convention. I therefore set down the suggestion for sheer malice, and so dismiss it.

13.2.4.12An Old Whig, No. 3, October 20, 1787

… As to the trial by jury, the question may be decided in a few words. Any future Congress sitting under the authority of the proposed new constitution, may, if they chuse, enact that there shall be no more trial by jury, in any of the United States; except in the trial of crimes; and this "supreme law" will at once annul the trial by jury, in all other cases. The author of the speech supposes that no danger "can possibly ensue, since the proceedings of the supreme court are to be regulated by the Congress, which is a faithful representation of the people; and the oppression of government is effectually barred; by declaring that in all criminal cases the trial by jury shall be preserved." Let us examine the last clause of this sentence first. — I know that an affected indifference to the trial by jury has been expressed, by some persons high in the confidence of the present ruling party in some of the states; — and yet for my own part I cannot change the opinion I had early formed of the excellence of this mode of trial even in civil causes. On the other hand I have no doubt that whenever a settled plan shall be formed for the extirpation of liberty, the banishment of jury trials will be one of the means adopted for the purpose. — But how is it that "the oppression of government is effectually barred by declaring that in all criminal cases the trial by jury shall be preserved?" — Are there not a thousand civil cases in which the government is a party? — In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution[,] yet there are all of them civil causes. — These penalties, forfeitures and demands of public debts may be multiplied at the will and pleasure of government. — These modes of harassing the subject have perhaps been more effectual than direct criminal prosecutions. … The reason that is pretended in the speech why such a declaration; as a bill of rights requires, cannot be made for the protection of the trial by jury; — "that we cannot with any propriety say 'that the trial by jury shall be as heretofore' " in the case of a federal system of jurisprudence, is almost too contemptible to merit notice. — Is this the only form of words that language could afford on such an important occasion? Or if it were to what did these words refer when adopted in the constitutions of the states? — Plainly sir, to the trial by

juries as established by the common law of England in the state of its purity; — That common law for which we contended so eagerly at the time of the revolution, and which now after the interval of a very few years, by the proposed new constitution we seem ready to abandon forever; at least in that article which is the most invaluable part of it; the trial by jury.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, pp. 427–28.

13.2.4.13An American Citizen, No. 4, October 21, 1787

… Both the old and new foederal constitutions, and indeed *the constitution of Pennsylvania*, admit of courts in which no use is made of a jury. The board of property, the court of admiralty, and the high court of errors and appeals, in the state of Pennsylvania, as also the court of appeals under the old confederation, exclude juries. *Tryal by jury will therefore be in the express words of the Pennsylvania constitution, "as heretofore,"* — almost always used, though sometimes omitted. Trials for lands lying in any state between persons residing in such state, for bonds, notes, book debts, contracts, trespasses, assumptions, and all other matters between two or more citizens of any state, will be held in the state courts by juries, *as now*. In these cases, the foederal courts *cannot interfere*. But when a dispute arises between the citizens of any state about lands lying out of the bounds *thereof*, or when a trial is to be had between the citizens of any state and those of another, or the government of another, the private citizen will not be obliged to go into a court *constituted by the state*, with which, or with the citizens of which, *his dispute is. He can appeal to a disinterested foederal court*. This is surely a *great advantage*, and promises a *fair trial*, and an *impartial judgement*. The trial by jury is *not excluded* in these foederal courts. In all *criminal* cases, where the property or life of the citizen is at stake, he has the benefit of a jury. If convicted on impeachment, which is never done by a jury in any country, he cannot be fired, imprisoned or punished, but only may be *disqualified* from doing public mischief by losing his office, and his capacity to hold another. If the nature of his offence, besides its danger to his country, should be *criminal* in itself — should involve a charge of fraud, murder or treason — he may be tried for such crime, but cannot be convicted *without a jury*. In trials about property in the foederal courts, which can only be *as above stated*, there is

nothing in the new constitution *to prevent a trial by jury*. No doubt it will be the mode in every case, wherein it is practicable. This will be adjusted by law, and it could not be done otherwise. In short, the sphere of jurisdiction for the foederal courts *is limited*, and that sphere only is subject to the regulations of our foederal government. The known principles of justice, the attachment to trial by jury whenever it can be used, the instructions of the state legislatures, the instructions of the people at large, the operation of the foederal regulations on the property of a president, a senator, a representative, a judge, as well as on that of a private citizen, will certainly render those regulations as favorable as possible to *property; for life and liberty are put more than ever into the hands of the juries*. Under the *present* constitution of all the states, a public officer may be condemned *to imprisonment or death* on impeachment, *without a jury;* but the new foederal constitution protects the accused, till he shall be convicted, from the hands of power, by rendering *a jury the indispensible judges of all crimes*.

Pennsylvania Gazette (October 24), Kaminski & Saladino, vol. 13, pp. 434–35.

13.2.4.14Centinel, No. 2, October 24, 1787

Mr. *Wilson* says, that it would have been impracticable to have made a general rule for jury trial in the civil cases assigned to the federal judiciary, because of the want of uniformity in the mode of jury trial, as practiced by the several states. This objection proves too much, and therefore amounts to nothing. If it precludes the mode of common law in civil cases, it certainly does in criminal. Yet in these we are told “the oppression of government is effectually barred by declaring that in all criminal cases *trial by jury* shall be preserved.” Astonishing, that provision could not be made for a jury in civil controversies, of 12 men, whose verdict should be unanimous, *to be taken from the vicinage*; a precaution which is omitted as to trial of crimes, which may be any where in the state within which they have been committed. So that an inhabitant of *Kentucky* may be tried for treason at *Richmond*.

[Philadelphia] Freeman’s Journal, Kaminski & Saladino, vol. 13, p. 466.

13.2.4.15Proclamation, Wat Tyler, October 24, 1787

… Thus it may be argued … because the federal representation of the people will possess the power to declare in what civil cases the trial shall be by jury, *therefore* the trial by jury is abolished in all civil cases. …

Pennsylvania Herald, Jensen, vol. 2, p. 203.

13.2.4.16Timothy Meanwell, October 29, 1787

… I was informed that the trial by jury, which was guaranteed to us by the constitution of Pennsylvania, was in many instances abolished; this I did not believe when I heard it — I could not entertain an opinion that men so enlightened as those of the convention, among whose names I saw friend — and friend —, could be inattentive to the preservation of the trial by jury. I immediately took the constitution in my hand, and began to search it from end to end, and was in hopes of finding some clause like that in the Bill of Rights in the constitution of Pennsylvania, that would secure the trial by juries in all cases whatsoever, but I was disappointed.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 14, p. 512.

13.2.4.17Cincinnatus, No. 1, November 1, 1787

Let us suppose then, that what has happened, may happen again: That a patriotic printer, like Peter Zenger, should incur the resentment of our new rulers, by publishing to the world, transactions which they wish to conceal. If he should be prosecuted, if his judges should be as desirous of punishing him, *at all events*, as the judges were to punish Peter Zenger, what would his innocence or his virtue avail him? This constitution is so admirably framed for tyranny, that, by clear construction, the judges might put the verdict of a jury out of the question. Among the cases in which the court is to have appellate jurisdiction, are — controversies, to which the United States are a party: — In this appellate jurisdiction, the judges are to determine, *both law and fact*. That is, the court is both judge and jury. The attorney general then would have only to move a question of law in the court below, to ground an appeal to the supreme judicature, and the printer

would be delivered up to the mercy of his judges. Peter Zenger's case will teach us, what mercy he might expect. Thus, if the president, vice-president, or any other officer, or favorite of state, should be censured in print, he might effectually deprive the printer, or author, of his trial by jury, and subject him to something, that will probably very much resemble the Star Chamber of former times. The freedom of the press, the sacred palladium of public liberty, would be pulled down; — all useful knowledge on the conduct of government would be withheld from the people — the press would become subservient to the purposes of bad and arbitrary rulers, and imposition, not information, would be its object.

… Yet it was the jury only, that saved Zenger, it was a jury only, that saved Woodfall, it can only be a jury that will save any future printer from the fangs of power.

New York Journal, Kaminski & Saladino, vol. 13, pp. 532–33.

13.2.4.18Timoleon, November 1, 1787

"… With as little ceremony, and similar constructive doctrine, the inestimable trial by jury can likewise be depraved and destroyed — because the Constitution in the 2d section of the 3d article, by expressly assuming the trial by jury in *criminal cases*, and being silent about it in *civil causes*, evidently declares it to be unnecessary in the latter. And more strongly so, by giving the supreme court jurisdiction in appeals, *'both as to law and fact.'* If this be added, that the trial by jury in criminal cases is only stipulated to be *'in the state,'* not in the county where the crime is supposed to have been committed; one excellent part of the jury trial, from the vicinage, or at least from the county, is even in criminal cases rendered precarious, and at the mercy of rulers under the new Constitution. — Yet the danger to liberty, peace, and property, from restraining and injuring this excellent mode of trial, will clearly appear from the following observations of the learned Dr. Blackstone, in his commentaries on the laws of England, Art. Jury Trial Book 3. chap. 33. — 'The establishment of jury trial was always so highly esteemed and valued by the people, that no conquest, *no change of government*, could ever prevail to abolish it. In the magna charta it is more than once insisted upon *as the principle bulwark of our liberties* — And this is a species of knowledge most absolutely necessary for every gentleman; as well, because he may be frequently called upon to determine

in this capacity the rights of others, his fellow subjects; as, *because his own property, his liberty, and his life, depend upon maintaining in its legal force the trial by jury*… And in every country as the trial by jury has been *gradually disused*, so the great have increased in power, until the state has been torn to pieces by rival factions, and oligarchy in effect has been established, though under the shadow of regal government; unless where the miserable people have taken shelter under absolute monarchy, as the lighter evil of the two. … *It is therefore upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable trial by jury in all its rights'."* Thus far the learned Dr. Blackstone, — "Could the Doctor, if he were here, at this moment," … "have condemned those parts of the new Constitution in stronger terms, which give the supreme court jurisdiction both as to law and *fact;* which have weakened the jury trial in criminal cases and which have discountenanced it in all civil causes? At first I wondered at the complaint that some people made of this new Constitution, because it led to the government of a few; but it is fairly to be concluded, from this injury to the trial by jury, that *some* who framed this new system, saw with Dr. Blackstone, how operative jury trial was in preventing the tyranny of the great ones, and therefore frowned upon it, as this new Constitution does. …"

New York Journal, Extraordinary, Kaminski & Saladino, vol. 13, pp. 536–38.

13.2.4.19Brutus, No. 2, November 1, 1787

It has been said, in answer to this objection, that such declaration of rights, however requisite they might be in the constitutions of the states, are not necessary in the general constitution, because, "in the former case, every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given is reserved." It requires but little attention to discover, that this mode of reasoning is rather specious than solid. The powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government — It reaches to every thing which concerns human happiness — Life, liberty, and property, are under its controul. There is the same reason, therefore,

that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments. To set this matter in a clear light, permit me to instance some of the articles of the bills of rights of the individual states, and apply them to the case in question.

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For the purpose of securing the property of the citizens, it is declared by all the states, "that in all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

Does not the same necessity exist of reserving this right, under this national compact, as in that of this state? Yet nothing is said respecting it.

New York Journal, Kaminski & Saladino, vol. 13, pp. 526–27.

13.2.4.20An Old Whig, No. 5, November 1, 1787

… It is needless to repeat the necessity of securing other personal rights in the forming a new government. The same argument which proves the necessity of securing one of them shews also the necessity of securing others. Without a bill of rights we are totally insecure in all of them; and no man can promise himself with any degree of certainty that his posterity will enjoy the inestimable blessings of liberty of conscience, of freedom of speech and of writing and publishing their thoughts on public matters, of trial by jury, of holding themselves, their houses and papers free from seizure and search upon general suspicion or general warrants; or in short that they will be secured in the enjoyment of life, liberty and property without depending on the will and pleasure of their rulers.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 541.

13.2.4.21An Officer of the Late Continental Army, November 6, 1787

… The objections that have been made to the new Constitution are these: …

8. TRIAL BY JURY, that sacred bulwark of liberty, is ABOLISHED IN CIVIL CASES, and Mr. [James] W[ilson], one of the Convention, has told

you, that not being able to agree as to the FORM of establishing this point, they have left you deprived of the SUBSTANCE. Here are his own words: *"The subject was involved in difficulties. The Convention found the task* too DIFFICULT *for them, and left the business as it stands."*

[Philadelphia] Independent Gazetteer, Jensen, vol. 2, p. 211.

13.2.4.22Cincinnatus, No. 2, November 8, 1787

… I come now to the consideration of the trial by jury in civil cases. … The objection you impute to your opponents is — the trial by jury is abolished in civil cases. This you call a disingenuous form — and truly it is very much so on your part and of your own fabrication. The objection in its true form is, that — trial by jury is not secured in civil cases. To this objection, you could not possibly give an answer; you therefore ingeniously coined one to which you could make a plausible reply. We expected, and we had a right to expect, that such an inestimable privilege as this would have been secured — that it would not have been less dependent on the arbitrary exposition of future judges, who, when it may suit the arbitrary views of the ruling powers will explain it away at pleasure. …

But, if taken even on your own ground it is not so clearly tenable. In point of legal construction, the trial by jury does seem to be taken away in civil cases. It is a law maxim, that the expression of one part is an exclusion of the other. In legal construction therefore, the preservation of trial by jury in criminal, is an exclusion of it in civil cases. Why else should it be mentioned at all? Either it followed of course in both cases, or it depended on being stipulated. If the first, then the stipulation was nugatory — if the latter, then it was in part given up. Therefore, either we must suppose the Convention did a nugatory thing; or that by the express mention of jury in criminal, they meant to exclude it in civil cases. And that they did intend to exclude it, seems the more probable, as in the appeal they have taken special care to render the trial by jury of no effect by expressly making the court judges both of law and fact. And though this is subjected to the future regulation of Congress, yet it would be absurd to suppose, that the regulation meant its annihilation. We must therefore conclude, that in appeals the trial by jury is expressly taken away, and in original process it is by legal implication taken away in all civil cases.

Here then I must repeat — that you ought to have stated fairly to the

people, that the trial by jury was not secured; that they might know what, it was they were to consent to; and if knowing it, they consented, the blame could not fall on you. … The trial by [jury in] our country, is in my opinion, the great bulwark of freedom, and for certain, the admiration of all foreign writers and nations. The last writer of any distinguished note, upon the principles of government, the celebrated Montesquieu, is in raptures with this peculiar perfection in the English policy. …

Such are the opinions of Lord Camden and Vaughan, and multitudes of the first names, both English and other foreigners might be cited, who bestow unbounded approbation on this best of all human modes for protecting, life, liberty, and property.

I own then, it alarms me, when I see these Doctors of our constitutions cutting in twain this sacred shield of public liberty and justice. Surely my countrymen will think a little before they resign this strong hold of freedom. Our state constitutions have held it sacred in all its parts. They have anxiously secured it. But that these may not shield it from the intended destruction in the new constitution, it is therein as anxiously provided, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof; or which shall be made under the authority of the United States, shall be the supreme laws of the land; and the judges of every state, shall be bound thereby; any thing in constitution and the laws of any state, to the contrary notwithstanding."

Thus this new system, with one sweeping clause, bears down every constitution in the union, and establishes its arbitrary doctrines, supreme and paramount to all the bills and declarations of rights, in which we vainly put our trust, and on which we rested the security of our often declared, unalienable liberties. But I trust the whole people of this country, will unite, in crying out, as did our sturdy ancestors of old — *Nolumus leges anglicae mutari*. — We will not part with our birthright.

New York Journal, Kaminski & Saladino, vol. 14, pp. 12–14.

13.2.4.23A Son of Liberty, November 8, 1787

MR. GREENLEAF, Having observed in your paper of the 25th ult. that a writer under the signature of *A Slave*, has pointed out a number of advantages or blessings, which, he says, will result from an adoption of the new government, proposed by the Convention: — I have taken the liberty to

request, that you will give the following a place in your next paper, it being an enumeration of a *few* of the *curses* which will be entailed on the people of America, by this preposterous and newfangled system, if they are ever so infatuated as to receive it. … 3d. A suppression of trial by jury of your peers, in all civil cases, and even in criminal cases, the loss of the trial in the vicinage, where the fact and the credibility of your witnesses are known, and where you can command their attendance without insupportable expence, or inconveniences.

New York Journal, Kaminski & Saladino, vol. 13, p. 481.

13.2.4.24Uncus, November 9, 1787

Mr. Goddard, When you began publishing the *Centinel* in numbers, I expected we should have had one in each of your papers for some weeks, hoping, that after he had done finding fault with the doings of the late convention, the members of which were either too designing, — of too aristocratic principles, — too old, — or too ignorant, "inexperienced and fallible," for business of such magnitude; *he* would, by the *perfect rule* existing in his own mind, by which he has tried and condemned the proposed constitution, exhibit to the world a perfect model; which these States would have only to read, and invite "those who are competent to the task of developing the principles of government," to come forward, approve and adopt.

…

I believe, there is not a single article, wherein the *new plan* has proposed any amendment to the *old*, but what would be objected to by *Centinel*. To some he has objected, where they have made no amendment; as the power of Congress to try causes without a jury, which they have ever possessed.

[Baltimore] Maryland Journal, Kaminski & Saladino, vol.14, pp. 76, 79.

13.2.4.25Gentleman in New-York, November 14, 1787

"… I have not only no objection to, but am extremely desirous of, a strong and general government, provided the fundamental principles of liberty be well secured. These I take to be, trial by jury as has been and is practised. … In all these great points the proposed constitution requires amendment,

before it can be adopted even with safety.

"In the constitution of the foederal court, where its jurisdiction is original, the securing jury trial in criminal, is, according to all legal reasoning, an exclusion of it in civil matters — and in its appellant function it is expressly said the court shall judge both of *law* and *fact*. This of course renders the finding of a jury below, totally nugatory."

Virginia Independent Chronicle, Kaminski & Saladino, vol. 14, p. 103.

13.2.4.26A Georgian, November 15, 1787

And now we come to the point which at once teems with numberless enormous innovations by introducing strange and new courts of almost any denomination into any of the states whereby our own courts will soon be annihilated, and abolishing the only pledge of liberty, the trial by jury, to tryants only formidable, in all civil cases, countenancing the greatest injustice to be lawfully, nay constitutionally, committed by the rich against their brave fellow citizens whose only misfortune is to be, perhaps, not so rich as they, by dragging their lawsuits of any denomination and of any sum, however small, if they choose, before the GRAND TRIBUNAL OF APPEAL to which the poor will be unable to follow with their evidences and witnesses, and on account of the great expenses. Therefore, fellow citizens, pray restrain this encroachment so destructive to the inestimable rights the more numerous part of middle-circumstanced citizens now enjoy. With horror beware of the precipice before you; and, if you will, please join me in amending the third Article in the Federal Constitution thus:

…

"The trial of all civil and criminal causes, except in cases of impeachment (as provided for in Article I, section 3) shall be by jury, drawn by lot out of a box from among the freeholders of that state where Congress shall reside, and within five miles thereof; and, when a crime against the United States has been committed within no state, the Supreme Court of Congress shall have the trial of the same where Congress then resides."

Gazette of the State of Georgia, Kaminski & Saladino, vol. 3, pp. 241–42.

13.2.4.27Cincinnatus, No. 3, November 15, 1787

Sir, Your speech has varnished an iron trap, bated with some illustrious names, to catch the liberties of the people. And this you are pleased to call a constitution — “the best form of government that was ever offered to the world.” May Heaven then have mercy on the world and on us. …

In my former papers, I have shewn, … that the sacred trial by jury, in civil cases, is at best doubtful; and in all cases of appeal expressly taken away. … Upon the omission of the trial by jury in civil cases, you observe — “when this subject was in discussion, we were involved in difficulties which pressed on all sides, and no precedent could be discovered to direct our course. The cases open to trial by jury differed in the different states, it was therefore impracticable on that ground to have made a general rule.” — So, because the extent of the trial by jury varied in the different states, therefore it was proper to abolish it in all. For what else can your words — “it was impracticable to have made a general rule” mean? — If ever the rule is made, it must be general. And if this is impracticable — it surely follows, that in the foederal court we must go without it in civil cases. What sense is there in supposing, that what, for the reasons you alledge, was impracticable with the Convention, will be practicable with the Congress? What faculty can the one body have more than the other, of reconciling contradictions? … It is not possible to say, that the Convention could not have proposed, that there should be one similar general mode of trial by jury in the Fœderal court in all cases whatever. If the states would not have acceded to the proposition, we should only be where we are. And that this trial by jury is best, even in courts where the civil law process now prevails, I think no unbigoted man can doubt. …

New York Journal, Kaminski & Saladino, vol. 14, pp. 124–26.

13.2.4.28Letter, November 21, 1787

… The State of Rhode-Island refused to send delegates to the State Convention, and the event has manifested that their refusal was a happy one, as the New Constitution, which the Convention has proposed to us, is an elective monarchy, which is proverbially the worst government. … [T]he supreme continental court is to have, almost in every case, “appellate jurisdiction both as to law and fact,” which signifies, if there is any

meaning in words, the setting aside the trial by jury; … Our correspondent, therefore, thinks it the part of wisdom to abide, like the state of Rhode-Island, by the old articles of confederation, which, if reexamined with attention, we shall find worthy of great regard. …

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 14, p. 165.

13.2.4.29Demosthenes Minor, November 22, 1787

Article 3, section 1. The comments made upon this Article are merely vain exclamations against the Constitution for abolishing the trial by jury. In civil cases, surely, all causes that should be determined by a court of equity do not require the intervention of that tribunal. …

Gazette of the State of Georgia, Jensen, vol. 3, pp. 246–47.

13.2.4.30A Countryman, No. 2, November 22, 1787

Of a very different nature, tho' only one degree better than the other reasoning, is all that sublimity of *nonsense* and *alarm*, that has been thundered against it in every shape of *metaphoric terror*, on the subject of a *bill of rights*, the *liberty of the press*, *rights of conscience*, *rights of taxation and election*, *trials in the vicinity*, *freedom of speech*, *trial by jury*, and a *standing army*. These last are undoubtedly important points, much too important to depend on mere paper protection. For, guard such privileges by the strongest expressions, still if you leave the legislative and executive power in the hands of those who are or may be disposed to deprive you of them — you are but slaves. Make an absolute monarch — give him the supreme authority, and guard as much as you will by bills of right, your liberty of the press, and trial by jury; — he will find means either to take them from you, or to render them useless.

Your General Assembly under your present constitution are supreme. They may keep troops on foot in the most profound peace, if they think proper. They have heretofore abridged the trial by jury in some cases, and they can again in all. They can restrain the press, and may lay the most burdensome taxes if they please, and who can forbid? But still the people are perfectly safe that not one of these events shall take place so long as the members of the General Assembly are as much interested, and interested in

the same manner, as the other subjects.

On examining the new proposed constitution, there can not be a question, but that there is authority enough lodged in the proposed federal Congress, if abused, to do the greatest injury. And it is perfectly idle to object to it, that there is no bill of rights, or to propose to add to it a provision that a trial by jury shall in no case be omitted, or to patch it up by adding a stipulation in favor of the press, or to guard it by removing the paltry objection to the right of Congress to regulate the time and manner of elections.

New Haven Gazette, Kaminski & Saladino, vol. 14, pp. 172–74.

13.2.4.31A Well-Informed Correspondent, November 28, 1787

… The judicial powers of the Fœderal Courts have, also, been grossly misrepresented. It is said "that the trial by jury is to be abolished, and the courts of the several states are to be annihilated." But these, Sir, are mistaken notions, scandalous perversions of truth. The courts of judicature in each state will still continue in their present situation. The trial by jury in all disputes between man and man in each state will still remain inviolate, and in all cases of this description, there can be no appeal to the Fœderal Courts. It is only in particular specified cases, of which each state cannot properly take cognizance, that the judicial authority of the Fœderal Courts can be exercised. Even in the congressional courts of judicature, the trial of all crimes except in cases of impeachment, shall be by jury. How then can any man say that the trial by jury will be abolished, and that the courts of the several states will be annihilated by the adoption of the Fœderal Government? Must not the man who makes this assertion be either consummately impudent, or consummately ignorant? My God! what can he mean by such bareface representations? Can he be the friend to his country? Can he be a friend to the happiness of mankind? Is he not some insidious foe? Some emissary, hired by *British Gold* — plotting the ruin of both, by disseminating the seeds of suspicion and discontent among us?

Virginia Independent Chronicle, Kaminski & Saladino, vol. 14, pp. 244–45.

13.2.4.32James McHenry, Speech to the Maryland House, November 29, 1787

… 1st. The judicial power of the United States underwent a full investigation—it is impossible for me to Detail the observations that were delivered on that subject—The right of tryal by Jury was left open and undefined from the difficulty attending any limitation to so valuable a priviledge, and from the persuasion that Congress might hereafter make provision more suitable to each respective State — To suppose that mode of Tryal intended to be abolished would be to suppose the Representatives in Convention to act contrary to the Will of their Constituents, and Contrary to their own Interest. —

Kaminski & Saladino, vol. 14, p. 284.

13.2.4.33Luther Martin, Speech to the Maryland House, November 29, 1787

[T]hey would either trust your Juries for altho matters of fact are triable by juries in the Inferior Courts the Judges of the Supreme Court on *appeal* are to decide on *Law* and *fact* both. … [I]t is very doubtful if we are to have the priviledge of Tryal by Jury at all, where the cause originates in the supreme Court. …

Kaminski & Saladino, vol. 14, p. 290.

13.2.4.34A Countryman, No. 3, November 29, 1787

… Last week I endeavoured to evince, that the only surety you could have for your liberties must be in the nature of your government; that you could derive no security from bills of rights, or stipulations, on the subject of … trial by jury, or on any other subject. Did you ever hear of an absolute monarchy, where those rights which are proposed by the pygmy politicians of this day, to be secured by stipulation, were ever preserved? Would it not be mere trifling to make any such stipulations, in any absolute monarchy?

On the other hand, if your interest and that of your rulers are the same, your liberties are abundantly secure. …

No people can be more secure against tyranny and oppression in their rulers than you are at present; and no rulers can have more supreme and unlimited authority than your general assembly have.

New Haven Gazette, Kaminski & Saladino, vol. 14, p. 296

New Haven Gazette, Kaminski & Saladino, vol. 14, p. 296.

13.2.4.35Cincinnatus, No. 5, November 29, 1787

Sir [James Wilson], In my former observations on your speech, to your fellow-citizens, explanatory and defensive of the new constitution; it has appeared, by arguments to my judgment unanswerable, that by ratifying the constitution, as the convention proposed it, the people will leave the liberty of the press, and the trial by jury, in civil cases, to the mercy of their rulers —

…

… Do not the several states harmonize in trial by jury of the vicinage. … Are not these the great principles on which every constitution is founded? In these the laws and habits of the several states are uniform.

New York Journal, Kaminski & Saladino, vol. 14, pp. 303–06.

13.2.4.36Essay by One of the Common People, December 3, 1787

Never was the trial by jury in civil cases thought so lightly of in America as at this day: we have bled for it, and are now almost ready to trifle it away — because in cases of default (which implies a consent of parties) there is no trial by jury, we must give up that inestimable privilege in all civil cases whatever. — This is fine reasoning sure; because we will not have a jury when we do not want them, we shall not when we do — This gentleman cannot be serious when he asserts, that *"if it were to be expressed what civil causes should be tried by jury, it might take a volume of laws, instead of an article of rights;"* If it did I would have the volume, rather than hazard the priviledge. — But I will ask whether it requires this volume of laws to express that privilege in our state constitution? and whether there would be any difficulty in having it declared, that the citizens of each state shall enjoy it conformably to the usage in the state where the tribunal shall be established? he says, *"doubtless congress will make some general regulations in this matter,"* but it will be well to recollect that they may *unmake* them, or *not* make them too, if they please, and *when* they please; but if it is a part of the constitution, the *people alone* will have the power to change or annul it. — It is too great a privilege to be left at loose. I

sincerely believe if the federal constitution which shall be *given*, be *clearly defined*, and a *boundary line* be marked out, declaratory of the extent of their jurisdiction, of the rights which the state hold [*sic*] unalienable, and the privilege which the citizens thereof can never part with, the republick of America will last for ages, and be free.

Boston Gazette, Storing, vol. 4, p. 122.

13.2.4.37Philadelphiensis, No. 3, December 5, 1787

… The only thing in which a government should be efficient, is to protect the *liberties*, *lives*, and *property* of the people governed, from foreign and domestic violence. This, and this only is what every government should do effectually. For any government to do more than this is impossible, and every one that falls short of it is defective. Let us now compare the new constitution with this legitimate definition of an efficient government, and we shall find that it has scarce a particle of an efficient government in its whole composition.

In the first place then it does not protect the people in those liberties and privileges that all freemen should hold sacred — The *liberty of conscience*, the *liberty of the press*, the *liberty of trial by jury*, &c. are all unprotected by this constitution.

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 14, p. 351.

13.2.4.38Cumberland County Petition to the Pennsylvania Convention, December 5, 1787

Secondly: … This, as we conceive, unlimited powers given to Congress, in which they are to be the judges of what laws shall be necessary and proper, uncontrolled by a bill of rights, submits every right of the people of these states, both civil and sacred to the disposal of Congress, who may exercise their power to the expulsion of the jury — trial in civil causes — to the total suppression of the liberty of the press; and to setting up and establishing of a cruel tyranny, if they should be so disposed, over all the dearest and most sacred rights of the citizens.

Carlisle Gazette, Jensen, vol. 2, p. 310.

13.2.4.39The People: Unconstitutionalism, December 10, 1787

We know of no reason why they should interfere with our common law courts (which have stood an hundred and fifty years equal in rectitude to any in the world) and impose upon us a court of appeals in the common law to judge in equity law and fact denying the benefit of a jury, on credit the only security of property to the common or poor people; and as it is the only thing that has saved the British people from tyranny, we think it is the only thing that will save us as to that high court.

Middlesex Gazette, Jensen, vol. 3, pp. 494–95.

13.2.4.40Address and Reasons of Dissent of the Minority of the Pennsylvania Convention, December 12, 1787

The first consideration that this review suggests, is the omission of a BILL of RIGHTS, ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have the controul. The principal of which are the rights of conscience, personal liberty by the clear and unequivocal establishment of the writ of *habeas corpus*, jury trial in civil and criminal cases; … the stipulations heretofore made in favor of them in the state constitutions, are entirely superseded by this constitution.

…

We have before noticed the judicial power as it would effect a consolidation of the states into one government; we will now examine it, as it would affect the liberties and welfare of the people, supposing such a government were practicable and proper.

The judicial power, under the proposed constitution, is founded on the well-known principles of the *civil law*, by which the judge determines both on law and fact, and appeals are allowed from the inferior tribunals to the superior, upon the whole question; so that *facts* as well as *law*, would be reexamined, and even new facts brought forward in the court of appeals; and to use the words of a very eminent Civilian. — “The cause is many times another thing before the court of appeals, than what it was at the time of the first sentence.”

That this mode of proceeding is the one which must be adopted under

this constitution, is evident from the following circumstances: — 1st. That the trial by jury, which is the grand characteristic of the common law, is secured by the constitution, only in criminal cases. — 2d. That the appeal from both *law* and *fact* is expressly established, which is utterly inconsistent with the principles of common law, and trials by jury. The only mode in which an appeal from law and fact can be established, is, by adopting the principles and practice of the civil law; unless the United States should be drawn into the absurdity of calling and swearing juries, merely for the purpose of contradicting their verdicts, which would render juries contemptible and worse than useless. — 3d. That the courts to be established would decide on all cases *of law and equity*, which is a well known characteristic of the civil law. …

Not to enlarge upon the loss of the invaluable right of trial by an unbiased jury, so dear to every friend of liberty, the monstrous expense and inconveniences of the mode of proceedings to be adopted, are such as will prove intolerable to the people of this country. … We abhor the idea of losing the transcendent privilege of trial by jury, with the loss of which, it is remarked by the same learned author, that in Sweden, the liberties of the commons were extinguished by an aristocratic senate: and that *trial by jury* and the liberty of the people went out together.

Kaminski & Saladino, vol. 15, pp. 25, 27–28.

13.2.4.41A Countryman, No. 5, December 20, 1787

… The great power and influence of an hereditary monarch of Britain has spread many alarms, from an apprehension that the commons would sacrifice the liberties of the people to the money or influence of the crown: But the influence of a powerful *hereditary monarch*, with the national Treasury — Army — and fleet at his command — and the whole executive government — and one third of the legislative in his hands, — constantly operating on a house of commons, whose duration is never less than *seven years*, unless this same monarch should *end* it, (which he can do in an hour) has never yet been sufficient to obtain one vote of the house of commons which has taken from the people the liberty of the press, — trial by jury, — the rights of conscience, or of private property.

— Can you then apprehend danger of oppression and tyranny from too great duration of the power of *your* rulers.

New Haven Gazette, Kaminski & Saladino, vol. 15, p. 55.

13.2.4.42Reply to George Mason's Objections to a Constitution, December 19 and 26, 1787

… Another important and weighty objection brought against the Constitution is that there is no security for the right of trial by jury in civil cases. The right of trial by jury most certainly is not taken away, neither is there anything in the Constitution that looks to that point; it is altogether left to the general government to dilate the subject as they please. It is in their power, by a law to be enacted for that purpose, to suit the temper and dispositions of the different states as they please. … The appellate jurisdiction of the Supreme Court, I acknowledge, is both of law and fact; but this by no means excludes the idea of trial by jury. … The people are terrified with the idea that by means of this constitutional plan, justice will be unattainable here, as it is in England. If we can hope to have civil justice administered here to as great perfection and with as much integrity as it is in England, I will be content. … There is no part of the world wherein the laws relating to property are more judiciously and ably administered than in the courts of Great Britain. Had their conduct in every other department been equally wise and conducted with equal integrity, the good people of America would not this day been [*sic*] forming a government for themselves.

New Jersey Journal, Jensen, vol. 3, p. 158.

13.2.4.43America, December 31, 1787

… But you will say, that trial by jury, is an unalienable right, that ought not to be trusted with our rulers. Why not? If it is such a darling privilege, will not Congress be as fond of it, as their constituents? An elevation into that Council, does not render a man insensible to his privileges, nor place him beyond the necessity of securing them. A member of Congress is liable to all the operations of law, except during his attendance on public business; and should he consent to a law, annihilating any right whatever, he deprives himself, his family and estate, of the benefit resulting from that right, as well as his constituents. This circumstance alone, is a sufficient security.

But, why this outcry about juries? If the people esteem them so highly, why do they ever neglect them, and suffer the trial by them to go into disuse? In some States, *Courts of Admiralty* have no juries — nor Courts of Chancery at all. In the City-Courts of some States, juries are rarely or never called, altho' the parties may demand them; and one State, at least, has lately passed an act, empowering the parties to submit both *law* and *fact* to the Court. It is found, that the judgment of a Court, gives as much satisfaction, as the verdict of a jury, as the Court are as good judges of fact, as juries, and much better judges of law. I have no desire to abolish trials by jury, although the original design and excellence of them, is in many cases superseded. — While the people remain attached to this mode of deciding causes, I am confident, that no Congress can wrest the privilege from them.

[New York] Daily Advertiser, Kaminski & Saladino, vol. 15, p. 197.

13.2.4.44 John Nicholson, Petition Against Confirmation of the Ratification of the Constitution, January 1788

That your petitioners are much alarmed at an instrument called a Constitution for the United States of America; framed by a Convention which had been appointed by several of the states, "solely to revise the Articles of the Confederation, and report such alterations and provisions therein as should when agreed to in Congress, And confirmed by the several states, render the Federal Constitution Adequate to the exigencies of government, and the preservation of the Union" inasmuch as the liberties, lives and property of your petitioners are not secured thereby.

That the powers therein proposed to be granted to the government of the United States are too great, and that the proposed distribution of those powers are dangerous and inimical to liberty and equality amongst the people. …

That the right of trial by jury should be secured both in civil and criminal cases.

Jensen, vol. 2, pp. 710–11.

13.2.4.45 A Citizen of New Haven, January 7, 1788

[N]or is their any thing in the constitution to deprive them of trial by jury in cases where that mode of trial has been heretofore used. All cases in the courts of common law between citizens of the same state, except those claiming lands under grants of different states, must be finally decided by the courts of the state to which they belong, so that it is not probable that more than one citizen to a thousand will ever have a cause that can come before a federal court.

Connecticut Courant, Jensen, vol. 3, p. 527; Kaminski & Saladino, vol. 15, p. 283.

13.2.4.46Curtiopolis, January 18, 1788

Fathers, Friends, Countrymen, Brethren, and Fellow Citizens, The happiness and existence of America being now suspended upon your wise deliberations; three or four sly Aristocrats having lashed the public passions, like wild horses, to the car of Legislation, and driving us all in the midst of political clouds of error, into that ditch of despotism lately dug by the Convention: Such dismal circumstances have induced a private citizen to lay before you, in as concise a manner as possible, the objections that have been made, by the Pennsylvania Secession, Brutus, Cato, Cincinnatus, Farmer, An Officer, &c. &c. our best men.

…

26. It allows of other modes of trial besides that by jury, and of course this is *abolished:* such modes will be instituted under the direction of Congress, as will leave offenders, traitors, *malcontents*, or such of us as fall under the lash, *no chance at all*.

New York Daily Advertiser, Kaminski & Saladino, vol. 15, pp. 399–400, 402.

13.2.4.47The Federal Farmer, No. 15, January 18, 1788

As the trial by jury is provided for in criminal causes, I shall confine my observations to civil causes — and in these, I hold it is the established right of the jury by the common law, and the fundamental laws of this country, to give a general verdict in all cases when they chuse to do it, to decide both

as to law and fact, whenever blended together in the issue put to them.

…

But it is said, that no words could be found by which the states could agree to establish the jury-trial in civil causes. I can hardly believe men to be serious, who make observations to this effect. The states have all derived judicial proceedings principally from one source, the British system; from the same common source the American lawyers have almost universally drawn their legal information. All the states have agreed to establish the trial by jury, in civil as well as in criminal causes. The several states, in congress, found no difficulty in establishing it in the Western Territory, in the ordinance passed in July 1787.

Storing, vol. 2, pp. 319–21.

13.2.4.48The Federalist, No. 41, January 19, 1788

Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms "to raise money for the general welfare."

Kaminski & Saladino, vol. 15, p. 424.

13.2.4.49The Federal Farmer, No. 16, January 20, 1788

The trial by jury in criminal as well as in civil causes, has long been considered as one of our fundamental rights, and has been repeatedly recognized and confirmed by most of the state conventions. But the constitution expressly establishes this trial in criminal, and wholly omits it in civil causes. The jury trial in criminal causes, and the benefit of the writ of habeas corpus, are already as effectually established as any of the fundamental or essential rights of the people in the United States. … [I]nstead of establishing it in criminal causes only; we ought to establish it

generally; — instead of the clause of forty or fifty words relative to this subject, why not use the language that has always been used in this country, and say, "the people of the United States shall always be entitled to the trial by jury." This would shew the people still hold the right sacred, and enjoin it upon congress substantially to preserve the jury trial in all cases, according to the usage and custom of the country. I have observed before, that it is *the jury trial* we want; the little different appendages and modifications tacked to it in the different states, are no more than a drop in the ocean: the jury trial is a solid uniform feature in a free government; it is the substance we would save, not the little articles of form.

Security against expost [*sic*] facto laws, the trial by jury, and the benefits of the writs of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the course of the common law. These may be secured in general words, as in New-York, the Western Territory, &c. by declaring the people of the United States shall always be entitled to judicial proceedings according to the course of the common law, as used and established in the said states. Perhaps it would be better to enumerate the particular essential rights the people are entitled to in these proceedings, as has been done in many of the states, and as has been done in England. … We certainly, in federal processes, might as well claim the benefits of the writ of habeas corpus, as to claim trial by a jury — the right to have council — to have witnesses face to face — to be secure against unreasonable search warrants, &c. was the constitution silent as to the whole of them: — but the establishment of the former, will evince that we could not claim them without it; and the omission of the latter, implies they are relinquished, or deemed of no importance. These are rights and benefits individuals acquire by compact; they must claim them under compacts, or immemorial usage — it is doubtful, at least, whether they can be claimed under immemorial usage in this country; and it is, therefore, we generally claim them under compacts, as charters and constitutions.

Storing, vol. 2, pp. 325–26.

13.2.4.50Philadelphiensis, No. 18, January 23, 1788

… But the matter now in debate has no relation to that: the men opposed to the new constitution have the same cause to defend, that the people of

America had during the period of a seven years war. Who is he so base, that will peaceably submit to a government that will eventually destroy his sacred *rights and privileges?* The liberty of conscience, the liberty of the press, the liberty of trial by jury, &c. must lie at the mercy of a few despots — an infernal junto, that are for changing our *free republican government* into a tyrannical and absolute monarchy. These are what roused the sons of America to oppose Britain, and from the nature of things, they must have a similar effect now.

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 15, p. 461.

13.2.4.51Aristides, January 31, 1788

The institution of trial by jury has been sanctified by the experience of ages. It has been recognised by the constitution of every state in the union. It is deemed the birthright of Americans; and it is imagined, that liberty cannot subsist without it. The proposed plan expressly adopts it, for the decision of all criminal accusations, except impeachment; and is silent with respect to the determination of facts in civil causes.

The inference, hence drawn by many, is not warranted by the premises. By recognising the jury trial in criminal cases, the constitution effectually provides, that it shall prevail, so long as the constitution itself shall remain unimpaired and unchanged. But, from the great variety of civil cases, arising under this plan of government, it would be unwise and impolitic to say ought about it, in regard to these. Is there not a great variety of cases, in which this trial is taken away in each of the states? Are there not many more cases, where it is denied in England? For the convention to ascertain in what cases it shall prevail, and in what others it may be expedient to prefer other modes, was impracticable. On this subject, a future congress is to decide; and I see no foundation under Heaven for the opinion, that congress will despise the known prejudices and inclination of their countrymen. A very ingenious writer of Philadelphia has mentioned the objections without deigning to refute that, which he conceives to have originated "in sheer malice." —

Kaminski & Saladino, vol. 15, p. 536.

13.2.4.52Luther Martin, Genuine Information, No. 10, February 1, 1788

… And in all those cases where the general government has jurisdiction in civil questions, the proposed constitution *not only* makes *no provision for the trial by jury* in the *first* instance, but by its appellate jurisdiction *absolutely takes away that inestimable privilege*, since it expressly declares the supreme court shall have appellate jurisdiction both as to law and fact. — Should, therefore, a jury be adopted in the *inferior* court, it would only be a *needless expence*, since on an appeal the *determination* of that jury *even on questions of fact*, however honest and upright, is to be of *no possible effect* — the supreme court is to take up *all questions of fact* — to *examine the evidence relative* thereto — to *decide upon* them in the *same manner* as if they had *never been tried by a jury* —…

Thus, Sir, *jury trials*, which have ever been the *boast* of the English constitution, which have been by our several *State constitutions* so *cautiously secured* to us, — *jury trials* which have so long been considered the *surest barrier* against *arbitrary power*, and the *palladium* of *liberty*, — with the *loss* of *which* the *loss* of our *freedom* may be dated, are *taken away* by the proposed form of government, not *only* in a *great variety* of questions between *individual* and *individual*, but in *every case* whether *civil* or *criminal* arising *under the laws of* the United States or the *execution* of those laws. — It is *taken away* in *those very cases* where *of all others* it is *most essential for our liberty*, to have it *sacredly guarded* and *preserved* — in *every case* whether *civil* or *criminal*, between *government* and *its officers* on the one part and the *subject or citizen* on the other. — Nor was this the effect of inattention, nor did it arise from any real difficulty in establishing and securing jury trial by the proposed constitution, if the convention had wished so to do — But the *same reason* influenced *here* as in the case of the establishment of inferior courts; — as they could not trust *State judges*, so would they not confide in *State juries*. — They alleged that the general government and the State governments would always be at variance — that the citizens of the different States would enter into the views and interests of their respective States, and therefore ought not to be trusted in determining causes in which the general government was any way interested, without giving the general government an opportunity, if it disapproved the verdict of the jury, to appeal, and to have the *facts examined* into *again* and *decided upon* by *its own judges*, on whom it was thought a reliance might be had by the general government, they being

appointed under its authority.

[Baltimore] Maryland Gazette, Kaminski & Saladino, vol. 16, pp. 9–10.

13.2.4.53Philadelphiensis, No. 9, February 6, 1788

To such lengths have these bold conspirators carried their scheme of despotism, that your most sacred rights and privileges are surrendered at discretion. When government thinks proper, under the pretence of writing a libel, &c. it may imprison, inflict the most cruel and unusual punishment, seize property, carry on prosecutions, &c. and the unfortunate citizen has no *magna charta*, no *bill of rights*, to protect him; nay, the prosecution may be carried on in such a manner that even a *jury* will not be allowed him.

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 16, p. 59.

13.2.4.54An Old Whig, No. 8, February 6, 1788

First then, the general expectation seems to be that our future rulers will rectify all that is amiss. If a bill of rights is wanting, they will frame a bill of rights. If too much power is vested in them, they will not abuse it; nay, they will divest themselves of it. The very first thing they will do, will be to establish the liberties of the people by good and wholesome ordinances, on so solid a foundation as to baffle all future encroachments from themselves or their successors. Much good no doubt might be done in this way; if Congress should possess the most virtuous inclinations, yet there are some things which it will not be in their power to rectify. For instance; *the appellate jurisdiction both as to law and fact*, which is given to the supreme court of the continent, and which annihilates the trial by jury in all civil causes, the Congress can only modify: — They cannot extinguish this power, so destructive to the principles of real liberty. It would not by any means be extravagant to say, that a new continental convention ought to be called, if it were only for the sake of preserving that sacred palladium — THE INESTIMABLE RIGHT OF TRIAL BY JURY.

…

… Again; how could the stripping people [*sic*] of the right of trial by jury conduce to the strength of the state? Do we find the government in England at all weakened by the people retaining the right of trial by jury? Far from

it. Yet these things which merely tend to oppress the people, without conducing at all to the strength of the state, are the last which aristocratic rulers would consent to restore to the people; because they encrease the personal power and importance of the rulers.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 16, pp. 53, 55.

13.2.4.55Letter, February 21, 1788

The same accounts say, that the *British merchants* are very much pleased with this scheme of government; they are laughing in their sleeves, at the prospect of now having it in their power to collect all their *old American debts with interest*: for foreigners are by the 2d article of the new constitution, allowed to sue in the courts of Congress, and to drag the citizens of America from the remotest parts of the continent, *on an appeal* to the *supreme court* at the national seat of government, where jury trial in civil cases is abolished: hitherto juries have been favorable to fellow citizens, they have considered their distresses; but a court of law will not attend to *such trifles*.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 16, p. 519.

13.2.4.56Hugh Williamson, Speech, February 25, 1788

It seems to be generally admitted, that the system of Government which has been proposed by the late Convention, is well calculated to relieve us from many of the grievances under which we have been laboring. If I might express my particular sentiments on this subject, I should describe it as more free and more perfect than any form of government that ever has been adopted by any nation; but I would not say it has no faults. Imperfection is inseparable from every human device. Several objections were made to this system by two or three very respectable characters in the Convention, which have been the subject of much conversation; and other objections, by citizens of this State, have lately reached our ears. It is proper that you should consider of these objections. They are of two kinds; they respect the things that are in the system, and the things that are not in it. We are told

that there should have been a section for securing the Trial by Jury in Civil cases, … that there should also have been a Declaration of Rights. In the new system it is provided, that "*The trial of all crimes*, except in cases of Impeachment," *shall be by Jury*, but this provision could not possibly be extended to all *Civil* cases. For it is well known that the Trial by Jury is not general and uniform throughout the United States, … hence it became necessary to submit the question to the General Legislature, who might accommodate their laws on this occasion to the desires and habits of the nation. Surely there is no prohibition in a case that is untouched.

New York Daily Advertiser, Kaminski & Saladino, vol. 16, p. 202.

13.2.4.57The Impartial Examiner, No. 1, February 27 and March 5, 1788

I believe, it is acknowledged that the establishment of excises has been one of the greatest grievances, under which the English nation has labored for almost a century and an half. … If this branch of revenue takes place, all the consequent rigour of excise laws will necessarily be introduced in order to enforce a due collection. On any charges or offence in this instance you will see yourselves deprived of your boasted trial by jury. The much admired common law process will give way to some quick and summary mode, by which the unhappy defendant will find himself reduced, perhaps to ruin, in less time than a charge could be exhibited against him in the usual course. …

And what is that "appellate jurisdiction both as to law and fact," but an establishment, which may in effect operate as original jurisdiction?—Or what is an appeal to enquire into facts after a solemn adjudication in any court below, but a trial *de novo?* … Add to all, that this high prerogative court establishes no fundamental rule of proceeding, except that the trial by jury is allowed in some criminal cases. All other cases are left open—and subject "to such regulations as the Congress shall make." — Under these circumstances I beseech you all, as citizens of Virginia, to consider seriously whether you will not endanger the solemn trial by jury, which you have long revered, as a sacred barrier against injustice—which has been established by your ancestors many centuries ago, and transmitted to you, as one of the greatest bulwarks of civil liberty — which you have to this day maintained inviolate: — I beseech you, I say, as members of this

commonwealth, to consider whether you will not be in danger of losing this inestimable mode of trial in all those cases, wherein the constitution does not provide for its security. Nay, does not that very provision, which is made, by being confined to a few particular cases, almost imply a total exclusion of the rest? Let it, then, be a reflection deeply impressed on your minds — that if this noble privilege, which by long experience has been found the most exquisite method of determining controversies according to the scale of equal liberty, should once be taken away, it is unknown what new species of trial may be substituted in its room. Perhaps you may be surprised with some strange piece of judicial polity, — some arbitrary method, perhaps confining all trials to the entire decision of the magistracy, and totally excluding the great body of the people from any share in the administration of public justice.

… For instance, if Congress should pass a law that persons charged with capital crimes shall not have a *right to demand the cause or nature of the accusation*, shall not be *confronted with the accusers or witnesses, or call for evidence in their favor;* and a question should arise respecting their authority therein, — can it be said that they have exceeded the limits of their jurisdiction, when *that* has no limits; when no provision has been made for such a right?

Virginia Independent Chronicle, Storing, vol. 5, pp. 181–83, 185.

13.2.4.58Brutus, No. 14, February 28 and March 6, 1788

The second paragraph of sect. 2d. art. 3. …

…

It has been the fate of this clause, as it has of most of those, against which unanswerable objections have been offered, to be explained different ways, by the advocates and opponents to the constitution. I confess I do not know what the advocates of the system, would make it mean, for I have not been fortunate enough to see in any publication this clause taken up and considered. It is certain however, they do not admit the explanation which those who oppose the constitution give it, or otherwise they would not so frequently charge them with want of candor, for alledging that it takes away the trial by jury, appeals from an inferior to a superior court, as practised in the civil law courts, are well understood. In these courts, the judges determine both on the law and the fact; and appeals are allowed from the

inferior to the superior courts, on the whole merits: the superior tribunal will reexamine all the facts as well as the law, and frequently new facts will be introduced, so as many times to render the cause in the court of appeals very different from what it was in the court below.

…

It may still be insisted that this clause does not take away the trial by jury on appeals, but that this may be provided for by the legislature, under that paragraph which authorises them to form regulations and restrictions for the court in the exercise of this power.

… But supposing the Congress may under this clause establish the trial by jury on appeals. It does not seem to me that it will render this article much less exceptionable. An appeal from one court and jury, to another court and jury, is a thing altogether unknown in the laws of our state, and in most states in the union. A practice of this kind prevails in the eastern states; actions are there commenced in the inferior courts, and an appeal lies from them on the whole merits to the superior courts: the consequence is well known, very few actions are determined in the lower courts; it is rare that a case of any importance is not carried by appeal to the supreme court, and the jurisdiction of the inferior courts is merely nominal; this has proved so burthensome to the people in Massachusetts, that it was one of the principal causes which excited the insurrection in that state, in the year past; very few sensible and moderate men in that state but what will admit, that the inferior courts are almost entirely useless, and answer very little purpose, save only to accumulate costs against the poor debtors who are already unable to pay their just debts.

…

This method would preserve the good old way of administering justice, would bring justice to every man’s door, and preserve the inestimable right of trial by jury. It would be following, as near as our circumstances will admit, the practice of the courts in England, which is almost the only thing I would wish to copy in their government.

But as this system now stands, their is to be as many inferior courts as Congress may see fit to appoint, who are to be authorised to originate and in the first instance to try all the cases falling under the description of this article; there is no security that a trial by jury shall be had in these courts, but the trial here will soon become, as it is in Massachusetts’ inferior courts, mere matter of form; for an appeal may be had to the supreme court on the whole merits. This court is to have power to determine in law and in

equity, on the law and the fact, and this court is exalted above all other power in the government, subject to no controul, and so fixed as not to be removeable, but upon impeachment, which I shall hereafter shew, is much the same thing as not to be removeable at all.

New York Journal, Storing, vol. 2, pp. 431–37.

13.2.4.59A Columbian Patriot, February 1788

5. The abolition of trial by jury in civil causes. — This mode of trial the learned Judge Blackstone observes, "has been coeval with the first rudiments of civil government, that property, liberty and life, depend on maintaining in its legal force the constitutional trial by jury." He bids his readers pauze, and with Sir Matthew Hale observes, how admirably this mode is adapted to the investigation of truth beyond any other the world can produce. Even the party who have been disposed to swallow, without examination, the proposals of the *secret conclave*, have started on a discovery that this essential right was curtailed; and shall a privilege, the origin of which may be traced to our Saxon ancestors — that has been a part of the law of nations, even in the fewdatory systems of France, Germany, and Italy — and from the earliest records has been held so sacred, both in ancient and modern Britain, that it could never be shaken by the introduction of Norman customs, or any other conquests or change of government — shall this inestimable privilege be relinquished in America — either thro' the fear of inquisition for unaccounted thousands of public monies in the hands of some who have been officious in the fabrication of the *consolidated system*, or from the apprehension that some future delinquent possessed of more power than integrity, may be called to a trial by his peers in the hour of investigation?

Kaminski & Saladino, vol. 16, p. 279.

13.2.4.60The Landholder, No. 10, February 29, 1788

To the Honourable LUTHER MARTIN, Esq;

…

Since the publication of the Constitution, every topic of vulgar

declamation has been employed to persuade the people, that it will destroy the *trial by jury*, and is defective for being without a *bill of rights*. You, Sir, had more candour in the Convention than we can allow to those declaimers out of it; there you never signified by any motion or expression whatsoever, that it stood in need of a bill of rights, or in any wise endangered the trial by jury. In these respects the Constitution met your entire approbation: for had you believed it defective in these essentials, you ought to have mentioned it in Convention, or had you thought that it wanted further guards, it was your *indispensable duty to have proposed them*. I hope to hear that the same candour that influenced you on this occasion, has induced you to obviate any improper impressions such publications may have excited in your constituents, when you had the honour to appear before the General Assembly.

[Baltimore] Maryland Journal, Kaminski & Saladino, vol. 16, pp. 267–68.

13.2.4.61Publicola, March 20, 1788

… The constitution of the respective states, and the rights of the people, are to remain as under the confederation, excepting such parts as interfere with the express powers given to Congress by the new constitution. All the clamour therefore, which has been raised about the trial by jury, and the liberty of the press, might have been spared, as altogether unfounded. To those who wish to trust themselves under separate state governments, which may, as they have hitherto done, disregard the recommendations and requisitions of the union, I would recommend an attentive perusal of history, and as they do not seem to place any dependance on the reasoning of their fellow citizens, learn to be wise from the experience of past ages. They will find that in all countries, a strict union among the people, has been the only means of preserving liberty. …

State Gazette of North Carolina, Kaminski & Saladino, vol. 16, pp. 436–37.

13.2.4.62A Farmer, No. 4, March 21, 1788

… But moreover does not *Aristedes*, and every lawyer, know that in the interpretation of all political as well as civil laws, this fundamental maxim must be observed, *That where there are two objects in contemplation of any*

legislature, the express adoption of one, is the total exclusion of the other; and that the adoption of juries in civil *criminal* cases, in every legal interpretation, amounts to be an absolute rejection in *civil* cases: — If the right of establishing juries, by a *Congressional* law is admitted at all, it must be admitted, as an *inherent legislative right*, paramount to the constitution, as it is not derived from it, and then the power that can make, can by law unmake; so that referring this power to a source of authority *superior* to the act of government, would leave us without any juries at all (even in *criminal* cases) if Congress should so please; which position can never be the object of either friends or enemies to the system at present. — If it is defective, it is still bad policy to make it worse; but still in every view, we must reflect, that the establishment of trials by jury, belongs to *political*, not to *civil* legislation. It includes the right of organizing government, not of regulating the conduct of individuals, as the following enquiry will prove; we must never give an assembly the power of giving itself power.

As the worth and excellence of this mode of trial, preserved and handed down from generation to generation for near two thousand years, has drawn down the enthusiastic encomiums of the most enlightened lawyers and statesmen of every age; as it has taken deep root in the breast of every freeman, encompassed by the defences of affection and veneration, a repetition of its praises would be as tedious as useless: Some remarks however, still remain to be made, which will place this subject in a more important and conspicuous view.

The trial by jury, is the only remaining power which the Commons of England have retained in their own hands, of all that plentitude of authority and freedom, which rendered their northern progenitors irresistible in war, and flourishing in peace. — The usurpations of *the few*, gradually effected by artifice and force, have robbed *the many*, of that power which once formed the basis of those governments, so celebrated by mankind. — The government of Sparta, the form of which, it is said, has continued from the days of Lycurgus to our age, preserving its model amidst those overwheming tides of revolution and shipwrecks of governments, which Greece has sustained for near three thousand years; the same form of government among the Saxons and other Germans, consisting of King, Lords and Commons, applauded by Tacitus and Machiavelli, were thus distinguished from the present goverment of England — The power of the Commons resided with them, not in representatives but in the body of the

people. — *De minoribus rebus, principes consultant; de majoribus omnes*, are either the words of Tacitus or Caesar. The administration of *ordinary* affairs was committed to the select men; but all important subjects were deliberated on by the whole body of the people. — Such was the constitution of Sparta, and of England, when Machiavelli gives them as a model, for there can be no doubt but that the *folk-motes* of the Saxons were not formed by representation — The venerable remembrance of which assemblies, hung long about the affections of Englishmen, and it was to restore them that they offered such frequent libations of their noblest blood; but the usurpations of *the few* have been unwearied and irresistible, and the trial by jury is all that now remains to *the many*.

The trial by jury is — the democratic branch of the judiciary power — more necessary than representatives in legislature; for those usurpations, which silently undermine the spirit of liberty, under the sanction of law, are more dangerous than direct and open legislative attacks; in the one case the treason is never discovered until liberty, and with it the power of defence is lost; the other is an open summons to arms, and then if the people will not defend their rights, they do not deserve to enjoy them.

The *judiciary* power, has generally been considered as a *branch* of the *executive*, because these two powers, have been so frequently united; — but where united, there is no liberty. — in every *free* State, the judiciary is kept separate, independent, and considered as an intermediate power; — and it certainly partakes more of a *legislative*, than an *executive* nature — The sound definition which Delolme applied to one branch may be justly extended to the whole judiciary, — *That it is a subordinate legislation in most instance, supplying by analogy, and precedent in each particular case, the defects of general legislative acts*, — [W]ithout then the check of the *democratic branch — the jury*, to ascertain those facts, to which the judge is to apply the law, and even in many cases to determine the cause by a *general* verdict — the latitude of judicial power, combined with the various and uncertain nature of evidence, will render it impossible to convict a judge of corruption, and ascertain his guilt. — Remove the fear of punishment, give hopes of impunity, and vice and tyranny come scowling from their dark abodes in the human heart. — Destroy juries and every thing is prostrated to judges, who may easily disguise law, by suppressing and varying fact: — Whenever therefore the trial by juries has been abolished, the liberties of the people were soon lost — The judiciary power is immediately absorbed, or placed under the direction of the executive, as

example teaches in most of the States of Europe. — So formidable an engine of power, defended only by the gown and the robe, is soon seized and engrossed by the power that wields the sword. — Thus we find the judiciary and executive branches united, or the *former* totally dependent on the *latter* in most of the governments in the world. — It is true, where the judges will put on the sword and wield it with success, they will subject both princes and legislature to their despotism, as was the case in the memorable usurpation of the Justizia of Arragon, where the judiciary erected themselves into a frightful tyranny.

Why then shall we risque this important check to judiciary usurpation, provided by the wisdom of antiquity? Why shall we rob the Commons of the only remaining power they have been able to preserve, for their personal exercise? Have they ever abused it? — I know it has and will be said — they have — that they are too ignorant — that they cannot distinguish between right and wrong — that decisions on property are submitted to chance; and that the last word, commonly determines the cause: — There is some truth in these allegations — but whence comes it — The Commons are much degraded in the powers of the mind: — They were deprived of the use of understanding, when they were robbed of the power of employing it. — Men no longer cultivate, what is no longer useful, — should every opportunity be taken away, of exercising their reason, you will reduce them to that state of mental baseness, in which they appear in nine-tenths of this globe — distinguished from brutes, only by form and the articulation of sound — *Give them power and they will find understanding to us it* — But taking juries with all their real and attributed defects, it is not better to submit a cause to an impartial tribunal, who would at least, as soon do you right as wrong — than for every man to become subservient to government and those in power? — Would any man oppose government, where his property would be wholly at the mercy and decision of those that govern? — We know the influence that property has over the minds of men — they will risque their lives rather than their property; and a government, where there is no trial by jury, has an unlimited command over every man who has any thing to loose. — It is by the attacks on private property through the judiciary, that despotism becomes as irresistible as terrible. I could relate numerous examples of the greatest and best men in all countries, who have been driven to despair, by vexatious lawsuits, commenced at the instigation of the court, of favorites and of minions, and all *from the loss of juries*. — France was reduced to the brink of destruction in one instance. — The Queen mother Louise of Savoy, piqued at the

constable of Bourbon, a young and amiable man, who refused to marry her, commenced a suit against him for all his estate — The judges were ready at the beck of the court, and without a shadow of justice deprived him by law of every shilling he was worth; and drove from this country an unfortunate hero, whose mad revenge carried desolation into her bosom. — In Denmark a despicable minion, who came in rags to the court, after the establishment of their new government, which they solicited Frederick the IIId to make for them, acquired an immense fortune by plunder, sheltered by the favour of the Sovereign. At last he fixed his eyes on a most delightful estate, and offered to buy it — The owner did not want money, and could not think of selling the patrimony of an ancient family; this wretch then spirited up lawsuits against him, and after the most cruel vexations obliged him to sell the estate for much less than he at first offered him. This unfortunate gentleman was driven from the country which gave him birth, and a once happy society of relations and friends. — Such would have been the fate of England, from those courts without juries, which took cognizance of causes arising in the revenues and imports in Charles the first's time, the court fortunately for the liberties of England, seized the bull by the horns, when they attacked that wonderful man John Hampden. He spent 20,000 *l.* rather than pay an illegal tax of twenty shillings, brought the case before the Parliament, roused the spirit of the nation, and finally overturned courts, King, and even the constitution for many years. These dreadful examples may teach us the importance of juries in *civil* cases — they may recal [*sic*] to my countrymen a maxim which their ancestors, as wise, and more virtuous than their posterity, held ever in view — *That if the people creep like tortoises, they will still find themselves too fast in giving away power*.

[Baltimore] Maryland Gazette, Storing, vol. 5, pp. 37–40.

13.2.4.63Aristocrotis, April 1788

… Another privilege which the people possesses at present, and which the new congress will find it their interest to deprive them of, is trial by jury — for of all the powers which the people have wrested from government, this is the most absurd; it is even a gross violation of common sense, and most destructive to energy. In the first place it is absurd, that twelve ignorant plebians, should be constituted judges of a law, which passed through so many learned hands; — first a learned legislature after many learned

animadversions and criticisms have enacted it — Second, learned writers have explained and commented on it. — Third, lawyers twisted, turned and new modeled it — and lastly, a learned judge opened up and explained it. Yet after all these learned discussions, an illiterate jury (who have scarce a right to think for themselves instead of judging for others) must determine whether it applies to the fact or not; and by their verdict the learned judge must be governed in passing sentence; and perhaps a learned gentleman be cast in an action with an insignificant cottager.

Secondly. Common sense recoils at the very idea of such a pernicious practice as this, because it makes no difference between the virtuous and the vicious, the precious and the vile; between those of noble birth, and illustrious descent, and those of base blood, and ignoble obscure pedigree — for an ignorant stupid jury, cannot discern the merit of persons — it is the merits of the cause they examine; which is just reversing the question, and beginning at the wrong end. Thirdly. This custom is fatal to energy, for tho' a law should be expressed in the most pointed terms, a jury may soften and mitigate, and in a great measure destroy the spirit of it. …

Storing, vol. 3, pp. 204–05.

13.2.4.64Address of a Minority of the Maryland Convention, May 1, 1788

The great objects of these amendments were, 1st. To secure the trial by jury in all cases, the boasted birthright of Englishmen, and their descendants, and the palladium of civil liberty; and to prevent the *appeal from fact*, which not only destroys that trial in civil cases, but by *construction*, may also elude it in criminal cases; a mode of proceeding both expensive and burthensome; and also by blending law with fact, will destroy all check on the judiciary authority, render it almost impossible to convict judges of corruption, and may lay the foundation of that gradual and silent attack on individuals, by which the approaches of tyranny become irresistable.

[Baltimore] Maryland Gazette, Kaminski & Saladino, vol. 17, p. 243.

13.2.4.65The Federalist, No. 81, May 28, 1788

… To avoid all inconveniences, it will be safest to declare generally that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate puts it out of all doubt that the supposed abolition of the trial by jury by the operation of this provision is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the Supreme Court there should be no reexamination of facts where they had been tried in the original causes by juries. This would certainly be an authorised exception; but if for the reason already intimated it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this — … that this appellate jurisdiction does, in no case, *abolish* the trial by jury; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

Kaminski & Saladino, vol. 18, p. 110.

13.2.4.66The Federalist, No. 83, May 28, 1788

The objection to the plan of the convention, which has met with most success in this state, and perhaps in several of the other states, *is that* relative to *the want of a constitutional provision* for the trial by jury in civil cases. The disingenuous form in which this objection is usually stated, has been repeatedly adverted to and exposed; but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the constitution in regard to *civil causes*, is represented as an abolition of the trial by jury; and the declamations to which it has afforded a pretext, are artfully calculated to induce a persuasion that this pretended abolition is complete and universal; extending not only to every species of civil, but even to *criminal causes*. To argue with respect to the latter, would, however, be as vain and fruitless, as to attempt the serious proof of

the *existence* of *matter*, or to demonstrate any of those propositions which by their own internal evidence force conviction, when expressed in language adapted to convey their meaning.

With regard to civil causes, subtleties almost too contemptible for refutation, have been adopted to countenance the surmise that a thing, which is only *not provided for*, is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*. But as the inventors of this fallacy have attempted to support it by certain *legal maxims* of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

The maxims on which they rely are of this nature, “a specification of particulars is an exclusion of generals”; or, “the expression of one thing is the exclusion of another.” Hence, say they, as the constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury in regard to the latter.

The rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws. The true test therefore, of a just application of them, is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with reason or common sense to suppose, that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorise or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing, is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain that an injunction of the trial by jury in certain cases is an interdiction of it in others.

A power to constitute courts, is a power to prescribe the mode of trial; and consequently, if nothing was said in the constitution on the subject of juries, the legislature would be at liberty either to adopt that institution, or to let it alone. This discretion in regard to criminal causes is abridged by the express injunction of trial by jury in all such cases; but it is of course left at large in relation to civil causes, there being a total silence on this head. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation or necessity of employing the same mode in civil causes, but does not abridge *the power* of the legislature to exercise

that mode if it should be thought proper. The pretence therefore, that the national legislature would not be at full liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretence destitute of all just foundation.

From these observations, this conclusion results, that the trial, by jury in civil cases would not be abolished, and that the use attempted to be made of the maxims which have been quoted, is contrary to reason and common sense, and therefore not admissible. Even if these maxims had a precise technical sense, corresponding with the ideas of those who employ them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.

…

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defence against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.

…

It is evident that it can have no influence upon the legislature, in regard

to the *amount* of the taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence therefore, it must be upon the mode of collection, and the conduct of the officers entrusted with the execution of the revenue laws.

As to the mode of collection in this state, under our own constitution, the trial by jury is in most cases out of use. …

And as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases, will afford the security aimed at. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offences against the government; for which, the persons who commit them, may be indicted and punished according to the circumstances of the case.

The excellence of the trial by jury in civil cases, appears to depend on circumstances foreign to the preservation of liberty. The strongest argument in its favour is, that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose, that a corrupt influence would more easily find its way to the former than to the latter. The force of this consideration, is however, diminished by others. The sheriff who is the summoner of ordinary juries, and the clerks of courts who have the nomination of special juries, are themselves standing officers, and acting individually, may be supposed more accessible to the touch of corruption than the judges, who are a collective body. It is not difficult to see that it would be in the power of those officers to select jurors who would serve the purpose of the party as well as a corrupted bench. In the next place, it may fairly be supposed that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men who had been chosen by the government for their probity and good character. But making every deduction for these considerations the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success it discourages attempts to seduce the integrity of either. The

temptations to prostitution, which the judges might have to surmount, must certainly be much fewer while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes.

Notwithstanding therefore the doubts I have expressed as to the essentiality of trial by jury, in civil cases, to liberty, I admit that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favour, if it were possible to fix the limits within which it ought to be comprehended. There is however, in all cases, great difficulty in this; and men not blinded by enthusiasm, must be sensible that in a federal government which is a composition of societies whose ideas and institutions in relation to the matter materially vary from each other, that difficulty must be not a little augmented. For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles, which we are authoritatively informed, prevented the insertion of a provision on this head in the plan of the convention.

…

From this sketch it appears, that there is a material diversity as well in the modification as in the extent of the institution of trial by jury in civil cases in the several states; and from this fact, these obvious reflections flow. First, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the states; and secondly, that more, or at least as much might have been hazarded, by taking the system of any one state for a standard, as by omitting a provision altogether, and leaving the matter as it has been left, to legislative regulation.

Kaminski & Saladino, vol. 18, pp. 115–21.

13.2.4.67The Federalist, No. 84, May 28, 1788

[T]he Constitution proposed by the convention contains, as well as the constitution of this state, a number of such provisions [in favor of rights and privileges].

Independent of those which relate to the structure of the government, we find the following: … Article 3, section 2, clause 3 “The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be

held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

Kaminski & Saladino, vol. 18, p. 128.

13.2.4.68A [New Hampshire] Farmer, No. 3, June 6, 1788

I shall now make some observations on the unjust and illiberal sarcasms, passed by Mr. Alfredus, on our jurors: — And, as he has such a peculiar nack of leaping over important things, by saying "they are nothing to the purpose," or by stigmatizing them, "as impertinent observations, groundless assertions," *etc.* I shall copy his own words, and then follow, with the sentiments of the Hon. Justice Blackstone, who is one of the most celebrated Authors now extant.

Sir, in your publication of Friday, January 18th, ult. you say, "What are the advantages of this boasted trial by jury, and on which side do they lie? *Not certainly on the side of justice*, for one unprincipled juror, secured in the interest of the opposite party, will frequently divert her course, and in four cases out of five where injustice is done, it is by *the ignorance or knavery of the jury."* This, I may venture to affirm, is an impudent and bold stroke; it attacks the whole community at once, and has a tendency to sap and undermine the best preservative of liberty, and therefore ought to be held in abhorrence by every freeman; it is totally repugnant to the sense of the best writers on the subject, and especially to the ideas of the renowned author above mentioned, whose sentiments I shall now quote, vol. 3, page 378. *"When the jury have delivered in their verdict, and it is recorded in court, that ends the trial by jury; a trial which besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap as it is convenient, equitable and certain: upon these accounts — the trial by jury has been, as I trust ever will be looked upon as the glory of the English law; and if it has so great an advantage over individuals in regulating civil property, how much must that advantage be heightened, when it is applied* to criminal cases; *it is the most transcendant privilege which any subject can enjoy or wish for; he cannot be affected either in his property, his liberty or his person, but by the unanimous consent of twelve of his neighbors and equals; a Constitution that I may venture to affirm has, under Providence, secured the just liberties of the*

English nation for a long succession of ages; and therefore a celebrated French writer (Montesque) who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.

Great as this eulogium may seem, it is no more than this admirable Constitution, when traced to its principles, will be found, in sober reason, to deserve. The impartial administration of justice, which secures both our persons and properties, is the great end of civil society; but if that be entirely entrusted to the magistracy of a select body of men, and those generally selected by the Prince, or those who enjoy the highest offices in the state, their decision, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; here therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice; for the most powerful individual in the state, will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression, must be examined, and decided by twelve indifferent men, not appointed till near the hour of trial: and that, when once the fact is ascertained, the law must of course redress it—This therefore preserves, in the hands of the people, that share which they ought to have, in the administration of public justice; and prevents the encroachments of the more powerful and wealthy citizens.

Every new tribunal erected for the decision of facts, without the intervention of a jury, whether composed of justices of the peace; commissioners of the revenue; judges of a court of conscience; or any other standing magistrate, is a step towards establishing aristocracy, the most oppressive of absolute government. It is, therefore, upon the whole, the duty which every man owes to his country, his friends, his posterity, and himself, to maintain to the utmost of his power, this valuable Constitution in all its rights, and above all to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY," — Added to this, there is a late law of this state, which puts the pay, and travel of our jurors upon a very respectable footing — And lest Mr. Alfredus should say, this is nothing to the purpose, because the trial, by jury, under the English Constitution, — may be very

different from what it is in ours, I will just mention, wherein they differ, under the English Constitution, — The jurors are returned by the sheriff. — under ours they are draughted by lot, from each town, which, I think, is the most equitable method, and as to the modes of process through the trials, they are nearly the same, both endeavor to do justice to the parties.

[New Hampshire] Freeman's Oracle and New Hampshire Advertiser, Storing, vol. 4, pp. 213–14.

13.2.4.69Sydney, Address, June 13 & 14, 1788

By the 13th paragraph "no member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of the State by this constitution, unless by the law of the land, or judgment of its peers."

…

The 41st provides "that the trial by jury remain inviolate forever; that no acts of attainder shall be passed by the legislature of this State for crimes other than those committed before the termination of the present war. …"

There can be no doubt that if the new government be adopted in all its latitude, every one of these paragraphs will become a dead letter. …

New York Journal, Storing, vol. 6, p. 116.

13.2.5LETTERS AND DIARIES

13.2.5.1David Redick to William Irvine, September 24, 1787

The new plan of government proposed by the convention has made a bustle in the city and its vicinity. All people, almost, are for swallowing it down at once without examining its tendencies.

… Why is the trial by jury destroyed in civil causes before Congress? … I hope Congress will be very deliberate and digest it thoroughly before they send it recommended to the states.

Jensen, vol. 2, p. 134.

13.2.5.2William Pierce to St. George Tucker, September 28, 1787

… "A defect is found by some people in this new Constitution, because it has not provided, except in criminal cases, for Trial by Jury. I ask if the trial by jury in civil cases is really and substantially of any security to the liberties of a people. In my idea the opinion of its utility is founded more in prejudice than in reason. I cannot but think that an able Judge is better qualified to decide between man and man than any twelve men possibly can be. The trial by jury appears to me to have been introduced originally to soften some of the rigors of the feodal system. … An Englishman to be sure will talk of it in raptures; it is a virtue in him to do so, because it is insisted on in Magna Charta (that favorite instrument of English liberty) as the great bulwark of the nation's happiness. …["]

Kaminski & Saladino, vol. 16, pp. 444–45.

13.2.5.3James Madison to George Washington, September 30, 1787

An attempt was made in the next place by R.H. Lee to amend the act of the convention before it should go forth from Congress. He proposed a bill of Rights, — provision for juries in civil cases and several other things corresponding with the ideas of Colonel Mason. … It was amendments, and it was their duty to make use of it in a case where the essential guards of liberty had been omitted.

Hobson & Rutland, vol. 10, pp. 179–181.

13.2.5.4Arthur Lee to John Adams, October 3, 1787

… The omission of a Declaration of rights — … securing trial by Jury in criminal cases only — … are errors, if errors, gross as a mountain.

Kaminski & Saladino, vol. 13, pp. 307–08.

13.2.5.5Louis Guillaume Otto to Comte de Montmorin, October 20, 1787

… The Constitution is not even accompanied by a *Declaration of rights*, so that no recourse remains for the Citizen against oppression. … In England the right of resistance is part of the Constitution, here it is not even mentioned. — All civil cases will be decided in the supreme Court without benefit of Juries; but Judges will be named by Congress; what an unjust way of applying unjust laws!

Kaminski & Saladino, vol. 13, p. 424.

13.2.5.6Richard Henry Lee to Samuel Adams, October 27, 1787

Our mutual friend Mr. Gerry furnishes me with an opportunity of writing to you without danger of my letter being stopt on its passage, as I have some reason to apprehend has been the case with letters written by me and sent by the Post —. … In my letter to you …, I sent you the amendments that I proposed in Congress. … [Mr. Wilson's] principal Sophism is, that bills of rights were necessary in the State Constitutions because every thing not reserved was given to the State Legislatures, but in the Federal government, every thing was reserved that was not given to the federal Legislature. This is clearly a distinction without difference. Because Independent States are in the same relation to each other as Individuals are with respect to uncreated government. So that if reservations were necessary in one case, they are equally necessary in the other. But the futility of this distinction appears from the conduct of the Convention itself, for they have made several reservations — every one of which proves the Rule in Conventional ideas to be, that what was not reserved was given — … But they have no reservation in favor of the Press, Rights of Conscience, Trial by Jury in Civil Cases, or Common Law securities.

Kaminski & Saladino, vol. 13, pp. 484–85.

13.2.5.7William Grayson to William Short, November 10, 1787

I have received your favor, for which I am much obliged; the Convention at Philada. about which I wrote you, have at length produced (contrary to expectation) an entire new constitution; This has put us all in an uproar: — Our public papers are full of attacks and justifications of the new system: And if you go into private companies, you hear scarcely any thing else: —

In the Eastern states the thing is well received; the enemies to the Constitution say that this is no wonder, as they have overreached the Southern people so much in it's [*sic*] formation: In this State, I believe there is a great majority against it: the reason assigned by it's favorers is that they derives [*sic*] great advantages by imposing duties on ye. imports of Jersey & Connecticut, — In Jersey, nothing is more popular

…

With respect to my own sentiments I own I have important objections: — In the first place I think liberty a thing of too much importance to be trusted on the ground of *implication*: it should rest on principles expressed in the clearest & most unequivocal manner. A bill of rights ought then to have preceded. tryals [*sic*] by jury should have been expressly reserved in Civil as well as Criminal cases.

Kaminski & Saladino, vol. 14, pp. 81–82.

13.2.5.8David Ramsay to Benjamin Rush, November 10, 1787

As I suppose your convention is about convening & that you are a member I shall take the liberty of suggesting my wishes on the subject.

I am ready & willing to adopt the constitution without any alteration but still think objections might be obviated if the first state convention after accepting in its present form would nevertheless express their approbation of some alterations being made on the condition that Congress & the other States concurred with them. … I wish also that there might be added some declaration in favor of the Press and trial by Jury. I assent to Mr Wilsons reasoning that all is retained which is not ceded; but think that an explicit declaration on this subject might do good at least so far as to obviate objections. …

Kaminski & Saladino, vol. 14, pp. 83–84.

13.2.5.9Town of Preston, Connecticut, to the Connecticut Convention, November 12, 1787

5th. We observe that the right of trial by jury in civil causes is not secured in the federal courts. This is repugnant to the custom handed down from our

ancestors and always set easy on the people and esteemed as a privilege.

Jensen, vol. 3, p. 441.

13.2.5.10 James White to Richard Caswell, November 13, 1787

… I must in candor confess, that I have regretted that the proposed constitution was not more explicit with respect to several essentials: but the great clamor is, that no express provision is made for the TRYAL BY JURY, and LIBERTY OF THE PRESS; things so interwoven with our political, or legal ideas, that I conceive the sacred immutability of these rights to be such, as never to have occurred as questionable objects to the convention. … Whatever may be our wish in theory, we find in practice, by our own example, that states in confederacy, like individuals in society, must part with some of their privileges for the preservation of the rest. In proof of which, it cannot be denied that, for want of attention to, or knowledge of that maxim, these states are now tottering on the brink of anarchy.

Kaminski & Saladino, vol. 14, p. 96.

13.2.5.11 William Shippen, Jr., to Thomas Lee Shippen, November 22, 1787

… There certainly should be a bill of rights prefixed securing the liberty of the press, the liberty of conscience and trial by jury. … It would then be an excellent Constitution don't you think so my son?

Jensen, vol. 2, p. 288.

13.2.5.12 From Roger Sherman, December 8, 1787

I am informed that you wish to know my opinion with respect to the new Constitution lately formed by the federal convention, and the Objections made against it.

…

To form a just opinion of the new constitution it Should be considered,

whether the powers to be thereby vested in the federal government are Sufficient, and only Such as are necessary to Secure the Common interests of the States; and whether the exercise of those powers is placed in Safe hands. — In every government there is a trust, which may be abused; but the greatest Security against abuse is, that the interest of those in whom the powers of government are vested is the Same as that of the people they govern, and that they are dependent on the Suffrage of the people for their appointment to, and continuance in Office. this [*sic*] is a much greater Security than a declaration of rights, or restraining clauses upon paper.

The rights of the people under the new constitution will be Secured by a representation in proportion to their numbers in one branch of the legislature, and the rights of the particular State governments by their equal representation in the other branch.

…

It was thought necessary in order to carry into efect [*sic*] the laws of the union, and to preserve justice and harmony among the States to extend the judicial powers of the confederacy, they cannot be extended beyond the enumerated cases, but may be limited by Congress, and doubtless will be restricted to Such cases of importance & magnitude as cannot Safely be trusted to the final decision of the courts of the particular States, the Supreme court may have a circuit through the States to make the trials as convenient, and as little expensive to the parties as may be; and the trial by jury will doubtless be allowed in Cases proper for that mode of trial, …

Kaminski & Saladino, vol. 14, pp. 386–88.

13.2.5.13 George Lee Turberville to James Madison, December 11, 1787

… The operation of the Judiciary is a matter so far beyond the reach of most of our fellow Citizens that we are bounden to receive — & not to originate our opinions upon this branch of ye Federal government — Lawyers alone conceive themselves masters of this subject & they hold it forth to us *danger & distress* as the inevitable result of the new system — & that this will proceed from the immense power of the general Judiciary — which will pervade the states from one extremity to the other & will finally absorb — & destroy the state Courts — But to me their power seem’s very fairly defined by the clauses that constitute them — & the

mention of Juries, in criminal cases — seeming therefor by implication in civil cases — not to be allowed, is the only objection *I* have to this Branch —

Kaminski & Saladino, vol. 14, pp. 406–07.

13.2.5.14Thomas Jefferson to William Carmichael, December 15, 1787

Our new constitution is powerfully attacked in the American newspapers. the objections are that it's effect would be to form the 13. states into one: that proposing to melt all down into one general government they have fenced the people by no declaration of rights, they have … reserved a power of abolishing trials by jury in civil cases. … You will perceive that these objections are serious, and some of them not without foundation. The constitution however has been received with a very general enthusiasm, and as far as can be judged from external demonstrations the bulk of the people are eager to adopt it.

Boyd, vol. 12, p. 425.

13.2.5.15Thomas Jefferson to James Madison, December 20, 1787

… I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for … trials by jury in all matters of fact triable by the laws of the land and not by the law of Nations. To say, as Mr. Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved might do for the Audience to whom it was addressed, but is surely gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. It was a hard conclusion to say because there has been no uniformity among the states as to cases triable by jury, because some have been so incautious as to abandon this mode of trial, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just and wise to have concluded the other way that as most of the states had judiciously preserved this palladium, those who had

wandered should be brought back to it, and to have established general right instead of wrong. Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.

Boyd, vol. 12, p. 440.

13.2.5.16 Timothy Pickering to Charles Tillinghast, December 24, 1787

… The trial by jury in civil cases, I grant, is not explicitly secured by the constitution: but we have been told the reason of the omission; and to me it is satisfactory. In many of the civil causes subject to the jurisdiction of the federal courts, trial by jury would evidently be improper; in others, it was found impracticable in the convention to fix on the mode of constituting juries. But we may assure ourselves that the first Congress will make provision for introducing it in every case in which it shall be proper & practicable. … So if the Convention had positively fixed a trial by jury in all the civil cases in which it is contended that it ought to have been established, — it might have been found as highly inconvenient in practice as the case above stated; but being fixed by the *constitution*, the inconvenience must be endured (whatever mischief might arise from it) until the Constitution itself should be altered.

Kaminski & Saladino, vol. 14, pp. 204–05.

13.2.5.17 Thomas Paine to George Clymer, December 29, 1787

… There are many excellent things in the new System. I perceive the difficulties you must have found in debating on certain points, such as the trial by Juries, because in some cases, such for instance as that of the United States against any particular State, for if the trial is to be held in the delinquent State, a Jury composed from that State, would be a part of the delinquent, and consequently Judges in their own case.

Kaminski & Saladino, vol. 14, p. 487.

13.2.5.18Thomas Jefferson to Uriah Forrest, December 31, 1787

… I will now tell you what I do not like. — First the Omission of a Bill of rights, providing clearly, and without the aid of sophisms, for … trials by jury in all matters of fact triable by the laws of the land, and not by the law of Nations. To say, as Mr. Wilson does, that a bill of rights was not necessary, because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the audience to which it was addressed: but is surely a gratis dictum, the reverse of which might as well be said; and it is opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had made the reservation in express terms. It was hard to conclude because there has been a want of uniformity among the states as to cases triable by jury, because some have been so incautious as to abandon this mode of trial in certain cases, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just and wise to have concluded the other way, that as most of the states had preserved with jealousy this sacred palladium of liberty, those who had wandered should be brought back to it: and to have established general right instead of general wrong, for I consider all the ill as established, which may be established. I have a right to nothing which another has a right to take away; and Congress will have a right to take away trials by jury in all civil cases. Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inferences.

Boyd, vol. 12, pp. 476–77.

13.2.5.19Thomas B. Wait to George Thatcher, January 8, 1788

… How can you, after *perusing* the arguments of Crazy Jonathan, approve of the abolition of juries in civil causes — If the Genl. Court of this state are insurgents for depriving the subject of that right in 110 actions out of 120 — what shall we say to the Constitution that evidently deprives the subject of that right altogether? — O, my good friend, that cursed Small pox has made a crazy Jonathan of you in good earnest. — But your life is spared — and I am happy —

Kaminski & Saladino, vol. 15, p. 286.

13.2.5.20Samuel Holden Parsons to William Cushing, January 11, 1788

Trial by jury is said to be taken away. No such inference can be drawn from the Constitution. All civil [cases] were never tried by jury in this country or in Great Britain. … The mode of ascertaining the fact will be pointed out by law, and we cannot suppose Congress to divest themselves of all good sense as well as honesty so as to adopt measures totally repugnant to the habits and feelings of the people as the objection supposes.

Jensen, vol. 3, p. 572.

13.2.5.21Charles Johnson to James Iredell, January 14, 1788

… For my part I will candidly, and in confidence, declare to you that it is a doubtful point with me, and which I cannot yet bring to a decision, whether it will be better to receive the new Constitution, with all its seeming imperfections on its head, or run the risk of obtaining another Convention, which may revise and amend, expunge those articles that seem repugnant to the liberties of the people — … and explicitly secure the trial by jury, according to former usage — … with all the other rights of the individual which are not necessary to be given up to government, and which ought not and cannot be required for any good purpose.

Kaminski & Saladino, vol. 15, p. 364.

13.2.5.22Letter from Centinel, January 19, 1788

… Whilst I am issuing number after number of my Centinel, all written with a freedom and spirit sufficient, one would think, to rouse the people — I say, while I am doing this, the states, one after another, either unanimously or by large majorities, are ratifying the new constitution. … I have rung the changes upon — the liberty of the press — trial by jury — despotism and tyranny — and am reduced to the necessity of repeating in different words the same railings against the constitution. …

Pennsylvania Gazette, Kaminski & Saladino, vol. 15, p. 451.

13.2.5.23Thomas Jefferson to William Stephen Smith, February 2, 1788

… But I own it astonishes me to find such a change wrought in the opinions of our countrymen since I left them, as that threefourths of them should be contented under a system which leaves to their governors the power of taking from them the trial by jury in civil cases. … This is degeneracy in the principles of liberty to which I had given four centuries instead of four years.

Boyd, vol. 12, p. 558.

13.2.5.24Marquis de Lafayette to George Washington, February 4, 1788

… We are Anxiously Waiting for the Result of the State Conventions — the New Constitution Has Been Much Examined and Admired By European Philosophers — It Seems the Want of a declaration of Rights, of An Insurance for the trial By juries, … are, … the Principal Points objected to. …

Kaminski & Saladino, vol. 14, p. 501.

13.2.5.25George Washington to Marquis de Lafayette, April 28, 1788

… For example: there was not a member in the convention, I believe, who had the least objection to what is contended for by the Advocates for a *Bill of Rights* and *Tryal by Jury*. The first, where the people evidently retained every thing which they did not in express terms give up, was considered nugatory as you will find to have been more fully explained by Mr. Wilson and others:—And as to the second, it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future

adjustment.

Kaminski & Saladino, vol. 17, p. 235.

13.2.5.26William R. Davie to James Madison, June 10, 1789

…

I have collected with some attention the objections of the honest and serious — they are but few & perhaps necessary alterations. — … they also insist on the trial by jury being expressly secured to them in all cases. …

Hobson & Rutland, vol. 12, p. 211.

13.2.5.27Fisher Ames to Thomas Dwight, June 11, 1789

Mr. Madison has introduced his long expected Amendments. It contains a Bill of Rights — the right … of juries … at least this is the substance. There is too much of it.

Veit, p. 246.

13.2.5.28Diary of William Maclay, July 10–11, 1789

… Well and What now, is the fact to be tryed by Chancery powers. I am bold to say no Issue of fact ever was tryed or found for or against in Chancery. Facts often were carried into Chancery, as evidence but if they were doubted of, issue was joined on them, and directed to be tryed by a Jury. But now the ~~fact~~ Business unfolds itself, now we see what Gentlemen would be at, it is to try Facts on civil law principles, without the aid of a Jury, and this I promise You never will be submitted to. The question was put and wee carried it. But the House seemed rather to break up in a Storm.

…

As we came down the Stairs Docr. Johnson was by my side. Doctor (said I) I wish you would leave off, using these side Winds, and boldly at once bring in a Clause for deciding all Causes on civil law principles without the aid of a Jury. No No said he the Civil law name I am not very found of. I reply'd, you need not care about the name, since you have got the thing.

Bowling & Veit, pp. 105–06.

13.2.5.29Thomas Jefferson to the Abbé Arnoux, July 19, 1789

> With respect to the value of this institution [trial by jury] I must make a general observation. We think in America that it is necessary to introduce people into every department of government as far as they are capable of exercising it; and that this is the only way to insure a long continued and honest administration of its powers. … They are not qualified to judge questions of law, but they are capable of judging questions of fact. In the form of juries they determine all matters of fact, leaving to the permanent judges to decide the law resulting from those facts. But we all know that permanent judges acquire an Esprit de corps, that being known they are liable to be tempted by bribery, that they are misled by favor, by relationship, by spirit of party, by a devotion to the Executive or Legislative, that it is better to leave a cause to the decision of cross and pile, than to that of a judge biased to one side, and that the opinion of 12 honest jurymen gives still a better hope of right, than cross and pile does. It is therefore left to the juries, if they think the permanent judges are under any bias whatever in any cause, to take upon themselves to judge the law as well as the fact. Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them.

Boyd, vol. 15, pp. 282–83.

13.3DISCUSSION OF RIGHTS

13.3.1TREATISES

13.3.1.1Giles Duncombe, 1695

> And first as to their number twelve: and this number is no less esteemed by our Law than by Holy Writ. If the twelve Apostles on their twelve Thrones,

must try us in our Eternal State, good reason hath the Law to appoint the number of twelve to try our Temporal. The Tribes of Israel were twelve, the Patriarchs were twelve, and Solomon's Officers were twelve, I Kings, 4.7. … Therefore not only matters of Fact were tried by twelve, but of ancient times twelve Judges were to try matters in Law, in the Exchequer Chamber, and there were twelve Counsellors of State for matters of State; and he that wageth his Law must have eleven others with him, which think he says true. And the Law is so precise in this number of twelve, that if the tryal be by more or less, it is a mis-Tryal.

Tryals Per Pais, 3rd ed. (London: Richard and Edward Atkins, 1795), pp. 69–70.

13.3.1.2Montesquieu, 1748

Book XI: Of the Laws Which Establish Political Liberty, with Regard to the Constitution

…

It is true that in democracies the people seem to act as they please; but political liberty does not consist in an unrestrained freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will.

We must have continually present in our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit; and if a citizen could do what they forbid, he would be no longer possessed of liberty, because all his fellow citizens would have the same power.

Democratic and aristocratic states are not necessarily free. Political liberty is to be met with only in moderate governments; yet even in these it is not always met with. It is there only when there is no abuse of power: but constant experience shews us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit. Is it not strange, tho' true, to say that virtue itself has need of limits?

To prevent this abuse, 'tis necessary that by the very disposition of things power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige

him, nor forced to abstain from things which the law permits.

…

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive, in regard to matters that depend on civil laws.

…

The political liberty of the subject is a tranquillity of mind, arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.

…

The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people, at certain times of the year, and pursuant to a form and manner prescribed by law, in order to erect a tribunal that should last only as long as necessity requires.

By this method the power of judging, a power so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate.

In accusations of a deep or criminal nature, it is proper the person accused should have the privilege of chusing in some measure his judges in concurrence with the law; or at least he should have the right to except against so great a number, that the remaining part may be deemed his own choice.

The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of the general will.

But tho' the tribunals ought not to be fixt, yet the judgments ought, and to such a degree as to be ever conformable to the exact letter of the law. Were they to be the private opinion of the judge, people would then live in society without knowing exactly the obligations it lays them under.

Spirit of Laws, bk. 11, chs. 3, 4, 6.

13.3.1.3Bacon, 1766

Trial.

(G) WHAT IS TO BE TRIED BY A JURY.

It is in the General true that every Question of Fact is to be tried by a Jury.

And in some Cases where a Question of Fact may be otherwise tried it is in the Discretion of the Court to send it to be tried by a Jury.[1]

Under the foregoing Heads, which contain some Exceptions to the general Rule that Questions of Fact are to be tried by a Jury, it was necessary for the Illustration of the respective subjects to mention some Questions relating to Matters of Fact, concerning the Manner of trying which some Doubt had arisen, that are to be tried by a Jury.

It is not necessary to repeat here any of the Instances there given, which the Reader will upon referring to the foregoing Heads easily find.

And it is much less necessary to mention any particular Instances of Questions relating to Matters of Fact, concerning the Manner of trying which no Doubt has ever arisen, that are to be tried by a Jury.

It will therefore be sufficient in this Place to mention some few Instances of Questions concerning the Manner of trying of which some Doubt had arisen, that are to be tried by a Jury; for from these and those already mentioned a good Judgment may be formed what Questions are in other doubtful Cases to be tried by a Jury.

If any new Offence be created by a Statute and the Statute is silent as to the Manner of its being tried, the Trial thereof is to be by a Jury; because this Manner of Trial is agreeable to *Magna Charta*.[2]

Where the Agreement is in general Terms that a certain Fact shall be proved, the general Rule is that it must be proved to a Jury : For this is the most legal Way of proving any Matter of Fact.[3]

But if any particular Manner of proving a certain Fact has been agreed upon by the Parties, the Fact must always be proved in the Manner agreed

upon.[4]

If the Agreement be that a certain Fact shall be proved before *J. S.* this is to be proved by Witnesses to be examined by *J. S.* [5]

And although the Agreement be in general Terms that a certain Fact shall be proved; yet if it appears clearly from any Circumstance attending the Agreement that the Parties did not intend a Proof to a Jury, the Fact may be otherways proved.

If the Agreement be that a certain Fact shall be proved in two Days, this is not to be proved to a Jury but by the Examination of Witnesses; for as a Trial by a Jury can never be had within so short a Time as two Days this Manner of Trial could not have been intended.[6]

The Condition of a Bond dated the 23d Day of *August* was, that the Defendant should pay to the Plaintiff Ten Shillings for every Twenty Shillings which the Plaintiff should by sufficient Proof make it appear that *J. S.* was indebted to him; and that one Half of the same should be paid on or before the 25th Day of *November* then next ensuing. An Action of Debt being brought upon this Bond the Defendant pleaded, that the Plaintiff did not make it appear by sufficient Proof that *J. S.* was indebted to him in the Sum of Twenty Shillings. The Plaintiff replied that before the said 25th Day of *November* he and *J. S.* settled an Account, by which *J. S.* acknowledged himself to be indebted to the Plaintiff in the Sum of 310 *l.*[7]

Upon a Demurrer to this Replication it was insisted that the Proof ought to have been made to a Jury : But it was held that such Proof could not have been intended : Because a Trial by a Jury could not have been had before the Time limited for the Payment of Part of the Money was expired.

And where it is necessary that a Fact should be proved to a Jury, it is not necessary that it should be proved in a distinct Action.

A Promise was made by *J. S.* to pay *J. N.* Three Pounds upon his proving that a certain Cock did win his Battle. An Action being brought for this Money *J. S.* pleaded that no such Proof had been made. The Plea was held to be bad; *Et per Cur :* It was not necessary to make the Proof before the bringing of an Action for the Money; for it may be made in such Action.[8]

A Penalty was given by a Statute upon proving by two Witnesses that a certain Thing thereby prohibited had been done. In an Action of Debt for this Penalty the Question was, whether it was necessary to make Proof of the Offence by two Witnesses in another Action before an Action could be brought upon this Statute? It was held not to be necessary; for that such Proof may be well made in the Action upon the Statute.[9]

It is in the general true that the Question, what the Intent of a Party was? is not to be tried by a Jury; because this it not being a Question of Fact cannot be well judged of by a Jury.

But wherever the Question does not depend upon a Fact alone unless it was coupled with a certain Intent, the Intent as well as the Fact must be tried by a Jury : Because the Intent is in such Case the only Thing material. And the Jury must judge of this in the best Manner they are able from the Circumstances which attended the Fact.[10]

If the Question be, whether a Tenant chased his Beasts from a Manor after the Lord who came to distrain had seen them upon the Manor with an Intent to prevent their being distrained? this Intent must be tried by a Jury.[11]

If the Question be, whether the Intent of the Defendant was to carry the Wool which had been by him put on board a Ship to *Calais?* the Intent in this Case must be tried by a Jury.[12]

Notwithstanding that the Words for which an Action is brought would in the General be actionable, the Jury are to judge from all the Circumstances that attended the speaking of them whether they were spoken with an Intent to slander the Plaintiff; for unless there was such an Intent the Plaintiff ought not to recover any Damages.[13]

…

(Q) OF GRANTING A NEW TRIAL.

1. IN THE GENERAL.

THE Case of *Wood* and *Gunston*, which was in the Year 1655, is the first Case that is to be met with in the Books; in which a new Trial was granted.[14]

But it ought not to be from thence concluded that this was the first Instance of granting a new Trial; for the Silence of Reporters as to this Matter may be fairly ascribed to its not having been formerly the Custom-to report any Motions.[15]

And it was said by *Holt* Ch. J. that the granting of new Trials must have been much more antient than the Case of *Wood* and *Gunston :* Because it was long before this Case a good Cause of Challenge to a Juror that he had been a Juror in the same Cause.[16]

But it is said in another Book that the Reasoning of *Holt* Ch. J. in the Case of *Argent* and *Darrel* is not conclusive; for that the Challenge because a Man had been a Juror in the same Cause was not perhaps where a new Trial had been granted : But where a *Venire facias de novo* had been

awarded by Reason of a Mis-Trial or for some other Reason.[17]

The proper Time to move for a new Trial, if the Cause was tried in Term Time, is within the next four Days of the Term in which it was tried, if it was tried in Vacation Time, within the first four Days of the next Term : Because Judgment may be entered up after such four Days are respectively past.

But it has been held that if Judgment has not been in fact entered up, a Motion may be made for a new Trial after the Day upon which it might have been entered up is past. [18]

In a later Case however it was held that a new Trial cannot be moved for after the Day on which Jugment might have been entered up is past, although it has not been in fact entered up; unless the Matter upon which the Motion is founded was not discovered till such a Day was past.[19]

It is in the General true that a Motion for a new Trial cannot be made after a Motion in Arrest of Judgment; because by the latter Motion the Verdict is admitted to be good.[20]

But if the Matter upon which the Motion for a new Trial is founded was not discovered at the Time of the Motion in Arrest of Judgment a Motion for a new Trial may be made after a Motion in Arrest of Judgment.[21]

And if this is not the Case the Court will frequently give Leave to move for a new Trial after a Motion in Arrest of Judgment; because if there should be Reason to arrest the Judgment it would answer no Purpose for the Parties to be at the Expence of a second Trial; for the Judgment may after all be arrested.

A new Trial may be moved for although the Verdict was a special one and signed by the Counsel of both Sides; for the Intention in signing this was only to save a Matter of Law for the Opinion of the Court in Case the Verdict should stand; but the Matter of Law may be afterwards waved.[22]

If due Notice of Trial was not given this is a good Cause for the granting of a new Trial.[23]

But if a Defence has been made at the Trial the Court will not grant a new Trial although due Notice of Trial was not given; for the Defect of Notice is cured by the having made a Defence.[24]

A new Trial cannot be moved for after a Nonsuit; because the Plaintiff is by this out of Court.[25]

But the Court may be moved to set aside a Nonsuit for Irregularity, and if it appears to have been obtained irregularly the Court will make a Rule for

proceeding in the Cause, which answers the same Purpose as granting a new Trial would do.[26]

A new Trial cannot be moved for in the Court of Common Pleas in a Cause which was tried before a Judge of another Court, unless the Matter upon which the Motion is founded be verified by Affidavit.[27]

It is in the General true that the Court will not grant a new Trial, until a Report is made of the Trial by the Judge before whom the Cause was tried; for that it is not proper to receive any Account thereof by Affidavit.[28]

But if the Judge before whom the Cause was tried happens to die before he has made a Report of the Trial, the Court will receive an Account thereof by Affidavit.[29]

The Report of the Judge before whom the Cause was tried is conclusive as to every Thing which passed at the Trial: But the Court may and ought in some Cases to grant a new Trial although the Judge reports that the Verdict is quite to his Satisfaction.[30]

A new Trial ought not to be granted by an inferior Court, and if the Judge thereof does grant one a *Mandamus* lies for a *Procedendo ad Judicium* upon the first Verdict.[31]

It is by no Means a general Rule in Courts of Equity to grant a new Trial as a Thing of Course, although an Estate of Inheritance will be bound by the Verdict; for the granting or not granting of a new Trial must always depend upon the Circumstances of the particular Case.[32]

If there has been a View the Court will not unless there be some special Reason therefore grant a new Trial : Because it is to be presumed, that the Jury were as much or perhaps more influenced by what they observed upon the View as by the Evidence given in Court.[33]

If there are two Defendants in a Cause and the Verdict is in Favour of one of them, the Court will not grant a new Trial at the Instance of the other; for the Verdict must if set aside be set aside as to both, and it would be unreasonable that he in whose Favour the Verdict is should be a second Time brought into Jeopardy.[34]

But if the Defendant in whose Favour the Verdict is will in such Case wave the Benefit thereof, and consent that there shall be a new Trial, the Court will provided it be in other Respects proper grant a new Trial.[35]

It is laid down that Embracery is a good Cause for the granting of a new Trial : But that Maintenance is not.[36]

The Court will not grant a new Trial if it be probable that the Verdict

obtained at such new Trial will be given in Evidence in a criminal Prosecution.[37]

It is in the General true, that the Court will not grant a new Trial but upon the Payment of the Costs of the former Trial.[38]

But if a new Trial be granted upon the Account of any Irregularity at the former Trial, the Court will sometimes grant it without the Condition of paying the Costs of the former Trial.[39]

It being discovered that the Jury had drawn Lots in order to determine for which Party they should find a Verdict; the Court granted a new Trial, and ordered that the Costs of the former Trial should abide the Event thereof.[40]

In an Action of false Imprisonment brought against a Justice of the Peace it appeared in Evidence, that the Action was commenced within six Months after the End of the Imprisonment of the Plaintiff, but not within six Months after the Day of his Commitment. It was ruled by *Willes* Ch. J. before whom the Cause was tried that the Action was not commenced within the Time limited by the Statute, and the Plaintiff was for this Reason nonsuited. A new Trial was granted in this Case without the Condition of paying the Costs of the former Trial.[41]

It is said that when a new Trial is granted the first Verdict ought to stand as a Security, for that otherwise the Party against whom it was may spirit away the Witnesses upon whose Testimony it was obtained, and thereby deprive the other Party both of the Benefit of the first Verdict and of the Means of obtaining a second.[42]

It is in the General true, that where a new Trial has been granted, and there is a Verdict for the same Party that the Verdict upon the first Trial was for, the Court will not grant a third Trial.[43]

But upon the particular Circumstances of a Case, as if the second Verdict has been obtained by any bad Practice, the Court will grant a third Trial.[44]

2. AFTER A TRIAL AT BAR.

It is laid down in many Cases, that the Court cannot grant a new Trial after a Trial at Bar, unless there has been some Misbehaviour in the Jury; for that a Trial at Bar is by Reason of the greater Solemnity thereof of much more Authority than one at *Nisi Prius*.[45]

But as the Verdict upon an Issue directed from the Court of Chancery is only to inform the Conscience of the Chancellor, the Power of granting a new Trial after a Trial at Bar has been constantly exercised by this Court, which is not bound by the strict Rules of Law.[46]

And it has been held in some modern Cases, that a Court of Law has a Power of granting a new Trial as well after a Trial at Bar as after one at *Nisi Prius*.[47]

And it is in one of these observed, that in the Case of *Wood* and *Gunston*, which is the first that is to be found in the Books wherein a new Trial was granted, it was granted after a Trial at Bar.[48]

3. FOR ANY DEFECT OF MISTAKE IN THE JUDGE BEFORE WHOM THE CAUSE WAS TRIED.

If it appears that the Judge before whom the Cause was tried was therein interested the Court will grant a new Trial, and it is said the Court will do this even where all Parties did consent that the Cause should be tried before such Judge; for it is not to be imagined that he could be quite indifferent.[49]

A new Trial, was granted because a Lord who was interested in the Cause sat upon the Bench during the Trial.[50]

If the Judge before whom the Cause was tried was mistaken in any Thing the Court will grant a new Trial; for a Judge of *Nisi Prius* is to be considered as having acted rather in a ministerial Capacity than a judicial one, and as the Ground of granting a new Trial is the doing of Justice to the Party injured by the Verdict, it ought to be as well granted upon the Account of a Mistake in the Judge before whom the Cause was tried, as upon the Account of one in the Jury by whom it was tried.[51]

If the Judge before whom the Cause was tried did refuse to admit any proper Evidence, this is a good Reason for the granting of a new Trial.[52]

If the Judge before whom the Cause was tried did admit any improper Evidence which was objected to, the more regular Way was to have tendered a Bill of Exceptions at the Trial: But notwithstanding this has been omitted and the Trial did proceed the Court will in such Case grant a new Trial.[53]

4. FOR ANY DEFECT, MISTAKE OR FAULT IN THE JURY WHO TRIED THE CAUSE.

If the Sheriff did not follow the Direction of a Rule of Court in returning the Jury, this is a good Reason for the granting of a new Trial.[54]

But if the Party against whom the Verdict is did in such Case make a Defence at the Trial of the Cause the Court will not grant a new Trial; for as such Party would have had the Advantage of the Verdict if it had been in his Favour he ought to be bound by it now it is against him.[55]

In the *Venire facias* there was the Name of *Thomas Bucher* of *A.* In the *Distringas* this Name was left out and the Name of *Thomas Carter* of *A.* was inserted. *Thomas Carter* of *A.* being sworn upon the Jury which tried

the Cause the Verdict was held to be void; because the Cause was in this Case tried only by eleven of the Persons returned upon the Pannel.[56]

In both the *Venire facias* and the *Distringas* there was the Name of *John Taverner :* But a Person of the Name of *John Turner* was sworn upon the Jury which tried the Cause. On a Motion in Arrest of Judgment the Court were clear that if the Variance had been in the Christian Name the Judgment ought to be arrested : But they had some Doubt whether as the Variance was in the Surname the Judgment ought to be arrested, because a Man may have two Surnames. It was however afterwards held that it should be arrested.[57]

But a contrary Doctrine is laid down in a modern Case.

A Person was returned and sworn upon the Jury by the Name of *Henry*. A new Trial was moved for upon an Affidavit that his Christian Name was *Harry :* But it was refused; *Et per Cur' :* The Record and all the Jury Process are uniform and such an Affidavit ought not to be received to contradict these. This was the Person who was returned and intended to be upon the Jury, and there is no Pretence that the Verdict is unjust. It is commonly understood that *Henry* and *Harry* are the same Name; or that *Harry* is a corrupt Way of spelling *Henry*.[58]

A Person of the Name of *Richard Sheppard* was returned to serve as a Juror at the Assizes on the Crown Side. This Person being in the *Nisi Prius* Court when *Richard Gratter* returned upon the *Nisi Prius* Pannel was called, he answered and was sworn upon the Jury in the room of *Gratter*. A new Trial being moved for on the Part of the Defendant, it was said that the Defendant ought to have challenged this Man, and that the Court will not now receive any Affidavit to contradict the Record : But a new Trial was granted; *Et per Cur' :* The Court are not in this Case concluded by the Record. All the twelve Jurors must by the Statute of the 3 *Geo*. 2. be drawn out of the Jury Box, and consequently as this Man's Name was never in the Box here has been no Trial. The Defendant had no Opportunity of challenging this Man; nor is this a Defect which is cured by the Statute of the 32 *H*. 8.[59]

John Pearce returned upon the Pannel did not appear : But when he was called his Son answered and was sworn upon the Jury. A new Trial was granted; *Et per Cur' :* The Verdict in this Case was by only eleven of the Persons returned upon the Pannel.[60]

A Person returned upon the Pannel by the Name of *Hooper* was challenged and the challenge was allowed. This Man being afterwards

sworn upon the Jury as a *Talesman* by the Name of *Hook* a new Trial was for this Reason moved for and granted.[61]

The Court will not grant a new Trial because one of the Jurors was related to one of the Parties; for as the other Party might have challenged this Man he ought to suffer for his own Neglect.[62]

A new Trial was moved for because one of the Jurors had at the Time of the Trial a Suit depending with the Plaintiff against whom the Verdict was : But it was refused; *Et per Cur' :* Why did not the Plaintiff challenge this Man at the Trial of the Cause?[63]

If it appears however that there was a good Cause of Challenge to one or more of the Jurors, but that this was not known and consequently could not be taken Advantage of at the Trial of the Cause, the Court will in such Case grant a new Trial.[64]

A new Trial was granted because it was discovered after the Trial that the Foreman of the Jury had declared, that the Plaintiff should never have a Verdict whatsoever Witnesses he might produce.[65]

If the Jury receive any written Evidence which was not given in Court after they are gone from the Bar to consider of their Verdict, this is a good Reason for the granting of a new Trial.[66]

If after the Jury are gone from the Bar to consider of their Verdict they hear the Evidence of any Witness who was before examined in Court, the Verdict may be set aside although his Evidence was to the same Effect as the Evidence he had given in Court.[67]

But it is said that the Court will not in such Case grant a new Trial, unless it be indorsed upon the *Postea* that the Jury did receive such written or parol Evidence after they were gone from the Bar; for that this cannot be shewn by Affidavit.[68]

If the Jury carry any written Evidence which was given in Court with them from the Bar without the Direction or Leave of the Court, this is not a Reason for the granting of a new Trial : But it is a Misbehaviour in the Jury for which they are punishable.[69]

A new Trial was granted, because the Jury threw up Cross or Pile whether they should give the Plaintiff Five Hundred Pounds or Three Hundred Pounds Damages.[70]

The Jury drew Lots whether they should find a Verdict for the Plaintiff or for the Defendant. A new Trial was in this Case granted, notwithstanding the Lot fell upon the Party who was in the Opinion of the Judge before

whom the Cause was tried intitled to a Verdict.[71]

But a new Trial was refused, where the Jurors had voted and found their Verdict according to the Majority of Votes.[72]

In a modern Case, where the Jurors had voted and seven of them were for finding the Verdict as it was found, a new Trial was moved for: But it was refused; and by *Lee* Ch. J. nothing was in this Case decided by Chance as was done in the Case of *Phillips* and *Fowler*. The five might ultimately be convinced: But if they only acquiesced in the finding of the Verdict it is enough; and they shall not now be received to say they did not.[73]

A new Trial was granted upon Affidavits of eleven of the Jurors, setting forth that they had agreed to find a Verdict for the Plaintiff and to give him Five Shillings Damages, but that the Foreman had by Mistake given in a Verdict for the Defendant.[74]

The Defendant was indicted for having put some Ducats into the Pocket of the Prosecutor with an Intent to charge him with Felony. The Jury found the Defendant guilty generally : But upon a Motion for a new Trial Affidavits of all the Jurors were produced, in which they swore that they only intended to find him guilty of the Fact of having put the Ducats into the Prosecutor's Pocket but not of the Intent; and *Foster* J. before whom the Indictment was tried reported that his Direction to the Jury was, that in Case they did not think the Defendant guilty of the Intent as well as of the Fact of having put the Ducats into the Prosecutor's Pocket they ought to acquit him. A new Trial was granted; and by *Lee* Ch. J. we do not grant a new Trial in this Case on the Account of any after Thought of the Jurors, for the doing of this might be a very bad Precedent; but because the Verdict was contrary to the Direction of the Judge in a Matter of Law. By *Denison* J. if the Verdict had been as the Jury intended it, that the Defendant was guilty of the Fact but not of the Intent there must have been a *Venire facias de Novo*; for it would have been an incompleat Verdict.[75]

The Court did in one Case refuse to grant a new Trial, although the Jury found a general Verdict after it was agreed by the Counsel on both Sides that there should be a Special one, and would not give their Reasons for finding such a Verdict.[76]

But it seems from the Report of this Case that a new Trial was refused because it was moved for after a Trial at Bar.[77]

For in another Case, where a special Verdict was prayed, and the Jury after being directed by the Judge before whom the Cause was tried to find a special Verdict did find a General one, a new Trial was granted.[78]

It is in the General true, that if the Jury have found a Verdict contrary to the Evidence the Court will grant a new Trial.

But if there be two Issues and the Verdict is not contrary to the Evidence as to one of these, the Court will not grant a new Trial although it be contrary to the Evidence as to the other; for where the Verdict is right in Part the Court will never set it aside.[79]

As the granting of a new Trial is discretionary if the Action be a hard one and there be a Verdict for the Defendant, the Court will not grant a new Trial although the Jury did find a Verdict contrary to the Evidence, because every such Action ought to be discouraged as much as possible.

In an Action upon the Case against *J. S.* for negligently keeping his Fire, by which Means the House of the Plaintiff was burnt down, the Verdict was for the Defendant. A new Trial was moved for: But it was refused although the Verdict was contrary to the Evidence because the Action was a hard one.[80]

But it is said that if in such Case the Verdict had been for the Plaintiff the Court would have granted a new Trial.[81]

J. S. was hung in Chains by the Sheriff upon the private Soil of *J. N.* An Action being brought for this by *J. N.* against the Sheriff there was a Verdict contrary to the Evidence for the Defendant : Yet the Court refused to grant a new Trial because the Action was a hard one; it appearing that the Sheriff had done this merely for the Conveniency of the Place and not with a Design either to affront or to annoy *J. N.*[82]

It has been held in divers Cases that the Court will not grant a new Trial unless the Justice of the Case requires it, although the Jury have found a Verdict contrary to the Evidence.

In an Action of *Assumpsit* the Jury found a Verdict for the Plaintiff notwithstanding the Defendant did prove her Defence which was Coverture. A new Trial being moved for it was refused; *Et per Cur' :* As the Defendant was reputed to be a Feme Sole and lived as one, she ought not to have set up such a Defence in order to hinder the Plaintiff from recovering a just Debt.[83]

The Plaintiff in an Ejectment who was a Mortgagee claimed under a Surrender, whereas the Premisses were not Copyhold. The Defendant on his Part claimed under a meer voluntary Conveyance. A Verdict having been found for the Plaintiff the Court would not grant a new Trial; because the granting thereof would have been contrary to the real Justice of the Case.[84]

An Action of *Trover* having been brought by a Lessor against his Lessee

for some Trees cut down by the latter the Jury found a Verdict for the Defendant contrary to the Evidence : Yet a new Trial was refused : Because it appeared that the Trees were cut down in the making of Ditches, which were of much more Advantage to the Plaintiff's Land than the Value of the Trees.[85]

A new Trial being moved for in an Action of Trespass *Vi et Armis* the Judge before whom the Cause was tried reported, that the Trespass was proved, and that the Jury who had found the Verdict for the Defendant ought to have found it for the Plaintiff; but that in his Opinion Sixpence Damages would have been sufficient. A new Trial was refused, and by Lord *Mansfield* Ch. J. as the granting of a new Trial is discretionary the Court will never minister to the Passions of any Person by granting one in such a Case as the Present, where the Justice of the Case does by no Means require it.[86]

Upon a Motion for a new Trial in an Action for a Libel accusing the Plaintiff of Disaffection the Judge before whom the Cause was tried reported, that the Jury had found the Verdict for the Defendant contrary both to the Evidence and to his Direction : But that as the general Character of the Plaintiff was proved to be that of a Jacobite, and no Damage was proved to have been sustained from the Libel, the Jury ought not in his Opinion to have given more than Two Shillings and Sixpence Damages. The Court refused to grant a new Trial and by Lord *Mansfield* Ch. J. a new Trial ought never to be granted unless some manifest Injustice is done by the Verdict. As this is a vindictive Action and it was not proved that the Plaintiff sustained any Damage from the Libel the granting of a new Trial, by which the Plaintiff must in all Probability be Money out of Pocket if he should obtain a Verdict, would answer no other End than that of vexing the Defendant. It is the Duty of the Court to see that substantial Justice be in every Case done to all the Parties, but they ought never to minister to the Passions of any one of them.[87]

It has been held in some Cases, that if the Jury have found a Verdict which is in the Opinion of the Judge before whom the Cause was tried contrary to the Weight of the Evidence this is a good Reason for the granting of a new Trial.

The Question at the Trial of the Cause was whether *J. S.* was of sane Mind? And the Verdict was for the Plaintiff : But upon the Report of *Willes* Ch. J. before whom it was tried that the Weight of the Evidence was in his Opinion with the Defendant a new Trial was granted.[88]

Upon a Motion for a new Trial *Ryder* Ch. J. before whom the Cause was tried reported, that there was Evidence on both Sides : But that in his Opinion the Jury had found the Verdict contrary to the Weight of the Evidence. A new Trial was in this Case granted.[89]

And in another Case it was laid down generally that the Court may grant a new Trial, if the Verdict is in the Opinion of the Judge before whom the Cause was tried contrary to the Weight of the Evidence, although there was Evidence on both Sides.[90]

But it has been held in other Cases that the Court ought not to grant a new Trial; because the Jury have in the Opinion of the Judge before whom the Cause was tried found a Verdict contrary to the Weight of the Evidence.

A new Trial was refused notwithstanding *Lee* Ch. J. before whom the Cause was tried reported, that the Evidence for the Plaintiff for whom the Jury had found a Verdict was very weak, and that he had summed up the Evidence strongly for the Defendant.[91]

Upon a Motion for a new Trial the Judge before whom the Cause was tried reported, that the Weight of the Evidence was with the Plaintiff, and that in his Opinion the Jury, who had found the Verdict for the Defendant, ought to have found it for the Plaintiff : But a new Trial was refused; *Et per Cur' :* As there was Evidence at the Trial on the Part of the Defendant the Jury were the proper Persons to judge on which Side the Weight thereof was. This cannot be said to be a Verdict against Evidence and therefore we will not grant a new Trial,[92]

Upon a Motion for a new Trial *Pratt* Ch. J. before whom the Cause was tried after reporting the Evidence specially expressed himself to this Effect. If I had been upon the Jury, and had known no more of the Witnesses than I did when this Cause was tried, I should have thought that the Verdict which is for the Plaintiff ought to have been for the Defendant; but I do not chuse to declare myself dissatisfied therewith : Because wherever there is a flat Contrariety of Evidence as to the principal Matter in Issue, and the Characters of the Witnesses on both Sides stand unimpeached, the Weight of Evidence does not altogether depend upon the Number of Witnesses; for it is the Province of the Jury who may know them all to determine which Witnesses they will give Credit to; and in my Opinion no Judge has a Right to blame a Jury for exercising their Power of determining in such a Case. He concluded with leaving the Matter to the other Justices.[93]

The Rule for a new Trial was discharged; and by *Clive* J. the granting of a new Trial in this Case would be taking away that Power which is by the

Constitution vested in the Jury. It has been said that it is the Duty of the Judge to enlighten the Understanding of the Jury, but that he ought not to lead the Jury by the Nose.

Bathurst J. as there was in this Case strong Evidence for the Plaintiff a new Trial ought not to be granted, although the Weight of the Evidence was in My Lord's Opinion with the Defendant.

Gould J. it is very difficult to draw a Line between the Cases in which there ought or ought not to be a new Trial; and perhaps the granting of a new Trial must in every Case depend upon the particular Circumstances of the Case. In the present Case there is no Reason to grant one.

As the Law does not seem to be settled concerning the granting of a new Trial upon the Account either of the Smallness or Excessiveness of the Damages given by the Jury, it will be best to mention all the principal Cases as to both these Points.

In an Action for Words the Plaintiff had a Verdict and Twenty Shillings Damages were given. A new Trial being moved for it was refused; *Et per Cur' :* This is a very hard Case; but the Court has constantly refused to grant a new Trial upon Account of the Smallness of the Damages.[94]

In an Action for a malicious Prosecution of the Plaintiff for Felony the Damages given were only Six Shillings : Yet the Court would not grant a new Trial. It is in this Case laid down that the Court will never grant a new Trial upon Account of the Smallness of the Damages; because an Attaint would not lie in such a Case against the Jury, it not being a false Verdict which a Verdict for the Defendant would perhaps have been : And it is added that new Trials were introduced in the room of Attaints as being more expeditious and easier Remedies.[95]

In an Action of *Scandalum Magnatum* the Jury found for the Plaintiff but gave only Twelvepence Damages. A new Trial being moved for upon Account of the Smallness of the Damages it was refused.[96]

In an Action of Covenant for the Sum of One Hundred Pounds there was Judgment upon a Demurrer for the Plaintiff. A lesser Sum being given by the Jury upon a Writ of Enquiry a new Writ of Enquiry was awarded; *Et per Cur' :* As an Action of Debt might have been brought upon this Covenant the Jury ought to have given the whole Sum, unless the Defendant had proved something to lessen it. The general Rule of not granting a new Trial or a new Writ of Enquiry upon Account of the Smallness of the Damages does not extend to this Case; in which there must have been some Contrivance.[97]

Upon a Contract for Stock the Plaintiff and *J. S.* deposited Two Hundred Pounds each in the Hands of the Defendant. As *J. S.* did not perform his Part of Contract the Plaintiff brought an Action for the Four Hundred Pounds deposited, and obtained Judgment upon a Demurrer. A Writ of Enquiry was executed and the Plaintiff proved his Case; yet the Jury upon a mistaken Notion that the Defendant could not part with the Money without the Consent of both Parties gave him only a Penny Damages. A new Writ of Enquiry was awarded; *Et per Cur' :* The Rule of not setting aside a Verdict on Account of the Smallness of the Damages does not extend to this Case; in which the Jury were mistaken in a Point of Law.[98]

Upon the Execution of a Writ of Enquiry the Sheriff admitted improper Evidence to be given on the Part of the Defendant; for which Reason the Damages given were much less than they would otherwise have been. A new Writ of Enquiry was awarded; *Et per Cur' :* A Notion has prevailed that where the Damages are excessive the Court may grant a new Trial; but that it cannot where these are too small. There seems however to be no good Reason why a new Trial should not be as well granted in the latter Case as in the former.[99]

A new Trial being moved for on Account of the Smallness of the Damages it was refused; *Et per Cur' :* Where the Demand is certain, as if it arises upon a promisory Note, the Court will grant a new Trial upon Account of the Smallness of the Damages : But where the Demand is uncertain, as in the present Case where it is for the Cure of a Wound, the Court will not grant a new Trial upon Account of the Smallness of the Damages.[100]

In an Action of *Scandalum Magnatum* for these Words, *he is an unworthy Man and acts against Law and Reason*, the Jury found a Verdict for the Plaintiff and gave him 4000*l*. Damages. Upon a Motion for a new Trial it was sworn that one of the Jury had confessed, that they did not give such large Damages because the Plaintiff was so much damnified, but because he might have a greater Opportunity of shewing himself noble by remitting the Damages. A new Trial was refused and the Court gave their Opinions *seriatim*.[101]

North Ch. J. in a criminal Case a Man is by *Magna Charta* to be fined with a *Salvo Contenemento suo*, and consequently no greater Fine is to be imposed than he is able to pay; but in a Civil Action the Plaintiff ought in all Cases to recover a Compensation for the Damages which he hath sustained : And he ought in some Cases to recover both for the Damages

which he hath sustained and for those which he may sustain. In an Action for Words if the Words are not actionable in themselves the Jury are only to consider what Damages the Plaintiff hath sustained, and not what he may sustain *in futuro :* Because for the latter he may have a new Action : But if the Words are in themselves actionable the Jury ought as well to consider the Damages which the Plaintiff may afterwards sustain as those which he hath sustained. In the present Case the Court cannot set a Value upon the Plaintiff's Honour. The Jury have given him 4000*l*. Damages for the Injury thereto done, and as they are by Law the proper Judges of Damages the Court has no Power either to lessen these or to grant a new Trial; and it would be very inconvenient if the Court should examine upon what Account the Jury gave their Verdict.

Atkins J. accorded.

Wyndham J. was of a different Opinion. In the Case of *Wood* and *Gunston* which was an Action upon the Case for calling the Plaintiff Bankrupt the Court granted a new Trial; because the Damages of 500*l*. given by the Jury were in the Opinion of the Court excessive. In the present Case the Jury ought only to have considered the Damages which the Plaintiff had sustained, and not to have given large Damages that he might have an Opportunity of shewing himself generous. It is very true that the Court cannot lessen the Damages given by the Jury: But if these are too large a new Trial may be granted.

Scroggs J. accorded with *North* and *Wyndham*. If I had been upon the Jury I should not have given such large Damages : But as it does not appear that there was any Practice upon the Jury a new Trial ought not to be granted. Suppose the Jury had given the Plaintiff only a Penny Damage, the Court would not have granted a new Trial in order to give him a Chance of obtaining larger Damages; and it is equally reasonable that the Court should not now grant a new Trial in order to give the Defendant a Chance of having lesser Damages given against him.

In an Action for Words the Jury gave 800*l*. Damages. A new Trial was moved for upon Account of the Excessiveness of the Damages : But it was refused; because the Judge before whom the Cause was tried reported, that the Plaintiff had given the Defendant no Provocation, and that he believed the Jury had done what they in their Consciences believed to be right.[102]

In an Action for criminal Conversation with the Plaintiff's Wife there was a Verdict for the Plaintiff with 500*l*. Damages. Upon a Motion for a new Trial on Account of the Excessiveness of the Damages, it appeared

from the Report of Lord *Mansfield* Ch. J. before whom the Cause was tried, that the Woman had seduced the Defendant, and that the Defendant was in low Circumstances, being only a Clerk in the Exchequer at a Salary of Fifty Pounds a Year. A new Trial was refused; and by Lord *Mansfield* Ch. J. the Jury had all these Circumstances under their Consideration, and they are in every Action founded upon a *Tort* the proper Judges as to the *Quantum* of Damages.[103]

A new Trial was granted after a full Debate by Counsel on both Sides upon Account of the Excessiveness of the Damages in an Action for Words; and by *Glyn* Ch. J. Wherever the Court believe that the Jury gave their Verdict contrary to the Direction of the Judge before whom the Cause was tried a new Trial may be granted.[104]

But in another and fuller Report of this Case in the same Book the new Trial does not seem to have been granted merely upon Account of the Excessiveness of the Damages, but because the Jury had shewn a Partiality to the Plaintiff.[105]

In an Action of Assault and false Imprisonment the Jury gave 2000*l*. Damages, although the Plaintiff had been confined by her Mother only two or three Hours. A new Trial was granted on Account of the Excessiveness of the Damages; and by *Holt* Ch. J. the Jury were very shy of giving their Reasons for their Verdict, thinking they had an absolute Power to find it as they pleased : But this is a Mistake; for the Jury are to try the Cause with the Assistance of the Judge, and they ought to give their Reasons for their Verdict if they are required by the Judge so to do, that they may if they proceed upon a mistaken Notion be set right by him.[106]

In an Action of Assault and false Imprisonment the Verdict was for the Plaintiff with 300*l*. Damages. A new Trial being moved for on Account of the Excessiveness of the Damages it was refused; because the Court did not think that upon the whole Circumstances of this Case the Damages were too large. It was however in this Case said by *Pratt* Ch. J. that there is no Doubt but the Court may in every Action grant a new Trial upon Account of the Excessiveness of the Damages, although the Action be founded upon a *Tort* in which the Jury have no certain Rule of computing the Damages. But the Court should be very cautious of granting one in such a Case, and ought not to do it unless the Damages are quite enormous.[107]

5. FOR ANY NEGLECT OR MISTAKE IN THE COUNSEL OR ATTORNEY IN THE CAUSE.

A new Trial is said to have been granted, because the Counsel for the

Defendant who did not expect that the Cause would be called on was absent.[108]

But it is added by the Reporter of this Case, that a new Trial had in a similar Case been refused.

And in a modern Case a new Trial was moved for because the Defendant's Attorney had neglected to attend the Trial of the Cause : But it was refused; *Et per Cur' :* As the Plaintiff has in this Case been guilty of no Fault there ought not to be a new Trial, which as his Witnesses may die or be out of the Way may be inconvenient to him : Nor is it necessary to grant one; for the Defendant who is bound by the Verdict has a Remedy against his own Attorney.[109]

At the Trial of the Cause a Matter of Law was started by the Judge before whom it was tried; the Consequence of which if it had been relied on must have been a Verdict for the Defendant : But instead of relying upon this the Defendant's Counsel put his Defence upon other Matters, and there was a Verdict for the Plaintiff. A new Trial being moved for it was refused; *Et per Cur' :* The Act of a Counsel in the Cause is always to be considered as the Act of his Client; and if he waves any Thing which would have been in Favour of his Client, it is the same Thing as if the Client does himself wave it. The Mistake of the Judge or of the Jury is always a good Reason for the granting of a new Trial : But it has never been held that the Mistake of a Counsel in the Cause is so.[110]

6. FOR ANY NEGLECT, MISTAKE OR FAULT, IN A PARTY TO THE CAUSE OR ONE OF HIS WITNESSES.

A new Trial was moved for, because a material Witness of the Party moving for this did not appear at the Trial of the Cause : But it was refused; *Et per Cur' :* If a new Trial was to be granted upon this Account one might be granted in almost every Case; for it would be almost always in the Power of a Party to prevail upon one of his own material Witnesses to be absent, on Purpose to make his Absence a Ground for the obtaining of a new Trial.[111]

Upon a Motion for a new Trial the Party who moved for it offered an Affidavit, that one of his material Witnesses did not appear at the Trial of the Cause : But the Court would not suffer this Affidavit to be read.[112]

But if the Appearance of a material Witness for one Party to the Cause has been prevented by any Contrivance of the other Party, as by the arresting of such Witness, the Court will grant a new Trial.[113]

So if the Appearance of a material Witness at the Trial of the Cause was

prevented by his sudden Illness, this is a good Reason for the granting of a new Trial.[114]

It is however said that the Court will not in any Case grant a new Trial, because a material Witness did not appear at the Trial of the Cause, unless an Affidavit be produced of what he knows concerning the Matter in Question, that the Court may be able to judge of the Materiality of his Evidence.[115]

It is said that a Court of Equity will grant a new Trial, whenever it appears that the Witness, upon whose Testimony a Verdict at Law was principally founded, stands convicted of any infamous Crime.[116]

But it has been held that this is not a sufficient Ground for the granting of a new Trial; *Et per Cur' :* If the Record of the Conviction of such Witness had been produced at the Trial, the Judge would not have admitted his Testimony; and as this was not done the Party who has been guilty of a Neglect ought to suffer for it.[117]

It is in many Cases laid down that the Court will never grant a new Trial; because the Party who moves for it was not at the Trial of the Cause furnished with any Evidence, which it was in his Power to have been then furnished with.[118]

But it is said in one of these that if any material Evidence, of which the Party had no Knowledge at the Trial of the Cause, is afterwards discovered, this is a good Reason for the granting of a new Trial.[119]

The former however seems from what was laid down in a modern Case to be the better Opinion.

In an Action for criminal Conversation with the Plaintiff's Wife there was a Verdict for the Plaintiff, and 1000*l.* Damages were given. A new Trial was moved for upon an Affidavit of its having been discovered since the Trial, that the Woman was not the Wife of the Plaintiff; but it was refused; *Et per Cur' :* It is a settled Rule, that a new Trial is not to be granted on the Account of any Evidence having been discovered after the Trial, which by using due Diligence might have been discovered before the Cause was tried. It is laid down in divers Cases, that the Court will not grant a new Trial, because one of the Parties was not at the Trial of the Cause prepared to make out his Case; and it would be of the most dangerous Consequence to suffer one Party, after he has heard the Evidence of the other, to give new Evidence to contradict this. In the present Case the Defendant ought to have been prepared at the Trial to have proved that the Woman was not the Plaintiff's Wife; which was the very Gist of the

Action.[120]

A new Trial being moved for upon an Affidavit that a material Witness had made a Mistake in giving his Evidence at the Trial of the Cause it was refused; *Et per Cur' :* It would of the most dangerous Consequence to grant a new Trial after the Gist of the Cause is seen, in order to suffer a Witness to give Evidence different from what he had before given.[121]

Upon a Motion for a new Trial it appeared, that the Plaintiff's Attorney had wrote Letters to two Persons upon the Pannel, importuning them to appear and setting forth the Hardships his Client had suffered in the Cause. A new Trial was granted, and the Attorney was committed for having been guilty of Embracery; and he was obliged to pay Ten Pounds to the other Party towards his Costs, before the Court would consent to his being discharged.[122]

But it was in a later Case held that although one of the Parties has desired a Person to appear as a Juryman, this is not a good Reason for the granting of a new Trial.[123]

The latter Case is said to have been determined upon the Authority of the Case of Lady *Herbert* and *Shaw*.[124]

But the Case alluded to does not seem to warrant such a Determination.

In this Case the Duke of *Leeds* had wrote Letters to all the Persons upon the Pannel; every one of which Letters, after desiring the Person to appear at the Trial, concluded with these Words, "Which I shall take as a great Obligation, and shall be glad of an Occasion to shew you how much I am Sir your humble Servant." A new Trial being moved for on the Account of these Letters it was indeed refused; but it was refused upon the particular Circumstances of the Case, namely that the Defendant who had had Notice long before the Trial of these Letters did not move for a Trial at Bar, which the Plaintiff had offered to consent to; and it was moreover said by the Court, that such a Sort of Letter considered by itself is of the most dangerous Consequence, it being a Temptation to a Juryman to be partial.[125]

A new Trial was moved for, because the Plaintiff, in whose Favour it was, had after the finding of the Verdict given to every one of the Jurors Four Pounds, whereas by a Rule of the Court they were entitled to no more than Twenty Shillings each. The Court being equally divided no Rule could be made. *Morton* J. and *Rainsford* J. were of Opinion that although the Plaintiff might be punishable for Disobedience to the Rule of the Court, this was not a good Reason for the granting of a new Trial : But *Keeling* Ch. J. and *Twisden* J. were of Opinion that there ought to be a new Trial; for that

if the Parties may give what they please to the Jurors after the Verdict, it is to be presumed that the Jurors will frequently be inclined to find a Verdict for that Party who is best able to reward them well.[126]

7. IN AN INDICTMENT OR INFORMATION.

The Court will not grant a new Trial where the Defendant in an Indictment or Information has been acquitted, although the Verdict was contrary to the Evidence.[127]

A new Trial being moved for because the Verdict for the Defendant in an Indictment for a Libel was contrary to the Evidence it was refused; *Et per Cur' :* A new Trial is never to be granted after an acquittal in a criminal Case, unless the Defendant has been guilty of some Fraud or bad Practice.[128]

The Defendant in an Information for a Riot having been acquitted a new Trial was moved for. The Verdict was in the Opinion of the Judge before whom the Information was tried contrary to the Evidence : Yet a new Trial was refused; because it did not appear to have been obtained by any corrupt Practice of the Defendant.[129]

Upon an Information in the Nature of a *quo Warranto* the Jury found for the Defendant. A new Trial was moved for; and the Judge before whom the Information was tried reported that the Verdict was in his Opinion contrary to the Evidence. *Parker* Ch. J. and *Powis* J. were of Opinion that a new Trial might in this Case be granted : But *Eyre* J. and *Pratt* J. were of a contrary Opinion. The Court of King's Bench being thus divided the rest of the Judges were consulted; who being also equally divided in their Opinions the Rule for a new Trial was of Course discharged.[130]

A new Trial was moved for because the Verdict, which was for the Defendant in an Information in the Nature of a *quo Warranto,* was contrary to the Evidence : But the Court refused to grant a Rule to shew Cause; and by *Lee* Ch. J. in *Rex* and *Bennet* the Judges were equally divided in their Opinions, whether a new Trial could in such Case be granted; and in *Rex* and *Jones, Trin.* 10 *G.* 1. wherein the same Question arose, the Court did not come to any Determination.[131]

It has been held that if the Defendant in an Indictment or Information has been acquitted by some Trick or Fraud of his own, he may be punished by Information for such Trick or Fraud, but that the Court will not grant a new Trial.[132]

And it is said to have been formerly held, that if the Defendant in an

Indictment or Information had been acquitted the Court would not in any Case grant a new Trial, although the Verdict was obtained by some Trick or Fraud of the Defendant.[133]

But it seems to be the better Opinion, that if the Defendant in an Indictment or Information has obtained a Verdict by any Trick or Fraud of his own, the Court will in every Case except that of an Indictment for a capital Offence grant a new Trial.[134]

A new Trial was granted after the Defendant in an Indictment for keeping a Bawdy House had been acquitted : Because the Trial was brought on by the Defendant, and he had not given due Notice of Trial to the Prosecutor.[135]

It seems to be settled that a new Trial may be granted in an Indictment or Information, in Case the Defendant has been found guilty.[136]

It has indeed been formerly held, that the Court cannot grant a new Trial at the Instance of the Defendant in an Indictment or Information, without the Consent of the King's Counsel.[137]

But it has been since held, that the Court may grant a new Trial at the Instance of the Defendant in an Indictment or Information without the Consent of the King's Counsel; and it is in this Case said that Mr. *Siderfin* is mistaken in his Report of the Case of *Read* and *Dawson*.[138]

A new Trial cannot be moved for by a Defendant in an Indictment or Information after an Interlocutory Judgment has been signed.[139]

Upon a Motion for a new Trial at the Instance of the Defendant in an Indictment for Forgery it was insisted, that it was not necessary for him to be present in Court at the making of the Motion; for that this is different from the Case of a Motion in Arrest of Judgment: But it was held that he must be present in Court when such Motion is made; *Et per Cur' :* The Verdict fixes such a Suspicion of Guilt upon the Defendant, that the Court will always be sure of him before they intimate any Opinion concerning the granting of a new Trial; and the Chief Justice mentioned two Cases in which the Distinction attempted to be made in this Case had been overruled.[140]

8. IN A PENAL ACTION.

The Court will not grant a new Trial at the Instance of the Plaintiff in a penal Action.

In an Action for the Penalty given by Statute for killing a Hare, the Jury found for the Defendant contrary to the Direction of the Judge before whom

the Cause was tried. A new Trial being moved for it was refused : Because the Action was a penal one.[141]

In an Action for the Penalty given by Statute for selling less than two Gallons of Spirituous Liquors the Fact was proved; and *Eyre* Ch. J. before whom the Cause was tried directed the Jury to find for the Plaintiff. Notwithstanding this Direction the Verdict was for the Defendant, yet a new Trial was refused.[142]

In an Action for the Penalty given by Statute for the fraudulent Exportation of Jesuits Bark, the Verdict was for the Defendant. A Motion was made for a new Trial : But it was refused by the whole Court of Exchequer.[143]

The Reporter does indeed add that it seemed to be admitted, that a new Trial might be granted in a Case of this Nature if the Fact would have admitted thereof; and the Counsel for the Plaintiff were prepared with Precedents to this Purpose.

But he does not mention where any such Precedent is to be met with, and this Doctrine is contrary to what is laid down in a later Case.

An Action having been brought for the Penalty given by the Statute against Horse-Racing, the Jury found a Verdict contrary to plain Evidence for the Defendant. A new Trial was refused in this Case; *Et per Cur' :* As there is no Proof in this Case of any Misbehaviour in the Defendant, it is within the Reason of the Practice of the Court of *Exchequer*, in which a new Trial is never granted at the Instance of the Plaintiff in an Action for a Penalty given by a Statute, unless the Defendant has been guilty of some Misbehaviour.[144]

9. IN SOME OTHER CASES.

It is laid down in some Cases, that the Court will never grant a new Trial in an Ejectment; because as the Verdict in this Action is not conclusive another Ejectment may be brought, and consequently there is no Necessity for the granting of a new Trial.[145]

And in one Modern Case it is said, that the Court will not grant a new Trial in an Ejectment, unless the Case be so particularly circumstanced that Justice cannot otherwise be attained.[146]

But these Cases do not seem to be Law.

For in one Modern Case it is only said, that the Court will not grant a new Trial in an Ejectment where the Verdict is for the Defendant; from whence it may fairly be inferred, that where the Verdict is for the Plaintiff a

new Trial may be had.[147]

And in another very recent Case it is expresly laid down, that where the Verdict is for the Plaintiff the Court will grant a new Trial as readily in an Ejectment as in any other Action.

A Motion being made for a new Trial in an Ejectment it was refused upon the particular Circumstances of the Case : But by Lord *Mansfield* Ch. J. it is not true that the Court will in no case grant a new Trial so readily in an Ejectment as in another Action. Where the Verdict is for the Defendant the Court will not indeed grant a new Trial but for very strong Reasons; because as the Verdict is not conclusive the Plaintiff may bring another Ejectment: But where the Verdict is for the Plaintiff, the Court will grant a new Trial just as readily in an Ejectment as in any other Action, and the Court ought so to do; for if the Possession should once be changed in consequence of a Verdict in an Ejectment, it would perhaps answer no Purpose for the Person who has lost his Possession, which was perhaps his only Title, to be at Liberty to bring another Ejectment.[148]

Bacon Abridgment, vol. 5, pp. 227–28, 238–53.

13.3.1.4Blackstone, 1768

THE subject of our next enquiries will be the nature and method of the trial *by jury*; called also the trial *per pais*, or *by the country*. A trial that hath been used time out of mind in this nation, and seems to have been co-eval with the first civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon colonies, their institution being ascribed by bishop Nicolson to Woden himself, their great legislator and captain. Hence it is, that we may find traces of juries in the laws of all those nations which adopted the feodal system, as in Germany, France, and Italy; who had all of them a tribunal composed of twelve good men and true, "*boni homines*," usually the vasals or tenants of the lord, being the equals or peers of the parties litigant: and, as the lord's vasals judged each other in the lord's courts, so the king's vasals, or the lords themselves, judged each other in the king's court. In England we find actual mention of them so early as the laws of king Ethelred, and that not as a new invention. Stiernhook ascribes the invention of the jury, which in the Teutonic languages is denominated

nembda, to Regner, king of Sweden and Denmark, who was co-temporary with our king Egbert. Just as we are apt to impute the invention of this, and some other pieces of juridical polity, to the superior genius of Alfred the great; to whom, on account of his having done much, it is usual to attribute every thing: and as the tradition of antient Greece placed to the account of their one Hercules whatever atchievement [*sic*] was performed superior to the ordinary prowess of mankind. Whereas the truth seems to be, that this tribunal was universally established among all the northern nations, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other. It's establishment however and use, in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battel, was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In *magna carta* it is more than once insisted on as the principal bulwark of our liberties; but especially by chap. 29. that no freeman shall be hurt in either his person or property, "*nisi per legale judicium parium suorum vel per legem terrae*.["] A privilege which is couched in almost the same words with that of the emperor Conrad, two hundred years before: "*nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per judicium parium suorum.*" And it was ever esteemed, in all countries, a privilege of the highest and most beneficial nature.

…

TRIALS by jury in civil causes are of two kinds; *extraordinary*, and *ordinary*. The extraordinary I shall only briefly hint at, and confine the main of my observations to that which is more usual and ordinary.

…

WITH regard to the *ordinary* trial by jury in civil cases, I shall pursue the same method in considering it, that I set out with in explaining the nature of prosecuting actions in general, *viz*. by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

WHEN therefore an issue is joined, by these words, "and this the said A prays may be enquired of by the country," or, "and of this he puts himself upon the country, and the said B does the like," the court awards a writ of *venire facias* upon the roll or record, commanding the sheriff "that he cause to come *here* on such day, twelve free and lawful men, *liberos et legales homines*, of the body of his county, by whom the truth of the matter may be

better known, and who are neither of kin to the aforesaid A, nor the aforesaid B, to recognize the truth of the issue between the said parties." And such writ is accordingly issued to the sheriff.

THUS the cause stands ready for the trial *at the bar* of the court itself: for all trials were there antiently had, in actions which were there first commenced; which never happened but in matters of weight and consequence, all trifling suits being ended in the court-baron, hundred, or county courts: and all causes of great importance or difficulty are still usually retained upon motion, to be tried at the bar in the superior courts. But when the usage began, to bring actions of any trifling value in the courts of Westminster-hall, it was found to be an intolerable burthen to compel the parties, witnesses, and jurors, to come from Westmorland perhaps or Cornwall, to try an action of assault at Westminster. Therefore the legislature took into consideration, that the king's justices came usually twice in the year into the several counties, *ad capiendas assisas*, to take or try writs of assise, of *mort d'ancestor*, *novel disseisin*, *nusance*, and the like. The form of which writs we may remember was stated to be, that they commanded the sheriff to summon an assise or jury, and go to view the land in question; and then to have the said jury ready at the next coming of the justices of assise (together with the parties) to recognize and determine the disseisin, or other injury complained of. As therefore these judges were ready in the country to administer justice in real actions of assise, the legislature thought proper to refer other matters in issue to be also determined before them, whether of a mixed or personal kind. And therefore it was enacted by statute Westm. 2. 13 Edw. I. c. 30. that a clause of *nisi prius* should be inserted in all the aforesaid writs of *venire facias;* that is, "that the sheriff should cause the jurors to come to Westminster (or wherever the king's courts should be held) on such a day in easter and michaelmas terms; *nisi prius*, unless before that day the justices assigned to take assises shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assise, which was sure to be held in the vacation before easter and michaelmas terms; and there the trial was had.

…

LET us now pause awhile, and observe (with sir Matthew Hale) in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth, beyond any other method of trial in the world. For, first the *person returning* the jurors is a man of

some fortune and consequence; that so he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults of either himself or his officers: and he is also bound by the obligation of an oath faithfully to execute his duty. Next, as to the *time of their return:* the panel is returned to the court upon the original *venire*, and the jurors are to be summoned and brought in many weeks afterwards to the trial, whereby the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connections, and relations, that so they may be challenged upon just cause; while at the same time by means of the compulsory process (of *distringas* or *habeas corpora*) the cause is not like to be retarded through defect of jurors. Thirdly, as to the *place* of their appearance: which in causes of weight and consequence is at the bar of the court; but in ordinary cases at the assises, held in the county where the cause of action arises, and the witnesses and jurors live: a provision most excellently calculated for the saving of expense to the parties. For, though the preparation of the causes in point of pleading is transacted at Westminster, whereby the order and uniformity of proceeding is preserved throughout the kingdom, and multiplicity of forms is prevented; yet this is no great charge or trouble, one attorney being able to transact the business of forty clients. But the troublesome and most expensive attendance is that of jurors and witnesses at the trial; which therefore is brought home to them, in the country where most of them inhabit. Fourthly, the *persons before whom* they are to appear, and before whom the trial is to be held, are the judges of the superior court, if it be a trial at bar; or the judges of assise, delegated from the courts at Westminster by the king, if the trial be held in the country: persons, whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no small influence upon the multitude. The very point of their being strangers in the county is of infinite service, in preventing those factions and parties, which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of the peace, and the like. And, the better to remove all suspicion of partiality, it was wisely provided by the statutes 4 Edw. III. c. 2. 8 Ric. II. c. 2. and 33 Hen. VIII. c. 24. that no judge of assise should hold pleas in any county wherein he was born or inhabits. And, as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These justices, though thus varied and shifted at every assises, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together,

communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments blended together, as they are interchangeably courts of appeal or advice to each other. And hence their administration of justice, and conduct of trials, are consonant and uniform; whereby that confusion and contrariety are avoided, which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment. …

…

A COMMON jury is one returned by the sheriff according to the directions of the statute 3 Geo. II. c. 25. which appoints, that the sheriff shall not return a separate panel for every separate cause, as formerly; but one and the same panel for every cause to be tried at the same assises, containing not less than forty eight, nor more than seventy two, jurors: and that their names, being written on tickets, shall be put into a box or glass; and when each cause is called, twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused; and unless a previous view of the lands, or tenements, or other matters in question, shall have been thought necessary by the court: in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed to take such view; and then such of the jury as have appeared upon the view (if any) shall be sworn on the inquest previous to any other jurors. These acts are well calculated to restrain any suspicion of partiality in the sheriff, or any tampering with the jurors when returned.

As the jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts; challenges to the *array*, and challenges to the *polls*.

…

BUT challenges to the polls of the jury (who are judges of fact) are reduced to four heads by sir Edward Coke: *propter honoris respectum; propter defectum; propter affectum;* and *propter delictum*.

…

3. JURORS may be challenged *propter affectum*, for suspicion of biass or partiality. This may be either a *principal* challenge, or *to the favour*. A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action

depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. Challenges *to the favour*, are where the party hath no principal challenge; but objects only some probable circumstances of suspicion, as acquaintance, and the like; the validity of which must be left to the determination of *triors*, whose office it is to decide whether the juror be favourable or unfavourable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and, if they try one man and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, and two triors shall be superseded, and the two first sworn on the jury shall try the rest.

4. CHALLENGES *propter delictum* are for some crime of misdemesnor, that affects the juror's credit and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if he hath received judgment of the pillory, tumbrel, or the like; or to be branded, whipt, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *praemunire*, or forgery; or lastly, if he hath proved recreant when champion in the trial by battel, and thereby hath lost his *liberam legem*. A juror may himself be examined on oath of *voir dire*, *veritatem dicere*, with regard to the three former of these causes of challenge, which are not to his dishonour; but not with regard to his head of challenge, *propter delictum*, which would be to make him either forswear or accuse himself, if guilty.

…

WHEN the evidence is gone through on both sides, the judge in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.

THE jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict: and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. A method of accelerating unanimity not wholly unknown in other

constitutions of Europe, and in matters of greater concern. For by the golden bulle of the empire, if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water, till the same is accomplished. But if our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar; or if they receive any fresh evidence in private; or if to prevent disputes they cast lots for whom they shall find; any of these circumstances will entirely vitiate the verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned, the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart. This necessity of a total unanimity seems to be peculiar to our own constitution; or, at least, in the *nembda* or jury of the antient Goths, there was required (even in criminal cases) only the consent of the major part; and in case of an equality, the defendant was held to be acquitted.

WHEN they are all unanimously agreed, the jury return back to the bar; and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which by the old law he is liable, as has been formerly mentioned, in case he fails in his suit, as a punishment for his false claim. To be *amerced*, or *a mercie*, is to be at the king's mercy with regard to the fine to be imposed; *in misericordia domini regis pro falso clamore suo*. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *nonsuit, non sequitur clamorem suum*. Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to *call the plaintiff;* and if neither he, nor any body for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him: for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is for ever barred from attacking the defendant upon the same ground of complaint. But, in case the plaintiff appears, the jury by their foreman deliver in their verdict.

A VERDICT, *vere dictum*, is either *privy*, or *public*. A *privy* verdict is when the judge hath left or adjourned the court; and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court: which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; wherein the jury may, if they please, vary from their privy verdict. So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the *public* verdict; in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought.

Blackstone Commentaries, bk. 3, ch. 23; vol. 3, pp. 349–77 (footnotes omitted).

ALSO SEE 12.3.1

13.3.2CASE LAW

13.3.2.1Den dem. Bayard v. Singleton, 1787

That by the constitution every citizen has undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken way without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

1 N.C. (1 Mart.) 5, 7 (Super. Ct.).

1 For the history of the criminal prosecution clauses, *see* 12.1.1.

2 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.
>
> HJ, p. 112.

3 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

1 *Bro. Trial, pl*. 60. *Bro. Appeal, pl*. 47.

2 7 *Mod*. 99. *Reg*. and *Sturmey*.

3 *Hob*. 217. *Crookhay* and *Woodward. Hob*. 93. 5 *Rep*. 108. *Sid*. 313. *Cro. Jac*. 381.

4 *Hob*. 217. *Crookhay* and *Woodward*. 5 *Rep*. 108. *Sid*. 313. *Hob*.93

5 3 *Lev*. 241. *Beayne* and *Beal. Cro. Jac*. 381. *Sid*. 313.

6 *Cro. Jac*. 381. *Gold* and *Death*.

7 *Lutw*. 665. *Ladd* and *Garrod*.

8 *Moor* 845. *Griffin*'s Case. 2 *Leon*. 215.

9 *Cro. Jac*. 188. *Aldred* and *Matthew*.

10 1 *H. H. P. C*. 229.

11 *Bro. Issue, pl*. 45.

12 *Bro. Issue, pl*. 22. 1. *H. H. P. C*. 229.

13 1 *Lev*. 82. *Crawford* and *Middleton. Cro. Eliz* 297. 1 *Roll. Abr*. 58.

14 *Sty*. 462. *Wood* and *Gunston*.

15 1 *Will. Reg*. and *the Corp. of Bewdley*.

16 *Salk*. 648. *Argent* and *Darrel*.

17 *Str*. 995. *Rex* and *Bell*.

18 *Str*. 995. *Gilman* and *Smith, Mich*. 9 *G*. 1.

19 1 *Barn*. 328. *Wilis* and *Bennett, Mich*. 11 *G*. 2.

20 *Salk*. 647. *Turbeville* and *Stamp*.

21 *Rep. of Pr. in C. B*. 124. *Phillips* and *Fowler*.

22 *Bunb*. 51. *Namink* and *Farwell*.

23 *Salk*. 646. *Thermolin* and *Cole*.

24 *Ibid*.

25 7 *Mod*. 54. *Hyon* and *Ballard*.

26 *Rep. of Pr. in C. B*. 63. 125. 7 *Mod*. 54.

27 2 *Barn*. 352. *Bond* and *Palmer*.

28 3 *Keb*. 351. *St. Bar* and *Williams*.

29 *M. S. Rep. Bolston* and *Homes, Trin*. 30 *G*. 2. *in B. R.*

30 12 *Mod*. 336. *Anon*.

31 *Str*. 113. *Brook* and *Ewers. Salk*. 650.

32 *Vin. Trial* 467. *pl*. 4.

33 11 *Mod*. 1. *Anon*.

34 12 *Mod*. 275. *Bond* and *Spark* and *another. Str*. 814.

35 12 *Mod*. 275. *Bond* and *Spark*.

36 11 *Mod*. 118. *Lady Herbert* and *Shaw*.

37 12 *Mod*. 319. *Richardson* and *Williams*.

38 2 *Vern*. 75. 12 *Mod*. 370.

39 12 *Mod*. 370. *Anon*.

40 *Str*. 642. *Hale* and *Cove*.

41 *M. S. Rep. Pickersgill* and *Palmer, Hil*. 2 *G*. 3. *in C. B.*

42 12 *Mod*. 439. *Anon. Sty*. 466.

43 *Salk. 649. Clark and Udall. Str*. 692.

44 6 *Mod*. 22.

45 1 *Sid*. 58. *Salk*. 648. 12 *Mod*. 93. 128. 1 *Will*. 213. *Prec. In Ch*. 193. *Ld. Raym*. 514.

46 *Salk*. 650. *Fenwick* and *Lady Grosvenor*.

47 *Str*. 584, 1105. *Ld. Raym*. 1360.

48 *Str*. 585. *Musgrave* and *Nevinson*.

49 2 *Lill. Abr*. 749.

50 11 *Mod*. 119. *Lady Herbert* and *Shaw*.

51 10 *Mod*. 202. *Reg*. and *the Corp. of Helston*.

52 6 *Mod*. 242. 7 *Mod*. 53, 64.

53 7 *Mod*. 64. *Thomkins* and *Hill*. 7 *Mod*. 53.

54 11 *Mod*. 1.

55 12 *Mod*. 567. *Anon*. 12 *Mod*. 584.

56 *Cro. Eliz*. 57. *Displin* and *Spratt*. 1 *Roll. Abr*. 196. *pl*. 3.

57 *Cro. Eliz*. 222. *Fermor* and *Dorrington, Pascb*. 33 *Eliz*.

58 2 *Barn*. 364. *Wrey* and *Thorn, Mich*. 18 *G*. 2.

59 2 *Barn*. 362. *Norman* and *Beaumont*.

60 2 *Barn*. 366. *Russel* and *Ball*.

61 *Ld. Raym*. 1410. *Parker* and *Thornton*.

62 1 *Ventr*. 30. *Cotton* and *Daintry*. *Sty*. 100.

63 *Sty*. 129. *Loveday*'s Case.

64 7 *Mod*. 54. *Hyon* and *Ballard*.

65 *Salk*. 645. *Dent* and *the Hundred of Hertford*.

66 1 *Sid*. 235. *Goodman* and *Cotherington*.

67 *Cro. Eliz*. 189. *Metcalfe* and *Deane*.

68 1 *Sid*. 235. *Goodman* and *Cotherington*. *Cro. Eliz*. 189.

69 *Salk*. 645. *King* and *Burdett*.

70 *Bunb*. 51. *Mellish* and *Arnold*. 2 *Lev*. 140, 205.

71 *Str*. 642. *Hale* and *Cove*.

72 *Comb*. 14. *Anon*.

73 *M. S. Rep. Lawrence* and *Boswell. Trin*. 26 *G*. 2, *in B. R.*

74 *Rep. of Pr. in C. B*. 66. *Baker* and *Miles*.

75 *M. S. Rep. Rex* and *Simonds, East*. 25 *G*. 2.

76 7 *Mod*. 37. *Gay* and *Cross*.

77 *Ibid*.

78 1 *Will*. 213. *Reg*. and *the Corp. of Bewdley*. *Str*. 1106, 1142.

79 1 *Barn*. 9, 317, 333.

80 *Salk*. 644. *Smith* and *Frampton*.

81 *Salk*. 653. *Dunckley* and *Wade*.

82 *Salk*. 648. *Sparks* and *Spicer*.

83 *Salk*. 646. *Deerly* and *the Duchess of Mazarine*.

84 *Salk*. 644. *Smith* and *Page*.

85 *Salk*. 647. *Starr* and *Wade*.

86 *M. S. Rep. Macro* and *Hull, Mich*. 30 *G*. 2. *in B. R.*

87 *M. S. Rep. Burton* and *Thompson, Mich*. 32 *G*. 2. *in B. R.*

88 1 *Barn*. 322. *Wheeler* and *Pitt, Mich*. 8 *G*. 2.

89 *M. S. Rep. Burt* and *Mason, Hil*. 29 *G*. 2. *in B. R.*

90 *M. S. Rep. Bright* and *Enion, Trin*. 30 *G*. 2, *in B. R.*

91 *Str*. 1142. *Smith* and *Huggins, Mich*. 14 *G*. 2.

92 *Str*. 1142. *Ashley* and *Ashley, Mich*. 14 *G*. 2.

93 *M. S. Rep. Francis* and *Baker, Hil*. 3 *G*. 3. *in C. B.*

94 *Str*. 940. *Hayward* and *Newton, Mich*. 6 *G*. 2.

95 *Str*. 1051. *Barker* and *Sir Woolston Dixie, Trin*. 9 *G*. 2.

96 1 *Barn*. 332. *Lord Gower* and *Heath, Trin*. 13 *G*. 2.

97 *Salk*. 647. *Anon, Mich*. 10 *W*. 3.

98 *Str*. 425. *Woodford* and *Eades, East*. 7 *G*. 1.

99 2 *Barn*. 354. *Tutton* and *Andrews, Trin*. 14 *G*. 2.

100 2 *Barn*. 366. *Russel* and *Ball, East*. 18 *G*. 2.

101 2 *Mod*. 150. *Lord Townsend* and *Hughes, Hil*. 28 *G*. 2.

102 2 *Jon*. 200. *Boulsworth* and *Pilkington, Hil*. 33 *G*. 2.

103 *M. S. Rep. Wilsford* and *Berkley, Trin*. 31 *G*. 2. *in B. R.*

104 *Sty*. 462. *Wood* and *Gunston, Mich*. 7 *G*. 2.

105 *Sty*. 466.

106 *Comb*. 357. *Ash* and *Ash, Hil*. 8 *W*. 3.

107 *M. S. Rep. Leman* and *Allen, Hil*. 3 *G*. 3. *in C. B.*

108 *Salk*. 645. *Anon*.

109 *M. S. Rep. Clifton* and *Grey, Mich*. 31 *G*. 2. *in B. R.*

110 10 *Mod*. 202, 203. *Reg*. and *Corp. of Helston*.

111 1 *Ventr*. 30. *Cotton* and *Daintry*.

112 1 *Barn*. 322. *Wheeler* and *Pitt*.

113 11 *Mod*. 141. *Davis* and *Daverell*.

114 11 *Mod*. 1. 6 *Mod*. 22.

115 *Salk*. 645. *Anon*.

116 *Prec. in Ch*. 194. *Tovey* and *Young*.

117 *Salk*. 653. *Ford* and *Tilly*. 12 *Mod*. 584.

118 12 *Mod*. 584. *Salk*. 273, 647, 653. *Prec. in Ch*. 194. *Str*. 691.

119 12 *Mod*. 584.

120 *M. S. Rep. Walker* and *Scot, Mich*. 23 *G*. 2. *in B. R.*

121 *M. S. Rep. Lewis* and *Sheldon, East*. 25 *G*. 2. *in B. R.*

122 2 *Ventr*. 173. *Anon. Pasch*. 2 *W*. 3.

123 *Str*. 643. *Snell* and *Timbrel. Mich*. 12 *G*. 1.

124 *Ibid*.

125 11 *Mod*. 119. *Lady Herbert* and *Shaw*.

126 1 *Ventr*. 30. *Cotton* and *Daintry*.

127 1 *Sid*. 154. 1 *Lev*. 124. *Ld. Raym*. 63. 12 *Mod*. 9.

128 *Salk*. 646. *Rex* and *Bear*.

129 1 *Show*. 336. *Rex* and *Davis*. 12 *Mod*. 9.

130 *Str*. 101. *Rex* and *Bennet*.

131 *M. S. Rep. Rex* and *Blunt, Trin*. 26 *G*. 2.

132 1 *Sid*. 153. 1 *Lev*. 9.

133 *Salk*. 646. *Rex* and *Bear*.

134 1 *Sid*. 154. 1 *Lev*. 9. *Salk*. 646.

135 12 *Mod*. 9. *Reg*. and *Coke*.

136 1 *Lev*. 9. 2 *Jon*. 163. *Str*. 104, 968. 1102.

137 1 *Sid*. 50. *Read* and *Dawson, Mich*. 13 *Car*. 2.

138 *Ld. Raym*. 63. *Rex* and *Stone. Mich*. 3 *W*. 3.

139 *Str*. 1102. *Rex* and *Armstrong*.

140 *Str*. 968. *Rex* and *Gibson*.

141 *Str*. 899. *Seymour Qui tam* and *Day*.

142 1 *Barn*. 316. *Phillips Qui tam* and *Scullard*.

143 *Bunb*. 253. *Robinson Qui tam* and *Lequesne, Trin*. 1 *G*. 2.

144 *Str*. 1238. *Matthison Qui tam* and *Allanson, Mich*. 18 *G*. 2.

145 1 *Jon*. 225. *Salk*. 648, 650. *Ld. Raym*. 514.

146 *Str*. 1106. *Dormer* and *Parkhurst, Hil*. 12 *G*. 2.

147 1 *Barn*. 323. *Brown* and *Petcher, Mich*. 8 *G*. 2.

148 *M. S. Rep. Wright on the Dem. Of Clymer* and *Littler, Mich*. 2 *G*. 3. *in B. R.*

CHAPTER 14

AMENDMENT VIII

BAIL/PUNISHMENT CLAUSES

14.1TEXTS

14.1.1DRAFTS IN FIRST CONGRESS

14.1.1.1Proposal by Madison in House, June 8, 1789

14.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

…

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Congressional Register, June 8, 1789, vol. 1, pp. 427–28.

14.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit:

…

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Daily Advertiser, June 12, 1789, p. 2, col. 1.

14.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

inflicted.

New-York Daily Gazette, June 13, 1789, p. 574, col. 3.

14.1.1.2Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 7 Excessive bail shall not be required, nor excessive fines imposed, nor cruel & unusual punishments be inflicted in any case.

Madison Papers, DLC.

14.1.1.3House Committee of Eleven Report, July 28, 1789

Art. 1, Sec. 9 — Between Par. 2 and 3 insert, …

…

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Broadside Collection, DLC.

14.1.1.4House Consideration, August 17, 1789

14.1.1.4.a [The Committee of the Whole House] then proceeded to the 6th clause of the 4th proposition in these words, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Congressional Register, August 17, 1789, vol. 2, p. 225 ("The question was put on the clause, and it was agreed to by a considerable majority.").

14.1.1.4.b Ninth Amendment — "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("This amendment was adopted.").

14.1.1.4.c Ninth amendment — "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 ("This amendment was adopted.").

amendment was adopted.").

14.1.1.4.d 9th Amendment. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Gazette of the U.S., August 22, 1798, p. 249, col. 3 ("This amendment was adopted.").

14.1.1.5House Consideration, August 18, 1789

Eighth. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

HJ, p. 107 ("read and debated … agreed to by the House, … two-thirds of the members present concurring").[1]

14.1.1.6House Resolution, August 24, 1789

ARTICLE THE *THIRTEENTH*.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

House Pamphlet, RG 46, DNA.

14.1.1.7Senate Consideration, August 25, 1789

14.1.1.7.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States" was read as followeth: …

Article the thirteenth

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Rough SJ, pp. 218–19.

14.1.1.7.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*Article the Thirteenth.*

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Smooth SJ, p. 196.

14.1.1.7.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"*ARTICLE* THE *THIRTEENTH.*

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Printed SJ, p. 105.

14.1.1.8Further Senate Consideration, September 7, 1789

14.1.1.8.a On Motion to adopt the thirteenth article of amendments proposed by the House of Representatives.

Rough SJ, p. 256 ("It passed in the affirmative.").

14.1.1.8.b On motion, To adopt the thirteenth Article of Amendments proposed by the House of Representatives —

Smooth SJ, pp. 228–29 ("It passed in the Affirmative.").

14.1.1.8.c On motion, To adopt the thirteenth Article of Amendments proposed by the House of Representatives —

Printed SJ, p. 121 ("It passed in the Affirmative.").

14.1.1.8.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

Article thirteenth,

Senate MS, 4, RG 46, DNA.

14.1.1.9 Further Senate Consideration, September 9, 1789

14.1.1.9.a On motion to number the remaining articles agreed to by the Senate tenth, eleventh and twelfth instead of the numbers affixed by the Resolve of the House of Representatives.

Rough SJ, p. 277 ("It passed in the affirmative."; motion renumbered thirteenth article as tenth article).

14.1.1.9.b On motion, To number the remaining articles agreed to by the Senate, tenth, eleventh and twelfth, instead of the numbers affixed by the Resolve of the House of Representatives —

Smooth SJ, p. 246 (" It passed in the Affirmative."; motion renumbered thirteenth article as tenth article).

14.1.1.9.c On motion, To number the remaining Articles agreed to by the Senate, tenth, eleventh and twelfth, instead of the numbers affixed by the Resolve of the House of Representatives —

Printed SJ, p. 131 ("It passed in the Affirmative."; motion renumbered thirteenth article as tenth article).

14.1.1.9.d To erase the word "Thirteenth" & insert — Tenth.

Ellsworth MS, p. 4, RG 46, DNA.

14.1.1.10 Senate Resolution, September 9, 1789

ARTICLE THE TENTH.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Senate Pamphlet, RG 46, DNA.

14.1.1.11 Further House Consideration, September 21, 1789

Resolved, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

14.1.1.12 Further Senate Consideration, September 21, 1789

14.1.1.12.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

14.1.1.12.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

14.1.1.13Further Senate Consideration, September 21, 1789

14.1.1.13.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

14.1.1.13.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

14.1.1.14Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a

speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to & ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

14.1.1.15 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

14.1.1.16 Senate Consideration of Conference Committee Report, September 24, 1789

14.1.1.16.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

14.1.1.16.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Printed SJ, p. 145.

14.1.1.17 Further Senate Consideration of Conference Committee Report, September 24, 1789

14.1.1.17.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the

1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

14.1.1.17.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p.148.

14.1.1.18Further Senate Consideration of Conference Committee Report, September 25, 1789

14.1.1.18.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the

House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

14.1.1.18.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

14.1.1.19 Agreed Resolution, September 25, 1789

14.1.1.19.a Article the Tenth.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Smooth SJ, Appendix, p. 294.

14.1.1.19.b ARTICLE the TENTH.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Printed SJ, Appendix, p. 164.

14.1.1.20 Enrolled Resolution, September 28, 1789

Article the tenth … Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Enrolled Resolutions, RG 11, National Archives.

14.1.1.21 Printed Versions

14.1.1.21.a Art. VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Statutes at Large, vol. 1, p. 21.

Statutes at Large, vol. 1, p. 21.

14.1.1.21.b ART. X. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Statutes at Large, vol. 1, p. 98.

14.1.2PROPOSALS FROM THE STATE CONVENTIONS

14.1.2.1New York, July 26, 1788

That excessive Bail ought not to be required; nor excessive Fines imposed; nor Cruel or unusual Punishments inflicted.

State Ratifications, RG 11, DNA.

14.1.2.2North Carolina, August 1, 1788

13th. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, [*sic*]

State Ratifications, RG 11, DNA.

14.1.2.3Pennsylvania Minority, December 12, 1787

4. That excessive bail ought not to be required nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Pennsylvania Packet, December 18, 1787.

14.1.2.4Rhode Island, May 29, 1790

13th. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

State Ratifications, RG 11, DNA.

14.1.2.5Virginia, June 27, 1788

Thirteenth, That excessive Bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

State Ratifications, RG 11, DNA.

14.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

14.1.3.1CONNECTICUT: DECLARATION OF RIGHTS, 1776

[¶ 4] And that no Man's Person shall be restrained, or imprisoned, by any Authority whatsoever, before the Law hath sentenced him thereunto, if he can and will give sufficient Security, Bail, or Mainprize for his Appearance and good Behaviour in the mean Time, unless it be for Capital Crimes, Contempt in open Court, or in such Cases wherein some express Law doth allow of, or order the same.

Connecticut Acts, p. 2.

14.1.3.2Delaware: Declaration of Rights, 1776

Sect. *16*. That excessive bail ought not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

Delaware Laws, vol. 1, p. 81.

14.1.3.3Georgia: Constitution, 1777

LIX. Excessive fines shall not be levied, nor excessive bail demanded.

Georgia Laws, p. 15.

14.1.3.4Maryland: Declaration of Rights, 1776

22. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted by the courts of law.

Maryland Laws, November 3, 1776.

14.1.3.5Massachusetts

14.1.3.5.aBody of Liberties, 1641

[18] No mans person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, If he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capital, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it.

…

[43] No man shall be beaten with above 40 stripes, nor shall any true gentleman, nor any man equall to a gentleman be punished with whipping, unles his crime be very shamefull, and his course of life vitious and profligate.

…

[45] No man shall be forced by Torture to confesse any Crime against himselfe nor any other unlesse it be some Capitall case where he is first fullie convicted by cleare and suffitient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours, or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane.

[46] For bodilie punishments we allow amongst us none that are inhumane Barbarous or cruel.

Massachusetts Colonial Laws, pp. 37, 43.

14.1.3.5.bConstitution, 1780

[Part I, Article] XXVI. No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

Massachusetts Perpetual Laws, p. 7.

14.1.3.6New Hampshire: Bill of Rights, 1783

[Part I, Article] XVIII. All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.

…

[Part I, Article] XXXIII. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

New Hampshire Laws, pp. 25–26, 27.

14.1.3.7New York

14.1.3.7.aAct Declaring … Rights & Priviledges, 1691

That a Freeman shall not be amerced for a small Fault, but after the manner of his Fault, and for a great Fault after the greatness thereof, saving to him his Freehold; and a Husband-man, saving to him his Wainage; and a Merchant, saving to him his Merchandize; and none of these Amercements shall be assessed, but by the Oath of Twelve Honest and Lawful men of the Vicinage. Provided, the Faults and Misdemeanours be not in Contempt of Courts of Judicature. All Tryals shall be by the Verdict of Twelve Men, and as near as may be Peers or Equals, and of the Neighbourhood of the place where the fact shall arise or grow, whether the same be by Indictments, Declaration, Information, or otherwayes, against the Person Offender or Defendant.

…

That in all Cases whatsoever, Bayl by sufficient Sureties shall be allowed and taken, unless for Treason and Fellony, plainly and specially expressed and mentioned in the Warrant of Commitment, and that the Fellony be such as is restrained from Bayl by the Laws of *England*.

New York Acts, pp. 17–18.

14.1.3.7.bBill of Rights, 1787

Seventh, That no Citizens of this State shall be fined or amerced without reasonable Cause, and such Fine or Amerciament shall always be according to the Quantity of his or her Trespass or Offence, and saving to him or her his or her Contentement; *That is to say*, Every Freeholder saving his Freehold, a Merchant saving his Merchandize, and a Mechanic saving the Implements of his Trade.

Eighth, That excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted.

New York Laws, vol. 2, p. 2.

14.1.3.8North Carolina: Declaration of Rights, 1776

Sect. X. That excessive Bail should not be required, nor excessive Fines imposed, nor cruel or unusual punishments inflicted.

North Carolina Laws, p. 275.

14.1.3.9Pennsylvania

14.1.3.9.aLaws Agreed Upon in England, 1682

XI. That all *Prisoners* shall be Baylable by sufficient Sureties, unless for *Capital Offences*, where the Proof is evident, or the Presumption great.

…

XVIII. That all Fines shall be moderate, and saving mens Contenements, Merchandize or Wainage.

Pennsylvania Frame, pp. 8, 9.

14.1.3.9.b Constitution, 1776

CHAPTER II.

…

SECT. 29. Excessive bail shall not be exacted for bailable offences: And all fines shall be moderate.

…

Sect. 38. The penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.

Sect. 39. To deter more effectually from the commission of crimes, by continued visible punishments of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing by hard labour, those who shall be convicted of crimes not capital; wherein the criminals shall be employed for the benefit of the public, or for the reparation of injuries done to private persons: And all persons at proper times shall be admitted to see the prisoners at their labour.

Pennsylvania Acts, McKean, pp. xviii, xix.

14.1.3.9.c Constitution, 1790

ARTICLE IX.

…

Sect. XIII. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

Sect. XIV. 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.

Pennsylvania Acts, Dallas, p. xxxv.

14.1.3.10South Carolina

14.1.3.10.aConstitution, 1778

XL. That the penal Laws, as heretofore used, shall be reformed, and Punishments made, in some Cases, less sanguinary, and, in general, more proportionate to the Crime.

South Carolina Constitution, p. 15.

14.1.3.10.b Constitution, 1790

ARTICLE IX.

…

Section 4. Excessive bail shall not to be required, nor excessive fines

imposed, nor cruel punishments inflicted.

South Carolina Laws, App., p. 41.

14.1.3.11Vermont: Constitution, 1777

CHAPTER II.

…

SECTION XXV.

THE Person of a Debtor, where there is not a strong Presumption of Fraud, shall not be continued in Prison, after delivering up, *bona fide*, all his Estate, real and personal, for the Use of his Creditors, in such manner as shall be hereafter regulated by Law. All Prisoners shall be bailable by sufficient Sureties, unless for capital Offences, when the Proof is evident, or Presumption great.

SECTION XXVI.

EXCESSIVE bail shall not be exacted for bailable Offences: And all Fines shall be moderate.

Vermont Acts, p. 9.

14.1.3.12Virginia: Declaration of Rights, 1776

IX. THAT excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Virginia Acts, p. 33.

14.1.4OTHER TEXTS

14.1.4.1English Bill of Rights, 1689

… That excessive baile ought not to be required nor excessive fines imposed nor cruell and unusuall punishments inflicted.

1 Will. & Mar., sess. 2, c. 2.

14.1.4.2Northwest Territory Ordinance, 1787

Article of the Second. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury: of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of common law; all persons shall be bailable unless for Capital Offences, where the proof shall be evident, or the presumption great; all fines shall be moderate, and no cruel or unusual punishments shall be inflicted; no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it Necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements bona fide and without fraud, previously formed.

Continental Congress Papers, DNA.

14.1.4.3Richard Henry Lee to Edmund Randolph, Proposed Amendments, October 16, 1787

… That excessive Bail, excessive fines, or cruel and unusual punishments, should not be demanded or inflicted. …

Virginia Gazette, December 22, 1787.

14.2DISCUSSION OF DRAFTS AND PROPOSALS

14.2.1THE FIRST CONGRESS

14.2.1.1June 8, 17892

14.2.1.2August 17, 1789

14.2.1.2.a The house went into a committee of the whole, on the subject of amendments.

…

[T]he committee … then proceeded to the 6th clause of the 4th proposition in these words, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Mr. Smith (of S.C.) objected to the words "nor cruel and unusual punishments," the import of them being too indefinite.

Mr. Livermore.

The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislature to adopt it, but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

The question was put on the clause, and it was agreed to by a considerable majority.

Congressional Register, August 17, 1789, vol. 2, pp. 219, 225–26.

14.2.1.2.b Ninth Amendment — "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("This amendment was adopted.").

14.2.1.2.c The house resolved itself into a committee of the whole on the subject of amendments to the constitution.

…

Ninth amendment — "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

New-York Daily Gazette, August 19, 1789, p. 803, col. 4 ("This

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 ("This amendment was adopted.").

14.2.1.2.d In Committee of the whole House.

…

9th Amendment. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Mr. Livermore said, the clause appears to express much humanity, as such, he liked it; but as it appeared to have no meaning, he did not like it: As to bail, the term is indefinite, and must be so from the nature of things; and so with respect to fines; and as to punishments, taking away life is sometimes necessary, but because it may be thought cruel, will you therefore never hang any body — the truth is, matters of this kind must be left to the discretion of those who have the administration of the laws.

This amendment was adopted.

Gazette of the U.S., August 22, 1789, p. 249, col. 3.

14.2.2STATE CONVENTIONS

14.2.2.1Massachusetts, January 30, 1788

Mr. HOLMES. …

…

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.

Elliot, vol. 2, p. 111.

14.2.2.2Virginia

14.2.2.2.aJune 14, 1788

Mr. HENRY…

> … Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence — petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights? — "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. …
>
> In this business of legislation, your members of Congress will lose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? — That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany — of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. …
>
> …

Mr. GEORGE NICHOLAS. …

> … But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. … If we had no security against torture but our declaration of rights, we might be tortured tomorrow; for it has been repeatedly infringed and disregarded. A bill of rights is only an acknowledgement of the prëexisting claim to rights in the people. …
>
> Mr. GEORGE MASON replied that the worthy gentleman was mistaken

in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel or unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

Mr. NICHOLAS acknowledged the bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity.

Elliot, vol. 3, pp. 447–48, 451–52.

14.2.2.2.bJune 15, 1788

Gov. RANDOLPH. …

As to the exclusion of excessive bail and fines, and cruel and unusual punishments, this would follow of itself, without a bill of rights. Observations have been made about watchfulness over those in power which deserve our attention. There must be a combination; we must presume corruption in the House of Representatives, Senate, and President, before we can suppose that excessive fines can be imposed or cruel punishments inflicted. Their number is the highest security. Numbers are the highest security in our own Constitution, which has attracted so many eulogiums from the gentlemen. Here we have launched into a sea of suspicions. How shall we check power? By their numbers. Before these cruel punishments can be inflicted, laws must be passed, and judges must judge contrary to justice. This would excite universal discontent and detestation of the members of the government. They might involve their friends in the calamities resulting from it, and could be removed from office. I never desire a greater security than this, which I believe to be absolutely sufficient.

Elliot, vol. 3, pp. 467–68.

14.2.3PHILADELPHIA CONVENTION

None.

14.2.4NEWSPAPERS AND PAMPHLETS

14.2.4.1GEORGE MASON, OBJECTIONS TO THE CONSTITUTION, OCTOBER 7, 1787

Under their own Construction of the general Clause at the End of the enumerated Powers, the Congress may grant Monopolies in Trade & Commerce, constitute new Crimes, inflict unusual & severe Punishments, and extend their Power as far as they shall think proper; so that the State Legislatures have no Security for the Powers now presumed to remain to them; or the People for their Rights. —

Kaminski & Saladino, vol. 13, p. 350.

14.2.4.2Centinel, No. 2, October 24, 1787

The new plan, it is true, does propose to secure the people of the benefit of personal liberty by the *habeas corpus;* and trial by jury for all crimes, except in case of impeachment; but there is no declaration … that the requiring of excessive bail, imposing of excessive fines and cruel and unusual punishments be forbidden. …

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 13, p. 466.

14.2.4.3Brutus, No. 2, November 1, 1787

For the security of liberty it has been declared, "that excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted — That all warrants, without oath or affirmation, to search suspected places, or seize any person, his papers or property, are grievous and oppressive."

These provisions are as necessary under the general government as under

that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, granting search warrants, and seizing persons, papers, or property, in certain cases, as the other.

New York Journal, Kaminski & Saladino, vol. 13, p. 527.

14.2.4.4Philadelphiensis, No. 9, November 7, 1787

To such lengths have these bold conspirators carried their scheme of despotism, that your most sacred rights and privileges are surrendered at discretion. When government thinks proper, under the pretense of writing a libel, &c. it may imprison, inflict the most cruel and unusual punishment, seize property, carry on prosecutions, &c. and the unfortunate citizen has no *magna charta*, no *bill of rights*, to protect him; nay, the prosecution may be carried on in such a manner that even a *jury* will not be allowed him. Where is that *base slave* who would not appeal to the *ultima ratio*, before he submits to this government?

[Philadelphia] Independent Gazetteer, Storing, vol. 3, p. 129.

14.2.4.5The Impartial Examiner, No. 1, February 27, and March 5, 1788

… For instance, if Congress should pass a law that persons charged with capital crimes shall not have a *right to demand the cause or nature of the accusation*, shall not be *confronted with the accusers or witnesses, or call for evidence in their own favor;* and a question should arise respecting their authority therein, — can it be said that they have exceeded the limits of their jurisdiction, when *that* has no limits; when no provision has been made for such a right? — When no responsibility on the part of Congress has been required by the constitution? The same observation may be made on any arbitrary or capricious imprisonments *contrary to the law of the land*. The same may be made, if *excessive bail should be required; if excessive fines should be imposed;* if *cruel and unusual punishments should be inflicted;* if *the liberty of the press should be restrained;* in a word — if laws should be made totally derogatory to the whole catalogue of rights, which are now secured under your present form of government.

Virginia Independent Chronicle, Storing, vol. 5, p. 185.

14.2.4.6Marcus, No. 4, March 12, 1788

As to the constituting of new crimes, and inflicting unusual and severe punishment, certainly the cases enumerated wherein the Congress are empowered either to define offences, or prescribe punishments, are such as are proper for the exercise of such authority in the general Legislature of the Union. They only relate to “counterfeiting the securities and current coin of the United States; to piracies and felonies committed on the high seas, and offences against the law of nations, and to treason against the United States.” These are offences immediately affecting the security, the honor or the interest of the United States at large, and of course must come within the sphere of the Legislative authority which is entrusted with their protection. Beyond these authorities Congress can exercise no other power of this kind, except in the enacting of penalties, to enforce their acts of Legislation in the cases where express authority is delegated to them, and if they could not enforce such acts by the enacting of penalties those powers would be altogether useless, since a legislative regulation without some sanction would be an absurd thing indeed. The Congress having, for these reasons, a just right to authority in the above particulars, the question is, whether it is practicable and proper to prescribe the limits to its exercise, for fear that they should inflict punishments unusual and severe? It may be observed, in the first place, that a declaration against “cruel and unusual punishments,” formed part of an article in the Bill of Rights at the Revolution in England, in 1688. The prerogative of the Crown having been grossly abused in some preceding reigns, it was thought proper to notice every grievance they had endured, and those declarations went to an abuse of power in the crown only, but were never intended to limit the authority of Parliament. Many of these articles of the Bill of Rights in England, without a due attention to the difference of the cases, were eagerly adopted when our Constitutions were formed, the minds of men then being so warmed with their exertions in the cause of liberty, as to lean too much perhaps towards a jealousy of power to repose a proper confidence in their own government. From these articles in the State Constitutions, many things were attempted to be transplanted into our new Constitution, which would either have been nugatory or improper: This is one of them. The

expressions “unusual and severe,” or “cruel and unusual,” surely would have been too vague to have been of any consequence, since they admit of no clear and precise signification. If to guard against punishments being too severe, the Convention had enumerated a vast variety of cruel punishments, and prohibited the use of any of them, let the number have been ever so great, an inexhaustible fund must have been unmentioned, and if our government had been disposed to be cruel, to their invention would only have been put to a little more trouble. If to avoid this difficulty, they had determined, not negatively, what punishments should not be exercised, but positively what punishments should, this must have led them into a labyrinth of detail which in the original constitution of a government would have appeared perfectly ridiculous, and not left a room for such changes according to circumstances, as must be in the power of every Legislature that is rationally formed. Thus, when we enter into particulars, we must be convinced that the proposition of such a restriction would have led to nothing useful, or to something dangerous, and therefore that its omission is not chargeable as a fault in the new Constitution. Let us also remember, that as those who are to make those laws must themselves be subject to them, their own interest and feelings will dictate to them not to make them unnecessarily severe; and that in the case of treason, which usually in every country exposes men most to the avarice and rapacity of government, care is taken that the innocent family of the offender shall not suffer for the treason of their relation. This is the crime with respect to which a jealousy is of the most importance, and accordingly it is defined with great plainness and accuracy, and the temptations to abusive prosecutions guarded against as much as possible. …

Norfolk and Portsmouth Journal, Kaminski & Saladino, vol. 16, pp. 381–82.

14.2.5LETTERS AND DIARIES

None.

14.3DISCUSSION OF RIGHTS

14.3.1TREATISES

14.3.1.1Bond, 1707

Of Bailment and Mainprise.

BAilment, Mainprise or Replevin, is the saving, or the delivery of a person out of Prison before he hath satisfied the Law, *sc*. by finding Sureties, to answer and be justified by the Law, 22 *H*. 6. *Bro. Surety* 8. and *Mainprise*. 89.

If Mainpernors doubt that their Prisoner will fly, they may bring him before a Justice, who shall commit him and discharge them: So it seems of a person bailed, *Dalt. c*. 125.

For want of taking sufficient Bail, the Justices are fineable: If it be tendred and refused, they shall be grievously amerced in case when it is grantable, 3 *Ed*. 1. *c*. 15. 23 *H* 6. *c*. 10. On the other side where a person is not bailable, if he be let to Mainprise, it is a negligent Escape, and fineable as before, 25 *Ed*. 3. *f*. 39. and see *Stamf*. 33. and 79.

If any Sheriff, Constable, *&c*. shall bail any person in their Custody not bailable, and being convict thereof, he loses his Fees and Office for ever; but if an UnderSheriff, *&c*. shall do so without his Masters knowledge, he shall be imprisoned for three years, and fined at the King's pleasure, 3 *Ed*. 1. *c*. 15. *Doct. &. Stud*. 135.

Note, Officers which let to Bail contrary to 3 *Ed*. 1. *cap*. 15. Shall be punished by the Justice of Gaol delivery either according to the Statute or at Common Law.

Justices and Coroners within *London* and *Middlesex*, and Towns Corporate, have power to Bail Felons, *&c*. as they have formerly accustomed, 1 & 2 *Ph. & Mar. c*. 13.

It is held by the Authority of 23 *H*. 6. *f*. 1. That if a Sheriff, *&c*. shall Bail a person not bailable, the Recognizance is void.[1]

No person arrested for manslaughter, Felony or Suspicion thereof, shall be let to Bail by any Justice but in open Session, or by two of them at the least, *Quorum unus*, and both must be present at the time of Bailment, 1 & 2 *Ph. & Mar. cap*. 13.

The Justice which commits a Prisoner ought to shew in the *Mittimus* the Cause thereof, that it may appear whether Bailable or not.

Where one is Bailable by Law, Action lies against the Justice of Peace that committed him, *Styles Rep*. 182.

A Felon examined and committed by two Justices may be Bailed by one alone, *Keble p*. 188. §. 33.

One found guilty of Manslaughter by the Coroners Inquest denied to be Bailed in the *Kings Bench*, 1 *Rol. Rep*. 268.

One *Herbert* was Bailed for Murther, *Latch. fo*. 12.

One Outlawed of Murther bailed, *Stiles* [*sic*] 93.

Two suspected of Murther bailed, *Styles* 96.

One for suspicion of Treason bailed, 2 *Sid*. 179.

In the four Cases following a person is not Bailable at Common Law; See *Westm*. 1. *cap*. 15. *Bro. Mainprise* 47. *F. N. B.* 66 *E*.[2]

1. A person taken for the death of a man, *sc*. Murderer, or any other Homicide. See now Stat. 1 & 2 *Ph. & Mar. cap*. 13. which admits Bail for any Homicide except Murther.

> But the Justices cannot Bail a Manslayer if he confess the Offence to be taken in the manner, *Dalt. c*. 125.

2. No person taken by the King's Commandment, by his own Mouth, or by his Privy Council, is Bailable, *Stamf*. 72. *Bro. Mainpris*. 37, 47.

3. Person taken by the Commandment of the King's Justices, and this must be meant of their absolute Commandment for Misdemeanors in their presence, *Stamf*. 73.

4. Trespassers in the Forest were not Bailable by the Common Law, but that was remedied by 1 *Ed* 3. *cap*. 8. and 7 *R*. 2. *cap*. 4. And now by the Statute of 1 & 2 *Ph. & Mar. cap*. 13. it is provided, That no Justice of the Peace shall let to Bail contrary to the Statute of *Westm*. 1. *cap*. 15. by which Statute these persons following are not Bailable.

> 1. One that hath abjured the Realm. 2. An Approver. 3. One appealed by the Approvers, so long as the Approver lives, unless he be of good Fame, or that the Approver wave his Appeal or be vanquished, *Stamf*. 74. 25 *Ed*. 3. *f*. 42. 4. He that is taken for the Burning of an House. 5. One taken by an *Excommunicato Capiende*. 6. One taken with the manner. 7. A Thief openly defamed and known. 8. All persons outlawed, unless in some Cases such may be Bailed by the Court, *Stamf*. 74. 9. One that hath broke Prison. 10. Imprisoned for Treason touching the King himself. 11. One taken for falsifying the Kings moneys. 12. He which Counterfeits the Kings Seal, *Bro. Mainprise* 59. 13. Such

as are taken for a great and manifest Offence, as one indicted and imprisoned for a Riot, *&c*.

By the aforesaid Statute persons are Bailable in the six ensuing Cases.[3]

1. One taken or indicted for a light suspicion of Felony, *Lamb*. 335. *F. N. B.* 249, 250, 251. *F*. unless he be of evil Fame, or that there be some strong presumption against him, *Stamf.* 74.

2. Taken or indicted for Petty Larceny, if not guilty of some Larceny before, *Fitz. Mainprise* 2. *Fitz*. 250.

3. Such as be indicted for Larceny before Sheriff, Coroner, *&c*. or in some base Court; if likewise of good Fame, *Stamf*. 47. *Fitz* 247. and 250. *Fitz. Mainprise* 97.

4. One indicted before the Coroner for killing a Man *Se defendendo* was Bailed by the Justices of Gaol-delivery. A Murderer indicted at the Kings Suit and acquitted within the year and day shall be either committed to Prison or Bailed until the year and day be passed, that the Wife or next Heir may bring their Appeal within that time, 3 *H*. 7. *cap*. 1. and *Fitz*. 251 *G*.

One Convict of Felony, and remaining in Prison, obtains the Kings Pardon, the Justices of the Gaol-delivery may Bail him, if he may come in with his Pardon at the next Gaol-delivery, *Bro. Mainprise* 94.

5. Such as are charged with the Receipt of Thieves, Felons, or of Command, or Force or Aid in Felony done, be Bailable, *Stamf.* 71. *Bro. Mainprise* 11. and 39. 58.

It seems that Abettors, Consentors, Procurers, and all Accessories to Felony, Bailable, are within the Equity of this Statute, as well in the Case of Murder as otherwise. But after the Principal is attainted they cannot be Bailed, until after they have come in and pleaded, for when he makes default it is in nature of a *Fugam fecit*, and a great cause of Suspicion, which when he appears is taken away, and so he becomes Bailable, *Stamf.* 71. *Bro. Mainprise* 6, 9, 22, 54, 64, 97.

If *I*. be Accessory to two, and but one Principal is Attaint, *I*. shall not be Bailed.

If the Principal in Felony die in Prison or be attainted of another Felony, the Accessory is Bailable, *Fitz. Coron.* 378. *Bro. Mainprise* 91.

6. Persons indicted of any Trespass not concerning Life or Member are Bailable. *Westm*. 1. *c*. 15.

A person imprisoned by a Process from the Sessions is Bailable by two Justices (1 *Quorum*) out of Sessions, *Lamb*. 337.

Justices of Peace can Bail no Prisoner, but such as is committed for Causes which may be heard and determined before themselves.

See the excellent Statute made 13 *Car*. 2. *cap*. 2. in favour of the Liberty of the Subject, appointing how, and in what Cases, when and by whom Prisoners shall be Bailed or discharged; but this concerns not the Justice of Peace.

Alehouses without License shall be committed without Bail; so if they have been suppressed, *Vide Tit*. Alehouses.[4]

Such as shall suffer Townsmen to continue Tipling in their Houses, or such as shall sell less than is appointed by the Stat. 1 *Jac. cap*. 9. 21 *Jac. cap*. 7.

Persons convict upon the Statute of *Northampton* (2 *Ed*. 3. *c*. 3.) such as shall procure another to be Arrested in the Name of a third Person not knowing thereof, 8 *Eliz. cap*. 2.

Petty Jury in *London* attaint, or receiving moneys, *&c*. 11 *H*. 7. *cap*. 21.

Mother or reputed Father of a Bastard Child not performing the Justices Order after notice, See *Tit*. Bastard.

Surveyors, *&c*. for repairing of Bridges, if they resuse to account, 21 *H*. 8. *cap*. 5.

Persons conspiring to indict another of Felony, *Fitz. Mainp*. 7.

Constable, *&c*. not levying the Forfeitures for abuses an Alehouse, *&c*. 1 *Jac. c*. 9.

Constables neglecting to execute the Justices Warrant concerning Alehouses, *&c*. 3 *Car*. Constables neglecting to whip Trespassers in Corn, Wood or Orchard, *&c*. 13 *H*. 6. *cap*. 10.

Breakers of the Kings Prison are not Bailable, by the *Stat. Westm*. 1. made 3 *E*. 1. *cap*. 15.

Speakers of false News, which may cause Discord between the King and his People; or of false News or Lies of the Barons and Great Men of the Realm, shall be Imprisoned till they produce the first Author, *Westm*. 1. (3 *Ed*. 1) *cap*. 34. 2 *R*. 2. *cap*. 5.

Refusers to be Overseers of Cloth, *Vide Tit*. Cloth.

Such as are convicted of making deceitful Cloth. *Ibid*.

Persons convicted for unlawful hunting of Deer, *&c*. 5 *Eliz. cap*. 21.

Dyers using Logwood, and thereof convict, 39 *Eliz. cap*. 11.

Destroyers of Ponds, Pools, *&c*. where Fish are kept, or unlawful Fishers in the same. Gagers, Packers, Searchers of Fish, 11 *H*. 7. *cap*. 23.

Forestallers, Regrators, Ingrossers, 5 *Ed*. 6. *cap*. 14.

Forgers of any Deed, the Assenters thereunto, and Publisher thereof, knowing the same, 5 *Eliz. cap*. 14.

In fraudulent Conveyances the parties thereunto, the Justifiers thereof, and such as put the same in use, or assign over such Lands, *&c*. knowing the same, 13 *Eliz. cap*. 5. 14 *Eliz. cap*. 11. 27 *Eliz. cap*. 4.

Unlawful Games, the maintainers of Houses for such; The Players in the same or elsewhere, 33 *H*. 8. *cap*. 9. *Vid. Tit*. Games. Such as shoot in, keep, carry or use any Guns, *&c*. 33 *H*. 8. *cap*. 6.

All persons which shall shoot at any Hare with a Gun, *&c*. or trace in the Snow, or destroy Hares with any Engin, 1 *Jac*. 27.

Hatters which shall take above two Apprentices, or for less than seven years, 8 *Eliz. cap*. 11.

Takers of Hawks or their Eggs out of another Man's Grounds, 5 *Eliz. cap*. 21.

Hawkers between the first of *July*, and the 31st of *August*, 7 *Jac. cap*. 11.

Bailiffs and High Constables not paying the Forfeitures concerning Highways collected by them, 2 *Ph. & Mar. cap*. 8.

Hostlers or Innkeepers which shall make any Horsebread or not sell the same, *&c*. for reasonable Gain, contrary to the Statute, 21 *Jac. c*. 21.

Hunters, *&c*. for any Deer or Conies contrary to the Statute, 5 *Eliz. c*. 21. 3 *Jac. c*. 13. 7 *Jac. c*. 13.

Labourers and Artificers departing from their Work before it be finished, 5 *Eliz. c* 4.

Servants departing before their Term be ended without leave of a Justice, or at the end of the Term without a Quarters warning. *Ibid*.

Persons compellable to serve, refusing so to do, for Wages rated by the Justice, or which have promised to serve, and not perform. *Ibid*.

Persons refusing to be bound Apprentice according to the Statute. *Ibid*.

Single Women between the years of twelve, and under forty years, which shall refuse to go to Service. *Ibid*.

Such Masters as shall give a Servant or Labourer, which shall take Wages, *&c*. contrary to the Rates assessed by Proclamation. *Ibid*.

Masters hiring Servants for less than one year, or which have departed out of Service without Testimonial, *Ibid*.

Masters taking Apprentices contrary to this Statute, *Ibid*.

The Defendant in Appeal of Maim where the Fact seems to be heinous, 6 *H.* 7. *f.* 1.

Persons disobeying the restraint of Malting, 39 *Eliz. cap*. 16.

Such persons as shall shoot at or kill, *&c*. with any Gun or Bow, any Partridges, *&c*. or with Setting Dogs or Engins, or shall destroy their Nests or Eggs, or keeping any Settings Dogs or Net, *&c*. except they have an Estate, *&c*. 1 *Jac. c*. 27.

Persons convict on 11 *H*. 7. *c*. 17. for taking the Eggs of any Swan out of the Nest.

Persons perjured in Depositions in a Court of Record, or a Court Baron; so are the Procurers, 14 *Eliz. cap*. 11.

Persons committed by the President of the College of Physicians, 1 *Mar. c*. 9.

Refusers to pay Rates for the Relief of person infected with the Plague, 1 *Jac. c*. 31.

Refusers to pay their Rates to the Poor, setting them on work, or binding out of Apprentices, 43 *Eliz. c*. 2.

Overseers refusing to make their Accounts, or to pay Arrearages, or be negligent in their Office, *Ibid*.

The Grandfather or Grandmother, Parents, Children refusing to relieve one another, *Ibid*.

Refusers to pay the Rates to the Relief of Prisoners in the *Kings-Bench* or *Marshalsey*, *Ibid*.

Disturbers of Preachers, *&c*. their Aiders and Procurers, any that rescues such Offenders, or hinders the arresting of them, 1 *Mar. c*. 3. *Sess*. 2.

Such as divulge vain Prophesies, to make disturbance, 5 *Eliz. c*. 5.

Person suspected to be Jesuits, Seminaries, and refusing to answer, 35 *Eliz. c*. 2. 2 *Jac. c*. 4.

Woman Recusant convict, and not conforming her self, 7 *Jac. c*. 6.

Feme Covert refusing at the Assizes or Quarter-Sessions to take the Oath of Allegiance, 8 *Jac. c*. 4.

A Master of a Ship permitting any Child to pass over the Sea without Licence, 1 *Jac. c*. 4.

Recusants refusing to declare what Armour, *&c*. or to deliver the same, 3 *Jac. c*. 5.

Recusants which impugne the King’s Authority Ecclesiastical, or perswading others thereto, or meet at Conventicles, or perswade others so

to do, 35 *Eliz. c.* 1.

Persons absenting from Church, and having nothing to be distrained, 3 *Jac. c.* 4.

Person convict of *Redisseisin, Merton c.* 3.

Schoolmasters not allowed by the Ordinary, and persons keeping of a Schoolmaster absenting from Church, 23 *Eliz c.* 1.

Sheriffs not electing Knights of Parliament in full County, between the Hours of Eight and Eleven in the Forenoon, 8 *H.* 6. *c.* 11. 23 *H.* 6. *c.* 15.

Sheriffs making Return contrary to the said Statute, *Ibid.*

Sheriffs, *&c.* making any Warrant for arresting, *&c.* of any person to appear in any Court not having the Original Writ or Process, 43 *Eliz. c.* 6.

Soldiers purloining their Horses or Harness, 2 *Ed.* 6. *cap.* 2.

Refusers to pay their Rates to the Stock of the Shire, and having nothing to be distrained, 43 *Eliz. c.* 2.

Defendant in Suit for Tythe, which disobey the Sentence, 27 *H.* 8. *c.* 20. 32 *H.* 8. *c.* 7.

Such as Counterfeit the Marks of Vessels of Wax or Honey, 23 *Eliz. c.* 8.

Conjurers, *&c.* which shall undertake to discover any Treasure lost or stolen, which provoke any person to love, or shall hurt any Cattle or Ground, 1 *Jac.* c. 21. 4 *Ph. & Mar. c.* 8.

Such as shall take Women unmarried and under the Age of Sixteen Years out of the Possession of their Parents, and against their Will; two years Imprisonment, &c. 4 & 5 *Ph. & Mar. c.* 8.

At Common Law, the Sheriff and Constables, as Conservators of the Peace, might have bailed one suspected of Felony, this Power is taken away and given to the Justice by the Statute following. Every Justice might Bail such Persons at his discretion, by the Statute, 1 *R.* 3. *cap.* 3. which for the abuse of it was altered by 3 *H.* 7. *cap.* 3. and there by two Justices, one being of the *Quorum,* were enabled to bail Person Mainpernable to the next Sessions or Gaol-delivery; afterwards by the Statute 1 & 2 *Ph. & Mar. cap.*13. it was provided that it be for Manslaughter or Felony, or suspition of either, then two Justices must be present together, at the time of the Bailment, which they must certifie to the next Gaol-delivery; if they do not, to be fined there; but Criminals for Offences under Felony, one single Justice may bail.

The Bail in Murther, Felony, &c. may keep the Murtherer, Felon, &c. as a Prisoner till the day of Appearance; For the Bail is *Corpus pro corpore,*

and the Bail must render themselves if the Murtherer, Felon, &c. escape, *Bulstr*. 70. *Hetly* 157.

If an Indictment be removed by *Certiorari*, and no Bail put in above, the Court below may proceed without a *Procedendo*, *Styl*. 321.

If Proceedings be removed by *Certiorari*, and after sent back by a *Procedendo*, yet the Bail is for ever discharged, *Co. Bail and Mainprise fo*. 26.

Vid Tit. Cerciorari [sic].

Bond Justice of the Peace, pp. 46–53.

14.3.1.2Bacon, 1736

14.3.1.2.aBail in Criminal Causes

Bail in Criminal Causes.

BAIL in Criminal Causes is regularly to be allowed in all such Cases wherein it seems doubtful, whether the Person accused be guilty of the Offence or not; in which Case, according to another General Rule, it may be allowed and taken by that Person who has Cognizance of the Crime, and therefore being Judge of the Offence, may, if he thinks fit, Bail the Offender.[5]

(A) In what Cases it is grantable by a Sheriff.

(B) Where by a Justice of the Peace.

(C) Where by Justices of Goal-Delivery.

(D) Where by the Court of King's Bench.

(E) Where by the other Courts of Westminster.

(F) What shall be said to be sufficient Bail.

(G) The Offence of taking insufficient Bail.

(H) The Offence of granting it where it ought to be denied.

(I) The Offence of denying, delaying or obstructing it where it ought to be granted.

(K) In what form it is to be taken.

(L) What shall forfeit the Recognizance.

(A) IN WHAT CASES IT IS GRANTABLE BY A SHERIFF.

BY the Common Law, according to some Opinions, the Sheriff without any Writ, might *ex Officio* as (a) principal Conservator of the Peace, Bail any Person arrested on Suspicion of Felony; and it is certain, that by the Common Law he (b) might Bail any Person who was indicted before him at his Torn for Felony, or any other Crime that is bailable.[6]

Also Bail is grantable by a Sheriff by Virtue of the following Writs 1. By that of *Odio & Atia*, by which a Person committed for the Death of a Man, might on an Inquest taken by the Sheriff, if he were found to have done the Fact by Misadventure or *se Defendendo*, be mainprized by 12 Men, upon the Writ *de Ponendo in Ballium*; but this Writ seems obsolete at this Day.[7] 2dly, By Writ of Mainprize, which of late has been disused, but seems still in Force, and may be brought by Persons Bailable, as those who are imprisoned for a slight Suspicion of Felony, or indicted of Larceny, before the Steward of a Leet, or of a Trespass before Justices of the Peace, *&c*.[8] 3dly, That of *Homine replegiando*, whereon if he return that the Plaintiff is esloigned, he may by *Capias* of *Withernam* imprison the Defendant, whether he be a Peer or Commoner, till the Plaintiff shall be replevied.[9]

By *Westm*. 1. *cap*. 15. it is enacted as followeth; “For as much as (c) Sheriffs and others, who 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 one Party and grieve the other; and for as much as before this Time it was not determined which Persons were replevisable and which not, but only those that were taken for the (d) Death of a Man, or by (e) Commandment of the King, or of the (f) Justices, or for the (g) Forest: It is provided, and by the King commanded, That such Prisoners as before were (*h*) outlawed, and they which have abjured the Realm, (a) Provers, and such as be taken with the (b) Manner, and those which have broken the (c) King’s Prison, Thieves (d) openly defamed and known, and such as be appealed by Provers, so long as the Provers be living (if they be not of good Name) and (e) such as be taken for House-burning feloniously done, or for false Money, or for counterfeiting the King’s Seal, or Persons (f) excommunicate, taken at the Request of the Bishop, or for (g) manifest Offences, or for Treason touching the King himself, shall be in no wife replevisable by the common Writ, nor without Writ, but (h) such as be indicted of Larceny by Inquests taken before Sheriffs or Bailiffs by their Office, or of light Suspicion, or for Petit Larceny, that amounteth not above the Value of Twelve Pence, if they were not accused of some other Larceny

aforetime, or accused of (i) Receipt of Thieves or Felons, or of Commandment, or Force, or of Aid in Felony done, or accused of some other Trespass, for which one ought not to lose Life or Member, and a Man approved by a Prover after the Death of the Prover (if he be no common Thief nor defamed) shall be henceforth let out by sufficient Surety, whereof the Sheriff will be answerable, and that without giving ought of his Goods.[10]

(B) WHERE BY A JUSTICE OF THE PEACE.

IT seems clear, that where-ever Justices of the Peace have Power to hear and determine any Offence which is bailable within the Statute *Westm*. 1. any one of such Justices seems consequently to have Power to Bail any Person indicted at the Sessions for such Offence, because every such Justice is a Judge of the Court which is to determine it.[11]

Also every Justice of the Peace has a Discretionary Power of admitting Persons to Bail who have given a dangerous Wound.[12]

But the Power of Justices of admitting to Bail, is chiefly regulated by Acts of Parliament, to which Purpose it is recited by 1 *R*. 3. *cap*. 3. “That divers Persons had been daily arrested and imprisoned for Suspicion of Felony, sometime of Malice, and sometime of a light Suspicion, and so kept in Prison without Bail or Mainprize, to their great Vexation and Trouble; and thereupon it is enacted, That every Justice of the Peace in every Shire, City or Town, may by his or their Discretion, let such Prisoners and Persons so arrested to Bail or Mainprize, in like Form as though the same Prisoners or Persons were indicted thereof of Record before the same Justices at their Sessions.”

But this Statute, so far as it gives such Power to a single Justice, is repealed by 3 *H*. 7. *cap*. 3. which enacteth, “That Justices of the Peace, or two of them at the least, whereof one to be of the *Quorum*, have Power to Bail any Person Mainpernable by Law, to their next General Sessions, or to the next General Gaol-Delivery, as well within Franchise as without; and that the same Justices, or one of them, shall certify the same to such Sessions or Gaol-Delivery, on Pain of 10 *l*.”

But these Statutes having been often abused by Justices of the Peace bailing Persons in the Name of two Justices, where one only was present, and for Offences not bailable;

It is enacted by 1 & 2 *Ph. & Mar. cap*. 13. “That no Justice shall Bail any Person for Offences declared to be irreplevisable by *Westm*. 1. and that no

Person arrested for Manslaughter or Felony, or Suspicion thereof, shall be let to Bail or Mainprize by any Justices of the Peace, if it be not in open Sessions, except it be by two Justices at the least, and one to be of the *Quorum*, and the same Justices to be present together at the Time; which Bailment or Mainprize they shall certify in Writing, subscribed or signed by them at the next General Gaol-Delivery; and such Justices before such Bailment for Felony, shall take the Examination of the Prisoner, and the Information of them that bring him, of the Fact and Circumstances thereof, and shall put in Writing so much thereof as shall be material, before they make the Bailment, and shall certify such Examination and Bailment to the next General Gaol-Delivery, and shall have Authority to bind all such by Recognizance or Obligation, as do declare any Thing material to prove the said Offences, to appear at the next General Gaol-Delivery, and to give Evidence, *&c*. and shall certify the said Evidence and Bonds, *&c*. before the Time of the Trial; and if any Justice of *Quorum* shall offend against this Act, he shall be fined in Discretion by the Justices of Gaol-Delivery, or Proof by Examination before them, *&c. But it is Provided*, That Justices in *Middlesex*, and in Cities, Boroughs, and Towns Corporate, shall have Authority to Bail Prisoners in such Manner as was before accustomed, and also shall take Examinations and Bonds as aforesaid, upon every Bailment, and certify the Bailment-Bond and Examination at the next General Gaol-Delivery."

The Authority given to one Justice of the Peace by 1 *R*. 3. to admit Persons to Bail for Felony, being repealed by 3 *H*. 7. and 1 *&* 2 *Ph. & Ma*. one Justice of the Peace cannot admit Persons to Bail, unless it be for an Offence directly tending to the Breach of the Peace, the Restraint whereof is the chief End of his Office, or for an Offence by Statute put under the Conuzance of one Justice, or for an Offence indictable at the Sessions.[13]

But though the Statute of *Ph. & Ma*. has prescribed the Statute of *Westm*. 1. as a Pattern for Justices to follow in relation to Bail, and it therefore follows, that a Person under an actual Arrest for any Crime, declared to be irreplevisable by that Act, cannot be bailed by any Justice; yet if a Person at large be only accused of any such Crime on a slight Suspicion, before a Justice of the Peace, it seems that the Justice ought not to commit him, but ought to take Surety from him to appear before a proper Court.[14]

Also the Statute of 1 *&* 2 *Ph. & M*. expresly mentioning the Bailing of Persons for Manslaughter, as well as for other Felonies, it is clear, that Justices of the Peace, may by Force thereof safely Bail any Person

imprisoned on a slight Suspicion of a Fact, appearing to be no higher an Offence than Manslaughter; and much more if it appear to amount to no more than Homicide by Misadventure, or in Self-defence; but the Justices ought to be cautious the Offence does not amount to Murder; also that there be no violent Presumptions that the Party did the Fact; for if any such appear, the Party ought not to be Bailed, though the Offence amount to no more than Homicide by Misadventure or Self-defence.[15]

(C) WHERE BY JUSTICES OF GAOL-DELIVERY.

JUstices of Gaol-Delivery not being within the Restraint of the Statute *Westm*. 1. may bail Persons convicted before them of Homicide by Misadventure, or Self-defence, the better to enable them to Purchase their Pardon.[16]

Also it seems that in Discretion they may Bail a Person convicted before them of Manslaughter, upon Special Circumstances; as if the Evidence against him were flight, or if he had purchased his Pardon.[17]

Also if an Appellee plead an Excommunication in Disability of the Plaintiff, it seems they may bail him till the Plaintiff shall be absolved; for otherwise the Appellee might lie in Prison for ever, without having an Opportunity of coming to his Trial.[18]

And where such Justices have Power to admit Persons to Bail, it seems that they may do it after their Sessions is over, as well as during their Sessions.[19]

(D) WHERE BY THE COURT OF KING'S BENCH.

THIS Court by the Plenitude of its Power, may in Discretion admit Persons to Bail, though committed by other Courts for Crimes not bailable by those Courts, on Consideration of the Nature and Circumstances of the Case.[20]

But here it must be observed, that with respect to the Nature of Offence, although this Court is not tied down by the Rules prescribed by the Statute of *Westm*. 1. yet it will in Discretion pay a due Regard to the Rules prescribed by it, and not admit a Person to Bail who is expresly declared to be irreplevisable, without some particular Circumstances in his Favour.[21]

And therefore if a Person be attainted of Felony, or convicted thereof by Verdict General or Special, or notoriously guilty of Treason or Manslaughter, *&c*. by his own Confession or otherwise, he is not to be admitted to Bail without some special Motive to induce the Court to grant it.[22]

As where a Person taken by a *Capias Utlagatum* on an Appeal of Felony,

by the Name of *J. S. Gentleman*, pleads that his Name is *J. S.* Yeoman, and not Gentleman, and so he is not the same Person that was outlawed; in which Case, the Court in Discretion may Bail him, for until the Plea be determined, it appears not whether he were the Person intended or not.[23]

So if a Man is convicted of Felony upon Evidence, by which it plainly appears to the Court that he is not guilty of it; in which Case even the Justices of Gaol-Delivery may bail him.[24]

Or where a Prosecution is unreasonably delayed, or where the Prisoner may be in Danger of losing his Life, either by Famine or dangerous Distemper, *&c*. unless he bailed.[25]

The Court of King's Bench hath always admitted Persons to Bail imprisoned by the King's Special Command, or by Order of the Privy Council, where the Commitments expressed the Crime or Cause for which the Party was committed, on the like Circumstances, on which in Discretion it will grant Bail on other Commitments.[26]

But it was formerly (a) holden by many, and at Length adjudged in (*b*). Sir *John Corbet*'s Case, that Persons committed by the special Command of the King, signified by Warrant from the Lords of the Privy Council, were not Bailable without the King's Consent, unless there appeared some extraordinary Circumstances in the Case; it being to be presumed that the King could not exert his Prerogative in such a Manner, without some good Reason for the Safety of the State, not fit to be divulged; but this being thought to be a great Strain of the Prerogative, and to make the Liberty of the Subject precarious, and contrary to the Purport of *Magna Charta*, and many other Statutes, which declared, That no Man shall be imprisoned but by due Process of Law, *&c*. occasioned the Petition of Right, 13 *Car*. 1. and the 16 *Car*. 1. *cap*. 10. By which it seems now established, That where Commitments by the Privy Council do not with convenient Certainty express the Crime alledged against the Party, he ought to be bailed.[27]

The great Regard which is so justly due, and which has always been paid to the Proceedings of either House of Parliament, who are the Guardians of the Liberty of the Subject, makes it somewhat doubtful in what Cases the Court of King's Bench will Discharge or Bail a Person committed by either of those Houses.[28]

Hence no Precedent can be found, where the Court of King's Bench has bailed a Prisoner sitting the Parliament, on a Commitment, which on the Return of it stands indifferent whether it be strictly legal or not.[29]

And therefore in the Lord *Shaftsbury*'s Case, who upon his *Habeas*

Corpus in the *King's Bench* was returned to have been committed by the House of Lords, for a High Contempt committed against the House; the Court would not take Notice of any Exceptions against the Form of the Commitment; as that it was too general, and did not express the Nature of the Contempt, or in what Place it was committed, *&c*. for that it shall be presumed that it was such, for which the Lords might lawfully make such an Order, and no other Court shall prescribe to them in what Form they ought to make it.[30]

But a Person committed for a Contempt by the Order of either House of Parliament, may be Discharged by the Court of *King's Bench* after a Dissolution or Prorogation of the Parliament, whether he were committed during the Sessions or afterwards; for that all the Orders of Parliament are (c) determined by a Dissolution or Prorogation, and all Matters before either House must be commenced a-new at the next Parliament, except only in the Case of a Writ of Error; and if the Subject should be deprived of his Liberty till the next Parliament, which perhaps may not meet again in many Years, no one could say when his Imprisonment would end.[31]

And though the Court of King's Bench may in their Discretion bail a Lord upon an Impeachment of High Treason, after a Dissolution or Prorogation of the Parliament, yet may they refuse it, not as a Matter out of their Power, but as a Thing which they are not bound to do, and improper on Consideration of the whole Circumstances of the Affair.[32]

The Earl of *Salisbury* was Impeached for being Reconciled to the Church of *Rome*, by the Convention that was turned into a Parliament 1 *W. & M.* and lay in the *Tower* till the next Parliament, which being adjourned for two Months, he moved to be Discharged on the Act of Oblivion, wherein neither his Crime nor his Person were excepted, but clearly within the Act of Pardon, or that he might be bailed; but as to the Act of Pardon, the Court held, that it should be (a) pleaded with proper Averments, which could not be done here, because there was nothing before the (b) Court upon which to ground such Plea; and that as to the Bailing him, this being a short Adjournment, the Application for that Purpose should be to the Parliament.[33]

In former Days, and particularly at the Time when Sir *Edward Coke* was Chief Justice, several Persons committed to the *Fleet* by the Lord Chancellor, were bailed by the Court of King's Bench, upon Exceptions to the (c) Generality of the Form of the Commitments.

Also one *Glanvil*, who was generally committed by the Command of the

Lord Chancellor, without setting forth any Cause of such Command, seems to have been bailed upon Examination of the Merits of the Decree, for disobeying whereof he was in Truth committed; whereby it appeared that the Decree related to a Matter before adjudged at the Common Law; which was thought contrary to the Purport of 27 *E*. 3. *cap*. 1. and 4 *H*. 4. *cap*. 23. But this Proceeding being resented by the Lord Chancellor, the said *Glanvil* was afterwards recommitted by him for the same Matter, and yet was afterwards on another *Habeas Corpus* bailed the second Time by the Court of *King's Bench*.[34]

But as there have been no such Proceedings of late Days, the Disuse of them has certainly lessen'd, if not wholly removed the Force of these Resolutions, especially as it is now established, that a Court of Equity can give Relief after a Judgment at Law; for otherwise it would have no Power of moderating the Rigour of the Law, it being in many Cases very doubtful what the Law is before it be determined; the Superior Courts therefore will put the (d) most favourable Construction on one another's Proceedings, and not intend that they acted beyond their Jurisdiction.[35]

The Court of King's Bench having the Supreme Controul of all Inferior Courts, may in Discretion admit Persons to Bail committed by such Courts, upon Consideration of the whole Circumstances of the Case, as the (e) Length of the Imprisonment, the (f) Enormity, or dangerous Tendency, or Notoriety, or small Consequence of the Offence, or Obstinacy of the Offender, or the (g) Dignity of the Court by which he was committed, and other such like Circumstances; of which the Court will receive Information by Suggestion or Affidavit, being (a) consistent with the Return of the *Habeas Corpus*.[36]

(E) WHERE BY THE OTHER COURTS OF WESTMINSTER.

THE Courts of Common Pleas and Exchequer, at any Time during Term, and the Chancery, either in Term or Vacation, may by the Common Law award a *Habeas Corpus* for any Person committed for a Crime under the (b) Degree of Felony or Treason; and thereupon discharge him, if it shall plainly appear by the Return that the Commitment was illegal, or bail him if it shall appear doubtful.[37]

And by the *Habeas Corpus* Act, any of the said Courts in Termtime, and any Judge of the said Courts, being of the Degree of the Coif, in the Vacation, may award a *Habeas Corpus* for any Person bailable within the Intent of that Act, for any Crime under the Degree of Felony.[38]

(F) WHAT SHALL BE SAID TO BE SUFFICIENT BAIL.

NO Person shall be bailed for Felony by less than two, and it is said not to be usual for the *King's Bench* to bail a Man on a *Habeas Corpus*, on a Commitment for Treason or Felony, without four Sureties; the Sum in which the Sureties are to be bound, ought to be never less than 40 *l.* for a Capital Crime; but it may be higher in Discretion, on Consideration of the Ability and Quality of the Prisoner, and the Nature of the Offence; and the Sureties may be examined on Oath concerning their Sufficiency, by him that takes the Bail; and if a Person be bailed by insufficient Sureties, he may be required either by him who took the Bail, or by any other who hath Power to bail him, to find better Sureties, and on his Refusal may be committed; for insufficient Sureties are as none.[39]

But Justices must take care, that under Pretence of demanding sufficient Surety, they do not make so excessive a Demand, as in Effect amounts to a Denial of Bail; for this is looked upon as a great Grievance, and is complained of as such by 1 *W. & M. Sess*. 2. by which it is declared, that excessive Bail ought not to be required.[40]

(G) THE OFFENCE OF TAKING INSUFFICIENT BAIL.

IF the Party bailed by insufficient Sureties, do not appear according to the Condition of the Recognizance, the Justice, &c. who bailed him is Fineable by the Justices of Assise; but if he appear, it seems that the Person who bailed him is excused.[41]

(H) THE OFFENCE OF GRANTING IT WHERE IT OUGHT TO BE DENIED.

THE Bailing a Person not bailable by Law, is punishable at Common Law, as a negligent Escape, or as an Offence against the several following Statutes.[42]

By the Statute of *Westm*. 1. *cap*. 15. it is enacted, "That 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 be thereof attainted, he shall lose his Fee and Office for ever; and if the UnderSheriff, 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."

Also it is enacted by 27 *E*. 1. commonly called the Statute *de Finibus levatis, cap*. 3. "That the Justices assigned to take Assises, &c. when they

Deliver the Gaols, &c. shall inquire if Sheriffs, or any other, have let out by Replevin Prisoners not replevisable, or have offended in any Thing contrary to the Form of the said Statute of *Westm*. 1. and whom they shall find guilty they shall chasten and punish in all Things according to the Form of the said Statute."

And it is further enacted by 4 *E*. 3. *cap*. 2. "That at the Time of the Assignment of Keepers of the Peace, Mention shall be made, that such as shall be indicted or taken by them, shall not be let to Mainprize by the Sheriffs, nor by none other Ministers, if they be not Mainpernable by Law, nor that none who are indicted shall be delivered but by the Common Law; and that the Justices assigned to deliver Gaols, shall have Power to inquire of Sheriffs, Gaolers and others, in whose Ward such Persons indicted shall be, if they make Deliverance, or let to Mainprize any so indicted, which be not mainpernable, and to punish the said Sheriffs, Gaolers and others, if they do any Thing against the said Act."

And it is enacted by 1 & 2 *Ph. & M. cap*. 13. "That no Justice or Justices of the Peace shall let to Bail or Mainprize, any 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 of bailed by the abovementioned Statute of *Westm*. 1. *cap*. 15. And that the Justices of Gaol-Delivery of the Place where such Justices of the Peace shall be guilty of such Offence, upon due Proof thereof, by Examination before them, shall for every such Offence set such Fine on every such Justice, as the same Justices of Gaol-Delivery shall think meet."

Justices of the Peace, before they bail a Man under Commitment, must at their Peril inform themselves of the Cause for which he was committed; for if he were in Truth committed for a Cause not bailable by Law, it is no Excuse that they did not know that he was committed for such Cause.[43]

(I) THE OFFENCE OF DENYING, DELAYING OR OBSTRUCTING IT WHERE IT OUGHT TO BE GRANTED.

IT is clearly agreed to be an Offence by the Common Law as well as by Statute, and punishable by Indictment as well as by Action, to deny or delay, or obstruct Bail where it ought to be granted.[44]

But it seems also clear, that he who has Power to bail another, is not bound to demand of him to find Sureties, and to forbear committing him till he shall refuse to find them, but may well justify his Commitment, unless the Party himself shall offer his Sureties.[45]

The principal Statutes relating to this Offence, are the abovementioned

Statute of *Westm*. 1. *cap*. 15. and the Statute *de Finibus cap*. 3. and 31 *Car*. 2. *cap*. 2. commonly called the *Habeas Corpus* Act; by the First whereof it is enacted, “That if any withhold Prisoners replevisable after that they have offered sufficient Surety, he shall pay a grievous Amercement to the King; and if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and shall also be in the great Mercy of the King.” And by the latter of the said Statutes it is enacted, “That Justices of Assise shall inquire if Sheriffs, or any other have offended in any Thing contrary to the said Statute of *Westm*. and whom they shall find guilty, they shall punish in all Things according to the Form of the said Statute.”

Also it is recited by the abovementioned Statute of 31 *Car*. 2. “That great Delays had been used by Sheriffs, Gaolers, and other Officers, to whose Custody the King’s Subjects had been committed for Criminal, or supposed Criminal Matters; in making Return of Writs of *Habeas Corpus*, by standing out an *Alias* and *Pluries*, and sometimes more; and by other Shifts to avoid their yielding Obedience to such Writs, contrary to their Duty and the known Laws of the Land; whereby many Subjects had been detained in Prison in such Cases, where by Law they were bailable, *&c. And thereupon it is enacted*, That wheresoever any Person shall bring any *Habeas Corpus* directed to any Person whatsoever, for any Person in his Custody, and the said Writ shall be served upon the said Officer, or left at the Gaol or Prison with any of the Under-Officers, UnderKeepers, or Deputy of the said Officers, or Keepers or Deputies, shall within three Days after such Service thereof (unless the Commitment were for Treason or Felony, plainly and specially expressed in the Warrant of Commitment) upon Payment or Tender of the Charges of bringing the said Prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed on the said Writ, not exceeding 12 *d. per* Mile; and on Security given by his own Bond to pay the Charges of carrying back the Prisoner, if he should be remanded; and that he will not make any Escape by the Way, make Return of such Writ, and bring or cause to be brought, the Body of the Party so committed or restrained, unto or before the Lord Chancellor, or Lord Keeper, or the Judges or Barons of the Court from which the said Writ shall issue, or such other Persons before whom the said Writ is made returnable, according to the Command thereof; and shall then likewise certify the true Causes of his Detainer or Imprisonment, unless the Commitment be in a Place beyond Twenty Miles Distance, *&c*. and if beyond the Distance of Twenty, and not above one Hundred Miles, then within the Space of Ten Days; and if beyond the Distance of one Hundred Miles, then within the Space of

Twenty Days."[46]

And it is further enacted, *Par*. 3. "That all such Writs shall be marked in this Manner, *per Statutum tricesimo primo* Caroli *secundi Regis*, and shall be signed by the Person that awards the same; and if any Person shall be, or stand committed or detained as aforesaid, for any Crime, unless for Treason or Felony, plainly expressed in the Warrant of Commitment, in the Vacation Time, it shall be lawful for such Person so committed or detained, (other than Persons Convict or in Execution by legal Process) or any one on his Behalf, to complain to the Lord Chancellor or Lord Keeper, or any Justice of either Bench, or Baron of the Exchequer of the Degree of the Coif; and the said Lord Chancellor, *&c*. Justice or Baron, on View of the Copy of the Warrant of the Commitment, or otherwise on Oath that it was denied, are authorised and required, on Request in Writing, by such Person, or any in his Behalf, attested and subscribed by two Witnesses who were present at the Delivery of the same, to grant an *Habeas Corpus* under the Seal of the Court, whereof he shall be one of the Judges, to be directed to the Officer in whose Custody the Party shall be, returnable *immediate* before the said Lord Chancellor, *&c*. Justice or Baron, and on Service thereof, as aforesaid, the Officer, *&c*. in whose Custody the Party is, shall within the Times respectively before limited, bring him before the said Lord Chancellor, Justice or Baron before whom the Writ is returnable; and in Case of his Absence, before any other of them, with the Return of such Writ, and the true Cause of the Commitment and Detainer; and thereupon within two Days after the Party shall be brought before them, the said Lord Chancellor, Justice or Baron before whom the Prisoner shall be brought, as aforesaid, shall discharge the said Prisoner from his Imprisonment, taking his Recognizance with one or more Sureties, in any Sum according to their Discretions, having regard to the Quality of the Prisoner and Nature of the Offence, for his Appearance in the King's Bench, the Term following, or in such other Court wherein the Offence is properly Cognizable, as the Case shall require, and then shall certify the said Writ, with the Return thereof, and the Recognizance into such Court, unless it be made appear to the said Lord Chancellor, *&c*. that the Party so committed, is detained upon a legal Process, or Order, or Warrant, out of some Court that hath Jurisdiction of criminal Matters, or by some Warrant signed and sealed with the Hand and Seal of any of the said Justices or Barons, or some Justice or Justices of the Peace, for such Matters or Offences for which by Law the Prisoner is not bailable."

But it is provided, Par. 4. “That if any Person shall have wilfully neglected, by the Space of two whole Terms after his Imprisonment, to pray a *Habeas Corpus* for his Enlargement, he shall not have a *Habeas Corpus* to be granted in Vacation Time, in Pursuance of this Act.”

And it is further enacted, Par. 5. “That if any Officer, *&c*. shall neglect or refuse to make the Returns aforesaid, or to bring the Body of the Prisoner, according to the Command of the Writ, within the respective Times aforesaid, or shall not within six Hours after Demand, deliver a true Copy of the Commitment, *&c*. he shall forfeit for the first Offence 100 *l*. for the second 200 *l*. and be made uncapable to hold his Office.”

And it is further enacted, *Par*. 6. That no Person who shall be set at Large upon any *Habeas Corpus*, shall be again imprisoned for the same Offence, by any Person whatsoever, other than by the legal Order and Process of such Court wherein he shall be bound by Recognizance to appear, or other Court having Jurisdiction of the Cause, on Pain of 500 *l*.”

And it is further enacted, Par. 7. “That if any Person, who shall be committed for Treason or Felony, plainly and specially expressed in the Warrant of Commitment, upon his Prayer or Petition in open Court, the first Week of the Term, or the first Day of the Sessions of *Oyer* and *Terminer*, or General Gaol-Delivery, to be brought to his Trial, shall not be indicted sometime in the next Term, Sessions of *Oyer* and *Terminer*, or General Gaol-Delivery, after such Commencement, the Justices of the said Courts shall, upon Motion in open Court, the last Day of the Term or Sessions, set at Liberty the Prisoner upon Bail, unless it appear upon Oath, that the Witnesses for the King could not be produced the said Term, *&c*. and if such Prisoner upon his Prayer, *&c*. shall not be indicted and tried the second Term or Sessions, he shall be discharged from his Imprisonment.”

And it is further enacted, Par. 10. “That it shall be lawful for any Prisoner, as aforesaid, to move and obtain his *Habeas Corpus*, as well out of the Chancery or Exchequer, as the King’s Bench or Common Pleas; and if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons, for the Time being, of the Degree of the Coif, of any of the Courts aforesaid, in the Vacation Time, upon View of the Copy of a Warrant of Commitment or Detainer, or on Oath made that such Copy was denied, shall deny any Writ of *Habeas Corpus* by this Act required to be granted, being moved for as aforesaid, they shall severally forfeit to the Party grieved the Sum of 500 *l*.”

But it is provided, Par. 18. “That after the Assises proclaimed for that

County where the Prisoner is detained, no Person shall be removed from the Common Gaol upon any *Habeas Corpus* granted in Pursuance of this Act; but upon such *Habeas Corpus*, shall be brought before the Judge of Assise in open Court, who thereupon shall do what to Justice shall appertain; *but it is provided nevertheless*, *Par*. 19. that after the Assises are ended, any Person detained may have his *Habeas Corpus* according to the Direction of this Act."

(K) IN WHAT FORM IT IS TO BE TAKEN.

WHERE a Person actually present in Court is bailed for a Crime punishable with Loss of Life or Member, it seems to be in the Discretion of the Court to take a Recognisance from each of the Bail, either in a certain Sum, or Body for Body, or both Ways; however such Recognisance of Body for Body doth not make the Bail liable to the same Punishment with the Prisoner, but only to be fined, *&c*.[47]

But for a Crime of an inferior Nature, it seems that the Recognisance ought to be only in a certain Sum of Money, and not Body for Body.[48]

(L) WHAT SHALL FORFEIT THE RECOGNISANCE.

IF the Recognisance be in the usual Form, *ad standum recto de felonia praedicta & ad respondendum Domino Regi*, and at the Trial the Party stands mute, though it may be reasonably argued from the Import of these Words, that in Strictness the Recognisance is forfeited, yet the later Opinions hold otherwise; for if a Man's Bail, who are his Gaolers of his own choosing, do as effectually secure his Appearance, and put him as much under the Power of the Court, as if he had been in the Custody of the proper Officer, they seem to have answered the End of the Law, and to have done all that can be reasonably required of them.[49]

If *A*. enters into a Recognisance that *B*. shall appear in the King's Bench such a Term, to answer such an Information, and not to depart till he shall be discharged by the Court, and afterwards a *Nolle prosequi* is entred on that Information, and another exhibited, whereto he refuses to appear, *&c*. the Recognisance is forfeited.[50]

Bacon Abridgment, vol. I, pp. 219–31.

14.3.1.2.bFelony

(H) WHERE THE OFFENDER IS TO BE TRANSPORTED.

IT is enacted by 4 *Georg*. 1. *cap*. 11. and 6 *Georg*. 1. *cap*. 23. “That where any Person or Persons shall be convicted of Grand or Petit Larceny, or any felonious stealing or taking of Money, Goods or Chattels, either from the Person or in the House of any other, or in any other Manner, and who by the Law shall be intitled to the Benefit of the Clergy, and liable only to the Penalties of Burning in the Hand or Whipping, (except Persons convicted for receiving or buying stolen Goods, knowing them to be stolen,) it shall and may be lawful for the Court before whom they were convicted, or any Court, held at the same or any other Place, with the like Authority, if they think fit, instead of ordering any such Offenders to be burnt in the Hand, or whipt, to order and direct that such Offenders shall be sent, as soon as conveniently may, to some of his Majesty’s Colonies and Plantations in *America* for the Space of seven Years; and that Court before whom they were convicted, or any subsequent Court, with like Authority as the former, shall have Power to convey, transfer and make over such Offenders, by Order of Court, to the Use of any Person or Persons who shall contract for the Performance of such Transportation to him or them, and his and their Assigns, for such Term of seven Years; and where any Person shall be convicted for any Crimes, for which they are excluded their Clergy, and the King shall extend his Mercy to them upon Condition of Transportation to any Part of *America*, and such Intention of Mercy be signified by a Principal Secretary of State, it shall be lawful for any Court having proper Authority, to allow such Offenders the Benefit of a Pardon, to order and direct the like Transportion to any Person, who will contract for the Performance thereof, of any such Offenders; as also of any Person convict of receiving or buying stolen Goods, knowing them to be stolen, for the Term of fourteen Years, in Case such Condition of Transportation be general, or else for such other Term as shall be made Part of such Condition; and such Person so contracting, and his Assigns, shall have an Interest in the Service of the said Offenders for such Term of Years; and if any such Offender return into *Great Britain* or *Ireland*, before the End of his Term, he shall be liable to be punished as any Person attainted of Felony, without the Benefit of Clergy, *&c*. Provided, that the King may pardon and dispense with any such Transportation, and allow of the Return of such Offender, paying his Owner, at the Time, such Sum as shall be adjudged reasonable by any two Justices of the Peace, where such Owner dwells, and where any such Offenders shall be transported, and shall have served their Terms, such Services shall have the Effect of a Pardon, as for the Crimes for which they were transported.”

And it is further enacted, "That every such Person, to whom any such Court shall order any such Offenders to be transferred or conveyed, shall, before such Offenders shall be delivered to them, contract with such Person as shall be appointed by such Court, and shall give sufficient Security, to the Satisfaction of such Court, for the Transporting such Offenders to some Plantation in *America*, to be ordered by such Court, and the procuring an authentick Certificate from the Governor, or chief Custom-House Officer, of the Place of the Landing of such Offenders, *&c*. and their not returning by the wilful Default of such Contractor."

And it is further enacted, by 6 *Geo*. 1. *cap*. 23. "That the Court may nominate two or more Justices of the Peace, for the Place where such Offenders shall be convicted, who shall have Power to contract with any Person or Persons for the Performance of the Transportation of such Offenders, and to order such and the like Security, as the said former Act directs, to be taken by Order of Court, and to cause such Felons to be delivered to such Contractors; which said Contracts and Security shall be certified by the said Justices to the next Court, held with like Authority, to be filed, *&c*."

And it is further enacted, "That all Charges, in or about such Contracts, *&c*. shall be born by each County, *&c*. for which the Court was held, and that the respective Treasurers shall pay the same; and that all Securities for Transportation shall be by Bond, in the Name of the Clerks of the Peace, *&c*. and the Money recovered shall be to the Use of the respective Counties."

And it is further enacted, "That the Persons so contracting, *&c*. may carry such Offenders towards the SeaPort, *&c*. and that if any Person shall rescue such Offenders, or aid them in making their Escape, *&c*. they shall be deemed guilty of Felony without Clergy; and that if any Felon ordered for Transportation shall be afterwards at large within any Part of *Great Britain*, without some lawful Cause, before the Expiration of his Term, and be lawfully convict thereof, he shall suffer Death without Clergy, and may be tried before Justices of Assise *Qyer* and *Terminer*, or Gaol-Delivery, for the County where he shall be apprehended, *&c*. or from whence he was ordered to be transported, *&c*. and that the Clerk of Assise, and Clerk of the Peace, where such Orders of Transportation shall be made, shall on Request of the Prosecutor, *&c*. certify briefly a Transcript, containing the Tenor of every Indictment, Conviction and Order of Transportation, to the Justices of Assise, *&c*. which shall be sufficient Proof of such Conviction, and Order

of Transportation."

Bacon Abridgment, vol. II, pp. 478–79.

14.3.1.3Bacon, 1740

14.3.1.3.aForfeiture

Forfeiture is a Word often made use of in the Law, and in Civil Cases is usually applied to Alienations and Dispositions made by those who have but a particular Estate or Interest in Lands or Tenements, to the Prejudice of those in Remainder or Reversion; also the Omission or Neglect of a Duty, which the Party binds himself to perform, or to the Performance of which he is injoined by the Law, is upon the Breach or Neglect thereof called a Forfeiture, that is, the Advantages accruing from the Performance of the Thing are by his Omission defeated and determined.[51]

In this Sense of the Word the Principal Matters relating to Forfeiture are considered under the Titles *Estate for Life*, *Copyhold*, *Conditions*, *Obligations*, and Title *Offices*; and therefore in this Place we shall consider it only as it relates to Crimes and Offences, for which the Party is punished in his Estate and Posterity.

(A) For what Crimes an Offender shall forfeit his Lands at Common Law.

(B) For what Crimes his Goods and Chattels.

(C) For what Crimes by Statute.

(D) To what Time the Forfeiture shall have relation.

(E) What is to be done with the Offender's Goods before Conviction.

(F) Where the Wife shall lose her Dower.

(G) How far the Blood of the Offender is corrupted.

(A) FOR WHAT CRIMES AN OFFENDER SHALL FORFEIT HIS LANDS AT COMMON LAW.

BY the Common Law, all Lands of Inheritance whereof the Offender is seised in his own Right, and also all Rights of Entry to Lands in the Hands of a Wrong-doer, are forfeited to the King on an Attainder of High Treason, altho' the Lands are holden of another; for there is an Exception in the Oath of Fealty, which saves the Tenant's Allegiance to the King; so that if he forfeits his Allegiance, even the Lands held of another Lord are forfeited to

the King, for the Lord himself cannot give out Lands but upon that Condition.[52]

Also upon an Attainder of Petit Treason or Felony, all Lands of Inheritance whereof the Offender is seised in his own Right, as also all Rights of Entry to Lands in the Hands of a Wrong-doer, are forfeited to the Lord of whom they are immediately holden; for this by the Feudal Law was deemed a Breach of the Tenant's Oath of Fealty in the highest Manner, his Body with which he had ingaged to serve the Lord being forfeited to the King, and thereby his Blood corrupted, so that no Person could represent him; and consequently dying without Heir the Lord is in by Escheat.[53]

But the Lord can't enter into the Lands holden of him upon an Escheat for Petit Treason or Felony without a Special Grant, till it appear by due Process, that the King hath had his Prerogative of the Year, Day and Waste.[54]

And as to this, since the Statute of *Praerogativa Regis*, it seems to have been generally holden, that the King has a Right, not only to Waste the Lands of Inheritance, which a Person attainted of Felony held immediately of any other Lord, but also to hold them over for a Year and Day; and by some he had always this Right, but according to others he had anciently a Right only to the Waste, and the Year and Day was given him in lieu of it.[55]

As to Lands whereof a Person attainted of High Treason (a) dies seised of an Estate in Fee, they are actually vested in the King without any Office, because they can't descend, the Blood being corrupted, and the Freehold shall not be in Abeyance.[56]

It is said, that the Inheritance of Things not lying in Tenure, as of Rents-Charge, Rents-Seck, Commons, *&c*. are forfeited to the King by an Attainder of High Treason; and that the Profits of them are also forfeited to him by an Attainder of Felony during the Life of the Offender, and that the Inheritance shall be extinguished by his Death; for it can't escheat, because it lies not in Tenure; neither can it descend, because the Blood is corrupted.[57]

It seems agreed, that no (b) Right of Action to Lands of Inheritance could ever be forfeited; neither could (c) a Right of Entry into Lands whereof there was a Tenant by Title, nor an (d) Use, (except where Land had been (e) fraudulently conveyed with an Intent to avoid a Forfeiture;) nor a (f) Condition forfeited before 33 *H*. 8. neither could Land in (g) Tail be forfeited after the making of *Westm*. 2. any longer than for the Life of the Tenant in Tail, till 26 *H*. 8.[58]

The Profits of Lands, whereof one attainted of Felony is seised of an Estate of Inheritance in his Wife's Right, or of an Estate for Life only in his own Right, are forfeited to the King, and nothing shall go to the Lord.[59]

All Customary Estates of Inheritance are forfeited by an Attainder of Treason or Felony, unless there be some particular Custom to the contrary, as in *Gavelkind*, because the Person is *civiliter mortuus* by the Attainder, and therefore is disabled to have or hold any Estate, or to have any Property in any Thing; and therefore if a Person be seised in Fee of a Copyhold, and be attainted of Treason or Felony, the Copyhold is in the Lord without any Presentment of the Homage, because it is against the Nature of a Court-Baron to inquire of Criminal Matters or Offences against the King; and such Homage is at the Will of the Lord, and often influenced by him; but if a Copyholder be convicted of Felony, and presented by the Homage, by Special Custom the Estate may be forfeited to the Lord; but this is only by the Special Custom, since the Copyholder is not disabled by the Conviction to hold the Estate, as he is if he were attainted; and therefore since it is by the Custom only that such Forfeiture accrues, it must be in the Manner which the Custom has settled it, which is by Presentment of the Homage; but if a Copyhold is granted for Life, and by another Copy the Reversion is granted to another, *Habend*. after the Death of the first Copyholder, or Surrender, Forfeiture or other Determination of the first Estate; the first Copyholder commits Murder, and is thereof attainted, the King Pardons the Murder and the Attainder and all Forfeitures thereby; in this Case, he in the Reversion is intitled to the Estate; for the King can't have it for the Business of the Tenure, since he can't be Tenant at Will to any Person; and the Lord can't have it, because he can't be Tenant to himself; therefore the particular Estate of Tenant for Life being extinguished, the Reversion immediately commences.[60]

(B) OF THE FORFEITURE OF GOODS AND CHATTELS.

ALL Things whatsoever, which come under the Notion of a Personal Estate, and which a Man is intitled to in his (a) own Right, whether they be in Action or Possession, are forfeitable in the following Instances to the (b) King, for the Trouble and Charge he has been at in holding Courts and bringing the Offenders to Justice.[61]

Also Personal Things settled by way of Trust on the Offender are as much forfeited, as if he had the Legal Interest, or were in Possession of them; as if a Bond be taken in another's Name, or a Lease made to another

in Trust for a Person who is afterwards convicted of Treason or Felony; these are as much liable to be forfeited, as a Bond made to him in his own Name, or a Lease in Possession.[62]

Also the Trust of a Term granted by a Man for the Use of himself, his Wife and Children, *&c*. is liable in like Manner to be forfeited, if fraudulently made with an Intent to avoid a subsequent Forfeiture, but it shall be forfeited so far only, as it is reserved to the Benefit of the Party himself, if made *bona fide*, whether before or after Marriage, for good Consideration without Fraud, which is to be left to a Jury on the whole Circumstances of the Case, and shall never be presumed by the Court where it is not expresly found.[63]

But the Power of Revocation of the Trust of a Settlement reserved to the Grantor is not liable to be forfeited, if it depend upon something Personal to be done by the Grantor himself, as the making the Deed of Revocation under his Hand and Seal.[64]

A Man forfeits all such Personal Estate in the following Instances.

1. Upon a Conviction of Treason or (c) Felony, as is clearly agreed by all the Books.[65]
2. Upon the Coroner's Inquest taken on (a) View of a dead Body, and finding him guilty either as Principal or as Accessory (b) before the Fact, and that he fled for the same, whereby he forfeits his Goods absolutely, and the Issues of his Lands, till he be acquitted or pardoned.[66]
3. Upon a Jury's finding that the Defendant fled at the same Time that they acquit him of an Indictment of Capital Felony, or, as some say, of Larceny, before Justices of *Oyer*, *&c*. but such a Finding causes no Forfeiture of the Issue of the Land, because by the Acquittal the Land is discharged; neither will it have any Effect as to the Goods, if the Indictment were insufficient, or if the Flight be disproved on a Traverse, which, as all agree, may be taken to any such Finding, except that by a Coroner's Inquest, and, as (c) some say, even to that as well in respect of the Flight, as of the Particulars of the Goods.[67]
4. The Goods of Persons outlawed are forfeited to the King, for the Retiring from the Inquiries of Justice is held so criminal in the Eye of the Law, that it is punished with Loss of Goods so long as the Outlawry stands in Force. So (d) if a Person make Default till the Award of an Exigent, either upon an Appeal or Indictment of a Capital Felony, he forfeits his Goods, unless he was Pardoned before the Exigent was awarded; and it is (e) holden, that the

Law is the same as to such a Default upon an Indictment of Petit Larceny, and that wherever Goods are so forfeited they are not saved by an Acquittal at the Trial; (f) but by a Reversal of the Award of the Exigent they are saved, whether such Reversal be for an Error either in Fact or in Law, as for the Imprisonment of the Defendant at the Time when the Exigent was awarded, or for a Defect in the Indictment, Appeal or Process.[68]

5. If a Man be *Felo de se*, or if a Felon be killed in the Robbery, or by resisting in order to escape, he forfeits his Goods and Chattels; for when a Man thus forsakes Life, all his Goods and Chattels are derelict; and therefore the King shall have them as the Maintainer of publick Justice.[69]

6. If a Felon waives, that is, leaves any Goods in his Flight from those who either pursue him, or are apprehended by him so to do, he forfeits them, whether they be his own Goods, or Goods stolen by him; and at Common Law, if the Owner did not pursue and appeal the Felon, he lost the Goods for ever; but by the (g) 21 *H*. 8. *cap*. 11. for incouraging the Prosecution of Felons it is provided, that if the Party comes in as Evidence on the Indictment, and attaint the Felon, he shall have a Writ of Restitution.[70]

And here we may observe a Difference between Goods waived, Strays and the like, and Goods forfeited for Felony or Flight; for, as it has been observed, Goods forfeited for Felony are not in the King without an Office found of such Felony or Flight, because the Property can't alter without Matter of Record; but Goods waived are in the King without Office, because there the Property is in no Body; and therefore by publick Agreement is put out of the Finder, in whom it was by the State of Nature, and is vested in the King as a Recompence for his Trouble and Charge in the Execution of Justice.[71]

(C) FOR WHAT CRIMES BY STATUTE.

BY the 26 *H*. 8. *cap*. 13. it is enacted, "That every Offender and Offenders being hereafter lawfully convicted of any Manner of High Treasons by Presentment, Confession, Verdict or Process of Outlawry, according to the due Course and Custom of the Common Laws of this Realm, shall lose and forfeit to the King, his Heirs and Successors, all such Lands, Tenements and Hereditaments, which any such Offender or Offenders shall have of any Estate of Inheritance in Use or Possession, by any Right, Title or Means, within the Realm of *England* or elsewhere, within any the King's Dominions, at the Time of any such Treason committed, or at any Time after, saving to every Person and Persons, their Heirs and Successors, other

than the Offenders in any Treasons, their Heirs and Successors, and such Person and Persons as claim to any their Uses, all such Rights, Titles, Interests, Possessions, Leases, Rents, Offices and other Profits, which they shall have at the Day of committing such Treasons, or at any Time before, in as large and ample Manner, as if this Act had never been had nor made."

And by the 33 *H*. 8. *cap*. 20. it is enacted, "That if any Person or Persons shall be attainted of High Treason, by the Course of the Common Law or Statutes of this Realm, in every such Case every such Attainder by the Common Law shall be of as good Strength, Value, Force and Effect, as if it had been done by Authority of Parliament; and that the King, his Heirs and Successors shall have as much Benefit and Advantage by such Attainder, as well of Uses, Rights, Entries, Conditions, as Possessions, Reversions, Remainders, and all other Things, as if it had been done and declared by Authority of Parliament; and shall be deemed and adjudged in actual and real Possession of the Lands, Tenements, Hereditaments, Uses, Goods, Chattels, and all other Things of the Offenders so attainted, which his Highness ought lawfully to have, and which they being so attainted, ought or might lawfully lose or forfeit, if the Attainder had been done by Authority of Parliament, without any Office or Inquisition to be found of the same, any Law, Statute or Use of the Realm to the contrary thereof in any wise notwithstanding.

"Saving to all and every Person and Persons, and Bodies Politick, and their Heirs, Assigns and Successors, and every of them, (other than such Person and Persons, which hereafter shall be attainted of High Treason, and their Heirs and Assigns and every of them, and all and every other Person and Persons claiming by them or any of them, or to their Uses, or to the Uses of any of them after the said Treasons committed,) all such Right, Title, Use, Possession, Entry, Reversions, Remainders, Interests, Conditions, Fees, Offices, Rents, Annuities, Commons, Leases, and all other Commodities, Profits and Hereditaments whatsoever they or any of them should, might or ought to have had, if this Act had never been had or made."

In the Construction of these Statutes the following Opinions have been holden.

1. That neither of these Statutes are repealed by 1 *Ma. Sess*. 1. *cap*. 1. which enacts, "That no Pains of Death, Penalty or Forfeiture shall ensue to any Offender, for the doing any Treason, Petit Treason, or Misprision of

Treason, other than such as be within the Statute of 25 *E*. 3. ordained and provided;" for the Words, *other than such, &c*. have been construed not to extend to the Pains, *&c*. mentioned in the Beginning of the Sentence, but to the Offences mentioned in the End of it.[72]

2. That Estates in Tail are forfeited by Force of these Words in 26 *H*. 8. *of any Estate of Inheritance*, which must be void, if they do not include Estates in Tail; (a) also Lands given to a Man and his Wife, and the Heirs of their two Bodies, are as much forfeited by his Attainder, as Lands given to him and the Heirs of his Body.[73]

3. That neither a Right to (b) a Writ of Error to reverse an erroneous Common Recovery, (c) nor a meer Right of Action to Lands in the Hands of a Stranger as of a Discontinuee, or of the Heir of the Disseisor, are forfeited by either of these Statutes; (d) but Rights of Entry are as much forfeited as Lands in Possession; yet the King shall (e) not be adjudged in Possession, by Virtue of such a Right, without an Office, and a *Scire facias* or Seisure on such Office, for the Words, *The King shall be deemed in Possession without Office, &c*. shall have this Construction, that he shall be in Possession without Office, in the same Manner as he should have been on an Office found at Common Law; but at Common Law, if a Disseisee had been attainted of High Treason, the King should not have been in Possession without Office, and a *Scire facias* or Seisure thereon.[74]

4. If Tenant in Tail of the Gift of the Crown makes a Feoffment in Fee, and then is attainted of High Treason, the Right of the tail is forfeited, for it could not be discontinued, because the Reversion continued always in the Crown; and tho' it be put in Abeyance by the Feoffment, as to any Benefit which the Feoffor could have claimed from it; yet since it is not turned to a Right of Action, but would have still continued in him for the Benefit of the Heir, if there had been no Attainder, it shall likewise continue in him for the Benefit of the Crown.[75]

5. That if one attainted of High Treason is seised of a defeasible Estate-tail, and hath also a Right to an antient Intail, which is discontinued, he forfeits both, for the first is within the express Words of 26 *H*. 8. and the other within those of 33 *H*. 8. and it doth not follow, that because naked Rights to Lands in the Hands of a Discontinuee, or of the Heir of a Disseisor, are not within the Meaning of the Statute, therefore a Right in the Party himself is not; for the Forfeiture of such naked Rights might not only be of dangerous Consequence in unsettling Possessions, but might also be prejudicial to Strangers, whom the Statute, by an express Saving, plainly intends to favour; but a Forfeiture of the Offender's Right to his own Lands

can prejudice none but himself and his Heirs.[76]

6. In the Construction of the Statute of 33 *H.* 8. it is (f) agreed, that a Power of Revoking the Uses of a Settlement may be forfeited by Force thereof, if the Execution of it require nothing but what may be as well performed by any other Person, as by the Party himself by whom it was reserved; as the Tender of a Ring, *&c*. (g) Neither doth the Mention of such Considerations and Inducements for the Reserving such a Power in the Preamble of it, as are inseparable from the Person, alter the Case, if nothing of this Kind be inserted in the Proviso it self, by which it is reserved; but (a) if such Proviso require any Thing of this Kind, it prevents the Forfeiture; as if it be worded thus, That if the Party should be minded to alter and revoke the Uses, and signify his Mind in Writing under his Hand and Seal, or (b) if it only require, that the Revocation be under his Hand and Seal, without saying any Thing about his changing his Mind; or as (c) some say, if it only require the Tender of a Ring by the Party *ipso adtunc declarante* his Intent, *&c*.[77]

7. That neither an (d) Annuity granted *pro consilio impendendo*, (e) nor an Office granted for Life, and requiring Skill and Confidence, are forfeitable by these Statutes; but such Office in Fee may be forfeited without the Aid of them, because the Grantor in giving an Estate descendable to all the Heirs of the Grantee, however unqualified, appears not to have been induced to make his Grant from the Consideration of the peculiar Merit of the Persons who are to execute the Office.[78]

By an Act of Parliament made 13 *Car*. 2. it was enacted, *That all the Manors, Messuages, Lands, Tenements, Possessions and Reversions, Remainders, Rights, Interests, Hereditaments, Leases, Chattels Real, and other Things of what Nature soever, that Sir* John Danvers, *or any other to his Use, or in Trust for him, had the 25th of* March 1646. *or at any Time after, should be forfeited to the King;* and it was adjudged, that by Force of these Words, *All Interests of what Nature soever*; an Estate-tail was forfeited.[79]

But it is holden, that the Statutes of *Praemunire*, which give a general Forfeiture of all the Lands and Tenements of the Offender, extend not to Lands in Tail.[80]

It is agreed, that a Saving against Corruption of Blood in a Statute concerning Felony saves the Land to the Heir, because the Escheat to the Lord for Felony is only *pro defectu tenentis*, occasioned by the Corruption of Blood; also the Saving the Land to the Heir saves the Corruption of

Blood and Loss of Dower.[81]

But a Saving against the Corruption of Blood in a Statute concerning High Treason does not save the Land to the Heir, because the Land goes to the King by Way of immediate Forfeiture, and not by Way of Escheat.[82]

(D) TO WHAT TIME THE FORFEITURE SHALL HAVE RELATION.

THE Forfeiture upon an Attainder either of Treason or Felony shall have Relation to the (f) Time of the Offence, for the Avoiding all subsequent Alienations of the Lands, but to the Time of the Conviction, or *fugam fecit* found, *&c*. only as to Chattels, unless the Party were killed in flying from, or resisting those who had arrested him; in which Case it is said, that the Forfeiture shall relate to the Time of the Offence.[83]

No Attainder whatsoever shall have any Relation as to the mean Profits of the Lands of the Person attainted, (a) but only from the Time of the Attainder.[84]

The Forfeiture of a Person becoming *Felo de se* has Relation to the Time the mortal Wound was given, so that all intermediate Alienations are avoided.[85]

(E) WHAT IS TO BE DONE WITH THE OFFENDER'S GOODS BEFORE CONVICTION.

IT hath always been held, that one indicted or appealed of Treason or Felony may, *bona fide*, sell any of his Chattels Real or Personal, for the Sustenance of himself and Family, until they be actually forfeited.[86]

But where a Person being in *Newgate* for Robbery and Burglary, before Conviction, made a Bill of Sale of all his Goods to his Son; and on Trover brought by the Son against the Sheriffs of *London*, it was held by *Holt*, that the Bill was fraudulent, and that though a Sale, *bona fide*, and for a valuable Consideration, had been good, because the Party had a Property in the Goods till Conviction, and ought to be reasonably sustained out of them, yet that such a Conveyance as this cannot be intended to any other Purpose than to prevent a Forfeiture and defraud the King; and this he said was a Fraud at Common Law.[87]

It seems the better Opinion, that at (b) this Day, before Indictment, the Goods of the Offender cannot be searched and inventoried, and that after Indictment they cannot be seised and taken away till the Felon is convicted, for till the Conviction the Property remains in the Felon.[88]

And by the 25 *E*. 3. *cap*. 14. it is enacted, "That no Sheriff, Undersheriff, nor Escheator, Bailiff of Franchise, nor any other Person, take or seise the

Goods of any Person arrested or imprisoned for Suspicion of Felony, before that the same Person so arrested and imprisoned be convicted or attainted of such Felony according to the Law; or else the fame Goods otherwise lawfully forfeited; upon Pain to forfeit the double Value of the Goods so taken to him that is so hurt in that Behalf by (c) Action of Debt, *&c*."[89]

This Statute is said to be in Affirmance of the Common Law, and hath been [(d)]adjudged to extend as well to the Seisure of Money, as of any other Chattel.[90]

It seems plain from this Statute, that Goods may be seised as soon as they are forfeited; and it seems the whole Township is answerable for them to the King, and may seise them where-ever they can be found.[91]

And at Common Law it was no Plea for such Township, that the Goods were delivered to the Custody of *J. S.* who imbezilled them, *&c*. but it is enacted by 31 *E*. 3. *cap*. 3. that if any Man or Town be charged in the Exchequer by Estreats of the Justices of the Chattels of Fugitives and Felons, and will alledge in Discharge of him another which is chargeable, he shall be heard, and Right done to the other.[92]

(F) WHERE THE WIFE SHALL LOSE HER DOWER.

BEfore the Statute of 1 *E*. 6. *cap*. 12. the Wife not only lost her Dower at Common Law, but also her Dower *Ad ostium Ecclisiae*, or *ex assensu Patris*, or by Special Custom (except that of Gavelkind), by the Husband's Attainder of Treason or (a) Capital Felony, whether committed before or after the Marriage.[93]

But the Wife never forfeited Lands given jointly to her Husband and her, whether by Way of Frank-marriage, or otherwise, but only for the Year and Day, and Waste.[94]

It is enacted by 1 *E*. 6. *cap*. 12. *par*. 17. that albeit any Person shall be attainted of any Treason or Felony whatsoever; yet that notwithstanding every Woman, that shall fortune to be the Wife of the Person so attainted, shall be endowable and enabled to demand, have, and enjoy her Dower, in like Manner and Form as tho' her Husband had [not] been attainted, *&c*.

But this is repealed as to Treason by 5 & 6 *E*. 6. *cap*. 11. *par*. 9. by which it is enacted, "That the Wife, whose Husband shall be attainted of any Treason (b) whatsoever, shall in no wise be received to ask, challenge, demand, or have Dowry of any the Lands, Tenements or Hereditaments of the Person so attainted, during the said Attainder in Force."[95]

If the Husband seised of Lands in Fee makes a Feoffment, and then

commits Treason, and is attainted of it, the Wife shall not recover Dower against the Feoffee.[96]

So (c) if the Husband is attainted of Treason, and afterwards pardoned, yet the Wife shall not recover Dower; but (d) of Lands purchased by the Husband after the Pardon the Wife shall be endowed.[97]

If a Husband having levied a Fine with Proclamations is erroneously attainted of Treason, and the five Years pass after his Death, and then the Outlawry is reversed, the Fine and Nonclaim are no Bar till five Years are passed after the Reversal, because the Wife could not sue for her Dower while the Attainder stood in Force, neither could she any Way reverse.[98]

After the making of the Statute 1 *E*. 6. *cap*. 12. it seems to have been doubted, whether the Wife should not lose her Dower in Case of any new Felony made by Act of Parliament; and therefore where several Offences have been made Felony since, Care has been taken to provide for the Wife's Dower.[99]

(G) HOW FAR THE BLOOD OF THE OFFENDER IS CORRUPTED.

IT is clearly agreed, that by an Attainder of Treason or (a) Felony, the Blood of the Offender is so far stained or corrupted, that the Party loses all the Nobility or Gentility he might have had before, and becomes ignoble.[100]

Also it is clearly agreed, that he can neither inherit as Heir to any Ancestor, nor have an Heir, and the Policy of the Law herein is to make Men more mindful of their Allegiance, and to deter them from taking up Arms against the Crown; for as the natural Love Men have for their Posterity, often restrains them from Actions which would prejudice them, either by Intailing the Infamy of such Actions on them, or making them Sharers in the Punishment which the Law has appointed for such Offences; so Men are less careful of their Persons, when their Miscarriages will neither involve their Children in the Guilt or Punishment of them.[101]

Therefore it is (b) laid down as a sure Rule, that where-ever it is necessary for any one, who would make a Title to another, to derive the Descent thro' him, that the Attainder is an effectual Bar to such Title, (c) unless the Land were intailed, in which Case he claims *per formam doni*, and paramount his Title.[102]

As if there be Grandfather, Father and Son, and the Father is attainted, the Son cannot claim as Heir to the Grandfather of the Lands in Fee-simple, because he must of Necessity derive the Descent thro' the Father, which by Reason of the Attainder he cannot do.[103]

So if there be two Brothers, and one of them having Issue a Son be attainted, and either the Son or Uncle purchase Land, and die without Issue, the other cannot be his Heir, because the Blood of the Father, thro' whom the Descent must be conveyed, is corrupted.[104]

But it is also a general Rule, that the Attainder of a Person, who needs not be mentioned in the Conveyance of the Descent, does no hurt, let the Ancestor be never so remote; and that therefore where one may claim as immediate Heir to another, without deriving the Descent thro' any other, he shall not be barred by the Attainder of any other.

As if the Son of one attainted purchase Land, and have a Son and die, such Son shall inherit him, because he derives his Descent immediately from him.[105]

So if a Man hath two Sons, and is attainted, and one of the Sons purchase Lands, and die without Issue, the other shall be his Heir, because he may make his Title without mentioning the Father; and therefore there is no Disability in the one to be represented, or in the other to represent.[106]

So where a Person attainted hath Issue by a Woman seised of Lands of Inheritance, such Issue may inherit the Mother, tho' he never had any inheritable Blood from the Father.[107]

If the Father of a Person attainted die seised of an Estate of Inheritance during his Life, no younger Brother can be Heir, but the Land shall rather escheat; for the elder Brother, tho' attainted, is still a Brother, and no other can be Heir to the Father while he is alive; but if he die before the Father, the younger Brother shall be Heir, because there is no Default in the Father to be represented, nor in the younger Son to represent the Father after the Death of his Brother.[108]

But if the eldest Son had left Issue and died, such Issue could not have inherited, but such Land must have escheated, because the eldest Son could not have represented the Grandfather, but by the Mediation of the Father, and as standing in his Stead, and that in this Case he could not do, because the Father can have no Representatives, and the younger Son could not inherit, because the elder Line is still continuing, which excludes the Younger.[109]

If a Man be seised of Lands in Fee, and hath Issue two Daughters, and one of them is attainted of Felony, and the Father dies, both Daughters being alive, one Moiety shall descend to the innocent Daughter, and the other Moiety shall escheat.[110]

But if a Man make a Lease for Life, Remainder to the right Heirs of *A*.

being dead, who hath Issue two Daughters, whereof one is attainted of Felony, it seems the Remainder is not good for a Moiety, but void for the Whole.[111]

For in the first Case the Lord by Escheat must make a Title to devest the Estate which was once lawfully vested in the Ancestor; which he cannot do, because there is no Defect in this Case, since the Ancestor may be legally represented, and the innocent Daughter may legally represent; and therefore there can be no Title in the Lord to evict that Moiety, tho' he has Title to the Moiety of the offending Daughter, who after her Crime can represent no Man; but in the second Case, the Sisters are to make Title to the Remainder, which they cannot do, because to make Title to the Remainder, they must bring themselves within the Words of the Gift; and the innocent Daughter cannot take upon her the Character of an Heir alone, since they both make but one Heir to the Ancestor; and both cannot join, because one is attainted and incapable of that Character.[112]

Altho' a Person attainted be to many Purposes looked upon as dead in Law, yet he hath a Capacity to purchase Land, which the King shall have upon Office found, and not the Lord of the Fee, because his Person being forfeited to the King he can't Purchase but for the King.[113]

But if a Man attainted be pardoned by Act of Parliament he may Purchase as before, for he is totally restored and inheritable to all Persons; but if he be pardoned by Charter, he may thenceforth Purchase Lands, but can't inherit his former Relations; for the King's Charter can't alter the Law, or take away the Right of others, or restore the Relation that was lost.[114]

If a Man be attainted and after pardoned by Charter, the Children born before such Pardon shall not inherit; but if they fail, the Children born after such Pardon may inherit him; for the Pardon makes him capable of new Relations as well as of new Purchases, tho' all the old Legal Benefits and Relations are lost.[115]

Bacon Abridgment, vol. II, pp. 575–586.

14.3.1.3.bOutlawry

OUTLAWRY is a Punishment inflicted on a Person for a Contempt and Contumacy, in refusing to be amenable to and abide by the Justice of that Court which hath lawful Authority to call him before them; and as this is a Crime of the highest Nature, being an Act of Rebellion against that State or Community of which he is a Member, so doth it subject the Party to divers

Forfeitures and Disabilities; for hereby he loseth his *Liberam legem*, is out of the King's Protection, *&c*.[116]

And as to Forfeitures for refusing to appear, herein the Law distinguishes between Outlawries in Capital Cases and those of an inferior Nature; for as to Outlawries in Treason and Felony, the Law interprets the Party's Absence a sufficient Evidence of his Guilt, and without requiring further Proof or Satisfaction accounts him guilty of the Fact, on which ensues Corruption of Blood, and Forfeiture of his whole Estate Real and Personal.[117]

But Outlawry in lesser Crimes, or in personal Actions, does not occasion the Party to be looked upon as guilty of the Fact, nor does it occasion an entire Forfeiture of his real Estate, but yet is very fatal and penal in its Consequences; for hereby he is restrained of his Liberty, if he can be found, forfeits his Goods and Chattels and the Profits of his Lands, while the Outlawry remains in Force.[118]

Also it is said, that antiently Outlawry was looked upon as so horrid a Crime, that any one might as lawfully kill a Person outlawed as he might a Wolf, or other noxious Animal; but that the Law herein was changed in *Ed*. III.'s Time, which provides, that a Person outlawed shall be put to Death by the Sheriff only, having lawful Authority for that Purpose.[119]

Also from the Heinousness of the Offence the Sheriff may, on a *Capias utlagatum*, break open the House of the Person outlawed; for it would be unreasonable, that this Privilege or Protection, allowed of in other Cases, should be extended to him who is declared a Contemner and Violator of the Law; and therefore the Seising him as an Outlaw, doth imply the Liberty of entring and seising him wheresoever he lies hid.[120]

And as the Punishment of Outlawry is of a very severe Nature, so the Law hath provided and taken great (a) Care, that no Person should be outlawed without due Notice and apparent Contempt to the Court; as will appear under the following Heads:[121]

(A) In what Cases Process of Outlawry lies.

(B) By what Jurisdiction such Processes are to issue.

(C) Against whom Process of Outlawry may be awarded: And herein,

1. Whether it may be awarded against a Peer.
2. Whether Process of Outlawry may be awarded against an Infant.
3. Of awarding Process of Outlawry against a Feme Sole or Covert, and the Proceedings thereon.
4. Of awarding Process of Outlawry against several Defendants, and

4. Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.
5. Of awarding Process of Outlawry against Principal and Accessary.

(D) What Forfeitures and Disabilities an Outlawry subjects the Party to: And herein,

1. Where it is of the same Effect with a Sentence or Judgment.
2. Of the Forfeiture as to Lands, Goods, *&c*. and therein of the Difference between Outlawries in Criminal and Civil Cases, and of the King's and Party's Interest at whose Suit the Outlawry was had: *And herein*,
    1. Of the Difference between a Forfeiture in a Criminal and Civil Case.
    2. What Things are forfeited by the Outlawry.
    3. To what Time the Forfeiture shall relate.
    4. Of the King's and Party's Interest at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.
3. Of the Party's Disability to bring any Action.
4. What further Disabilities Outlawry subjects the Party to.

(E) Of the Regularity of the Proceeding on an Outlawry, and for what Errors it may be reversed: And herein,

1. Where, for want of such Process as required by Law, the Outlawry may be reversed.
2. Where for want of Form in such Processes the Outlawry may be reversed.
3. Where for Variance in such Processes the Outlawry may be reversed.
4. Where for a defective Execution and Return the Outlawry may be reversed: *And herein*,
    1. To whom such Process is to issue and be executed.
    2. To what Place the Process is to issue; and therein of the *Quinto exactus*, and Proclamations on an Outlawry.
    3. What shall be said a good Execution and Return.

(F) Of the Manner of reversing an Outlawry; and therein of the Difference between Errors in fact and in Law.

(G) What the Party must do in order to intitle him to a Reversal: And herein,

1. Of appearing in Person or by Attorney.
2. Of giving Bail.

2. Of giving Bail.
3. Of suing out a *Scire facias*.

(H) The Effects and Consequences of a Reversal: And herein,

1. Where the Proceedings on the Reversal are in the same Plight as if an Outlawry had been.
2. To what the Party shall be restored on Reversal of the Outlawry.

(A) IN WHAT CASES PROCESS OF OUTLAWRY LIES.

IT seems, that originally Process of Outlawry only lay in Treason and Felony, and was afterwards extended to Trespasses of an enormous Nature; and herein it is laid down by Serjeant (a) *Hawkins*, that Process of Outlawry at this Day lies in all Appeals, and in all Indictments of Treason or Felony, and in all Indictments of Trespass *vi & armis*, and on all Returns of Rescous, and as some say, in all Indictments of Conspiracy or Deceit, or other Crimes of a higher Nature than Trespass *vi & armis*; but it lies not in an Action, nor, as some say, on an Indictment on a (b) Statute, unless it be given by such Statute, either expresly, as in the Case of *Praemunire*, or impliedly, as in Cases made Treason or Felony by Statute, or where a Recovery is given by an Action in which such Process lay before, as in the Case of a (c) Forcible Entry.[122]

In an Assise a *Capias pro fine* lies, and upon that Process of Outlawry, if the Assise be found with Force, but being a mixed Action, as savouring of the Realty, it is out of the Statute of Additions, 1 *H*. 5. *cap*. 5. which extends only to Personal Actions, Appeals and (d) Indictments.[123]

So Process of Outlawry lies in Replevin, and is given by the Statute 25 *E*. 3. *cap*. 17. which gives the *Capias* in this Manner; when on the *Pluries replegiari facias* the Sheriff returns *Averia elongata*, then a *Capias* in *Withernam* issues, and on that's being returned *Nulla bona*, a *Capias* issues, and so to Outlawry; but it does not lie on the orignal Writ of Replevin, which is *Vicountiel* and determined; and therefore as no Addition is required in such original Writ, so neither ought there to be any in the second Writ; for where a Writ or Process is founded on a former, it must pursue the former, and cannot vary from it.[124]

By the Common Law, in all Actions of Trespass *Quare vi & armis*, and in which there is a Fine to the King, a *Capias* was the Process; and herein Process of Outlawry lay by the Common Law.[125]

But in Account, Debt, (e) Detinue, Annuity, Covenant, and such Actions as are grounded upon Negligence or Laches merely, no *Capias* lay at

Common Law, but only Summons and Distress infinite, and therefore the *Capias* and Outlawry in these Actions were introduced by divers Acts of Parliament.[126]

By the Statute of *Marlebridge*, *cap*. 23. the Writ of *Monstravit de compoto* was given, where before the Process in Account was Summons, Attachment and Distress infinite; and by *Westm*. 2. *cap*. 11. Process of Outlawry is given in Account.[127]

By the 25 *E*. 3. *cap*. 17. it is accorded, that such Process shall be made in a Writ of Debt and Detinue of Chattels, and taking of Beasts, by Writ of *Capias*, and by Process of Exigent, by the Sheriff's Return, as is used in a Writ of Account.[128]

And by the 19 *H*. 7. *cap*. 9. reciting, 'That for as much as before this Time there hath been great Delays in Actions of the Case that have been sued as well before the King in his Bench, as in the Court of his Common Bench, by Reason of which Delays many Persons have been put from their Remedy; it is therefore ordained, enacted and established, that like Process be had hereafter in Actions upon the Case as well sued and hanging, as to be sued in any of the said Courts, as in Actions of Trespass or Debt.'

But it hath been adjudged, that Process of Outlawry lies in no Case but where a *Capias* lies; and that therefore where the Proceeding is by Bill and not by Original, as there can be no *Capias*, so there can be no Process of Outlawry, as in a Bill of Privilege by or against an Attorney.[129]

(B) BY WHAT JURISDICTION SUCH PROCESSES ARE TO ISSUE.

IT is clear, that the Courts at *Westminster* may issue Process of Outlawry, and that the Court of King's Bench, either upon an Indictment originally taken there or removed thither by *Certiorari*, may issue Process of *Capias* and Exigent into any County of *England*, upon a *Non est inventus* returned by the Sheriff of the County where he is indicted, and a *Testatum* that he is in some other County.[130]

Also Justices of Oyer and Terminer may issue a *Capias* or Exigent, and so proceed to the Outlawry of any Person indicted before them, directed to the Sheriff of the same County where they held their Session at Common Law; and by the Statute of 5 *E*. 3. *cap*. 11. they may issue Process of *Capias* and Exigent to all the Counties of *England*, against Persons indicted or outlawed of Felony before them.[131]

But Justices of Gaol-Delivery regularly cannot issue a *Capias* or Exigent; because their Commission is to deliver the Gaol *de prisonibus in ea*

existentibus, so that those whom they have to do with are always intended in Custody already.[132]

Justices of the Peace may make out Process of Outlawry upon (a) Indictments taken before themselves, or upon Indictments taken before the Sheriff, and returned to the Justices of the Peace, by the Statute of 1 *E*. 4. *cap*. 1. but the Power of the Sheriff, to make any Process upon Indictments taken before him, is taken away by that Statute.[133]

It is made a *Quaere* by *Hale*, whether a Coroner can by Law make out Process of Outlawry against a Man indicted by Inquisition before him.[134]

It hath been held, that tho' the Process in Inferior Courts be a *Capias*, that yet they cannot proceed to outlaw the Party.[135]

The Process to the Outlawry, *viz*. the *Capias* and Exigent, must be in the King's Name, and under the Judicial Seal of the King appointed to that Court that issues the Process, and with the (a) *Teste* of the Chief Justice or Chief Judge of that Court or Sessions.[136]

(c) AGAINST WHOM PROCESS OF OUTLAWRY MAY BE AWARDED: And herein,

1. WHETHER IT MAY BE AWARDED AGAINST A PEER.

IF a Nobleman, or Peer of the Realm, be indicted and cannot be found, Process of Outlawry shall be awarded against him, and he shall be outlawed *per judicium Coronatorem*.[137]

But in Civil Actions between Party and Party, regularly a *Capias* or Exigent lies not against a Lord of Parliament of *England*, whether Secular or (b) Ecclesiastical; yet in case of an Indictment for Treason or Felony, yea or but for a Trespass *vi & armis*, as an Assault or Riot, Process of Outlawry shall issue against a Peer of the Realm, for the Suit is for the King, and the Offence is a Contempt against him; and therefore, if a Rescue be returned against a Peer, or if a Peer be convict of a Disseisin with Force, or denies his Deed, and it be found against him, a *Capias pro fine* and Exigent shall issue, for the King is to have a Fine; and the same Reason holds upon an Indictment of Trespass or Riot, and much more in the Case of Felony.[138]

2. WHETHER PROCESS OF OUTLAWRY MAY BE AWARDED AGAINST AN INFANT.

An Infant above the Age of fourteen may be outlawed, and the Outlawry is not erroneous; but an Infant under the Age of fourteen cannot be outlawed, for if he be it is erroneous.[139]

But the Outlawry of such Infant is not void, it being of Record, but it is voidable only by Writ of Error.[140]

A Woman is said to be waived and not outlawed; and the Reason, says my Lord *Coke*, why the Outlawry of a Woman is legally called *Waiviaria mulieris* is, because Women are not sworn in Leets or Torns, as Men are, who are above the Age of twelve; and therefore, says he, Men are called *utlagati*, i. e. *Extra legem positi*, but Women are *Waiviatae*, i. e. *Derelictae*, left out or not regarded, because they are not sworn to the Law.[141]

Therefore, where a *Capias* and Exigent were awarded against three Men and two Women, and the Return was *Utlagati existunt*, where, as to the Women, it ought to have been *Waiviatae existunt*, this was held to be Error.[142]

If in an Action against Husband and Wife the Husband is outlawed, and Wife waived, and she is taken upon the *Capias utlagat'*, tho' she is to be discharged of the Imprisonment, (because the Plaintiff cannot proceed against her alone) yet she still remains waived, and when her Husband is taken he must bring her in.[143]

In an Action for a Debt due by the Wife before Marriage, the Husband was returned outlawed and the Wife waived, but before the Return of the Exigent an Attorney procured for the Wife a *Supersedeas*, surmising, that the Wife had appeared by him as her Attorney; and on Motion that this Appearance of the Wife should be received, all the Court conceived, that if upon the Exigent the Sheriff had returned *Reddidit se*, or upon *Pluries Capias* had returned *Cepi Corpus* for the Wife, then her Appearance should be entered, but not by Attorney, as it is here; and the Exigent should only issue against the Husband, *& idem dies* should be given to the Wife; but when the Husband upon the Exigent is returned outlawed, then it shall be entered *Aler sans jour* for the Wife, for the Process is determined; and if he will purchase his Pardon, he shall not have any Allowance thereupon in a *Scire facias*, unless he appear for himself and his Wife; but if for the Husband, the Sheriff should return *Cepi Corpus* upon a *Pluries Capias*, and a *Non est inventa* for the Wife, yet an Exigent shall issue against both, because it must be presumed the Husband might bring in his Wife; but if upon the Exigent the Sheriff returned *Reddidit se* for the Husband and for the Wife, and she is waived, the Husband shall go *sine die*; but in this Case, because the Exigent was returned against both to be outlawed, the *Supersedeas* supposing the Appearance of the Wife is meerly idle and void; whereupon it was disallowed, and the Exigent appointed to be filed against both[144]

4. OF AWARDING PROCESS OF OUTLAWRY AGAINST SEVERAL DEFENDANTS, AND THE PROCEEDINGS THEREON.

If two are sued in a joint Action and neither of them will appear, Process of Outlawry must be taken out against both.[145]

If an Exigent be awarded against two, and the Return is *primo exacti fuerunt & non comparuerunt*, without saying, *nec eorum aliquis comparuit*, it is erroneous.[146]

If two in a Writ of Account are adjudged to account, and one is after (a) outlawed in the Suit, and the other appears, he shall account alone.[147]

When two are adjudged to account, and one is outlawed and accounts, if he discharges himself upon the Account, this shall be a Discharge to the other, when he sues a *Scire facias* upon a Charter of Pardon; and if he be charged by the Account, this shall be a Charge upon the other, because they were adjudged to account jointly.[148]

If in Debt upon an Obligation against *B.* and *C.* Sons and Heirs of the Obligor, and against *D.* the Daughter and Heir of *A.* who was another of the Sons and Heirs of the Obligor in Gavelkind, Process is continued till the Uncles are outlawed and the Niece waived, and after the Uncles are pardoned, and bring a *Scire Facias* against the Plaintiff, who thereupon declares against them *simul cum* the Niece; and the Uncles plead, their Niece is but of the Age of seven, *unde non intendunt quod durante minori aetate sua* they ought to answer, *&c.* yet the Parol shall not demur; for the Niece is out of Court, and *quoad* her the Original is determined, and at her full Age no Re-summons could be sued against her, but the Uncles only, because she never appeared in Court.[149]

An Action of Trespass was brought against two, one was outlawed, after the Entry of the Writ it was entered, *& sciendum est quod praedict' J. S.* (one of the Defendants) *Utlagat' est*, and then counts against one of them; and on Motion in Arrest of Judgment, the Court held the Declaration naught, and that the Course of pleading in such Cases, after the Entry of the Writ, was to say, *& quod praedict'* J. S. *utlagat' est in Praec' illo*, and that the last Words are essential, because that he might be outlawed in another Writ, and not in this.[150]

5. OF AWARDING PROCESS OF OUTLAWRY AGAINST PRINCIPAL AND ACCESSARY.

Herein we must first take Notice, that by the Statute of *Westm.* 1. *cap.* 14. it is recited, 'That it had been used in some Counties to outlaw Persons being appealed of Commandment, Force, Aid or Receipt, within the same Time that he which is appealed for the Deed is outlawed; and thereupon it is provided, that none be outlawed upon Appeal of Commandment, Force,

Aid or Receipt, unless he that is appealed of the Deed be attainted, so that one like Law be used therein thro' the Realm; nevertheless, he that will so appeal, shall not by reason of this intermit or leave off to commence his Appeal at the next County against them, no more than against their Principals which he appealed of the Deed, but their Exigent shall remain until such as be appealed of the Deed be attainted of Outlawry, or otherwise.'

In the Construction of this Statute, the following Particulars are laid down by Serjeant *Hawkins* as most remarkable.

1*st*, That it seems agreed, that it extends as well to Indictments as to Appeals, not only because the Word *Appeal* in the Statute may in a large Sense be taken for any Accusation in general; but because Indictments are certainly as much within the Reason of the Statute as Appeals; and the Common Law, for the settling whereof this Statute was made, did not make, any Distinction in this Respect between Appeals and Indictments.[151]

2*dly*, That it seems to be agreed, that where-ever some of the Defendants are expresly charged as Principals, and others as Accessaries, before the Award of this Exigent, the Outlawry thereon of those charged as Accessaries cannot but be reversible, because it appears upon the Record that the Exigent issued contrary to the Direction of the Statute; but if several be outlawed on a Writ of Appeal, which chargeth them all alike without any Distinction, there can be no Advantage taken of the Appellant's not having pursued the Statute, since it appears not but that he might have charged them all as Principals.[152]

3*dly*, That it is strongly holden, that if an Appellant take out the Exigent at the same Time against all the Defendants, he must, when they appear, count against them all as Principals, and shall be concluded from charging any of them as Accessaries, because he has taken out such Process as is erroneous where all are not Principals; but he makes a Doubt, whether this be Law at this Day, since all Errors, as the Law seems now to be holden, are salved by Appearance.[153]

4*thly*, That it seems the better Opinion, that where there are more than one Principal, the Exigent shall not issue till all of them are arraigned; and herein it is said by *Hale*, that if *A.* and *B.* be indicted as Principals in Felony, and *C.* as Accessary to them both, the Exigent against the Accessary shall stay till both be attainted by Outlawry or Plea; for that it is said, if one be acquitted, the Accessary is discharged, because indicted as Accessary to both, and therefore shall not be put to answer till both be

attaint; but hereof he adds a *Dubitatur*, because tho' *C*. be Accessary to both, he might have been indicted as Accessary to one, because the Felonies are in Law several; but if he be indicted as Accessary to both, he must be proved so.[154]

In Treason all are Principals; and therefore Process of Outlawry may go against him that receives, at the same Time as against him that did the Fact.[155]

(D) WHAT FORFEITURES AND DISABILITIES AN OUTLAWRY SUBJECTS THE PARTY TO: And herein,

1. WHERE IT IS OF THE SAME EFFECT WITH A SENTENCE OR JUDGMENT.

IF a Man be outlawed of Treason or Felony, tho' there be no other Judgment (a) but *Utlagatus est per judicium coronatorem*, yet it is of it self an Attainder, and subjects the Party to such an Award thereupon to be made by the Court where he is brought, as is suitable to the Offence for which he is indicted and outlawed.[156]

But if such Outlawry appear to the Court to be erroneous, whereof any one as *Amicus curiae* may inform them, the Party shall have Counsel assigned him to take Advantage of the Error; but if he will neither bring a Writ of Error, nor plead in convenient Time, and the Outlawry be voidable only, and not void, the proper Execution shall be awarded against him, but no Sentence pronounced; because the Outlawry is a Judgment, and no Man shall have two Judgments for one Offence.[157]

And herein it is said by *Hale*, that tho' the Court *ex officio* is to prefix the Party a Day to purchase a Writ of Error, and in the mean Time to respite Execution; yet that must be on his alledging Error in Fact, or Error in Law upon the Outlawry; for if the Court be satisfied that it is merely a Pretence, they may chuse whether they will allow him a Day to sue forth a Writ of Error, but may award Execution presently.[158]

But tho' an Outlawry be an Attainder, and equal to a Conviction or Sentence by Verdict or Confession, yet it does not subject the Party to any severer Punishment than the Crime does for which the Outlawry was pronounced; and therefore, if it be in such a Crime for which Clergy is allowable, the Party outlawed shall be allowed his Clergy in the same Manner as he who is convicted by Verdict or Confession.

One was outlawed upon an Information for seducing a young Gentleman to marry a young Woman of a lewd Character, and fined 5000 *l*. and it was moved in Behalf of the Defendant, that he could not be fined upon the Outlawry; because in Misdemeanors the Outlawry does not enure as a

Conviction for the Offence, as it does in Cases of Treason and Felony, but as a Conviction for the Contempt in not answering, which Contempt is punished by the Forfeiture of his Goods and Chattels; and if he might be fined now, he must be fined again upon the principal Judgment; and the first was held to be irregular; and that the Outlawry in these Cases is not a Conviction, as appears by *Fleta*, *Quamvis quis pro contumacia & fuga utlagetur non propter hoc convictus est de facto principali*.[159]

2. OF THE FORFEITURE AS TO LANDS, GOODS, &C. AND THEREIN OF THE DIFFERENCE BETWEEN OUTLAWRIES IN CRIMINAL AND CIVIL CASES, AND OF THE KING'S AND PARTY'S INTEREST AT WHOLE SUIT THE OUTLAWRY WAS HAD: And herein, *1. OF THE DIFFERENCE BETWEEN A FORFEITURE IN A CRIMINAL AND CIVIL CASE.*

Herein we must observe that an Outlawry of Treason or Felony is Conviction and Attainder of the Offence wherewith the Party is charged; and such Outlawry corrupts the Blood, and causes an absolute Forfeiture of the Party's Estate both Real and Personal, *viz*. in case of Outlawry of Treason his Lands are forfeited to the King of whomsoever they are held; and in case of Outlawry of Felony, to the Lord by Escheat of whom they are immediately holden.[160]

Also in Civil Cases, the Retiring from the Inquiries of Justice is held so criminal in the Eye of the Law, that it is punished with the Loss of the Offender's Goods and Chattels, and the Issues and Profits of his Real Estate; but in Outlawries in Civil Cases the King has no Estate, but only a Pernancy of the Profits; nor can he manure or sow the Ground; and his Interest continues no longer than the Party hath an Estate, and determines with the Party's Death; and being originally introduced to compel the Defendant to come in the sooner and answer the Plaintiff's Demand, may more easily be superseded or reversed, and thereby the King's Pernancy of the Profits discharged, than an Outlawry in a Capital Case.[161]

Also if a Person make Default till the Award of an Exigent, either upon an Appeal or Indictment of a Capital Offence, he forfeits his Goods, unless he was pardoned before the Exigent was awarded; and it is holden, that the Law is the same, as to such a Default upon an Indictment of Petit Larceny, and that where-ever Goods are so forfeited, they are not saved by an Acquittal at the Trial, but by a Reversal of the Award of the Exigent they are saved, whether such Reversal be for an Error either in Fact or in Law; as for the Imprisonment of the Defendant at the Time when the Exigent was awarded, or for a Defect in the Indictment, Appeal or Process.[162]

2. WHAT THINGS ARE FORFEITED BY THE OUTLAWRY.

Outlawry in a Capital Case being, as has been said, an Attainder and

Conviction, it is clear, that all Lands of Inheritance, as all other the Real and Personal Estate whereof the Party outlawed is seised or possessed in his own Right, are forfeited absolutely.[163]

Also the King hath by the Common Law such a Power to require his Subjects to answer all Demands of Law and Justice, that his not appearing on Process in a Civil Action, is such a Contempt, that the Party guilty is put out of the Law, forfeits his Goods and Chattels, his Leases for Years, and his Trust in such Leases, and the Profits of his Lands of Freehold.[164]

But Outlawry in Trespass or any Civil Action, works no Corruption of Blood; and therefore if the Husband be outlawed in any such Action, the Wife shall notwithstanding have Dower, and the Issue shall inherit; for it is a Forfeiture owf the Issues and Profits of the Lands only during the Life of the Party outlawed, and so long as the Outlawry remains unreversed; also it seems, that if the Wife herself be outlawed or waived in any such Action, yet her Dower is not forfeited.[165]

It is said to have been agreed by the whole Court, that Arrearages of Rent reserved upon an Estate for Life are not forfeited by Outlawry, because they are Real, and no (a) Remedy for them but by Distress; otherwise if upon a Lease for Years.[166]

Also it is held, that there are other Things which the Party outlawed may have, and are not forfeited to the King; and that therefore an Executor or Administrator cannot plead in Excuse of Assets, that his Testator or Intestate was outlawed, because he might have Debts (b) due upon Contract; also Goods taken for Trespass before the Outlawry, for which he may have Trespass, and recover the Value of the Goods, which shall be Assets in his Hands.[167]

So if the Testator had mortgaged his Land upon Condition, that if the Mortgagee pay not at such a Day to him, his Executors or his Heirs, 100 *l.* that then it shall be lawful for him or his Heirs to re-enter, and after, but before the Day, the Testator is outlawed, and makes his Executor, and dies, and at the Day the Mortgagee pays the Money to the Executors; this is Assets, and not forfeited to the King.

If Tenant for Term of Years be outlawed, the Term is forfeited to the King, and he may seise it, and use it at his Pleasure.

So if *A.* being possessed of a Lease for Years grants it over to *B.* in Trust for himself, and afterwards is outlawed in a personal Action, this Trust shall be forfeited to the King.

If Tenant at (c) Will sows the Land and afterwards is outlawed, the King

shall have the Corn.[168]

If the Conuzee of a Statute-Staple take the Conuzor into Execution upon the Statute, and afterwards is outlawed in a personal Action, the Debt shall be forfeited to the King, and the King may discharge the Conuzor out of Execution.[169]

So if there are two Conuzees of a Statute, and they take the Body of the Conuzor into Execution, and one of the Conuzees is outlawed in a personal Action, it is said to be a Forfeiture of the Debt against both.[170]

If a Man be outlawed in a Personal Action the King shall present to his Churches, altho' he hath a Freehold or Inheritance in them.[171]

So if a Person outlawed hath an Advowson, that happens to become void (a) during the Time the Outlawry is in Force, such Avoidance is forfeited to the King, whether the Outlawry were in a Capital Case, an Action of Trespass, or other Personal Action.[172]

If pending a *Quare impedit* brought by *A.* he is outlawed, und Judgment is given for him in the *Quare impedit*, and thereupon the Incumbent resigns, and takes a new Presentation from the Queen by Virtue of the Outlawry, and accordingly he is instituted and inducted, and afterwards *A.* reverseth the Outlawry, and brings a *Scire facias* to have Execution of the Judgment; tho' the Presentation was vested in the Queen, and executed before the Outlawry reversed, yet *A.* shall have Execution of his Judgment; for upon a Recovery in a *Quare impedit*, any Incumbent that cometh in *Pendente placito* shall be removed.[173]

Things Personal, settled by way of Trust on the Offender, are as much forfeited as if he had the legal Interest, or were in Possession of them; as if a Bond be taken in another's Name, in Trust for a Person who is afterwards outlawed, this is forfeited in the same (b) Manner as if taken in his own Name.[174]

So the Trust of a Term granted by a Man for the Use of himself, his Wife and Children, *&c.* is liable in like Manner to be forfeited, if fraudulently made with an Intent to avoid a subsequent Forfeiture; but it shall be forfeited so far only as is reserved for the Benefit of the Party himself, if made *bona fide*, whether before or after Marriage for good Consideration, without Fraud, which is to be left to a Jury on the whole Circumstances of the Case, and shall never be presumed by the Court, where it is not expresly found.[175]

So where upon an Indictment of Recusancy the Party, intending to go beyond Sea, made a Deed of Gift of all his Goods and Chattels upon some

feigned Consideration, and then he went out of the Realm, and was afterwards outlawed on the same Indictment; and it was adjudged, that the Deed of Gift was void to defeat the Queen of the Forfeiture of the Goods, and this by the Statute of 13 *Eliz. cap.* 5. and that the Queen was intitled to his Leases and Goods by the Forfeiture.[176]

The Forfeiture, as has been said, must be of Goods which the Party has in his (c) own Right, and not in Right of another; and therefore an Executor or Administrator outlawed forfeit nothing which they have in Right of their Testator or Intestate.[177]

So if an Executor recovers in Account against the Receiver of the Testator, and afterwards is outlawed, yet he shall not forfeit this Debt; for it continues the Debt of the Testator, and is only put in Certainty by the Judgment.[178]

Debts and Duties upon Simple Contract are forfeited to the King by the Outlawry of the Party, tho' the Debtor might have waged his Law on such Contract to an Action brought by the Creditor; of which Privilege he is deprived by the Outlawry.[179]

It hath been adjudged, that the Cattle of a Stranger (a) *Levant* and *Couchant* on Lands extended on an Outlawry, may be taken for the King upon a *Levari facias* as the Issues and Profits of the Lands; for that otherwise there might be no Issues at all, or the Person outlawed may take in other Mens Cattle to agist, and so defeat the Outlawry.[180]

So if the Person outlawed should after the Inquisition make a Feoffment of his Lands, the Cattle of the Feoffee may be taken for the Issues of those Lands, for the Land is (b) Debtor to the King.[181]

But if the Owner of the Soil is outlawed, the Cattle of a Commoner cannot be taken as Issues; but if they should be taken, he must plead his Title in the Exchequer, unless his Right of Common is found by Inquisition on the Outlawry.[182]

3. TO WHAT TIME THE FORFEITURE SHALL RELATE.

If a Man be outlawed upon an Indictment of Felony and Treason, and pending the Process he alien the Land, yet the King or Lord shall have the Land which he held at the Time of the Treason or Felony committed; for the Indictment contains the Year and Day when it was done, unto which the Attainder by Outlawry relates: But if a Man sue an Appeal by Writ of Felony or Murder, and pending it the Party aliens, and then is outlawed before Appearance, the Lord's Escheat is lost, because it relates only to the

Time of the Outlawry pronounced; in as much as the Writ of Appeal is general, and contains no (c) certain Time of the Offence committed.[183]

As to Goods and Chattels, the very Issuing of the Writ of Exigent in case of Treason or Felony gives to the King, or the Lord of a Franchise to whom that Liberty is granted, the Forfeiture of all the Goods of the Party so put in Exigent, from the Time of the *Teste* of the Writ of Exigent.[184]

And as the Award of the *Exigent* gives the Forfeiture, so if that be well awarded, the Forfeiture shall continue, tho' the Outlawry be reversed for Error in Law or in Fact, subsequent to the Award of the Exigent; for the King's Title being by the Exigent, and that being of Record must be awarded by Matter of as high a Nature; therefore it is necessary for a Party outlawed in Treason to bring his Writ of Error specially, *tam in adjudicatione brevis de Exigi facias quam in promulgatione utlagariae*: Also a Writ of Error lies to reverse the very Award of the Exigent; and tho' no subsequent Error to the Award of the Exigent will avoid it, yet if there be Error in the Exigent, or in the Appeal or Indictment upon which it issues, both Outlawry and Exigent shall be reversed.[185]

And as the Award of the Exigent gives the Forfeiture of the Goods, so the Outlawry gives the Forfeiture or Loss of the Lands of the Party outlawed; but the bare Judgment of Outlawry by the Coroners, without the Return thereof of Record, is no Attainder, nor gives any Escheat, but it must be returned by the Sheriff with the Writ of *Exigi facias*, and the Return indorsed.[186]

And therefore, if there be a *Quinto exactus*, and thereupon *utlagatus est per judicium coronatorum*, but no Return thereof is made, there lies a Writ of *Certiorari* to the Coroners, or to the Sheriff and Coroners, to certify the Outlawry into the King's Bench; but this is only either to ground a Charter of Pardon on it, or to amerce the Sheriff where he returned only a *Quarto exactus*; but as to the Effect it has otherwise, my Lord Chief Justice *Hale* thinks as follows,[187]

1*st*, That it doth not disable the Party to bring an Action, because in relation to Party and Party it stands as nothing, 'till returned by the Sheriff.[188]

2*dly*, That consequently, barely upon such a Return of an Outlawry upon a *Certiorari*, without the Writ of Exigent indorsed and returned together with the *Certiorari*, it seems no Escheat lies for the Lord; but this he makes a *Quaere*.[189]

3*dly*, But if the Writ of *Certiorari* be directed to the Sheriff and Coroners, and the Writ of Exigent be extant in Court, and they return this Outlawry;

possibly this may be a sufficient Warrant to enter it of Record, as a Return upon the *Exigent* for the King's Advantage, and to issue upon it a *Capias utlagatum* to have the Forfeiture of his Goods.[190]

4*thly*, But unless the Writ is some Way returned or extant, it gives the King no Title to Land or Goods; for the Writ of *Exigi facias* is the Warrant of the Outlawry, and that which gives the Coroners their Authority in such a Case to give Judgment of Outlawry; and it is not like the Case where there was once a Writ and Return of Outlawry, and the Record since lost, for that upon Circumstances a Jury, upon the General Issue, may find a Record, tho' not shewn in Evidence; but here the Writ was never in Truth indorsed nor returned.[191]

5*thly*, But if the Writ of *Certiorari* were directed to the Coroners alone, tho' it may be a Ground to cause the Sheriff to mend his Return, and make it according to the Truth; yet the Certificate of the Coroners will not make a Record to intitle the King or Lord to any Thing without the Writ of Exigent extant, and the Return upon it amended by the Sheriff; for without the *Exigi facias*, and the Return of the Outlawry upon it, there is neither Disability, Forfeiture nor Escheat; and therefore a *Certiorari* shall not be so much as granted to the Coroners to remove an Outlawry after the Party's Death.[192]

A. was outlawed, and afterwards made a Lease of his Lands, and afterwards these Lands amongst others were found by Inquisition; and this Lease was pleaded in Bar to bind the King, being before the Inquisition; and the Court held, that a Lease or other Estate made by the Party after Outlawry, and before an Inquisition taken, will prevent the King's Title, if it be made *bona fide* and upon good Consideration; but if it be in Trust for the Party only, it will not be a Bar; but that no Conveyance whatsoever made after the Inquisition will take away or discharge the King's Title.[193]

A. was outlawed at the Suit of *B.* and his Lands extended; afterwards *C.* claiming Title to them brought his Ejectment, and pleaded to the Inquisition; and upon a Bill in the Exchequer, an Injunction was prayed for the King to stay the Proceedings at Law, but denied; for tho' a Person outlawed cannot after an Extent prevent the King's Title by any Alienation whatsoever; yet such Outlawry gives no (a) Privilege to the Possession of a Disseisor, but that the Disseisee may enter and bring his Ejectment; for by the Outlawry the King had no Interest in the Land it self, but only a Title to recover the Profits.[194]

It was found by Special Verdict in Ejectment, that *A.* being outlawed in a personal Action levied a Fine, and the King seised the Lands in the Hands

of the Conuzee; and it was resolved, that if the Seisure was before the Fine levied, the King may well retain against the Conuzee; but if the Fine was levied before the Seisure, the Conuzee may well take.[195]

From these Cases the Law seems to be now settled, as laid down in *Salk.* *viz*. That by a bare Outlawry the Party immediately forfeits his personal Goods, and they are vested in the King, but that he does not forfeit the Profits of his Lands, nor Chattels Real, 'till Inquisition taken; and that therefore an Alienation after Outlawry, and before Inquisition, is good to bar the King of the Pernancy; but if he makes a Feoffment after Inquisition, the Feoffee has the Estate, and the King shall have the Profits.[196]

4. OF THE KING'S AND PARTY'S INTEREST, AT WHOSE SUIT THE OUTLAWRY WAS HAD, IN THE ESTATE AND EFFECTS OF THE PARTY OUTLAWED, AND THEIR REMEDIES FOR THE SAME.

When the Outlawry is returned on the *Exigi facias* by the Sheriff, and recorded in Court, Execution may be taken out against the Party outlawed, either general, to arrest the Body, or special, to arrest the Body and extend the Goods and Lands, as also Debts and *Choses in Action* belonging to the Party outlawed; and when such Inquisition is returned by the Sheriff, a Transcript of the Outlawry and Inquisition is transmitted into the Exchequer; and thereupon, if any Debt be returned due from any one to the outlawed, on Application to the *Exchequer* a *Scire facias* issues to such Person, to shew Cause why the King should not have such Sum so found due on the Inquisition to the Outlawed; and the Reason of returning the Transcript of the Record into the Exchequer is, *ad ulterior' Execution' praedicto Domino Reg' per eand' Cur' de Scacc' superinde fiend'*; for when the Inquisition has returned the Outlawed to be possessed of any Goods or Lands, the Property of these Goods belong to the King, since the Outlawed being out of the King's Protection cannot enjoy any Thing, and the Profits of the Land are to be seised into the King's Hands; but the Lands themselves are not forfeited, unless it be in Capital Cases; but in other Cases the Profits are seised whilst the Party continues outlawed; and therefore the Transcript of this Record is sent into the Exchequer, that the Court of ordinary Revenue may have it in Charge; but the Court of Exchequer (a) usually grants a *Custodiam* to such Person as sued out the Outlawry.[197]

The King by his Prerogative is to have *Bona felonum & fugitivorum*; and (b) tho' the Lord of a Manor or other private Person may claim them, yet that cannot be by Prescription, but must be by way of Grant; for every Prescription must be immemorial; and the Goods of Felons and Fugitives

cannot be forfeited without Matter of Record, which presupposes the Memory of that Continuance.[198]

There is a Difference said to be between an Outlawry on mesne Process and after Judgment; that as to the first the Party hath no Interest, but that the whole Benefit of the Forfeiture accrues to the King.[199]

If a *Capias ad satisfaciendum* issues upon a Judgment in an Action of Debt, and the Sheriff returns *Non est inventus*, and after a *Capias utlagatum* issues, upon which he is taken and imprisoned, and after he is let to go at large, the Party that recovered may have an Action of Debt for this Escape against the Sheriff, because of the Prejudice to him, (a) he being in Execution as well for his Benefit as for the King's. 1 *Rol. Abr*. 810. (b) *Leighton* ver. *Walwin*.[200]

So if a *Capias utlagatum* issues upon an Outlawry upon mesne Process, and the Defendant is taken and suffered to escape, an Action upon the Case lies; because the Plaintiff is thereby delayed of his Debt.[201]

If within the Year a *Capias ad satisfaciendum* issues on a Judgment, and the Defendant is thereupon outlawed, and two Years after taken upon a *Capias utlagatum*, and the Sheriff suffers him to escape, Debt will lie against him; for the Defendant was in Execution at the Suit of the Plaintiff, without Prayer, in as much as the Plaintiff was at the End of his Process, and no Continuance nor *Scire facias* lay after the *Capias utlagatum*, which being sued at the Charge of the Plaintiff imported an Election of the Body. *Salk*. 318. (c) *Wolf* ver. *Davison* adjudged.[202]

If *A*. hath Judgment in Debt against *B*. for 50 *l*. and thereupon he takes out a special *Capias utlagatum* against him, and *J. S* promises, that in Consideration of his staying any further Proceeding on that Writ, he the said *J. S*. would satisfy him the Debt, unless *B*. did it before such a Day; an *Assumpsit* lies on this Promise, for the Plaintiff is at the Charge of suing out the Writ, and hath the Carriage of it; and the Party shall be in Execution at his Suit, and the King is to satisfy him out of the Goods of the Party outlawed; altho' it was objected, that the Consideration was against Law, being in Delay of Justice, and that the whole Benefit accrued to the King.[203]

But it hath been adjudged, that an Action on the Case will not lie against the Sheriff for neglecting to extend or seise the Goods and Lands of a Person outlawed upon a *Capias utlagatum*, because it is the King's Loss; and tho' it was urged, the Sheriff's Extending and Seising would be a Means to enforce the Defendant to appear to the Plaintiff's Action; this the Court said was so remote, as not to be considered as a Ground to support an

Action; but if it had been shewn, that the Sheriff might have taken his Body, and had neglected to do it, there might have been more Reason to support the Action.[204]

When after the Extent the Lands are leased out, or a *Custodiam* granted to him at whose Suit the Outlawry was had, the Lessee shall account only according to the extended Value; and if they happen to be extended too low, the Party hath no Remedy but by taking out a *Melius inquirend'*, and thereby have them extended at a greater Value.[205]

If by the Inquisition the Lands of the Person outlawed are found in the particular Occupation of such and such Persons, but the Value of every particular Parcel is not found, but by the Lump that *in toto* the Lands are of such a Value; this is a good Finding.[206]

It was found by Inquisition upon an Outlawry, that the Party outlawed was seised in Fee *de sex clausis prati & pasturae*; and it was objected, that the Inquisition was void for Uncertainty; *& per Hale* Chief Baron, an Inquisition found *de uno messuagio sive tenemento* has been held good; because it is not an Office of Intitling, but of Instruction or Information, which does not require such precise Certainty as an Office of Intitling does; so in an Inquisition upon an Extent upon a Statute or Judgment, or in Dower, such Certainties suffice, else all such Inquisitions were liable to be quashed, which would annul all such Proceedings; which would be mischievous; and such Inquisitions have not used to be quashed for Want of such precise Certainty.[207]

A Bill was exhibited by the Attorney General against a Person outlawed, to discover his Real and Personal Estate, and what secret and fraudulent Gifts and Conveyances he had made, because by the Outlawry his Goods and the Profits of his Land were forfeited; to which the Defendant demurred; *quia nemo tenetur prodere seipsum*, and to discover his Estate upon a Forfeiture; but the Court held, that he ought to answer the Bill; because the King is intitled to his Estate by Course of Law, and the Outlawry is in the Nature of a Gift to the King, or a Judgment for him; and a common Person may have a Bill of Discovery in the like Case to intitle him to take out Execution.[208]

Also in Case of Outlawry, it is said to be the Course of the Exchequer to prefer an Information in Nature of Trover and Conversion against him who hath the Goods of a Person outlawed.[209]

3. OF THE PARTY'S DISABILITY TO BRING ANY ACTION.

A Person outlawed cannot regularly maintain any Action, for by his Contumacy he is out of the King's Protection, and shall have no Privilege or (a) Benefit from that Law of which he is a Violator, and to which he refuses to be amenable himself.[210]

This Disability may be taken Advantage of by pleading the same in Bar or Abatement, with this Diversity, that it may be pleaded in Abatement in all Cases, but it cannot be pleaded in Bar, unless the Ground or (b) Cause of the Action be forfeited; as in Felony, where it may be pleaded in Bar to all Actions concerning Lands and Tenements, as well as Goods and Chattels, because all are forfeited by the Felony.[211]

But tho' it cannot be pleaded in Bar, unless the Ground or Cause of Action be forfeited, nor in Actions where the Damages are incertain; yet it is now held, that in Actions on the Case, where the Debt to avoid the avoid the Law-Wager is turned into Damages, there Outlawry may be pleaded in Bar; for it was vested in the King by the Forfeiture as a Debt certain due to the Outlaw; and the turning it into Damages, whereby it becomes uncertain, shall not devest the King of what he was once lawfully possessed of.[212]

It hath also been held, that Outlawry may be pleaded in Bar after it is pleaded in Abatement; because the Thing is forfeited, and the Plaintiff has no Right to recover.[213]

The Disability cannot be taken Advantage of until the Exigent be returned; for the Inquirng after him in the County is in order that he may appear; and therefore if he does appear at the Return of the Exigent, the Law is satisfied, and the Outlawry must not be recorded against him.[214]

Also this Disability is only pleadable when the Plaintiff sues in his own Right; for if he sues in *Auter droit* as Executor, Administrator, or as Mayor with his Commonalty, Outlawry shall not disable him, because the Person whom he represents has the Privilege of the Law, and Outlawry being no Objection to his Representation, it is no Objection but he should be answered.[215]

But it hath been held, that to an Action *qui tam* Outlawry in the Informer is a good Plea, tho' objected that he sues in Right of the King; for as to a Moiety he recovers to his own Use, which he cannot do by Reason of this Disability.[216]

So where a Relator in his Information set forth, that he and the Defendants were Part-owners of several Coal-Mines in *Derbyshire*, that the King had a Duty of Lot and Cope out of all the Lead-Mines there; that by the Custom, if one Owner were at the Expence for the Improving and

Working a Mine, all the Owners ought to contribute and bear their Part of the Charge; that the Relator had been at great Charges in making Soughs and other Things for Working and Improving the Mines, without which they could not be wrought, and so the King would lose his Duty; and that the Defendant would not contribute, nor pay any Part of the Charge; therefore to make him account with the Relator, and pay his Part of the Charge, was (amongst other Things) the Scope of the Information. To which the Defendant pleaded an Outlawry in the Relator; and after much Debate the Plea was held good; for tho' Mr. Attorney be Plaintiff, yet the Relator is to have the whole Benefit or Loss of the Suit, and is himself Party to it; for it would abate by his Death, *&c*. and the King's Name is only made use of by the Form of the Court, and he is not directly concerned at all, and very little by Consequence, and the Suit is not for the King's Duty, but the Relator's Interest.[217]

If there be two Tenants in Common of a Rectory for Years, and one of them is outlawed, yet the other, on setting forth this Matter, may have an Action of Debt for a Moiety.[218]

If the Party outlawed bring a Writ of Error to reverse the Outlawry, the Outlawry in that Suit, or any Stranger's, shall not disable him; for if he were outlawed at several Men's Suits, and one should be a Bar to another, he could never reverse any of them; and if it be for Error in the same Outlawry, the Outlawry it self is no Objection, for that would be *Exceptio ejusdem rei cujus petitar dissolutio*; nor is another Outlawry pleadable in Bar to such Writ of Error, for then two erroneous Outlawries would be irreversible, which would amount to *exceptio ejusdem rei*, *&c*. So if there be an Attaint brought on a Verdict, Outlawry grounded on that Verdict shall not be pleaded in Bar, for the above Reasons.[219]

As this is a dilatory Plea, when it is pleaded in another Court than where the Outlawry issued, the Defendant must bring it in immediately; for this being in Delay, if the Court should give Time, and it should not be brought in, Delay of Justice would be from the Court; and since there is a Way of having it immediately, by producing it under the Great Seal, no Time shall be given to bring it (a) *sub pede sigilli*; but otherwise when it is in the same Court, for then the Record is already in Court.[220]

In pleading Outlawry in Disability in another Court, the antient Way was to have the Record of the Outlawry it self *sub pede sigilli* by *Certiorari* and *Mittimus*; but this being very expensive, it is now held to be sufficient, to plead the *Capias utlagatum* under the Seal of the Court from whence it

issues; for the Issuing of the Execution could not be without the Judgment, and therefore such Execution is a Proof to the Court that there is such a Judgment; which is a Proof, that the Defendant's Plea of a Matter of Record is proved by a Matter of Record, and therefore appears to the Court not to be a meer Dilatory; and therefore on shewing such Execution, if the Plaintiff will plead *Nul tiel record*, the Court will give the Defendant a Day to bring it in.[221]

Outlawry in a County Palatine cannot be pleaded in any of the Courts at *Westminster*, for he is only ousted of his Law within that Jurisdiction; and it shall not extend to disable a Man in another County where they have no Power; for the County Palatine being a Royal Jurisdiction within Bounds, the Losing the Privileges of the Law within that Jurisdiction can be no Disadvantage to him in another County; and if he does not live within the Palatine Jurisdiction, he is not obliged to attend there; but it seems, that Outlawry in the County Palatine of *Lancaster* may be pleaded in the Courts of *Westminster*; because that County was erected by Act of Parliament in *Ed*. III.'s Time, but *Durham* and *Chester* are by Prescription.[222]

If Outlawry be pleaded either in Bar or Abatement, and the Plaintiff replies *Nul tiel record*, and the Defendant has a Day given him to bring in the Record, and in the Interim the Plaintiff removes the Record by Writ of Error, and reverses it; tho' the Defendant fails in bringing in the Record, yet this shall not be fatal and peremptory on him; for in the first Case he shall have Liberty to plead a new Bar, and in the second, the Judgment shall only be a *Respondeas ouster*; because his Plea was a true Plea at the Time of pleading it, and the Plaintiff was actually disabled from suing, not having then his *Liberam legem*.[223]

So that Outlawry does not abate the Writ, but is only a Temporary Impediment that disables a Plaintiff from proceeding; for upon obtaining a Charter of Pardon, or reversing the Outlawry, he is restored to his Law, and shall oblige the Defendant to plead to the same Writ.[224]

Audita querela to avoid a Statute upon the Statute of Usury; to which the Defendant pleaded Outlawry in the Plaintiff at the Suit of *J. S.* and on Demurrer it was insisted, that Outlawry could not be pleaded in this Case, the Suit being only by way of Discharge, and not to recover any Thing; but it was held, that a Person outlawed is not receivable to sue in any Court, unless it be to reverse his own Outlawry; and the Chief Justice said, that where the Action is *ad lucrandum*, there ought to be Ability in the Person, and that it is all one to gain by way of Discharge, as by way of

Perquisition.[225]

But where Error was brought by six to reverse a Judgment in Ejectment, and the Defendant in Error pleaded Outlawry in one of the Plaintiffs; the Plea was held ill on Demurrer, because this was only a Commission which went in (b) Discharge, and in which all the Plaintiffs were obliged to join; it was also said in this Case, that it would be very mischievous upon an Outlawry in case of (c) Error, Attaint or *Audita querela*, which are only by way of Discharge, if this should be any Bar.[226]

A Person is outlawed in Debt, and taken upon a *Capias* and committed to the *Fleet*, the Keeper of the *Fleet* lets him escape voluntarily, and afterwards the Executor of the Plaintiff in Debt takes him in Execution again upon a new Writ, and upon this second Taking he brings an *Audita querela*; to which Outlawry in the Plaintiff in the *Audita querela* was pleaded; upon which Plea he demurred; and it was resolved, that Outlawry was a good Plea in this Case in Disability of the Plaintiff; because that this Writ is not directly to reverse the Outlawry, (as a Writ of Error is) but is founded upon a Wrong, *viz*. upon the Escape, and not upon the Record only.[227]

In Debt upon a Judgment brought in *Trinity* Term, the Defendant imparled 'till *Michaelmas* Term, and then pleaded in Bar, that the Plaintiff *die lunae prox' post test' Sanct' Martini* was outlawed; to which the Plaintiff demurred; it was urged, that the Outlawry was mesne between the Action brought and the Plea pleaded, and that all Matters in Discharge of the Action, which happen after the Action brought, ought to be pleaded *puis darrein continuance*; but the Court compared this to the common Case of a Judgment confessed by an Executor after an Action brought; which is never pleaded after *Puis darrein continuance*, but as this Case is; and in these Cases the Time of the Outlawry, and the Time of the Judgment, and when it was, appear in themselves.[228]

In pleading Outlawry, it hath been adjudged, that the Defendant must conclude his Plea with a *prout patet per recordum*, and not *hoc paratus est verificare*.[229]

If the Defendant after Imparlance pleads Outlawry in Bar, and the Plaintiff replies *Nul tiel record*, and the Defendant hath a Day to bring in the Record, and fails therein, Judgment shall be given absolutely against him, and not a *Respondeas ouster*.[230]

If ten Outlawries on mesne Process be pleaded in Disability of the Plaintiff this is naught for Duplicity; for tho' there be a Difference as to

pleading double between Pleas in Bar and Abatement, there is likewise a Difference between a Plea of an Outlawry in Disability and other Pleas in Abatement; and the Court held this Plea ill for Duplicity, because the Plaintiff is disabled as well by one Outlawry as by all the other nine, to which several Answers are required.[231]

Outlawry may be pleaded to a Bill in Equity, as well as to an Action at Common Law; and in this Case the Defendant need not set down the Plea, as he must other Pleas and Demurrers, in eight Days, or they must stand overruled; but the Plaintiff must set it down, if there be any Insufficiency in Point of Form in pleading; for being *sub pede sigilli* it appears, upon shewing of it, to be a good Plea, and therefore not presumed to be necessary to be argued before the Court; also if an Outlawry be not pleaded, yet it may be shewed at the Hearing as a peremptory Matter against the Plaintiff's Demand, if it be personal; because it shews the Right of the Thing in Demand to be in the King. If a Plea of Outlawry stand allowed, whereby the Suit is put *sine die*, and after the Outlawry is reversed, the Plaintiff must bring his Bill of Revivor; because that Suit being abated, the Defendant has no Day in Court, and therefore must be brought into Court by a new Process.[232]

But if the Bill be for Relief against an Action at Law, and an Outlawry be pleaded by the Defendant in the same Action, it will not be allowed; (a) because the Outlawry is Part of the Grievance, and it is *exceptio ejusdem rei cujus petitur dissolutio*; also, as at Law, an Outlawry in an Executor, Administrator or Guardian, is no good Plea, because they do not claim in their own Right; and the real Actor being the Testator or Infant, the Outlawry in any third Person is no Exception against him why he should not share *in judicio*.[233]

4. WHAT FARTHER DISABILITIES OUTLAWRY SUBJECTS THE PARTY TO.

Persons outlawed are under several other Disabilities, besides that of bringing an Action; such a one cannot be a Juror, because he is not *Liber & legalis homo*, as the Law requires.[234]

But one outlawed in a personal Action may be a Witness, tho' he cannot be a Juror.[235]

A Person outlawed cannot be an (a) Auditor to take Accounts.[236]

One outlawed in a personal Action cannot be an Approver; because by his Outlawry he is out of the Law, and his Accusation shall not be of such Credit as to put any Person on his Trial.[237]

If a Man pledge Goods and then is outlawed, he cannot redeem them; because then the absolute Property of them is in the King; but if the Outlawry be reversed, then the outlawed Person is re-instated in his Property as if there had been no Outlawry, and therefore may redeem them.[238]

Persons outlawed in Debt, Trespass or other Civil Action, may be Heirs.[239]

If a Husband be outlawed in Trespass, or any Civil Action, the Wife shall have Dower, for this works no Corruption of Blood, or Forfeiture of Lands; so likewise it seems if the Wife be outlawed or waived in such Actions, yet her (b) Dower is not forfeited.[240]

A. being outlawed, the Queen granted him a Lease for Years, rendring Rent, he was again outlawed after the Grant, but before any Seisure there was a Pardon of all Goods and Chattels forfeited; and it was adjudged, that a Person outlawed was capable of receiving a Lease, and that by the Pardon, the Term which was forfeited revived, and was restored again.[241]

It is held, that where Clergy is allowable, it shall be as much allowed to one who is outlawed by Common Law for Felony, as to one who is convicted by Verdict or Confession; also a Statute taking away the Benefit of Clergy, from those who shall be found guilty, doth not thereby take it from Persons who are outlawed; neither doth the Statute of 25 *H.* 8. *cap.* 1. *sect.* 3. which takes away Clergy from those who are found guilty after the Laws of this Realm, extend to Persons outlawed.[242]

By the Statute of *Westm.* 1. *cap.* 15. it is enacted, that if a Person be attaint by Outlawry of any Felony, he is not bailable; but it is held, that the Court of King's Bench may in their Discretion, in some special Cases, bail a Person upon an Outlawry of Felony; as where he pleads, that he is not of the same Name with the Person that was outlawed, or alledges any other Error in the Proceedings.[243]

(E) OF THE REGULARITY OF THE PROCEEDINGS ON AN OUTLAWRY, AND (a) FOR WHAT ERRORS IT MAY BE REVERSED: And herein,[244]

1. WHERE, FOR WANT OF SUCH PROCESS AS REQUIRED BY LAW, THE OUTLAWRY MAY BE REVERSED.

THE Forfeitures and Penalties in an Outlawry being so severe, great Care hath been taken and Caution used, that no Person should be outlawed without sufficient Notice, and great Contumacy to the Process of the Court; and therefore the Law requires, that in all Civil Causes and in every Indictment or Appeal for any Crime under the Degree of Capital, there

should be three *Capias's* to the Sheriff of the County where the Action or Prosecution is commenced, before the Exigent is awarded; and if any such Process is omitted, the Outlawry is erroneous.[245]

But (b) after Judgment upon a *Capias ad satisfaciendum*, an Exigent may be awarded, without an *Alias* and *Pluries*, and thereupon the Defendant be outlawed; because he having been already in Court before Judgment, and having Conusance of the Debt, ought to pay the Debt on the first suing out of the *Capias*; otherwise it is a Contumacy in not performing the Judgment of the Court, for which Disobedience he is put out of the King's Protection.[246]

It is said to be agreed, that one *Capias* before the Award of the Exigent hath alway been sufficient in an Indictment or Appeal of Death, or High Treason; but that it seems doubtful whether two *Capias's* were not required by the Common Law in all Indictments and Appeals of any other Felony; however, says *Hawkins*, it is (c) certain, that they are required in all Indictments of any other Felony by 25 *E*. 3. 14. by which it is recorded, 'That if after any Man be indicted of Felony before the Justices in their Sessions, to hear and determine, it shall be commanded to the Sheriff to attach his Body by Writ or Precept, which is called a *Capias*; and if the Sheriff return that the Body is not found, another shall be incontinently made, returnable at three Weeks after, wherein it shall be comprised, that the Sheriff shall cause to be seised his Chattels, and safely to keep them 'till the Day of the Writ or Precept returned; and if the Sheriff return, that the Body is not found, and the Indictee cometh not, the Exigent shall be awarded, and the Chattels shall be forfeit, as the Law of the Crown ordaineth; but if he come and yield himself, or be taken by the Sheriff or by other Minister, before the Return of the second *Capias*, then the Goods and Chattels shall be saved.'[247]

It is said to have been the general Opinion, that this Statute extends to Appeals, as well as to Indictments, tho' it mention only the latter; but that it extends not to any Indictment or Appeal of Death, tho' it speak of Felony in general.[248]

It is left a *Quaere*, if three *Capias's* be still necessary in an Appeal of Rape, as they were at the Common Law, notwithstanding it be made Felony by Statute.[249]

2. WHERE FOR WANT OF FORM IN SUCH PROCESSES THE OUTLAWRY MAY BE REVERSED.

If any Process required in an Outlawry be erroneous, the Outlawry for this may be reversed; for a Person shall not be subject to any Disadvantage in

respect of having such Process awarded against him, nor shall he be condemned barely for not appearing, where that which should have compelled him to have appeared is (a) defective.[250]

As where the *Capias* was *este Edmundo Anderson*, without a *T*, for this Error the Outlawry was reversed; for the *Capias* and Exigent must be in the King's Name, and under the Judicial Seal of the King appointed to that Court that issues the Process, and with the *Teste* of the Chief Justice or Chief Judge of that Court or Sessions.[251]

Every *Capias* ought to be returnable the ensuing Term, for the Mischief that might otherwise befal the Prisoner in being kept always in Prison.[252]

The *Capias utlagatum* can issue only in Termtime, being a Judicial Writ; yet in pleading an Outlawry the Party need not alledge that it issued in Termtime; for that it shall be so intended, unless the contrary appears.[253]

If the Process be against a Feme, and the Words are, *Quas recuperavit versus Eum*, instead of *Eam*; this is (b) such an Error for which the Outlawry may be reversed.[254]

If the Writ be *Praecipipimus vobis* instead of *Praecipimus vobis*, this is erroneous; for without a Command to the Sheriff the Writ is not good, and here there is none; the Word *Praecipipimus* being senseless is of no greater Force than if omitted.[255]

3. WHERE FOR VARIANCE IN SUCH PROCESSES THE OUTLAWRY MAY BE REVERSED.

If there be a Variance between the Original and Extent or other Process, for this the Outlawry may be reversed.[256]

As a Variance between the original Writ and Filazer's Rule.[257]

So where in Error to reverse an Outlawry in Trespass, in the Original the Plaintiff was named *Barnes*, and in the Exigent *Bernes*; this was held Error; so where in the Original it was *Blaba sua*, and the *Exigent* was *Blada*; this was held a plain Variance, and the Outlawry was reversed.[258]

So where in the Original the Party was named *Agnes Gargrave* of *Kingsly in Com' Ebor'*, and in the *Exigent* she is named *Nuper de Kingsley*; this was held Error.[259]

4. WHERE FOR A DEFECTIVE EXECUTION AND RETURN THE OUTLAWRY MAY BE REVERSED: and herein,

1. TO WHOM SUCH PROCESS IS TO ISSUE AND BE EXECUTED.

The Exigent and several Processes in Order to an Outlawry, are to be directed to the Sheriff of the proper County; and such Care hath been taken that there might be no Surprize in the Affair, that in Civil Cases there are

three several Offices concerned in the Issuing of such Process; the first is the Chancery, out of which the Original issues; the second, the Philazer, who makes out the *Capias, Alias* and *Pluries*; and the third, the Exigenter, who makes out the Exigents; which several Process must be legally executed before the Party can be said to be outlawed; therefore if the Sheriff returns a *Cepi*, if he have not the Body at the Day, the Court will not award an Exigent on the Suggestion of an Escape, unless the Sheriff will return one.[260]

If the Exigent be directed to the Sheriffs of the City of *Lincoln*, and the Direction is *Quod Capias Corpus ejus ita quod Habeas Corpus ejus*, where (as it was objected) it ought to have been *Capiatis & habeatis*; yet this is no Error, for they are both but one Officer to the Court, and tho' in the End of the Writ it was *Ita quod habeatis ibi hoc breve*; this was likewise held to be good, and no way repugnant, being good both Ways.[261]

But if in the Direction of Process of Outlawry to the Sheriffs of *London*, it be *Praecipimus tibi* instead of *vobis*; this is such an Error for which the Outlawry will be reversed, because that the Court will *ex officio* take Notice that there are two Sheriffs in *London*.[262]

Judgment of Outlawry is given by the Coroner at the fifth County-Court, upon the Party's not appearing to the Exigent, (which is a Writ, commanding the Sheriff to cause the Defendant to be demanded from County-Court to County-Court until he be outlawed, *&c.*) and such Judgment is entered thus, *Ideo, &c. per judicium Coronatoris Domini Regis Comitatus praedict' utlagatus est*.[263]

If the Judgment appear not by the Return of the Exigent to have been given by the Coroner, it is erroneous, except in *London*, where the Mayor by Custom is Coroner, and the Judgment given by the Recorder.[264]

If there be two Coroners in a County, the Calling upon the Exigent may be by one of them, and likewise one alone may give the Judgment of Outlawry; but it seems, the Return must be by two in Ministerial Acts; the Name of the Coroner must be subscribed to the Judgment of Outlawry at the *Quinto exactus* upon an Outlawry of Felony; and it must be subscribed also by the Name of their Office, *A. B. & C. D. Coronatores*, unless in *London*, where the Mayor is Coroner; the Sheriff's Name and Office must also be subscribed to the Return of the Exigent, *e. g. A. B. Armiger vicecomes*.[265]

If after the *Quinto exactus* the Coroners refuse to give Judgment of Outlawry, the Court will grant an Attachment against them; and it is said,

that the Coroners of *Stafford* for such an Offence were fined 10 *l*. but after the Judgment of the Outlawry pronounced, they may (a) stay the Return of the Exigent for to be advised, if the Case requires it.[266]

By the Statute of 34 *H* 8. *cap*. 14. The Clerks of the Crown, Clerks of Assise, and Clerks of the Peace, are to certify into the King's Bench the Names of all Persons outlawed, attainted or convicted; and upon Letter from the Justices aforesaid, Certificates shall be made of such Persons outlawed, attaint or convict, to the Justices of Gaol-Delivery.[267]

2. TO WHAT PLACE THE PROCESS IS TO ISSUE; AND THEREIN OF THE QUINTO EXACTUS, *AND PROCLAMATIONS ON AN OUTLAWRY.*

The Exigent must be sued to the County where the Party really resides, for there all Actions were originally laid; and because that Outlawries were at first only for Treason, Felony, or very enormous Trespasses, the Process was to be executed at the Torn, which is the Sheriff's Criminal Court; and this held not only before the Sheriff but before the Coroners, who were ancient Conservators of the Peace, being the best Men in each County, to preside with the Sheriff in his Court, and who pronounced the Outlawry in the County-Court on the Party's being *Quinto exactus*; and therefore anciently there was no Occasion for any Process to any other County than that in which the Party actually resided; but this Matter being since altered, and the Learning thereof depending on several Acts of Parliament, it will be necessary to take Notice of the Statutes themselves.[268]

And first, it is enacted by the 6 *H*. 6. *cap*. 1. 'That before any Exigents be awarded against Persons indicted in the King's Bench of Treason or Felony, Writs of *Capias* shall be directed as well to the Sheriff or Sheriffs of the County wherein they be indicted, as to the Sheriff or Sheriffs of the County whereof they be named in the Indictments; the same *Capias* having the Space of six Weeks at the least, or longer Time, by the Discretion of the said Justices, if the Case require it, before the Return of the same; which Writs so returned, the Justices shall proceed in the Manner as they had done before the Statute; and if any Exigent be awarded, or any Outlawry pronounced against such Persons, before the Return of the said Writs, the same Exigent so awarded, with the Outlawry thereof pronounced, shall be void and holden for none.'

And it is farther Enacted by 8 *H*. 6. *cap*. 10. 'That upon every Indictment or Appeal, by the which any Subject dwelling in other Counties than where such Indictment or Appeal shall be taken of Treason, Felony and Trespass, before the Justices of the Peace, or before any other having Power to take such Indictments or Appeals, or other Commissioners or Justices in any

County, Franchise or Liberty of *England*, before any Exigent awarded, presently after the first Writ of *Capias* returned another Writ of *Capias* shall be awarded, directed to the Sheriff of the County whereof he who is indicted is or was supposed to be conversant, by the same Indictment, returnable before the same Justices, before whom he is indicted or appealed, at a certain Day, containing the Space of three Months from the Date of the said last Writ, where the Counties be holden from Month to Month, and where the Counties be holden from six Weeks to six Weeks, the Space of four Months, until the Day of the Return of the said Writ, by which Writ of second *Capias* the Sheriff shall be commanded to take him which is so indicted or appealed by his Body, if he can be found within his Bailiwick; and if he cannot be found within his Bailiwick, to make Proclamation in two Counties before the Return of the same Writ, that he which is so indicted or appealed shall appear before the said Justices, *&c*. at the Day contained in the said Writ, to answer, *&c*. after which Writ so served and returned, if he which is so indicted or appealed come not at the Day of such Writ returned, the Exigent shall be awarded; and that every Exigent and Outlawry otherwise awarded or pronounced shall be holden for none and void.'

But it is expresly provided, 'That the above recited Statute concerning Process to be made before the King in his Bench stand in Force, and that this present Statute shall not extend to Indictments or Appeals taken within the County of *Chester*; and that if any Persons shall be indicted or appealed of Felony or Treason, and at the Time of the same Felony or Treason supposed was conversant within the County whereof the Indictment or Appeal makes mention, the like Process to be made against them as was used before.'

And it is farther enacted by 10 *H*. 6. *cap*. 6. That such second *Capias* as is required by 8 *H*. 6. *cap*. 10. shall be awarded upon Indictments or Appeals removed into the King's Bench, or elsewhere, by *Certiorari* or otherwise.'

And by the 31 *Eliz. cap*. 3. it is enacted, 'That in every Action personal, wherein any Writ of Exigent shall be awarded out of any Court, one Writ of Proclamation shall be awarded and made out of the same Court having Day of *Teste* and Return, as the said Writ of Exigent shall have directed, and delivered of Record to the Sheriff of the County where the Defendant, at the Time of the Exigent so awarded, shall be dwelling; which Writ of Proclamation shall contain the Effect of the same Action: And that the

Sheriff of the County, unto whom any such Writ of Proclamation shall be directed, shall make three Proclamations in this Form following, and not otherwise; that is to say, one of the same Proclamations in the open County-Court, and one other of the same Proclamations to be made at the General Quarter-Sessions of the Peace in those Parts where the Party Defendant, at the Time of the Exigent awarded, shall be dwelling, and one other of the same Proclamations to be made one Month at the least before the *Quinto exactus* by Virtue of the said Writ of Exigent, at or near the most usual Door of the Church or Chapel of that Town or Parish where the Defendant shall be dwelling at the Time of the Exigent so awarded; and if the Defendant shall be dwelling out of any Parish, then in such Place, as aforesaid, of the Parish in the same County, and next adjoining to the Place of the Defendant's Dwelling, and upon a Sunday immediately after Divine Service and Sermon, if any Sermon there be; and if no Sermon there be, then forthwith after Divine Service; and that all Outlawries had and pronounced, and no Writs of Proclamations awarded and returned according to the Form of this Statute, shall be utterly void and of none Effect.'

In the Construction of these Statutes the following Opinions have been holden:

That tho' the Words are express, that any Outlawry pronounced contrary to the Directions of the Statute shall be void; yet it is not to be taken, as if such Outlawries were absolutely void, but only voidable by Writ of Error.[269]

If a Defendant be expresly named of the same County wherein he is indicted or appealed, and be also named under an *Alias dictus* of another, it hath been adjudged, that there is no need of any *Capias*, with a Command for Proclamation according to 8 *H.* 6. because that which comes under the *Alias dictus* is no Way traversable nor material: Also if a Defendant be named of *B.* and late of *C.* there is no need of any *Capias* to the Sheriff of the County wherein *C.* lies; because that it appears, that the Defendant is at present conversant at *B.* but if a Defendant be named of no certain Place at present, but only late of *B.* and late of *C.* and late of *D. &c.* being all of them in Counties different from that in which the Prosecution is commenced, a *Capias* shall go to the Sheriff of every one of those Counties.[270]

On a Writ of Error to reverse an Outlawry upon the Statute of 5 *Eliz.* of Perjury, the first Error assigned was, that he was indicted by the Name of *N. L. de parochia de Aldgate*, and not shew in what County *Aldgate* is. 2*dly*,

For that a County-Court was held 23 *Feb*. and the next County-Court was held 23 *March* following, so as there were not twenty-eight Days between these two County-Courts, as there ought to be by the Law, exclusive and not inclusive. And for the first Cause it was reversed; altho' it was objected to be well enough, because *Middlesex* was in the Margin, so the Parish should be intended to refer thereto; but because an Indictment shall not be taken by Intendment, and because the County in the Margin shall be referred to the Place where the Offence was committed, and not to the Indictment of the Party; and by the Statute of 8 *H*. 6. there ought to be the Addition of the Place and County where the Party indicted inhabits; therefore it was held to be ill, and reversed for the second Cause; also it was held to be erroneous; but *Tanfield* said, that ought to be assigned as an Error *in Fait*, for it might be Leap-Year, and then it is good, and that Matter issuable.[270]

If an *Exigi facias* be delivered to the Sheriff, and there are but two County-Courts before the Return, and the Sheriff return the first and second *Exactus, & non comparuit*, and that there were no more County-Days between the Delivery of the Writ to him and the Day of the Return, there may issue a special *Exigi facias* with an *Allocato comitatu*, if it be prayed after the Return, and before any new County-Day be past; but if any County-Day be past between the last of the former County-Days and the Return, no *Exigi facias* shall issue with an *Allocato comitatu*, but an *Exigi facias de novo*; for the Demand of the Party must be at five County-Courts successively held one after another without any County-Court intervening; so if after the second *Exactus* the Offender render himself, and find Mainprize, and at the Day of the Return make Default, no *Exigi facias* with an *Allocato Comitatu* shall issue, because three County-Days intervened, but a new Exigent and a *Capias* against the Bail.[272]

And therefore it hath been holden, that in *London*, where the Holding of the *Hustings* is uncertain, no *Exigi facias* shall issue with an *allocato Hustings*, because the Court cannot take Notice of the set Times of holding it, as they may of the Times of holding the County-Courts; but it is now agreed, that if an Exigent issues in *London*, and they begin *Husting de placito terrae* (as they may) they shall proceed along at that *Hustings* to the Outlawry, without mingling their *Hustings de communibus placitis*; but if an *allocato Husting* comes, they shall proceed without omiting any *Husting*.[273]

Before a Person is pronounced outlawed he is to be *Quinquies exactus*, for he hath three Days for Appearance, one for Grace, and if he stands in Contempt at all these Days, at the fifth County-Court he is pronounced outlawed by the Coroners; and therefore (*a*) if a Person be outlawed the Day of the *Quinto exactus*, this is Error, because he hath all that Day to appear.[274]

But if an Exigent be awarded against *A.* and after he is *Quinto exactus*, and before the Return of the Exigent, he dies, yet the Outlawry shall stand in its Force, and shall not be reversed; for Judgment was by the Coroners upon the *Quinto exactus*, and they may certify the Outlawry; but otherwise (*b*) if *A.* had died before the *Quinto exactus*.[275]

If, on an Outlawry against two, it be returned, that *Exacti non comparuerunt*, without saying *nec aliquis eorum comparuit*, this is erroneous; for peradventure one of them did appear.[276]

So where a *Capias*, and thereupon an Exigent, was awarded against five, *viz.* three Men and two Women, and the Return was, *Quod ad quartum comitatum, &c. non comparuerunt*, without saying *nec eorum aliquis comparuit*; and this was held to be manifest Error; and it being likewise returned *utlagati existunt*, where for the Women it ought to have been *Waviatae*, this was likewise held to be Error.[277]

The Return must shew where the County-Court was held, and in what County, and this must be shewn on every *Exactus*; and therefore (*a*) an Outlawry was reversed, because the Place where the County-Court was held was not shewn on the *secund' Exactus*; so (*b*) where not shewn on the *tertio Exactus*.[278]

Also the Party must be named of such a Place (*c*) *in Com' Midd'*, and not *de Midd'*.[279]

If the Sheriff returns, that *ad Comitatum meum* S. *tent' apud* C. and says not *in Com' praed'*, or *in Com'* S. this is erroneous.[280]

So if it be *ad Comitatum meum tentum apud* S. *in Com' Somers'*, and says not *ad Comitatum meum Somers'*, or *ad Comitatum Somers'*, without saying *ad Comitatum meum Somerset*; this is erroneous.[281]

So an Outlawry was reversed, for that the Proclamations were returned to be *ad Comitat' meum tent' apud* such a Place *in Com' praedict'*, and not said *pro Com'*; for antiently one Sheriff had two or three Counties, and might hold the Court in one County for another.[282]

The Sheriff must return the Day and Year of the King to every *Exactus*; and therefore if the Day and Year of the King be inserted in the 1*st*, 2*d*, 3*d*,

and 5*th Exactus*, but omitted in the 4*th*, it is erroneous, and shall not be supplied by Intendment.[283]

So if it be *Anno Regni Dominae Reginae*, without saying *Elizabethae*, without saying *Reginae*, or *Anno Regni Domini Regis Jacobi*, without saying *Regni suae Angliae*, for the Year of *England* and *Scotland* differ; so if there be less than a Month between the first and second *Exactus*; in these Cases the Outlawry is erroneous.[284]

So if the Return be *ad Husting tent' apud Guildhall Civitatis London*, without saying *de communibus Placitis*, it is erroneus; because they have two Hustings, one *de Communibus Placitis*, another *de placitis terrae*. [285]

If an Outlawry be returned, that the Party was *exact'* at three several Times, 10 *Jac*. and that he was *Quarto exact'* 25th Day of *Feb' & non comparuit*, without mentioning any Year, & *Quinto exact'* such a Day in *March*, 10 *Jac'*, altho' it may be intended, that he was *Quarto exact'* in 10 *Jac*. yet the Outlawry shall not be good by Intendment; for perhaps the Clerk would have made it *Quarto Exact'* 8 *Jac*. which would have been clearly bad.[286]

(F) OF THE MANNER OF REVERSING AN OUTLAWRY; AND THEREIN OF THE DIFFERENCE BETWEEN ERRORS IN FACT AND IN LAW.

OUtlawries are regularly to be reversed by Plea by Writ of *Identitate nominis*, or by Writ of Error, for any Errors, be they Errors in Fact or in Law.[287]

As to Errors in Fact; as that in Felony, the Party was an Infant under the Age of fourteen, was in Prison or beyond Sea; these can regularly be only taken Advantage of by Writ of Error; but it is agreed, that by the Common Law *in favorem vitae* an Outlawry of Treason or Felony might be avoided by Plea, that the Defendant was in Prison, or in the King's Service beyond Sea, *&c*. at the Time of the Outlawry pronounced against him; but that no Outlawry for any other Crime (against a Party rightly described) can be avoided by Plea of any Matter of Fact whatsoever.[288]

As to avoiding of an Outlawry of Felony, because the Party was beyond the Sea, these Differences are laid down by *Rolle* and *Hale*, as agreed to by the Court. 1st, That if a Man, having committed a Felony, goes beyond the Sea voluntarily, or upon his own Occasions, and not in the King's Service, before any Exigent awarded, tho' after the Indictment, and then an Exigent is awarded, and the Offender beyond the Sea is outlawed for the Felony, he may assign it for Error. 2*dly*, But if after the Exigent awarded upon the Indictment of Felony, then he goes beyond the Sea voluntarily, or upon his

own Occasions, and being so beyond Sea is outlawed, he shall not avoid it by such being beyond Sea; because by the Exigent awarded he has Notice of the Prosecution, and by such a Means he may avoid his Conviction, by staying till all the Witnesses are dead. 3*dly*, But yet *prima facie* the Error in that Case is well assigned, by alledging he was *ultra mare tempore promulgationis utlagariae* ; and if he were in the Realm after the Exigent issued, it shall come in by the Plea of the King's Attorney to shew it. 4*thly*, But if he were within the Realm at the Time of the Exigent issued, and went beyond the Sea upon the Service of the King or Kingdom, and then is outlawed, being beyond the Sea, this Outlawry shall be reversed; if the Party alledge generally, that he was *ultra mare tempore promulgationis utlagariae*, and the King's Attorney reply, that he was in *England tempore emanationis brevis de Exigi facias*, it is a good Replication for the Plaintiff in the Writ of Error to alledge, that he went out after the Exigent, and before the Outlawry pronounced, upon the King's Command or Service, and shew it specially, and so confess and avoid the Plea.[289]

As to the Avoiding an Outlawry in Treason, on the Party's being beyond Sea, it is enacted by the 26 *H*. 8. *cap*. 13. and 5 & 6 *E*. 6. *cap*. 11. 'That all Process of Outlawry to be had or made within this Realm against any Offenders in Treason, being resiant [*sic*; resident] or inhabiting out of the Limits of this Realm, or in any of the Parts beyond the Seas, at the Time of the Outlawry pronounced against them, shall be as good and effectual in Law, to all Intents and Purposes, as if such Offenders had been resident and dwelling within this Realm at the Time of such Process awarded, and Outlawry pronounced ; (*a*) provided that the Party so to be outlawed shall, within one Year next after the said Outlawry pronounced, yield himself to the Chief Justice of *England* for the Time being, and offer to traverse the Indictment or Appeal whereon the said Outlawry shall be pronounced, as is aforesaid, that then he shall be received to the same Traverse; and being thereupon found Not guilty by the Verdict of twelve Men, he shall be clearly acquitted and discharged of the said Outlawry, *&c*.'[290]

It is the allowed Practice of the Court of Common Pleas to suffer a Defendant, coming in by *Capias utlagatum* the same Term on which an Exigent is returnable, to avoid the Outlawry without Writ of Error, by shewing, that he purchased a *Supersedeas* out of the same Court, and delivered it to the Sheriff before the *Quinto exactus, &c*. or by shewing any other Matter apparent on Record which makes the Outlawry erroneous; as the Want of an Original, or the Omission of Process, or Want of Form in a

Writ of Proclamation, *&c*. or a Return by a Person appearing not to be Sheriff, or a Variance between the Original and Exigent, or other Process, or the Want of such Addition as required by 1 *H*. 5. yet it is said in many Books to be the constant Course of the Court of King's Bench never to reverse an Outlawry on the Crown-side, either in the same or a different Term, for these or other Errors of a like Nature, without a Writ of Error.[291]

It is agreed, that any Outlawry whatsoever may be avoided by a Defendant's coming in upon the *Capias utlagatum*, and pleading a Misnomer either of the Name or Addition in the Writ, *&c*. as by shewing, that whereas he is called by such a Name of Baptism or Surname, he hath been always known by a different one, and not by that in the Writ, *&c*. or whereas he is named of such Estate, Degree or Mystery, that he hath some other Addition, and not that in the Writ, *&c*. also it is said in many Books, that he may plead, that there is no such Town as that whereof he is named; and it seems clearly agreed, that he may plead, that at the Time of the Writ purchased, and ever since, he hath made his Abode at some other Town, and not at that in the Writ, *&c*. and it is said, that by such Plea the Outlawry shall only be avoided as to the Person who pleads it, (who shall not be intended to be the Person meant) and shall stand in Force against the Person of the Name and Addition in the Record ; but it is said, that a Person of the same Name and Addition as are mentioned in a Record of Outlawry cannot avoid it, by averring, that there are two Persons of such Name and Addition, and that the Person intended is the Elder, and he himself is the Younger, but shall be put to his Writ *De identitate nominis*; which is said by some to be the only Remedy in such Case, after an Outlawry returned ; and it seems, that notwithstanding in Civil Cases, before an Outlawry is returned, one of the same Name may come into Court, and shew that he is not the Person intended; whereupon if the Plaintiff confess it, the Diversity of the Names shall be entered on the Roll, and a new Exigent shall issue, with a fuller Description of the Person intended; yet this cannot be done upon an Indictment without a Writ of *Identitate nominis*, because it would make the Process variant from the Indictment, which cannot be altered without the Consent of the Jurors.[292]

If *A*. brings an *Audita querela* against *B*. and declares, that whereas *B*. had recovered against *A*. 200 *l*. Debt, *&c*. and thereupon the said *A*. was outlawed, and upon a *Capias utlagatum* taken, and in Execution at the Suit of the said *B*. and after from the said Execution was delivered and suffered to go at large, *&c*. and yet *B*. hath taken out Execution upon the said

Judgment, and endeavours, *&c*. the Defendant may plead and shew how, that after the said Enlargement, and before the Purchase of the *Audita querela*, the Outlawry was set aside and made void; and so conclude *Quod (a) non habetur tale recordum*[293]

If a Person procures another to be outlawed clandestinely, who appears openly and in Publick, the Court will, on Motion, oblige such Person who procures the Outlawry to reverse the same at his own Costs; but if it appears, that the Party outlawed had lurked backward and forward between two Counties, and that the Person procuring the Outlawry had dealt openly, and had been regular in sending down the Proclamations to the Sheriff of the County where he sometimes resided; the Court will not interpose in this summary Manner, but will leave the Party to his ordinary Remedies by Plea or Writ of Error.[294]

(G) WHAT THE PARTY MUST DO IN ORDER TO INTITLE HIM TO A REVERSAL: And herein, 1. OF APPEARING IN PERSON OR BY ATTORNEY.

REgularly in all Outlawries, as well Personal as Criminal, the Party in order to reverse the same was to appear in Person, and could not appear by Attorney.[295]

But now by the 4 & 5 *W*. & *M*. *cap*. 18. For the more easy and speedy Reversing of Outlawries in the Court of King's Bench, it is enacted, 'That from and after the first Day of *Easter* Term thence ensuing, no Person or Persons whatsoever, who are or shall be outlawed in the said Court for any Cause, Matter or Thing whatsoever, (Treason and Felony only excepted,) shall be compelled to come in Person into or appear in Person in the said Court to reverse such Outlawry, but shall or may appear by Attorney and reverse the same without Bail in all Cases, (except where special Bail shall be ordered by the said Court.)'

And it is farther enacted by the said Statute, 'That if any Person or Persons outlawed, or hereafter to be outlawed, in the said Court, (other than for Treason or Felony,) shall from and after the said first Day of *Easter* Term be taken and arrested upon any *Capias utlagatum* out of the said Court, it shall and may be lawful to and for the Sheriff or Sheriffs, who hath or shall have taken and arrested such Person and Persons, (in all Cases were special Bail is not required by the said Court,) to take an Attorney's Engagement under his Hand to appear for the said Defendant or Defendants, and to reverse the said Outlawries, and thereupon to discharge the said Defendant and Defendants from such Arrests; and in those Cases, where special Bail is required by the said Court, the said Sheriff and

Sheriffs shall and may take Security of the said Defendant or Defendants by Bond, with one or more sufficient Surety or Sureties, in the Penalty of double the Sum for which special Bail is required, and no more, for his, her or their Appearance by Attorney in the said Court at the Return of the said Writ, and to do and perform such Things as shall be required by the said Court; and after such Bond taken to discharge the said Defendant and Defendants from the said Arrests.'

And it is farther enacted by the said Statute, 'That if any Person or Persons outlawed as aforesaid, and taken and arrested upon a *Capias utlagatum*, shall not be able within the Return of the said Writ to give Security, as aforesaid, in Cases where special Bail is required, so as he or they are committed to Gaol for Default thereof, that whensoever the said Prisoner or Prisoners shall find sufficient Security to the Sheriff or Sheriffs, in whose Custody he or they shall be, for his or their Appearance by Attorney in the said Court at some Return in the Term then next following, to reverse the said Outlawry or Outlawries, and and to do and perform such other Thing and Things as shall be required by the said Court, it shall and may be lawful to and for the said Sheriff and Sheriffs, after such Security taken, to discharge and set at Liberty the said Prisoner and Prisoners for the same; any Law or Usage contrary notwithstanding.'

It hath been held, that if the Party outlawed comes in by *Cepi Corpus*, he shall not be admitted to reverse the Outlawry without appearing in Person, as in such Case he was obliged to do at Common Law; or putting in Bail with the Sheriff for his Appearance upon the Return of the *Cepi Corpus*, and for doing what the Court shall order.[296]

2. OF GIVING BAIL.

By *Westm*. 1. *cap*. 9. it is expresly provided, that those who are outlawed, have abjured the Realm, *&c*. should be excluded the Benefit of Replevin; yet it hath been always held, that the Court of King's Bench may in their Discretion, in special Cases, bail a Person upon an Outlawry of Felony; as where he pleads, that he is not of the same Name, and therefore not the same Person with him that was outlawed, or alledges any other Error in the Proceedings.[297]

By the 3 *Eliz. cap*. 3. *Sect*. 3. it is enacted, 'That before any Allowance of any Writ of Error, or Reversing of any Outlawry be had by Plea, or otherwise, through or by want of any Proclamation to be had or made according to the Form of this Statute, the Defendant and Defendants in the original Action shall put in Bail, not only to appear and answer to the

Plaintiff in the former Suit in a new Action to be commenced by the said Plaintiff for the Cause mentioned in the first Action, but also to satisfy the Condemnation, if the Plaintiff shall begin his Suit before the End of two Terms next after the Allowing the Writ of Error, or otherwise Avoiding of the said Outlawry.'

A. who was a foreign Merchant and never in *England*, was outlawed at the Suit of *B.* in an Action on several Promises for Goods sold and delivered; and upon a special *Capias utlagatum* a Ship and other Effects belonging to *A.* were seised, as forfeited upon this Outlawry; and it was moved, that this Outlawry may be vacated, and Restitution awarded, upon Affidavits produced and read, that the Defendant was never *Infra legem, i. e.* that he never was in *England*, and therefore could not be outlawed, because that was putting him *extra Legem. Sed per Cur'* : This Outlawry shall not be vacated upon such Affidavits, but the Defendant may bring a Writ of Error, which he was compelled to do, and thereupon to put in Bail to the Action in which he was outlawed according to the new Statute of 4 & 5 *W & M.* and then the Plaintiff consented to the Reversal of the Outlawry.[298]

H. was outlawed in two Actions, one was for 10 *l.* the other for 40 *s.* and upon reversing the Outlawry the Court took special Bail for the first, and an Appearance for the other, upon the Statute 4 & 5 *W. & M.* and the Recognizance was taken pursuant to 31 *Eliz.*[299]

3. OF SUING OUT A *SCIRE FACIAS.*

It is clearly agreed, that an Attainder of Felony of a Person who had any Lands shall never be reversed by Writ of Error, without a *Scire facias* against all the Ter-tenants and Lords mediate and immediate; but it is (*a*) settled, that such *Scire facias* is not necessary in the Case of High Treason.[300]

Also it is said, that it is not necessary in the Case of Felony, when it is suggested on the Roll that the Party had no Lands, and the Attorney General confesses it.[301]

(h) the effects and consequences of a reversal:

And herein,

1. WHERE THE PROCEEDINGS ON THE REVERSAL ARE IN THE SAME PLIGHT AS IF NO OUTLAWRY HAD BEEN.

IT is agreed, that after an Outlawry of Treason or Felony is reversed, the Party shall be put to plead to the Indictment, for that stills remains good, and (*b*) he may be tried at the King's Bench Bar; or the Record may be remitted into the Country, if it were removed into the King's Bench by

Certiorari, with a Command to the Justices below to proceed by the Statute of 6 *H*. 6. *cap*. 6.[302]

So if a Man be outlawed by Process in an Information, and comes in and reverses the Outlawry, he must plead *instanter* to the Information. [303]

The Law is the same in Civil Cases; and therefore if an Outlawry in a personal Action be reversed, the Original remains.[304]

Trespass for taking and detaining his Beasts till he made a Fine, the Action was laid in *Sussex*; the Defendant pleads, that the Cause of Action did not accrue within six Years before Suing of the Writ. The Plaintiff replies, that at another Time he brought an Original in Battery in *London*, intending when the Defendant had appeared to have declared for this Trespass; and that the Defendant was outlawed in *London*; and that within such a Time after the Reversal of the Outlawry he declared here; the Defendant demurred ; and for the Defendant it was insisted, that the Original being laid in *London*, he could not in this Action declare in another County, tho' the Cause of Action be transitory; but upon Information by the Prothonotaries that the Course of the Court is, that altho' the Original be laid in *London* for expediting the Outlawry, yet when the Defendant comes in, the Plaintiff may declare against him in any other County, be the Action local or transitory; and the Statute 21 *Jac*. 1. *cap*. 16. gives to Plaintiffs generally a Power to commence a new Suit within the Year after the Outlawry reversed; and that so he may do in this Case to warrant his Declaration within the Course of the Court; and Judgment was given for the Plaintiff.[305]

2. TO WHAT THE PARTY SHALL BE RESTORED ON REVERSAL OF THE OUTLAWRY.

It hath been adjudged, that if the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be (*a*) reversed, the Party may enter on the Patentee, and needs neither to sue a Petition to the King, nor a *Scire facias* against the Patentee.[306]

If the Goods of a Person outlawed are sold by the Sheriff upon a *Capias utlagatum*, and after the Outlawry is reversed by Writ of Error, he shall be restored to the Goods themselves; because the Sheriff was not compellable to sell those Goods, but only to keep them to the Use of the King.[307]

If an Advowson comes to the King by Forfeiture upon an Outlawry, and, the Church becoming void, the King presents, and then the Outlawry is reversed; yet the King shall enjoy that Presentment, because the Presentment there came to the King as the Profit of the Advowson.[308]

But if the Church be void at the Time of the Outlawry, and the Presentation is thereby forfeited as a Chattel principally and distinct of it self, there, upon the Reversal of the Outlawry, the Party shall be restored to the Presentation.[309]

If a Termor being outlawed for Felony grants over his Term, and after the Outlawry is reversed, the Grantee may have Trespass for the Profits taken between the Reversal of the Outlawry and the Assignment; for by the Reversal it is as if no Outlawry had been, and there is no Record of it.[310]

It is said, that if a Man be outlawed in the King's Bench, and the Party's Goods are seised into the King's Hands, and then the Outlawry is reversed, there can be no Restitution; the Reason whereof is, for that the Court of King's Bench cannot send a Writ to the Treasurer; and the Court of Exchequer have no Record before them to issue out a Warrant for Restitution.[311]

It hath been adjudged in Chancery, that if *A.* being possessed of several Houses for a long Term for Years, mortgages the same, and is outlawed for High Treason, upon which those Houses are seised into the King's Hands, and the same granted for valuable Consideration to *J. S.* who likewise gets an Assignment of the Mortgage; that yet the Representative of *A.* may redeem the Mortgage upon Reversal of the Outlawry; and herein the Lord Keeper said, that the Judgment upon the Reversal is, that the Party shall be restored to all that has not been answered to the King; which in all Cases has been understood of the mesne Profits answered to the King, and not as to the principal Thing it self, tho' seised into the King's Hands; and that it was undoubtedly so as to a Freehold or Inheritance, and he saw no substantial Difference in the Case of a Leasehold.[312]

Bacon Abridgment, vol. 3, pp. 745–88.

14.3.1.4Montesquieu, 1748

Of the Powers of Punishment

Experience shows that in countries remarkable for the lenity of penal laws, the spirit of the inhabitants is as much thereby affected, as in other countries, with severer punishments.

If an inconveniency or abuse arises in the state, a violent government endeavors suddenly to redress it; and instead of putting the old laws in execution, it establishes some cruel punishment which instantly puts a stop

to the evil. But the spring of government hereby loses its elasticity; the imagination grows accustomed to the severe as well as the milder punishment; and as the fear of the latter diminishes, they are soon obliged in every case to have recourse to the other.

…

Of the Just Proportion Betwixt Punishments and Crimes

It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser, and that which is more pernicious to society rather than that which is less.

…

It is a great abuse amongst us to subject to the same punishment a person that only robs on the highway, and another that robs and murders. Obvious it is that for the public security some difference should be made in the punishment.

…

Where there is no difference in the punishment, there should be some in the expectation of pardon. …

Spirit of Laws, bk. 6, chs. 12, 16.

14.3.1.5Hawkins, 1762

CHAP. XV.
Of Bail.

Sect. 1. AND now I am to consider in what Manner, and in what Cases Offenders are to be bailed; as to which it is to be observed, That wherever a Person is brought before a Justice of Peace upon an Accusation of Treason or Felony, he must be either bailed or committed, unless it manifestly appear that no such Crime was committed, or that the Cause for which alone the Party was suspected, was totally groundless; in which Cases only it is lawful to discharge him without Bail.[313]

For the better Understanding of the Nature of Bail, I shall consider the following Points:

1. The Nature of Bail and Mainprize in general.
2. What shall be said to be sufficient Bail.
3. The Offence of taking insufficient Bail.

4. The Offence of granting it where it ought to be denied.
5. The Offence of denying, delaying or obstructing it where it ought to be granted.
6. In what Cases it is grantable.
7. In what Form it is to be taken.
8. What shall forfeit the Recognizance.

And first, As to the Nature of Bail and Mainprize in general, I shall endeavour to shew,
1. In what Respect they agree.
2. In what they differ.

Sect. 2. As to the first Particular it seems, That the Words Bail and Mainprise, are often used promiscuously in our [a] Law-Books and [b] Acts of Parliament as signifying one and the same Thing; and it is [c] certain, That Bail and Mainprise agree in this Notion, that they save a Man from Imprisonment in the common Gaol, by his Friends undertaking for him before certain Persons for that Purpose authorized, that he shall appear at a certain Day, and answer the Crime with he is charged, and he justified by Law.

Sect. 3. As to the second particular, The chief, if not the [d] only, Difference between Bail and Mainprise seems to be this, That a Man's Mainpernors are [e] barely his Sureties, and cannot justice the Detaining or Imprisoning of him themselves, in Order to secure his Appearance: But that a Man's Bail are looked upon as his [f] Gaolers of his own choosing, and that the [g] Person bailed is in the Eye of the Law, for many Purposes, esteemed to be as much in the Prison of the Court by which he is bailed, as if he were in the actual Custody of the proper Gaoler. But I do not find this Point clearly settled in Relation to any other Court besides the King's Bench, as hath been more fully shewn *Ch.* 6. *Sect.* 4. However it seems certain in every Bailment, That if the Party bailed be [h] suspected by his Bail as likely to deceive them, he may be detained by them, and enforced to appear according to the Condition of the Recognizance, or may be [i] brought by them before the Justice of Peace, by whom he shall be committed, unless he find new Sureties.

Sect. 4. As to the second Point, *viz.* What shall be said to be sufficient Bail, it seems to be [k] agreed, That no Person ought in any Case to be bailed for Felony by less than two; and it is [l] said to be the Practice of the King's Bench, not to admit any Person to Bail upon a *Habeas Corpus* on a Commitment for Treason or felony without four Sureties: Also [m] it seems to

have been anciently an established Rule, That none under the Degree of Subsidy-men, should be admitted to bail any Person for a capital Crime: But the Manner of granting Taxes by Way of Subsidy having been of late for many Years disused, this Rule at present seems to be of little Use: But the only sure Way of proceeding in this Case, is to take Care that every one of the Bail be of Ability sufficient to answer the Sum in which they are bound, which [n] ought never to be less than forty Pounds for a capital Crime, but may be as much higher as the Justices in Discretion shall think fit to require, upon Consideration of the Ability and Quality of the Prisoner, and the Nature of the Offence: And if it shall seem doubtful, whether the Persons who offer themselves to be Sureties, be able to answer such Sum; it is [o] said, That the Person who is to take the Bail, may examine them on their Oaths concerning their Sufficiency: And if a Person who has Power to take Bail be so far imposed upon as to suffer a Prisoner to be bailed by insufficient Persons, it is said, That either he, or any other Person who hath Power to bail him may require the Party to find better Sureties, and to enter into a new Recognizance with them, and may commit him on his Refusal, for what insufficient Sureties are as no Sureties.[314]

Sect. 5. But Justices must take Care, That under Pretence of demanding sufficient Surety, they do not make so excessive a Demand, as in effect amounts to a Denial of Bail; for this is looked on as a great Grievance, and is complained of as such by 1 *W. & M. Sass*. 2. by which it is declared, *That Excessive Bail ought not to be required*.

Sect. 6. As to the third Point, *viz*. the Offence of taking insufficient Bail, it seems clear; That where-ever a Sheriff, in Pursuance of the Statute of *Westminster*. *cap*. 15. Or Justices of Peace in Pursuance of the subsequent Statutes, grounded on the said Statute of *Westminster* 1. and set forth more at large in the following Part of this Chapter, shall admit any Person to bail for Felony, with insufficient Sureties, who shall not afterwards appear according to the Condition of the Recognizance, the Justices of Assise may, by Force of 27 *Ed*. 1. *chap*. 3. commonly called the Statute *de finibus levatis*, impose such Fine on such Sheriff or Justices of Peace, as to such Justices of Assise in their Discretion shall seem proper. But if a Prisoner, who is bailed by insufficient Sureties, do appear according to the Condition of the Recognizance, it seems that those who admitted him to bail are safe, inasmuch as the End of the Law is answered, and the Appearance of the Prisoner as effectually procured by such Sureties, as if they had been never so sufficient.[315]

Sect. 7. As to the fourth Point, *viz*. The Offence of granting Bail where it ought to be denied: There is no Doubt but that the Bailing of a Person who is not bailiable by Law, is punishable either at Common Law, as a negligent Escape, as shall be more fully shewn in the Chapter concerning Escapes, or as an Offence against the several Stautes concerning Bail.[316]

Sect. 8. And first it is enacted by the Statute of *Westminster* 1. 15. *That 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 be thereof attainted, he shall lose his Fee and Office for ever. And if the UnderSheriff, 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*.

Sect. 9. Also it is enacted by 27 *Ed*. 1. commonly called the Statute *de finibus levatis, cap*. 3. *That the Justices assigned to take Assise*, &c. *where they deliver the Goods*, &c. *shall inquire if Sheriffs, or any other, have let out by Replevin Prisons not replevisable, ar have offended in any Thing contrary to the Form of the said Statute of* Westminster 1. *and whom they shall find Guilty they shall chasten and punish in all Things, according to the Form of the said Statute*.[317]

Sect. 10. And it is farther enacted by 4 *Ed*. 3. 2. *That at the Time of the Assignment of Keepers of the Peace, Mention shall be made, That such as shall be indicted, or taken by them, shall not be let to Mainprise by the Sheriffs, nor by none other Ministers, if they be not mainpernable by Law; nor that none who are indicted shall be delivered but by the Common Law. And that the Justices assigned to deliver the Gaols, shall have Power to inquire of Sheriffs, Gaolers, and others, in whose Word such Person indicted shall be, if they make Deliverance, or let to Mainprise, any so indicted, which be not mainpernable; and to punish the said Sheriffs, Gaolers, and others, if they do any Thing against the said Act*.[318]

Sect. 11. And it is enacted by 1 & 2 *Ph. & Mar*. 13. *That no Justice or Justices of Peace, shall let to Bail or mainprise any 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 abovementioned Statute of* Westminster *the* first, cap. 15. *And that the Justices of Gaol-Delivery of the Place where such Justices of the Peace shall be guilty of such Offence, upon due Proof thereof, by Examination before them shall for every such Offence set such Fine on*

every such Justice, as the same Justices of Gaol-Delivery shall think meet, &c.

Sect. 12. It hath been resoved [*sic*; resolved], That it is no Excuse for Justices of Peace admitting a Person to Bail, who was in Truth committed for a Cause not bailable by law, that they did not know that he was committed for such Cause; and that no other Cause of his Commitment was mentioned in his *Mittimus* but the Suspicion of Felony; for that they ought, at their Peril, to have informed themselves of the Cause for which the Party was committed, that they might be satisfied that he was bailable by Law.[319]

Sect. 13. As to the fifth Point, *viz*. The offence of denying, delaying, or obstructing Bail, where it ought to be granted; this seems to be a Misdemeanor, not only by the Statute, but also by the Common Law, and punishable thereby as an Offence against the Liberty of the Subject, not only by Action at the Suit of the Party wrongfully imprisoned, but also by Indictment at the Suit of the King.[320]

Sect. 14. But it seems clear, That he who has Power to bail another is not bound to demand of him to find Sureties, and to forbear committing him ’till he shall refuse to find them; but may well justify his Commitment, unless the Party himself shall offer his Sureties.[321]

Sect. 15. The principal Statutes relating to this Offence, are the abovementioned Statute of *Westminster* 1. 15. and the Statute *de finibus, cap*. 3. and 31. *Car*. 2. *cap*. 2. commonly called the *Habeas Corpus* Act: By the first whereof it is enacted, *That if any withhold Prisoners replevisable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King. 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*. And by the latter of the said Statutes it is enacted, *That Justices of Assise shall inquire if Sheriffs, or any other, have offended in any Thing contrary to the said Statute of* Westminster, *and whom they shall find Guilty they shall punish in all Things according to the Form of the said Statute*.

Sect. 16. Also it is recited by the above mentioned Statute of 31 *Car*. 2. *That great Delays had been used by Sheriffs, Gaolers, and other Officers, to whose Custody the King’s Subjects had been committed for criminal, or supposed criminal Matters; in making Return of Writs of* Habeas Corpus, *by standing out an* Alias *and* Pluries, *and sometimes more, and by other Shifts to avoid their yielding Obedience to such Writs, contrary to their Duty, and the known Laws of the Land, whereby many Subjects had been long*

detained in Prison, in such Cases where by Law they were bailable, &c. And thereupon it is enacted, *That whomsoever any Person shall bring any* Habeas Corpus *directed unto any Person whatsoever, for any Person in his Custody, and the said Writ shall be served upon the said Officer, or left at the Gaol or Prison with any of the Under-Officers, UnderKeepers, or Deputy of the said Officers or Keepers, that the said Officer or Officers, his or their Under-Officers, UnderKeepers, or Deputies, shall, within three Days after such Service thereof; (unless the Commitment were for Treason or Felony plainly and specially expressed in the Warrant of Commitment) upon Payment or Tender of the Charges of bringing the said Prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed on the said Writ, not exceeding* 12 d. *per Mile, and on Security given by his own Bond, to pay the Charges of carrying back the Prisoner, if the should be remanded, and that be will not make any Escape by the Way, make Return of such Writ, and bring, or cause to be brought, the Body of the Party so committed, or restrained, unto or before the Lord Chancellor, or Lord Keeper, or the Judges or Barons of the Court from which the said Writ shall issue, or such other Persons before whom the said Writ is made returnable, according to Command thereof; and shall then likewise certify the true Causes of his Detainer of Imprisonment, unless the Commitment be in a Place beyond twenty Miles Distance*, &c. *and if beyond the Distance of twenty, and not above one hundred miles, then within the Space of ten Days, and if beyond the Distance of one hundred Miles, then within the Space of twenty Days*,

Sect. 17. And it is further enacted, Par. 3. *That all such Writs shall be marked in this Manner*, Per Statutum tricesimo primo Caroli Secundi Regis; *and shall be signed by the Person that awards the same. And if any Person shall be, or stand committed or detained as aforesaid, for any Crime, unless for Treason or Felomy, plainly expressed in the Warrant of Commitment, in the Vacation-time, if shall be lawful for such Person so committed or detained (other than Persons convict, or in Execution by legal Process) or any one on his Behalf, to complain to the Lord Chancellor, or Lord Keeper, or any Justice of either Bench, or Baron of the Exchequer of the Degree of the Coif; and the said Lord Chancellor*, &c. *Justice of Baron, on View of the Copy of the Warrant of the Commitment, or otherwise on Oath that it was denied, are authorized and required, on request in Writing by such Persons, or any in his Behalf, attested and subscribed by two Witnesses, who were present at the Delivery of the same, to grant an* Habeas Corpus *under the Seal of the Court whereof he shall be one of the Judges, to be*

directed to the Officer in whose Custody the Party shall be returnable immediate *before the said Lord Chancellor*, &c. *Justice or Baron; and on Service thereof as aforesaid, the Officer*, &c. *in whose Custody the Party is, shall within the Times respectively before limited, bring him before the said Lord Chancellor, Justice of Baron before whom the said Writ is returnable; and in Case of his Absence, before any other of them, with the Return of such Writ, and the true Cause of the Commitment and Detainer. And thereupon, within two Days after the Party shall be brought before them, the said Lord Chancellor, Justice of Baron, before whom the Prisoner shall be brought as aforesaid, shall discharge the said Prisoner from his Imprisonment, taking his Recognizance, with one or more Sureties, in any Sum according to their Discretion, having Regard to the Quality of the Prisoner and Nature of the Offence, for his Appearance in the King's Bench the Term following, or in such other Court wherein the Offence is properly cognisable, as the Case shall require; and then shall certify the said Writ with the Return thereof, and the Recognisance, into such Court; unless it be made appear to the said Lord Chancellor*, &c. *that the Party so committed is detained upon a legal Process, Order or Warrant, out of some Court that bath Jurisdiction of criminal Matters; or by some Warrant signed and sealed with the Hand and Seal of any of the said Justices or Barons, or same Justice or Justices of the Peace, for such Matter or offence, for the which by Law the Prisoner is not bailable*:

Sect. 18. But it is Provided, Par. 4. *That if any Person shall have wilfully neglected by the Space of two whole Terms after his Imprisonment, to pray a* Habeas Corpus *for his Enlargement, he shall not have a* Habeas Corpus *to be granted in Vacation-time, in Pursuance of this Act*.

Sect. 19. And it is farther enacted, Par. 5. *That if any Officer*, &c. *shall neglect or refuse to make the Returns aforesaid, or to bring the Body of the Prisoner according to the Command of the said Writ, within the respective Times aforesaid, or shall not within six Hours after Demand deliver a true Copy of the Commitment*, &c. *he shall forfeit for the first Offence* 100 l. *for the second* 200 l. *and be made incapable to hold his Office*, &c.

Sect. 20. And it is farther enacted, Par. 6. *That no Person who shall be set at large upon any* Habeas Corpus, *shall be again imprisoned for the same Offence by any Person whatsoever, other than by the legal Order and Process of such Court wherein he shall be bound by Recognizance to appear, or other Court having Jurisdiction of the Cause, on Pain of* 500 l.

Sect. 21. And it is farther enacted, Par. 7. *That if any Person who shall be*

committed for Treason of Felony, plainly and specially expressed in the Warrant of Commitment; upon his Prayer of Petition in open Court, the first Week of the Term, or the first Day of the Session of Oyer and Terminer, or general Gaol-Delivery, to be brought to his Trial, shall not be indicted some Time in the next Term, Sessions of Oyer and Terminer, of general Gaol-Deliver after such Commitment, the Justices of the said Courts shall, upon Motion in open Court, the last Day of the Term, or Sessions, set at Liberty the Prisoner upon Bail; unless it appear upon Oath, that the Witnesses for the King could not be produced the same Term, &c. *And if such Prisoner, upon his Prayer*, &c. *shall not be indicted and tried the second Term, or Sessions, he shall be discharged from his Imprisonment*.

Sect. 22. And it is farther enacted, Par. 10. *That it shall be lawful for any Prisoner, as aforesaid, to move and obtain his* Habeas Corpus, *as well out of the Chancery or Exchequer, as the King's Bench or Common Pleas: And if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons for the Time being, of the Degree of the Coif, of any of the Courts aforesaid, in the Vacation-Time, upon View of the Copy of a Warrant of Commitment or Detainer, or on Oath made that such Copy was denied, shall deny any Writ of* Habeas Corpus, *by this Act required to be granted, being moved for as aforesaid, they shall severally forfeit to the Party grieved, the Sum of* 500 l.

Sect. 23. But it is Provided, Par. 18. *That after the Assises proclaimed for that Country where the Prisoner is detained, no Person shall be removed from the common Gaol upon any* Habeas Corpus *granted in Pursuance of this Act; but upon such* Habeas Corpus *shall be brought before the Judge of Assise in open Court, who thereupon shall do what to Justice shall appertain*. But it is provided nevertheless, Par. 19. *That after the Assises are ended, any Person detained may have his* Habeas Corpus *according to the Direction of this Act*.

Sect. 24. It is observable, that this Statute makes the Judges liable to an Action at the Suit of the Party grieved in one Case only, which is the refusing to award a *Habeas Corpus* in Vacation-time; and seems to leave it to their Discretion in all other Cases, to pursue its Directions in the same Manner as they ought to execute all other Laws, without making them subject to the Action of the Party, or to any other express Penalty or Forfeiture: And this is most agreeable to the general Reason of the Law, which regularly will not suffer a Judge to be liable to an Action for what he

does as Judge.[322]

As to the sixth Point. *viz*. In what Cases Bail is grantable, I shall endeavour to shew,

1. Where it is grantable by a Sheriff.
2. Where by a Justice of Peace.
3. Where by a Justices of Gaol-Delivery.
4. Where by the Courts of *Westminster-Hall*.

As to the first Point, I shall first consider, where Bail is grantable by a Sheriff *ex Officio;* and secondly, where by Virtue of a Writ.

Sect. 25. As to the first particular, it is holden by [a] some, That by the Common Law the Sheriff might, by Virtue of his Office, as principal Conservator of the Peace, bail any Person arrested on Suspicion of Felony, or for any other Offence which is bailable.

Sect. 26. Also it hath been holden, [b] that a Constable had the like Power by the Common Law: And it may [c] probably be inferred form the Recitals of the Writs of Mainprise in the Register, that by the Common Law the Sheriff had Power to bail Persons indicted of Larceny in a [d] Court-Leet, and also Persons indicted as [e] Accessaries to a Felon, and Persons appealed by Approvers, after the Death of the Approvers, *&c*. But it seems that Sheriff [f] had no Power *ex Officio*, to bail any Person indicted of any Crime before Justices of Peace. And it is certain, [g] that neither the Sheriff, nor Constable could, in any of the Cases above mentioned, take Bail by Recognizance, but only by Obligation. And some [h] have holden, That the Statutes which impower Justices of Peace to admit Persons to Bail, on an Accusation of Felony, and particularly prescribe in what Manner they shall do it, have taken away all Power of this Kind from the Sheriff and Constable; yet other seem to be of another Opinion, because the said Statutes are wholly in the Affimative.

Sect. 27. But it seems certain, [i] That by the Common Law, the Sheriff might bail any Person who was indicted before him at his Torn, for Felony, or any other Crime that is bailable; because he might both award Process and also give Judgment against the Person so indicted: And it is a general [k] Rule, That whosoever is Judge of the Offence, may bail the Offender. But it is holden, [l] That at this Day the Sheriff has lost his Power, by Reason of 1 *Ed*. 4. *cap*. 2. set forth more at large *cap*. 10. *sect*. 74. by which it is enacted, That the Sheriff shall not proceed on any such Indictment, but shall remove it to the next Sessions of Peace.[323]

As to the second Particular, it seems, That Bail is grantable by a Sheriff

by Virtue of the following Writs.
1. That of *Odio* and *Atia*.
2. That of Mainprise.
3. That of *Homine replegiando*.

Sect. 28. But having already, in *Book* 1. *Cap*. 29. *Sect*. 20 and 24. incidently shewn the Nature of the first of these Writs which seems to be in great Measure obsolete at this Day, I shall refer the Reader to what is there said concerning it.

Sect. 29. Secondly, Of the Writ of Mainprise little Notice is taken in the late Books; yet the Law relating to it seems to be still in Force in many Cases; and consequently in such Cases, those who are bailable, and have been refused the Benefit of Bail, may still by Virtue thereof be delivered out of Prison (upon their Finding Sureties [m] to the Sheriff that they will appear and answer to the Crimes alledged against them, before the Justices in the Writ mentioned, *&c*.) as those [n] who are imprisoned for a slight Suspicion of Felony, or indicted of Larceny [o] before the Steward of a Leet, or of Trespass [p] before Justices of Peace, and many other [q] Persons all which it will be needless to enumerate.

Sect. 30. But as to that which is said in general, both by Sir *Matthew Hale*[a] and Sir *Edward Coke*, [b] in Relation to this Matter, from which it may seem to have been the Opinion of those Authors, That no Writ of Mainprise is grantable at this Day; it may be answered, That this is to be understood [c] only of the Writ of Mainprise for Persons indicted before the Sheriff in his Torn, in relation to whom he has no judicial Power at this Day, and consequently no Power to bail them *ex Officio;* from whence it follows, That the Writ of Mainprise for such Persons, being grounded on a Suggestion that the Sheriff had unjustly refused before to admit them to bail, cannot now be proper, because he cannot be said to have unjustly refused to do a Thing which he had no Power to do. But this can be no Manner of Reason why the Writ of Mainprise should not be still grantable in other Cases.

Sect. 31. Thirdly, As to the Writ of *Homine replegiando*, there seems to be no Doubt but that at the Common Law the Sheriff might deliver any Persons out of Prison by Virtue of this Writ, except in those special Cases mentioned in the Statute of *Westminster* 1. *cap*. 15. which is set forth more at large in the next Section: And if he had returned, that the plaintiff had been eloigned out of the County by the Defendant, he might afterward, by Virtue of a *Capias in Withernam* against such Defendant, whether he were

a Peer or Commoner, have taken and imprisoned him till the Plaintiff should be replevied. But the Writ of *Homine replegiando* has been much disused of late, in such Cases wherein Justices of Peace have been authorized to admit Persons to bail; yet whether the statutes which gave such Authority to Justices of Peace, being wholly in the Affirmative, do take away the Sheriff's Power in the Cases mentioned in those Statutes, may deserve to be considered. However there can be do doubt but that in other Cases the Writ of *Homine replegiando*, [d] and *Capias in Withernam*, are very proper and effectual Remedies.[324]

Sect. 32. But for the better Understanding the Sheriff's Power in this Particular, I shall set down, and endeavour to explain so much of the said Statute of *Westminster* 1. *cap*. 15. as relates to it, which is enacted as followeth. *Forasmuch as Sheriffs, and others who 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: 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 a Man, or by Commandment of the King, or of the Justices, or for the Forest: 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 Manner* [e] *and those which have broken the King's Prison, Thieves openly defamed and know, 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: But such as be indicted of Larceny by Enquests taken before Sheriffs, or Bailiffs by their Office, or of light Suspicion, or for Petit Larceny, that amounteth not above the Value of Twelvepence, if they were not accused of some other Larceny aforetime, or accused of Receipt of Thieves or Felons, or of Commandment, or Force or of Aid in Felony done, or accused of some other Trespass, for which one ought not lose Life or Member, and a Man approved by a Provor, after the Death of the Provor (if he be no common Theif, nor defamed) shall be henceforth let out by sufficient Surety, whereof the Sheriff will be answerable, and that without giving ought of their Goods.*

For the better Exposition hereof, I shall distinctly consider,

1. That Part of the Preamble which declares, what Persons had always been agreed not to be replevisable.
2. That Part of the Purview which shews what other Persons shall not be replevisable.
3. That which shews what Persons shall be replevisable.

Of those who by the Preamble are declared to have always been agreed to be irreplevisable, there are four Kinds.[325]

1. *Those who are taken for the Death of a Man*.
2. *Those who are taken by the Commandment of the King*.
3. *Those who are taken by the Commandment of the Justices*.
4. *Those who are taken for the Forest*.

Sect. 33. As to the first of these Particulars, it is observable that the Statute declares generally, That those imprisoned for the Death of a Man have always been taken to be irreplevisable, without making any Distinction between such Homicide as is malicious, and that which happens by Misadventure, or in Self-Defence. And it is further to be observed, that the Statute *of Glocester [sic; Gloucester], cap*. 9. provided, *That where a Man kills another by Misfortune, or in his Defence, or in other Manner without Felony, he shall be put in Prison till the next Coming of the Justices in Eyre, or Justices assigned to the Gaol-Delivery*, &c. And agreeably hereto we find, That all Persons in general, who are taken for the Death of a Man, are excepted out of the Writ [a] *de Homine replegiando:* And that even the superior [b] Courts, which are not restrained by these Statutes, have yet been always cautious of bailing Persons imprisoned for any Homicide, except in such special Cases as shall be set forth more at large in the following Part of this Chapter:

Sect. 34. Also it seems agreed, That Justices of Peace, who have Power at this Day to bail a Man arrested for a light Suspicion of Homicide, cannot bail any such Person for Manslaughter, or even excusable Homicide, if it manifestly appear that he was guilty of the Fact, let it be ever so plain that it cannot amount to Murder, as shall be shewn more at large in the following Part of this Chapter [c].

Sect. 35. And it is enacted by 3 *H*. 7. 1. *That if it happen, that any Person named as Principal or Accessary, be acquitted of any Murder at the King's Suit, within the Year and Day, that then the same Justices before whom he is acquitted, shall not suffer him to go at large, but either remit him to Prison, or bail him, after their Discretion, till the Year and Day be passed*.

Sect. 36. As to the second Particular, *viz*. That concerning those who are taken by the Commandment of the King, it seems, That the Words of the Statute concerning them are to be understood of such only as are imprisoned either by the King's personal Command, or by the Command of his Privy Council, which is looked upon to be as it were incorporated with him and to speak with his Mouth; and accordingly we find the Exception in the Writ of *Homine replegiando*, relating to Persons imprisoned by the King, thus expressed in the Register, *Nisi capti sunt per speciale praeceptum nostrum;* by which it seems to be implied, That this Exception is not to be applied generally to every Command whatsoever of King: To which it may be added, That if it were to be understood in so large a Sense, it would extent even to those who are taken by a *Capias* in a personal Action, for that every such *Capias* is the Commandment of the King; but it seems certain, That a Defendant taken by such a *Capias* is replevisable by the Common Law. But Persons imprisoned by the special Command of the King, or of his Privy Council, are so far from being replevisable by the Sheriff, that they have formerly [a] been adjudged not to be bailable even by the Court of King's Bench: However at this Day the Law is otherwise declared and settled by Parliament, as shall be shewn more at large in the following Part of this Chapter.[326]

Sect. 37. As to the third Particular, *viz* That concerning Persons imprisoned by the Command of the Justices, it is observable, That the Exception in the Writ of *Homine replegiando*, in the Register, [b] concerning Persons so imprisoned, is restrained to those who are taken by the special Command of the King's Chief Justice. But by *Fitzherbert* [c] and *Staunford* [d], *Coke* [e] and *Dalton*, [f] the Words of the Statute relating to Persons so imprisoned, seem to be understood in a large Sense of any of the King's Justices in general, as of those of Assise, as well as of those of the Courts of *Westminster-Hall*. But it seems that they are not to be understood generally of Persons imprisoned by any Command whatsoever of such Justices, for that those who are imprisoned by their ordinary Command, not by Way of Punishment, but in Order only to be safely kept, are said to be replevisable by the Sheriff, in Cases not prohibited by the Statute; and therefore it seems, That they must be taken in a more restrained Sense of those only who are imprisoned by the absolute Command of such Justices by Way of Punishment, as for a Misdemeanor done in their Presence, or for other Contempts, or such like Matters, which lie rather in their Discretion than in their ordinary Power; and it seems that a Commitment by the Chief Justice, without shewing any Case whatsoever, shall be intended to be for some

such Matter; and there can be no Doubt but that a Person under such a Commitment is irreplevisable by the Sheriff. Also it hath been holden, That a Person so committed is not bailable upon a *Habeas Corpus:* But how far Persons committed by the absolute Command of one Court, are bailable by another, shall be more fully considered in the following Part of this Chapter.

Sect. 38. As to the fourth Particular, *viz*. That concerning those who are imprisoned for the Forest, who also are excepted out of the Writ [g] of *Homine Replegiando*; it seems that the said Exception is to be understood as well of Forests in the Hands of Subjects, [h] as of those in the Hands of the King; but it seems, that it is to be understood strictly of proper Forests only, and not be extended [i] by Equity to Chases or Parks. And as to Imprisonments for Offences in Forests, the Law has been much mitigated by later statutes; for it is recited by I *Ed*. 3. *cap*. 8. *That divers Persons had been undone by the Chief Keepers of Forests*, &c. *against the Form of the Great Charter* [k] *of the Forest, and against the Declaration*[l] *made by king* Edward I. *by which be granted, That Trespasses done, in his Forest, of Vert and Venison, should be presented at the next Swainmote, before the Forester,* &c. *and that such Presentments made before such Forester,* &c. *should by the Oaths of Knights, and other discreet and lawful Men*, &c. *by the common Assent of all the said Ministers, be solemnly written, and with their Seals ensealed: And that if any Indictment should be in any other Manner made, that the same should be void*. And thereupon it is ordained, *That from thenceforth no Man shall be taken nor imprisoned for Vert or Venison, unless he be taken with the Manner, or else indicted after the Form before specified: And then the chief Warden shall let him to mainprise till the Eyre of the Forest, without any Thing taken for his Deliverance. And if the said Warden will not so do, he shall have a* [a] *Writ out of the Chancery*, &c. *to be at Mainprise till the Eyre. And if the Warden shall not obey such Writ, the Plaintiff shall have a* [b] *Writ to the Sheriff to attach the said Warden before the King, at a certain Day*, &c. *And the Sheriff (the Verders being called to him) shall deliver him that is so taken, by good Mainprise, in the Presence of the Verders, and shall deliver the Names of the Mainpernors to the same Verders, to answer in the Eyre before the Justices*, &c. And it is farther enacted, by 7 *R*. 2. 4. *That no Man shall be imprisoned by any Officer of the Forest without due Indictment, or being taken with the Manner, or trespassing in the Forest*, &c.[327]

Sect. 39. And *Note*, That Persons so indicted, or taken with the Manner,

being imprisoned by such Officers, have their Election either to be mainprized by twelve Mainpernors, by Virtue of the Writ of *Homine replegiando*, given by the said Statute of 1 *Ed*. 3. 8. or to be bailed upon a *Habeas Corpus*, by the Judges of *Westminster-Hall*, &c. And if a Person be imprisoned for any Offence relating to the Forest, without having been first indicted for it, or taken with the Manner, there seems to be no Doubt but that he may have an Action of false Imprisonment, and may also be mainprised or bailed in the Manner abovementioned.[328]

And now I am to consider that Part of the Purview of the above recited Statute of *Westminster* 1. 15. which shews that other Persons are not replevisable, of which there are two Sorts.

1. Such as are excluded from the Benefit of a Replevin, in respect of the Notoriety of their offence.
2. Such as are excluded from it in respect of the Heinousness of the Crime alledged against them.

Persons excluded from the Benefit of a Replevin, in respect of the Notoriety of their Offence, are of two Kinds.

1. Those who by an express or implied Judgment, Sentence or Conviction, or their own Confession, appear to be Guilty.
2. Those who are under violent Presumptions of Guilt.

Sect. 40. And first [c], Of those who by Judgment, Sentence, Conviction or Confession, appear to be Guilty, some are excluded from the Benefit of a Replevin by the express Words of the Statute; as *Those who are outlawed, or have abjured the Realm; Persons excommunicate, taken at the Request of the Bishop, and Provers*. And all other Persons who are condemned, or convicted of Felony, or any other [d] heinous Crime whatsoever, where by their own Confession or by Verdict General or Special; [e] and also all those [f] who on their Examination own themselves guilty of a Felony alledged against them, and are charged in their *Mittimus* with the Felony so confessed, seem to be excluded from it by Parity of Reason, and the manifest Intent of the Statute; for [g] Bail is only proper where it stands indifferent whether the Party be Guilty or Innocent of the Accusation against him, as it often does before his Trial; but where that Indifferency is removed, it would, generally speaking, be absurd to bail him: And agreeably hereto the Statue of 2 *H*. 5. *cap*. 2. provides, even as to civil Causes, *That if upon a Writ of* Certiorari, *or* Corpus cum causa, *out of Chancery, it shall be returned that the Prisoner is condemned by Judgment given against him, he shall be remanded*, &c. Also 23 *H*. 6. *cap*. 10. which

ordains, That Sheriffs, *&c*. shall let out of Prison Persons in their Custody by Force of any Writ, *&c*. in Personal Actions, or on Indictments of Trespass, by sufficient Sureties, *&c*. expresly excepts *All such as shall be in their Ward by Condemnation, Execution*, &c. And therefore it cannot but be reasonable to intend, That the said Statute of *Westminster* 1, put the Cases of Persons outlawed and excommunicate as Examples only; meaning thereby to intimate, That all other Persons under the like Circumstances should be in like Manner irreplevisable: Yet it is certain, that the Court of King's Bench may, in their Discretion, in some special Cases, bail a Person upon an Outlawry of Felony; as [a] where he pleads that he is not of the same Name, and therefore not the same Person with him that was outlawed; or alledges [b] any other Error in the Proceedings. Also it seems, That the Court of King's Bench, or Justices of Gaol-Delivery, may bail [c] a Person convicted of Manslaughter, or, as some say, of any other Felony, for which he afterwards gets the King's Pardon. And [d] there seems to be no Doubt at this Day, but that they may also bail any Person who is found guilty before them of Homicide in Self-defence, or by Misadventure. Also it is certain, That if a Person appear to be imprisoned for an Excommunication, in a Cause of which the Spiritual Court hath no Conusance, he may be delivered either upon a *Habeas Corpus*, or by quashing or superseding the Writ of *Excommunicato capiendo*.

Secondly, Of those who are under violent Presumptions of a Guilt, and in that respect are excluded by the Statute from the Benefit of of a Replevin, there are several Kinds.

Sect. 41. I. *Those who are taken with the Manner* (or rather the *Mainer* that is, with the thing stolen, as it were, in their Hands) and by Parity of Reason, those who are taken freshly upon a Hue and Cry.[329]

Sect. 42. II. *Those who have broken the King's Prison*, and by the same Reason those who have broken any other Prison, which the Law presumes that no innocent Person will do.

Sect. 43. III. *Those who are appealed by Provers*, who regularly are not bailable, because the Approver, by confessing his own Guilt, induces a strong Presumption against those whom he accuses of the same Crime of which he owns himself guilty; yet by the express Words of the Statute, *If the Person appealed by an Approver be of good Reputation, he may be bailed, even in the Life of the Approver; and unless he be a notorious Felon, he may be bailed after his Death*. And by Parity of Reason, he may also be bailed, if the Approver waive [e] his Appeal, or be vanquished, [f]

unless there be some other Cause to detain him in Prison, as the Appeal of some other Approver, *&c.* And if a Person disabled by Law to become an Approver, as one attainted, [g] *&c.* appeal another of High Treason, it seems that the Person so appealed ought to be bound [h] to his Good Behaviour towards the King: But [i] if such Person had appealed him of Felony only it seems that he ought to have been wholly discharged, if there had been no other Accusation against him.[330]

Sect. 44. IV. *Thieves openly known and notorious*, who, as it seems, ought not to be bailed for any fresh Felony, whereof there is probable Evidence against them. But how far Persons accused of any Crime shall be so far esteemed likely to have committed it, from their former scandalous Behaviour, as to be presumed guilty upon slight Evidence, seems in great measure to be left to the Discretion [k] of the Person who hath Power to bail them; who, upon Consideration of the Circumstances of the whole Matter, and the Probabilities of both Sides, if he find it reasonable strongly to presume them to be guilty, ought not to bail but commit them.

Sect. 45. V. *Persons taken for open and manifest Offences*, which seems to be understood of inferior Crimes of an enormous Nature, under the degree of Felony, as dangerous Riots, [a] favouring of High Treason, [b] scandalous Extortions, Conspiracies, [c] by Justices, *&c.* violent and exorbitant Rescouses [d] of Person arrested by Virtue of the King's Writs, Misprision [e] of Treason, *Praemunire*, [f] Maim, and such like heinous Offences, whereof no one who is notoriously guilty, seems to be bailable by the Intent of this Statute; for notwithstanding in the latter Part of it, it be said generally, That those who are accused of a Trespass, for which a Man shall not lose Life or Member, are replevisable; yet upon the Construction of the whole it seems reasonable to qualify the Generality of that Expression with this Limitation, that such Accusation ought to be either on a light Suspicion; or if it be on plain and unquestionable Evidence, that the Offence ought to be inconsiderable, for if all Persons whatsoever shall be replevisable for Offences not touching Life or Member, let their Guilt be never so notorious, the abovementioned general unlimited Clause, that those who are taken for open Offences shall be irreplevisable, must be restrained to Felonies and Offences touching Member, which seems contrary to the most obvious reasonable Purport of it, and also to common Practice, and that allowed general Rule, That Bail is only then proper where it stands indifferent whether the Party were Guilty or Innocent; *sed quaere*. Yet it seems to be in great Measure left to the Discretion of the Person who

has Power to admit others to Bail, to judge in what Cases their Crime is so flagrant and enormous, that they ought not to have the Benefit of it.

Of those who are excluded by the Purview of the said Statute, from the Benefit of a Replevin, in respect of the Heinousness of the Crime alledged against them, there are four Kinds.

1. *Those who are taken for Arson*.
2. *Those who are taken for false Money*.
3. *Those who are taken for falsifying the King's Seal*.
4. *Those who are taken for Treason, which touches the King himself*.

Sect. 46. And all such Persons being expresly declared to be irreplevisable, it seems clear, That they can in no Case be delivered out of Prison by the Sheriff, either by Virtue of the said Writ of *Homine replegiando*, or without it: Yet if a Person at large be accused before a Sheriff, on a light Suspicion of any of these, or of any other of the abovementioned Crimes which always have been agreed to be irreplevisable, as of Homicide, *&c*. it seems by no means to follows either from the Words or Intention of the Statute, That the Sheriff is bound to keep him in Prison till he be delivered by due Course of Law; but in such a Case it seems to be more reasonable, that he take Surety of him to appear in a proper Court to answer such Accusation; for it seems extremely harsh, and contrary to the first Principles of the Law, which favours nothing more than the Liberty of the Subject, to put an Officer under a Necessity of depriving a Man of his Liberty upon every Accusation of such a Crime, be it never so weakly grounded. And the Words of the Statute, declaring Persons to be irreplevisable for such Crimes, seem clearly applicable to such only as are under an actual Imprisonment, and not to those who are barely accused; for that none can be properly said to be replevied, but those who being actually imprisoned, are, upon finding Pledges, delivered out of Custody; from which it follows, That Persons not imprisoned are not within the Statute: Nay, the Law if so far from obliging a Sheriff to imprison a Man on every Accusation whatsoever of such Crimes, that it subjects him, as well as any other Person, to an Action of False Imprisonment, if he does it without a reasonable Ground; as hath been more fully shewn in the Chapters concerning Arrests. But if a Person, actually under an Arrest, either of a Magistrate or private Person, for any of the abovementioned Crimes, it seems clear from the express Words of the Statute, that the Sheriff cannot replevy him; and it seems, that at the Common Law he ought to have safely detained the Party so arrested till he could have obtained his

legal Deliverance, and that the Person so arrested had no Remedy but by Indictment or Action of False Imprisonment against those who arrested and delivered him to the Sheriff, on a groundless Suspicion. But how far the Law may at this Day be altered in this Point, by the universal and allowed Practice of Sheriffs receiving no Person into their Custody, for any Crime, without the Warrant of some Magistrate, shall be more fully Considered in the next Chapter.

Sect. 47. It is certain, That the Court of King's Bench still may, and always might, bail Persons in Custody for any of these Crimes, notwithstanding this Statute; yet in Discretion it seldom uses this power but in very special Cases, as shall be shewn in the following Part of this Chapter.[331]

And now I am to consider that Part of the Purview of the said Statute, which shews what Persons are replevisable; for the better Understanding whereof, I shall endeavour to explain,[332]

1. The Branch relation to Person accused as Principals.
2. That which concerns those who are charged as Accessaries.

Sect. 48. As to the first Branch, First, *Those who are indicted of Larceny by Inquests taken before Sheriffs, or Bailiffs, by their Office*, that is, before Sheriffs in their Torns, and Lords in their Leets, are expresly declared to be replevisable; and according to same Opinions, those who are indicted or appealed in any other Court, of any other Felony, not expresly declared by the Statute to be irreplevisable, as Robbery or Burglary, *&c*. are replevisable by the Sheriff *ex officio*, without Writ, within the Equity of this Clause: Yet the Authorities which are brought to warrant this Opinion, relate only to the Bailment of Persons by superior Courts, upon Indictments or Appeals of Such Crimes before such Courts, and do by no means prove that such Persons are replevisable by the Sheriff *ex officio*, without Writ: And it is observable, that the Writs of Mainprise in the Register, for Persons indicted only of Trespass, before Justices of Peace, expresly declare, That such Persons cannot be delivered out of Prison without the King's special Command, from whence it seems to follow, That such Persons are not within the common Benefit of a Replevin by the Sheriff, without same such special Command. And if Persons indicted of Trespass only, before Justices of peace, are not within the ordinary Remedy of a Replevin by the Sheriff without a Writ, surely it cannot be thought that Persons indicted of higher Crimes, and before Superior Courts, can be any way intitled to it: However, inasmuch as the said Statute of *Westminster* 1. expresly allows Persons

indicted of Larceny before the Sheriff the ordinary Remedy of a Replevin, and expresly excludes same other particular Felonies, and say nothing of others, it seems a reasonable Construction of the Statute, That the Sheriff might by Virtue of it, either with or without Writ, replevy those who were indicted before himself, or at a Court-Leet, of those other Felonies not expresly excepted, as well as those indicted of Larceny only. And the Statute leaving such a Latitude to the Sheriff in Relation on the Persons so indicted before himself, or at a Court-Leet, it hath been usual for superior Courts, (who, though they be not within the Statute, have yet always had a great Regard to the Rules prescribed by it) to use the same Liberty in Relation to such Crimes, and sometimes greater, for such special Reasons, and in such special Cases, as shall be sat forth more at large in the following Part of this Chapter. Yet notwithstanding the Statute seems generally to allow the Benefit of a Replevin to all those who are indicted of Larceny, *&c*. without any Limitation; yet it hath been always construed to intend only, that such Persons indicted of a Grand larceny, as are of a good Reputation, shall be replevisable, and therefore if there be strong Presumptions of their Guilt, it seem that they ought not to be bailed; but this is in great Measure to be left to Discretion.[333]

Sect. 49. Secondly, *Those who are imprisoned for a light Suspicion*, are likewise declared by the Statute to be replevisable; yet notwithstanding the Words are general, it hath always been taken to be the Intent of them, That the Persons so imprisoned ought to be of a good Reputation: Also it seems clear, That the Statute means only such Person as are imprisoned for Crimes not expresly excepted by it from the Benefit of a Replevin; and therefore that this Branch cannot extend to Persons imprisoned for the Treasons mentioned in the Statute, Arson, or Homicide, but only to those taken for Larceny, Robbery, Burglary and such like Felonies, *&c*.[334]

Sect. 50. Thirdly, Those who are imprisoned *for Petit Larceny, which does not amount to above the Value of* 12 d. are also declared by the Statute to be replevisable, *if they have not been accused of some other Larceny before:* And it seems to be agreed, That there is no Necessity that such Persons be of good Reputation; yet upon the Construction of the whole Statute, if such Persons be taken with the Manner, or confess the Fact, *&c*. or their Crime be otherwise open and manifest, it seems that they ought not to be bailed; but if there be any Colour of Probability for their Innocence, it seems most agreeable to the Intention of the Statute to bail them.[335]

Sect. 51. Fourthly, *Persons accused of other Trespass for which a Man*

ought not to lose Life or Member, are declared by the Statute to be replevisable; yet perhaps the Generality of this Clause is restrained by that other Clause which declares, That Persons taken for open and manifest Offences shall not be replevied, as hath been more fully shewn, *Sect*. 45.

Sect. 52. Fifthly, The Appellee of an Approver is also expresly declared to be bailable after Death of the Approver, unless he be a notorious Felon. But having already incidentally shewn, *Sect*. 43. in what Cases such an Appellee is replevisable, I shall refer the Reader, for this Matter, to what is said concerning it.

Sect. 53. Secondly, As to the Branch concerning those who are Charged as Accessaries, which is in the following Words, *Those who are accused of the Receipt of Thieves or Felons, or of Commandment, or of Force, or of Aid of Felony done, shall be replevisable*, &c. it is observable, That notwithstanding the Statute mentions only those who are Accessary by receiving Felons, or by Commandment, Force or Aid; yet all those who are accessary to a Felony any [a] other Way, as by Persuasion or any other Procurement, or Abetment, have always been taken to be within the Equity of it; and most [b] of the Books relating to this Matter seem generally to hold, That all Accessaries, whether to Homicide or any other Felony, are bailable till the Principal be convicted, or attained; and that they are bailable even after such Conviction or attainder, upon their [c] pleading to the Indictment, and do not express any Limitation or Restriction, that they be of good Fame, or but slightly suspected, *&c*. And in the Case [d] of 25 *Ed*. 3. 44. *pl*. 14. wherein a Person appealed of Murder, as having holden the Deceased in his Arms while the other killed him, was not let to Mainprise, the Reason given for it by the Reporter is, because the Defendant was in a Manner a Principal; for the otherwise being an Accessary only, he ought to have been let to Mainprise by the Intent of the Statute. Yet I find it made a *Quaere* in the Year-Book of 21 [e] *Ed*. 4. Whether Accessaries are to be let to Bail of Course? And perhaps it may be more reasonable to intend, in the above cited Case of 25 *Ed*. 3. That such Person was denied the Benefit of Mainprise by Reason of the Notoriety of his Guilt, for it seems clear, both from the [f] *Register*, [g] *Fitzberbert*, and [h] *Dalton*, That Accessaries to Felonies are not to be bailed unless they be of good Reputation; and if the Want of good Reputation, which is at most but a very slight Inducement to presume them guilty of a particular Crime, be a good Cause to exclude them from the Benefit of Mainprise, which is given them by the general Words of the Statute, it seems strange, the strong and unquestionable Evidence of their

Guilt should not much more exclude them from it; especially considering, that it is an allowed Rule, [i] That Bail is only proper where it stands indifferent whether the Person accused were guilty or innocent. And since latter Statutes have, in many Cases, excluded Accessaries before the Fact from the Benefit of Clergy, it seems absurd to say, That Persons notoriously guilty of being Accessary to the Crimes which exclude them from the Benefit of Clergy, shall be admitted to Bail; whereas if they had been committed to Prison on the like Evidence of Guilt, as Principals, for Felonies within the Benefit of Clergy, or even for inferior Offences of an enormous Nature, they could not have had the like Privilege: And therefore since the general Words of the Statute concerning the Replevising of Accessaries, are agreed to receive the above mentioned Limitations, That they ought to be of a good Reputation, and also to plead first to the Indictment, if the Principal be attainted; why should it not be reasonable to admit this farther Restriction, That their Guilt be not notorious? Which seems admitted to be implied in most of the other Clauses of the Statute, which yet are penned in as general Words, as that relating to Accessaries. But this Matter seems at this Day to be put beyond all Question, by 31 *Car*. 2. *cap*. 2. Par. 21. By which it is recited, *That many Times Persons charged with Petit Treason, or Felony, or as Accessaries thereunto, are committed on Suspicion only, whereupon they are bailable or not, according as the Circumstances making out that Suspicion, are more or less weighty*, &c. And thereupon it is enacted, *That no Person so charged, shall be removed or bailed by Virtue of that Act, in other Manner than he might before*. From which it seems clearly to follow, That where there are strong Presumptions of Guilt against a Person so charged, he neither was bailable before that Statute, nor is now bailable by Virtue of it.

As to the second Point, *viz*. In what Cases Bail is grantable by a Justices of Peace, I shall endeavour to shew,

1. How far it is grantable by Construction of the Statutes and Commission, which gives Justices of Peace a Jurisdiction over certain Crimes, without saying any Thing concerning the Power of granting Bail.
2. How far it is grantable by the Statutes specially relating to the Power of granting Bail.

Sect. 54. As to the first Point it seems, That where-ever Justices of Peace have Jurisdiction of a Crime, they may bail the Person indicted before them of such Crime, upon such Circumstances for which other Courts may bail the Person so indicted before them; for that it seems to be a good general

Rule, That so far as any Persons are Judges of any Crime, so far they have Power of bailing a Person indicted before them of such Crime: And upon this Ground it seems clear, That any two Justices of Peace, whereof one is of the *Quorum*, may, of common Right, bail Persons indicted before the Sessions of Justices of Peace, for that any two such Justices may hear and determine the Indictment. [a] Also it hath been holden, That any one Justice of Peace hath the like Power in Relation to Persons so indicted, because every such Justice being a Judge of the Court which is to determine of Offence, seems consequently to have a discretionary Power of Judging whether it be bailable, and of admitting the Party to Bail. And this seems to be implied by the Statute of 1 *Ric*. 3. *cap*. 3. which giving one Justice of Peace Power of bailing Persons arrested for Felony, *in like Form as if such Persons had been indicted at Sessions*, clearly supposes, that if such Persons had been indicted at Sessions, they might have been bailed by any one Justice: And if any one Justice of Peace had such Power of bailing the Persons so indicted at Sessions, before the Statutes specially relating to the Power of Justices of Peace in granting Bail, it seems, That he still has the same Power in Relation to Persons so indicted of any bailable Crime under the Degree of Felony, because the said Statutes seem not to restrain him in any such Case, under the Degree of Felony, from any Power which he lawfully might claim before. Also it seems to be agreed, That any one Justice of Peace might always in his Discretion either bail or imprison one who has given another a dangerous Wound, according as it shall appear from the whole Circumstances, that the Party is most likely to live or die, for that every such Justice being a principal Conservator of the Peace, the Offence at Present being only an enormous Breach thereof, and no Felony, seems properly to come under his Conusance.[336]

Sect. 55. As to the second Point, *viz*. How for Bail is grantable by Justices of Peace, by Virtue of the Statutes specially relating to their Power of granting Bail, it is recited by 1 *R*. 3. *cap*. 3. *That divers Persons had been daily arrested and imprisoned for Suspicion of Felony, sometime of Malice, and sometime of a light Suspicion, and so kept in Prison, without Bail or Mainprise, to their great Vexation and Trouble: And thereupon it is enacted, That every Justice of Peace in every Shire, City or Town, may by his or their Discretion, let such Prisoners and Persons so arrested to Bail or Mainprise, in like Form as though the same Prisoners, or Persons, were indicted thereof of Record, before the same Justices at their Sessions*.[337]

Sect. 56. But it is recited by 3 *H*. 7. *cap*. 3. *That by Colour of the said*

Statute of 1 R. 3. *divers Persons which were not mainpernable, were oftentimes let to Bail and Mainprise by Justices of Peace, against the due Form of Law; whereby many Felons had escaped, to the great Displeasure of the King, and Annoyance of his Liege People*; and thereupon it is enacted, *That the Justices of Peace in every Shire, City, and Town, or two of them at least, whereof one to be of the* Quorum, *have Authority and Power to let any such Prisoners, or Persons mainpernable by Law, that have been imprisoned within their several Counties, City or Town, to Bail or Mainprise, unto their next general Sessions, or unto their next general Gaol-Delivery of the same Gaols, in every Shire, City, or Town, as well within Franchises as without, where any Gaols be or hereafter shall be: And that the said Justices of Peace, or one of them, so taking any such Bail or Mainprise, do certify the same at the next general Sessions of the Peace, or the next general Gaol-Delivery of any such Gaol, in every such County, City or Town, next following after any such Bail or Mainprise so taken; on Pain to forfeit to the King for every Default thereupon recorded*, 10 *l. And that the aforesaid Act, giving Authority and Power in the Premisses, to any Justice of the Peace by himself, be in that Behalf utterly void, and of none Effect*.[338]

Sect. 57. And it is recited by 1 & 2 *Ph. & M.* 13. *That since the said Statute of* 3 H. 7. *one Justice of Peace, in the Name of himself, and one other of the Justices his Companion, not making the said Justice Party nor Privy unto the Case wherefore the Prisoner should be bailed, had oftentimes by sinister Labour and Means, set at large the greatest and notablest Offenders, such as be not replevisable by the Laws of this Realm; and yet the rather to hide their Affections in that Behalf, had signified the Cause of their Apprehension to be only for Suspicion of Felony; whereby the said Offenders had and did daily escape Punishment*, &c. And thereupon it is enacted, *That from the first Day of* April *then next coming, no Justice or Justices of Peace shall let to Bail or Mainprise any such Person or Person, who for any Offence or Offences, by them or any of them committed, be declared not to be replevised or be forbidden to be replevised or bailed by the abovementioned Statute of* Westminster 1.[339]

Sect. 58. And it is further enacted, *Par.* 3. *That any Person or Persons arrested for Manslaughter or Felony, or Suspicion of Manslaughter or Felony, being bailable by the Law, shall not 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 the least, whereof one to be the* Quorum, *and the same*

Justices to be present together at the Time of the said Bailment or Mainprise; which Bailment or Mainprise they shall certify in Writing subscribed or signed with their own Hands, at the next general Gaol-Delivery to be holden within the County where the said Person or Person shall be arrested or suspected.

Sect. 59. And it is farther enacted, *Par.* 4. *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; which said Examination, together with the said Bailment, the said Justices shall certify at the next general Gaol-Delivery to be holden within the Limits of their Commission.*

Sect. 60. And it is farther enacted, *Par.* 5. *That the said Justices shall have Authority to bind all such by Recognizance or Obligation, as do declare any Thing material to prove the said Offences or Felonies, to appear at the next general Gaol-Delivery to be holden within the County, City, or Town-Corporate where the Trial thereof shall be, and then and there to give Evidence, as such Bond or Bonds in writing as he shall take, at or before the Time of his said Trial thereof to be had or made. And in Case any Justice of Peace of* Quorum *shall offend in any Thing, contrary to the true Intent and Meaning of this Act; the Justices of Gaol-Delivery, 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, as the same Justices of Gaol-Delivery shall think meet,* &c.

Sect. 61. But it is provided, Par. 6. *That Justices of Peace, and Coroners, within the City of* London, *and the County of* Middlesex, *and in other Cities, Boroughs, and Towns Corporate, shall within their several Jurisdictions, have Authority to let to bail Felons and Prisoners, in such Manner and Form as they had been before accustomed; and also shall take Examinations and Bonds, as is aforesaid, upon every Bailment by them made, and certify every such Bailment, Bond and Examination, at the next general Gaol-Delivery,* &c.

From these Statutes the following Particulars appear most observable.

Sect. 62. First, That it seems clearly to be imply'd by the above mentioned Statute of 1 *R.* 3. 3. which authorized any one Justice of Peace to

bail a Person on a slight Suspicion of Felony, in like Manner as if such Person had been indicted at Sessions, That before the Statute Justices of Peace could bail those only for Felony, who had been indicted of it before them. And by Parity of Reason it seems also to follow, That they had no Power to bail Persons for other Crime before such Indictment, unless it were an Offence directly tending to the Breach of the Peace, the Bailing of Persons for which seems properly to come under their Conusance as Conservators of the Peace: And therefore it seems difficult to maintain the Power of one Justice of the Peace to bail a Person for any other Crime, unless it be by some Statute limited to the Conusance of one Justice, or the Party have been indicted for it at Sessions because the Commission in giving a Justice a general Jurisdiction over any Crime, shall be construed so far only to give him a Power to bail a Person accused of it, as it makes him a Judge of it, which he cannot be till it come regularly before him by Indictment; and the Statutes above mentioned specially relating to the Power of Justices of Peace, in granting Bail, expressly require the Conusance of two Justices.[340]

Sect. 63. Secondly, That Justices of Peace have no Power to bail any Person not replevisable by the above mentioned Statute of *Westminster* 1. 15. from whence it seems to follow, That a Person under the actual Commitment or Arrest of any other Magistrate, or even of a private Person, for any Crime declared to be irreplevisable by that Statute, as Treason against the King's Person, Arson, *&c*. cannot be delivered from his Imprisonment by the Bailment of any Justice of Peace. Yet if a Person at large be only accused of any such Crime, on a slight Suspicion, before a Justice of Peace, it seems that the Justice ought not to commit him, but to take Surety of him to appear before a proper Court, as hath been more fully shewn in Relation to the Sheriff, *Sect*. 46. And inasmuch as the above mentioned Statute of 1 & 2 *Ph. & M*. 13. expressly mentions the Bailing of Persons for Manslaughter, as well as for other Felonies, there can be no Doubt, but that Justices of Peace may, by Force thereof, safely bail any Person imprisoned on a slight Suspicion of a Fact, clearly appearing to be no higher an Offence than Manslaughter, and much more if it appear to amount to no more than Homicide by Misadventure, or in Self-defence. Yet it seems to be agreed, That such Justices must, at their Peril, take Care that the Offence in Truth amounted not to Murder; and that they ought in no Case to bail any Person who manifestly appears to have been guilty of any of the Homicides above mentioned, either by his own Confession, or the Notoriety of the Fact, not only because the above mentioned Statute of

Westminster 1. 15. which is the Pattern prescribed by 1 & 2 *Ph. & M.* for the Direction of Justices of Peace in Relation to bail, expressly excludes all Persons from the Benefit of it which are guilty of open and manifest Offences; but also because the Statute of *Gloucester*, *cap*. 9. is express, That all Persons who are guilty of Homicide, by Misadventure or in Self-defence, shall be kept in Prison till the next coming of the Justices Itinerant, or of Gaol-Delivery.

Sect. 64. Thirdly, That the chief Import of these Statutes is to shew in what Manner Persons are to be bailed by Justices of Peace, and not to declare what Persons are bailable by them; in Relation to which Matter, the old Rules of the Statute of *Westminster* 1. are generally still to be followed, which extending only to criminal offences punishable in the ordinary way by Indictment before the Sheriff, *&c*. give no Power to bail Persons taken on Process in Civil Actions, or for Contempts to Superior Courts, as by Process of Rebellion out of Chancery. And therefore by a reasonable Construction of all these Statutes, Justices of Peace have no Power in any such Cases to admit any Person to Bail.[341]

Sect. 65. As to the third Point, *viz*. Where Bail is grantable by the Justices of Gaol-Delivery, it seems to be clearly settled [a] at this Day, That such Justices may bail any Person convicted before them of Homicide by Misadventure, or in Self-defence, the better to enable him to purchase his Pardon: And if a Person convicted of Manslaughter before such Justices, purchase his Pardon, it seems, that they may [b] bail him, even after their Sessions is determined, till the next Sessions of Gaol-Delivery, that he may come in then and plead his Pardon, for that the Power of such Justices seems [c] to continue for such Purposes after their Sessions. Also [d] if a Man be convicted of Manslaughter before such Justices, against plain Evidence, it is said that they may bail him till the next Sessions of Gaol-Delivery, in order to purchase his Pardon in the mean Time. But it seems, [e] That Justices of Peace have no Power to bail a Man in any of these case, because they are tied up for the most part to the Rules prescribed by the abovementioned Statute of *Westminster* 1. But this Statute not [f] extending to Justices of Gaol-Delivery, seems to leave them a discretionary Power in those Cases wherein it restrains the Sheriff from admitting Persons to bail. And therefore if a Defendant in an Appeal of Death, plead an Excommunication in Disability of the Plaintiff, it seems to be holden by *Staundford*, [g] That such Justices may bail the Defendant from Day to Day, till the Plaintiff shall be absolved, for that otherwise the Defendant might lie in Prison for

ever, without any Opportunity of coming to his Trial. But it is observable, That the Books [h], which are cited for the Maintenance of this Opinion, speak only of an Appeal of Robbery: Yet if Justices of Gaol-Delivery have such Power of Bailing Persons in the Case of Death, on the Circumstances abovementioned, as it seems agreed in the Case abovecited that they have, I do not find any Reason why they may not as well upon other such like Circumstances, bail Persons indicted or appealed before them of any other Crime, in such Manner as the Court of King's Bench may do, as shall be more fully shewn under the next Point.

As to the Fourth Point, *viz*. Where Bail is grantable by the Courts of *Westminster-Hall*, I shall endeavour to shew,

1. Where it is grantable by the Court of King's Bench.
2. Where by the other Courts of *Westminster-Hall*.

As to the first of these Points I shall consider,

1. Where Bail is grantable by the Court of King's Bench, to a Person imprisoned by the King's special Command, or by the Order of his Privy Council.
2. Where to a Person committed by either House of Parliament.
3. Where to one committed by the Court of Chancery.
4. Where to one committed by an Inferior Court of Record.
5. Where to one expresly excluded by the abovementioned Statute of *Westminster* 1. Chap. 15. from the common Benefit of a Replevin by the Sheriff.

Sect. 66. As to the first of these Particulars, *viz*. Where Bail is grantable by the Court of King's Bench to a Person imprisoned by the King's special Command, or by the Order of the Privy Council, I do not find but that where-ever [a] Commitment by the Privy Council hath specially expressed the Crime for which the Party hath been committed, this Court has always admitted him to Bail, on the like Circumstances on which, in Discretion, it will grant Bail on other Commitments: [b] And where-ever it has appeared, that Persons have been imprisoned by Colour of an usurped Authority, pretended to be derived from any patent whatsoever, contrary to Law, it seems that the said Court hath always discharged the Person so imprisoned, without Bail. But there have been formerly many Opinions [c] That Persons committed by the special Command of the King, or of his Privy Council, without expressing any other Cause of the Commitment, were not bailable by any Court whatsoever, without some Intimation of the King's Consent to such Bailment, by Letter from the Privy Council, or otherwise. And a

Distinction [d] was taken by some between a Commitment by one of the Privy Council, and a Commitment by the whole Body; and that the former ought indeed to set forth some other Cause of the Commitment besides the Command of the Person who made it; but that the latter needed not any.

Sect. 67. But this Matter came afterwards to be very solemnly debated in the famous Case [e] of Sir *John Corbet* and others, who being imprisoned by a Warrant from the Privy Council, about the third Year of the Reign of King *Charles* the First, moved the Court of King's Bench to admit them to bail upon their *Habeas Corpus*; whereupon it was returned, that they were detained in the Prison of the *Fleet* by the special Command of the King, signified to the Warden by a Warrant of some of the Members of the Privy Council, in which Warrant no other Cause of the Imprisonment was contained but such special Command: And it was strongly urged on the Behalf of the Prisoners, That such Imprisonment is against the Statute of *Magna Charta, cap*. 29. which provides, *That no Freeman shall be taken or imprisoned, and that the King will not pass upon him, nor condemn him, but by the Judgment of his Peers, or the Law of the Land*; and also against many other Statutes [f] made in Affirmance of *Magna Charta*, by which it is ordained, *That no Man shall be taken by Petition, or Suggestion, made to the King or to his Council, unless it be by Indictment or Presentment, or by Process by Original Writ; and that no Man shall be imprisoned*, &c. *without being brought to answer by due process of Law; nor be put to answer without Presentment before Justices, or Matter of Record, or by due Process, and Writ. Original*. And it was argued, That the Liberty of the Subject would be precarious, and lie at the King's Mercy, if Persons who happen to incur his Displeasure, for what perhaps the Law esteems no Crime, should by Means of such a Commitment be liable to be for ever imprisoned, without any Possibility of Redress; and that it seems inconsistent with natural Justice to expose a Man to so severe a Punishment for a supported Crime alleged against him, without giving him an Opportunity of clearing himself by a lawful Trial. And it was farther urged, That, according to the Opinion of Sir *John Markham*, in the Time of King *Edward* the Fourth, the King could not so much as arrest a Man upon Suspicion of Treason or Felony, as any of his Subjects may; for that if the King should do wrong, the Party could have no Action against him. Also it was insisted, That the Preamble of the Statute of *Westminster* 1. 15. which declares, That Persons imprisoned by the King's Command have always been taken to be irreplevisable, must be intended only of a Replevin by the common Writ *de Homine replagiando*, or by the Sheriff *ex officio* without

Writ, for that it speaks only of a Replevin by the Sheriffs and others; and therefore shall not be taken to extend to superior Courts And it was never thought, that the Court of King's Bench was restrained by it from bailing Persons imprisoned for Homicide; and yet all such are equally declared by the Statute to be irreplevisable; Also many Precedents were alleged, whereby it appeared, That Persons committed by the King's special Command had been discharged upon Writs of *Habeas Corpus*.[342]

Sect. 68. But on the other Side it was argued, That such Commitments could not reasonably be intended to be against the Purview of the Statutes abovecited, inasmuch as the said Statute of *Westminster* 1. 15. which was made in the very next Reign after that in which the Statute of *Magna Charta* was made, it was declared to be a settled and undoubted Point, That Persons committed by the Command of the King (which, as it seems to agreed, is to be understood of the King's special, absolute, and extrajudicial Command) are not replevisable: And it cannot be imagined that so high a Regard should be paid to such a Commitment, if it were thought to be illegal, and contrary to *Magna Charta*. And it was insisted, That Commitments of this Kind have often been allowed by the Court [a] of Justice, and are mentioned by Authors [b] of the best Credit since the abovecited Statutes, without any the least Objection to their Legality, and as depriving the Party imprisoned by them from the common Benefit of the Writ of Replevin. And it was also strongly urged, That there are often secret Causes not fit to be divulged, which may make it necessary for the Safety of the State, in some particular Circumstances, to restrain some Person from their Liberty for a certain Time, and that the King, who is entirely entrusted with Management of State-Affairs, shall be presumed always to act for the Publick Good; and that it is immodest for any of his Courts to question the Justice of his Proceedings of this Kind, which the law seems wholly to have left to his Wisdom, or to suffer a Suggestion that he abuse his Prerogative to cover Oppression; and that the Subject is in no Danger of Perpetual Imprisonment of this Account, for that the Court of King's Bench hath always used a discretionary Power over such Commitments, as well as all other, and therefore upon special Circumstances of Hardship, may admit Persons under such Commitments of Bail; but that where was nothing extraordinary in the Case, it hath been the general Course of the Court not to do it without a special Order from the Council for it, as appeared from the Examination of most of the Precedents relating to this Matter. And therefore in the Case abovementioned the Court of King's Bench was unanimous in Opinion, That Sir *John Corbet*, and the other Gentlemen so

committed by the King's special Command, as is abovementioned, had no Right, *prima facie*, to demand the benefit of Bail, without the Consent of the Council, and therefore remanded them.[343]

Sect. 69. But this Matter being afterward considered in Parliament, and it being the general Opinion, That the chief Reason why those Gentlemen incurred the King's Displeasure was their Refusal to pay the Loans, which, as they insisted, were demanded of them without sufficient Authority; and it being evident, That if there were no certain legal remedy for the Liberty of the Subject against such a Strain of the Prerogative, no Man could be safe in maintaining his Property, either in Parliament, or out of it, against a disputed Demand from the Crown, but would be liable to a discretionary Imprisonment, and that under Colour of Law, without any certain Redress from the Law; it was thought necessary on this Occasion to draw up the famous Petition of Right, which was afterwards assented to by the King, wherein, among other Things, the Lords and Commons complain to the King, *That against the Tenor of the above* [a] *cited Statutes, divers Subjects had then of late been imprisoned, without any Cause shewed; and when for their Deliverance they had been brought before Justices by Writs of* Habeas Corpus *there to undergo and receive as the Court should order; and their Keeper commanded to certify the Causes of their Detainer, no Cause had been certified, but that they were detained by his Majesty's special Command signified by the Lords of his Privy Council, and yet were returned back to several Prisons, without being charged with any Thing to which they might make answer according to the Law: And thereupon the said Lords and Commons, among other Things, humbly pray, That no Freeman, in any such Manner as is before mentioned, be imprisoned, or detained*, &c.[344]

Sect. 70. And it seems to have been generally agreed, since the Time of this Petition, That where-ever any Commitment by the Privy Council hath not expressed, with some convenient Certainty, the Crime alleged against the Party, he ought to be bailed upon his *Habeas Corpus*.[345]

Sect. 71. And for the greater Security of the Liberty of the Subject, against Commitments by the Command of the King, or of his Privy Council, it is father provided and enacted, by 16 *Car*. 10. *Par*. 8. *That if any Person shall be committed, restrained of his Liberty, or suffer Imprisonment by the Command or Warrant of the King's Majesty, in his own Person, or by the Command or Warrant of the Council-Board, or of any of the Lords or others of his Majesty's Privy Council; That in every*

such Case, every such Person upon Demand or Motion of the Judges of the King's Bench or Common Pleas, in open Court, shall without Delay, upon any Pretence whatsoever, for the ordinary Fees usually paid for the same, have forthwith granted unto him a Writ of Habeas Corpus, *to be directed generally unto all and every Sheriff, Gaoler, Minister, Officer, or other Person in whose Custody the Party committed or restrained shall be, and such Sheriff,* &c. *shall, at Return of the said Writ, and according to the Command thereof, on due and convenient Notice thereof given unto him, at the Charge of the Party who requires or procures such Writ, and on Security by his own Bond given, to pay the Charges of carrying back the Prisoner, if he shall be remanded by the Court,* &c. *which Charges shall be ordered by the Court, bring or cause to be brought the Body of the Party before the Judges of the Court, from whence the same Writ shall issue, in open Court, and shall then likewise certify the Cause of such his Detainer or Imprisonment, and thereupon the Court within three Court-Days after such Return made and delivered* [a] *in open Court shall proceed to examine and determine whether the Cause of such Commitment, appearing upon the said Return, be just and legal or not, and shall thereupon do what to Justice shall appertain, either by delivering, bailing, or remanding the Prisoner: And if any Thing shall be otherwise wilfully done, or omitted to be done by any Judge, Justice, Officer or other Person aforementioned, contrary to the true Meaning hereof, That then such Person so offending shall forfeit to the Party grieved, his treble Damages,* &c.[346]

Sect. 72. But it is provided, Par. 9. *That the above-recited Clause shall extend only to the Warrants and Directions of the Council-Board, and to the Commitments, Restraints and Imprisonments of any Person or Persons, made, commanded or awarded, by the King's Majesty, his Heirs or Successors, in their own Person, or by the Lords and other of the Privy Council, and every one of them.*

Sect. 73. As to the second Particular, *viz.* Where Bail is grantable by the Court of King's Bench, to a Person imprisoned by either House of Parliament, There can be no Doubt but that the highest Regard is to be paid to all the Proceedings of either of those Houses, and that where-ever the contrary does not plainly and expresly appear, it shall be presumed that they act within their Jurisdiction, and agreeably to the Usages of Parliament, and the Rules of Law and Justice: And therefore, where-ever it stands indifferent upon the Return of a *Habeas Corpus*, whether a Commitment by either of those Houses were strictly legal or not, and the Parliament be still

sitting, I can find no Precedent that the Prisoner hath been bailed by the Court of King's Bench. And it cannot but be expected, that those Houses would be apt to resent an Attempt of this Kind, which might seem to carry with it an implicit Reflection on their Honour, as unjustly depriving a Subject of his Liberty, and putting him under a Necessity of demanding Justice from another Court, by unreasonably refusing to restore him to it; which surely shall never be intended, where their Proceedings are capable of a more favourable Construction. And therefore in the Lord *Shaftbury*'s Case, who, upon his *Habeas Corpus* in the King's Bench, was returned to have been committed by the House of Lords for his high Contempt committed against that House, the Court would not take Notice of any Exceptions against the Form of the Commitment, as that it was too general, and did not express the Nature of the Contempt, or in what Place it was committed, *&c*. for that it shall be presumed, That it was such for which the Lords might lawfully make such an Order, and no other Court shall prescribe to them in what Form they ought to make it. But if it be demanded, in Case a Subject should be committed by either of those Houses, for a Matter manifestly out of their Jurisdiction, what Remedy can he have? I answer, That it cannot well be imagined that the Law, which favours nothing more than the Liberty of the Subject, should give us a Remedy against Commitments by the King himself, appearing to be illegal, and yet give us no Manner of Redress against a Commitment by our Fellow Subjects, equally appearing to be unwarranted. But as this is a Case, which, I am perswaded, will never happen, it seems needless over nicely to examine it.[347]

Sect. 74. However it seems agreed, That a Person committed for a Contempt, by the Order of either House of Parliament, may be discharged by the Court of King's Bench after a Dissolution, or Prorogation of the Parliament, whether he were committed during the Sessions, or afterwards; for that all the Orders of Parliament are determined by a Dissolution, or Prorogation; and all Matters before either House must be commenced a-new at the next Parliament, except only in the Case of a Writ of Error: And if the Subject should be deprived of his Liberty till the next Parliament, which perhaps may not meet again in many Years, no one could say when his Imprisonment would end.[348]

Sect. 75. But it is holden in *Shower's Reports*, that a Lord committed by the House of Lords, on an Impeachment of Treason, and afterwards pardoned, cannot be discharged by the Court of King's Bench, because the

Impeachment being in a superior Court, the Pardon must be pleaded there; and the Commitment being by the Lords, the King's Bench cannot take Conusance of it. Yet it seems to have been taken for granted in the Lord *Stafford*'s Case, That the Court of King's Bench may, in their Discretion, bail a Lord upon an Impeachment of High Treason, which in that Case they refused to do, not as a Matter out of their Power, but as a Thing which they were not bound to do, and improper on Consideration of the whole Circumstances. And though the Reasons above cited from *Shower's Reports* seem proper to prove, That the Court of King's Bench cannot discharge a Prisoner from any Impeachment in Parliament whatsoever; yet they seem by no Means to prove, that they cannot bail him. But it is observable, That it doth not clearly appear, from either of the abovementioned Reports, whether any Parliament were sitting at the Times of the Motions for such Discharge and Bailment, or not; but it is certainly most likely to prevail in such a Motion, when no Parliament is sitting, nor likely soon to sit, and after the Party hath been long in Prison; because, in such a Case, if he should not be bailed, he might he perpetually imprisoned for a Crime, without any Opportunity of making his Defence.[349]

Sect. 76. As to the third Particular, *viz.* Where Bail is grantable by the King's Bench, to a Person committed by the Court of Chancery, little is said in the Books, except in the Reign of King *James* the First, at the Time when Sir *Edward Coke* was Chief Justice, when this Matter was very much litigated, and occasioned great Heats between the two Courts, and several Persons committed to the *Fleet* by the Chancellor, were bailed by the Court of King's Bench, upon Exceptions to the Generality of the Form of the Commitments, as [a] not shewing the Time of the Commitment, or setting [b] forth only the Command of the Lord Chancellor as the Ground of the Imprisonment, without mentioning any Crime at all, or mentioning the Crime in [c] general Terms, as for a Contempt to the Court of Chancery, without shewing what the Contempt was, or at what Time committed: And one [d] *Glanvil*, who was generally committed by the Command of the Lord Chancellor, without setting forth any Cause of such Command, seems to have been bailed upon Examination of the Merits of the Decree, for disobeying whereof he was in Truth committed; whereby it appeared that the Decree related to a Matter before adjudged at the Common Law, which was thought contrary to the Purport of the [f] Statutes of 27 *Ed.* 3. 1. & 4 *H.* 4. 23. But this Proceeding being resented by the Lord Chancellor, the said *Glanvil* was afterwards recommitted by him for the same Matter, and yet was afterwards, on another *Habeas Corpus*, bailed the second Time by the

Court of King’s Bench: But I have not met with any Precedent of this Kind of late Years; and how far the long Disuse of such like Proceedings may have lessened the Authority of the Cases abovementioned, may deserve to be considered. However, it cannot but be expected, That the Superior Courts will pay the highest Regard to one another’s Proceedings, and be ready to presume, That they are agreeable to Law, unless the contrary appear, or the Case be very particular and extraordinary, which may perhaps reasonably induce them, in some Circumstances, to make Exceptions from those general Rules, which in common Case usually govern their Discretion. But what Case in particular may be said to be of so extraordinary a Nature, it would be needless and presumptuous for me to endeavour to examine. But as to the Case abovementioned, which was formerly so much litigated, concerning the Chancery’s giving Relief against a Judgment at Law, since it seems to be settled at this Day, that the Chancery may, in some Cases, give Relief against the unequitable Use of such a Judgment, especially as to a Point not relievable by Law; whenever it stands indifferent, whether the Matter examined by Chancery, after a Judgment at Law, be so such a Nature as is proper for Relief in Chancery, or not; it is not probable, That any other Court of *Westminster-Hall* will easily presume that it is not, when the Chancellor, who is the proper Judge, hath determined that it is; And agreeably hereto it hath been adjudged, That a Commitment from Chancery, for Disobedience to a Decree, is good, without shewing what the Decree was.

Sect. 77. As to the fourth Particular, *viz*. Where Bail is grantable by the Court of King’s Bench to one committed by an inferior Court of Record; it seems, That this Court, having the Supreme Controul of all inferior Courts, may, in Discretion, on Consideration of the whole Circumstances of any Case whatsoever, bail any Person who shall appear to have been unjustly or hardly deprived of his Liberty by any inferior Court. And therefore, where-ever it shall clearly and expressly appear, that a Person hath been committed by any such Court, for a Matter which either is in Truth no Crime at all, or if it be a Crime, is not within the Jurisdiction of such Court, there can be no doubt but that it is a proper Motion to the King’s Bench to bail him. But in what other Cases in particular one may hope for the like Success in a Motion of this Kind, it seems difficult to determine; for that every such Case depends upon its particular Circumstances, which have great Weight with the Court in its Determinations of this Kind, in which it is in great Measure left to its Discretion. And therefore, though perhaps it may bail a Man on a Commitment by a Mayor of a Town, or a Justice of

Peace, or other inferior Magistrate, for a Contempt, without shewing the particular Nature of it; yet it cannot be expected, that it will with like Readiness hail a Man of such a general Commitment by a Court of higher [a] Dignity, as a Court of *Oyer* and *Terminer*, or any other Court of *Westminster-Hall*; to the honour of whose Proceedings the greatest Regard is always to be given; and on this Ground chiefly, as I suppose, where a Person on a *Habeas Corpus*, was returned to have been committed by an Order of the Exchequer, for not paying a Fine of 50 *l*. by the Ecclesiastical Commissioners imposed upon him, the Court of King's Bench [b] refused to bail him, though it was not shewn wherefore the said Fine was imposed. And as a great Regard is always paid to the Dignity of the Court by which the Party is committed; so is it likewise to the Notoriety of the Offence; and therefore, where a Person convicted of buying and selling old Money, before Justices of *Oyer* and *Terminer*, was committed in Execution for the Fine, by an Order of the Court, not strictly formal, yet the Court of King's Bench refused [c] to bail him, for this Reason chiefly, because he was in Execution, and his Commitment was defective only in Point of Form. Also where Persons taken in Execution for their Fines to the King, set on them by a Sessions of Justices of Peace, have not only brought their *Habeas Corpus*, but also their Writ of Error in the King's Bench, and assigned Errors, yet the Court has refused to bail them. But I take it for granted, in those Cases which are but briefly reported, That it appeared upon the whole Record, That such Fines were legally imposed. Also it seems, that the said Court has sometimes been induced to deny Persons committed by other Courts, by Warrants not strictly formal, the Benefit of Bail, for the Enormity, dangerous Tendency, or Obstinacy [a] of their Offence, which if it had been attended with less aggravating Circumstances might not have excluded them from it. Also the said Court, in determining whether it be proper to bail a Man committed by another Court, usually considers all the other Circumstances of the Case, as the Length [b] and Hardship [c] of the Imprisonment, and such like, in order to give such a Determination upon the whole, as may be most agreeable to the Honour and Prerogative of the Crown, and the Liberty and Safety of the Subject.[350]

Sect. 78. But it seems to be agreed, That no one can in any Case controvert the Truth of the Return to a *Habeas Corpus*, or plead or suggest any Matter repugnant to it: Yet it hath been holden, That a Man may confess and avoid such a Return, by admitting the Truth of the Matters contained in it, and suggesting others not repugnant, which take off the Effect of them. And upon this Ground, where one *Swallow*, a Citizen of

London, was committed for refusing to accept the Office of an Alderman of the said City to which he had been elected, and the Custom of the City justifying a Commitment for such a Refusal, and the Election and Refusal were set forth in the Return to the *Habeas Corpus*; he filed a Suggestion in the Crown-Office, That he was an Officer of the King's Mint, and that all such Officers were exempted from all City-Offices, both by Prescription and by the King's Charter; and thereupon the Patent of the Grant of his Office, and also the Patent of the exemption being inrolled in the Court, he was discharged.[351]

Sect. 79. Also the Court will sometimes examine by Affidavit, the Circumstances of a Fact on which a Prisoner brought before them by an *Habeas Corpus* hath been indicted, in order to inform themselves, on Examination of the whole Matter, whether it be reasonable to bail him or not. And agreebly hereto, where one *Jackson*, who had been indicted of Piracy before the sessions of Admiralty, on a malicious Prosecution, brought his *Habeas Corpus* in the said Court in order to be bailed; the Court examined the whole Circumstances of the Fact by Affidavits, upon which it appeared, That the Prosecutor himself, if any one, was guilty, and carried on the present Prosecution to screen himself; and thereupon the Court in Consideration of the Unreasonableness of the Prosecution, and the Uncertainty of the Time when another sessions of Admiralty might be holden, admitted the said *Jackson* to Bail, and committed the Prosecutor till he should find Bail to answer the Fact contained in the Affidavits.[352]

Sect. 80. As to the fifth Particular, *viz*. Where Bail is grantable by the Court of King's Bench, to one excluded by the above mentioned Statute of *Westminster* 1. *chap*. 15. From the common Benefit of a Replevin by the Sheriff; It cannot be doubted, but that notwithstanding neither [d] the Judges of this, nor of any other Superior Court of Justice, are strictly within the Purview of that Statute; yet [a] they will always, in their Discretion pay a due Regard to the Rules prescribed by it, and not admit a Person to Bail who is expressly declared by it to be irreplevisable, without some particular Circumstance in his Favour: And therefore it seems difficult to find an Instance where Persons attainted [b] of Felony, or but convicted thereof by Verdict general or [c] special, or notoriously [d] guilty of Treason or Manslaughter, *&c*. by their own Confession or otherwise; have been admitted to the Benefit of Bail, without some special Motive to induce the Court to grant it: As where [e] a Person taken by a *Capias utlagatum*, on an Appeal of Felony by the Name of *J. S*. Gentleman, pleads that his Name is

J. S. Yeoman, and not Gentleman, and so he is not the same Person who was outlawed, in which Case the Court in Discretion may bail him; for until the Plea is determined, it appears not whether he were the Person intended, or not. Or where [f] a Person outlawed alledges an Error in the Record, in which Case also the Court, *ex gratia*, may bail him, especially if the Error be apparent. Or where a Man is convicted [g] of Felony, upon Evidence by which it plainly appears to the Court that he is not guilty of it; in which Case even the Justices of Gaol-Delivery may bail him. Or where [h] it appears to the Court that the Prosecutor of an Indictment, or the Plaintiff in an Appeal, hath unreasonably delayed his Prosecution; as where two *Nihils* are returned upon two Writs of *Scire facias*, awarded against a Plaintiff in an Appeal removed by *Certiorari* into the King's Bench and the Prisoner hath lain a long Time under Confinement. Or where [i] the Defendant in an Appeal hath pleaded an Excommunication in Disability of the Plaintiff: In which Case it is apparent that the Plaintiff cannot proceed at present; and if the Defendant should be kept in Prison till the Plaintiff be absolved, he might be a Prisoner for Life. Or where [k] it appears to the Court, That the Defendant may be in Danger of losing his Life, either by Famine, or a dangerous Distemper, *&c*. if he continue longer in Prison.

As to the second Point, *viz*. In what Cases Bail is grantable by the other Courts of *Westminster-Hall;* I shall consider,

1. How far it is grantable by such Court, to Persons committed for Causes under the Degree of Treason or Felony.
2. How far to Persons committed for Treason or Felony.

Sect. 81. As to the first Point, *viz*. How far Bail is grantable by the said Courts, to Persons committed for Causes under the Degree of Treason or Felony; it seems,[1] That the Courts of Common Pleas and Exchequer, at any Time during Term, and the Court of Chancery, either in Term or Vacation, may award a *Habeas Corpus* by the Common Law, for any Person committed for any such Cause, and thereupon discharge him, if it shall clearly appear by the Return, That the Commitment was against Law (as being made by one who had no Jurisdiction of the Cause, or for a Matter for which by Law no Man ought to be punished) or bail him, if it shall be doubtful whether the Commitment were legal or not, *&c*. However it is certain at this Day, That by Force of the *Habeas Corpus* Act, Par. 3 & 10. set forth more at large *Sect*. 17 & 22. any of the said Court, in Termtime, and any Judge of either Bench, or Baron of the Exchequer, being of the Degree of the Coif, in the Vacation, may award a *Habeas Corpus* for any

Prisoner whatsoever, who is bailable by the Intent of that Act, and thereupon bail him.

Sect. 82. As to the second Point, *viz*. How far Bail is grantable by the said Courts to Persons committed for Treason or Felony; it is observable, That the above mentioned Clauses of the said *Habeas Corpus* Act extend not to Persons committed for Treason, or Felony, plainly and specially expressed in the Warrant of Commitment; neither do I find any printed Case, wherein Persons committed for such Crimes have been bailed either by the Courts of Common Pleas or Exchequer. However it is certain, That in some Cases Persons committed for Felony are bailable by the Court of Chancery. But our Law-Books being generally silent in Relation to these Matters I shall refer the Reader for the more accurate Knowledge of them, of Observation and Experience.[353]

Sect. 83. As to the seventh general Point of this Chapter, *viz*. In what Form Bail is to be taken; it seems to be the Practice of the Court of King's Bench in admitting a Person to Bail,[a] who is actually present in Court,[b] upon an Indictment or Appeal of Felony, or other Crime, punishable with Loss [c] of Member, to take [d] a several Recognisance to the King in a certain Sum from each of the Bail, that the Prisoner shall appear at a certain Day, *&c*. and also,[e] That the Bail shall be liable for the Default of such Appearance, *&c*. Body for Body. And it seems to be left to the Discretion of Justices of Peace, in admitting any Person to Bail for Felony, to take the Recognisance either in a certain Sum, or else Body for Body. But [f] where a Person is bailed by the Court of King's Bench, before the Return of a *Capias* awarded against him for Felony, or (as it seems to be implied in the Book cited in the Margin that he may be,) in any Court for a Crime of an Inferior Nature, it seems, That the Recognisance ought to be only in a certain Sum of Money, and not Body for Body. However it is certain [g] at this Day, That Persons bound Body for Body, are not liable on the Forfeiture of the Recognisance, to such Punishment to which the Principal is to be adjudged, if found Guilty, but only to be fined, *&c*.[354]

Sect. 84. As to the eighth general Point of this Chapter, *viz*. What shall forfeit the Recognisance: If on a Bailment for Felony, the usual [h] Form, *ad Standum recto de felonia praedicta, & ad respondendum Domino Regi*, be made use of, and at the Trial the Party stand obstinately mute, it may reasonably be argued, that in Strictness the Recognisance is forfeited, for [i] that the Expressions above mentioned seem to import at least thus much, That the Prisoner shall make some Answer; and at the Common Law,

before the Statute [k] of *Marlebridge, cap*. 28. if a Person under Bail had insisted on his Privilege as a Clerk, and refused to answer to the Crime alledged against him, his Sureties were to be amerced; and though the said Statute have in that Case excused the Bail, yet an obstinate Refusal to answer in other Cases may perhaps remain as it was at the Common Law. Mr. *Dalton* [1] indeed seems to be of another Opinion, because the Words above mentioned are always used of Course: But it seems strange, That Words should be looked on as idle and insignificant because they are most usual and proper. However, if late Practice and Experience have been agreeable to the above mentioned Opinion of Mr. *Dalton*, as I apprehend that they have, they will certainly be of great Force to maintain it: And indeed it must be confessed, That if a Man's Bail, who are his Gaolers of his own choosing, do as effectually secure his Appearance, and put him as much under the Power of the Court as if he had been in the Custody of the proper Officer, they seem to have answered the End of the Law, and to have done all that can be reasonably required of them: But howsoever the Law may stand in Relation to this Case, it is certain, That if Persons be bound by Recognisance, that *J. S.* shall appear in the King's Bench the first Day of such a Term, to answer to such an Information against him, and not depart till he shall be discharged by the Court, and afterwards the Attorney General enter a *Nolle prosequi* as to that Information, and exhibit another, on which the Defendant is convicted, and refuses to appear in Court after personal Notice, the Recognisance is forfeited; for being express that the Party shall not depart till he be discharged by the Court, it cannot be satisfy'd shall he be forthcoming, and ready to answer to any other Information exhibited against him while he continue not discharged, as much as to that which he was particularly bound to answer to. But in such Case it seems, That the Recongnisance shall not be forfeited by the Party's not appearing in Court the first Day of every Term, after he hath pleaded to the Information, as it may be before he hath pleaded.

Hawkins Pleas of the Crown, book II, pp. 87–116.

14.3.1.6Burn, 1766

Transportation.

1. WHERE any person shall be convicted of grand or petit larceny, or any

felonious stealing or taking of money or goods, within the benefit of clergy; and liable only to burning in the hand or whipping (except persons convicted for receiving or buying stolen goods, knowing them to be stolen) the court before whom he shall be convicted, or any subsequent court held with like authority, instead of ordering him to be burnt in the hand or whipt, may order him to be sent as soon as conveniently may be, to some of his majesty's plantations in *America*, for seven years; and shall have power to convey, transfer, and make over such offender, by order of court, to the use of any person who shall contract for the performance of such transportation, to him and his assigns, for seven years. 4 *G. c.* 11. *s.* 1. 6 *G. c.* 23. *s.* 1.

2. And where any offender shall be convicted of any crime, for which he is excluded the benefit of clergy, and the king shall be pleased to extend mercy to him, on condition of transportation to any part of *America*, and such intention of mercy be signified by a principal secretary of state, it shall be lawful for any court having proper authority, to allow such offender the benefit of a pardon under the great seal, and to order the like transfer and conveyance, to any person (who will contract for the performance of such transportation) and to his assigns, of such offender, as also of any person convicted of receiving or buying stolen goods knowing them to be stolen, for the term of 14 years, in case such condition of transportation be general, or else for such other term as shall be made part of such condition. 4 *G. c.* 11. *s.* 1.[355]

3. Every such person, to whom any such court shall order the offender to be transferred or conveyed, before he shall be delivered over to him or his assigns to be transported, shall contract with such person as shall be ordered by the court, and give sufficient security to the satisfaction of such court, that he will transport, or cause to be transported effectually, such offender, to such of his majesty's plantations in *America* as shall be ordered by the court, and procure an authentic certificate from the governor, or the chief custom house officer of the place (which they shall give without fee) of the landing of such offender (death and casualties of the sea excepted), and that the said offender shall not be suffered to return from the said place to any part of *Great Britain* or *Ireland*, by the wilful default of such person so contraction, or his assigns. 4 *G. c.* 11. *s.* 3.[356]

4. The court may appoint, if they think fit, two or more justices where the offender shall be convicted, who shall have power to contract with any person for performance of the transportation; and may order the like security, and cause the felons to be delivered by the gaoler to the person contracting or his assigns; which contracts and security shall be certified by

the justices who shall make and take the same, to the next court held with like authority for the place where the felon was convicted, to be filed and kept among the records of such court. 6 *G. c.* 23. *s.* 2.[357]

5. And all securities for transportation shall be by bond in the name of the clerk of the peace, who shall (by such suit as the justices in sessions shall direct) prosecute such bond in his own name, and be paid such costs as he shall sustain in such suit for the penalty of such bond, or otherwise howsoever by reason thereof, out of the publick stock by the treasurer; and all money recovered on such bond, shall be to the use of the county or place, and be paid to the treasurer, and be part of the publick stock. 6 *G. c.* 23. *s.* 4.[358]

6. The person so contracting, and to whom any felon shall be delivered to be transported, or any person directed by the said justices (impowered to contract as aforesaid), or their assigns, may in such manner as they think fit, carry and secure the felon, in and through any county, toward the sea port; and if any person shall rescue such felon, or assist him in escaping, he shall be guilty of felony without benefit of clergy. 6 *G. c.* 23. *s.* 5.[359]

7. All charges in and about making the contracts, taking securities, and conveying of felons in order to be transported, shall be born by the county or place for which the court was held; and the treasurer shall, by order of the justices in sessions, pay the same to such persons as shall be employed for the purposes aforesaid. 6 *G. c.* 23. *s.* 3.[360]

8. If any person shall assist any felon to attempt his escape, from any boat or vessel carrying felons for transportation, he shall (being prosecuted within a year) be guilty of felony, and transported for seven years. 16 *G.* 2. *c.* 31. *s.* 3. 4.[361]

9. Where any person of the age of 15, and under 21, shall be willing to be transported, and to enter into any service in any of his majesty's plantations in *America*, it shall be lawful for any merchant or other, to contract with him for such service, not exceeding eight years; provided such person come before the lord mayor or a justice of the peace, if the contract be in *London*, or before two justices if elsewhere, and before him or them acknowledge such consent, and sign the contract in his or their presence, and with his or their approbation. And then it shall be lawful for such merchant or other, to transport such person, and keep him according to the contract: Which said contract, and approbation of such magistrate or magistrates, with the tenor of such contract, shall be certified by such magistrate or magistrates to the next sessions, to be registred by the clerk of the peace without fee. 4 *G. c.* 11. *s.* 5.[362]

10. And if any offender so ordered to be transported, shall return into *Great Britain* or *Ireland*, before the end of his term, he shall be liable to be punished as a person attainted of felony without benefit of clergy, and execution shall be awarded against him accordingly. 4 *G*. *c*. 11. *s*. 2.[363]
11. And by the 16 *G*. 2. *c*. 15. If any felon or other offender, ordered for transportation, or having agreed to transport himself on certain conditions either for life or any number of years, shall be afterwards at large in any part of *Great Britain*, without some lawful cause, before the expiration of the term; he shall be guilty of felony without benefit of clergy. *s*. 1.[364]
And he may be tried at the assizes of the county or liberty where he shall be apprehended, or from whence he was ordered to be transported; and the clerk of assize, and clerk of the peace, where such orders of transportation shall be made, shall, at the request of the prosecutor, or any other in the king's behalf, certify a transcript briefly and in a few words, containing the effect and tenor of every indictment and conviction of such felon, and of the *order and contract* for transportation, to the judges where he shall be indicted (not taking for the same above 2 *s*. 6 *d*.) which certificate being produced in court shall be a sufficient proof that such person hath been convicted and ordered to be transported. 6 *G*. *c*. 23. *s*. 6, 7. 16 *G*. 2. *c*. 15. *s*. 2.

Order and contract] So it is in the record; But in Mr. *Hawkins*'s edition of the statutes, it is *order or contract*, which may induce a mistake: for as the words *order or contract* do imply, that a person may be convicted upon a certificate either of the one, or of the other, it may happen in such case that an innocent person shall be condemned; for if a *contract* for transportation shall be certified only, and not the *order* for transportation, it is possible there may never have been any such order, and then such contract, being without the party's own consent or knowledge, and without any order to support it, is void.
12. And whoever shall discover, apprehend, and prosecute to conviction of felony without benefit of clergy, any such offender, shall be intitled to a reward of 20 *l*. and shall have the like certificate, and like payments made, without fee as any persons may be intitled to for the apprehending, prosecuting, and convicting of highwaymen. 16 *G*. 2. *c*. 15. *s*. 3.[365]
13. But the king may at any time pardon and dispense with the transportation, and allow of the offender's return, he paying to his proprietor such as shall be adjudged reasonable by any two justices of the peace within the province where such proprietor dwells. And where the

offender shall have served his term, such service shall have the effect of a pardon. 4 *G. c*. 11. *s*. 2.

Burn Justice of the Peace, pp. 225–29.

14.3.1.7Blackstone, 1769

And, first, to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate, by the common law[d]; as well as by the statute Westm. 1. 3 Edw. I. c. 15 and the *habeas corpus* act, 31 Car. II c. 2. And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. st. 2. c. 1. that excessive bail ought not be required: though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine. And on the other hand, if the magistrate takes insufficient bail, he is liable to be fined, if the criminal doth not appear[e]. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate; but most usually by the justices of the peace. Regularly, in all offences either against the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament[f]. …

… But, where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given; *viz*. the body of the accused, in order to ensure that justice shall be done upon him, if guilty.

Blackstone Commentaries, bk. 4, ch. 22; vol. 4, pp. 294–95.

14.3.2 CASE LAW

14.3.2.1TITUS OATES' CASE, 1685

[Upon Titus Oates' conviction upon two indictments for perjury, the Court pronounced sentence:]

"First, the Court does order for a fine, that you pay 1000 marks upon each Indictment.

"Secondly, That you be stripped of all your Canonical Habits.

"Thirdly, The Court does award, That you do stand upon the Pillory, and in the Pillory, here before Westminster-hall gate, upon Monday next, for an hour's time, between the hours of 10 and 12; with a paper over your head (which you must first walk with round about to all the Courts in Westminster-hall) declaring your crime." And that is upon the first indictment.

"Fourthly, (on the Second Indictment), upon Tuesday, you shall stand upon, and in the Pillory, at the Royal Exchange in London, for the space of an hour, between the hours of twelve and two; with the same inscription.

"You shall upon the next Wednesday, be whipped from Aldgate to Newgate.

"Upon Friday, you shall be whipped from Newgate to Tyburn, by the hands of the common hangman."

But, Mr. Oates, we cannot but remember, there were several particular times you swore false about; and therefore, as annual commemoration, that it may be known to all people as long as you live, we have taken special care of you for an annual punishment.

"Upon the 24th of April every year, as long as you live, you are to stand upon the Pillory, and in the Pillory, at Tyburn, just opposite to the gallows, for the space of an hour, between the hours of ten and twelve.

"You are to stand upon, and in the Pillory, here at Westminster-hall gate, every 9th of August, in every year, so long as you live. And that it may be known what we mean by it, 'tis to remember, what he swore about Mr. Ireland's being in town between the 8th and 12th of August.

"You are to stand upon, and in the Pillory, at Charing-cross, on the 10th of August, every year, during your life, for an hour, between ten and twelve.

"The like over-against the Temple gate, upon the 11th.

"And upon the 2d of September, … you are to stand upon, and in the Pillory, for the space of one hour, between twelve and two, at the Royal Exchange; and all this you are to do every year, during your life; and to be committed close prisoner, as long as you live.

[Following the Revolution, Oates sought reversal unsuccessfully in the House of Lords. Several lords entered this dissent:]

"1. For that the king's bench, being a temporal court, made it part of the judgment, that Titus Oates, being a clerk, should for his said perjuries, be divested of his canonical and priestly habit, and to continue divested all his life; which is a matter wholly out of their power, belonging to the ecclesiastical courts only.

"2. For that the said judgments are barbarous, inhuman, and unchristian; and there is [*sic*] no precedents to warrant the punishments of whipping and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him.

"3. For that the particular matters upon which the indictments were found, were the points objected against Mr. Titus Oates' own testimony in several of the trials, in which he was allowed to be a good and credible witness, though testified against him by most of the same persons, who witnessed against him on those indictments.

"4. For that this will be an encouragement and allowance for giving the like cruel, barbarous, and illegal judgements [*sic*] hereafter, unless this judgment be reversed.

"5. Because sir John Holt, sir Henry Pollexfen, the two chief justices, and sir Robert Atkins chief baron, with six judges more, (being all that were then present), for these and many other reasons, did, before us, solemnly deliver their opinions, and unanimously declare, That the said judgements [*sic*] were contrary to law and ancient practice, and therefore erroneous, and ought to be reversed.

"6. Because it is contrary to the declaration on the twelfth of February last, which was ordered by the Lords Spiritual and Temporal and Commons assembled, and by their declarations engrossed in parchment, and enrolled among the records of parliament, and recorded in chancery; whereby it doth appear, that excessive bail ought not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted. …"

10 How. St. Tr. 1079, 1316–17 (K.B. 1685), 1325 (H.L. 1689).

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1 On August 22, 1789, the following motion was agreed to:

ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.

HJ, p. 112.

2 For the reports of Madison's speech in support of his proposals, *see* 1.2.1.1.a–c.

1 *The Authority of Justices Bailing*.

2 What persons bailable at the Common Law.

3 Persons Bailable.

4 *Where Bail is taken away by Statute*.

5 2 *Inst*. 189. 2 Hawk. P. C. 93.

6 *Vide* 2 *Hawk. P. C*. 93.

(a) That a Constable had the like Power, *vide* 2 *Hawk. P. C*. 93. And how far this Power is taken away by those Statutes which impower Justices of the Peace to admit Persons to Bail on an Accusation of Felony, and particularly prescribe in what Manner they shall do it, *vide Ibidem* 93.

(b) But this Power is now taken away by 1 *E*. 4. *cap*. 2. by which it is enacted, That the Sheriff shall not proceed on such Indictment, but shall remove it to the next Sessions of the Peace. *H. P. C*. 106. 2 *Hawk. P. C*. 93.

7 *Co. Bail and Mainprize, cap*. 10. 2 *Hawk. P. C*. 93. 1 *Hawk. P. C*. 76.

8 *Register* 269. *H. P. C*. 103, 104. 2 *Hawk. P. C*. 93.

9 *F. N. B*. 66. *Register* 78, 79. *Vide* Head of *Writs*.

10 (c) This Statute beginning with Inferior Officers, extends not to Judges of Superior Courts. 2 *Inst*. 185, 186. But though the Superior Courts are not strictly within the Purview of the Statute, yet they will always in their Discretion pay a due Regard to the Rules prescribed by it; and not admit a Person to Bail who is expresly declared by it to be irreplevisable, without some particular Circumstances in his Favour. 2 *Hawk. P. C*. 113, 114. — And by the 1 & 2 *Ph. & M*. Justices of the Peace shall not Bail any Person for Offences declared irreplevisable by this Statute, *vide infra*.

(d) For this *vide* 2 *Hawk. P. C*. 95. and the Statutes of *Glouc. cap*. 9. 3 *H*. 7. 1.

(e) This Exception is not to be applied generally to every Command of the King, but only to such as proceed from him in Person, or from his Privy Council. 2 *Hawk. P. C*. 95.

(f) This is not to be understood of ordinary Commitments by such Justices for safe Custody, but of Imprisonments by their absolute Command, by way of Punishment, as for Contempts, and such like Matters, which lie rather in their Discretion than in their ordinary Power. 2 *Hawk P. C*. 96. *S. P. C*. 73. *Dalt. ch*. 114. *F. N. B*. 251. 24 *E*. 3. 33. *pl*. 25. 1 *Rol. Rep*. 131.

(g) They must be Forests, strictly such, and not Parks or Chases; but it is not material whether the Forest be the King's, or a Subject's. *Register* 77. 4 *Inst*. 314. *Co. Lit*. 2. *a*. 233. *a. F. N. B*. 67. *Plowd*. 124. *Vide* the 1 *E*. 3 *cap*. 8. and 7 *R*. 2 *cap*. 4. *That no Man shall be Imprisoned by any Officer of the Forest without due Indictment, or being taken with the Manner, or Trespassing in the Forest:* For the Explanation of which *vide* 2 *Hawk. P. C*. 97. And for what shall be said a Taking in the Manner, *vide Carth*. 77, 78.

(h) Yet the King's Bench may in Discretion Bail a Man upon an Outlawry of Felony; as where an Error is alledged in the Proceedings, &c. 19 *H*. 6. 2.a. 2 *Hawk*. P.C. 98. *Vide* Title *Outlawry*.

(a) For this *vide* 2 *Hawk. P. C*. 204. Head of *Approver*.

(b) Yet the King's Bench may in Discretion Bail a Man upon an Outlawry of Felony; as where an Error alledged in the Proceedings, & 19 *H*. 6. 2 *a*. 2 *Hawk. P. C*. 98. *Vide*. Or rather *Mainer*, that is with the Thing

stolen as it were in their Hands. *H. P. C.* 101. 2 *Hawk. P. C.* 98.

(c) Also they who have broken any other Prison. 2 *Inst.* 188. 2 *Hawk. P. C.* 98.

(d) The Judgment whereof must be left to the Discretion of the Person who hath Power to Bail them. 2 *Hawk. P. C.* 98.

(e) Persons taken for Arson, or for false Money, or for falsifying the King's Seal, or for Treason which touches the King himself, are in respect of the Heinousness of their Offence excluded from Replevin, especially if they be in actual Custody; but yet such, according to the Circumstances of their Cases, may be Bailed in the King's Bench. 2 *Hawk. P. C.* 99.

(f) But if a Person appear to be Imprisoned for an Excommunication, in a Cause whereof the Spiritual Court hath no Cognizance, he may be delivered either by *Habeas Corpus* or by Quashing, or superseding the Writ of *Excommunicato capiendo*. 2 *Hawk. P. C.* 98.

(g) Must be intended of inferior Crimes of an enormous Nature, under the Degree of Felony; the Judgment whereof seems to be left to Discretion. *Vide* 2 *Hawk. P. C.* 99.

(h) But how far it must appear that those excepted out of the Statute are of good Reputation, and innocent of the Fact, *vide* 2 *Hawk. P. C.* 101. And that it must be left to the Discretion of the Person who has the Power of Bailing them.

(i) This is to be understood of Accessories before and after to Capital Offences, with these Restraints, that the Persons so accused are of good Reputation, and under no violent Presumptions of Guilt. 2 *Hawk. P. C.* 102. and 31 *Car.* 2. *cap.* 2. *Part.* 21.

11 *H. P. C.* 105. Coke, Bail and Mainprize, chap. 6. *Lamb.* 347.

12 2 *Hawk. P. C.* 103

13 2 *Hawk. P. C.* 105.

14 2 *Hawk. P. C.* 105.

15 2 *Hawk. P. C.* 105. 1 *Rol. Rep.* 268. H. P. C. 99. Dalt. c. 114. *Lamb.* 346. 2 *Inst.* 314.

16 *Cromp.* 154. a. H. P. C. 101 *F. N. B.* 246. *S. P. C.* 15. 2 *Hawk. P. C.* 106.

17 *H. P. C.* 101. *Cromp.* 153.

18 2 *Hawk. P. C.* 106. 1 *Salk.* 61. S. P. C. 72.

19 2 *Hawk. P. C.* 106.

20 *Vaugh.* 157. 6 *Mod.* 73. 2 *H. P. C.* 112. *Raym.* 381.

21 2 *Inst.* 185, 186, 189. *H. P. C.* 104. 1 *Salk.* 61. 3 *Bulst.* 113. 2 *Hawk. P. C.* 113, 114. 5 *Mod.* 454.

22 *Kelynge* 90. *Dyer* 79. 1 *Bulst.* 87. 2 *Hawk. P. C.* 114.

23 2 *Hawk. P. C.* 114. So for any other Error in the Outlawry, especially if it be an apparent one. *Vide* 5 *H.* 7. 16. *pl.* 7. 2 *Inst.* 188. *H. P. C.* 101. 1 *Sid.* 316.

24 *Cromp. Justice* 154. 2 *Hawk. P. C.* 114.

25 5 *Mod.* 455. 1 *Sid.* 78. 1 *Bulst.* 85. *Palm.* 558. 1 *Keb.* 305. *Latch* 12. *Cro. Jac.* 356. *Co. Lit.* 289.

26 5 *Mod.* 78. 1 *Sid.* 143. *Palm.* 559. Also where it hath appeared that Persons have been committed by Colour of an Authority claimed under any illegal Patent, this Court hath always discharged the Persons so committed without Bail. 1 *Leon.* 70. 1 *And.* 297. 2 *Hawk. P. C.* 107.

27 (a) 33 *H*. 6. 28. *b*. 1 *And*. 298. 1 *Rol. Rep*. 134, 192, 219. *Con. Moor* 839. 1 *And*. 158. *F. N. B* 66 *S. P. C*. 72.

(b) See the Arguments on the *Habeas Corpus*, concerning Loans, and *Rushworth*'s *Collections*, 1 *Part fol*. 458. *Vide Cro. Car*. 507, 579, 593.

28 2 *Hawk. P. C*. 110.

29 2 *Hawk. P. C*. 110.

30 1 *Mod*. 144, 145, *&c*.

31 2 *Hawk. P. C*. 111. 1 *Keb*. 871, 887, 889. 1 *Sid*. 245. 1 *Lev*. 165. 1 *Mod*. 155, 157.

(c) But *Q*. for though the Prorogation of the Parliament was the chief Reason why the Earl of *Danby* was bailed; yet the binding him to appear at the next Sessions of Parliament, was an Affirmance of the Commitment, and a plain Proof of the Opinion of the Court at that Time, that the Commitment was not avoided or discharged by the Prorogation of the Parliament. *Carth*. 132, 133. *Vide Skin*. 56. That Earl of *Danby* was not bailed.

32 *Raym*. 381. Lord *Stafford*'s Case.

33 *Carth*. 131, 132. 1 *Show*. 100. S. C. Earl of *Salisbury*'s Case.

(a) For which are cited *Plow*. 484, 401. 8 *Co*. 68. 4 *H*. 7. 8. *Rast. Ent*. 665.

(b) But the Reporter makes a *Quare*, Whether he might not plead it in Discharge of the Matter returned by the *Habeas Corpus*, and enter it as the same Roll. *Carth*. 132.

(c) As not shewing the Time of the Commitment. 1 *Rol. Rep*. 192. — Or setting forth only the Command of the Lord Chancellor as the Ground of the Imprisonment, without mentioning any Crime at all. *Moor* 839. 1 *Rol. Rep*. 219. — Or mentioning the Crime in general Terms; as for a Contempt to the Court of Chancery; without mentioning what the Contempt was. 1 *Rol. Rep*. 192, 218.

34 1 *Rol. Rep*. 111, 219. *Moor* 838. 2 *Bulst*. 301. *Cro. Jac*. 343. 3 *Bulst*. 115. 1 *Rol. Rep*. 277. *Vide Dalison* 81. 3 *Leon*. 18.

35 2 *Hawk. P. C*. 111, 112. *Abr. Eq*. 130.

(d) A Commitment from Chancery for Disobedience to a Decree, is good without shewing what the Decree was. 1 *Mod*. 155. adjudged. *Moor* 840. S. P.

36 *Vaugh*. 157. 6 *Mod*. 73. 2 *Hawk. P. C*. 112.

(e) 1 *Rol. Rep*. 218, 337. 2 *Bulst*. 140. *Latch* 12.

(f) 1 *Bulst*. 48 to 54.

(g) For this *vide* 2 *Hawk. P. C*. 112. *Vaugh*. 139. 2 *Bulst*. 139. *Cro. Jac*. 219. *Cro. Car*. 579. 1 *Sid*. 144, 286, 320. *Salk*. 348. 5 *Mod*. 19. *March* 52.

(a) That no one can in any Case controvert the Truth of the Return to a *Habeas Corpus*, or plead or suggest any Matter repugnant to it; yet a Man may confess and avoid such Return, by admitting the Truth of the Matters contained in it, and suggesting others not repugnant, which take off the Effect of them. 1 *Sid*. 287. 5 *Mod*. 323, 454. 2 *Jones* 222. 2 *Hawk. P. C*. 113.

37 2 *Inst*. 53, 55, 615. 4 *Inst*. 290. *Vaugh*. 154. 2 *And*. 297. Dalison 81. 3 *Leon*. 18. 2 *Jones* 13, 14. 2 *Mod*. 198.

(b) That in some Cases the Chancery may by the Common Law bail Persons for Felony. 2 *Hawk. P. C*.

115.

38 *Vide infra* Letter (I).

39 2 *Hawk. P. C.* 88. *H. P. C.* 97. *Dalt. cap.* 14. That formerly none under the Degree of Subsidy Men were admitted to be Bail for any Person. *Dalt. c.* 70, and 114.

40 2 *Hawk. P. C.* 89.

41 *S. P. C.* 333. *H. P. C.* 97. 2 *Hawk. P. C.* 89. *Vide infra* Letter (H). And that if a Justice admits a Person to Bail by insufficient Sureties, whom he knows not to be bailable by Law, corruptly for Lucre or Reward, the Court of King's Bench will grant an Information against him, *vide* Title *Informations*; or it is such an Offence for which he may be indicted, *vide* Title *Indictments*.

42 2 *Hawk. P. C.* 89. *S. P. C.* 33. *Vide* Title *Escape*.

43 *Poph.* 96. *Dalt. c.* 114. 2 *Hawk. P. C.* 90.

44 14 *H.* 7. 7. *pl.* 19. *H. P. C.* 97. *Dalt.* 114. 2 *Hawk. P. C.* 90.

45 *H. P. C.* 97. 2 *Hawk. P. C.* 90.

46 *Habeas Corpus* Act.

47 2 *Jones* 210. 1 *Lev.* 106. 1 *Sid.* 211. 4 *Inst.* 178. and *per* 2 *Hawk. P. C.* 115. Justices of the Peace may take the Recognisance in such Form.

48 2 *Hawk. P. C.* 115. Where the Court on Motion, may dispense with the Principals joining in the Recognisance. 1 *Salk.* 3.

49 2 *Inst.* 150. 4 *Inst.* 178. *S. P. C.* 77. *Dalt. c.* 127. 2 *Hawk. P. C.* 115.

50 2 *Hawk. P. C.* 116.

51 *Co. Lit.* 59. a.

52 *Co. Lit.* 8. 3 *Inst.* 19.

53 3 *Inst.* 19.

54 *Stamf. P. C.* 191. 2 *Hawk. P. C.* 448.

55 2 *Inst.* 36, 37. 4 *Co.* 124, & *vide* 2 *Hawk. P. C.* 449.

56 *Co. Lit.* 2. 4 *Co.* 58. 1 *Leon.* 21.

(a) But by the Common Law such Lands were not vested in the actual Possession of the King during the Life of the Offender. 3 *Co.* 10. *Stamf. P. C.* 191. *Bro. Coron.* 208, 210. 1 *Leon.* 21. *Co. Lit.* 2.

57 3 *Inst.* 19, 21. 2 *Hawk. P. C.* 449.

58 (b) 3 *Co.* 2, 3. 7 *Co.* 17.

(c) 3 *Inst.* 19. 3 *Co.* 2, 3.

(d) 3 *Inst.* 19.

(e) 2 *Rol. Abr.* 34.

(f) 3 *Inst.* 19.

(g) 3 *Inst.* 19. *Stamf. P. C.* 187. *Plow.* 554. *Dyer* 289. *pl.* 55. *Co. Lit.* 130, 372, 391.

59 3 *Inst*. 19. *Fitz. Assise* 166. *Forfeiture* 23. 4 *Ass. pl*. 4.

60 1 *Buls*. 13. 2 *Brownl*. 217, *&c*. 1 *Leon*. 1. *Godb*. 267. 2 *Jon*. 151, 189. 1 *Lev*. 263. 2 *Keb*. 451. 2 *Vent*. 38. 5 *Co*. 117. *Co. Cop. Sect*. 58. *Pollex*. 615. to 621.

61 *Staundf. Prerog*. 45, 46. 12 *Co*. 12.

(a) But not those which he hath as Executor or Administrator to another. *Cro. Car*. 566 —— Also a Term limited to Executors, and not vested in the Party himself is not forfeitable. 2 *Leon*. 5, 6. 1 *And*. 19. *Moor* 100. *Dyer* 309, 310.

(b) That the Lord of a Manor, or other private Person, may have *bona Felonum & Fugitivorum*, but they must be claimed by way of Grant and not by Prescription, because no Man can prescribe for them; for every Prescription must be immemorial; and the Goods of Felons and Fugitives can't be forfeited without Matter of Record, which presupposes the Memory of that Continuance. 5 *Co*. 109. 46 *E*. 3. 16.

62 *Cro. Jac*. 312. *Hob*. 214.

63 2 *Keb*. 564, 608, 644, 763, 772. 1 *Lev*. 279. *Lane* 54, 113. 1 *Mod*. 16, 38. *Hard*. 466. 1 *And*. 294. *Raym*. 120. 2 *Rol. Abr*. 34. 1 *Rol. Abr*. 343. *March* 45, 88. 1 *Sid*. 260, 403. 1 *Keb*. 909.

64 2 *Keb*. 564. 1 *Lev*. 279. 1 *Mod*. 16, 38.

65 5 *Co*. 109.

(c) And therefore a Person convicted of Manslaughter, and making Purgation, as was the ancient Practice, or burnt in the Hand according to the present, forfeits his Goods and Chattels, but not his Lands, for the King hath lost a Subject; and therefore the Party is punishable, tho' in a more gentle Manner than when there is a sedate and deliberate Revenge. 5 *Co*. 110. —— That a Person convicted of Heresy forfeited neither Lands nor Goods because the Proceedings against him were only *pro salute anime. Doct. and Stud. lib*. 2. *cap*. 29. *Hale*'s *P. C*. 5.

66 *Staundf. P. C*. 183. *Hale*'s *P. C*. 271. *Keilw*. 68. *b. Dyer* 239. *pl*. 36. 5 *Co*. 110.

(a) And that in such Cases where the Coroner can't have the View of the Body, the King shall intitle himself to the Goods and Chattels upon a Presentment. 5 *Co*. 109.

(b) *Secus* if he be found Accessory after, for the Indictment is so far void. *Staundf. P. C*. 184.

67 *Keilw*. 68. 5 *Co*. 110. *Hale*'s *P. C*. 271. *Staundf*. 184.

(c) For this *vide* Tit. *Coroner*.

68 5 *Co*. 110, 111. *vide* Tit. *Outlawry*.

(d) *Fitz. Coron*. 181. *Forfeiture* 28. *Staundf. P. C*. 183, 184. *Staundf. Prerog*. 47. *Bro. Coron*. 8. *Finch* 352. 1 *Rol. Abr*. 793. 41 *Ass. pl*. 13. 22 *Ass. pl*. 11. *Cro. Eliz*. 4. 72.

(e) *Hale*'s *P. C*. 271.

(f) 5 *Co*. 110, 111. 43. *E*. 3. 17. *Hale*'s *P. C*. 271. *Co. Lit*. 259. *Cro. Jac*. 464. *Staundf. Prerog*. 47.

69 5 *Co*. 109. *Fitz. Coron*. 289, 312. *Staundf. P. C*. 184. 3 *Inst*. 56, 227. *Plow*. 260.

70 5 *Co*. 109. 3 *Inst*. 134. *Cro. Eliz*. 694.

(g) But for this *vide* 2 *Hawk. P. C*. 170. And that a Sale in a Market Overt does not so far alter the Property of the Goods, but that upon a Prosecution by the Person, from whom they were stolen, he shall have them again. Tit. *Fairs and Markets*.

71 5 *Co*. 109. *Foxley*'s Case.

72 *Staundf. P. C*. 187. 3 *Inst*. 19. *Dyer* 28. 2 *Hawk. P. C*. 452.

73 *Staundf. P. C*. 187. *Co. Lit*. 372, 391.

(a) *Dyer* 322. *pl*. 27. adjudged.

74 (b) 3 *Co*. 2, 3. agreed in the Marquess of *Winchester*'s Case. 1 *Leon*. 270, 271. *Moor* 125. *Hob*. 340. *Cro. Eliz*. 389. *Cro. Car*. 428. 7 *Co*. 13. *Lit. Rep*. 100. S. P. agreed.

(c) 3 *Co*. 2, 3. *Hob*. 340. 7 *Co*. 13. 4 *Co*. 58. *a*.

(d) 3 *Co*. 2, 3, 10.

(e) 3 *Co*. 11. *a*. 4 *Co*. 58. *a*. 1 *Leon*. 21. 9 *Co*. 95. *a*.

75 *Cro. Car*. 427. *Stone* and *Newman*'s Case, & *vide Plow*. 552.

76 *Hob*. 334. *Palm*. 351. 2 *Rol. Rep*. 305.

77 (f) In *Englefield*'s Case. 7 *Co*. 12, 13. *Poph*. 18. 1 *And*. 293. *Moor* 303. 4 *Leon*. 135. *Palm*. 433. 1 *Rol. Rep*. 142.

(g) *Englefield*'s Case adjudged in 7 *Co*. 12. and in the Books cited *supra*, and agreed to be Law, 2 *Keb*. 566, 763, 773. 1 *Lev*. 279. *Lane* 44. 1 *Rol. Rep*. 142.

(a) As in the Duke of *Norfolk*'s Case, where there was this Proviso, That if the Duke should be minded to alter and revoke the Uses, and signify his Mind in Writing under his Hand and Seal, that then, *&c*. and it was clearly adjudged, that the Power of Revocation was not forfeitable, because it depended on the Duke's Signifying his Mind in Writing under his proper Hand and Seal, which none but himself could do. 7 *Co*. 13. cited and agreed, 1 *Lev*. 279. 2 *Keb*. 566, 763, 773. 3. *Inst*. 19.

(b) 1 *Mod*. 16, 38. 1 *Lev*. 279. *Main*'s Case.

(c) *Vide Palm*. 429. *Latch* 25, 26, 70, 102. 1 *Jon*. 135. 1 *Vent*. 129. 1 *Mod*. 40.

78 (d) *Plow*. 381.

(e) *Plow*. 379, & *vide* Tit. *Offices*.

79 2 *Lev*. 169. *Browne* and *Wyate*. 2 *Jon*. 57. 2 *Mod*. 130. 3 *Keb*. 459, 651, 712. 1 *Vent*. 299. *Pollexf*. 181. S. C.

80 *Co. Lit*. 130.

81 *Hale*'s *P. C*. 8. 3 *Inst*. 47.

82 1 *Salk*. 83.

83 *Plow*. 488. b. *Co. Lit*. 2. *b*. 8 *Co*. 170.

(f) That if the Time proved varies from that laid in the Indictment, and the Jury find the Defendant guilty generally, the Forfeiture shall relate to the Time laid, till the Verdict be falsified by the Party interested, as it may be in this Respect, tho' not as to the Point of the Offence. *Hale*'s *P. C*. 264, 270. 3 *Inst*. 230. — But if the Jury find the Defendant guilty on the Day on which the Fact is proved, whether before or after the Day laid in the Indictment, in such Case the Forfeiture shall relate to the Day so specially found. *Kelynge* 16. *Hale*'s *P. C*. 264. 2 *Inst*. 318. 3 *Inst*. 230.

84 8 *Co*. 170. *Plow*. 488.

(a) Whether in a *Praemunire*, the Forfeiture shall relate to the Time of the Offence, or only to that of the Judgment, *Q. & vide Cro. Car*. 172. 1 *Jon*. 217. & Tit. *Praemunire*.

85 *Plow*. 260. 5 *Co*. 110. *Hale*'s *P. C*. 29.

86 8 *Co*. 171.

87 *Skin*. 357. *Jones* and *Ashurt*.

88 3 *Inst*. 229. *Bridg*. 77. *Hale*'s *P. C*. 269.

(b) That according to the general Tenor of the old Books, the Goods of one arrested for Treason or Felony may, by the Purview of an antient Statute, which seems to continue still in Force, be immediately inventoried and appraised; after which, and on Surety found that they shall be forthcoming, they shall be kept by the Bailiffs of the Party arrested, and for Want of such Surety by his Neighbours, till he be convicted or found to have fled, *&c*. whereby they are actually forfeited, *vide* 2 *Hawk. P. C*. 455. and the Authorities there cited.

89 (c) For Precedents of such Actions, *vide* 1 *Lutw*. 132. *Cro. Eliz*. 749.

90 8 *Co*. 171.

[(d)] *Raym*. 414.

91 *Co. Lit*. 391. 2 *Hawk. P. C*. 455. and several antient Authorities there cited.

92 2 *Hawk. P. C*. 456.

93 *Co. Lit*. 31. *b*. 37. *a*. 41. *a. F. N*. B. 150. *Perk. Sect*. 308. *Bro*. Tit. *Dower* 82. *Plow*. 261.

(a) That the Wife of a *Felo de se* shall have Dower. *Plow*. 261, 262, Dame *Hale*'s Case. — So if the Husband be outlawed in Trespass or any Civil Action, for this works no Corruption of Blood, or Forfeiture of Lands. *Perk. Sect*. 388. *Co. Lit*. 31. *a*. — So if the Husband be attainted of Heresy, for this is only a Spiritual Offence. *Co. Lit*. 31. — So if the Husband or Wife be excommunicated. *Co. Lit*. 31. — So if either the Husband or Wife be attainted in a *Praemunire*, she shall be endowed; but for this *vide Co. Lit*. 134. and Tit. *Praemunire*.

94 *Co. Lit*. 37. 3 *Inst*. 216.

95 (b) This Act extends to an Attainder of Petit Treason, as well as to an Attainder of High Treason. *Staundf*. 195. *Dyer*. 140. *pl*. 42. *Co. Lit*. 37. *a*. 392. *b*. — But not to Misprision of Treason. *Co. Lit*. 37. *a*. *Moor* 639. *Dyer* 97. *pl*. 49. 13 *Co*. 19.

96 *Bendl*. 56. *Dyer* 140. *Co. Lit*. 111. a.

97 (c) 3 *Leon*. 3.

(d) *Perk. Sect*. 391.

98 3 *Inst*. 216, *Moor* 639. *pl*. 879.

99 For this *vide* Tit. *Dower*.

100 *Co. Lit* 8, 41. 3 *Inst*. 211. *Staundf. P. C*. 195.

(a) But an Attainder of Piracy corrupts not the Blood. *Co. Lit*. 391. — Nor of Petit Larceny. 3 *Inst*. 211. *Co. Lit*. 41. *a. Noy* 170.

101 *Co. Lit*. 8. a. 391. b. 392. *Staundf. P. C*. 165. *Bro. Nonability* 21. *Cro*. 66.

102 (b) As in *Cro. Car*. 543. *Lit. Rep*. 28. *Noy*. 159. 1 *Vent*. 413, 417. 1 *Lev* 60. 1 *Sid*. 200.

(c) *Lit. Sect*. 746. 3 *Co*. 10. 8 *Co*. 166. *a*. — And therefore if the Grandfather be seised in Tail, and the Father be attainted of Treason since the 26 *H*. 8. and dies in the Life of the Grandfather, the Son shall inherit the Grandfather, for the Son is Heir *per formam doni* to the Tail, which is originally not forfeitable, and by that Statute the Father forfeits only the Lands and Rights that he hath in him. *Co. Lit*. 8. 3 *Co*. 10. *Dowty*'s Case.

103 *Co. Lit*. 392. *Dalis*. 14. *pl*. 3. 1 *Vent*. 416.

104 *Dyer* 274. *pl*. 40. *Cro. Car*. 543. 1 *Vent*. 413, 416, 425. *Lit. Rep*. 28. *Noy* 159, 166. 1 *Lev*. 60. 1 *Sid*. 200. 1 *Vent*. 413.

105 1 *Vent*. 416.

106 *Co. Lit*. 8. a. 4 *Leon*. 5. *Cro. Jac*. 539. 1 *Rol. Abr*. 625. *pl*. 5. *Cro. Car*. 543. *Palm*. 19. 1 *Lev*. 59. 1 *Vent*. 425. 2 *Rol. Rep*. 93. 2 *Sid*. 25, 27. *Moor* 569. *pl*. 775. *Noy* 158. *Lit. Rep*. 28. — But my Lord *Coke* says, that the Reason of this Case is, because the Attainder of the Father corrupts only the lineal Blood, and not the collateral Blood between the Brethren, which was vested in them before the Attainder; but he saith that some have holden, that if a Man, after he be attainted, have Issue two Sons, the one cannot be Heir to the other, because they could not be Heir to their Father, for that they never had any inheritable Blood in them. *Co. Lit*. 8. *a*. — But the Ground of this Opinion is overthrown by the Resolution in the Case of *Collingwood* and *Pace*, wherein it was adjudged in the Exchequer-Chamber by seven Judges against Three, that the Sons of an Alien might be Heirs one to another, if born in *England*, or naturalized, tho' it is certain they could not be Heirs to their Father. 1 *Sid*. 193. *Hard*. 224. 1 *Vent*. 413. 1 *Lev*. 59. and therefore it seems now settled, that such Sons, whether born before or after the Attainder of their Father, may inherit each other.

107 *Noy* 159, 167. *Staundf. P. C*. 196. 2 *Sid*. 248. *Cro. Jac*. 539. *Lit. Rep*. 28. 1 *Lev*. 59. 1 *Sid*. 201. 1 *Vent*. 422. *Co. Lit*. 84. *b*.

108 *Co. Lit*. 8. *a*. 13. *a. Noy* 166, 170. 1 *Lev*. 60. 1 *Sid*. 193. 1 *Vent*. 413.

109 *Dyer* 48.

110 *Co. Lit*. 163 b.

111 *Co. Lit*. 163 b.

112 *Co. Lit*. 163 b.

113 *Co. Lit*. 2. b.

114 *Co. Lit*. 8. a. 391. b. 392. b. *Stamf. P. C*. 195. 3 *Inst*. 233. *Dalis*. 14. *pl*. 3.

115 *Noy*. 170. *Co. Lit*. 8. *a*. 3 *Inst*. 233.

116 *Co. Lit*. 128 *Doct. & Stud. Dial*. 2. *cap*. 3. 1 *Rol. Abr*. 802.

117 *Co. Lit*. 128. 3 *Inst*. 101.

118 *Plow*. 541. 9 *H*. 6. 20. b. *Show. Parl. Ca*. 73.

119 *Co. Lit*. 128. b.

120 2 *Hale*'s *Hist. P. C*. 202. 9 *Co*. 91. 1 *Bulst*. 146. *Cro. Eliz*. 908. *Moor* 606, 668. *Yelv*. 28. *Cro. Car*. 537. 4 *Leon*. 41. 2 *Jon*. 233.

121 (a) That no Person is to be outlawed *nisi per legem terrae*. 2 *Inst*. 47. — That three *Capias's* are

required, and the Party to be called in five County Courts, a Month between every Court. *Bract. Lib*. 3. *tract*. 2. *cap*. 11.

122 *Staunf*. 192. *Bro*. Title *Outlawry*, 26, 36, 59. *Co. Lit*. 128 *b*. *Dyer* 213, 214.

(a) 2 *Hawk. P. C*. 302, 303. and several Authorities there cited.

(b) Does not lie on an Indictment on the Statutes against Forestalling. 21 *Ed*. 4. 11. *b*. 2 *Hale*'s *Hist. P. C*. 194.

(c) On a Conviction by Justices on View of a Forcible Entry Process of Outlawry lies. 1 *Keb*. 563.

123 2 *Inst*. 665. 6 *Mod*. 85.

(d) But a Presentment is the same with an Indictment, on which Process of Outlawry lies. 2 *Leon*. 200.

124 6 *Mod* 84. 1 *Salk*. 5. Earl of *Banbury* ver. *Wood*.

125 35 *H*. 6. 6. *b*. 22 *H*. 6. 13. *Rast. Ent*. 293. 10 *Co*. 72. 2 *Rol. Abr*. 805.

126 *Co. Lit*. 128. *b*. 3 *Co*. 12. 2 *Bulst*. 63. 2 *Inst*. 143. *Cro. Jac*. 222, 261. *Yelv*. 158. *Raym*. 128. 1 *Keb*. 890, 908. 1 *Sid*. 248, 258.

(e) Whether Process of Outlawry lies in a Writ of Detinue of Charters. *Dyer* 223. *a. dubitatur*.

127 2 *Inst*. 145, 380. *F. N. B*. 259.

128 3 *Co*. 12. 2 *Rol. Rep*. 295. 2 *Bulst* 63.

129 1 *Leon*. 329. 2 *Rol. Abr*. 76. 1 *Sid*. 159. 1 *Keb*. 577.

130 2 *Hale*'s *Hist. P. C*. 198.

131 2 *Hale*'s *Hist. P. C*. 31, 199.

132 2 *Hale*'s *Hist. P. C*. 199.

133 2 *Hale*'s *Hist*. [*P. C*.] 199.

(a) Justices of the Peace in their Sessions may proceed to Outlawry in Cases of Indictments found before them, and that by the Common Law; and in Cases of Popular Actions may proceed to Outlawry by the Statute of 21 *Jac*. 1. *cap*. 4 2 *Hale*'s *Hist. P. C*. 52. — But they cannot issue a *Capias utlagatum*, but must return the Record of the Outlawry into the King's Bench, and there Process of *Capias utlagatum* shall issue. *Dalt*. 406. 2 *Hale*'s *Hist. P. C*. 52.

134 2 *Hale*'s *Hist. P. C*. 199 — *Per Hawkins*, a Coroner may award Process 'till the Exigent, on a Bill of Appeal before him; and that by the better Opinion, such Process shall be awarded by him only, and not by him and the Sheriff jointly, and that he may proceed thereon to Outlawry; but that since *Magna Charta, cap*. 17. by which it is enacted, *That no Sheriff, Constable, Coroner, or other Bailiff of the King, shall hold Pleas of the Crown*, he cannot proceed to the Trial of the Appellee. 2 *Hawk. P. C*. 51. and several Authorities there cited.

135 *Yelv*. 158. *Cro. Jac*. 222, 261. *Raym*. 128. 1 *Sid*. 248, 259. 1 *Keb*. 890, 908.

136 2 *Hale*'s *Hist. P. C*. 199.

(a) Where the *Capias* was *este Edmundo Anderson*, without a *T*. and for this Error of Outlawry was reversed; for the *Teste* is the Warrant of the Writ, as it is of all Judicial Writs. *Cro. Eliz*. 592. *Grondy* ver. *Ischam*.

137 2 *Inst*. 49. 3 *Inst*. 31. *Staunf*. 130. 2 *Hawk. P. C*. 424.

138 2 *Hale*'s *Hist. P. C.* 199, 200. *Cro. Eliz.* 170, 503. 5 *Co.* 54. 1 *Rol. Abr.* 220.

(b) That an Abbot or Prior ought not to be outlawed. 3 *E.* 3. 2 *Rol. Ab.* 805.

139 3 *H.* 5. *Utlag.* 11. *Fitz.* Title *Utlawry*, 11. 2 *Rol. Abr.* 805. *Dyer* 104. 2 *Hale*'s *Hist. P. C.* 207, 208.

140 *Dyer* 239. *a.* 2 *Rol. Abr.* 805.

141 *Co. Lit.* 122. b. *Lit. Sect.* 186.

142 *Cro. Jac.* 358. *Middleton*'s Case. 1 *Rol. Rep.* 407. S. P. 1 *Rol. Abr.* 804. S. P.

143 For this, *vide Dyer* 271. *b. Cro. Jac.* 445. *Cro. Eliz.* 370. *Hutt.* 86. 1 *Sid.* 21.

144 *Cro. Car.* 58, 59. *Smith* ver. *Ash & ux'. Hutt.* 86. S.C.

145 *Cro. Eliz.* 648. *Beverly* ver. *Beverly.*

146 2 *Rol. Abr.* 802. *Taverner*'s Case. 2 *Hale*'s *Hist. P. C.* 204 S. C. cited and S. P. said to have been often adjudged. — *Cro. Jac.* 358. S. P. adjudged, and said to be manifest Error. 3 *Mod.* 89, 90. S. P. adjudged. 1 *Rol. Rep.* 406. *Palm.* 388. S. P. adjudged.

147 41 *E.* 3. 3. 1 *Rol. Abr.* 127. S. C. 1 *Brownl.* 25. S. P. said.

(a) But if sued by Bill upon which no Outlawry can be, what Proceedings shall be, *Quare; & vide* 1 *Sid.* 159. 1 *Keb.* 577.

148 41 *E.* 3. 13. *b.* 1 *Rol. Abr.* 127. *& vide Moor* 188. 2 *Leon.* 76.

149 *Dyer* 239. *pl.* 203. *Hawtry* ver. *Anger. N. Bendl.* 148. *pl.* 205. *Moor* 74. *pl.* 203. and 1 *And.* 10. S. C. adjudged.

150 1 *Sid.* 173. 1 *Keb.* 642. S. C. *Guy* ver. *Barnard.*

151 2 *Inst.* 183. 2 *Hawk. P. C.* 306.

152 2 *Hawk. P. C.* 306. 2 *Hale*'s *Hist. P. C.* 200.

153 2 *Hawk. P. C.* 306, & *vide* 2 *Hale*'s *Hist. P. C.* 200.

154 2 *Hawk. P. C.* 306. 2 *Hale*'s *Hist. P. C.* 200, 201.

155 1 *Hale*'s *Hist. P. C.* 238.

156 2 *Hale*'s *Hist. P. C.* 399.

(a) If the Outlawry appear by the Sheriff's Return of the Exigent, or by the Coroner's Return of a *Certiorari* to them directed, to certify whether the Party were outlawed or not, the Party is as much attainted, and shall forfeit and lose as much, as if Sentence had been given against him upon Verdict or Confession. 2 *Hawk. P. C.* 446–7, *& vide* 2 *Hale*'s *Hist.* 205-6. — That those Malefactors, who wilfully fly from Justice, add a new Crime to their former Offence, and therefore ought to have no Benefit of the Law. 3 *Mod.* 72.

157 2 *Hawk. P. C.* 447.

158 2 *Hale*'s *Hist. P. C.* 408.2 *Hawk P. C.* 343. 1 *Hale*'s *Hist. P. C.* 521. 2 *Hale*'s *Hist.* 350.

159 2 *Salk.* 494. *The King* ver. *Tippin.*

160 9 *H* 6. 20. 2 *Rol. Abr.* 85. *Staunf. Pre.* 47. *Co. Lit.* 128. 2 *Hale*'s *Hist.* 205.

161 *Plow.* 541. 5 *Co.* 110. *Show. Par. Ca.* 73, *& vide* the Authorities *supra.*

162 *Staunf. Pre*. 47, 183. 1 *Rol. Abr*. 793. *Cro. Eliz*. 472. 5 *Co*. 110. *Co. Lit*. 259. *Cro. Jac*. 464.

163 For which, *vide* Title *Forfeiture*.

164 1 *Salk*. 109. 5 *Mod*. 114.

165 *Bro*. Title *Outl*. 82. *Perk. Sect*. 388. *Co. Lit*. 31. *a*.

166 *Hetl*. 164. *Cro. Eliz*. 851. *Hutt*. 53, *& vide* 4 *Co*. 93. *a*. 2 *Rol. Abr*. 806. *Cro. Eliz*. 203.

(a) For this, *vide* Tit. *Rents*.

167 *Hutt*. 53. 9 *H*. 6. 21. 2 *Rol. Abr*. 806. 2 *Rol. Abr*. 807.

(b) That Debtors may pay Debts to the Executor or Administrator of a Person outlawed, and their Release shall be a good Discharge to them, tho' the Executors shall be accountable to the King for them. *Hutt*. 54.

168 9 *H*. 6. 21. 2 *Rol. Abr*. 806.

(c) If a Man lease at Will, and the Lessee sows the Land, and the Lessor is outlawed, the King shall not have the Corn, and can have only the Rent, for he is intitled to no more than the Lessor himself. 5 *Co*. 116.

169 2 *Rol. Abr*. 807. *North* ver. *Fines*.

170 2 *Rol. Abr*. 808.

171 22 *Ass*. 33. 2 *Rol. Abr*. 708. S. C.

172 2 *Rol. Abr*. 807.

(a) If after the Outlawry the Party purchaseth any more Goods, the Property is immediately vested in the King. *Carth*. 442.

173 *Beverley* ver. *Cornwall*, *Cro. Eliz*. 44. 1 *And*. 148. *Moor* 269. *Savil* 89. *Goulds*. 103. *Owen* 3. S. C.

174 *Hob*. 214. *Cro. Jac*. 512.

(b) And shall be executed by an Information in the Exchequer Chamber, or in Chancery. 1 *Hale*'s *Hist. P. C*. 248.

175 *Lane* 54, 113. 1 *Mod*. 16, 38. 2 *Keb*. 564, 608, 644, 763, 772. 1 *Lev*. 279. *Hard*. 496. 1 *And*. 294. *Raym*. 120. 2 *Rol. Abr*. 34. 1 *Rol. Abr*. 343. *March* 45, 88. 1 *Sid*. 260. 1 *Keb*. 909.

176 3 *Co*. 82. *Pawncefoot* ver. *Blunt*, cited in *Twine*'s Case; *& vide Dyer* 295. *a*.

177 11 *H*. 6. 17. 37. *Cro. Eliz*. 575, 851. 2 *Rol. Abr*. 806. *Cro. Car*. 566.

(c) So a Term limited to Executors, and not vested in the Party himself, is not forfeitable. 2 *Leon*. 5, 6. 1 *And*. 19. *Moor* 100. *Dyer* 309.

178 20. *H*. 6. 8. *b*. 2 *Rol. Abr*. 806.

179 4 *Co*. 95. *Slade*'s Case.

180 *Carth*. 441. 1 *Salk*. 395. 5 *Mod*. 112. S. C. *Britton* ver. *Cole*.

(a) That it is necessary to aver that the Cattle were *Levant* and *Couchant. Carth*. 442.

181 *Carth*. 442. *per Cur*.

(b) But if Tenant for Life is outlawed, and dies, Q. whether the Issues can be extended on the Reversioner. *Carth*. 442.

182 *Carth*. 442.

183 *Co. Lit*. 13, 14.

(c) But if the Defendant had appeared, and the Plaintiff had declared upon his Writ, and the Defendant had been convicted and attainted by Verdict or Confession, or if the Appeal had been by Bill, and thereupon the Party had been outlawed, tho' before Appearance, the Escheat had related to the Time of the Fact committed to avoid mesne Incumbrances; for in the Declaration in the one Case, and in the Bill in the other, the Year and Day of the Felony is set forth. 1 *Hale*'s *Hist. P. C*. 261-2.

184 *Co. Lit*. 288 *b*. 41 *Ass*. 13.

185 *Staunf. P. C*. 184. 41 *Ass*. 13. 4 *E*. 3. 17. 5 *Co*. 111. *a*.

186 *Co. Lit*. 197.

187 *Reg*. 284. *Dyer* 223. *a*. 317. *a*.

188 *Dyer* 317. a. 2 *Hale*'s *Hist. P. C*. 206.

189 2 *Hale*'s *Hist. P. C*. 206.

190 2 *Hale*'s *Hist. P. C*. 206–7.

191 2 *Hale*'s *Hist. P. C*. 207.

192 2 *Hale's Hist. P. C*. 207.

193 *Hard*. 101. *Attorney General* ver. *Sir Ralph Freeman*.

194 *Hard*. 176. *Hammond*'s Case.

(a) Any one that has an Estate or a Right may grant the same over, if his Title be precedent to the Outlawry. *Hard*. 422. — *A*. owes Money to *B*. on a Judgment, and to *C*. on a Bond, *A*. is outlawed at the Suit of the Obligee, and his Lands seised on the Outlawry; and the Question was, whether the Conusee of a Judgment could extend those Lands; and it was held, the Outlawry should be preferred, and that the King's Hands, should not be amoved, unless the Conuzor could shew Covin and Practice between the Obligor and Obligee. 2 *Salk*. 495. *Attorney General* ver. *Baden*.

195 *Raym*. 17. 1 *Lev*. 33. 1 *Keb*. 57, 74, 76. *Windsor* ver. *Seywell*.

196 1 *Salk*. 395. *Carth*. 442. S. C. And that if a Person outlawed do alien his Lands before any Inquisition taken for the King, which he may lawfully do, yet the Alience must plead off the Extent in the Exchequer, by shewing his Title precedent.

197 *Hard*. 422. *Carth*. 441.

(a) That the King is to satisfy the Party at whose Suit the Outlawry was taken out; but this *per Popham* Ch. J. is *de gratia*, and not *de jure*. *Yelv*. 19, & *vide* 2 *Vern*. 314. *Show. Parl. Ca*. 72. *The King* ver. *Baden*, a good Case on this Head.

198 46 *E*. 3. 16. 5 *Co*. 109. *Co. Lit*. 288.

(b) Outlawry in *Northumberland* for a Debt in *Durham*, whether the King or Bishop of *Durham*, he having a Grant of *bona fugit'* in *Durham*, should have the Goods, *vide Lane* 90, 91. 2 *Rol. Abr*. 808.

199 *Co. Lit*. 288.*b*. *Cro. Eliz*. 707. But in 2 *Lev*. 50. it is held, that there is no Difference between Outlawries before and after Judgment.

200 *Cro. Jac*. 619. *Moor* and *Sir George Reynolds*, S. P. but by *Bridg*. 67. it appears to have been an

Action upon the Case.

(a) But if after the Year (admitting) he could not be in Execution for him without Prayer, yet Case lies; for the Plaintiff was prejudiced by the Escape, for he ought not to be discharged, 'till he found Sureties to satisfy the Plaintiff. 5 *Co*. 89. *b*. and *vide* 5 *E*. 3. *c*. 13.

(b) 5 *Co*. 88. *Garnon*'s Case, S. C. the *Capias utlagatum* being taken out and executed within the Year. *Cro. Eliz*. 706, 707. S. C. adjudged. *Moor* 566. *pl*. 772. S. C. 1 *Rol. Abr*. 895. S. C. *Yelv*. 20. S. C. cited. *Comb*. 201. and 5 *Mod*. 201. S. C. cited.

201 *Cro. Eliz*. 652. *Bonner* ver. *Stokely* adjudged. *Moor* 641. *pl*. 882. S. P. adjudged, & *vide* 1 *Lutw*. 110, 111.

202 1 *Sid*. 380. S. P. adjourned.

(c) 5 *Mod*. 200. S. C. adjudged. *Comb*. 373. S. C. adjourned; and *Holt* Ch. J. said, he never understood the Diversity taken in the Case where within the Year and where after.

203 *Yelv*. 19. *Jennings* ver. *Hatley* adjudged, by three Judges *cont. Popham*.

204 2 *Vent*. 89, 90. *Dawson* ver. *The Sheriffs of London*.

205 *Hard*. 106. *Marters* ver. *Whitefield*

206 *Hard*. 6, 7. *Crosse*'s Case; *& vide Hard*. 58. where it is said, that such Inquisition ought to be as certain as an Indictment or Declaration.

207 *Hard*. 191. *Wilford* ver. *Greaves*.

208 *Hard*. 22. *The Protector* ver. *Lord Lumley*.

209 1 *Mod*. 90.

210 *Lit. Sect*. 197. *Co. Lit*. 128.

(a) But a Person outlawed may be sued, being to his Prejudice. Noy 1. 1 Sid. 60. *Legatus Legem Terrae amittit. Glanvil. Lib*. 2. *cap*. 3. *Respondra a Touts mes nul respondra a lay. Cro. Jac*. 426. cited from *Britton* and *Bracton*.

211 28 *E*. 3. 92. 22 *Ass. pl*. 47, 63. 5 *Co*. 109. 7 *Co*. 29. *Co. Lit*. 29.

(b) If the Demandant in a *Cessavit* be outlawed in a personal Action, this Outlawry may be pleaded in Bar of the Action, because the Arrearages are due to the King. 2 *Inst*. 298.

212 *Dyer* 227. in Margine. 3 *Leon*. 197, 105. *Owen* 22. *Cro. Eliz*. 203. 2 *Vent*. 282. 3 *Lev*. 29.

213 1 *Jon*. 239. *Lutw*. 1604.

214 1 *And*. 36. *Co. Lit*. 128. *Dyer* 317. *a. pl*. 6. 2 *Rol. Abr*. 805.

215 *Co. Lit*. 128.*a. Doct. Pl*. 390.

216 2 *Mod*. 267. *& vide* 11 *Co*. 65. *Hob*. 327.

217 *Preced. Chan*. 13. Attorney General of the Duchy, at the Relation of Mr. *Vermuden* ver. *Sir John Heath & al'*, in the Duchy Chamber *coram* Ch. B. *Atkins* and Just. *Ventris; & vide* 2 *Bulst*. 134. which seems *cont. & vide* 1 *And*. 30.

218 1 *Sid*. 49.

219 *Co. Lit*. 128. *Raym*. 46.

220 19 *Ass*. 10. *Doct. Pl*. 396. 6 *Co*. 53. 5 *Co*. 88. 8 *Co*. 142.

(a) That Outlawry must be pleaded *sub pede sigilli*, otherwise the Plaintiff may refuse it, he shall not afterwards demur for that Cause. 1 *Salk*. 217.

221 *Co. Lit*. 128. *Doct. Pl*. 392. 394.

222 *Fitz. Coron*. 233. *a*. 12 *E*. 4. 16. *Doct. Pl*. 396. *Co. Lit*. 128. 2 *Ro. Rep*. 38. *Cro. Car*. 566.

223 *Doct. Pl*. 397. 5 *Co*. 90. *Moor* 73. *Dyer* 228. Cro. Jac. 484. 1 *Salk* 329. 2 *Rol. Rep*. 38. *Yelv*. 36. 8 *Co*. 142. 1 *Brownl*. 83.

224 *Co. Lit*. 128. *Doct. Pl*. 397.

225 *Cro. Jac*. 425. *Piers Griffith* ver. *Hugh Middleton*.

226 *Cro. Jac*. 616. *Rythal*. ver. *Harris*, adjudged by three Judges *ver*. *Houghton*.

(b) But it was agreed, That if two Plaintiffs in Debt be barred, and bring Error, the Outlawry against one is a good Bar against the other, because they are to recover. *Cro. Jac*. 616.

(c) But for this, *vide Cro. Eliz*. 648, 6 *Co*. 25. *Cro. Jac*. 117.

227 1 *Sid*. 43. *Jason* ver. *Kete*.

228 1 *Salk*. 178. *Moor* ver. *Green*. 5 *Mod*. 11. S. C.

229 3 *Lev*. 29.

230 *Cro. Car*. 566. *Dawson* ver. *Lee*

231 *Carth*. 8, 9. *Trevelian* ver. *Seccomb*. 1 *Show*. 80. S. C.

232 That this Plea must be on Oath. 2 *Vern*. 37.

233 (a) That to avoid Pleas of Outlawry, the Plaintiff may make all that have Outlawries against him Defendants. 2 *Vern*. 199. *per Hutchins* Lord Commissioner.

234 *Co. Lit*. 6. *b. & vide* Title *Juries*.

235 *Vide* Title *Evidence*.

236 Co. Lit. 6. *b*.

(a) But a Person outlawed may be a private Attorney. *Co. Lit*. 52. *a*. — May be Executors or Administrators, *vide* Title *Executors and Administrators*. — Incapable of executing an Office in a Corporation. *Carth*. 199. *Show*. 288.

237 2 *Hawk. P. C*. 205.

238 1 *Bulst*. 29.

239 *Co. Lit*. 8. b.

240 *Brook* 82. *Perk*. 388. *Co. Lit*. 31. *a*.

(b) So a Husband shall be Tenant by the Curtesy, tho' he be outlawed in a Civil Action. 5 *Co*. 110. *Co. Lit*. 92. *b*. 391. *a*.

241 *Owen* 116. *Knowles* ver. *Powel*. *Moor* 237. S. C.

242 11 *Co*. 29, 31. 2 *Hawk P. C*. 343, 350.

243 2 *Inst*. 187. 2 *Hawk. P. C*. 97.

244 (a) By Statute of Recusancy the Outlawry of a Recusant not to be reversed for Want of Form. 5 *Mod*. 141.

245 3 *H*. 6. 9. 1 *Rol. Abr*. 793. *Finch of Law* 351, 355. *Rast. Ent*. 188. *pl*. 18. *Co. Lit*. 259.

246 40 *E*. 3. 25. *pl*. 28. *Finch* 476.

(b) So after Judgment there need not be any Proclamations to the County where he resided. *Cro. Jac*. 577. — If one is outlawed in *Middlesex* a *Capias utlagat'* may be sued out against him in any other County without a *Testatum*. 1 *Vent*. 33. 2 *Hale*'s *Hist*. 198.

247 2 *Hawk. P. C*. 303.

(c) But *vide* 2 *Hale*'s *Hist. P. C*. 194-5.

248 2 *Hawk. P. C*. 303.

249 2 *Hawk. P. C*. 303.

250 3 *H*. 7. 8. *b*. 9. *a*. 1 *Sid*. 100. *Dyer* 206.

(a) Where, for want of Form in a Writ of Proclamation, and for improper Abbreviations, the Outlawry was reversed. *Stile* 182. — So where in the Exigent it was *Utlest* for *Utlagat'*, the Outlawry was reversed. *Stile* 227. So where it was *Utlegat'* instead of *Utlagat*. 1 *Lev*. 164. — But it is said, that a Defect in Process in an Outlawry may be salved by the Defendant's Purchasing a Pardon, and shewing it to the Court; for that supposes that there was such an Outlawry against him as needed a Pardon, which if it were erroneous it would not do. 2 *Hawk. P. C*. 302.

251 *Cro. Eliz*. 592. 2 *Hale*'s *Hist. P. C*. 199.

252 But for this, *Cro. Eliz*. 467. *Dyer* 175. 1 *Lev*. 143. 2 *Salk*. 700.

253 *Latch*. 11. 1 *Lutw*. 333.

254 *Cro. Jac*. 577.

(b) So an Outlawry was reversed upon a Writ of Error, for that in the Exigent it was fourteen in Figures, and not in Words. 2 *Keb*. 128. So where the Year of the Lord was in Figures, and not in Words. *Stile* 334. — So where it was *ex insinuatone* for *ex insinuatione*, for want of *i*, the Outlawry was held to be erroneous. *Cro. Jac*. 577.

255 *Stile* 334.

256 *Fitz. Utlagary*, 41. *Bro. Variance*, 90. *Misnomer*, 80. *Error*, 172.

257 2 *Leon*. 120.

258 *Cro. Eliz*. 240. *Elden* ver. *Barnes*.

259 *Cro. Jac*. 576.

260 2 *Hawk P. C*. 303.

261 *Cro. Jac*. 576.

262 *Hetley* 93. *Lit Rep*. 150. S. C.

263 *Dyer* 223. *pl*. 24. *Bro. Coron*. 166. 3 *Inst*. 212.

264 *Co. Lit*. 288. *Dyer* 317. *pl* 6. 8 *Co*. 126. *Cro. Eliz*. 648. *Palm*. 43. *Cro. Jac*. 358, 531. 1 *Rol. Rep*. 266.

265 2 *Hale*'s *Hist. P. C.* 204.

266 *Noy* 113. An Attachment granted against the Coroners of *York*.

(a) That a *Certiorari* lies to return the Outlawry, which must be returned by the Sheriff on the *Exigi facias*, and such Return recorded in the Court above. *Dyer* 223. *a*.

267 2 *Hale*'s *Hist. P. C.* 36.

268 *Fitz. Exigent*, 26. *Dyer* 295.

269 *Cro. Eliz.* 179. 3 *Co.* 59. *Plow.* 137. *Hob.* 166.

270 2 *Hawk. P. C.* 304-5. 2 *Hale*'s *Hist. P. C.* 195-6.

271 *Cro. Jac.* 167. [*Leeche*'s] Case.

272 2 *Hale*'s *Hist. P. C.* 201-2.

273 *Palm.* 287. 2 *Leon.* 14. 2 *Hale*'s *Hist. P. C.* 202.

274 (*a*) *Cro. Jac.* 660. *Palm.* 280. S. C.

275 *Noy* 49. *Hartland* ver. *Yates*.

(*b*) If upon an Indictment of Murder an Exigent be awarded, but before the Return the Party dies, his Executors may by Writ of Error, setting forth the special Matter, reverse the Proceedings. 5 *Co.* 111. *a*. *Eaton*'s Case cited in *Foxley*'s Case. — That an Executor may reverse an Outlawry. 2 *Keb.* 507. — That an Heir or Executor may. 2 *Hawk. P. C.* 461. — But a Gaoler or Sheriff cannot take any Advantage of an Error in an Outlawry. *Dyer* 67. *a*. 3 *Keb.* 286.

276 1 *Rol. Abr.* 802. *Clark*'s Case. 2 *Rol. Rep.* 440. S. C. adjudged. 3 *Mod.* 89. S. P. adjudged.

277 *Cro. Jac.* 358. *Middleton*'s Case.

278 2 *Hale*'s *Hist. P. C.* 203.

(*a*) *Stile* 451.

(*b*) 1 *Keb.* 50.

279 *Cro. Jac.* 616.

(*c*) An Outlawry in *London* was reversed upon a Writ of Error, because the *Hustings* were set out to be held in, but not for the City. *Trin.* 6 *Geo.* 2. *Martin* ver. *Duckett*.

280 11 *H.* 7. 10.*a*. 2 *Rol. Abr.* 802. 2 *Hale*'s *Hist. P. C.* 203.

281 2 *Rol. Abr.* 802. *Palm.* 480. *Latch* 210.

282 1 *Vent.* 108. 1 *Show.* 319. 3 *Mod.* 89. 2 *Keb.* 141. *Comb.* 19. 2 *Show.* 60, 68. 1 *Lev.* 164.

283 2 *Rol. Abr.* 802. 2 *Hale*'s *Hist. P. C.* 203.

284 2 *Rol. Abr.* 803. 2 *Hale*'s *Hist. P. C.* 203.

285 2 *Rol. Abr.* 802. 2 *Hale*'s *Hist. P. C.* 203.

286 2 *Rol. Abr.* 803. *Chapman*'s Case.

287 2 *Hale*'s *Hist. P. C.* 207.

288 *Co. Lit.* 259. 2 *Hawk. P. C.* 460.

289 2 *Hale*'s *Hist. P. C.* 208. 2 *Rol. Abr.* 804.

290 (*a*) For this, *vide Dyer* 287. *pl.* 48. 2 *Jon.* 180. 4 *Mod.* 47. 4 *Mod.* 366.

291 2 *Hawk. P. C.* 458–9. and several Authorities there cited.

292 2 *Hawk. P. C.* 460, 461.

293 8 *Co.* 141, 142. Doctor *Drury*'s Case. *Vaugh.* 158. S. C. cited.

(a) For this, *vide Ro. Ent.* 157. 3 *Keb.* 291. 1 *Mod.* 111. *Hern. Ent.* 49. *Asht. Ent.* 143.

294 2 *Vent.* 46. 2 *Jon.* 211. *Comb.* 19. 2 *Salk.* 495. S. P. where an Outlawry was reversed, on Motion, at the Charge of him who procured it, on Affidavit, that the Defendant was actually in the *Fleet* in Execution for the Plaintiff in another Suit, and that he knew it. —— But in the same Page in *Salk.* it is said, that tho' such Motions are frequently granted in *B. R.* because it is a great Charge to reverse an Outlawry there, yet that it is otherwise in *C. B.* the Charge there being but 16 *s.* 8 *d.*

295 2 *Leon.* 22. —— Where the Husband and Wife being outlawed, and the Wife refusing to appear, the Outlawry could not be reversed. *Cro. Eliz.* 611. —— One outlawed prayed to appear by Attorney, and upon an Affidavit made of his Sickness, the Court *ex speciali gratia* allowed him to appear by Attorney; but the Clerk was commanded to enter it, *Quod venit in propria persona*, the Law being clear, that upon an Outlawry he ought to appear in Person. *Cro. Jac.* 462. —— Having once appeared in Person, the Residue of the Proceedings may be by Attorney. 2 *Keb.* 507. —— Said that there was a Difference where the Error appeared on the Face of the Record; that in such Case Error may be assigned *per Attorn'*, without a special Rule of Court for that Purpose. *Carth.* 7.

296 2 *Salk.* 496.

297 2 *Hawk. P. C.* 98. *Vide* Title *Bail in Criminal Causes*, Letter (D).

298 *Carth.* 459. *Matthews* ver. *Erbo.*

299 2 *Salk.* 496.

300 *Dyer* 34. *pl.* 20. *Cro. Eliz.* 235 1 *Keb.* 141. *pl.* 11. 1 *Sid.* 316. 3 *Keb.* 29. 3 *Mod.* 42, 47. 4 *Mod.* 366. 2 *Hale*'s *Hist. P. C.* S. P. and that such Writ is to issue returnable at fifteen Days; and if any Lords do appear, they may plead to the Errors; and if the Sheriff return there are no Lands, *&c.* then the Court proceeds to examine the Errors. (*a*) So ruled *Mich.* 12 *Annae, The Queen* ver. *Strafford*, upon Examination of all the Precedents. 2 *Hawk. P. C.* 461. *Ca. Law & Eq.* 188.

301 2 *Salk.* 495.

302 *Cro. Jac.* 464. *Cro. Car.* 365. 3 *Mod.* 42. 6 *Mod.* 115.(*b*) 2 *Hale*'s *Hist. P.C.* 209.

303 1 *Salk.* 371. *Rex* ver. *Hill.* 5 *Mod.* 141. S. P.

304 *March* 9.

305 3 *Lev.* 245. *Whitwick* ver. *Hovenden.*

306 1 *And.* 188.

(*a*) Shall, after Outlawry reversed, be restored to his Law, and to be of Ability to sue. *Co. Lit.* 288. *b.*

307 5 *Co.* 90. *Hoe*'s Case. 1 *Rol. Abr.* 778. S. C. cited. *Cro. Eliz.* 278. S. P. adjudged; where a Termor being outlawed upon the Statute of Recusancy, the Lord Treasurer and Barons of the Exchequer sold the Term; *& vide* 2 *Jon.* 101. 2 *Show.* 68. and 3 *Keb.* 871. that there shall be Restitution of Profits actually paid into the Exchequer.

308 *Moor* 269. *Beverly* ver. *Cronwal*.

309 *Moor* 269. agreed *per Curiam*.

310 *Cro. Eliz*. 170. *Ognel*'s Case, & 13 *Co*. 20, 22.

311 5 *Mod*. 61.

312 2 *Vern*. 312. *Peyton* ver. *Ayliffe*; & 2 *Lev*. 49. the Case of *Pinfold* ver. *Northey*.

313 H. P. C. 98. Crompt. 154. 2 H. H. P. C. 120, 121.

a H. H. P. C. 124. Dalt. cap. 114. Lamb. 340. 4 Inst. 180.

b 1 Ric. 3. 3. 3 H. 7. 3. 1 & 2 Ph. &. Mar. 13

c H. P. C. 96. Dalt. cap. 114.

d 4 Inst. 179, 180.

e Fitz. Mainprise, 12, 13. Bro. Mainprise, 89. Coke, Bail & Mainprise, Ch. 3. and the Books cited under Letters f. g. h. Cont. 4 H. 6. 8 pl. 21. 32 H. 6. 4. pl. 3.

f 1 H. H. P. C. 325. 2 H. H. P. C. 35, 124, 125. H. P. C. 98. Fitz. Mainprise, 12, 13.

g S. P. C. 64. D. 21 H. 7. 33. pl. 26. 22 H. 6. 59. pl. 13. 39 H. 6. 27. pl. 39. 32 H. 6. 4. pl. 3. Supra ch. 6. sect. 4.

h Fitz. Mainprise, 12, 13. Dalt. cap. 114. Brook Mainprise, 99. 2 H. H. P. C. 127.

i H. P. C. 96. Dalt. cap. 114.

k 2 H. H. P. C. 125. H. P. C. 97. Dalt. cap. 114. See 10 Co. 101.

l Style's Practical Register 110.

m Dalt. cap. 70 & 114. H. P. C. 97.

n Dalt. cap. 114. H. P. C. 97.

o Dalt. cap. 114. Cromp. 194. 2 H. H. P. C. 125.

314 H. P. C. 96. Dalt. cap. 70 & 114.

315 Vide supra, cap.6. Sect. 10, 11, &c. Dalt. cap. 114. H P. C. 97.

316 S. P. C. 33. F. 77. A. 25 E. 3. 39. Pl. 22. Fitz. Escape, 4. Coron. 246. H. P. C. 97, 113. 1 H. H. P. C. 596, 597.

317 Vide supra, Cap. 6. Sect. 11, 12, &c.

318 Vide supra, Cap. 6. Sect. 13, 14.

319 2 Stra. 1216. Poph. 96. Dalt.cap. 114.

320 Vide 14 H. 7. 7. pl. 19. H. P. C. 97. Dalt.cap. 114.

321 H. P. C. 97. Dalt, cap. 114. 14 H. 7. 10. a. Bro. Peace, 7. Mainprise, 29.

322 B. 1. Ch. 72. Sect. 6. & B. 2. Ch. 1. Sect. 17.

a Dalison 11. See the Preamble of 13 Ed. 1. cap. 15. Register 83. b. 169. S. P. C. 74. Letter D. Fitz. Coron. 297. Contra 2 Inst. 190.

b Dalison 11. Contra 2 Inst. 190.

c Register 269. a.

d Register 270.

e Register 269. b.

f Register 153. b. 270 b. 271. a. b.

g Supra cap. 8. sect. 4. 5. Dalison 11.

h Dalison 11.

323 2 H. H. P. C 141 to 149.

i H. P. C. 106. 2 H. H. P. C. 148, 149. 2 Inst. 190. Register 269.

k Lamb. 342. 348. S. P. C. 74. Letter E. 2 Inst. 190.

l H. P. C. 106.

m Register 269, 270.

n F. N. B. 250. b. Register 269. a.

o F. N. B. 250. C. Register 269. a. 2 Inst. 290.

p F. N. B. 250. G. 251. C. Register 133. b. 270. b. 271. b.

q F. N. B. 250, 251. Register 269, &c.

a H. P. C. 104.

b 2 Inst. 190.

c F. N. B. 250. A. 4 Inst. 182. Coke, Bail and Mainprise, cap. 10. Vide supra cap. 10. sect. 71. 74.

324 F. N. B. 66, 67, 68. Register 78, 79. Register 79. a. F. N. B. 68. C. 2. H. H. P. C 141. Vide supra Section 26.

d 1 Sid. 210. Skin. 61, 76, 227, 337. Carth. 286, 287. Far. 9. 4 Mod. 183. 2 H. H. P. C. 127 to 136.

e See Sect. 41. 2 Inst. 190.

325 2. H. H. P. C. 129 to 132. 2 H. H. P. C. 129. 2 Inst. 186. 2 Inst. 315. 2 H. H. P. C. 138.

a Register 77. b. F. N. B. 66. E.

b 25 Ed. 3. 42. pl. 27. 41 Ass. pl. 14. 37 Ass. pl. 12. 29 Ass. 44. 1 Ro. Re. 268. 44 Ed. 3. 38. pl. 34. 21 Ed 4. 71. a.

c Sect. 63.

326 2 Inst. 186, 187. S. P. C. 72. E. 1 Rol. Rep. 134. Dalt. ch. 114. Register 77. b. S. P. C. 72. F.

a 1 And. 298. 1 Rol. Rep 134, 192. pl. 31, 32, 219. 1 Leon. 70. Bro. Mainprise, 37. Contra Moor 839. 1 And. 158.

b Register 77. b.

c F. N. B. 66. E.

d S. P. C. 73.

e 2 Inst. 187.

f Dalt. cap. 114. S. P. C. 73. Dalt. ch. 114. F. N. B. 251. B. S. P. C. 73. Dalt. ch. 114. 24 Ed. 3. 33. pl. 25. 1 Rol. Rep. 131.

327 2 a. 233. a.

g Register 77. b. 4 Inst. 314.

h Vide 1 Inst.

i Register 80. b. F. N. B. 67. D. Vide Plowd. Com. 124. a.

k 9 H 3. 10 & 16

l 34 Ed. 1. commonly called, Ordinatio Forestae.

a F. N. B. 67. A. Register 80. b.

b F. N. B. 67. B. Register 80. b.

328 4 Inst. 290. Register 80. b. F. N. B. 67. A. B. C. 45 Ed. 3.7. pl. 8. 4 Inst. 290. Register 80. a. b. 2 H. H. P. C. 132 to 135.

c S. P. C. 74. H. P. C. 101. Dalt cap. 114. 1 Rol. Rep. 268. 15 H. 7. 9. Pl. 8. Kelynge 90. 3 Bulst. 113. 114.

d Vide infra S. 44.

e Dy. 179. pl. 42. 1 Bulst. 87. 88. 15 H. 7. 9. a.

f 3 Bulst. 114. 1 Rol. Rep. 268. 4 Inst. 178.

g 2 Inst. 188. Dyer 179. pl. 42. H. P. C. 100, 101. See the Books above cited. H. P. C. 101. S. P. C. 74. Letter A. 2 Inst. 188.

a 5 H. 7. 16. pl. 7

b 19 H. 6. 2. a.

c Bro. Mainprise, 94. H. P. C. 101, 105.

d H. P.C. 101, 105. F. N. B. 246. C. Contra Fitz. Coron. 297, 354. Quære S. P. C. 74. D.

329 H. P. C. 101. Carth. 79. 2 Inst. 188. H. P. C. 102. Vide cap. 18. S. 1. & 4.

330 H. P. C. 102. 2 Inst. 188. Register 269. b.

e 25 Ed. 3. 42. pl. 27. H. P. C. 102. Fitz. Mainprise, 1. 2 Inst. 188.

f 25 Ed. 3. 42. pl. 31. Fitz. Mainprise, 2.

g H. P. C. 192.

h Fitz. Coron. 387.

i Bro. Coron. 81, 211. 17 Ass. pl. 4. 11 Ass. pl. 27.

k H. P. C. 102

a Dalt. cap. 114.

b Bro. Mainprise, 62. 42 Ass pl. 5.

c Coke Bail & Mainprise, Ch. 5. 27 Ass. pl. 12.

d Keilw. 165. b. Fitz. Execution, 147. 13 H. 7. 21. b. Rastal 380. pl. 6.

e H. P. C. 168.

f 6 H. 7. 1. b. Supr. Sect. 44.

331 2 Inst. 189. 40 Ass. 33. 2 H. H. P. C. 129, 134, 148.

332 2 H. H. P. C. 134, 135.

333 Inst. 190. S. P. C. 74. Letter C. H. P. C. 106. Dalt. cap. 114. 29 Ass. pl. 44. 16 Ed. 4. 5. pl. 4. Coke Bail & Mainprise, cap. 5. Register 270. b. 271. Register 269. 2 Inst. 190. H. P. C. 100. 16 Ed. 4. 5. S. P. C. 74. c.

334 Register 83. b. 269. F. N. B. 250. C. 2 Inst. 190.

335 2 Inst. 190. Register 269. b. F. N. B. 250. C. Vide supra Sect. 45.

a Register 270. S. P. C. 71. F. N. B. 250. E. H. P. C. 100

b S. P. C. 71. Bro. Mainprise, 6, 11, 22, 54, 58. H. P. C. 100. 2 H. H. P. C. 135. Coke, Bail & Mainprise, Chap. 5. Dyer 120. pl. 10. 25 Ed. 3. 42. pl. 22. 50 Ed. 3. 15. a. 29 Ass. 44. 40 Ass. 8.

c S. P. C. 71. H. P. C. 100. 2 H. H. P. C. 135. Bro. Mainprise, 58, 64. 40 Ed. 3. 42. pl. 22. 43 Ed. 3. 17. 40 Ass. 8. Cont. 27 Ed. 3. 94. pl. 3.

d Fitz. Coron. 135.

e 21 Ed. 4. 71. Bro. Mainprise, 78.

f Register 270.

g F. N. B. 250. E.

h Dalt. chap. 114.

i Supra Sect. 40.

336 H. P. C. 105, 106. Coke, Bail & Mainprise, Chap. 6. Lamb. 347, 348.

a See the Books above cited. Comp. 197, 234, 235. H. P. C. 105. 2 H. H. P. C. 137.
B. 1. Chap. 63. Sect. 19.

337 2 H. H. P. C. 137.

338 2 H. H. P. C. 137.

339 2 H. H. P. C. 137.

340 Coke, Bail and Mainprise, cap. 6 2 H. H. P. C. 137, 138. Supra. Sect, 54. 2 H. H. P. C. 138, 139, 140. Vide supra Sect. 33, 34. 1 Rol. Rep. 268. Dalt, cap. 114. H. P. C. 99. Lamb 346, 347. Supra Sect. 44, 45. 2 Inst. 314, 315.

341 Dalt. cap. 114. Cromp. 152 H. P. C. 105.

a Cromp. 154. a. 2 H. P. P. C. 129, 131. H. P. C. 101, 104, 105. Fitz. Coron. 361. Dalt. cap.114. F.N.B. 246. C. S. P. C. 15. C. 16. D. Con. 25 Ed. 3. 42. pl. 27. S. P. C. 74. D. Fitz. Coron. 354. Mainprise, 1.

b Crompt. 153. b. Bro. Mainprise, 94. H. P. C. 101.

c Vide supra cap. 6. sect. 7.

d Cromp. 154. a.

e H. P. C. 104, 105. Vide supra Sect. 63. Cont. Dalt. cap. 114.

f 2 Inst. 185, 186.

g S. P. C. 72.F.

h Fitz Mainprise, 6. 3 Ass. Pl. 12. Salk. 61 Seems contrary.

a 5 Mod. 78. 1 Sid. 143. 1 And. 297, 298. 1 Leon. 70 Palm. 559.

b 1 Leon. 70. 1 And. 297.

c 33 H. 6. 28. b. 1 And. 298. 1 Rol. Rep. 134, 192, pl. 31, 32. 219. pl. 22. Con. Mo. 839. 1 And. 158. See the Arguments on the Habeas Corpus concerning Loans, 81, 82, &c.

d 1 Leon. 70, 71.

342 1 H. 7. 4. b. 2 H. H. P. C. 131.

e See the Arguments on the Habeas Corpus concerning Loans, & Rushworth's Collections, 1 Part, Fol. 458, &c.

f 25 Ed. 3. 4. 28 Ed. 3. 3. 42 Ed. 3. 3.

343 Vide supra Sect. 36.

a Vide supra Sect. 66.

b S. P. C. 72. 73. F. N. B. 66. *E*. Rushworth's Collections, Part 1. fol. 510. 1. Rol. Rep. 219. See the Arguments on the Habeas Corpus above mentioned.

344 Rushworth's Collections Part 1. 428, 473, 499, &c. Rushworth's Collections, Part. 1. Fol. 613.

a Supra sect. 66.

345 Vide Cro. Car. 507, 579, 593.

346 2 H. H. P. C. 144, 145.

a See 1 Syd. 78. 1 Keb. 305. pl. 15, 17.

347 1 Mod. 144, 145.

348 Skin. 56, 163, 527. 1 Keb. 871, 887, 888. 1 Syd 245. 1 Lev. 165. 1 Mod. 155, 157.

349 Shower 100. Raym. 381. Skin. 56. 162, 163. Carth. 132, 133.

a 1 Rol. Rep. 192. pl. 32. 218. pl. 19.

b Moore 839. 1 Rol. Rep. 219. pl. 21.

c 1 Rol. Rep. 192. pl. 31. 32. 218. pl. 19, 20. 219. pl. 23.

d 1 Rol. Rep. 111, 219. Moore 838. 2 Bulst. 301. Cro. Jac. 343. Like CASE. 3 Bulst. 115. 1 Rol. Rep. 277.

f Vide 1 Rol. Rep. 277. 3 Bulst. 115. Dalison 81. 3 Leon. 18. Vaughan 130, 140. seems country. Vide Book 1. Ch. 19. Sect. 17. 1 Mod. 155. Moore 840. pl. 1133.

350 Vaughan 157. Vide 6 Mod. 73. &c. See Bushel's Case in Vaughan's Reports. 2 Bulst. 139, 1 40.

a See the precedent Section, and Cro. Jac. 219. And Vaughan 139, 140.

b Cro. Car. 579. Salk. 348. 5 Mod. 19. 20. &c Vide March 52, 53. 1 Sid. 288, 289. 1 Sid. 320. pl. 10. 144.

c 1 Sid. 144. 256, 320.

a 1 Bulst. from 48 to 54. 1 Rol. Rep. 220. pl 14. 337. pl. 52. 411. pl. 54.

b 1 Rol. Rep. 218. pl. 19. 337. pl. 15. 2 Bulst. 140.

c Latch 12.

351 1 Sid. 287, 288.

352 5 Mod. 323. 454, 455. 2 Jon. 222. Trin. 4. Geo. 1.

d 2 Inst. 185. 186, 189. 2 H. H. P. C. 129, 148. H. P. C. 104. Salk. 61.

a 3 Bulst. 113. 1 Rol. Rep. 168. Supra Sect. 33. Latch 12. S. P. C. 74, 75. Skin. 683. 5 Mod. 454, 455.

b Kelynge 90.

c Dyer 179. pl. 42. 1 Bulst. 87, 88.

d 1 Rol. Rep. 268. 3 Bulst. 113, 114. Vide supra Sect. 33.

e 5 H. 7. 16. pl. 7. 3 Bulst. 113, 114. Vide supra Sect. 33. 2 Inst. 188. H. P. C. 101. S. P. C. 74. Letter A.

f 19 H. 6. 2.a. S. P. C. 74. Letter A. 2 Inst. 188. 1 Sid 316.

g Crompton's Justice 154. pl. 22.

h 5 Mod. 454, 455. 1 Sid. 78. 1 Bulst. 85. Palm. 558, 559. 1 Keb. 305, 306. 48 Ed. 3. 22. a.

i 3 Ass. pl. 2. 13 Ed. 4. 8. pl. 3. Bro. Mainprise, 48, 73. S. P. C. 72. Letter B.

k Latch 12. Cro. Jac. 356. Co. Lit. 289. a.

1 2 Inst. 53. 55, 615. 4 Inst. 290. 2 H. H. P. C. 147. Vaughan 154, 155, 156, 157. 2 And. 197. Dalison 81. 3 Leon. 18. 2 Jo. 13, 14, 17. 2 Mod. 198, 306.

353 See Vaughan 156, 157. 2 Jo. 14. Register 271. a. b.

354 2 H. H. P. C. 126, 127.

a 1 Bulst. 45.

b 2 Jon. 210.

c Lev. 106. Contra. 1 Sid. 211.

d 4 Inst. 178. 1 Bulst. 45. 21 H. 7. 20. pl. 3. Con. 1 Sid. 210. Vide 2 Jo. 222.

e H. P. C. 97. Crompt. Justice 335. a. 2 Inst. 178. Dalt. cap. 127. Seems contrary.

f 1 Bulst. 45.

g 4 Inst. 178. S. P. C. 65. Fitz. Mainprise, 13. H. P. C. 97. 2 H. H. P. C. 125. Contra Fitz. Mainprise, 12.

h Dalt. cap. 127. S. P. C. 77. Letter C. 4 Inst. 178.

i S. P. C. 77. C.

k 2 Inst. 150. 4 Inst. 178. 2 H. H. P. C. 126.

1 Dalt. cap. 127. Queen and Redpath, 11 Ann.

355 For felonies without benefit of clergy.

356 Contract for transportation.

357 Persons impowered to contract.

358 Bond of transportation.

359 Conveying to the port.

360 Charges of transportation.

361 Escaping from on Shipboard.

362 Persons transporting themselves voluntarily.

363 Returning from transportation.

364 Being at large after order or agreement for transportation.

365 Reward for apprehending such person.

d 2 Hawk. P. C. 90.

e 2 Hawk. P. C. 89.

f 2 Hal. P. C. 127.

CHAPTER 15

AMENDMENT IX

UNENUMERATED RIGHTS CLAUSE

15.1TEXTS

15.1.1DRAFTS IN FIRST CONGRESS

15.1.1.1Proposal by Madison in House, June 8, 1789

15.1.1.1.a Fourthly. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit, …

…

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Congressional Register, June 8, 1789, vol. 1, pp. 427–28.

15.1.1.1.b *Fourthly*. That in article 1st, section 9, between clauses 3 and 4 [of the Constitution], be inserted these clauses, to wit: …

…

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Daily Advertiser, June 12, 1789, p. 2, col. 2.

15.1.1.1.c *Fourth*. That in article 1st, section 9, between clauses 3 and 4

[of the Constitution], be inserted these clauses, to wit: …

…

The exceptions here or elsewhere in the constitution, made in favour of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

New-York Daily Gazette, June 13, 1789, p. 574, col. 4.

15.1.1.2House Committee of Eleven Report, July 28, 1789

ART. 1, SEC. 9 — Between PAR. 2 and 3 insert, …

…

"The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Broadside Collection, DLC.

15.1.1.3House Consideration, August 17, 1789

15.1.1.3.a The 8th clause of the 4th proposition was taken up, which was "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Congressional Register, August 17, 1789, vol. 2, p. 226 (After the failure of the following motion, "the question was taken on the clause, and it passed in the affirmative.").

15.1.1.3.b Eleventh Amendment—The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Daily Advertiser, August 18, 1789, p. 2, col. 4 ("This was agreed to without amendment.").

15.1.1.3.c Eleventh amendment—"The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

New-York Daily Gazette, August 19, 1789, p. 802, col. 4 ("This was agreed to without amendment.").

15.1.1.3.d 11th Amendment. The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Gazette of the U.S., August 22, 1789, p. 249, col. 3 ("This was agreed to without amendment.").

15.1.1.4Motion by Gerry in House, August 17, 1789

Mr. GERRY said it ought to be "deny or impair," for the word "disparage" was not of plain import. …

Congressional Register, August 17, 1789, p. 226 ("[H]e therefore moved to make that alteration, but not being seconded, …").

15.1.1.5House Consideration, August 21, 1789

Tenth. The enumeration in this Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

HJ, p. 108 ("read and debated … agreed to by the House, … two-thirds of the members present concurring").[1]

HJ, p. 112.

15.1.1.6House Resolution, August 24, 1789

ARTICLE THE FIFTEENTH.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

House Pamphlet, RG 46, DNA.

15.1.1.7Senate Consideration, August 25, 1789

15.1.1.7.a The Resolve of the House of Representatives of the 24th of August, upon certain "Articles to be proposed to the Legislatures of the

several States as Amendments to the Constitution of the United States" was read as followeth: …

Article the fifteenth

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Rough SJ, p. 219.

15.1.1.7.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"Article the Fifteenth.

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Smooth SJ, p. 196.

15.1.1.7.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

"ARTICLE THE FIFTEENTH.

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Printed SJ, p. 106.

15.1.1.8Further Senate Consideration, September 7, 1789

15.1.1.8.a On Motion to adopt the fifteenth Article of amendments to the Constitution of the United States, proposed by the House of Representatives.

Rough SJ, p. 259 ("It passed in the Affirmative.").

15.1.1.8.b On motion, To adopt the fifteenth Article of Amendments to the Constitution of the United States, proposed by the House of Representatives —

Smooth SJ, p. 231 ("It passed in the Affirmative.").

15.1.1.8.c On motion, To adopt the fifteenth Article of Amendments to the Constitution of the United States, proposed by the House of Representatives —

Printed SJ, p. 122 ("It passed in the Affirmative.").

15.1.1.8.d Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in

Article fifteenth.

Senate MS, p. 4, RG 46, DNA.

15.1.1.9Further Senate Consideration, September 9, 1789

15.1.1.9.a On motion to number the remaining articles agreed to by the Senate tenth, eleventh and twelfth instead of the numbers affixed by the Resolve of the House of Representatives.

Rough SJ, p. 277 ("It passed in the affirmative."; motion renumbered fifteenth article as eleventh article).

15.1.1.9.b On motion, To number the remaining articles agreed to by the Senate, tenth, eleventh and twelfth, instead of the numbers affixed by the Resolve of the House of Representatives —

Smooth SJ, p. 246 ("It passed in the Affirmative."; motion renumbered fifteenth article as eleventh article).

15.1.1.9.c On motion, To number the remaining Articles agreed to by the Senate, tenth, eleventh and twelfth, instead of the numbers affixed by the Resolve of the House of Representatives—

Printed SJ, p. 131 ("It passed in the Affirmative."; motion renumbered fifteenth article as eleventh article).

15.1.1.9.d To erase the word — "Fifteenth" — & insert Eleventh.

Ellsworth MS, p. 4, RG 46, DNA.

15.1.1.10Senate Resolution, September 9, 1789

[ARTICLE THE*] ELEVENTH.*

The en[umeration in the Constitution of certain] rights, shall not be construed to deny or disparage others retained by the people.

Senate Pamphlet, RG 46, DNA [material in brackets not legible].

15.1.1.11Further House Consideration, September 21, 1789

Resolved, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

15.1.1.12Further Senate Consideration, September 21, 1789

15.1.1.12.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

15.1.1.12.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

15.1.1.13Further Senate Consideration, September 21, 1789

15.1.1.13.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

15.1.1.13.b The Senate proceeded to consider the message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

15.1.1.14Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as

follows “In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to & ∧ have the assistance of council for his defence.”

Conference MS, RG 46, DNA (Ellsworth’s handwriting).

15.1.1.15 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Article the eighth. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence.”

HJ, p. 152 (“On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14”).

15.1.1.16 Senate Consideration of Conference Committee Report, September 24, 1789

15.1.1.16.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

15.1.1.16.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law RESPECTING AN ESTABLISHMENT OF RELIGION, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial BY AN IMPARTIAL JURY OF THE DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, AS THE DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Printed SJ, p. 145.

15.1.1.17 Further Senate Consideration of Conference Committee Report, September 24, 1789

15.1.1.17.a A Message from the House of Representatives—

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and

informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

15.1.1.17.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p. 148.

15.1.1.18Further Senate Consideration of Conference Committee Report, September 25, 1789

15.1.1.18.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

15.1.1.18.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

15.1.1.19 Agreed Resolution, September 25, 1789

15.1.1.19.a Article the Eleventh.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Smooth SJ, Appendix, p. 294.

15.1.1.19.b ARTICLE the ELEVENTH.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Printed SJ, Appendix, p. 164.

15.1.1.20 Enrolled Resolution, September 28, 1789

Article the eleventh … The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Enrolled Resolutions, RG 11, DNA.

15.1.1.21 Printed Versions

15.1.1.21.a Art. IX. The enumeration in the Constitution of certain rights,

shall not be construed to deny or disparage others retained by the people.

Statutes at Large, vol. 1, p. 21.

15.1.1.21.b ART. XI. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Statutes at Large, vol. 1, p. 98.

15.1.2PROPOSALS FROM THE STATE CONVENTIONS

15.1.2.1New York, July 26, 1788

That all Power is originally vested in and consequently derived from the People, and that Government is instituted by them for their common Interest Protection and Security.

That the enjoyment of Life, Liberty and the pursuit of Happiness are essential rights which every Government ought to respect and preserve.

That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution.

State Ratifications, RG 11, DNA.

15.1.2.2North Carolina, August 1, 1788

1st. That there are certain natural rights of which men, when they form a

social compact, cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

2d. That all power is naturally vested in, and consequently derived from the people; that magistrates therefore are their trustees, and agents, and at all times amenable to them.

…

State Ratifications, RG 11, DNA.

15.1.2.3Virginia, June 27, 1788

First, That there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Second, That all power is naturally vested in and consequently derived from the people; that Magestrates, therefore, are their trustees and agents at all times amenable to them. …

State Ratifications, RG 11, DNA.

15.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

15.1.3.1Delaware: Constitution, 1776

ART. 30. No article of the declaration of rights and fundamental rules of this state, agreed to by this convention, … ought ever be violated on any pretence whatever. No other part of this constitution shall be altered, changed or diminished without the consent of five parts in seven of the Assembly, and seven Members of the Legislative Council.

Delaware Laws, vol. 1, App., p. 91.

15.1.3.2Georgia: Constitution, 1777

WHEREAS the conduct of the legislature of Great-Britain for many years past, has been so oppressive on the people of America, that of late years, they have plainly declared, and asserted a right to raise taxes upon the people of America, and to make laws to bind them in all cases whatsoever, without their consent; which conduct being repugnant to the common rights of mankind, hath obliged the Americans, as freemen, to oppose such oppressive measures, and to assert the rights and privileges they are entitled to, by the laws of nature and reason. …

…

We therefore the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, Do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State.

Georgia Laws, p. 7.

15.1.3.3Maryland: Declaration of Rights, 1776

3. That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great-Britain, and have been introduced, used, and practised by the courts of law or equity; and also to all acts of assembly in force on the first of June seventeen hundred and seventy-four, except such as may have since expired, or have been, or may be altered by acts of convention, or this declaration of rights; subject nevertheless to the revision of, and amendment or repeal by, the legislature of this state; and the inhabitants of Maryland are also entitled to all property derived to them from or under the charter granted by his majesty Charles the first, to Caecilius Calvert, baron of Baltimore.

…

42. That this declaration of rights, or the form of government to be established by this convention, or any part of either of them, ought not to be

altered, changed or abolished, by the legislature of this state, but in such manner as this convention shall prescribe and direct.

Maryland Laws, November 3, 1776.

15.1.3.4Massachusetts: Constitution, 1780

Preamble.

THE end of the institution, maintenance, and administration of government, is to secure the existence of the body politick; to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquillity, their natural rights, and the blessings of life: And whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

…

PART I.

A Declaration Of The Rights Of The Inhabitants
Of The Commonwealth Of Massachusetts.

ARTICLE

I. All men are born free and equal, and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

…

IV. The people of this Commonwealth, have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America, in Congress assembled.

Massachusetts Perpetual Laws, pp. 5–6.

15.1.3.5New Hampshire: Constitution, 1783

[Part I, Article I.] ALL men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

II. All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.

III. When men enter into a state of society, they surrender up some of their natural rights to society, in order to secure the protection of others; and, without such an equivalent, the surrender is void.

IV. Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.

…

VII. The people of this State, have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever hereafter shall, exercise, and enjoy every power, jurisdiction and right pertaining, thereto, which is not, or may not hereafter be by them expressly delegated to the United States of America in Congress assembled.

New Hampshire Laws, pp. 22–24.

15.1.3.6New Jersey: Constitution, 1776

WHEREAS all the constitutional Authority ever possessed by the Kings of *Great Britain* over these Colonies, … was by Compact, derived from the People, and held for them, for the common Interest of the whole Society. …

New Jersey Acts, p. iii.

15.1.3.7New York: Constitution, 1777

“We hold these Truths to be self-evident, that all Men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are, Life, Liberty and the Pursuit of Happiness. …”

New York Laws, vol. 1, p. 3.

15.1.3.8North Carolina: Constitution, 1776

Sect. XLIV. That the Declaration of Rights is hereby declared to be Part of the Constitution of this State, and ought never to be violated on any Pretence whatever.

North Carolina Laws, p. 280.

15.1.3.9Pennsylvania

15.1.3.9.aConstitution, 1776

WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness. And whereas the inhabitants of this commonwealth have, in consideration of protection only, heretofore acknowledged allegiance to the king of Great Britain; and the said king has not only withdrawn that protection, but commenced, and still continues to carry on, with unabated vengeance, a most cruel and unjust war against them employing therein, not only the troops of Great Britain, but foreign mercenaries, savages and slaves, for the avowed purpose of reducing them to a total and abject submission to the despotic domination of the British parliament, with many other acts of tyranny, (more fully set forth in the declaration of congress) whereby all allegiance and fealty to the said king and his successors, are dissolved and at an end, and all power and authority derived from him ceased in these colonies. And whereas it is absolutely necessary for the welfare and safety of the inhabitants of said colonies, that they be henceforth free and independent states, and that just, permanent, and proper forms of government exist in every part of them derived from and founded on the authority of the people only, agreeable to the directions of the honourable American congress. We, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great Governor of the universe (who alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of

government) in permitting the people of this state, by common consent, and without violence, deliberately to form for themselves such just rules as they shall think best, for governing their future society; and being fully convinced, that it is our indispensible duty to establish such original principles of government, as will best promote the general happiness of the people of this state, and their posterity, and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever, do, by virtue of the authority vested in us by our constituents, ordain, declare, and establish, the following *Declaration of Rights*, and *Frame of Government*, to be the Constitution of this commonwealth, and to remain in force therein for ever, unaltered, except in such articles as shall hereafter on experience be found to require improvement, and which shall by the same authority of the people, fairly delegated as this frame of government directs, be amended or improved for the more effectual obtaining and securing the great end and design of all government, herein before mentioned.

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

I. That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

…

IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

V. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community: And that the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish government in such manner as shall be by that community judged most conducive to the public weal.

Pennsylvania Acts, McKean, pp. vii–ix.

15.1.3.9.b Constitution, 1790

ARTICLE IX.

THAT *the general, great, and essential Principles of Liberty and free Government may be recognized and unalterably established,* WE DECLARE,

SECTION I. That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

SECT. II. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness: For the advancement of those ends they have, at all times, an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.

…

SECT. XXVI. To guard against transgressions of the high powers which we have delegated, WE DECLARE, That every thing in this article is excepted out of the general powers of government, and shall for ever remain inviolate.

Pennsylvania Acts, Dallas, pp. xxxiii, xxxvi.

15.1.3.10South Carolina: Constitution, 1790

ARTICLE IX.

Section 1. All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety and happiness.

South Carolina Laws, App., p. 41.

15.1.3.11Vermont: Constitution, 1777

WHEREAS all Government ought to be instituted and supported for the Security and Protection of the Community as such, and to enable the Individuals who compose it to enjoy their natural Rights, and the other Blessings which the Author of Existence has bestowed upon Man; and whenever those great Ends of Government are not obtained, the People have a Right by common Consent to change it, and take such Measures as

to them may appear necessary to promote their Safety and Happiness.

A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE STATE OF *VERMONT*

I. That all Men are born equally free and independent, and have certain natural, inherent and unalienable Rights, amongst which are the enjoying and defending Life and Liberty; acquiring, possessing and protecting Property, and pursuing and obtaining Happiness and Safety.

…

5. THAT all Power being originally inherent in, and consequently derived from the People; therefore all Officers of Government, whether legislative or executive, are their Trustees and Servants, and at all Times accountable to them.

Vermont Acts, pp. 1, 3.

15.1.3.12Virginia: Declaration of Rights, 1776

I. THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or devest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Virginia Acts, p. 33.

15.1.4OTHER TEXTS

15.1.4.1DECLARATION OF INDEPENDENCE, JULY 4, 1776

… We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it; and to institute new Government, laying its

foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Engrossed Manuscripts, DNA.

15.1.4.2Articles of Confederation, November 15, 1777

Article II. Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Continental Congress Papers, DNA.

15.1.4.3Richard Henry Lee to Edmund Randolph, Proposed Amendments, October 16, 1787

It having been found from universal experience that the most express declarations and reservations are necessary to protect the just rights and liberty of mankind from the silent, powerful and ever active conspiracy of those who govern; and it appearing to be the sense of the good people of America, by the various bills or declarations of rights whereon the governments of the greater number of the states are founded. That such precautions are necessary to restrain and regulate the exercise of the great powers given to rulers, In conformity with these principles, and from respect for the public sentiment on this subject, it is submitted, — That the new Constitution proposed for the government of the United States be bottomed upon a declaration, or bill of rights, clearly and precisely stating the principles upon which this social compact is founded. …

Virginia Gazette, December 22, 1787.

15.2DISCUSSION OF DRAFTS AND PROPOSALS

15.2.1THE FIRST CONGRESS

15.2.1.1June 8, 17892

15.2.1.1.a *Mr. Jackson.*

The more I consider the subject of amendments, the more, mr. speaker, I am convinced it is improper. I revere the rights of my constituents as much as any gentleman in congress, yet, I am against inserting a declaration of rights in the constitution, and that upon some of the reasons referred to by the gentleman last up. If such an addition is not dangerous or improper, it is at least unnecessary: that is a sufficient reason for not entering into the subject at a time when there are urgent calls for our attention to important business. Let me ask, gentlemen, what reason there is for the suspicions which are to be removed by this measure? Who are congress that such apprehensions should be entertained of them? Do we not belong to the mass of the people? Is there a single right but, if infringed, will affect us and our connections as much as any other person? Do we not return at the expiration of two years into private life, and is not this a security against encroachment? Are we not sent here to guard those rights which might be endangered, if the government was an aristocracy or a despotism? View for a moment the situation of Rhode-Island and, say whether the people's rights are more safe under state legislatures than under a government of limited powers? Their liberty is changed to licentiousness. But do gentlemen suppose bills of rights necessary to secure liberty? If they do, let them look at New York, New Jersey, Virginia, South Carolina, and Georgia. Those states have no bills of rights, and are the liberty of the citizens less safe in those states, than in the other of the United States? I believe they are not.

There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the government.

Congressional Register, June 8, 1789, vol. 1, p. 437.

15.2.1.1.b Mr. Jackson observed, That the Hon. Gentleman's ingenious detail, so far from convincing him of the expediency of bringing forward the subject of amendments at this time, had confirmed him in the contrary opinion: The prospect which such a discussion opened, was wide and extensive, and would preclude other benefits, of much greater moment, at the present juncture — He differed widely from the Gentleman, with regard to bills of

rights — several of the States had no such bills — Rhode-Island had none — there, liberty was carried to excess, and licentiousness triumphed — In some States, which had such a nominal security, the encroachments upon the rights of the people had been most complained of. …

Gazette of the U.S., June 10, 1787, p. 67, col. 2.

15.2.1.2August 17, 1789

15.2.1.2.a The 8th clause of the 4th proposition was taken up, which was "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Mr. Gerry said it ought to be "deny or impair," for the word "disparage" was not of plain import; he therefore moved to make that alteration, but not being seconded, the question was taken on the clause, and it passed in the affirmative.

Congressional Register, August 17, 1789, vol. 2, p. 226.

15.2.1.2.b 11th Amendment. ["]The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

This was agreed to without amendment.

Gazette of the U.S., August 22, 1787, p. 249, col. 3.

15.2.2STATE CONVENTIONS

15.2.2.1MASSACHUSETTS

15.2.2.1.aFebruary 4, 1788

Rev. Mr. THACHER. … There are other restraints, which, though not directly named in this Constitution, yet are evidently discerned by every man of common observation. These are, the government of the several states, and the spirit of liberty in the people.

Elliot, vol. 2, p. 145.

15.2.2.1.bFebruary 5, 1788

Mr. PARSONS demonstrated the impracticability of forming a bill, in a national constitution, for securing individual rights, and showed the inutility of the measure, from the ideas, that no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced.

Elliot, vol. 2, pp. 161–62.

15.2.2.2New York, July 1, 1788

Mr. TREDWELL. Sir, little accustomed to speak in public, and always inclined, in such an assembly as this, to be a hearer rather than a speaker, on a less important occasion than the present I should have contented myself with a silent vote; but when I consider the nature of this dispute, that it is a contest, not between little states and great states, (as we have been told,) between little folks and great folks, between patriotism and ambition, between the navigating and non-navigating individuals, (for not one of the amendments we contend for has the least reference to the clashing interests of the states;) when I consider, likewise, that a people jealous of their liberties, and strongly attached to freedom, have reposed so entire a confidence in this assembly, that upon our determination depends their future enjoyment of those invaluable rights and privileges, which they have so lately and so gallantly defended at every risk and expense, both of life and property, — it appears to me so interesting and important, that I cannot be totally silent on the occasion, lest lisping babes should be taught to curse my name, as a betrayer of their freedom and happiness.

The gentleman who first opened this debate did (with an emphasis which I believe convinced every one present of the propriety of the advice) urge the necessity of proceeding, in our deliberations on this important subject, coolly and dispassionately. With how much candor this advice was given, appears from the subsequent parts of a long speech, and from several subsequent speeches almost totally addressed to our fears. The people of New Jersey and Connecticut are so exceedingly exasperated against us, that, totally regardless of their own preservation, they will take the two rivers of Connecticut and Delaware by their extremities, and, by dragging

them over our country, will, by a sweeping deluge, wash us all into the Hudson, leaving neither house nor inhabitant behind them. But if this event should not happen, doubtless the Vermontese, with the British and tories our natural enemies, would, by bringing down upon us the great Lake Ontario, sweep hills and mountains, houses and inhabitants, in one deluge, into the Atlantic. These, indeed, would be terrible calamities; but terrible as they are, they are not to be compared with the horrors and desolation of tyranny. The arbitrary courts of Philip in the Netherlands, in which life and property were daily confiscated without a jury, occasioned as much misery and a more rapid depopulation of the province, before the people took up arms in their own defence, than all the armies of that haughty monarch were able to effect afterwards; and it is doubtful, in my mind, whether governments, by abusing their powers, have not occasioned as much misery and distress, and nearly as great devastations of the human species, as all the wars which have happened since Milton's battle of the angels to the present day. The end or design of government is, or ought to be, the safety, peace, and welfare of the governed. Unwise, therefore, and absurd in the highest degree, would be the conduct of that people, who, in forming a government, should give to their rulers power to destroy them and their property, and thereby defeat the very purpose of their institutions; or, in other words, should give unlimited power to their rulers, and not retain in their own hands the means of their own preservation. The first governments in the world were parental, the powers of which were restrained by the laws of nature; and doubtless the early succeeding governments were formed on the same plan, which, we may suppose, answered tolerably well in the first ages of the world, while the moral sense was strong, and the laws of nature well understood, there being then no lawyers to explain them away. But in after times, when kings became great, and courts crowded, it was discovered that governments should have a right to tyrannize, and a power to oppress; and at the present day, when the *juris periti* are become so skilful in their profession, and quibbling is reduced to a science, it is become extremely difficult to form a constitution which will secure liberty and happiness to the people, or laws under which property is safe. Hence, in modern times, the design of the people, in forming an original constitution of government, is not so much to give powers to their rulers, as to guard against the abuse of them; but, in a federal one, it is different.

Sir, I introduce these observations to combat certain principles which have been daily and confidently advanced by the favorers of the present Constitution, and which appear to me totally indefensible. The first and

grand leading, or rather misleading, principle in this debate, and on which the advocates for this system of unrestricted powers must chiefly depend for its support, is that, in forming a constitution, whatever powers are not expressly granted or given the government, are reserved to the people, or that rulers cannot exercise any powers but those expressly given to them by the Constitution. Let me ask the gentleman who advanced this principle, whether the commission of a Roman dictator, which was in these few words — to take care that the state received no harm — does not come up fully to their ideas of an energetic government; or whether an invitation from the people to one or more to come and rule over them, would not clothe the rulers with sufficient powers. If so, the principle they advance is a false one. Besides, the absurdity of this principle will evidently appear, when we consider the great variety of objects to which the powers of the government must necessarily extend, and that an express enumeration of them all would probably fill as many volumes as Pool's Synopsis of the Critics. But we may reason with sufficient certainty on the subject, from the sense of all the public bodies in the United States, who had occasion to form new constitutions. They have uniformly acted upon a direct and contrary principle, not only in forming the state constitutions and the old Confederation, but also in forming this very Constitution, for we do not find in every state constitution express resolutions made in favor of the people; and it is clear that the late Convention at Philadelphia, whatever might have been the sentiments of some of its members, did not adopt the principle, for they have made certain reservations and restrictions, which, upon that principle, would have been totally useless and unnecessary; and can it be supposed that wise body, whose only apology for the great ambiguity of many parts of that performance, and the total omission of some things which many esteem essential to the security of liberty, was a great desire for brevity, should so far sacrifice that great and important object, as to insert a number of provisions which they esteemed totally useless? Why is it said that the privilege of the writ of *habeas corpus* shall not be suspended, unless, in cases of rebellion or invasion, the public safety may require it? What clause in the Constitution, except this very clause itself, gives the general government a power to deprive us of that great privilege, so sacredly secured to us by our state constitutions? Why is it provided that no bill of attainder shall be passed, or that no title of nobility shall be granted? Are there any clauses in the Constitution extending the powers of the general government to these objects? Some gentlemen say that these, though not necessary, were inserted for greater caution. I could have

wished, sir, that a greater caution had been used to secure to us the freedom of election, a sufficient and responsible representation, the freedom of the press, and the trial by jury both in civil and criminal cases.

These, sir, are the rocks on which the Constitution should have rested; no other foundation can any man lay, which will secure the sacred temple of freedom against the power of the great, the undermining arts of ambition, and the blasts of profane scoffers — for such there will be in every age — who will tell us that all religion is in vain; that is, that our political creeds, which have been handed down to us by our forefathers as sacredly as our Bibles, and for which more of them have suffered martyrdom than for the creed of the apostles, are all nonsense; who will tell us that paper constitutions are mere paper, and that parchment is but parchment, that jealousy of our rulers is a sin, &c. I could have wished also that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment — a tyranny of all others most dreadful, and which will assuredly be exercised whenever it shall be thought necessary for the promotion and support of their political measures. It is ardently to be wished, sir, that these and other invaluable rights of freemen had been as cautiously secured as some of the paltry local interests of some of the individual states. But it appears to me, that, in forming this Constitution, we have run into the same error which the lawyers and Pharisees of old were charged with; that is, while we have secured the tithes of mint, anise, and cumin, we have neglected to weightier matters of the law, judgment, mercy, and faith. …

…

In this Constitution, sir, we have departed widely from the principles and political faith of ’76, when the spirit of liberty ran high, and danger put a curb on ambition. Here we find no security for the rights of individuals, no security for the existence of our state governments; here is no bill of rights, no proper restriction of power; our lives, our property, and our consciences, are left wholly at the mercy of the legislature, and the powers of the judiciary may be extended to any degree short of almighty. Sir, in this Constitution we have not only neglected, — we have done worse, — we have openly violated, our faith, — that is our public faith.

Elliot, vol. 2, pp. 396–401.

15.2.2.3North Carolina, July 29, 1788

Mr. MACLAINE. Mr. Chairman, I beg leave to make a few observations. One of the gentleman's objections to the Constitution now under consideration is, that it is not the act of the states, but of the people; but that it ought to be the act of the states; and he instances the delegation of power by the states to the Confederation, at the commencement of the war, as a proof of this position. I hope, sir, that all power is in the people, and not in the state governments. If he will not deny the authority of the people to delegate power to agents, and to devise such a government as a majority of them thinks will promote their happiness, he will withdraw his objection. The people, sir, are the only proper authority to form a government. They, sir, have formed their state governments, and can alter them at pleasure. Their transcendent power is competent to form this or any other government which they think promotive of their happiness. But the gentleman contends that there ought to be a bill of rights, or something of that kind—something declaring expressly, that all power not expressly given to the Constitution ought to be retained by the states; and he produces the Confederation as authority for its necessity. When the Confederation was made, we were by no means so well acquainted with the principles of government as we are now. We were then jealous of the power of our rulers, and had an idea of the British government when we entertained that jealousy. There is no people on earth so well acquainted with the nature of government as the people of America generally are. We know now that it is agreed upon by most writers, and men of judgment and reflection, that all power is in the people, and immediately derived from them. The gentleman surely must know that, if there be certain rights which never can, nor ought to, be given up, these rights cannot be said to be given away, merely because we have omitted to say that we have not given them up. Can any security arise from declaring that we have a right to what belongs to us? Where is the necessity of such a declaration? If we have this inherent, this unalienable, this indefeasible title to those rights, if they are not given up, are they not retained? If Congress should make a law beyond the powers and the spirit of the Constitution, should we not say to Congress, "You have no authority to make this law. There are limits beyond which you cannot go. You cannot exceed the power prescribed by the Constitution. You are amenable to us for your conduct. This act is unconstitutional. We will disregard it, and punish you for the attempt."

But the gentleman seems to be most tenacious of the judicial power of

the states. The honorable gentleman must know, that the doctrine of reservation of power not relinquished, clearly demonstrates that the judicial power of the states is not impaired. …

…

Mr. SPENCER answered, that the gentleman last up had misunderstood him. He did not object to the caption of the Constitution, but he instanced it to show that the United States were not, merely as states, the objects of the Constitution; but that the laws of Congress were to operate upon individuals, and not upon states. He then continued: I do not mean to contend that the laws of the general government should not operate upon individuals. I before observed that this was necessary, as laws could not be put in execution against states without the agency of the sword, which, instead of answering the ends of government, would destroy it. I endeavored to show that, as the government was not to operate against states, but against individuals, the rights of individuals ought to be properly secured. In order to constitute this security, it appears to me there ought to be such a clause in the Constitution as there was in the Confederation, expressly declaring, that every power, jurisdiction, and right, which are not given up by it, remain in the states. Such a clause would render a bill of rights unnecessary. But as there is no such clause, I contend that there should be a bill of rights, ascertaining and securing the great rights of the states and people. Besides my objection to the revision of facts by the federal court, and the insecurity of jury trial, I consider the concurrent jurisdiction of those courts with the state courts as extremely dangerous. …

Elliot, vol. 4, pp. 160–64.

15.2.2.4Pennsylvania

15.2.2.4.aOctober 28, 1787

Mr. WILSON. … In a government possessed of enumerated powers, such a measure [adopting a bill of rights] would be not only unnecessary, but preposterous and dangerous. Whence comes this notion, that in the United States there is no security without a bill of rights? Have the citizens of South Carolina no security for their liberties? They have no bill of rights. Are the citizens on the eastern side of the Delaware less free, or less secured in their liberties, than those on the western side? The state of New Jersey has no bill of rights. The state of New York has no bill of rights. The

states of Connecticut and Rhode Island have no bill of rights. I know not whether I have exactly enumerated the states who have not thought it necessary to add *a bill of rights* to their constitutions; but this enumeration, sir, will serve to show by experience, as well as principle, that, even in single governments, a bill of rights is not an essential or necessary measure. But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgement, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the peop e [*sic*].

Elliot, vol. 2, pp. 436–37.

15.2.2.4.bDecember 4, 1787

MR. WILSON. … I consider that there are very few who understand the whole of these rights. All the political writers, from *Grotius* and *Puffendorf* down to *Vattel*, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens.

… Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing. …

Elliot, vol. 2, p. 454.

15.2.2.4.cSeptember 3, 1788

PROCEEDINGS OF THE MEETING [of citizens] AT HARRISBURG, IN PENNSYLVANIA

We, the conferees, … agree in opinion,— …

I. That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States: nor

shall any authority, power, or jurisdiction, be assumed or exercised by the executive or judiciary departments of the Union, under color or pretence of construction or fiction; but all the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several states in the Union, according to their respective constitutions; and that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution.

Elliot, vol. 2, pp. 543, 545.

15.2.2.5North Carolina, July 29, 1788

MR. IREDELL. … The gentleman says that unalienable rights ought not to be given up. Those rights which are unalienable are not alienated. They still remain with the great body of the people. If any right be given up that ought not to be, let it be shown. Say it is a thing which affects your country, and that it ought not be surrendered: this would be reasonable. But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

MR. BLOODWORTH. … By its not being provide for, it is expressly provided against. I still see the necessity of a bill of rights. Gentlemen use contradictory arguments on this subject, if I recollect right. Without the most express restrictions, Congress may trample on your rights. Every possible precaution should be taken when we grant powers. Rulers are always disposed to abuse them.

Elliot, vol. 4, pp. 166–67.

15.2.2.6South Carolina, May 20, 1788

Mr. PATRICK DOLLARD. … They are nearly all, to a man, opposed to this new Constitution, because, they say, they have omitted to insert a bill of rights therein, ascertaining and fundamentally establishing, the unalienable rights of men, without a full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary that a good government should have the control. They say that they are by no means against vesting Congress with ample and sufficient powers; but to make over to them, or any set of men, their birthright, comprised in Magna Carta, which this new Constitution absolutely does, they can never agree to.

Elliot, vol. 4, p. 337.

15.2.2.7Virginia

15.2.2.7.aJune 12, 1788

Mr. HENRY. … When we see men of such talents and learning compelled to use their utmost abilities to convince themselves that there is no danger, is it not sufficient to make us tremble? Is it not sufficient to fill the minds of the ignorant part of men with fear? If gentlemen believe that the apprehensions of men will be quieted, they are mistaken, since our best-informed men are in doubt with respect to the security of our rights. Those who are not so well informed will spurn at the government. When our common citizens, who are not possessed with such extensive knowledge and abilities are called upon to change their bill of rights (which, in plain, unequivocable terms, secures their most valuable rights and privileges) for construction and implication, will they implicitly acquiesce? Our declaration of rights tells us that "all men are by nature free and independent," &c. … Will they exchange these rights for logical reasons?

Elliot, vol. 3, pp. 317–18.

15.2.2.7.bJune 14, 1788

Mr. GEORGE MASON. Mr. Chairman, gentlemen say there is no new power given by this clause. Is there any thing in this Constitution which secures to the states the powers which are said to be retained? Will powers remain to the states which are not expressly guarded and reserved? I will suppose a case. Gentlemen may call it an impossible case, and suppose that Congress will act with wisdom and integrity. Among the enumerated

powers, Congress are to lay and collect taxes, duties, imposts, and excises, and to pay the debts, and to provide for the general welfare and common defence; and by that clause (so often called the *sweeping clause*) they are to make all laws necessary to execute those laws. Now, suppose oppressions should arise under this government, and any writer should dare to stand forth, and expose to the community at large the abuses of those powers; could not Congress, under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press? Might they not even bring the trial of this restriction within the ten miles square, when there is no prohibition against it? Might they not thus destroy the trial by jury? Would they not extend their implication? It appears to me that they may and will. And shall the support of our rights depend on the bounty of men whose interest it may be to oppress us? That Congress should have the power to provide for the general welfare of the Union, I grant. But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be perverted to its destruction.

Many gentlemen, whom I respect, take different sides of this question. We wish this amendment to be introduced, to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States. This clause has never been complained of, but approved by all. Why not, then, have a similar clause in this Constitution, in which it is the more indispensably necessary than in the Confederation, because of the great augmentation of power vested in the former? In my humble apprehension, unless there be some such clear and finite expression, this clause now under consideration will go to any thing our rulers may think proper. Unless there be some express declaration that every thing not given is retained, it will be carried to any power Congress may please.

MR. HENRY moved to read from the 8th to the 13th article of the declaration of rights; which was done.

MR. GEORGE NICHOLAS, in reply to the gentlemen opposed to the clause under debate, went over the same grounds, and developed the same principles, which Mr. Pendleton and Mr. Madison had done. The opposers of the clause, which gave the power of providing for the general welfare,

supposed its dangers to result from its connection with, and extension of, the powers granted in the other clauses. He endeavored to show the committee that it only empowered Congress to make such laws as would be necessary to enable them to pay the public debts and provided for the common defence; that this general welfare was united, not to the general power of legislation, but to the particular power of laying and collecting taxes, imposts, and excises, for the purpose of paying the debts and providing for the common defence,—that is, that they could raise as much money as would pay the debts and provide for the common defence, in consequence of this power. The clause which was affectedly called the *sweeping clause* contained no new grant of power. To illustrate this position, he observed that, if it had been added at the end of every one of the enumerated powers, instead of being inserted at the end of all, it would be obvious to any one that it was not augmentation of power. If, for instance, at the end of the clause granting power to lay and collect taxes, who could suspect it to be an addition of power? As it would grant no new power if inserted at the end of each clause, it could not when subjoined to the whole.

He then proceeded thus: But, says he, who is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void or else the people will have a right to declare it void. Is this depending on any man? But, says the gentleman, it may go to any thing. It may destroy the trial by jury; and they may say it is necessary for providing for the general defence. The power of providing for the general defence only extends to raise any sum of money they may think necessary, by taxes, imposts, &c. But, says he, our only defence against oppressive laws consists in the virtue of our representatives. This was misrepresented. If I understand it right, no new power can be exercised. As to those which are actually granted, we trust to the fellow-feelings of our representatives; and if we are deceived, we then trust to altering our government. It appears to me, however, that we can confide in their discharging their powers rightly, from the peculiarity of their situation, and connection with us. If, sir, the powers of the former Congress were very inconsiderable, that body did not deserve to have great powers.

It was so constructed that it would be dangerous to invest it with such. But why were the articles of the bill of rights read? Let him show us that those rights are given up by the Constitution. Let him prove them to be

violated. He tells us that the most worthy characters of the country differ as to the necessity of a bill of rights. It is a simple and plain proposition. It is agreed upon by all that the people have all power. If they part with any of it, is it necessary to declare that they retain the rest? Liken it to any similar case. If I have one thousand acres of land, and I grant five hundred of it, must I declare that I retain the other five hundred? Do I grant the whole thousand acres, when I grant five hundred, unless I declare that the five hundred I do not give belong to me still? It is so in this case. After granting some powers, the rest must remain with the people.

Gov. RANDOLPH observed that he had some objections to the clause. He was persuaded that the construction put upon it by the gentlemen, on both sides, was erroneous; but he thought any construction better than going into anarchy.

MR. GEORGE MASON still thought that there ought to be some express declaration in the Constitution, asserting that rights not given to the general government were retained by the states. He apprehended that, unless this was done, many valuable and important rights would be concluded to be given up by implication. All governments were drawn from the people, though many were perverted to their oppression. The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people, by their bill of rights, declared to be paramount to the power of the legislature. He asked, Why should it not be so in this Constitution? Was it because we were more substantially represented in it than in the state government? If, in the state government, where the people were substantially and fully represented, it was necessary that the great rights of human nature should be secure from the encroachments of the legislature, he asked if it was not more necessary in this government, where they were but inadequately represented? He declared that artful sophistry and evasions could not satisfy him. He could see no clear distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a bill of rights, implication might swallow up all our rights.

MR. HENRY. Mr. Chairman, the necessity of a bill of rights appears to me to be greater in this government than ever it was in any government before. I have observed already, that the sense of the European nations, and particularly Great Britain, is against the construction of rights being retained which are not expressly relinquished. I repeat, that all nations have adopted this construction—that all rights not expressly and unequivocally

reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers. It is so in Great Britain; for every possible right, which is not reserved to the people by some express provision or compact, is within the king's prerogative. It is so in that country which is said to be in such full possession of freedom. It is so in Spain, Germany, and other parts of the world. Let us consider the sentiments which have been entertained by the people of America on this subject. At the revolution, it must be admitted that it was their sense to set down those great rights which ought, in all countries, to be held inviolable and sacred. Virginia did so, we all remember. She made a compact to reserve, expressly, certain rights.

When fortified with full, adequate, and abundant representation, was she satisfied with that representation? No. She most cautiously and guardedly reserved and secured those invaluable, inestimable rights and privileges, which no people, inspired with the least glow of patriotic liberty, ever did, or ever can, abandon. She is called upon now to abandon them, and dissolve that compact which secured them to her. She is called upon to accede to another compact, which most infallibly supersedes and annihilates her present one. Will she do it? This is the question. If you intend to reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights. If the people do not think it necessary to reserve them, they will be supposed to be given up. How were the congressional rights defined when the people of America united by a confederacy to defend their liberties and rights against the tyrannical attempts of Great Britain? The states were not then contented with implied reservation. No, Mr. Chairman. It was expressly declared in our Confederation that every right was retained by the states, respectively, which was not given up to the government of the United States. But there is no such thing here. You, therefore, by a natural and unavoidable implication, give up your rights to the general government.

Your own example furnishes an argument against it. If you give up these powers, without a bill of rights, you will exhibit the most absurd thing to mankind that ever the world saw — a government that has abandoned all its powers — the powers of direct taxation, the sword, and the purse. You have disposed them to Congress, without a bill of rights — without check, limitation, or control. And still you have checks and guards; still you keep barriers — pointed where? Pointed against your weakened, prostrated, enervated state government! You have a bill of rights to defend you against

the state government, which is bereaved of all power, and yet you have none against Congress, though in full and exclusive possession of all power! You arm yourselves against the weak and defenceless, and expose yourselves naked to the armed and powerful. Is not this a conduct of unexampled absurdity? What barriers have you to oppose to this most strong, energetic government? To that government you have nothing to oppose. All your defence is given up. This is a real, actual defect. It must strike the mind of every gentleman. When our government was first instituted in Virginia, we declared the common law of England to be in force.

That system of law which has been admired, and has protected us and our ancestors, is excluded by that system. Added to this, we adopted a bill of rights. By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? By the ancient common law, the trial of all facts is decided by a jury of impartial men from the immediate vicinage. This paper speaks of different juries from the common law in criminal cases; and in civil controversies excludes trial by jury altogether. There is, therefore, more occasion for the supplementary check of a bill of rights now than then. Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence — petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights? — “that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. That paper tells you that the trial of crimes shall be by jury, and held in the state where the crime shall have been committed. Under this extensive provision, they may proceed in a manner extremely dangerous to liberty: a person accused may be carried from one extremity of the state to another, and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both, and who may be biased against him. Is not this sufficient to alarm men? How different is this from the immemorial practice

of your British ancestors, and your own! I need not tell you that, by the common law, a number of hundredors were required on a jury, and that afterwards it was sufficient if the jurors came from the same county. With less than this the people of England have never been satisfied. That paper ought to have declared the common law in force.

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? — That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany — of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. And can any man think it troublesome, when we can, by a small interference, prevent our rights from being lost? If you will, like the Virginian government, give them knowledge of the extent of the rights retained by the people, and the powers of themselves, they will, if they be honest men, thank you for it. Will they not wish to go on sure grounds? But if you leave them otherwise, they will not know how to proceed; and, being in a state of uncertainty, they will assume rather than give up powers by implication.

A bill of rights may be summed up in a few words. What do they tell us? — That our rights are reserved. Why not say so? Is it because it will consume too much paper? Gentlemen’s reasoning against a bill of rights does not satisfy me. Without saying which has the right side, it remains doubtful. A bill of rights is a favorite thing with the Virginians and the people of the other states likewise. It may be their prejudice, but the government ought to suit their geniuses; otherwise, its operation will be unhappy. A bill of rights, even if its necessity be doubtful, will exclude the possibility of dispute; and, with great submission, I think the best way is to have no dispute. In the present Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, &c. There was certainly some celestial influence governing those who deliberated on that

Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds. With respect to the freedom of the press, I need say nothing; for it is hoped that the gentlemen who shall compose Congress will take care to infringe as little as possible the rights of human nature. This will result from their integrity. They should, from prudence, abstain from violating the rights of their constituents. They are not, however, expressly restrained. But whether they will intermeddle with that palladium of our liberties or not, I leave you to determine.

MR. GRAYSON thought it questionable whether rights not given up were reserved. A majority of the states, he observed, had expressly reserved certain important rights by bills of rights, and that in the Confederation there was a clause declaring expressly that every power and right not given up was retained by the states. It was the general sense of America that such a clause which was necessary; otherwise, why did they introduce a clause which was totally unnecessary? It had been insisted, he said, in many parts of America, that a bill of rights was only necessary between a prince and people, and not in such a government as this, which was a compact between the people themselves. This did not satisfy his mind; for so extensive was the power of legislation, in his estimation, that he doubted whether, when it was once given up, *any thing* was retained. He further remarked, that there were some negative clauses in the Constitution, which refuted the doctrine contended for by the other side. For instance; the 2d clause of the 9th section of the 1st article provided that “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.” And, by the last clause of the same section, “no title of nobility shall be granted by the United States.” Now, if these restrictions had not been here inserted, he asked whether Congress would not most clearly have had a right to suspend that great and valuable right, and to grant titles of nobility. When, in addition to these considerations, he saw they had an indefinite power to provide for the general welfare, he thought there were great reasons to apprehend great dangers. He thought, therefore, that there ought to be a bill of rights.

Elliot, vol. 3, pp. 441–49.

15.2.2.7.cJune 24, 1788

Mr. HENRY. … What is the inference when you enumerate the rights which you are to enjoy? That those not enumerated are relinquished.

…

Mr. HENRY. … Other essential rights—what are they? The world will say that you intend to give them up. When you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered.

…

Mr. MADISON. With respect to the proposition of the honorable gentleman to my left, (Mr. Wythe) gentlemen apprehend that, by enumerating three rights, it implied there were no more. The observations made by a gentleman lately up, on that subject, correspond precisely with my opinion. That resolution declares that the powers granted by the proposed Constitution are the gift of the people, and may be resumed by them when perverted to their oppresion, and every power not granted thereby remains with the people, and at their will. It adds, likewise, that not right, of any denomination, can be cancelled, abridged, restrained, or modified, by the general government, or any of its officers, except in those instances in which power is given by the Constitution for these purposes. There cannot be a more positive and unequivocal declaration of the principle of the adoption — that everything not granted is reserved. This is obviously and self-evidently the case, without the declaration. Can the general government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied that everything omitted is given to the general government? Has not the honorable gentleman himself admitted that an imperfect enumeration is dangerous? Does the Constitution say that they shall not alter the law of descents, or do those things which would subvert the whole system of the state laws? If it did, what was not excepted would be granted. Does it follow, from the omission of such restrictions, that they can exercise powers not delegated? The reverse of the proposition holds. The delegation alone warrants the exercise of any power.

Elliot, vol. 3, pp. 587–88, 594, 620.

15.2.3PHILADELPHIA CONVENTION

None.

15.2.4NEWSPAPERS AND PAMPHLETS

15.2.4.1John DeWitt, October 1787

The Compact itself is a recital upon paper of that proportion of the subject's natural rights, intended to be parted with, for the benefit of adverting to it in case of dispute. Miserable indeed would be the situation of those individual States who have not prefixed to their Constitutions a Bill of Rights, if, as a very respectable, learned Gentleman at the Southward observes, "the People, when they established the powers of legislation under their separate Governments, invested their Representatives with every right and authority which they did not, in explicit terms, reserve; and therefore upon every question, respecting the jurisdiction of the House of Assembly, if the Frame of Government is silent, the jurisdiction is efficient and complete." In other words, those powers which the people by their Constitutions expressly give them, they enjoy by positive grant, and those remaining ones, which they never meant to give them, and which the Constitutions say nothing about, they enjoy by tacit implication, so that by one means and by the other, they became possessed of the whole. — This doctrine is but poorly calculated for the meridian of America, where the nature of compact, the mode of construing them, and the principles upon which society is founded, are so accurately known and universally diffused. That insatiable thirst for unconditional controul over our fellow-creatures, and the facility of sounds to convey essentially different ideas, produced the first Bill of Rights ever prefixed to a Frame of Government. The people, altho' fully sensible that they reserved every title of power they did not expressly grant away, yet afraid that the words made use of, to express those rights so granted might convey more than they originally intended, they chose at the same moment to express in different language those rights which the agreement did not include, and which they never designed to part with, endeavoring thereby to prevent any cause for future altercation and the intrusion into society of that

doctrine of tacit implication which has been the favorite theme of every tyrant from the origin of all governments to the present day.

[Boston] American Herald, Storing, vol. 4, p. 22.

15.2.4.2James Wilson, October 6, 1787

It will be proper however, before I enter into the refutation of the charges that are alledged, to mark the leading descrimination [*sic*] between the state constitutions, and the constitution of the United States. When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating fœderal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: for it would have been superfluous and absurd to have stipulated with a foederal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence.

Pennsylvania Herald (October 9, 1787), Kaminski & Saladino, vol. 13, pp. 339–40.

15.2.4.3The Federal Farmer, No. 4, October 12, 1787

DEAR SIR, … It is said, that when the people make a constitution, and delegate powers, that all powers not delegated by them to those who govern, is reserved to the people; and that the people, in the present case, have reserved in themselves, and in there [*sic*] state governments, every right and power not expressly given by the federal constitution to those who shall administer the national government. It is said on the other hand, that the

people, when they make a constitution, yield all power not expressly reserved to themselves. The truth is, in either case, it is mere matter of opinion, and men usually take either side of the argument, as will best answer their purposes: But the general assumption being, that men who govern, will, in doubtful cases, construe laws and constitutions most favourably for encreasing their own powers; all wise and prudent people, in forming constitutions, have drawn the line, and carefully described the powers parted with and the powers reserved.

Kaminski & Saladino, vol. 14, pp. 44–45.

15.2.4.4An Old Whig, No. 2, October 17, 1787

MR. PRINTER, … The principle is this: that "in *delegating federal powers*, the congressional authority is to be collected, *not from tacit implication*, but from *the positive grant* expressed in the instrument of union," "*that everything which is not given is reserved." If this* be a just representation of the matter, the authority of the several states will be sufficient to protect our liberties from the encroachments of Congress, without any continental bill of rights; *unless* the powers which are *expressly given* to Congress are *too large*.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 400.

15.2.4.5The Federal Farmer, No. 16, January 20, 1788

… We must consider this constitution, when adopted, as the supreme act of the people, and in construing it hereafter, we and our posterity must strictly adhere to the letter and spirit of it, and in no instance depart from them: … by the people's now establishing certain fundamental rights, it is strongly implied, that they are of opinion, that they would not otherwise be secured as a part of the federal system, or be regarded in the federal administration as fundamental. … — Further, the people, thus establishing some few rights, and remaining totally silent about others similarly circumstanced, the implication indubitably is, that they mean to relinquish the latter, or at least feel indifferent about them. Rights, therefore, inferred from general principles of reason, being precarious and hardly ascertainable in the

common affairs of society, and the people, in forming a federal constitution, explicitly shewing they conceive these rights to be thus circumstanced, and accordingly proceed to enumerate and establish some of them, the conclusion will be, that they have established all which they esteem valuable and sacred. On every principle, then, the people especially having began, ought to go through enumerating, and establish particularly all the rights of individuals, which can by any possibility come in question in making and executing federal laws.

Storing, vol. 2, pp. 326–27.

15.2.4.6The Federalist, No. 84, May 28, 1788

I go further, and affirm that the bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evidence that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.

Kaminski & Saladino, vol. 18, p. 130.

15.2.5LETTERS AND DIARIES

15.2.5.1George Washington to President of Congress, September 17, 1787

… Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend, as well on situation and circumstance, as on the object to be obtained. It is at all times

difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was encreased [*sic*] by a difference among the several States as to their situation, extent, habits, and particular interests.

Kaminiski and Saladino, vol. 13, p. 211.

15.2.5.2James Madison to Thomas Jefferson, October 24, 1787

… A reform therefore which does not make provision for private rights, must be materially defective. The restraints agst. paper emissions, and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be controuled by some provision which reaches all cases whatsoever. The partial provision made, supposes the disposition which will evade it. … The great desideratum in Government is, so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society to controul one part from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the entire Society. …

Kaminski & Saladino, vol. 13, pp. 447, 449.

15.2.5.3Thomas Jefferson to James Madison, December 20, 1787

To say, as mr Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the Audience to whom it was addressed, but is surely gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. It was a hard conclusion to say because there has been no uniformity among the states as to cases triable by jury, because some have been so incautious as to abandon this mode of trial, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just and wise to have concluded the other way that as most of the states had judiciously preserved this palladium, those who had

wandered should be brought back to it, and to have established general right instead of wrong. Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.

Boyd, vol. 12, p. 440.

15.2.5.4 George Washington to Marquis de Lafayette, April 28, 1788

… For example: there was not a member of the convention, I believe, who had the least objection to what is contended for by the Advocates for a *Bill of Rights* and *Tryal by Jury*. The first, where the people evidently retained every thing which they did not in express terms give up, was considered nugatory as you will find to have been more fully explained by Mr. Wilson and others: — And as to the second, it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment.

Kaminski and Saladino, vol. 17, p. 235.

15.2.5.5 James Madison to Thomas Jefferson, October 17, 1788

… It is true nevertheless that not a few, particularly in Virginia have contended for the proposed alterations from the most honorable & patriotic motives; and that among the advocates for the Constitution, there are some who wish for further guards to public liberty & individual rights. As far as these may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution. There is scarce any point on which the party in opposition is so much divided as to its importance and its propriety. My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it

might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light 1. because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of Conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power. One of the objections in New England was that the Constitution by prohibiting religious tests opened a door for Jews Turks & infidels. 3. because the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4 because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.

Rutland & Hobson, vol. 11, p. 297.

15.2.5.6Thomas Jefferson to James Madison, March 15, 1789

… In the arguments in favor of a declaration of rights, you omit one which has great weight to me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity. … The Declaration of rights is like all other human blessings alloyed with some inconveniences, and not accomplishing fully it's [*sic*] object. But the good in this instance vastly overweighs the evil. I cannot refrain from making short answers to the objections which your letter states to have been raised. I. That the rights in question are reserved by the manner in which the federal powers are granted. Answer. a constitutive act may certainly be so formed as to need no declaration of rights. The act itself has the force of a declaration as far as it goes: and if it goes to all material points nothing more is wanting.

Boyd, vol. 14, pp. 659–60.

15.2.5.7Tench Coxe to James Madison, June 18, 1789

I observe you have brought forward the amendments you proposed to the federal Constitution. I have given them a very careful perusal, and have attended particularly to their reception by the public. The most decided friends of the constitution admit (generally) that they will meliorate the government by removing some points of litigation and jealousy, and by heightening and strengthening the barriers between necessary power and indispensable liberty. … Those who are honest are well pleased at the footing on which the press, liberty of conscience, original right & power, trial by jury &ca. are rested.

Veit, p. 253.

15.2.5.8Richard Parker to Richard Henry Lee, July 6, 1789

I observe the slip of the newspaper sent me and know the design, but I still think a Bill of rights not necessary here. … However I have no objection to such a bill of Rights as has been proposed by Mr. Maddison [*sic*] because we declare that we do not abridge our Rights by the reservation that we retain all that we have not specifically given. …

Veit, p. 260.

15.2.5.9Henry Gibbs to Roger Sherman, July 16, 1789

… All Ambiguity of Expression certainly ought to be remov'd; Liberty of Conscience in religious matters, right of trial by Jury, Liberty of the Press &c. may perhaps be more explicitly secur'd to the Subject & a general reservation made to the States respectively of all the powers not expressly delegated to the general Government. …

Veit, p. 263.

15.2.5.10William L. Smith to Edward Rutledge, August 10, 1789

… I shall support the Amendmts [*sic*] proposed to the Constitution that any exception to the powers of Congress shall not be so construed as to give it

any powers not *expressly* given, & the enumeration of certain rights shall not be so construed as to deny others retained by the people — & the powers not delegated by this Constn. nor prohibited by it to the States, are reserved to the States respectively. …

Veit, p. 273.

15.2.5.11James Madison to George Washington, December 5, 1789

[Randolph's] principle objection was pointed agst. the word *'retained,'* in the eleventh proposed amendment [Ninth Amendment], and his argument if I understood it applied in this manner — that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of, and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe and more consistent with the spirit of the 1st & 17th amendts. proposed by Virginia that this reservation agst. constructive power, should operate rather as a provision agst. extending the powers of Congs. by their own authority, than a protection to rights reducible to no definitive certainty. But others, among whom I am one, see not the force of this distinction. …

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing.

Hobson & Rutland, vol. 12, pp. 458–59.

15.3DISCUSSION OF RIGHTS

15.3.1TREATISES

15.3.1.1Blackstone, 1765

> For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principle view of human laws is, or ought to be, to explain, protect, and enforce such rights as are absolute. …
>
> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind.
>
> Commentaries, bk. 1, ch. 1; vol. 1, p. 120.

15.3.2CASE LAW

None.

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.

2 For Madison's speech in support of his proposals, see 1.2.1.1.a–c.

CHAPTER 16

AMENDMENT X

RESERVATION OF POWERS CLAUSE

16.1TEXTS

16.1.1DRAFTS IN FIRST CONGRESS

16.1.1.1Proposal by Madison in House, June 8, 1789

16.1.1.1.a Eighthly. That immediately after article 6th [of the Constitution], be inserted, as article 7th, the clauses following, to wit:

The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judcial; [*sic*] nor the judicial exercise the powers vested in the legislative or executive departments.

The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the States respectively.

Congressional Register, June 8, 1789, vol. 1, p. 429.

16.1.1.1.b *Eighthly*. That immediately after article 6th [of the Constitution], be inserted, as article 7th, the clauses following, to wit:

The powers delegated by this constitution, and [*sic;* are] appropriated to the departments to which they are respective [*sic*] distributed: so that the legislatively [*sic*] department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments. The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively.

Daily Advertiser, June 12, 1789, p. 2, col. 2.

16.1.1.1.c *Eighth*. That immediately after article 6th [of the Constitution], be inserted, as article 7th, the clause following, to wit:

The powers delegated by this constitution, and [*sic;* are] appropriated to the departments to which they are respectively distributed: so that the legislatively [*sic*] department shall never exercise the powers vested in the executive or judicial; [nor the executive exercise the powers vested in the legislative or judicial;] nor the judicial exercise the powers vested in the legislative or executive departments.

New-York Daily Gazette, June 13, 1789, p. 574, col. 4.

16.1.1.2 Proposal by Sherman to House Committee of Eleven, July 21–28, 1789

[Amendment] 11 The legislative, executive and judiciary powers vested by the Constitution in the respective branches of the government of the united States, shall be exercised according to the distribution therein made, so that neither of said branches shall assume or exercise any of the powers peculiar to either of the other branches.

And the powers not delegated to the government of the united States by the Constitution, nor prohibited by it to the particular States, are retained by the States respectively. nor Shall any the exercise power by the government of the united States the particular instances here in enumerated by way of caution be construed to imply the contrary.

Madison Papers, DLC.

16.1.1.3 House Committee of Eleven Report, July 28, 1789

"Immediately after ART. 6, the following to be inserted as ART. 7."

"The powers delegated by this Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or the Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive."

"The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."

Broadside Collection, DLC.

16.1.1.4House Consideration, August 18, 1789

The 8th proposition in the words following, was considered, “Immediately after art. 6, the following to be inserted as art. 7.”

16.1.1.4.a “The powers delegated by this constitution to the government of the United States, shall be exercised as therein appropriated, so that the legislative shall not exercise the powers vested in the executive or the judicial; nor the executive the power vested in the legislative or judicial; nor the judicial the powers vested in the legislative or executive.”

Congressional Register, August 18, 1789, vol. 2, pp. 233–34 (“On the motion being put, the proposition was carried.”).

16.1.1.4.b Seventeenth amendment — Immediately after Art. 6, the following to be inserted as Art. 7. “The powers delegated by this Constitution, to the government of the United States shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or the Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.”

Daily Advertiser, August 19, 1789, p. 2, col. 3 (“This was agreed to.”).

16.1.1.4.c 17th amendment: Immediately after art. 6, the following to be inserted as art. 7.

“The powers delegated by this Constitution, to the government of the United States shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or the Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.”

Gazette of the U.S., August 22, 1789, p. 250, col. 1 (“[This amendment] was finally carried.”).

16.1.1.5House Consideration, August 18, 1789

16.1.1.5.a The 9th proposition in the words following was considered, “The powers not delegated by the constitution, nor prohibited by it to the states, are reserved to the states respectively.”

Congressional Register, August 18, 1789, vol. 2, p. 234.

16.1.1.5.b Eighteenth amendment — “The powers not delegated by this

Constitution, nor prohibited by it to the States, are reserved to the States respectively."

Daily Advertiser, August 19, 1789, p. 2, col. 3.

16.1.1.5.c 18th Amendment: "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."

Gazette of the U.S., August 22, 1789, p. 250, col. 1.

16.1.1.6Motion by Tucker in House, August 18, 1789

16.1.1.6.a Mr. TUCKER

Proposed to amend the proposition by prefixing to it, "all powers being derived from the people." … He extended his motion also, to add the word "expressly" so as to read "The powers not expressly delegated by this constitution."

Congressional Register, August 18, 1789, vol. 2, p. 234 ("Mr. Tucker's motion being negatived. …").

16.1.1.6.b Mr. TUCKER proposed an introductory clause to this amendment, *viz. all power being derived from the people*.

Gazette of the U.S., August 22, 1789, p. 250 ("This motion was negatived.").

16.1.1.7Motion by Carroll or Gerry in House, August 18, 1789

16.1.1.7.a Mr. CARROLL proposed to add to the end of the proposition, "or to the people," this was agreed to.

Congressional Register, August 18, 1789, vol. 2, p. 235.

16.1.1.7.b Mr. Gerry then proposed to add, after the word "States," *and people there of*.

Gazette of the U.S., August 22, 1789, p. 250, col. 1 ("The motion was negatived, and the amendment agreed to.").

16.1.1.8Motion by Gerry in House, August 21, 1789

The 9th proposition, mr. Gerry proposed to amend by inserting the word "expressly" so as to read the powers not expressly delegated by the constitution, nor prohibited to the states, are reserved to the states respectively or to the people. …

Congressional Register, August 21, 1789, vol. 2, pp. 243–44 ("He was supported in this by one fifth of the members present, whereupon they were taken.").

16.1.1.9Motion by Sherman in House, August 21, 1789

Mr. Sherman

Moved to alter the last clause so as to make it read, the powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Congressional Register, August 21, 1789, vol. 2, p. 244 ("This motion was adopted without debate.").[1]

HJ, p. 112.

16.1.1.10House Resolution, August 24, 1789

ARTICLE the SIXTEENTH.

The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

ARTICLE the SEVENTEENTH.

The powers not delegated by the Constitution, nor prohibited by it, to the States, are reserved to the States respectively.

House Pamphlet, RG 46, DNA.

16.1.1.11Senate Consideration, August 25, 1789

16.1.1.11.a The Resolve of the House of Representatives of the 24th of August, upon certain “Articles to be proposed to the Legislatures of the several States as Amendments to the Constitution of the United States” was read as followeth: …

Article the sixteenth

> "The powers delegated by the Constitution to [the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial;] nor the Judicial the powers vested in the Legislative or Executive.

Article the seventeenh [sic]

> "The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively;"

Rough SJ, pp. 219–20 [material in brackets not legible].

16.1.1.11.b The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

Article the Sixteenth.

> "The powers delegated by the Constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

Article the Seventeenh. [sic]

> "The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively;"

Smooth SJ, pp. 196–97.

16.1.1.11.c The Resolve of the House of Representatives of the 24th of August, was read as followeth:

…

ARTICLE THE SIXTEENTH.

> "The powers delegated by the Constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

ARTICLE THE SEVENTEENH. [sic]

> "The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively;"

Printed SJ, p. 106.

16.1.1.12Further Senate Consideration, September 7, 1789

16.1.1.12.a On Motion to adopt the sixteenth Article of Amendments to the Constitution of the United States, proposed by the House of Representatives.

Rough SJ, p. 259 ("It passed in the negative.").

16.1.1.12.b On motion, To adopt the sixteenth Article of Amendments to the Constitution of the United States, proposed by the House of Representatives —

Smooth SJ, p. 231 ("It passed in the Negative.").

16.1.1.12.c On motion, To adopt the sixteenth Article of Amendments to the Constitution of the United States, proposed by the House of Representatives —

Printed SJ, p. 122 ("It passed in the Negative.").

16.1.1.13Further Senate Consideration, September 7, 1789

16.1.1.13.a On Motion to amend the seventeenth Article, by inserting the word, "expressly," before the word "delegated" —

Rough SJ, p. 259 ("It passed in the negative.").

16.1.1.13.b On motion, To amend the seventeenth Article, by inserting the word "Expressly," before the word "delegated" —

Smooth SJ, p. 231 ("It passed in the Negative.").

16.1.1.13.c On motion, To amend the seventeenth Article, by inserting the word "expressly," before the word "delegated" —

Printed SJ, p. 233 ("It passed in the Negative.").

16.1.1.14Further Senate Consideration, September 7, 1789

16.1.1.14.a On motion, To adopt the seventeenth Article of amendments to the Constitution of the United States, proposed by the House of Representatives, to read as follows,

"The powers not delegated to the United States by the Constitution, nor prohibited by it, to the States,

are reserved to the States respectively, or to the People."

Rough SJ, pp. 259–60 ("It passed in the affirmative.").

16.1.1.14.b On motion, To adopt the seventeenth article of Amendments to the Constitution of the United States, proposed by the House of Representatives, to read as follows,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"

Smooth SJ, p. 231 ("It passed in the Affirmative.").

16.1.1.14.c On motion, To adopt the seventeenth article of Amendments to the Constitution of the United States, proposed by the House of Representatives, to read as follows,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"

Printed SJ, p. 123 ("It passed in the Affirmative.").

16.1.1.14.d Resolved ∧ that the Senate do not ~~to~~ concur with the House of Representatives in

Article sixteenth.

Resolved ~~to~~ ∧ that the Senate do concur with the House of Representatives in Article seventeenth.

to read as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it, to the States, are reserved to the States respectively, or to the people."

Senate MS, pp. 4–5, RG 46, DNA.

16.1.1.15Further Senate Consideration, September 9, 1789

16.1.1.15.a On motion to number the remaining articles agreed to by the Senate tenth, eleventh and twelfth instead of the numbers affixed by the Resolve of the House of Representatives.

Rough SJ, p. 277 ("It passed in the affirmative."; motion renumbered seventeenth article as twelfth article).

16.1.1.15.b On motion, To number the remaining articles agreed to by the Senate, tenth, eleventh and twelfth, instead of the numbers affixed by the Resolve of the House of Representatives —

Smooth SJ, p. 246 ("It passed in the Affirmative."; motion renumbered seventeenth article as twelfth article).

16.1.1.15.c On motion, To number the remaining Articles agreed to by the Senate, tenth, eleventh and twelfth, instead of the numbers affixed by the Resolve of the House of Representatives —

Printed SJ, p. 131 ("It passed in the Affirmative."; motion renumbered seventeenth article as twelfth article).

16.1.1.15.d To erase the word — "Seventeenth" — & insert Twelfth.

To insert in the Seventeenth Article after the word "delegated" — to the United States. — &

To insert at the end of the same article — or to the people; —

Ellsworth MS, p. 4, RG 46, DNA.

16.1.1.16 Senate Resolution, September 9, 1789

ARTICLE THE TWELFTH.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Senate Pamphlet, RG 46, DNA.

16.1.1.17 Further House Consideration, September 21, 1789

RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments proposed by the Senate to the said articles, two thirds of the members present concurring on each vote.

RESOLVED, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers at the same on the part of this House.

HJ, p. 146.

16.1.1.18Further Senate Consideration, September 21, 1789

16.1.1.18.a A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Smooth SJ, pp. 265–66.

16.1.1.18.b A message from the House of Representatives —

Mr. Beckley, their Clerk, brought up a Resolve of the House of this date, to agree to the 2d, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th, and 26th Amendments proposed by the Senate, "To Articles of Amendment to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States," and to disagree to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments: Two thirds of the members present concurring on each vote: And "That a conference be desired with the Senate on the subject matter of the Amendments disagreed to," and that Mr. Madison, Mr. Sherman, and Mr. Vining, be appointed managers of the same, on the part of the House of Representatives —

And he withdrew.

Printed SJ, pp. 141–42.

16.1.1.19Further Senate Consideration, September 21, 1789

16.1.1.19.a The Senate proceeded to consider the Message of the House of Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth Mr. Carroll and Mr. Paterson be managers of the conference on the part of the Senate.

Smooth SJ, p. 267.

16.1.1.19.b The Senate proceeded to consider the message of the House of

Representatives disagreeing to the Amendments made by the Senate "To Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do recede from their third Amendment, and do insist on all the others.

Resolved, That the Senate do concur with the House of Representatives in a conference on the subject matter of disagreement on the said Articles of Amendment, and that Mr. Ellsworth, Mr. Carroll, and Mr. Paterson be managers of the conference on the part of the Senate.

Printed SJ, p. 142.

16.1.1.20 Conference Committee Report, September 24, 1789

[T]hat it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and ~~to~~ petition the Government for a redress of grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows "In all criminal prosecutions, the accused shall enjoy the right to a speedy & publick trial by an impartial jury of the district wherein the crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses ~~against him~~ in his favour, & to & ∧ have the assistance of counsel for his defence."

Conference MS, RG 46, DNA (Ellsworth's handwriting).

16.1.1.21 House Consideration of Conference Committee Report, September 24 [25], 1789

Resolved, That this House doth recede from their disagreement to the first,

third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: Provided, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

Article the third. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Article the eighth. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

HJ, p. 152 ("On the question, that the House do agree to the alteration and amendment of the eighth article, in manner aforesaid, It was resolved in the affirmative. Ayes 37 Noes 14").

16.1.1.22 Senate Consideration of Conference Committee Report, September 24, 1789

16.1.1.22.a Mr. Ellsworth, on behalf of the managers of the conference on "articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the district wherein the Crime shall have been committed, as the district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor,

and to have the assistance of Counsel for defence."

Smooth SJ, pp. 272–73.

16.1.1.22.b Mr. Ellsworth, on behalf of the managers of the conference on "Articles to be proposed to the several States as Amendments to the Constitution of the United States," reported as follows:

That it will be proper for the House of Representatives to agree to the said Amendments proposed by the Senate, with an Amendment to their fifth Amendment, so that the third Article shall read as follows: "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble and petition the Government for a redress of Grievances;" And with an Amendment to the fourteenth Amendment proposed by the Senate, so that the eighth Article, as numbered in the Amendments proposed by the Senate, shall read as follows; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the District wherein the Crime shall have been committed, as the District shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence."

Printed SJ, p. 145.

16.1.1.23 Further Senate Consideration of Conference Committee Report, September 24, 1789

16.1.1.23.a A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the people peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Smooth SJ, pp. 278–79.

16.1.1.23.b A Message from the House of Representatives —

Mr. Beckley, their Clerk, brought up the Amendments to the "Articles to be proposed to the

Legislatures of the several States, as Amendments to the Constitution of the United States;" and informed the Senate, that the House of Representatives had receded from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th Amendments, insisted on by the Senate: Provided that the "Two Articles, which by the Amendments of the Senate are now proposed to be inserted as the third and eighth Articles," shall be amended to read as followeth:

Article the Third. "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and petition the Government for a redress of Grievances."

Article the Eighth. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial Jury of the State and District, wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Printed SJ, p.148.

16.1.1.24 Further Senate Consideration of Conference Committee Report, September 25, 1789

16.1.1.24.a The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Smooth SJ, p. 283.

16.1.1.24.b The Senate proceeded to consider the Message from the House of Representatives of the 24th, with Amendments to the Amendments of the Senate, to "Articles to be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States" — And

Resolved, That the Senate do concur in the Amendments proposed by the House of Representatives, to the Amendments of the Senate.

Printed SJ, pp. 150–51.

16.1.1.25 Agreed Resolution, September 25, 1789

16.1.1.25.a Article the Twelfth.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Smooth SJ, Appendix, p. 294.

16.1.1.25.b ARTICLE THE TWELFTH.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Printed SJ, Appendix, p. 164.

16.1.1.26Enrolled Resolution, September 28, 1789

Article the Twelfth. … The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Enrolled Resolutions, RG 11, DNA.

16.1.1.27Printed Versions

16.1.1.27.a ART. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Statues at Large, vol. 1, p. 21–22.

16.1.1.27.b ART. XII. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Statutes at Large, vol. 1, p. 98.

16.1.2PROPOSALS FROM THE STATE

CONVENTIONS

16.1.2.1Maryland Minority, April 26, 1788

1. That congress shall exercise no power but what is expressly delegated by this constitution.

Maryland Gazette, May 1, 1788 (committee majority).

16.1.2.2Massachusetts, February 6, 1788

First, That it be explicitly declared that all Powers not expressly delegated by the aforesaid Constitution are reserved to the several States to be by them exercised.

State Ratifications, RG 11, DNA.

16.1.2.3New Hampshire, June 21, 1788

First that it be Explicitly declared that all Powers not expressly & particularly Delegated by the aforesaid Constitution are reserved to the several States to be, by them Exercised. —

State Ratifications, RG 11, DNA.

16.1.2.4New York, July 26, 1788

That all Power is originally vested in and consequently derived from the People, and that Government is instituted by them for their common Interest Protection and Security.

That the enjoyment of Life, Liberty and the pursuit of Happiness are essential rights which every Government ought to respect and preserve.

That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly

delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution.

State Ratifications, RG 11, DNA.

16.1.2.5North Carolina, August 1, 1788

1st. That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life, and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

2d. That all power is naturally vested in, and consequently derived from the people; …

I. That each state in the union shall, respectively, retain every power, jurisdiction and right, which is not by this constitution delegated to the Congress of the United States, or to the departments of the Federal Government.

…

XVIII. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

State Ratifications, RG 11, DNA.

16.1.2.6Pennsylvania Minority, December 12, 1787

15. That the sovereignty, freedom, and independency of the several states shall be retained, and every power, jurisdiction and right which is not by this Constitution expressly delegated to the United States in Congress

assembled.

Pennsylvania Packet, December 18, 1787.

16.1.2.7South Carolina, May 23, 1788

This Convention doth also declare that no Section or paragraph of the said Constitution warrants a Construction that the states do not retain every power not expressly relinquished by them and vested in the General Government of the Union.

State Ratifications, RG 11, DNA.

16.1.2.8Virginia, June 27, 1788

First, That there are certain natural rights of which men, when they form a social compact cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Second, That all power is naturally vested in and consequently derived from the people; that Magestrates, therefore, are their trustees and agents at all times amenable to them. …

Amendments to the Body of the Constitution.

First, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Foederal Government. … Seventeeth, That those clauses which declare that Congress shall not exercise certain powers be not interpreted in any manner whatsoever to extend the powers of Congress. But that they may be construed either as making exceptions to the specified powers where this shall be the case, or otherwise as inserted merely for greater caution.

State Ratifications, RG 11, DNA.

16.1.3STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

16.1.3.1DELAWARE, 1776

ART. 30. No article of the declaration of rights and fundamental rules of this state, agreed to by this convention, … ought ever be violated on any pretence whatever. No other part of this constitution shall be altered, changed or diminished without the consent of five parts in seven of the Assembly, and seven Members of the Legislative Council.

16.1.3.2Georgia, 1777

WHEREAS the conduct of the legislature of Great-Britain for many years past, has been so oppressive on the people of America, that of late years, they have plainly declared, and asserted a right to raise taxes upon the people of America, and to make laws to bind them in all cases whatsoever, without their consent; which conduct being repugnant to the common rights of mankind, hath obliged the Americans, as freemen, to oppose such oppressive measures, and to assert the rights and privileges they are entitled to, by the laws of nature and reason. …

…

We therefore the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, Do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State.

Georgia Laws, p. 7.

16.1.3.3Maryland: Declaration of Rights, 1776

1. That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.

Maryland Laws, November 3, 1776.

16.1.3.4Massachusetts: Constitution, 1780

Preamble.

THE end of the institution, maintenance, and administration of government, is to secure the existence of the body politick; to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquility, their natural rights, and the blessings of life: And whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

…

PART I.

A Declaration Of The Rights Of The Inhabitants Of The Commonwealth Of Massachusetts.

ARTICLE

I. All men are born free and equal, and have certain natural, essential and unalienable rights: among which may be reckoned the right of enjoying and defending their lives and liberties: that of acquiring, possessing, and protecting property: in fine, that of seeking and obtaining their safety and happiness.

…

IV. The people of this Commonwealth, have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state: and do, and forever herafter shall, exercise and enjoy every power, jurisdiction and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America, in Congress assembled.

V. All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

…

VII. Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honour, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

…

XXX. In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: To the end it may be a government of laws and not of men.

Massachusetts Perpetual Laws, pp. 5–6, 8.

16.1.3.5New Hampshire: Constitution, 1783

[Part I, Article I.] All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.

II. All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness.

III. When men enter into a state of society, they surrender up some of their natural rights to society, in order to secure the protection of others; and, without such an equivalent, the surrender is void.

IV. Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.

…

VII. The people of this State, have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do, and forever hereafter shall, exercise, and enjoy every power, jurisdiction and right pertaining thereto, which is not, or may not hereafter be by them expressly delegated to the United States of America in Congress assembled.

New Hampshire Laws, pp. 22–24.

16.1.3.6New Jersey: Constitution, 1776

WHEREAS all the constitutional Authority ever possessed by the Kings of *Great Britain* over these Colonies, … was by Compact, derived from the

People, and held for them, for the common Interest of the whole Society. …

New Jersey Acts, p. iii.

16.1.3.7New York: Constitution, 1777

I. THIS Convention, therefore, in the name and by the Authority of the good People of this State, doth ORDAIN, DETERMINE AND DECLARE, That no Authority shall, on any Pretence whatever, be excercised [*sic*] over the People or Members of this State, but such as shall be derived from and granted by them.

New York Laws, vol. 1, p. 5.

16.1.3.8North Carolina: Declaration of Rights, 1776

Sect. I. That all political Power is vested in and derived from the People only.

North Carolina Laws, p. 275.

16.1.3.9Pennsylvania

16.1.3.9.aConstitution, 1776

WHEREAS all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the author of existence has bestowed upon man; and whenever these great ends of government are not obtained, the people have a right, by common consent to change it, and take such measures as to them may appear necessary to promote their safety and happiness. And whereas the inhabitants of this commonwealth have, in consideration of protection only, heretofore acknowledged allegiance to the king of Great Britain: and the said king has not only withdrawn that protection, but commenced, and still continues to carry on, with unabated vengeance, a most cruel and unjust war against them employing therein, not only the troops of Great Britain, but foreign mercenaries, savages and slaves, for the avowed purpose of

reducing them to a total and abject submission to the despotic domination of the British parliament, with many other acts of tyranny, (more fully set forth in the declaration of congress) whereby all allegiance and fealty to the said king and his successors, are dissolved and at an end, and all power and authority derived from him ceased in these colonies. And whereas it is absolutely necessary for the welfare and safety of the inhabitants of said colonies, that they be henceforth free and independent states, and that just, permanent, and proper forms of government exist in every part of them derived from and founded on the authority of the people only, agreeable to the directions of the honourable American congress. We, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great Governor of the universe (who alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government) in permitting the people of this state, by common consent, and without violence, deliberately to form for themselves such just rules as they shall think best, for governing their future society; and being fully convinced, that it is our indispensible duty to establish such original principles of government, as will best promote the general happiness of the people of this state, and their posterity, and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever, do, by virtue of the authority vested in us by our constituents, ordain, declare, and establish, the following *Declaration of Rights*, and *Frame of Government*, to be the Constitution of this commonwealth, and to remain in force therein for ever, unaltered, except in such articles as shall hereafter on experience be found to require improvement, and which shall by the same authority of the people, fairly delegated as this frame of government directs, be amended or improved for the more effectual obtaining and securing the great end and design of all government, herein before mentioned.

CHAPTER I.

A DECLARATION of the RIGHTS of the Inhabitants of the State of Pennsylvania.

I. THAT all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

…

IV. That all power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.

V. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community: And that the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish government in such manner as shall be by that community judged most conducive to the public weal.

Pennsylvania Acts, McKean, pp. vii–ix.

16.1.3.9.b Constitution, 1790

ARTICLE IX.

THAT *the general, great, and essential Principles of Liberty and free Government may be recognized and unalterably established*, WE DECLARE,

SECTION I. THAT all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

SECT. II. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness: For the advancement of those ends they have, at all times, an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.

…

SECT. XXVI. To guard against transgressions of the high powers which we have delegated, WE DECLARE, That every thing in this article is excepted out of the general powers of government, and shall for ever remain inviolate.

Pennsylvania Acts, Dallas, pp. xxxiii, xxxvi.

16.1.3.10South Carolina: Constitution, 1790

ARTICLE IX.

Section 1. All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety and happiness.

South Carolina Laws, App., p. 41.

16.1.3.11Vermont: Constitution, 1777

WHEREAS all government ought to be instituted and supported for the Security and Protection of the Community as such, and to enable the Individuals who compose it to enjoy their natural Rights, and the other Blessings which the Author of Existence has bestowed upon Man; and whenever those great Ends of Government are not obtained, the People have a Right by common Consent to change it, and take such Measures as to them may appear necessary to promote their Safety and Happiness.

A DECLARATION of the RIGHTS of the Inhabitants of the state of *VERMONT*

I. That all Men are born equally free and independent, and have certain natural, inherent and unalienable Rights, amongst which are the enjoying and defending Life and Liberty; acquiring, possessing and protecting Property, and pursuing and obtaining Happiness and Safety.

…

V. That all Power being originally inherent in, and consequently derived from the People; therefore all Officers of Government, whether legislative or executive, are their Trustees and Servants, and at all Times accountable to them.

Vermont Acts, pp. 1, 3.

16.1.3.12Virginia: Declaration of Rights, 1776

I. THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or devest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Sec. 2. That all power is vested in, and consequently derived from the

people; that Magistrates are their trustees and servants, and at all times amenable to them.

Virginia Acts, p. 33.

16.1.4OTHER TEXTS

16.1.4.1Declaration of Independence, July 4, 1776

… We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it; and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Engrossed Manuscripts, DNA.

16.1.4.2Articles of Confederation, November 15, 1777

Article II. Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Continental Congress Papers, DNA.

16.1.4.3Richard Henry Lee to Edmund Randolph, Proposed Amendments, October 16, 1787

It having been found from universal experience that the most express declarations and reservations are necessary to protect the just rights and liberty of mankind from the silent, powerful and ever active conspiracy of

those who govern; and it appearing to be the sense of the good people of America, by the various bills or declarations of rights whereon the governments of the greater number of the states are founded. That such precautions are necessary to restrain and regulate the exercise of the great powers given to rulers. In conformity with these principles, and from respect for the public sentiment on this subject, it is submitted, — That the new Constitution proposed for the government of the United States be bottomed upon a declaration or bill of rights, clearly and precisely stating the principles upon which this social compact is founded. …

Virginia Gazette, December 22, 1787.

16.2DISCUSSION OF DRAFTS AND PROPOSALS

16.2.1THE FIRST CONGRESS

16.2.1.1June 8, 17892

16.2.1.1.a Mr. Jackson.

The more I consider the subject of amendments, the more, mr. speaker, I am convinced it is improper. I revere the rights of my constituents as much as any gentleman in congress, yet, I am against inserting a declaration of rights in the constitution, and that upon some of the reasons referred to by the gentleman last up. If such an addition is not dangerous or improper, it is at least unnecessary: that is a sufficient reason for not entering into the subject at a time when there are urgent calls for our attention to important business. Let me ask gentlemen, what reason there is for the suspicions which are to be removed by this measure? Who are congress that such apprehensions should be entertained of them? Do we not belong to the mass of the people? Is there a single right but, if infringed, will affect us and our connections as much as any other person? Do we not return at the expiration of two years into private life, and is not this a security against encroachment? Are we not sent here to guard those rights which might be endangered, if the government was an aristocracy or a despotism? View for a moment the situation of Rhode-Island and, say whether the people's rights

are more safe under state legislatures than under a government of limited powers? Their liberty is changed to licentiousness. But do gentlemen suppose bills of rights necessary to secure liberty? If they do, let them look at New York, New Jersey, Virginia, South Carolina, and Georgia. Those states have no bills of rights, and are the liberty of the citizens less safe in those states, than in the other of the United States? I believe they are not.

There is a maxim in law, and it will apply to bills of rights, that when you enumerate exceptions, the exceptions operate to the exclusion of all circumstances that are omitted; consequently, unless you except every right from the grant of power, those omitted are inferred to be resigned to the discretion of the government.

Congressional Register, June 8, 1789, vol. 1, p. 437.

16.2.1.1.b Mr. Jackson observed, That the Hon. Gentleman's ingenious detail, so far from convincing him of the expediency of bringing forward the subject of amendments at this time, had confirmed him in the contrary opinion: The prospect which such a discussion opened, was wide and extensive, and would preclude other benefits, of much greater moment, at the present juncture — He differed widely from the Gentleman, with regard to bills of rights — several of the States had no such bills — Rhode-Island had none — there, liberty was carried to excess, and licentiousness triumphed — In some States, which had such a nominal security, the encroachments upon the rights of the people had been most complained of. …

Gazette of U.S., June 10, 1787, p. 67, col. 2.

16.2.1.2August 15, 1789

Mr. Hartley

Observed that it had been asserted in the convention of Pennsylvania, by the friends of the Constitution, that all the rights and powers that were not given to the government, were retained by the states and the people thereof; this was also his own opinion, but as four or five states had required to be secured in those rights by an express declaration in the constitution, he was disposed to gratify them; he thought every thing that was not incompatible with the general good ought to be granted, if it would tend to obtain the confidence of the people in the government, and, upon the whole, he

thought these words were as necessary to be inserted in the declaration of rights as most in the clause.

Congressional Register, August 15, 1789, vol. 2, pp. 198–99.

16.2.1.3August 18, 1789

16.2.1.3.a The 9th proposition, in the words following was considered, "The powers not delegated by the constitution, nor prohibited by it to the states, are reserved to the states respectively."

Mr. Tucker

Proposed to amend the proposition, by prefixing to it, "all powers being derived from the people," thought this a better place to make this assertion than the introductory clause of the constitution, where a similar sentiment was proposed by the committee. He extended his motion also, to add the word "expressly," so as to read "The powers not expressly delegated by this constitution."

Mr. Madison

Objected to this amendment, because it was impossible to confine a government to the exercise of express powers, there must necessarily be admitted powers by implication, unless the constitution descended to recount every minutiae. He remembered the word "expressly" had been moved in the convention of Virginia, by the opponents to the ratification, and after full and fair discussion was given up by them, and the system allowed to retain its present form.

Mr. Sherman

Coincided with mr. Madison in opinion, observing that corporate bodies are supposed to possess all powers incident to a corporate capacity, without being absolutely expressed.

Mr. Tucker

Did not view the word "expressly" in the same light with the gentleman who opposed him; he thought every power to be expressly given that could be clearly comprehended within any accurate definition of the general power.

Mr. Tucker's motion being negatived,

Mr. yarroll proposed to add to the end of the proposition, "or to the people," this was agreed to.

Congressional Record, August 18, 1789, vol. 2, pp. 234–35.

16.2.1.3.b 18th Amendment: "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively."

Mr. Tucker proposed an introductory clause to this amendment, *viz. all power being derived from the people*.

Mr. Madison objected to this, as confining the government within such limits as to admit of no implied powers, and I believe, he said, that no government ever existed which was not necessarily obliged to exercise powers by implication. This question was agitated in the Convention of Virginia; it was brought forward by those who were opposed to the Constitution, and was finally given up by them.

Mr. Sherman observed, that all corporations are supposed to possess all the powers incidental to their corporate capacity: It is not in human wisdom to provide for every possible contingency.

This motion was negatived.

Mr. Gerry then proposed to add, after the word "States," *and people thereof*.

Mr. Carroll objected to the addition, as it tended to create a distinction between the people and their legislatures.

The motion was negatived, and the amendment agreed to.

Gazette of the U.S., August 22, 1789, p. 250, col. 1.

16.2.1.4August 21, 1789

The house proceeded in the consideration of the amendments to the constitution reported by the committee of the whole. …

…

The 9th proposition, mr. Gerry proposed to amend by inserting the word "expressly" so as to read the powers not expressly delegated by the constitution, nor prohibited to the states, are reserved to the states respectively or to the people; as he thought this an amendment of great

importance, he requested the ayes and noes might be taken. He was supported in this by one fifth of the members present, whereupon they were taken. …

Mr. Sherman

Moved to alter the last clause so as to make it read, the powers not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The motion was adopted without debate.

Congressional Register, August 21, 1789, vol. 2, p. 243.

16.2.2STATE CONVENTIONS

16.2.2.1Massachusetts

16.2.2.1.aFebruary 4, 1788

Rev. Mr. THACHER. … There are other restraints, which, though not directly named in this Constitution, yet are evidently discerned by every man of common observation. These are, the government of the several states, and the spirit of liberty in the people.

Elliot, vol. 2, p. 145.

16.2.2.1.bFebruary 5, 1788

Mr. PARSONS demonstrated the impracticability of forming a bill, in a national constitution, for securing individual rights, and showed the inutility of the measure, from the ideas, that no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and, should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced.

Elliot, vol. 2, pp. 161–62.

16.2.2.2New York, July 1, 1788

Mr. TREDWELL. Sir, little accustomed to speak in public, and always inclined, in such an assembly as this, to be a hearer rather than a speaker, on a less important occasion than the present I should have contented myself with a silent vote; but when I consider the nature of this dispute, that it is a contest, not between little states and great states, (as we have been told,) between little folks and great folks, between patriotism and ambition, between freedom and power; not so much between the navigating and the non-navigating individuals, (for not one of the amendments we contend for has the least reference to the clashing interests of the states;) when I consider, likewise, that a people jealous of their liberties, and strongly attached to freedom, have reposed so entire a confidence in this assembly, that upon our determination depends their future enjoyment of those invaluable rights and privileges, which they have so lately and so gallantly defended at every risk and expense, both of life and property, — it appears to me so interesting and important, that I cannot be totally silent on the occasion, lest lisping babes should be taught to curse my name, as a betrayer of their freedom and happiness.

The gentleman who first opened this debate did (with an emphasis which I believe convinced every one present of the propriety of the advice) urge the necessity of proceeding, in our deliberations on this important subject, coolly and dispassionately. With how much candor this advice was given, appears from the subsequent parts of a long speech, and from several subsequent speeches almost totally addressed to our fears. The people of New Jersey and Connecticut are so exceedingly exasperated against us, that, totally regardless of their own preservation, they will take the two rivers of Connecticut and Delaware by their extremities, and, by dragging them over our country, will, by a sweeping deluge, wash us all into the Hudson, leaving neither house nor inhabitant behind them. But if this event should not happen, doubtless the Vermontese, with the British and tories our natural enemies, would, by bringing down upon us the great Lake Ontario, sweep hills and mountains, houses and inhabitants, in one deluge, into the Atlantic. These, indeed, would be terrible calamities; but terrible as they are, they are not to be compared with the horrors and desolation of tyranny. The arbitrary courts of Philip in the Netherlands, in which life and property were daily confiscated without a jury, occasioned as much misery and a more rapid depopulation of the province, before the people took up arms in their own defence, than all the armies of that haughty monarch were able to effect afterwards; and it is doubtful, in my mind, whether

governments, by abusing their powers, have not occasioned as much misery and distress, and nearly as great devastations of the human species, as all the wars which have happened since Milton's battle of the angels to the present day. The end or design of government is, or ought to be, the safety, peace, and welfare of the governed. Unwise, therefore, and absurd in the highest degree, would be the conduct of that people, who, in forming a government, should give to their rulers power to destroy them and their property, and thereby defeat the very purpose of their institutions; or, in other words, should give unlimited power to their rulers, and not retain in their own hands the means of their own preservation. The first governments in the world were parental, the powers of which were restrained by the laws of nature; and doubtless the early succeeding governments were formed on the same plan, which, we may suppose, answered tolerably well in the first ages of the world, while the moral sense was strong, and the laws of nature well understood, there being then no lawyers to explain them away. But in after times, when kings became great, and courts crowded, it was discovered that governments should have a right to tyrannize, and a power to oppress; and at the present day, when the *juris periti* are become so skilful in their profession, and quibbling is reduced to a science, it is become extremely difficult to form a constitution which will secure liberty and happiness to the people, or laws under which property is safe. Hence, in modern times, the design of the people, in forming an original constitution of government, is not so much to give powers to their rulers, as to guard against the abuse of them; but, in a federal one, it is different.

Sir, I introduce these observations to combat certain principles which have been daily and confidently advanced by the favorers of the present Constitution, and which appear to me totally indefensible. The first and grand leading, or rather misleading, principle in this debate, and on which the advocates for this system of unrestricted powers must chiefly depend for its support, is that, in forming a constitution, whatever powers are not expressly granted or given the government, are reserved to the people, or that rulers cannot exercise any powers but those expressly given to them by the Constitution. Let me ask the gentleman who advanced this principle, whether the commission of a Roman dictator, which was in these few words—to take care that the state received no harm — does not come up fully to their ideas of an energetic government; or whether an invitation from the people to one or more to come and rule over them, would not clothe the rulers with sufficient powers. If so, the principle they advance is a false one. Besides, the absurdity of this principle will evidently appear,

when we consider the great variety of objects to which the powers of the government must necessarily extend, and that an express enumeration of them all would probably fill as many volumes as Pool's Synopsis of the Critics. But we may reason with sufficient certainty on the subject, from the sense of all the public bodies in the United States, who had occasion to form new constitutions. They have uniformly acted upon a direct and contrary principle, not only in forming the state constitutions and the old Confederation, but also in forming this very Constitution, for we do not find in every state constitution express resolutions made in favor of the people; and it is clear that the late Convention at Philadelphia, whatever might have been the sentiments of some of its members, did not adopt the principle, for they have made certain reservations and restrictions, which, upon that principle, would have been totally useless and unnecessary; and can it be supposed that wise body, whose only apology for the great ambiguity of many parts of that performance, and the total omission of some things which many esteem essential to the security of liberty, was a great desire of brevity, should so far sacrifice that great and important object, as to insert a number of provisions which they esteemed totally useless? Why is it said that the privilege of the writ of *habeas corpus* shall not be suspended, unless, in cases of rebellion or invasion, the public safety may require it? What clause in the Constitution, except this very clause itself, gives the general government a power to deprive us of that great privilege, so sacredly secured to us by our state constitutions? Why is it provided that no bill of attainder shall be passed, or that no title of nobility shall be granted? Are there any clauses in the Constitution extending the powers of the general government to these objects? Some gentlemen say that these, though not necessary, were inserted for greater caution. I could have wished, sir, that a greater caution had been used to secure to us the freedom of election, a sufficient and responsible representation, the freedom of the press, and the trial by jury both in civil and criminal cases.

These, sir, are the rocks on which the Constitution should have rested; no other foundation can any man lay, which will secure the sacred temple of freedom against the power of the great, the undermining arts of ambition, and the blasts of profane scoffers — for such there will be in every age — who will tell us that all religion is in vain; that is, that our political creeds, which have been handed down to us by our forefathers as sacredly as our Bibles, and for which more of them have suffered martyrdom than for the creed of the apostles, are all nonsense; who will tell us that paper constitutions are mere paper, and that parchment is but parchment, that

jealousy of our rulers is a sin, &c. I could have wished also that sufficient caution had been used to secure to us our religious liberties, and to have prevented the general government from tyrannizing over our consciences by a religious establishment — a tyranny of all others most dreadful, and which will assuredly be exercised whenever it shall be thought necessary for the promotion and support of their political measures. It is ardently to be wished, sir, that these and other invaluable rights of freemen had been as cautiously secured as some of the paltry local interests of some of the individual states. But it appears to me, that, in forming this Constitution, we have run into the same error which the lawyers and Pharisees of old were charged with; that is, while we have secured the tithes of mint, anise, and cumin, we have neglected the weightier matters of the law, judgment, mercy, and faith. …

In this Constitution, sir, we have departed widely from the principles and political faith of ‘76, when the spirit of liberty ran high, and danger put a curb on ambition. Here we find no security for the rights of individuals, no security for the existence of our state governments; here is no bill of rights, no proper restriction of power; our lives, our property, and our consciences, are left wholly at the mercy of the legislature, and the powers of the judiciary may be extended to any degree short of almighty. Sir, in this Constitution we have not only neglected, — we have done worse, — we have openly violated, our faith, — that is our public faith.

…

Respecting the power to make all *laws necessary* for the carrying the Constitution into execution,—

“*Provided*, That no power shall be exercised by Congress, but such as is expressly given by this Constitution; and all others, not expressly given, shall be reserved to the respective states, to be by them exercised.”

Moved by Mr. LANSING.

Elliot, vol. 2, pp. 396–401, 406.

16.2.2.3North Carolina

16.2.2.3.aJuly 29, 1788

Mr. MACLAINE. Mr. Chairman, I beg leave to make a few observations. One of the gentleman’s objections to the Constitution now under

consideration is, that it is not the act of the states, but of the people; but that it ought to be the act of the states; and he instances the delegation of power by the states to the Confederation, at the commencement of the war, as a proof of this position. I hope, sir, that all power is in the people, and not in the state governments. If he will not deny the authority of the people to delegate power to agents, and to devise such a government as a majority of them thinks will promote their happiness, he will withdraw his objection. The people, sir, are the only proper authority to form a government. They, sir, have formed their state governments, and can alter them at pleasure.

Their transcendent power is competent to form this or any other government which they think promotive of their happiness. But the gentleman contends that there ought to be a bill of rights, or something of that kind — something declaring expressly, that all power not expressly given to the Constitution ought to be retained by the states; and he produces the Confederation as an authority for its necessity. When the Confederation was made, we were by no means so well acquainted with the principles of government as we are now. We were then jealous of the power of our rulers, and had an idea of the British government when we entertained that jealousy. There is no people on earth so well acquainted with the nature of government as the people of America generally are. We know now that it is agreed upon by most writers, and men of judgment and reflection, that all power is in the people, and immediately derived from them. The gentleman surely must know that, if there be certain rights which never can, nor ought to, be given up, these rights cannot be said to be given away, merely because we have omitted to say that we have not given them up. Can any security arise from declaring that we have a right to what belongs to us? Where is the necessity of such a declaration? If we have this inherent, this unalienable, this indefeasible title to those rights, if they are not given up, are they not retained? If Congress should make a law beyond the powers and the spirit of the Constitution, should we not say to Congress, “You have no authority to make this law. There are limits beyond which you cannot go. You cannot exceed the power prescribed by the Constitution. You are amenable to us for your conduct. This act is unconstitutional. We will disregard it, and punish you for the attempt.”

But the gentleman seems to be most tenacious of the judicial power of the states. The honorable gentleman must know, that the doctrine of reservation of power not relinquished, clearly demonstrates that the judicial power of the states is not impaired. …

…

Mr. SPENCER answered, that the gentleman last up had misunderstood him. He did not object to the caption of the Constitution, but he instanced it to show that the United States were not, merely as states, the objects of the Constitution; but that the laws of Congress were to operate upon individuals, and not upon states. He then continued: I do not mean to contend that the laws of the general government should not operate upon individuals. I before observed that this was necessary, as laws could not be put in execution against states without the agency of the sword, which, instead of answering the ends of government, would destroy it. I endeavored to show that, as the government was not to operate against states, but against individuals, the rights of individuals ought to be properly secured. In order to constitute this security, it appears to me there ought to be such a clause in the Constitution as there was in the Confederation, expressly declaring, that every power, jurisdiction, and right, which are not given up by it, remain in the states. Such a clause would render a bill of rights unnecessary. But as there is no such clause, I contend that there should be a bill of rights, ascertaining and securing the great rights of the states and people. Besides my objection to the revision of facts by the federal court, and the insecurity of jury trial, I consider the concurrent jurisdiction of those courts with the state courts as extremely dangerous. …

Elliot, vol. 4, pp. 160–64.

16.2.2.3.bAugust 1, 1788

Mr. Iredell. …

"1. Each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the general government; nor shall the said Congress, nor any department of the said government, exercise any act of authority over any individual in any of the said states, but such as can be justified under some power particularly given in this Constitution; but the said Constitution shall be considered at all times a solemn instrument, defining the extent of their authority, and the limits of which they cannot rightfully in any instance exceed.["]

Elliot, vol. 4, p. 249.

16.2.2.4Pennsylvania

16.2.2.4.aOctober 28, 1787

> Mr. WILSON. …In a government possessed of enumerated powers, such a measure [adopting a bill of rights] would be not only unnecessary, but preposterous and dangerous. Whence comes this notion, that in the United States there is no security without a bill of rights? Have the citizens of South Carolina no security for their liberties? They have no bill of rights. Are the citizens on the eastern side of the Delaware less free, or less secured in their liberties, than those on the western side? The state of New Jersey has no bill of rights. The state of New York has no bill of rights. The states of Connecticut and Rhode Island have no bill of rights. I know not whether I have exactly enumerated the states who have not thought it necessary to add a *bill of rights* to their constitutions; but this enumeration, sir, will serve to show by experience, as well as principle, that, even in single governments, a bill of rights is not an essential or necessary measure. But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgement, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the peop e. [*sic*]
>
> Elliot, vol. 2, pp. 436–37.

16.2.2.4.bDecember 4, 1787

> Mr. WILSON. … I consider that there are very few who understand the whole of these rights. All the political writers, from *Grotius* and *Puffendorf* down to *Vattel*, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of

rights appertaining to the people as men and as citizens.

… Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing. …

Sir, I think there is another subject with regard to which this Constitution deserves approbation. I mean the accuracy with which the *line is drawn* between the powers of the *general government* and those of the *particular state governments*. We have heard some general observations, on this subject, from the gentlemen who conduct the opposition. They have asserted that these powers are unlimited and undefined. These words are as easily pronounced as *limited* and *defined*. They have already been answered by my honorable colleague, (Mr. M'Kean;) therefore I shall not enter into an explanation. But it is not pretended that the line is drawn with mathematical precision; the inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire. Whoever views the matter in a true light, will see that the powers are as minutely enumerated and defined as was possible, and will also discover that the general clause, against which so much exception is taken, is nothing more than what was necessary to render effectual the particular powers that are granted.

But let us suppose — and the supposition is very easy in the minds of the gentlemen on the other side — that there is some difficulty in ascertaining where the true line lies. Are we therefore thrown into despair? Are *disputes* between the *general* government and the *state* governments to be necessarily the consequence of inaccuracy? I hope, sir, they will not be the enemies of each other, or resemble comets in conflicting orbits, mutually operating destruction; but that their motion will be better represented by that of the planetary system, where each part moves harmoniously within its proper sphere, and no injury arises by interference or opposition. Every part, I trust, will be considered as a part of the United States. Can any cause of distrust arise here? Is there any increase of risk? Or, rather, are not the enumerated powers as well defined here, as in the present Articles of Confederation?

Elliot, vol. 2, pp. 454, 481–82.

16.2.2.4.cSeptember 3, 1788

PROCEEDINGS OF THE MEETING [of citizens] AT HARRISBURG, IN PENNSYLVANIA

We, the conferees, … agree in opinion, —…

I. That Congress shall not exercise any powers whatever, but such as are

expressly given to that body by the Constitution of the United States: nor shall any authority, power, or jurisdiction, be assumed or exercised by the executive or judiciary departments of the Union, under color or pretense of construction or fiction; but all the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several states in the Union, according to their respective constitutions; and that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution.

Elliot, vol. 2, pp. 543–45.

16.2.2.5North Carolina, July 29, 1788

MR. IREDELL. … The gentleman says that unalienable rights ought not to be given up. Those rights which are unalienable are not alienated. They still remain with the great body of the people. If any right be given up that ought not to be, let it be shown. Say it is a thing which affects your country, and that it ought not to be surrendered: this would be reasonable. But when it is evident that the exercise of any power not given up would be a usurpation, it would be not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

MR. BLOODWORTH. … By its not being provided for, it is expressly provided against. I still see the necessity of a bill of rights. Gentlemen use contradictory arguments on this subject, if I recollect right. Without the most express restrictions, Congress may trample on your rights. Every possible precaution should be taken when we grant powers. Rulers are always disposed to abuse them.

Elliot, vol. 4, pp. 166–67.

16.2.2.6South Carolina, May 20, 1788

Mr. PATRICK DOLLARD. … They are nearly all, to a man, opposed to this new Constitution, because, they say, they have omitted to insert a bill of rights therein, ascertaining and fundamentally establishing, the unalienable rights of men, without a full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary that a good government should have the control.

Elliot, vol. 4, p. 337.

16.2.2.7Virginia

16.2.2.7.aJune 12, 1788

Mr. HENRY. … When we see men of such talents and learning compelled to use their utmost abilities to convince themselves that there is no danger, is it not sufficient to make us tremble? Is it not sufficient to fill the minds of the ignorant part of men with fear? If gentlemen believe that the apprehensions of men will be quieted, they are mistaken, since our best-informed men are in doubt with respect to the security of our rights. Those who are not so well informed will spurn at the government. When our common citizens, who are not possessed with such extensive knowledge and abilities, are called upon to change their bill of rights (which, in plain, and unequivocal terms, secure their most valuable rights and privileges) for construction and implication, will they implicitly acquiesce? Our declaration of rights tells us that "all men are by nature free and independent," &c. … Will they exchange these rights for logical reasons?

Elliot, vol. 3, pp. 317–18.

16.2.2.7.bJune 14, 1788

Mr. GEORGE MASON. Mr. Chairman, gentlemen say there is no new power given by this clause. Is there any thing in this Constitution which secures to the states the powers which are said to be retained? Will powers remain to the states which are not expressly guarded and reserved? I will suppose a case. Gentlemen may call it an impossible case, and suppose that Congress will act with wisdom and integrity. Among the enumerated powers, Congress are to lay and collect taxes, duties, imposts, and excises, and to pay the debts, and to provide for the general welfare and common

defence; and by that clause (so often called the *sweeping clause*) they are to make all laws necessary to execute those laws. Now, suppose oppression should arise under this government, and any writer should dare to stand forth, and expose to the community at large the abuses of those powers; could not Congress, under the idea of providing for the general welfare, and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press? Might they not even bring the trial of this restriction within the ten miles square, when there is no prohibition against it? Might they not thus destroy the trial by jury? Would they not extend their implication? It appears to me that they may and will. And shall the support of our rights depend on the bounty of men whose interest it may be to oppress us? That Congress should have power to provide for the general welfare of the Union, I grant. But I wish a clause in the Constitution, with respect to all powers which are not granted, that they are retained by the states. Otherwise, the power of providing for the general welfare may be perverted to its destruction.

Many gentlemen, whom I respect, take different sides of this question. We wish this amendment to be introduced, to remove our apprehensions. There was a clause in the Confederation reserving to the states respectively every power, jurisdiction, and right, not expressly delegated to the United States. This clause has never been complained of, but approved by all. Why not, then, have a similar clause in this Constitution, in which it is the more indispensably necessary than in the Confederation, because of the great augmentation of power vested in the former? In my humble apprehension, unless there be some such clear and finite expression, this clause now under consideration will go to any thing our rulers may think proper. Unless there be some express declaration that every thing not given is retained, it will be carried to any power Congress may please.

Mr. HENRY moved to read from the 8th to the 13th article of the declaration of rights; which was done.

Mr. GEORGE NICHOLAS, in reply to the gentlemen opposed to the clause under debate, went over the same grounds, and developed the same principles, which Mr. Pendleton and Mr. Madison had done. The opposers of the clause, which gave the power of providing for the general welfare, supposed its dangers to result from its connection with, and extension of, the powers granted in the other clauses. He endeavored to show the

committee that it only empowered Congress to make such laws as would be necessary to enable them to pay the public debts and provide for the common defence; that this general welfare was united, not to the general power of legislation, but to the particular power of laying and collecting taxes, imposts, and excises, for the purpose of paying the debts and providing for the common defence, — that is, that they could raise as much money as would pay the debts and provide for the common defence, in consequence of this power. The clause which was affectedly called the *sweeping clause* contained no new grant of power. To illustrate this position, he observed that, if it had been added at the end of every one of the enumerated powers, instead of being inserted at the end of all, it would be obvious to any one that it was no augmentation of power. If, for instance, at the end of the clause granting power to lay and collect taxes, it had been added that they should have power to make necessary and proper laws to lay and collect taxes, who could suspect it to be an addition of power? As it would grant no new power if inserted at the end of each clause, it could not when subjoined to the whole.

He then proceeded thus: But, says he, who is to determine the extent of such powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void. Is this depending on any man? But, says the gentleman, it may go to any thing. It may destroy the trial by jury; and they may say it is necessary for providing for the general defence. The power of providing for the general defence only extends to raise any sum of money they may think necessary, by taxes, imposts, &c. But, says he, our only defence against oppressive laws consists in the virtue of our representatives. This was misrepresented. If I understand it right, no new power can be exercised. As to those which are actually granted, we trust to the fellow-feelings of our representatives; and if we are deceived, we then trust to altering our government. It appears to me, however, that we can confide in their discharging their powers rightly, from the peculiarity of their situation, and connection with us. If, sir, the powers of the former Congress were very inconsiderable, that body did not deserve to have great powers.

It was so constructed that it would be dangerous to invest it with such. But why were the articles of the bill of rights read? Let him show us that those rights are given up by the Constitution. Let him prove them to be violated. He tells us that the most worthy characters of the country differ as

to the necessity of a bill of rights. It is a simple and plain proposition. It is agreed upon by all that the people have all power. If they part with any of it, is it necessary to declare that they retain the rest? Liken it to any similar case. If I have one thousand acres of land, and I grant five hundred acres of it, must I declare that I retain the other five hundred? Do I grant the whole thousand acres, when I grant five hundred, unless I declare that the five hundred I do not give belong to me still? It is so in this case. After granting some powers, the rest must remain with the people.

Gov. RANDOLPH observed that he had some objections to the clause. He was persuaded that the construction put upon it by the gentlemen, on both sides, was erroneous; but he thought any construction better than going into anarchy.

Mr. GEORGE MASON still thought that there ought to be some express declaration in the Constitution, asserting that rights not given to the general government were retained by the states. He apprehended that, unless this was done, many valuable and important rights would be concluded to be given up by implication. All governments were drawn from the people, though many were perverted to their oppression. The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people, by their bill of rights, declared to be paramount to the power of the legislature. He asked, Why should it not be so in this Constitution? Was it because we were more substantially represented in it than in the state government? If, in the state government, where the people were substantially and fully represented, it was necessary that the great rights of human nature should be secure from the encroachments of the legislature, he asked if it was not more necessary in this government, where they were but inadequately represented? He declared that artful sophistry and evasions could not satisfy him. He could see no clear distinction between rights relinquished by a positive grant, and lost by implication. Unless there were a bill of rights, implication might swallow up all our rights.

Mr. HENRY. Mr. Chairman, the necessity of a bill of rights appears to me to be greater in this government than ever it was in any government before. I have observed already, that the sense of the European nations, and particularly Great Britain, is against the construction of rights being retained which are not expressly relinquished. I repeat, that all nations have adopted this construction — that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers,

as necessarily inseparable from the delegated powers. It is so in Great Britain; for every possible right, which is not reserved to the people by some express provision or compact, is within the king's prerogative. It is so in that country which is said to be in such full possession of freedom. It is so in Spain, Germany, and other parts of the world. Let us consider the sentiments which have been entertained by the people of America on this subject. At the revolution, it must be admitted that it was their sense to set down those great rights which ought, in all countries, to be held inviolable and sacred. Virginia did so, we all remember. She made a compact to reserve, expressly, certain rights.

When fortified with full, adequate, and abundant representation, was she satisfied with that representation? No. She most cautiously and guardedly reserved and secured those invaluable, inestimable rights and privileges, which no people, inspired with the least glow of patriotic liberty, ever did, or ever can, abandon. She is called upon now to abandon them, and dissolve that compact which secured them to her. She is called upon to accede to another compact, which most infallibly supersedes and annihilates her present one. Will she do it? This is the question. If you intend to reserve your unalienable rights, you must have the most express stipulation; for, if implication be allowed, you are ousted of those rights. If the people did not think it necessary to reserve them, they will be supposed to be given up. How were the congressional rights defined when the people of America united by a confederacy to defend their liberties and rights against the tyrannical attempts of Great Britain? The states were not then contented with implied reservation. No, Mr. Chairman. It was expressly declared in our Confederation that every right was retained by the states, respectively, which was not given up to the government of the United States. But there is no such thing here. You, therefore, by a natural and unavoidable implication, give up your rights to the general government.

Your own example furnishes an argument against it. If you give up these powers, without a bill of rights, you will exhibit the most absurd thing to mankind that ever the world saw — a government that has abandoned all its powers — the powers of direct taxation, the sword, and the purse. You have disposed them to Congress, without a bill of rights — without check, limitation, or control. And still you have checks and guards; still you keep barriers — pointed where? Pointed against your weakened, prostrated, enervated state government! You have a bill of rights to defend you against the state government, which is bereaved of all power, and yet you have

none against Congress, though in full and exclusive possession of all power! You arm yourselves against the weak and defenseless, and expose yourselves naked to the armed and powerful. Is not this a conduct of unexampled absurdity? What barriers have you to oppose to this most strong, energetic government? To that government you have nothing to oppose. All your defence is given up. This is a real, actual defect. It must strike the mind of every gentleman. When our government was first instituted in Virginia, we declared the common law of England to be in force.

That system of law which has been admired, and has protected us and our ancestors, is excluded by that system. Added to this, we adopted a bill of rights. By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? By the ancient common law, the trial of all facts is decided by a jury of impartial men from the immediate vicinage. This paper speaks of different juries from the common law in criminal cases; and in civil controversies excludes trial by jury altogether. There is, therefore, more occasion for the supplementary check of a bill of rights now than then. Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence — petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights? — “that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. That paper tells you that the trial of crimes shall be by jury, and held in the state where the crime shall have been committed. Under this extensive provision, they may proceed in a manner extremely dangerous to liberty: a person accused may be carried from one extremity of the state to another, and be tried, not by an impartial jury of the vicinage, acquainted with his character and the circumstances of the fact, but by a jury unacquainted with both, and who may be biased against him. Is this not sufficient to alarm men? How different is this from the immemorial practice of your British ancestors, and your own! I need not tell you that, by the

common law, a number of hundredors were required on a jury, and that afterwards it was sufficient if the jurors came from the same county. With less than this the people of England have never been satisfied. That paper ought to have declared the common law in force.

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? — That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany — of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. And can any man think it troublesome, when we can, by a small interference, prevent our rights from being lost? If you will, like the Virginian government, give them knowledge of the extent of the rights retained by the people, and the powers of themselves, they will, if they be honest men, thank you for it. Will they not wish to go on sure grounds? But if you leave them otherwise, they will not know how to proceed; and, being in a state of uncertainty, they will assume rather than give up powers by implication.

A bill of rights may be summed up in a few words. What do they tell us? — That our rights are reserved. Why not say so? Is it because it will consume too much paper? Gentlemen’s reasoning against a bill of rights does not satisfy me. Without saying which has the right side, it remains doubtful. A bill of rights is a favorite thing with the Virginians and the people of the other states likewise. It may be their prejudice, but the government ought to suit their geniuses; otherwise, its operation will be unhappy. A bill of rights, even if its necessity be doubtful, will exclude the possibility of dispute; and, with great submission, I think the best way is to have no dispute. In the present Constitution, they are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, &c. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened

circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear. They ought to be restrained within proper bounds. With respect to the freedom of the press, I need say nothing; for it is hoped that the gentlemen who shall compose Congress will take care to infringe as little as possible the rights of human nature. This will result from their integrity. They should, from prudence, abstain from violating the rights of their constituents. They are not, however, expressly restrained. But whether they will intermeddle with that palladium of our liberties or not, I leave you to determine.

Mr. GRAYSON thought it questionable whether rights not given up were reserved. A majority of the states, he observed, had expressly reserved certain important rights by bills of rights, and that in the Confederation there was a clause declaring expressly that every power and right not given up was retained by the states. It was the general sense of America that such a clause was necessary; otherwise, why did they introduce a clause which was totally unnecessary? It had been insisted, he said, in many parts of America, that a bill of rights was only necessary between a prince and people, and not in such a government as this, which was a compact between the people themselves. This did not satisfy his mind; for so extensive was the power of legislation, in his estimation, that he doubted whether, when it was once given up, *any thing* was retained. He further remarked, that there were some negative clauses in the Constitution, which refuted the doctrine contended for by the other side. For instance; the 2d clause of the 9th section of the 1st article provided that “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.” And, by the last clause of the same section, “no title of nobility shall be granted by the United States.” Now, if these restrictions had not been here inserted, he asked whether Congress would not most clearly have had a right to suspend that great and valuable right, and to grant titles of nobility. When, in addition to these considerations, he saw they had an indefinite power to provide for the general welfare, he thought there were great reasons to apprehend great dangers. He thought, therefore, that there ought to be a bill of rights.

Elliot, vol. 3, pp. 441–49.

Elliot, vol. 3, pp. 142–45.

16.2.2.7.cJune 24, 1788

Mr. HENRY. … What is the inference when you enumerate the rights which you are to enjoy? That those not enumerated are relinquished.

…

Mr. HENRY. … Other essential rights — what are they? The world will say that you intended to give them up. When you go into an enumeration of your rights, and stop that enumeration, the inevitable conclusion is, that what is omitted is intended to be surrendered.

Mr. MADISON. … With respect to the proposition of the honorable gentleman to my left, (Mr. Wythe,) gentlemen apprehend that, by enumerating three rights, it implied there were no more. The observations made by a gentleman lately up, on that subject, correspond precisely with my opinion. That resolution declares that the powers granted by the proposed Constitution are the gift of the people, and may be resumed by them when perverted to their oppression, and every power not granted thereby remains with the people, and at their will. It adds, likewise, that no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the general government, or any of its officers, except in those instances in which power is given by the Constitution for these purposes. There cannot be a more positive and unequivocal declaration of the principle of the adoption — that everything not granted is reserved. This is obviously and self-evidently the case, without the declaration. Can the general government exercise any power not delegated? If an enumeration be made of our rights, will it not be implied that every thing omitted is given to the general government? Has not the honorable gentleman himself admitted that an imperfect enumeration is dangerous? Does the Constitution say that they shall not alter the law of descents, or do those things which would subvert the whole system of the state laws? If it did, what was not excepted would be granted. Does it follow, from the omission of such restrictions, that they can exercise powers not delegated? The reverse of the proposition holds. The delegation alone warrants the exercise of any power.

Elliot, vol. 3, pp. 587–88, 594, 620.

16.2.3PHILADELPHIA CONVENTION

16.2.3.1Charles Pinckney's Plan, May 29, 1787

10. Each State retains its Rights not expressly delegated —. …

Jensen, vol. 1, p. 246.

16.2.4NEWSPAPERS AND PAMPHLETS

16.2.4.1John DeWitt, No. 2, October 1787

The Compact itself is a recital upon paper of that proportion of the subject's natural rights, intended to be parted with, for the benefit of adverting to it in case of dispute. Miserable indeed would be the situation of those individual States who have not prefixed to their Constitutions a Bill of Rights, if, as a very respectable, learned Gentleman at the Southward observes, "the People, when they established the powers of legislation under their separate Governments, invested their Representatives with every right and authority which they did not, in explicit terms, reserve; and therefore upon every question, respecting the jurisdiction of the House of Assembly, if the Frame of Government is silent, the jurisdiction is efficient and complete." In other words, those powers which the People by their Constitutions expressly give them, they enjoy by positive grant, and those remaining ones, which they never meant to give them, and which the Constitutions say nothing about, they enjoy by tacit implication, so that by one means and by the other, they become possessed of the whole. — This doctrine is but poorly calculated for the meridian of America, where the nature of compact, the mode of construing them, and the principles upon which society is founded, are so accurately known and universally diffused. That insatiable thirst for unconditional controul over our fellow-creatures, and the facility of sounds to convey essentially different ideas, produced the first Bill of Rights ever prefixed to a Frame of Government. The people, altho' fully sensible that they reserved very title of power that they did not expressly grant away, yet afraid that the words made use of, to express those rights so granted might convey more than they originally intended, they choose at the same moment to express in different language those rights which the agreement did not include, and which they never designed to part with, endeavoring thereby to prevent any cause for future altercation and the intrusion into society of that

doctrine of tacit implication which has been the favorite theme of every tyrant from the origin of all governments to the present day.

[Boston] American Herald, Storing, vol. 4, p. 22.

16.2.4.2James Wilson, October 6, 1787

It will be proper however, before I enter into the refutation of the charges that are alledged, to mark the leading descrimination [*sic*] between the state constitutions, and the constitution of the United States. When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating fœderal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case every thing which is not reserved is given, but in the latter the reverse of the proposition prevails, and every thing which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: for it would have been superfluous and absurd to have stipulated with a foederal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act, that has brought that body into existence.

Pennsylvania Herald (October 9, 1787), Kaminski & Saladino, vol. 13, pp. 339–40.

16.2.4.3The Federal Farmer, No. 4, October 12, 1787

Dear Sir, … It is said, that when the people make a constitution, and delegate powers, that all powers not delegated by them to those who govern, is reserved to the people; and that the people, in the present case, have reserved in themselves, and in there [*sic*] state governments, every right and power not expressly given by the federal constitution to those who shall administer the national government. It is said on the other hand, that the

people, when they make a constitution, yield all power not expressly reserved to themselves. The truth is, in either case, it is mere matter of opinion, and men usually take either side of the argument, as will best answer their purposes: But the general assumption being, that men who govern, will, in doubtful cases, construe laws and constitutions most favourably for encreasing their own powers; all wise and prudent people, in forming constitutions, have drawn the line, and carefully described the powers parted with and the powers reserved.

Kaminski & Saladino, vol. 14, pp. 44–45.

16.2.4.4An Old Whig, No. 2, October 17, 1787

MR. PRINTER, … The principle is this: that "in *delegating federal powers*, the congressional authority is to be collected, *not from tacit implication*, but from *the positive grant* expressed in the instrument of union," "*that everything which is not given is reserved." If this* be a just representation of the matter, the authority of the several states will be sufficient to protect our liberties from the encroachments of Congress, without an continental bill of rights; *unless* the powers which are *expressly given* to Congress are *too large*.

[Philadelphia] Independent Gazetteer, Kaminski & Saladino, vol. 13, p. 400.

16.2.4.5Centinel, No. 2, October 24, 1787

In the plan of Confederation of 1778, it was thought proper by Article the 2d, to declare that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States in Congress assembled." Positive grant was not then thought sufficiently descriptive and restraining upon Congress, and the omission of such a declaration now, when such great devolutions of power are proposed, manifests the design of reducing the several States to shadows. But Mr. Wilson will tell you that every right and power not specially granted to Congress is considered as withheld. … The lust for power is so universal, that a speculative unascertained rule of construction would be a poor security for the liberties

of the people.

[Philadelphia] Freeman's Journal, Kaminski & Saladino, vol. 13, p. 460.

16.2.4.6Cincinnatus, No. 1, November 1, 1787

… The confederation, in its very outset, declares — that what is not expressly given, is reserved. This constitution makes no such reservation. The presumption therefore is, that the framers of the proposed constitution, did not mean to subject it to the same exception.

New York Journal, Kaminski & Saladino, vol. 13, p. 531.

16.2.4.7A Landholder, No. 6, December 10, 1787

There is no declaration of rights. Bills of rights were introduced in England when its kings claimed all power and jurisdiction, and were considered by them as grants *to the people*. They are insignificant since government is considered as originating from the people, and all the power government now has is a grant *from the people*. The constitution they establish with powers limited and defined becomes now, to the legislator and magistrate, what originally a bill of rights was to the people. To have inserted in this Constitution a bill of rights for the states would suppose them to derive and hold their rights from the federal government, when the reverse is the case.

Connecticut Courant, Jensen, vol. 3, pp. 487, 489.

16.2.4.8Address and Reasons of Dissent of the Minority of the Pennsylvania Convention, December 18, 1787

The new constitution, consistently with the plan of consolidation, contains no reservation of the rights and privileges of the state governments, which was made in the confederation of the year 1778, by Article the 2d. …

…

Kaminski & Saladino, vol. 15, p. 25.

16.2.4.9A Citizen of New Haven, January 7, 1788

The powers vested in the federal government are particularly defined, so that each state still retains its sovereignty in what concerns its own internal government and a right to exercise every power of a sovereign state not particularly delegated to the government of the United States.

Connecticut Courant, Jensen, vol. 3, p. 525.

16.2.4.10The Federal Farmer, No. 16, January 20, 1788

We must consider this constitution, when adopted, as the supreme act of the people, and in construing it hereafter, we and our posterity must strictly adhere to the letter and spirit of it, and in no instance depart from them. … By the people's now establishing certain fundamental rights, it is strongly implied, that they are of opinion, that they would not otherwise be secured as a part of the federal system, or be regarded in the federal administration as fundamental. … Further, the people, thus establishing some few rights, and remaining totally silent about others similarly circumstanced, the implication indubitably is, that they mean to relinquish the latter, or at least feel indifferent about them. Rights, therefore, inferred from general principles of reason, being precarious and hardly ascertainable in the common affairs of society, and the people, in forming the constitution, explicitly shewing they conceive these rights to be thus circumstanced, and accordingly proceed to enumerate and establish all which they esteem valuable and sacred. On every principle, then, the people especially having began, ought to go through enumerating, and establish particularly all the rights of individuals, which can by any possibility come in question in making and executing federal laws.

Storing, vol. 2, pp. 326–27.

16.2.4.11The Federalist, No. 84, May 28, 1788

I go further, and affirm that the bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a

colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evidence that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power.

Kaminski & Saladino, vol. 18, p. 130.

16.2.5LETTERS AND DIARIES

16.2.5.1George Washington to President of Congress, September 17, 1787

… Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was encreased [*sic*] by a difference among the several States as to their situation, extent, habits, and particular interests.

Kaminski and Saladino, vol. 13, p. 211.

16.2.5.2Roger Sherman and Oliver Ellsworth to Governor Huntington, September 26, 1787

… Some additional powers are vested in Congress, which was a principle object the states had in view in appointing the Convention; those powers extend only to matters respecting the common interests of the Union and are specially defined, so that the particular states retain their *Sovereignty* in all other matters.

Jensen, vol. 3, p. 351.

16.2.5.3James Madison to Thomas Jefferson, October 24, 1787

… A reform therefore which does not make provision for private rights, must be materially defective. The restraints agst. paper emissions, and violations of contracts are not sufficient. Supposing them to be effectual as far as they go, they are short of the mark. Injustice may be effected by such an infinitude of legislative expedients, that where the disposition exists it can only be controuled by some provision which reaches all cases whatsoever. The partial provision made, supposes the disposition which will evade it. … The great desideratum in Government is, so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society to controul one part from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the entire Society.

Kaminski & Saladino, vol. 13, pp. 447, 449.

16.2.5.4Thomas Jefferson to James Madison, December 20, 1787

To say, as mr Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the Audience to whom it was addressed, but is surely gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. It was a hard conclusion to say because there has been no uniformity among the states as to cases triable by jury, because some have been so incautious as to abandon this mode of trial, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just and wise to have concluded the other way that as most of the states had judiciously preserved this palladium, those who had wandered should be brought back to it, and to have established general right instead of wrong. Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference. …

Boyd, vol. 12, p. 440.

16.2.5.5George Washington to Marquis de Lafayette, April 28, 1788

… For example: there was not a member of the convention, I believe, who had the least objection to what is contended for by the Advocates for a *Bill of Rights* and *Tryal by Jury*. The first, where the people evidently retained everything which they did not in express terms give up, was considered nugatory as you will find to have been more fully explained by Mr. Wilson and others: — And as to the second, it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment.

Kaminski & Saladino, vol. 17, p. 235.

16.2.5.6Thomas Jefferson to James Madison, March 15, 1789

… In the arguments in favor of a declaration of rights, you omit one which has great weight to me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity. … The Declaration of rights is like all other human blessings alloyed with some inconveniences, and not accomplishing fully it's [*sic*] object. But the good in this instance vastly overweighs the evil. I cannot refrain from making short answers to the objections which your letter states to have been raised. I. That the rights in question are reserved by the manner in which the federal powers are granted. Answer. a constitutive act may certainly be so formed as to need no declaration of rights. The act itself has the force of a declaration as far as it goes: and if it goes to all material points nothing more is wanting.

Boyd, vol. 14, pp. 659–60.

16.2.5.7Abraham Baldwin to Joel Barlow, June 14, 1789

A few days since, Madison brought before us propositions of amendment agreeably to his promise to his constituents. Such as he supposed would tranquillize the minds of honest opposers without injuring the system. *viz.*

That what is not given is reserved, that liberty of the press & trial by jury shall remain *inviolable*. We are too busy at present in cutting away at the whole cloth, to stop to do any body's patching. There is no such thing as antifederalism heard of.

Veit, p. 250.

16.2.5.8Tench Coxe to James Madison, June 18, 1789

I observe you have brought forward the amendments you proposed to the federal Constitution. I have given them a very careful perusal, and have attended particularly to their reception by the public. The most decided friends of the constitution admit (generally) that they will meliorate the government by removing some points of litigation and jealousy, and by heightening and strengthening the barriers between necessary power and indispensable liberty. … Those who are honest are well pleased at the footing on which the press, liberty of conscience, original right & power, trial by jury &ca. are rested.

Veit, p. 253.

16.2.5.9Richard Parker to Richard Henry Lee, July 6, 1789

I observe the slip of the newspaper sent me and know the design, but I still think a Bill if rights not necessary here. … However I have no objection to such a bill of Rights as has been proposed by Mr. Maddison [*sic*] because we declare that we do not abridge our Rights by the reservation that we retain all that we have not specifically given. …

Veit, p. 260.

16.2.5.10Henry Gibbs to Roger Sherman, July 16, 1789

… All Ambiguity of Expression certainly ought to be remov'd; Liberty of Conscience in religious matters, right of trial by Jury, Liberty of the Press &c. may perhaps be more explicitly secur'd to the Subject & a general reservation made to the States respectively of all the powers not expressly

delegated to the general Government. …

Veit, p. 263.

16.2.5.11 William L. Smith to Edward Rutledge, August 10, 1789

… I shall support the Amendmts. [*sic*] proposed to the Constitution that any exception to the powers of Congress shall not be so construed as to give it any powers not *expressly* given, & the enumeration of certain rights shall not be so construed as to deny others retained by the people — & the powers not delegated by this Constn. nor prohibited by it to the States, are reserved to the States respectively. …

Veit, p. 273.

16.2.5.12 James Madison to George Washington, December 5, 1789

[Randolph's] principle objection was pointed agst. the word "*retained,*" in the eleventh proposed amendment [Ninth Amendment], and his argument if I understood it applied in this manner — that as the rights declared in the first ten of the proposed amendments were not all that a free people would require the exercise of, and that as there was no criterion by which it could be determined whether any other particular right was retained or not, it would be more safe and more consistent with the spirit of the 1st & 17th amendts. proposed by Virginia that this reservation agst. constructive power, should operate rather as a provision agst. extending the powers of Congs. by their own authority, than a protection to rights reducible to no definitive certainty. But others, among whom I am one, see not the force of this distinction. …

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing.

Hobson & Rutland, vol. 12, pp. 458–59.

16.3DISCUSSION OF RIGHTS

16.3.1TREATISES

16.3.1.1Blackstone, 1765

> For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration. And therefore the principle view of human laws is, or ought to be, to explain, protect, and enforce such rights as are absolute. …
>
> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind.
>
> Blackstone Commentaries, bk. 1, ch. 1; vol. 1, p. 120.

16.3.2CASE LAW

None.

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1 On August 22, 1789, the following motion was agreed to:

> ORDERED, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee.

2 For Madison’s speech in support of his proposals, *see* 1.2.1.1.a–c.

CHAPTER 17

ARTICLE I, SECTION 9, CLAUSE 2

HABEAS CORPUS CLAUSE

17.1TEXTS

17.1.1DRAFTS IN THE PHILADELPHIA CONVENTION

17.1.1.1Proposal by Pinckney, May 29, 1787

17.1.1.1.a

> Mr. Charles Pinckney, one of the Deputies of South Carolina, laid before the House for their consideration, the draught of a federal government to be agreed upon between the free and independent States of America.
>
> Journal, Farrand, vol. 1, p. 16 (footnote omitted).

17.1.1.1.b

> Mr. Charles Pinkney [*sic*] laid before the house the draught of a federal Government which he had prepared to be agreed upon between the free and independent States of America. — Mr. P. plan ordered that the same be referred to the Committee of the whole appointed to consider the State of the American Union.
>
> Madison's Notes, Farrand, vol. 1, p. 23 (footnote omitted).

17.1.1.1.c

…

The United States shall not grant any title of Nobility —— The Legislature of the United States shall pass no Law on the subject of Religion, nor touching or abridging the Liberty of the Press nor shall the Privilege of the Writ of Habeas Corpus ever be suspended except in case of Rebellion or Invasion.

New Jersey (Pinckney) Plan, Farrand, Appendix D, vol. 3, p. 599.

17.1.1.2Motion by Pinckney, August 20, 1787

17.1.1.2.a.

It was moved and seconded to refer the following propositions to the Committee of five.

Which passed in the affirmative.

…

The privileges and benefit of the writ of habeas corpus shall be enjoyed in this government in the most expeditious and ample manner: and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding months.

Journal, Farrand vol. 2, p. 334.

17.1.1.2.b.

Mr. Pinkney [*sic*] submitted to the House, in order to be referred to the Committee of detail, the following propositions —

…

"The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding months."

Madison's Notes, Farrand, vol. 2, p. 341.

17.1.1.3Motion by Pinckney, August 28, 1787

[In response to the Report of a Committee of Eleven, appointed August 25]

Mr. Pinkney [*sic*] … moved "that it [the writ of habeas corpus] should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months"

Madison's Notes, Farrand, vol. 2, p. 438.

17.1.1.4Motion by Govr. Morris, August 28, 1787

17.1.1.4.a

The honorable Mr Sherman from the Committee to whom were referred several propositions entered on the Journal the 25 instant informed the House that the Committee were prepared to report — The report was then delivered in at the Secretary's table, was read, and is as follows.

…

It was moved and seconded to amend the 4th section of the 11th article to read as follows.

"The trial of all crimes (except in cases of impeachment) shall be by Jury—and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State then the trial shall be at such place or places as the Legislature may direct."

which passed in the affirmative

It was moved and seconded to add the following amendment to the 4 sect. 11 article

"The privilege of the writ of Habeas Corpus shall not be suspended; unless where in cases of rebellion or invasion the public safety may require it."

which passed in the affirmative [Ayes – 7; noes – 3.] Journal, Farrand, vol. 2, p. 435 (footnote omitted).

17.1.1.4.b

Mr. Govr Morris moved that "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it".

…

The first part of Mr. Govr. Morris' [motion,] to the word "unless" was agreed to nem: con:—on the remaining part;

N. H. ay. Mas. ay. Ct. ay. Pa. ay. Del. Ay. Md. Ay. Va. Ay. N. C. no. S. C. no. Geo. No. [Ayes –7; Noes – 3.] Madison's Notes, Farrand, vol. 2, p. 438.

17.1.1.5Reference to Committee of Style and Arrangement, September 10, 1787

XI.

…

Sect. 4. The trial of all crimes (except in cases of impeachments) shall be by jury and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State then the trial shall be at such place or places as the Legislature may direct.

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.

Farrand, vol. 2, p. 576.

17.1.1.6Report of Committee of Style and Arrangement, September 12, 1787

ARTICLE I.

…

Sect. 9. The migration or importation of such persons as the several states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each such person.

[[a]] 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.

Farrand, vol. 2, p. 596.

17.1.1.7Printed Version, September 15, 1787

ARTICLE I.

…

Section 9. The Migration or Immigration of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a

Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

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.

Farrand, vol. 2, p. 656.

17.1.2STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

17.1.2.1GEORGIA

17.1.2.1.aConstitution of Georgia, 1777

LX. The principles of the habeas corpus act shall be a part of this constitution.

Georgia Laws, p. 16 [reprint of English Habeas Corpus Act of 1679, pp. 18–24].

17.1.2.1.b Constitution of Georgia, 1789

ARTICLE IV.

Sect. 4. All persons shall be entitled to the benefit of the writ of *habeas corpus*.

Georgia Laws, p. 29.

17.1.2.2Massachusetts: Constitution of Massachusetts, 1780

PART THE SECOND.

THE FRAME OF GOVERNMENT.

CHAPTER VI.

VII. The privilege and benefit of the writ of Habeas Corpus, shall be enjoyed in this Commonwealth, in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the Legislature, except

upon the most urgent and pressing occasions, and for a limited time not exceeding twelve months.

Massachusetts Perpetual Laws (1801), p. 44.

17.1.2.3New Hampshire: Constitution of New-Hampshire, 1784

PART II.

THE FORM OF GOVERNMENT.

The privilege and benefit of the habeas corpus, shall be enjoyed in this State, in the most free, easy, cheap, expeditious and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a time not exceeding three months.

New Hampshire Laws, p. 44.

17.1.2.4New York: Act for the Better Securing the Liberty of the Citizens, 1787

CHAP. 39.

AN ACT for the better securing the liberty of the citizens of this State, and for prevention of imprisonments.

PASSED the 21st of February, 1787.

WHEREAS great delays have been used by sheriffs, gaolers and other officers, to whose custody persons have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, and by other shifts, to avoid their yielding obedience to such writs, contrary to their duty, and the known laws of the land, whereby many persons have been, and hereafter may be, long detained in prison, in such cases, where by law they are bailable, to their great charges and vexation: For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal, or supposed criminal matters,[1]

Be it enacted by the People of the State of New York, represented in Senate and Assembly, and it is hereby enacted by the authority of the same, That whensoever any person or persons shall bring any habeas corpus, directed to any sheriff, gaoler, minister or other person or persons whatsoever, for any person in his, or their custody, and the said writ shall

be served upon the said officer, or other person or persons, or left at the gaol or prison, with any of the under officers, under keepers or deputy of the said officers, or keepers, that the said officer or officers, his or their under officers, under keepers or deputies, or other person or persons, shall within three days after the service thereof as aforesaid, (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment,) upon payment or tender of charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same, and indorsed upon the said writ, not exceeding twelve pence per mile, and upon security given by his own bond, to pay the charges of carrying back the prisoner, if he shall be remanded by the court or judge, to which he shall be brought, according to the true intent of this act, and that he will not make any escape by the way, make return of such writ, and bring or cause to be brought the body of the party so committed or restrained, unto or before the chancellor of this State for the time being, or the justices of the supreme court, or unto or before such of them before whom the said writ is made returnable, according to the command thereof, and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment of the said party be in a place beyond the distance of twenty miles from the place or places where such court or person is, or shall be residing; and if beyond the distance of twenty miles and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days after such delivery as aforesaid, and not longer. And to the intent that no sheriff, gaoler or other officer, may pretend ignorance of the import of any such writ;[2]

Be it further enacted by the authority aforesaid That all such writs shall be marked in this manner, by the statute, and be signed by the person that awards the same; and if any person or persons shall be or stand committed, or detained as aforesaid, for any crime, unless for treason or felony plainly expressed in the warrant of commitment, in the vacation time, and out of term, it shall and may be lawful to and for the person or persons so committed or detained, (other than persons convict, or in execution by legal process) or any one, on his, or their behalf, to apply or complain to the chancellor, or any one of the justices of the supreme court, and the said chancellor or justices, or any of them, upon view of the copy or copies of the warrant or warrants of commitment, and detainer, or otherwise, upon oath made that such copy or copies were denied to be given by such person or persons in whose custody the prisoner or prisoners is, or are detained, are

hereby authorized and required, upon request made in writing by such person or persons, or any on his, her, or their behalf, attested and subscribed by two witnesses who were present at the delivery of the same, to award and grant an habeas corpus, under the seal of such court whereof he shall then be one of the judges, to be directed to the officer or officers, or person or persons in whose custody the party so committed or detained shall be, returnable immediately before the said chancellor or justice of the said supreme court; and upon service thereof as aforesaid, the officer or officers, his or their under officer, or under officers, under keeper or under keepers, or their deputy, or person or persons in whose custody the party is so committed or detained, shall, within the times respectively before limited, bring such prisoner or prisoners before the said chancellor, or justices of the said supreme court, or one of them, before whom the said writ is made returnable; and in case of his absence, before any other of them, with the return of such writ, and the true causes of the commitment and detainer; and thereupon, within two days after the party shall be brought before them, the said chancellor, or such justice, before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties, in any sum according to their discretions, having regard to the quality of the prisoner, and nature of the offence, for his, or their appearance in the supreme court, the term following, or at the next general sessions or gaol delivery, of and for such county, city or place, where the commitment was, or where the offence was committed, or in such other court, where the said offence is properly cognizable, as the case shall require; and shall then certify the said writ, with the return thereof, and the said recognizance or recognizances, into the said court where such appearance is to be made; unless it shall appear unto the said chancellor or justice or justices, that the party so committed, is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices, or some justice or justices of the peace, for such matters or offences, for the which by the law the prisoner is not bailable. But if any person shall have wilfully neglected by the space of two whole terms after his imprisonment, to pray a habeas corpus for his enlargement, such person so wilfully neglecting, shall not have any habeas corpus to be granted in vacation time in pursuance of this act.[3]

And be it further enacted by the authority aforesaid, That if any officer or officers, his or their under officer or under officers, under keeper or under

keepers, or deputy, or other person or persons, shall neglect or refuse to make the returns aforesaid, or to bring the body or bodies of the prisoner or prisoners, according to the command of the said writ, within the respective times aforesaid, or upon demand made by the prisoner, or any person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver, to the person so demanding a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly, all and every the head gaolers, and keepers of such prisons, and such other person or persons in whose custody the prisoner shall be detained, shall for the first offence, forfeit to the prisoner or party grieved, the sum of one hundred pounds, and for the second offence the sum of two hundred pounds, and shall, if an officer, be and is hereby made incapable to hold or execute his said office; the said penalties to be recovered by the prisoner or party grieved, his or her executors or administrators, against such offender, his executors or administrators, by action of debt, suit, bill, plaint or information, in any court of record, wherein no privilege, injunction or stay of prosecution by non vult ulterius prosequi, or otherwise, shall be admitted or allowed, or any more than one imparlance: and any recovery or judgment at the suit of any party grieved, shall be a sufficient conviction for the first offence; and any after recovery or judgment at a suit of a party grieved, for any offence after the first judgment, shall be a sufficient conviction to bring the officers, or person or persons, within the said penalty, for the second offence.[4]

And for prevention of unjust vexation, by reiterated commitments for the same offence,

Be it further enacted by the authority aforesaid, That no person or persons, who shall be delivered or set at large, upon any habeas corpus, shall at any time thereafter be again imprisoned or committed for the same offence, by any person or persons whatsoever, other than by the legal order and process of such court, wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause; and if any other person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly cause or procure to be recommitted or imprisoned for the same offence, or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved, the sum of five hundred pounds, any colourable pretence or variation in the warrant or warrants of commitment notwithstanding, to be

recovered as aforesaid.[5]

And be it further enacted by the authority aforesaid, That if any person or persons shall be committed, for any treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court, the first week of the term, or first day of the sessions of oyer and terminer, or gaol delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer, or gaol delivery, after such commitment, it shall and may be lawful to and for the justices of the supreme court, and justices of oyer and terminer or gaol delivery, and they are hereby required, upon motion to them made in open court, the last day of the term, sessions or gaol delivery, either by the prisoner, or any one in his behalf, to set at liberty the prisoner, upon bail, unless it appear to the justices, upon oath made, that the witness against the prisoner could not be produced, the same term, sessions, or gaol delivery. And if any person or persons committed as aforesaid, upon his prayer or petition in open court, the first week of the term, or first day of the sessions of oyer and terminer, or gaol delivery, to be brought to his trial, shall not be indicted and tried the second term, sessions of oyer and terminer, or gaol delivery, after his commitment, or upon his trial, shall be acquitted, he shall be discharged from his imprisonment.[6]

Provided always, That nothing in this act shall extend to discharge out of prison, any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody according to the law for such other suit.[7]

And be it further enacted by the authority aforesaid, That if any person or persons, citizens of this State, shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter that the said person shall not be removed from the said prison and custody, into the custody of any other officer or officers, unless it be by habeas corpus, or some other legal writ or process, or where the prisoner is delivered to the constable or other inferior officer, to carry such prisoner to some common gaol, or where any person is sent by order of any court or judge or justice of the peace, to any common work house, or house of correction, or where the prisoner is removed from one prison or place, to another within the same county, in order to his, or her trial, or discharge, in due course of law, or in case of sudden fire or infection, or other necessity; and if any person or persons shall, after such commitment aforesaid, make

out and sign, or countersign, any warrant or warrants, for such removal aforesaid, contrary to this act, as well he who makes or signs, or countersigns such warrant or warrants, as the officer or officers who obey or execute the same, shall for every offence forfeit to the prisoner or party grieved two hundred pounds, to be recovered in manner aforesaid, by the party grieved.[8]

And be it further enacted by the authority aforesaid, That it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move for and obtain his or their habeas corpus, as well out of the court of chancery, as out of the supreme court; and if the chancellor, or any justice of the supreme court, for the time being, in the vacation time, upon view of the copy or copies of the warrant or warrants of commitment, or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of habeas corpus, by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved, the sum of five hundred pounds, to be recovered in manner aforesaid.[9]

And for preventing illegal imprisonments of the citizens of this State, in prisons out of this State.

Be it further enacted by the authority aforesaid, That no citizen of this State, who now is, or hereafter shall be an inhabitant or resident within this State, shall or may be sent prisoner to any place whatsoever, out of this State for any crime or offence committed within this State; and that every such imprisonment, is hereby enacted and adjudged to be illegal; and that if any of the said citizens now is, or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may for every such imprisonment, maintain, by virtue of this act, an action or actions of false imprisonment, in any court of record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner, or transported, contrary to the true intent and meaning of this act, and against all or any person or persons, who shall frame, contrive, write, seal, sign or countersign, any warrant or writing for such commitment, detainer, imprisonment or transportation, or shall be advising, aiding or assisting in the same, or any of them; and the plaintiff in every such action shall have judgment to recover treble costs, besides damages; which damages so to be given, shall not be less than five hundred pounds, in which action no delay, stay or stop of proceeding, by rule, order or command, nor no injunction or privilege whatsoever, nor any more than one imparlance shall be allowed,

excepting such rule of the court wherein the action shall depend, made in open court, as shall be thought in justice necessary for special cause to be expressed in the said rule. And the person or persons who shall knowingly frame, contrive, write, seal, sign, or countersign, any warrant for such commitment, detainer or transportation, or shall so commit, detain, imprison or transport, any person or persons contrary to this act, or be any wise advising, aiding or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within this State, and shall forfeit to the people of this State, all his goods and chattels, and the issues and profits of his lands and tenements, during his natural life.[10]

Provided always, that nothing in this act shall extend to give benefit to any person who shall, by contract in writing, agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any place out of this State, or to any part beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract.[11]

Provided also, that if any person or persons lawfully convicted of any felony, shall in open court pray to be transported beyond the seas, and the court shall think fit to leave him or them in prison for that purpose; such person or persons may be transported into any parts beyond the seas, this act, or any thing therein contained, to the contrary notwithstanding.[12]

Provided also, that if any person or persons at any time resident in this State, shall have committed or be charged with having committed any treason, felony, or other high misdemeanor, in any other of the United States of America, where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used, before the making of this act, any thing herein contained, to the contrary notwithstanding.[13]

Provided also, and be it further enacted by the authority aforesaid, That no person or persons shall be sued, impleaded, molested or troubled, for any offence against this act, unless the party offending be sued or impleaded for the same, within two years at most, after such time wherein the offence shall be committed, in case the party grieved shall not then be in prison; and if he or she shall be in prison, then within the space of two years after the decease of the person imprisoned, or his or her delivery out of prison, which shall first happen.[14]

And be it further enacted by the authority aforesaid, That if any

information, suit or action, shall be brought or exhibited against any person or persons, for any offence committed, or to be committed against the form of this law, it shall be lawful for such defendants, to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded, had been good and sufficient matter in law, to have discharged the said defendant or defendants against the said information, suit or action; and the said matter shall be then as available, to him or them, to all intents and purposes, as if he or they had suffiicently pleaded, set forth or alledged the same matter, in bar or discharge of such information suit or action.[15]

And to the intent that no person may avoid his trial, at the sessions of oyer and terminer or gaol delivery, by procuring his removal before the setting of the same court, at such times as he cannot be brought back to receive his trial there.

Be it further enacted by the authority aforesaid, That after the sessions of oyer and terminer, or gaol delivery proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol upon any habeas corpus granted in pursuance of this act; but upon any such habeas corpus, shall be brought before the justice or justices of the circuit court, in open court, who is or are thereupon to do what to justice shall appertain.[16]

Provided, that after the sessions of oyer and terminer, or gaol delivery are ended, any person or persons detained, may have his or their habeas corpus, according to the direction and intention of this act.

And because oftentimes persons charged with felony, or as accesssaies thereunto, are committed upon suspicion only, whereupon they are bailable, or not, according as the circumstances making out that suspicion, are more or less weighty, which are best known to the justices of the peace who committed the persons, and have the examinations before them, or to other justices of the peace in the county. Therefore

Be it further enacted by the authority aforesaid, That where any person shall appear to be committed by any judge or justices of the peace, and charged as accessory before the fact, to any felony, or upon suspicion thereof, or with suspicion of any felony, which felony shall be plainly and specially charged in the warrant of commitment, that such persons shall not be removed or bailed by virtue of this act, or in any other manner than they might have been, before the making of this act.[17]

New York Laws, vol. 1, pp. 424–30.

17.1.2.5North Carolina: Declaration of Rights, 1776

Sect. XIII. That every Freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed.

North Carolina Laws, p. 275.

17.1.2.6Pennsylvania

17.1.2.6.a Act for Better Securing Personal Liberty, 1785

CHAPTER CLXXVIII.

An ACT *for the better securing personal liberty, and preventing wrongful imprisonments*.

SECT. I. WHEREAS personal liberty is a principal blessing derived from free constitutions of government, and certain methods of proceeding should be prescribed, so that all wrongful restraints thereof may be easily and speedily redressed: *Be it therefore enacted, and it is hereby enacted by the Representatives of the Freemen of the commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same*, That if any person shall be or stand committed or detained for any criminal or supposed criminal matter, unless for treason or felony, the species whereof is plainly and fully set forth in the warrant of commitment, in vacation time and out of term, it shall and may be lawful to and for the person so committed or detained, or any one on his or her behalf, to appeal or complain to any Judge of the Supreme Court, or to the President of the court of Common Pleas for the county, within which the person is so committed or detained; and such Judge or Justice, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or otherwise, upon oath or affirmation legally made, that such copy or copies were denied to be given by the person or persons, in whose custody the prisoner is detained, is hereby authorised and required, upon request made in writing by such prisoner, or any person on his or her behalf, attested and subscribed by two witnesses, who were present at the delivery of the same, to award and grant an *Habeas Corpus*, under the seal of the court, whereof he shall then be a Judge or Justice, to be directed to the person or persons, in whose custody the prisoner is detained, returnable immediate before the said Judge or Justice;

and to the intent, that no officer, sheriff, goaler, keeper or other person, to whom such writ shall be directed, may pretend ignorance of the import thereof, every such writ shall be made in this manner, “By Act of Assembly, one thousand seven hundred and eighty-five,” and shall be signed by the Judge or Justice who awards the same. And whenever the said writ shall by any person be served upon the officer, sheriff, goaler, keeper, or other person whatsoever, to whom the same shall be directed, by being brought to him, or by being left with any of his under officers or deputies, at the goal or place where the prisoner is detained, he, or some of his under officers or deputies, shall, within three days after the service thereof as aforesaid, upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the Judge or Justice who awarded the writ, and thereon endorsed, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying him back, if he shall be re-demanded, and not to escape by the way, make return of such writ, and bring or cause to be brought the body of the prisoner unto or before the Judge or Justice, before whom the said writ is made returnable, and, in case of his absence, before any other of the Judges or Justices aforesaid, and shall then likewise specifically and fully certify the true cause or causes of the commitment and detainer of the said prisoner, and when he was commited, unless the commitment be in any place beyond the distance of twenty miles from the place where such Judge or Justice shall be residing, and if beyond the distance of twenty miles, and not above one hundred miles, then within ten days, and if beyond the distance of one hundred miles, then within twenty days: And thereupon the Judge or Justice, before whom the prisoner shall be so brought, shall within two days discharge the prisoner from imprisonment, taking his or her recognizance, with one or more surety or sureties, in any sum, according to his discretion, having regard to the circumstances of the prisoner, and the nature of the offence, for his or her appearance at the next court of Oyer and Terminer, General Gaol Delivery, or General Quarter Sessions of or for the county, city or place, where the offence was committed, or in such other court where it may be properly cognizable, as the case shall require, and then shall certify the said writ, with the return thereof, and the said recognizances, into the court where such appearance is to be made, unless it shall appear to the said Judge or Justice, that the party so committed is detained upon legal process, order or warrant, for such matter or offences, for which by the law the said prisoner is not bailable, and that the said Judge or Justice may, according to the intent and meaning of this act, be

enabled, by investigating the truth of the circumstances of the case, to determine whether, according to law, the said prisoner ought to be bailed, remanded or discharged; the return may, before or after it is filed, by leave of the said Judge or Justice, be amended, and also suggestions made against it, that thereby material facts may be ascertained.[18]

Sect. II. *And be it further enacted by the authority aforesaid*, That, in term time, it shall and may be lawful for any prisoner as aforesaid, in manner aforesaid, to move and obtain his or her *Habeas Corpus* out of the Supreme Court, or the court of Common Pleas for the county, in which he or she is imprisoned, whereupon proceedings shall be had as aforesaid.[19]

Sect. III. *And be it further enacted by the authority aforesaid*, That if any person shall be committed for treason or felony, and shall not be indicted and tried some time in the next term, session of Oyer and Terminer, General Gaol Delivery, or other court, where the offence is properly cognizable, after such commitment, it shall and may be lawful for the Judges or Justices thereof, and they are hereby required, upon the last day of the term, sessions, or court, to set at liberty the said prisoner upon bail, unless it shall appear to them, upon oath or affirmation, that the witnesses for the commonwealth, mentioning their names, could not then be produced; and if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment, unless the delay happen on the application, or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment.[20]

Sect. IV. *Provided always*, That nothing in this act shall extend to discharge out of prison any person guilty of or charged with treason, felony, or other high misdemeanor, in any other state, and who by the confederation ought to be delivered up to the executive power of such state, nor any person guilty of or charged with a breach or violation of the laws of nations.[21]

Sect. V. *Provided also*, That nothing in this act shall extend to discharge out of prison any person charged with debt or other action, or with process in any civil cause, but that after discharge for such criminal or supposed criminal matter, he or she shall be kept in custody, according to law, for such other suit.[22]

Sect. VI. And that no person may avoid his or her trial, by procuring a removal, so that he or she cannot be brought back in time, *Be it enacted by the authority aforesaid*, That no person shall be removed upon any *Habeas Corpus* granted in pursuance of this act, within fifteen days next preceding

the term, sessions of Oyer and Terminer, General Gaol Delivery, or other court, where the offence with which he or the stands charged is properly cognizable, but, upon such *Habeas Corpus*, shall be brought before the Judges or Justices thereof, who are thereupon to do what to justice shall appertain.[23]

Sect. VII. *Provided nevertheless*, That after such court the person detained may have his or her *Habeas Corpus*, according to this act.[24]

Sect. VIII. *And be it further enacted by the authority aforesaid*, That if any Judge or Justice aforesaid, being appealed or complained to as aforesaid, upon view of the copy or copies of the warrant or warrants of the commitment or detainer, or upon oath or affirmation made that such copy or copies were denied as aforesaid, shall refuse or neglect to award any writ of *Habeas Corpus*, by this act required to be granted, he shall forfeit to the prisoner, or party grieved, the sum of three hundred pounds, to be recovered by the said prisoner, or party grieved, his or her executors or administrators, against such offender, his executors or administrators, by action of debt, suit, bill, plaint, or information, in any court of record, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution, shall be allowed, or any more than one imparlance.[25]

Sect. IX. *And be it further enacted by the authority aforesaid*, That if any officer, sheriff, gaoler, keeper, or other person, to whom any such writ shall be directed as aforesaid, or any of his under officers or deputies, shall refuse or neglect to make the returns aforesaid, or to bring the body of the prisoner, according to the command of the said writ, within the respective times aforesaid, all and every such officer, sheriff, gaoler, keeper or other person, under officer or deputy, shall be guilty of a contempt of the court, under the seal of which the said writ shall have issued, and shall also for the first offence forfeit to the prisoner, or party grieved, one hundred pounds, and for the second offence two hundred pounds, and shall be and is hereby made incapable to hold or execute his said office; the said forfeitures to be recovered by the prisoner, or party grieved, in manner aforesaid.[26]

Sect. X. *And be it further enacted by the authority aforesaid*, That if any officer, sheriff, gaoler, keeper, or other person, to whom such writ shall be directed as aforesaid, or any of his under officers or deputies, upon demand by the prisoner, or some person in his or her behalf, shall refuse to deliver, or, within six hours after demand, shall not deliver to the prisoner, or person so demanding, a true copy or copies of the warrant or warrants of commitment and detainer of such prisoner, which are hereby required to be

delivered, all and every such officer, sheriff, goaler, keeper, or other person, under officer or deputy, so offending, shall, for the first offence, forfeit to the prisoner, or party grieved, one hundred pounds, and for the second offence two hundred pounds, and shall also be and is hereby made incapable to hold or execute his said office; the said forfeitures to be recovered by the prisoner, or party grieved, in manner aforesaid.[27]

Sect. XI. And for preventing unjust vexation by reiterated commitments for the same offence, *Be it further enacted by the authority aforesaid*, That no person, who shall be delivered or set at large upon an *Habeas Corpus*, shall, at any time thereafter, be again committed or imprisoned for the same offence by any person or persons whatsoever, other than by the legal order and process of such court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause, and if any other person or persons shall, knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offence, or supposed offence, any person delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner, or party grieved, any pretence of variation in the warrant or warrants of commitment notwithstanding, the sum of five hundred pounds, to be recovered by the prisoner, or party grieved, in manner aforesaid.[28]

Sect. XII. *And be it further enacted by the authority aforesaid*, That any person being committed to any prison, or in custody of any officer, sheriff, gaoler, keeper, or other person, or his under officer or deputy, for any criminal or supposed criminal matter, shall not be removed from the said prison or custody into any other prison or custody, unless it be by *Habeas Corpus*, or some other legal writ, or where the prisoner is delivered to the constable or other inferior officer, to be carried to some common gaol, or where any person is sent by any Judge or Justice, having proper authority, to some common workhouse or house of correction, or where the prisoner is removed from one place to another, within the same county, in order to his or her trial or discharge in due course of law, or in case of sudden fire or infection, or other necessity; and if any person or persons shall, after such commitment as aforesaid, make out, sign, countersign, and issue any warrant or warrants for such removal, except as before excepted, then he or they shall forfeit to the prisoner, or party grieved, two hundred pounds, to be recovered by the prisoner, or party grieved, in manner aforesaid.[29]

Sect. XIII. *And be it further enacted by the authority aforesaid*, That all

the provisions herein before made for the awarding and granting writs of *Habeas Corpus*, and proceeding thereon, in case of commitment or detainer for any criminal or supposed criminal matter, shall, in like manner, extend to all cases where any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his or her liberty, under any colour or pretence whatsoever, and that upon oath or affirmation made by such person, so confined or restrained, or by any other in his or her behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the person so applying, is not by virtue of any commitment or detainer for any criminal or supposed criminal matter, an *Habeas Corpus*, directed to the person or persons so confining or restraining the party as aforesaid, shall be awarded and granted, in the same manner, and under the same penalties, to be recovered from the same persons, as is herein before directed; and the Court, Judge or Justice, before whom the party so confined or restrained shall be brought, shall, after the return made, proceed, in the same manner as is herein before prescribed, to examine into the facts relating to the case, and into the cause of such confinement or restraint, and thereupon either bail, remand, or discharge the party so brought, as to justice shall appertain.[30]

SECT. XIV. *And be it further enacted by the authority aforesaid*, That whensoever any writ of *Habeas Corpus*, awarded and granted, either in term or vacation time, for any person so confined or restrained, without a commitment for any criminal or supposed criminal matter, shall be served upon the, person or persons so confining or restraining such party, by being brought to such person or persons, or by being left at the place where the party shall be so confined or restrained, the person or persons so confining or restraining such party shall make return of such writ, and bring, or cause to be brought, the body of such party, according to the command thereof, within the respective times limited, and under the provisions herein before prescribed, and every such person refusing or neglecting so to make return of such writ, or to bring, or cause to be brought, the body of the party, according to the command thereof, within the times respectively limited, and under the provisions herein before prescribed, shall be guilty of a contempt of the court, under the seal of which the said writ shall have issued, and shall also forfeit for the first offence, to the party grieved, one hundred pounds, and for the second offence, two hundred pounds, to be recovered by him or her, his or her executors or administrators, against the offender, his or her executors or administrators, in manner aforesaid.[31]

SECT. XV. *Provided always, and be it further enacted by the authority aforesaid*, That no person shall be sued, impleaded, molested or troubled, for any offence against this act, unless such person be sued or impleaded for the same within two years after the time wherein the said offence shall have been committed, in case the party grieved shall not be then in prison, or confined or restrained as aforesaid, and if the said party shall be then in prison, or so confined or restrained, then within two years after the decease of the person imprisoned, or so confined or restrained, or his or her delivery out of prison, or from such confinement or restraint.[32]

SECT. XVI. *And be it also enacted by the authority aforesaid*, That in or upon any action, suit, bill, plaint, or information, for any offence against this act, the defendant or defendants may plead the general issue, and give the special matter in evidence.[33]

Passed 18th February, 1785.

Pennsylvania Acts, Dallas pp. 241–45.

17.1.2.6.b Constitution of Pennsylvania, 1790

ARTICLE IX.

SECT. XIV. 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 require it.

Pennsylvania Acts, Dallas, p. xxxv.

17.1.2.7South Carolina

17.1.2.7.aAct … to Execute and Put in Force, 1712

An Act to empower the Right Honourable the Governor of this Province, the Lords Deputies, the Chief Justice, or the Justices of the Peace, and other Officers or Ministers within this Province, to execute and put in Force in the same, an Act made in the Kingdom of England, in the Thirty-first Year of the Reign of the late King Charles the Second, entitled, *An Act for the better securing the Liberty of the Subject, and for the Prevention of Imprisonments beyond the Seas, commonly called the* Habeas Corpus Act.*

WHEREAS no law or statute hath hitherto been made or enacted, which

better secures the liberty of the subject than an act made in the kingdom of England, in the 31st year of the reign of the late King Charles the Second, entitled, *An Act for the better securing the Liberty of the Subject, and for the Prevention of Imprisonment beyond the Seas*, commonly called the *Habeas Corpus Act;* but because the said act cannot fully, wholly and effectually be put in practice and execution in this Province, for want of such magistrates, justices and officers so impowered and qualified, as is directed and required by the said act, in order to put the same in execution; therefore for the effectual supplying the said defect, and that the people of this Province may not loose the benefit of so useful an act, *Be it enacted*, That the Right Honourable *Charles Craven*, Esquire, Governor of this Province, or the Governor for the time being, or any two of the Lords Proprietors Deputies, or the Chief Justice of this Province, or any one of the Lords Proprietors Deputies and any one Justice of the Peace, or any two Justices of the Peace, whereof one to be of the Quorum, within this part of the Province that lies South and West of Cape Fear, shall have power, and they are hereby authorised and impowered and required to do, act and put in execution the said act, commonly called the *Habeas Corpus Act*, and every matter, clause, or thing therein contained, according to their true intent and meaning, as fully, effectually and lawfully, as any Lord Chancellor, Lord Keeper, or any of her Majesty's Justices, either of the one bench or the other, or the Barons of the Exchequer of the degree of the Coif, may, can or ought to do within the kingdom of England.[34]

II. Every provost-martial, gaoler, or other person whatsoever, by what name soever called or known; which hath the keeping of any gaol or prison within the South-west part of this Province, shall have power, and are hereby impowered, authorised, required and commanded to give due obedience in the execution of every writ of *Habeas Corpus*, made or signed by any person or persons whatsoever by this act impowered to make, sign and grant the same, and to do and perform every other matter or thing which any sheriff, undersheriff, gaoler, minister, or other person whatsoever, which hath the keeping of any gaol or prison, by virtue of the said act ought, may or can do within the kingdom of England.[35]

III. Every person whatsoever to whom any power is given, either judicial or ministerial by this act, and which by virtue of this act he is required and commanded to do, and shall wilfully neglect, refuse or omit to do the same, when the same shall be legally requested and demanded, according to the direction of the said *Habeas Corpus Act*, and when the person or persons so

requesting and demanding the same, are legally entitled to request or demand by the said act, and are within the benefit of the same, according to the true intent and meaning thereof, that then and in such case, such person, whether magistrate or officer, wilfully so refusing, neglecting or omitting what this act requireth and commandeth him or them, for each wilful neglect, refusal or omission, shall forfeit the sum of £.500, current money of this Province, loss of places or office, and undergo such penalties as by the said act is appointed for every respective magistrate, officer, minister or person whatsoever, within the kingdom of England, to be recovered in any of the courts of record in this Province, in such manner and form as by the said *Habeas Corpus Act* is appointed to be recovered in any of her Majesty's Courts at Westminster.[36]

IV. All and every person which now is, or hereafter shall be within any part of this Province, shall have to all intents, constructions and purposes whatsoever, and in all things whatsoever, as large, ample and effectual right to and benefit of the said act, commonly called the *Habeas Corpus Act*, as if he were personally in the said Kingdom of England.[37]

December 12, 1712.

An act for the better securing the Liberty of the Subject, and for Prevention of Imprisonments beyond the Seas.

WHEREAS great delays have been used by sheriffs, gaolers and other officers, to whose custody any of the King's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *Habeas Corpus* to them directed, by standing out on *Alias* and *Pluries Habeas Corpus*, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation:

II. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters; (2) *Be it enacted*, That whensoever any person or persons shall bring any *Habeas Corpus* directed unto any sheriff or sheriffs, gaoler, minister or other person whatsoever, for any person in his or their custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under-officers, underkeepers, or deputy of the said officers or keepers, that the said officer or officers, his or their under-officers, underkeepers, or

deputies, shall within three days after the service thereof as aforesaid (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed upon the said writ, not exceeding 12 pence *per* mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the Court or Judge to which he shall be brought according to the true intent of this present act, and that he will not make any escape by the way, make return of such writ; (3) and bring or cause to be brought the body of the party so committed or restrained, unto or before the Lord Chancellor, or Lord Keeper of the Great Seal of *England* for the time being, or the Judges or Barons of the said Court from whence the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof; (4) and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment of the said party be in any place beyond the distance of 20 miles from the place or places where such court or person is or shall be residing; and if beyond the distance of 20 miles, and not above 100 miles, then within the space of 10 days, and if beyond the distance of 100 miles, then within the space of 20 days, after such delivery aforesaid, and not longer.[38]

III. And to the intent that no sheriff, gaoler or other officer may pretend ignorance of the import of any such writ; (2) Be it enacted, That all such writs shall be marked in this manner, *Per Statutum tricesimo primo Caroli Secundi Regis*, and shall be signed by the person that awards the same; (3) and if any person or persons shall be or stand committed or detained as aforesaid, for any crime, unless for felony or treason plainly expressed in the warrant of commitment, in the vacation-time, and out of term, it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution by legal process) or any one on his or their behalf, to appeal or complain to the Lord Chancellor or Lord Keeper, or any one of his Majesty’s Justices; either of the one bench or of the other, or the Barons of the Exchequer of the Degree of the Coif; (4) and the said Lord Chancellor, Lord Keeper, Justices or Barons, or any of them, upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise upon oath made that such copy or copies were denied to be given by such person or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorised, and

required, upon request made in writing by such person or persons, or any on his, her or their behalf, attested and subscribed by two witnesses who were present at the delivery of the same, to award and grant an *Habeas Corpus* under the seal of such Court whereof he shall then be one of the Judges, (*5*) to be directed to the officer or officers in whose custody the party so committed or detained shall be, returnable *immediate* before the said Lord Chancellor or Lord Keeper, or such Justice, Baron, or any other Justice or Baron of the Degree of the Coif of any of the said courts; (6) and upon service thereof as aforesaid, the officer or officers, his or their under-officer or under-officers, underkeeper or underkeepers, or their deputy, in whose custody the party is so committed or detained, shall within the times respectively before limited, bring such prisoner or prisoners before the said Lord Chancellor, or Lord Keeper, or such Justices, Barons or one of them, before whom the said writ is made returnable, and in case of his absence before any other of them, with the return of such writ, and the true causes of the commitment and detainer; (7) and thereupon within two days after the party shall be brought before them, the said Lord Chancellor or Lord Keeper, or such Justice or Baron before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or furcties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offence, for his or their appearance in the Court of King's Bench the term following, or at the next assizes, sessions or general gaol-delivery of and for such county, city or place where the commitment was, or where the offence was committed, or in such other court where the said offence is properly cognizable, as the case shall require, and then shall certify the said writ with the return thereof, and the said recognizance, or recognizances into the said court where such appearance is to be made; (8) unless it shall appear unto the said Lord Chancellor or Lord Keeper, or Justice or Justices, or Baron or Barons, that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said Justices or Barons, or some Justice or Justices of the Peace, for such matters or offences for the which by the law the prisoner is not bailable.[39]

IV. Provided always, and be it enacted, That if any person shall have wilfully neglected by the space of 2 whole terms after his imprisonment, to pray a *Habeas Corpus* for his enlargement, such person so wilfully neglecting shall not have any *Habeas Corpus* to be granted in vacation-

time, in pursuance of this act.[40]

V. And be it further enacted, That if any officer or officers, his or their under-officer or under-officers, underkeeper or underkeepers, or deputy, shall neglect or refuse to make the returns aforesaid, or to bring the body or bodies of the prisoner or prisoners according to the command of the said writ, within the respective times aforesaid, or upon demand made by the prisoner or person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver, to the person so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly; all and every the head gaolers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained, shall for the first offence forfeit to the prisoner or party grieved the sum of £100; (2) and for the 2d offence the sum of £. 200, and shall and is hereby made incapable to hold or execute his said office; (3) the said penalties to be recovered by the prisoner or party grieved, his executors or administrators, against such offender, his executors or administrators, by any action of debt, suit, bill, plaint, or information, in any of the King's Courts at *Westminster*, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution by *Non vult ulterius prosequi*, or otherwise, shall be admitted or allowed, or any more than one imparlance; (4) and any recovery or judgment at the suit of any party grieved, shall be a sufficient conviction for the first offence; and any after recovery or judgment at the suit of a party grieved for any offence after the first judgment, shall be a sufficient conviction to bring the officers or person within the said penalty for the second offence.[41]

VI. And for the prevention of unjust vexation by reiterated commitments for the same offence; (2) *Be it enacted*, That no person or persons which shall be delivered or set at large upon any *Habeas Corpus*, shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than by the legal order and process of such court wherein he or they shall be bound by recognizance to appear, or other court having jurisdiction of the cause; (3) and if any other person or persons shall knowingly contrary to this act recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offence or pretended offence, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of £500; any colourable

pretence or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.[42]

VII. Provided, That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or first day of the sessions of *Oyer* and *Terminer* and General Gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, Sessions of *Oyer* and *Terminer* or General Goal-delivery, after such commitment; it shall and may be lawful to and for the Judges of the Court of King's Bench and Justices of *Oyer* and *Terminer* or General Gaol-delivery, and they are hereby required, upon motion to them made in open court the last day of the term, Sessions or Goal-delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the Judges and Justices upon oath made, that the witnesses for the King could not be produced the same Term, Sessions, or General Gaol-delivery; (2) and if any person or persons committed as aforesaid, upon his prayer or petition in open Court the first week of the Term or first day of the Sessions of *Oyer* and *Terminer* and General Goal-delivery, to be brought to his trial, shall not be indicted and tried the second Term, Sessions of *Oyer* and *Terminer* or General Goal-delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.[43]

VIII. Provided always, That nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody according to the law, for such other suit.

IX. Provided always, That if any person or persons, subjects of this realm, shall be committed to any prison or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers; (2) unless it be by *Habeas Corpus* or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer to carry such prisoner to some common gaol; (3) or where any person is sent by order of any Judge of Assize or Justice of the Peace, to any common workhouse or house of correction; (4) or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law; (5) or

in case of sudden fire or infection, or other necessity; (6) and if any person or persons shall after such commitment aforesaid make out and sign, or countersign any warrant or warrants for such removal aforesaid, contrary to this act; as well he that makes or signs, or countersigns such warrant or warrants as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in this act before mentioned, both for the first and second offence respectively, to be recovered in manner aforesaid by the party grieved.

X. Provided also, That it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their *Habeas Corpus* as well out of the High Court of Chancery or Court of Exchequer, as out of the Courts of King's Bench or Common Pleas, or either of them; (2) and if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons for the time being, of the Degree of the Coif, of any of the Courts aforesaid, in the vacation-time, upon view of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of *Habeas Corpus* by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of £500, to be recovered in manner aforesaid.[44]

[NO PROVISION XI.]

XII. And for preventing illegal imprisonments in prisons beyond the seas, (2) Be it further enacted, That no subject of this realm that now is, or hereafter shall be an inhabitant or resiant of this kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, shall or may be sent prisoner into *Scotland*, *Ireland*, *Jersey*, *Guernsey*, *Tangier*, or into parts, garrisons, islands or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of his Majesty, his heirs or successors; (3) and that every such imprisonment is hereby enacted and adjudged to be illegal; (4) and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may for every such imprisonment maintain by virtue of this act an action or actions of false imprisonment, in any of his Majesty's Courts of Record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner or transported, contrary to the true meaning of this act, and against all or any person or persons that shall frame, contrive, write, seal or countersign any warrant or writing for such commitment, detainer, imprisonment or

transportation, or shall be advising, aiding or assisting in the same, or any of them; (5) and the plaintiff in every such action shall have judgment to recover his treble costs, besides damages, which damages so to be given, shall not be less than £.500; (6) in which action no delay, stay or stop of proceeding by rule, order or command, nor no injunction, protection or privilege whatsoever, nor any more than one imparlance shall be allowed, excepting such rule of the Court wherein the action shall depend, made in open Court, as shall be thought in justice necessary, for special cause to be expressed in the said rule; (7) and the person or persons who shall knowingly frame, contrive, write, seal or countersign any warrant for such commitment, detainer or transportation, or shall so commit, detain, imprison or transport any person or persons contrary to this act, or be any ways advising, aiding or assisting therein being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, or any of the islands, territories or dominions thereunto belonging; (8) and shall incur and sustain the pains, penalties and forfeitures limited, ordained and provided in and by the statute of provision and * *Praemunire* made in the sixteenth year of King *Richard* the Second; (9) and be incapable of any pardon from the King, his heirs and successors, of the said forfeitures, losses or disabilities or any of them.[45]

XIII. Provided always, That nothing in this act shall extend to give benefit to any person who shall by contract in writing agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any parts beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract.[46]

XIV. Provided always, and be it enacted, That if any person or persons lawfully convicted of any felony, shall in open court pray to be transported beyond the seas, and the court shall think fit to leave him or them in prison for that purpose, such person or persons may be transported into any parts beyond the seas; this act, or any thing therein contained to the contrary notwithstanding.[47]

[NO PROVISION XV.]

XVI. Provided also, That if any person or persons at any time resiant in this realm, shall have committed any capital offence in *Scotland* or *Ireland*, or any of the islands, or foreign plantations of the King, his heirs or successors, where he or she ought to be tried for such offence, such person

or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used before the making of this act; any thing herein contained to the contrary notwithstanding.[48]

XVII. Provided also, That no person or persons shall be sued, impleaded, molested or troubled for any offence against this act, unless the party offending be sued or impleaded for the same within two years at the most after such time wherein the offence shall be committed, in case the party grieved shall not be then in prison; and if he shall be in prison, then within the space of two years after the decease of the person imprisoned, or his or her delivery out of prison, which shall first happen.[49]

XVIII. And to the intent no person may avoid his trial at the Assizes or General Gaol-delivery, by procuring his removal before the Assizes, at such time as he cannot be brought back to receive his trial there; (2) *Be it enacted*, That after the Assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol upon any *Habeas Corpus* granted in pursuance of this act, but upon any such *Habeas Corpus* shall be brought before the Judge of Assize in open court, who is thereupon to do what to justice shall appertain.[50]

XIX. Provided nevertheless, That after the Assizes are ended, any person or persons detained, may have his or her *Habeas Corpus* according to the direction and intention of this act.

XX. And be it also enacted, That if any information, suit or action shall be brought or exhibited against any person or persons for any offence committed or to be committed against the form of this law, it shall be lawful for such defendants to plead the general issue, that they are Not Guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit or action, and the said matter shall be then as available to him or them, to all intents and purposes, as if he or they had sufficiently plended, set forth or alleged the same matter in bar or discharge of such information suit or action.

South Carolina Statutes, pp. 21–25.

17.1.2.7.b Act for Printing the Laws, 1712

AN ACT FOR PRINTING THE LAWS OF THIS PROVINCE

WHEREAS, nothing more conduceth to the well being, support, tranquility

and benefit of any place and people, than the preservation of their Laws, and the knowledge of them. … And whereas, Nicholas Trott, Esq. the Chief Justice of this Province, hath made a collection of the Laws of this Province, digested into an exact and easy method, and is now fitting up a double transcript of the same, with marginal notes, references and tables, fitted for the press, and the same having been laid before the General Assembly of this Province, and approved of by the same. …

1. *Be it therefore enacted*, by the most noble Prince Henry Duke of Beaufort, Pallatine, and the rest of the true and absolute Lords and Proprietors of this Province, by and with the advice and consent of the rest of the members of the General Assembly, now met at Charlestown, for the South West part of this Province, and by the authority of the same, that the body of the Laws of this Province, being collectyed by the said Nicholas Trott, shall be forthwith transmitted, either to London, New Yorke, or to Boston in New England, there to have four hundred books of the Laws printed and bound, at the charge of the publick, and to be paid for out of the publick Treasury of this Province, and to be transmitted hither at the risque of the public.
2. *And be it further enacted*, by the authority aforesaid, that the said book of the Laws, when printed as aforesaid, be and shall be taken, deemed, and held a good lawful Statute Book of this Province, in all Courts, and upon all occasions whatsoever, as the Statute Book of the Laws of Great Britain, is deemed, held and taken in that kingdom. And that any impression of the said Laws, which shall, or may be made by any other person or persons whatsoever, and imported to this Province, shall be of no manner of force and validity in any Courts, or on any occasion or occasions, within the Province aforesaid.

South Carolina Statutes, vol. 2, pp. 602–03.

17.1.2.7.cLaws of the Province of South Carolina, 1736

In fact, all these documents are enacted by and included in the third and fifth sections of the act of Dec. 12, 1712, No 331 p 25 of Grimke's Public Laws, and p 98 of the same: which sections are as follow

"Sect. 3. All the Statutes of the Kingdom of England relating to the allegiance of the people, to her present Queen Anne, and her lawful successors, and the several public oaths, and subscribing the tests required of the people of England in general by any of the said Statutes of the said Kingdom, *and also all such Statutes in the Kingdom of England as declare the rights and liberties of the*

subjects and enact the better securing of the same, and also, so much of the said Statutes as relates to the above mentioned particulars of the allegiance of the people to their sovereign, the public oaths, and subscribing the tests required of them, *and the declaring and securing the rights and liberties of the subjects*, are hereby enacted and declared to extend to, and to be of full force in this province, as if particularly enumerated in this act."

"Sect. 5. So much of the *Common Law* of England is enacted and made of force, as is not altered by the above enumerated acts, or inconsistent with the particular constitutions, customs, and laws of this province," &c.

Under this authority, I have inserted in succession, as one class of Laws, the Magna Carta of King John; the Magna Carta of Henry 3; the confirmation thereof by 25 Edw. 1; the petition of right to King Charles the first, and his acquiescence therein; the Habeas Corpus act of Ch.2d; and the Bill of Rights 1 William and Mary, sess. 2 ch 2.

South Carolina Statutes, vol. 1, pp. 73–74.

17.1.2.8Virginia

17.1.2.8.aSpotswood's Proclamation, 1710

Whereas We are above all things desirous that all our Subjects may enjoy their legal Rights, You are to take especial care that if any person be committed for any Criminal matters (unless for Treason or felony plainly expressed in the Warrant of Commitment) he have free liberty to petition by himself or otherwise the chief Barron or any one of the Judges of the common pleas for a writ of habeas corpus. …

Carpenter, p. 24.

17.1.2.8.b Act Directing the Mode of … Habeas Corpus, 1784

CHAPTER XXXV.

An act directing the mode of suing out of prosecuting writs of habeas corpus.

I. BE it enacted by the General Assembly. That when soever a habeas corpus shall be served, by delivering it to the officer or other person to whom it is directed, or by leaving it at the gaol or prison in which the party suing it out is detained, unless the warrant of commitment plainly and specially express the same to have been for treason or felony; if the charges of bringing the prisoner, to be ascertained by the court of judge who awarded the writ and thereon endorsed, not exceeding twelve pence per

mile, be paid or tendered, and sufficient security to pay the charges of carrying him back in case he be remanded, and that he will not escape by the way, be given; then the officer or his deputy, within three days after such service, or if the prisoner is to be brought more than twenty miles, with in so many days more as will be equal to one day for every twenty miles of such further distance, shall make return of the writ, and bring the body of the prisoner, or cause it to be brought, before the proper judge or judges, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment. Every such writ shall be signed by him who awards it. And if any person shall be or stand committed or detained as aforesaid, for any crime, unless it be for treason or felony, plainly expressed in the warrant of commitment in the vacation time, the prisoner not being convict, or in complain to any judge of the high court of chancery or general court, who, at the request of such prisoner, or other person on his behalf, attested by two witnesses present at the delivery thereof, is hereby authorized, upon view of a copy of the warrant of commitment or detainer, or otherwise upon affidavit made that such copy was desired to be given by him in whose custody the prisoner is detained, to award and grant a habeas corpus, under the seal of the said court, to be directed to the officer in whose custody the party committed or detained shall be, returned immediately before the said judge, or any other judge of one of the said court; and upon service thereof as aforesaid, the officer or his deputy, in whose custody the party is so committed or detained, shall, within the times before respectively limited, bring the prisoner before the court, or one of the judges thereof, before any other of them, with the return of the writ and the true causes of the commitment and detainer; and thereupon the judge before whom the prisoner shall be brought, shall, within two days thereafter, discharge him from imprisonment, taking his recognizance with surety in any sum, according to the discretion of the judge, having regard to the circumstances of the prisoner, and nature of the offence for his appearance in the general court the term following, or in some other court where the offence is properly cognizable, as the case shall require; and then also certify the said writ with the return thereof, and the said recognizance into the said court where such appearance is to be made, unless it shall appear to the judge that the party so committed is detained upon a legal process order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said judges, or some justice of the peace, for such matters or offences, for the which, by the law, the prisoner is not

bailable.

If any person shall have willfully neglected, by the space of two terms after his imprisonment, to pray a habeas corpus for his enlargement, such writ shall not be granted to him in vacation, in pursuance of this act. Any officer neglecting or refusing to make the return aforesaid, or to bring the body of the prisoner according to the command of the writ within the time aforesaid, and not delivering a true copy of the warrant of commitment and detainer, within six hours after demand thereof made, to the prisoner, or person demanding it on his behalf, which copy the officer or his deputy is hereby required to deliver, shall forfeit to the prisoner, one hundred pounds; to recover which, the right of action shall not cease by the death of either of both the parties. No person who shall have been delivered upon a habeas corpus, shall afterwards be imprisoned or committed for the same offence, otherwise than by the order or process of the court wherein he shall be bound by recognizance to appear, or some other court having jurisdiction of the cause. A citizen of this commonwealth committed to prison in custody of an officer for any criminal matter, shall not be removed from thence into the custody of another officer, unless it be by habeas corpus, or some other legal writ, or where the prisoner shall be delivered to the constable, or other inferior officer, to be carried to some common gaol, or shall be sent by warrant of an alderman to some common workhouse, or shall be removed from one place to another within the same county, in order to his discharge or trial, in due course of law; or in case of sudden fire or infection, or other necessity, or where the prisoner shall be charged by affidavit with treason or felony, alleged to be done in any of the other United States of America, in which last case he shall be sent thither in custody, by order of the general court, or warrant of any two judges thereof in vacation time, or may be bound by recognizance, with sureties before them, to appear there, whichsoever shall seem most proper, if the said court of judges, upon consideration of the matter, shall think he ought to be put upon his trial. Any person as aforesaid may move for and obtain his habeas corpus, as well out of the high court of chancery as out of the general court: And if any judge of either of the said courts in the vacation time, upon view of the copy of the warrant of commitment or detainer, or upon affidavit made, that such copy was denied as aforesaid, shall refuse any writ of habeas corpus by this act required to be granted, being moved for as aforesaid, such judge shall be liable to the action of the party grieved.

Virginia Acts (1784), pp. 408–10.

17.1.3OTHER TEXTS

17.1.3.1Magna Charta, 1225

C A P. XXIX.

Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquot modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae. Nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum.

9 H. 3, Magna Charta.

C A P. XXIX.

None shall be condemned without Trial. Justice shall not be sold or deferred.

No Freeman shall be taken, or imprisoned, or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

9 H. 3, Statutes at Large (Magna Charta to Henry VI), vol. 1, pp. 7–8.

17.1.3.2Petition of Right, 1629

THE Peticion Exhibited to His Majestie by the Lords Spirituall and Temporall and Cōmons in this psent Parliament assembled concning divers Rights; and Liberties of the Subjects: with the Kings; Majesties Royall Aunswere thereunto in full Parliament.[51]

To the Kings; most Excellent Majestic.

HUMBLY shew unto our Soveraigne Lord the King the Lords Spirituall and Temporall and Cōmons in Parliament assembled, That whereas it is declared and enacted by a Statute made in the tyme of the Raigne of King Edward the first cōmonly called Statutum de Tallagio non concedendo,[52] That no Tallage or Ayde should be layd or levyed by the King or his Heires

in this Realme without the good will and assent of the Archbishopps Bishopps Earles Barons Knights Burgesses and other the Freemen of the Cōmonaltie of this Realme, And by Authoritie of Parliament holden in the five and twentith yeare of the raigne of King Edward the third, it is declared and enacted, That from thenceforth no p– son should be compelled to make any Loanes to the King against his will because such Loanes were against reason and the franchise of the Land, And by other Lawes of this Realme it is pp– vided, that none should be charged by any charge or Imposicion called a Benevolence nor by such like Charge by which the Statutes before mencioned and other the good Lawes and Statutes of this Realme your Subjects have inherited this Freedome That they should [not] [a] be compelled to contribute to any Taxe Tallage Ayde or other like Charge not sett by cōmon consent in Parliament.

Yet neverthelesse of late divers Cōmissions[53] directed to sundry Cōmissioners in severall Counties with Instruccions have issued, by meanes whereof your people have been in divers places assembled and required to lend certaine sōmes of mony unto your Majestie, and many of them uppon their refusall soe to doe have had an Oath administred unto them not warrantable by the Lawes or Statutes of this Realme and have been constrayned to become bound to make apparance and give attendance before your Prívie Councell and in other places; and others of them have been therefore imprisoned confined and sondry other waies molested and disquieted And divers other charges have been laid and levied upon your people in severall Counties by Lord Lieuten'nts Deputie Lieuten'nts Cōmissioners for Musters Justices of Peace and others by Cōmaund or Direccion from your Majestie or your Privie Councell against the Lawes and free Customes of the Realme.

And where alsoe by the Statute called The great Charter of the Liberties of England,[54] It is declared and enacted, That no Freeman may be taken or imprisoned or be disseised of his Freehold or Liberties or his free Customes or be outlawed or exiled or in any manner destroyed, but by the lawfull Judgment of his Peeres or by the Law of the Land.

And in the eight and twentith yeere of the raigne of King Edward the third it was declared and enacted by authoritie of Parliament,[55] that no man of what estate or condicion that he be, should be put out of his Land or Tenements nor taken nor imprisoned nor disherited nor put to death without being brought to aunswere by due p– cesse of Lawe.

Neverthelesse against the tenor of the said Statutes and other the good Lawes

and Statutes of your Realme to that end p– vided, divers of your Subjects have of late been imprisoned without any cause shewed: And when for their deliverance they were brought before your Justices by your Majesties Writts of Habeas corpus there to undergoe and receive as the Court should order, and their Keepers cōmaunded to certifie the causes of their detayner, no cause was certified, but that they were deteined by your Majesties speciall cōmaund signified by the Lords of your Privie Councell, and yet were returned backe to severall prisons without being charged with any thing to which they might make aunswere according to the Lawe.[56]

And whereas of late great Companies of Souldiers and Marriners have been dispersed into divers Counties of the Realme,[57] and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourne against the Lawes and Customes of this Realme and to the great greivance and vexacion of the people.

And whereas alsoe by authoritie of Parliament in the five and twentith yeare of the Raigne of King Edward the third[58] it is declared and enacted that no man should be forejudged of life or limbe against the forme of the Great Charter and the Lawe of the Land, And by the said Great Charter, and other the Lawes and Statutes of this your Realme no man ought to be adjudged to death but by the Lawes established in this your Realme, either by the customes of the same Realme or by Acts of Parliament. And whereas no offendor of what kinde soever is exempted from the pceedings; to be used and punishments to be inflicted by the Lawes and Statutes of this your Realme, Neverthelesse of late [tyme[59]] divers Cōmissions under your Majesties great Seale have issued forth, by which certaine p– sons have been assigned and appointed Cōmmissioners with power and authoritie to pceed within the land according to the Justice of Martiall Lawe against such Souldiers or Marriners or other dissolute p– sons joyning with them as should cōmitt any murther robbery felony mutiny or other outrage or misdemeanor whatsoever, and by such sūmary course and order as is agreeable to Martiall Lawe and as is used in Armies in tyme of warr to p– ceed to the tryall and condemnation of such offenders, and them to cause to be executed and putt to death according to the Lawe Martiall.[60]

By ptext whereof some of your Majesties Subjects have been by some of the said Cōmissioners put to death, when and where, if by the Lawes and Statutes of the land they had deserved death, by the same Lawes and Statutes alsoe they might and by no other ought to have byn judged and executed.

And alsoe sundrie greivous offendors by colour thereof clayming an exemption have escaped the punishments due to them by the Lawes and Statutes of this your Realme, by reason that divers of your Officers and ministers of Justic have unjustlie refused or forborne to p– ceed against such Offendors according to the same Lawes and Statutes uppon p– tence that the said offenders were punishable onelie by Martiall law and by authoritie of such Cōmissions as aforesaid. Which Cōmissions and all other of like nature are wholly and directlie contrary to the said Lawes and Statutes of this your Realme.

They doe therefore humblie pray your most Excellent Majestie,[61] that no man hereafter be compelled to make or yeild any Guift Loane Benevolence Taxe or such like Charge without cōmon consent by Acte of Parliament, And that none be called to make aunswere or take such Oath or to give attendance or be confined or otherwise molested or disquieted concerning the same or for refusall thereof. And that no freeman in any such manner as is before mencioned be imprisoned or deteined. And that your Majestie would be pleased to remove the said Souldiers and Mariners and that your people may not be soe burthened in tyme to come. And that the aforesaid Cōmissions for pceeding by Martiall Lawe may be revoked and annulled. And that hereafter no Cōmissions of like nature may issue forth to any p– son or p– sons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesties Subjects be destroyed or put to death contrary to the Lawes and Franchise of the Land.

All which they most humblie pray of your most Excellent Majestie as their Rights; and Liberties according to the Lawes and Statutes of this Realme, And that your Majestie would alsoe vouchsafe to declare that the Awards doings and pceedings; to the p– judice of your people in any of the p– misses shall not be drawen hereafter into consequence or example. And that your Majestie would be alsoe graciouslie pleased for the further comfort and safetie of your people to declare your Royall will and pleasure, That in the things aforesaid all your Officers and Ministers shall serve you according to the Lawes and Statutes of this Realme as they tender the Honor of your Majestie and the prosperitie of this Kingdome.

Qua quidem P– eticoe ica & plenius intelica p– dem Dñm Regem talit est responsum in pleno Parliamento videlt.

R/. Soit droit fait come est desire.

3 Car. I, c. 1; Statutes at Large (James I–William III), pp. 23–24.

17.1.3.3An Act for the Regulating the Privie Councell …, 1640

AN ACT for [the Regulating[62]] the Privie Councell and for taking away the Court commonly called the Star Chamber.[63]

WHEREAS by the Great Charter many times confirmed in Parliament It is Enacted That no Freeman shall be taken or imprisoned or disseised of his Freehold or Liberties or Free Customes or be Outlawed or exiled or otherwise destroyed and that the King will not passe upon him or condemn him but by lawfull Judgement of his Peers or by the Law of the Land And by another Statute made in the fifth yeare of the Reigne of King Edward the Third[64] It is Enacted That no Man shall be attached by any accusation nor fore judged of Life or [Lim[65]] nor his Lands Tenements Goods nor Chattels seised into the Kings hands against the forme of the Great Charter and the Law of the Land And[66] by another Statute made in the five and twentieth yeare of the Reigne of the same King Edward the Third It is accorded assented and established That none shall be taken by petition or suggestion made to the King or to his Councell unlesse it be by Indictment or Presentment of good and lawfull People of the same Neighbourhood where such deeds be done in due manner or by Processe made by Writ Originall at the Common Law and that none be put out of his Franchise or Freehold unlesse he bee duly brought in to answer and forejudged of the same by the course of [the[67]] Law and if any thing be done against the same[68] it shall be redressed and holden for none And by another Statute made in the eight and twentieth yeare of the Reigne of the same King Edward the Third It is amongst other things Enacted That no Man of what Estate or condition soever he be shall be put out of his Lands or Tenements nor taken nor imprisoned nor disinherited without being brought[69] in to answer by due Processe of Law And by another Statute made in the two and fourtieth yeare of the Reigne of the said King Edward the Third It is enacted That no Man be put to answer without presentment before Justices or matter of Record or by due Processe and Writ Originall according to the old Law of the Land and if any thing be done[70] to the contrary it shall be void in Law and holden for errour And by another Statute made in the six and thirtieth yeare of the same King Edward the Third It is amongst other things Enacted That all Pleas which shall be pleaded in any Courts before any the Kings Justices or in his other places or before any of his other Ministers or in the Courts and places[71] of any other Lords within the Realm shall be entered and inrolled in Latine And whereas by the Statute made in the third yeare of King Henry the seaventh [*sic*] power is given to the Chancellour the Lord

Treasurer of England for the time being and the Keeper of the Kings Privie Seale or two of them calling unto them a Bishop and a Temporall Lord of the Kings most honourable Councell and the two chiefe Justices of the Kings Bench and Common Pleas for the time being or other two Justices in theire absence to proceed[72] as in that Act is expressed for the punishment of some particular offences therein mentioned And by the Statute made in the one and twentieth yeare of King Henry the eighth The President of the Councell is associated to joyne with the Lord Chancellour and other Judges in the said Statute of the third of Henry the seaventh mentioned But the said Judges have not kept themselves to the points limited by the said Statute but have undertaken to punish where no Law doth warrant and to make Decrees for things having no such authoritie and to inflict heavier punishments then by any Law is warranted And forasmuch as all matters examinable or determinable before the said Judges or in the Court commonly called the Star Chamber may have theire proper remedy and redresse and theire due punishment and correction by the Common Law of the Land and in the ordinary course of Justice elsewhere And forasmuch as the reasons and motives inducing the erection and continuance of that Court doe now cease and the Proceedings Censures and Decrees of that Court have by experience beene found to be an intolerable burthen to the Subjects and the meanes to introduce an Arbitrary Power and Government And forasmuch as the Councell Table hath of late times assumed unto it selfe a power to intermedle in Civill causes and matters onely of private interest betweene party and party and have adventured to determine of the Estates and Liberties of the Subject contrary to the Law of the Land and the Rights and Priviledges of the Subject by which great and manifold mischeifes and inconveniencies have arisen and happened and much incertainty by meanes of such proceedings hath beene conceived concerning Mens Rights and Estates For setling whereof and preventing the like in time to come. Be it Ordained and Enacted by the Authority of this present Parliament That the said Court commonly called the Star Chamber and all Jurisdiction Power and Authority belonging unto or exercised in the same Court or by any the Judges Officers or Ministers thereof be from the first day of August in the yeare of our Lord God one thousand six hundred fourty and one cleerely and absolutely dissolved taken away and determined and that from the said first day of August neither the Lord Chancellour or Keeper of the Great Seale of England the Lord Treasurer of England the Keeper of the Kings Privie Seale or President of the Councell nor any Bishop Temporall Lord Privy Councellor or Judge or Justice whatsoever shall have any power or

authoritie to heare examine or determine any matter or thing whatsoever in the said Court commonly called the Star Chamber or to make pronounce or deliver any Judgement Sentence Order or Decree or to doe any Judiciall or Ministeriall Act in the said Court And that all and every Act and Acts of Parliament and all and every Article Clause and Sentence in them and every of them by which any Jurisdiction power or authority is given limited or appointed unto the said Court commonly called the Star Chamber or unto all or any the Judges Officers or Ministers thereof or for any proceedings to be had or made in the said Court or for any matter or thing to be drawn into question examined or determined there shall for so much as concerneth the said Court of Star Chamber and the Power and Authoritie thereby given unto it be from the said first day of August repealed and absolutely revoked and made void.[73]

[And be it likewise Enacted That the like Jurisdiction now used and exercised in the Court before the President and Councell in the Marches of Wales and alsoe in the Court before the President and Councell established in the Northern parts And also in the Court commonly called the Court of the Dutchy of Lancaster held before the Chancellor and Councell of the Court And also in the Court of Exchequer of the Countie Palatine of Chester held before the Chamberlaine and Councell of that Court The like Jurisdiction being exercised there shall from the said first day of August one thousand six hundred fourty and one be alsoe repealed and absolutely revoked and made void Any Law prescription custome or Usage Or the said Statute made in the third yeare of King Henry the seventh Or the Statute made the one and twentieth of Henry the eighth Or any Act or Acts of Parliament heretofore had or made to the contrary thereof in any wise notwithstanding And that from henceforth no Court Councell or place of Judicature shall be erected ordained constituted or appointed within this Realme of England or Dominion of Wales which shall have use or exercise the same or the like Jurisdiction as is or hath beene used practised or exercised in the said Court of Star Chamber.][74]

Be it likewise declared and Enacted by Authoritie of this present Parliament That neither his Majestie nor his Privie Councell have or ought to have any Jurisdiction power or authority by English Bill Petition Articles Libell or any other arbitrary way whatsoever to examine or drawe into question determine or dispose of the Lands Tenements Hereditaments Goods or Chattels of any the Subjects of this Kingdome But that the same ought to be tried and determined in the ordinary Courts of Justice and by

the ordinary course of the Law.[75]

And be it further provided and Enacted That if any Lord Chancellor or Keeper of the Great Seale of England Lord Treasurer Keeper of the Kings Privy Seale President of the Councell Bishop Temporall Lord Privy Councellour Judge or Justice whatsoever shall offend or doe any thing contrary to the purport true intent and meaning of this Law [Then he or they shall for such offence forfeit the sum of five hundred pounds of lawfull Money of England unto any party grieved his Executors or Administrators who shall really prosecute for the same and first obtain Judgement thereupon to be recorded in any Court of Record at Westminster by Action of Debt Bill Plaint or Information wherein no Essoine Protection Wager of Law Aid Prayer Priviledge Injunction or Order of Restraint shall be in any wise prayed granted or allowed nor any more then one Imparlance And if any person against whom any such Judgment or Recovery shall be had as aforesaid shall after such Judgement or Recovery offend againe in the same then he or they for such offence shall forfeit the sum of one thousand pounds of lawfull Money of England unto any party greived his Executors or Administrators who shall really prosecute for the same and first obtain Judgement thereupon to be recorded in any Court of Record at Westminster by action of Debt Bill Plaint or Information in which no Essoine Protection Wager of Law Aid Prayer Priviledge Injunction or Order of Restraint shall be in any wise prayed granted or allowed nor any more than one Imparlance And if any Person against whom any such second Judgement or Recovery shall be had as aforesaid shall after such Judgement or Recovery offend againe in the same kind[76]] and shall be thereof duly convicted by Indictment Information or any other lawfull way or meanes that such Person soe convicted shall be from thenceforth disabled and become by vertue of this Act incapable Ipso facto to beare his and theire said Office and Offices respectively and shall be likewise disable to make any Gift Grant Conveyance or other disposition of any his Lands Tenements Hereditaments Goods or Chattels or to take any benefit of any Gift Conveyance or Legacy to his owne use.[77]

And every person[78] so offending shall likewise forfeit and loose unto the Party grieved by any thing done contrary to the true intent and meaning of this Law his trebble damages which he shall sustain and be put unto by meanes or occasion of any such Act or thing done the same to be recovered in any of His Majesties Courts of Record at Westminster by Action of Debt Bill Plaint or Informacon wherein no Essoine Protection Wager of Law Aid

Prayer Priviledge Injunction or Order of Restraint shall be in any wise prayed granted or allowed nor any more then one Imparlance

And be it alsoe provided and Enacted That if any person shall hereafter be committed restrained of his Libertie or suffer imprisonment [by the Order or Decree of any such Court of Star Chamber or other Court aforesaid now or at any time hereafter having or ptending to have the same or like Jurisdiction power or authoritie to commit or imprison as aforesaid Or by the command or Warrant of the Kings Majestie his Heires or Successors in theire owne Person or by the Command or Warrant of the Councell board or of any of the Lords or others of his Majesties Privy Councel[79]] That in every such case every Person so committed restrained of his libertie or suffering imprisonment upon demand or motion made by his Councell or other imployed by him for that purpose unto the Judges of the Court of Kings Bench or Common Pleas in open Court shall without delay upon any pretence whatsoever for the ordinary Fees usually paid for the same have forthwith granted unto him a Writ of Habeas Corpus to be directed generally unto all and every Sheriffs Gaoler Minister Officer or other Person in whose custody the party committed or restrained shall be [and the Sheriffs Gaoler Minister Officer or other pson in whose custody the pty so committed or restrained shall be] shall at the return of the said Writ & according to the command thereof upon due and convenient notice thereof given unto him [at the charge of the party who requireth or procureth such Writ and upon securitie by his owne bond given to pay the charge of carrying back the prisoner if he shall be remanded by the Court to which he shall be brought as in like cases hath beene used such charges of bringing up and carrying backe the prisoner to be alwaies ordered by the Court if any difference shall arise thereabout] bring or cause to be brought the body of the said party so committed or restrained unto and before the Judges or Justices of the said Court from whence the same Writ shall issue in open Court and shall then likewise certifie the true cause of such his deteinor or imprisonment and thereupon the Court within Three Court dayes after such return made and delivered in open Court shall proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legall or not and shall thereupon do what to justice shall appertaine either by delivering bailing or remanding the prisoner And if any thing shall be otherwise wilfully done or omitted to be done by any Judge Justice Officer or other person aforementioned contrary to the direction and true meaning hereof That then such person so offending shall forfeit to the party grieved his trebble damages to be recovered by such meanes and in

such manner as is formerly in this Act limited and appointed for the like penaltie to be sued for and recovered[80]

[Provided alwaies and be it Enacted That this Act and the severall Clauses therein contained shall be taken and expounded to extend only to the Court of Star Chamber and to the said Courts holden before the President and Councell in the Marches of Wales and before the President and Councell in the Northern parts and alsoe to the Court commonly called the Court of the Dutchy of Lancaster holden before the Chauncellour and Councell of that Court And alsoe in the Court of Exchequer of the County Palatine of Chester held before the Chamberlaine and Councell of that Court And to all Courts of like Jurisdiction to be hereafter erected ordained constituted or appointed as aforesaid And to the Warrants and directions of the Councell board and to the commitments restraints & Imprisonments of any Person or Persons made commanded or awarded by the Kings Majesty his Heires or Successors in theire owne person or by the Lords and others of the Privie Councell and every one of them[81]

And lastly Provided and be it Enacted That no person or persons shall be sued impleaded molested or troubled for any offence against this present Act unlesse the party supposed to have so offended shall be sued or impleaded for the same within two yeares at the most after such time wherein the said offence shall be committed.[82]][83]

16 Car. I, c. 10; Statutes at Large (James I–William III), pp. 110–12.

17.1.3.4Habeas Corpus Act, 1679

An Act for the better secureing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas.[84]

WHEREAS great Delayes have beene used by Sheriffes Goalers and other Officers to whose Custody any of the Kings Subjects have beene committed for criminall or supposed criminall Matters in makeing Returnes of Writts of Habeas Corpus to them directed by standing out an Alias and Pluries Habeas Corpus and sometimes more and by other shifts to avoid their yeilding Obedience to such Writts contrary to their Duty and the knowne Lawes of the Land whereby many of the Kings Subjects have beene and hereafter may be long detained in Prison in such Cases where by Law they are baylable to their great charge and vexation. For the prevention whereof and the more speedy Releife of all persons imprisoned for any such

criminall or supposed criminall Matters Bee it enacted by the Kings most Excellent Majestie by and with the Advice and Consent of the Lords Spirituall and Temporall and Commons in this present Parlyament assembled and by the authoritie thereof That whensoever any person or persons shall bring any Habeas Corpus directed unto any Sheriffe or Sheriffes Goaler Minister or other Person whatsoever for any person in his or their Custody and the said Writt shall be served upon the said Officer or left at the Goale or Prison with any of the Under Officers Underkeepers or Deputy of the said Officers or Keepers that the said Officer or Officers his or their Under Officers UnderKeepers or Deputyes shall within Three dayes after the Service thereof as aforesaid (unlesse the Committment aforesaid were for Treason or Fellony plainely and specially expressed in the Warrant of Committment) [upon Payment or Tender of the Charges of bringing the said Prissoner to be ascertained by the Judge or Court that awarded the same and endorsed upon the said Writt not exceeding Twelve pence [per Mile] [a] and upon Security given by his owne Bond to pay the Charges of carrying backe the Prisoner if he shall bee remanded by the Court or Judge to which he shall be brought according to the true intent of this present Act and that he will not make any escape by the way make Returne of such Writt [or][b] bring or cause to be brought the Body of the Partie soe committed or restrained unto or before the Lord Chauncellor or Lord Keeper of the Great Seale of England for the time being or the Judges or Barons of the said Court from whence the said Writt shall issue or unto and before such other person [and][c] persons before whome the said Writt is made returnable according to the Command thereof, and shall [likewise then][d] certifie the true causes of his Detainer or Imprisonment unlesse the Committment of the said Partie be in any place beyond the distance of Twenty miles from the place or places where such Court or Person is or shall be resideing and if beyond the distance of Twenty miles and not above One hundred miles then within the space of Ten dayes and if beyond the distance of One hundred miles then within the space of Twenty dayes after such [~~the~~] [e]delivery aforesaid and not longer.[85]

[And to the intent that noe Sheriffe Goaler or other Officer may pretend ignorance of the import of any such Writt Bee it enacted by the Authoritie aforesaid That all such Writts shall be marked in this manner Per Statutum Tricesimo primo Caroli Secundi Regis and shall be signed by the person that awards the same] And if any person or persons shall be or stand committed or detained as aforesaid for any Crime unlesse for Treason or Fellony plainely expressed in the Warrant of Committment in the Vacation

time and out of Terme it shall and may be lawfull to and for the person or persons soe committed or detained (other then persons Convict or in Execution) by legall Processe or any one [in][f] his or their behalfe to appeale or complaine to the Lord Chauncellour or Lord Keeper or any one of His Majestyes Justices [either][g] of the one Bench or of the other or the Barons of the Exchequer of the Degree of the Coife and the said Lord Chauncellor Lord Keeper Justices or Barons or any of them uppon view of the Copy or Copies of the Warrant or Warrants of Committment and Detainer or otherwise upon Oath made that such Copy or Copyes were denyed to be given by such person or persons in whose Custody the Prisoner or Prisoners is or are detained are hereby authorized and required [upon Request made in Writeing by such person or persons or any on his her or their behalfe attested and subscribed by two Witnesses [that][h] were present at the delivery of the same] to award and grant an Habeas Corpus under the Seale of such Court whereof he shall then be one of the Judges to be directed to the Officer or Officers in whose Custodie the Party soe committed or detained shall be returnable immediate before the said [Lord Chauncellor or] Lord Keeper or such Justice Baron or any other Justice or Baron of the Degree of the Coife of any of the said Courts and upon Service thereof as aforesaid the Officer or Officers his or their Under-Officer or Under Officers Under Keeper or Under Keepers or [their][i] Deputy in whose custodie the Partie is soe committed or detained shall within the times respectively before limitted [bring such Prisoner or Prisoners] before the sd Lord Chauncellor or Lord Keeper or such Justices Barons or one of them [before whome the said Writt is made returnable and in case of his absence before any other of them] with the Returne of such Writt and the true Causes of the Committment and Detainer and thereupon within two dayes after the Partie shall be brought before them the said Lord Chauncellor or Lord Keeper or such Justice or Baron before whome the Prisoner shall be brought as aforesaid shall discharge the said Prisoner from his Imprisonment takeing his or their Recognizance with one or more Suretie or Sureties in any summe according to their discretions haveing reguard to the quality of the Prisoner and nature of the Offence for his or their appearance in the Court of Kings Bench the Terme following or at the next Assizes Sessions or Generall Goale-Delivery of and for such County City or Place where the Committment was or where the Offence was committed or in such other Court where the said Offence is properly cognizable as the Case shall require and then shall certifie the said Writt with the Returne thereof and the said Recognizance or Recognizances into the said Court

where such Appearance is to be made unlesse it shall appeare unto the said Lord Chauncellor or Lord Keeper or Justice or Justices [or] a Baron or Barons that the Party soe committed is detained upon a legall Processe Order or Warrant out of some Court that hath Jurisdiction of Criminall Matters or by some Warrant signed and sealed with the Hand and Seale of any of the said Justices or Barons or some Justice or Justices of the Peace for such Matters or Offences for the which by the Law the Prisoner is not Baileable.[86]

[Provided alwayes and bee it enacted That if any person shall have wilfully neglected by the space of two whole Termes after his Imprisonment to pray a Habeas Corpus for his Enlargement such person soe wilfully neglecting shall not have any Habeas Corpus to be granted in Vacation time in pursuance of this Act.][87]

And bee it further enacted by the Authoritie aforesaid That if any Officer or Officers his or their Under-Officer or Under-Officers UnderKeeper or UnderKeepers or Deputy shall neglect or refuse to make the Returnes aforesaid or to bring the Body or Bodies of the Prisoner or Prisoners according to the Command of the said Writt within the respective times aforesaid or upon Demand made by the Prisoner or Person in his behalfe shall refuse to deliver or within the space of Six houres after demand shall not deliver to the person soe demanding a true Copy of the Warrant or Warrants of Committment and Detayner of such Prisoner, which he and they are hereby required to deliver accordingly all and every the Head Goalers and Keepers of such Prisons and such other person in whose Custodie the Prisoner shall be detained shall for the first Offence forfeite to the Prisoner or Partie grieved the summe of One hundred pounds and for the second Offence the summe of Two hundred pounds and shall and is hereby made incapeable to hold or execute his said Office, the said Penalties to be recovered by the Prisoner or Partie grieved his Executors or Administrators against such Offender his Executors or Administrators by any Action of Debt Suite Bill Plaint or Information in any of the Kings Courts at Westminster wherein noe Essoigne Protection Priviledge Injunction Wager of Law or stay of Prosecution by Non vult ulterius prosequi or otherwise shall bee admitted or allowed or any more then one Imparlance, and any Recovery or Judgement at the Suite of any Partie grieved shall be a sufficient Conviction for the first Offence and any after Recovery or Judgement at the Suite of a Partie grieved for any Offence after the first Judgement shall bee a sufficient Conviction to bring the

Officers or Person within the said Penaltie for the second Offence.[88]

And for the prevention of unjust vexation by reiterated Committments for the same Offence Bee it enacted by the Authoritie aforesaid That noe person or persons which shall be delivered or sett at large upon any Habeas Corpus shall at any time hereafter bee againe imprisoned or committed for the same Offence by any person or persons whatsoever other then by the legall Order and Processe of such Court wherein he or they shall be bound by Recognizance to appeare or other Court haveing Jurisdiction of the Cause and if any other person or persons shall knowingly contrary to this Act recommitt or imprison or knowingly procure or cause to be recommitted or imprisoned for the same Offence or pretended Offence any person or persons delivered or sett at large as aforesaid or be knowingly aiding or assisting therein then he or they shall forfeite to the Prisoner or Party grieved the summe of Five hundred pounds Any colourable pretence or variation in the Warrant or Warrants of Committment notwithstanding to be recovered as aforesaid.[89]

Provided alwayes and bee it further enacted That if any person or persons shall be committed for High Treason or Fellony plainely and specially expressed in the Warrant of Committment upon his Prayer or Petition in open Court the first Weeke of the Terme or first day of the Sessions of Oyer and Terminer or Generall Goale Delivery to be brought to his Tryall shall not be indicted sometime in the next Terme Sessions of Oyer and Terminer or Generall Goale Delivery after such Committment it shall and may be lawfull to and for the Judges of the Court of Kings Bench and Justices of Oyer and Terminer or Generall Goale Delivery and they are hereby required upon motion to them made in open Court the last day of the Terme Sessions or Goale-Delivery either by the Prisoner or any one in his behalfe to sett at Liberty the Prisoner upon Baile unlesse it appeare to the Judges and Justices upon Oath made that the Witnesses for the King could not be produced the same Terme Sessions or Generall Goale-Delivery. And if any person or persons committed as aforesaid upon his Prayer or Petition in open Court the first weeke of the Terme or first day of the Sessions of Oyer and Terminer or Generall Goale Delivery to be brought to his Tryall shall not be indicted and tryed the second Terme Sessions of Oyer and Terminer or Generall Goale Delivery after his Committment or upon his Tryall shall be acquitted he shall be discharged from his Imprisonment.[90]

[Provided alwayes That nothing in this Act shall extend to discharge out of Prison any person charged in Debt or other Action or with Processe in any

Civill Cause but that after he shall be discharged of his Imprisonment for such his Criminall Offence he shall be kept in Custodie according to Law for such other Suite.][91]

Provided alwaies and bee it enacted by the Authoritie aforesaid That if any person or persons Subject of this Realme shall be committed to [any] Prison or in Custodie of any Officer or Officers whatsoever for any Criminall or supposed Criminall matter That the said person shall not be removed from the said Prison and Custody into the Custody of any other Officer or Officers unlesse it be by Habeas Corpus or some other Legall Writt or where the Prisoner is delivered to the Constable or other inferiour Officer to carry such Prisoner to some Common Goale or where any person is sent by Order of any Judge of Assize or Justice of the Peace to any common Worke-house or House of Correction or where the Prisoner is removed from one Prison or place to another within the same County in order to his or her Tryall or Discharge in due course of Law or in case of suddaine Fire or Infection or other necessity[a]] and if any person or persons shall after such Committment aforesaid make out and signe or countersigne any Warrant or Warrants for such removeall aforesaid contrary to this Act as well he that makes or signes or countersignes such Warrant or Warrants as the Officer or Officers that obey or execute the same shall suffer and incurr the Paines and Forfeitures in this Act beforementioned both for the first and second Offence respectively to be recovered in manner aforesaid by the Partie grieved.[92]

Provided alsoe and bee it further enacted by the Authoritie aforesaid That it shall and may be lawfull to and for any Prisoner and Prisoners as aforesaid to move and obtaine his or their Habeas Corpus as well out of the High Court of Chauncery or Court of Exchequer as out of the Courts of Kings Bench or Common Pleas or either of them And if the said Lord Chauncellor or Lord Keeper or any Judge or Judges Baron or Barons for the time being of the Degree of the Coife of any of the Courts aforesaid in the Vacation time upon view of the Copy or Copies of the Warrant or Warrants of Committment or Detainer or upon Oath made that such Copy or (*) Copyes were denyed as aforesaid shall deny any Writt of Habeas Corpus by this Act required to be granted being moved for as aforesaid they shall severally forfeite to the Prisoner or Partie grieved the summe of Five hundred pounds to be recovered in manner aforesaid.[93]

And bee it enacted and declared by the Authority aforesaid That an Habeas Corpus according to the true intent and meaning of this Act may be

directed and runn into any County Palatine The Cinque Ports or other priviledged Places within the Kingdome of England Dominion of Wales or Towne of Berwicke upon Tweede and the Islands of Jersey or Guernsey Any Law or Usage to the contrary notwithstanding.[94]

And for preventing illegall Imprisonments in Prisons beyond the Seas Bee it further enacted by the Authoritie aforesaid That noe Subject of this Realme that now is or hereafter shall be an Inhabitant or Resiant of this Kingdome of England Dominion of Wales or Towne of Berwicke upon Tweede shall or may be sent Prisoner into Scotland Ireland Jersey Gaurnsey Tangeir or into any Parts Garrisons Islands or Places beyond the Seas which are or at any time hereafter [shall be] within or without the Dominions of His Majestie His Heires or Successors and that every such Imprisonment is hereby enacted and adjudged to be illegall and that if any of the said Subjects now is or hereafter shall bee soe imprisoned [every such person and persons soe imprisoned] shall and may for every such Imprisonment maintaine by vertue of this Act an Action or Actions of false Imprisonment in any of His Majestyes Courts of Record against the person or persons by whome he or she shall be soe committed detained imprisoned sent Prisoner or transported contrary to the true meaning of this Act and against all or any person or persons that shall frame contrive write seale or countersigne any Warrant or Writeing for such Committment Detainer Imprisonment or Transportation or shall be adviseing aiding or assisting in the same or any of them and the Plaintiffe in every such Action shall have Judgement to recover his treble Costs besides Damages which Damages soe to be given shall not be lesse then Five hundred pounds in which Action noe delay stay or stopp of Proceeding by Rule Order or Command nor noe Injunction Protection or Priviledge whatsoever nor any more then one Importance shall be allowed [excepting such Rule of the Court wherein the Action shall depend made in open Court as shall bee thought in Justice necessary for speciall cause to be expressed in the said Rule[d]] and the person or persons who shall knowingly frame contrive write seale or countersigne any Warrant for such Committment Detainer or Transportation or shall soe committ detaine imprison or transport any person or persons contrary to this Act or be any wayes adviseing aiding or assisting therein being lawfully convicted thereof shall be disabled from thenceforth to beare any Office of Trust or Proffitt within the said Realme of England Dominion of Wales or Towne of Berwicke upon Tweede or any of the Islands Territories or Dominions thereunto belonging and shall incurr and sustaine the Paines Penalties and Forfeitures limitted ordained and provided in (*) the Statute

of Provision and Premunire made in the Sixteenth yeare of King Richard the Second and be incapeable of any Pardon from the King His Heires or Successors of the said Forfeitures Losses or Disabilities or any of them.[95]

[Provided alwayes That nothing in this Act shall extend to give benefitt to any person who shall by Contract in writeing agree with any Merchant or Owner of any Plantation or other person whatsoever to be transported to any parts beyond Seas and receive earnest upon such Agreement although that afterwards such person shall renounce Treble Coats and Damages; such Contract.][96]

Provided alwayes and bee it enacted That if any person or persons lawfully convicted of any Felony shall in open Court pray to be transported beyond the Seas and the Court shall thinke fitt to leave him or them in Prison for that purpose such person or persons may be transported into any parts beyond the Seas This Act or any thing therein contained to the contrary notwithstanding.[97]

Provided alsoe and bee it enacted That nothing herein contained shall be deemed construed or taken to extend to the Imprisonment of any person before the First day of June One thousand sixe hundred seaventy and nine or to any thing advised procured or otherwise done relateing to such Imprisonment Any thing herein contained to the contrary notwithstanding.[98]

Provided alsoe That if any person or persons at any time resiant in this Realme shall have committed any Capitall Offence in Scotland or Ireland or any of the Islands or Forreigne Plantations of the King His Heires or Successors where he or she ought to be tryed for such Offence such person or persons may be sent to such place there to receive such Tryall in such manner as the same might have beene used before the makeing of this Act Any thing herein contained to the contrary notwithstanding.[99]

Provided alsoe and bee it enacted That noe person or persons shall be sued impleaded molested or troubled for any Offence against this Act unlesse the Partie offending be sued or impleaded for the same within Two yeares at the most after such time wherein the Offence shall be committed [in case the partie grieved shall not be then in Prison and if he shall not be in Prison then within the space of Two yeares] after the decease of the Person imprisoned or his or her delivery out of Prison which shall first happen.[100]

And to the intent noe person may avoid his Tryall at the Assizes or Generall Goale-Delivery by procureing his Removeall before the Assizes at such time as he cannot be brought backe to receive his Tryall there Bee it enacted That after the Assizes proclaimed for that County where the

Prisoner is detained noe person shall be removed from the Common Goale upon any Habeas Corpus granted in pursuance of this Act but upon any such Habeas Corpus shall be brought before the Judge of Assize in open Court who is thereupon to doe what to Justice shall appertaine.[101]

Provided neverthelesse That after the Assizes are ended any person or persons detained may have his or her Habeas Corpus according to the Direction and Intention of this Act.[102]

And bee it also enacted by the Authoritie aforesaid That if any Information Suite or Action shall be brought or exhibited against any person or persons for any Offence committed or to be committed against the Forme of this Law it shall be lawfull for such Defendants to pleade the Generall Issue that they are not guilty or that they owe nothing and to give such speciall matter in Evidence to the Jury that shall try the same which matter being pleaded had beene good and sufficient matter in Law to have discharged the said Defendant or Defendants against the said Information Suite or Action and the said matter shall be then as availeable to him or them to all intents and purposes as if he or they had sufficiently pleaded sett forth or alledged the same matter in Barr or Discharge of such Information Suite or Action.[103]

And because many times Persons charged with Petty Treason or Felony or as Accessaries thereunto are committed upon Suspicion onely whereupon they are Baileable or not according as the Circumstances makeing out that Suspicion are more or lesse weighty which are best knowne to the Justices of Peace that committed the persons and have the Examinations before them or to other Justices of the Peace in the County Bee it therefore enacted That where any person shall appeare to be committed by any Judge or Justice of the Peace and charged as Accessary before the Fact to any Petty Treason or Felony or upon Suspicion thereof or with Suspicion of Petty Treason or Felony which Petty Treason or Felony shall be plainely and specially expressed in the Warrant of Committment that such Person shall not be removed or bailed by vertue of this Act or in any other manner then they might have beene before the makeing of this Act.[104]

31 Car. II, c. 2; Statutes at Large (James I–William III), vol. 5, pp. 935–38.

17.1.3.5Address to the Inhabitants of Quebec, October 26, 1774

Another right relates merely to the liberty of the person. If a subject is

seized and imprisoned, though by order of government, he may, by virtue of this right, immediately obtain a writ, termed a *habeas corpus*, from a judge, whose sworn duty it is to grant it, and thereupon procure any illegal restraint to be quickly enquired into, and redressed.

Journals of the American Congress, 1774, p. 42.

17.1.3.6Northwest Territory Ordinance, 1787

Article the Second. The inhabitants of said territory shall always be entitled to the benefits of the writ of habeas corpus, and of trial by jury; …

Continental Congress Papers, DNA.

17.2DISCUSSIONS OF DRAFTS AND PROPOSALS

17.2.1PHILADELPHIA CONVENTION

17.2.1.1August 28, 1787

Mr. Pinkney [*sic*], urging the propriety of securing the benefit of the Habeas corpus in the most ample manner, moved "that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months"

Mr. Rutlidge [*sic*] was for declaring the Habeas Corpus inviolable—He did [not] conceive that a suspension could ever be necessary at the same time through all the States –

Mr. Govr Morris moved that "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it".

Mr. Wilson doubted whether in any case [a suspension] would be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.

The first part of Mr. Govr. Morris' [motion,] to the word "unless" was agreed to nem: con:—on the remaining part;

N H. ay. Mas. ay. Ct. ay. Pa. ay. Del. Ay. Md. Ay. Va. Ay. N. C. no. S C.

N.H. ay. Mas. ay. Ct. ay. Pa. ay. Del. Ay. Md. Ay. Va. Ay. N. C. no. S.C. no. Geo. No. [Ayes –7; noes –3.]Madison's Notes, Farrand, vol. 2, p. 438 (original brackets; footnote omitted).

17.2.2STATE CONVENTIONS

17.2.2.1Maryland, November 29, 1787

> Mr. McHenry … Public Safety may require a suspension of the Ha: Corpus in cases of necessity: when those cases do not exist, the virtuous Citizen will ever be protected by his opposition to power, 'till corruption shall have obliterated every sense of Honor & Virtue from a Brave and free People. …
>
> Farrand, vol. 3, p. 149.

> Mr. Martin … By the next paragraph, the general government is to have a *power* of *suspending* the *habeas corpus act*, in cases of *rebellion* or *invasion*.
>
> As the State governments have a power of suspending the habeas corpus act, in those cases, it was said there could be no good reason for giving such a power to the general government, since whenever the *State* which is invaded or in which an insurrection takes place, finds its safety requires it, *it* will make use of that power *And* it was urged, that if we gave this power to the general government, it would be an engine of oppression in its hands, since whenever a State should oppose its views, however arbitrary and unconstitutional, and refuse submission to them, the general government may declare it to be *an act of rebellion*, and suspending the habeas corpus act, may *seize* upon the persons of those *advocates of freedom*, who have had *virtue* and *resolution* enough to excite the opposition, and may *imprison* them during its pleasure in the *remotest* part of the union, so that a citizen of Georgia might be *bastiled* in the furthest part of New Hampshire or a citizen of New Hampshire in the furthest extreme to the south, cut off from their family, their friends, and their every connection. These considerations induced me, Sir, to give my negative also to this clause.
>
> Farrand, vol. 3, p. 213 (published in pamphlet form, "Genuine Information," January 22, 1788).

17.2.2.2Massachusetts

17.2.2.2.aJanuary 26, 1788

The paragraph which provides, that “the privilege of the writ of habeas corpus shall not be suspended, unless in cases of rebellion or invasion,” was read, when

Gen. THOMPSON asked the President, to please to proceed—we have, says he, read the book often enough—it is a consistent piece of inconsistency.

Hon. Mr. ADAMS, in answer to an enquiry of the Hon. Mr. Taylor, said, that this power given to the general government to suspend this privilege in cases of rebellion and invasion, did not take away the power of the several States to suspend it, if they see fit.

Dr. TAYLOR asked, why this darling privilege was not expressed in the same manner it was in the constitution of Massachusetts—*(Here the Hon. Gentleman read the paragraph respecting it in the constitution of this State and then the one in the proposed Constitution)*—He remarked on the difference of expression, and asked why the time was not limited.

Judge DANA, said the answer, in part, to the Hon. Gentleman must be that the same men did not make both Constitutions—that he did not see the necessity or great benefit of limiting the *time*—Supposing it had been, as in our Constitution, “not exceeding twelve months,” yet as our legislature can, so might the Congress continue the suspension of the writ from time to time, or from year to year.—The safest and best restriction, therefore, arises from the nature of the cases in which Congress are authorised to exercise that power at all, namely, in those of rebellion or invasion. These are clear and certain terms—facts of publick notoriety. And whenever these shall cease to exist, the suspension of the writ must necessarily cease also.—He thought the citizen had a better security for his privilege of the writ of habeas corpus under the federal than under the State Constitution; for our legislature may suspend the writ as often as they judge “*the most urgent and pressing occasions*” call for it. He hoped these short observations would satisfy the Hon. Gentleman’s enquiries, otherwise he should be happy in endeavouring to do it, by going more at large into the subject.

Judge SUMNER said, that this was a restriction on Congress, that the writ of habeas corpus should not be suspended, except in cases of rebellion and invasion. The learned Judge then explained the nature of this writ.—When a person, said he, is imprisoned, he applies to Judge of the Supreme

Court—the Judge issues his writ to the jailor, calling upon him to have the body of the person imprisoned, before him, with the crime on which he was committed.—If it then appears that the person was legally committed, and that he was not bailable, he is remanded to prison; if illegally confined, he is enlarged [i.e., released]. This privilege, he said, is essential to freedom—and therefore the power to suspend it, is restricted. On the other hand, the state, he said, might be involved in danger—the worst enemy may lay plans to destroy us, and so artfully as to prevent any evidence against him, and might ruin the country, without the power to suspend the writ was thus given.—Congress have only power to suspend the privilege to persons committed by their authority. A person committed under the authority of this state, will still have a right to this writ.

Massachusetts Convention.

17.2.2.2.bFebruary 1, 1788

Mr. NASSON …The paragraph that gives Congress power to suspend the writ of habeas corpus, claims a little attention—This is a great bulwark—a great privilege indeed—we ought not, therefore, to give it up, on any slight pretence. Let us see—how long it is to be suspended? As long as rebellion or invasion shall continue. This is exceedingly loose. Why is not the time limited, as in our Constitution? But, sir, its design would then be defeated—It was the intent, and by it we shall give up one of our greatest privileges. Mr. N concluded by saying, he had much more to say, but as the House was impatient, he should sit down for the present, to give other gentlemen an opportunity to speak.

Massachusetts Convention.

17.2.2.2.cFebruary 2, 1788

Timothy Winn…

I think the time for which our Legislators are chosen and are to stand, without alteration, much too long; and the power with which they are vested is so great, that the body of the people cannot reasonably expect to enjoy the rights of their persons and property under this system; more especially considering, that they are deprived of the benefit of the Habeas Corpus, which is so essential for preserving the rights of freemen, which we so earnestly contended for, with united efforts, and freely offered our lives and fortunes to obtain in the late British war. …

Massachusetts Convention (undelivered).

17.2.2.3New York, July 2, 1788

The committee then proceeded through sections 8, 9, and 10, of this article [I], and the whole of the next, with little or no debate. As the secretary read the paragraphs, amendments were moved, in the order and form hereafter recited. …

Sec. 9. Respecting the privilege of *habeas corpus*,—

"*Provided*, That, whenever the privilege of habeas corpus shall be suspended, such suspension shall in no case exceed the term of six months, or until the next meeting of the Congress."

Moved by Mr. LANSING. Elliot, vol. 2, p. 407.

17.2.2.4Pennsylvania

17.2.2.4.aNovember 28, 1787

Smilie: … It seems however that the members of the Federal Convention were themselves convinced, in some degree, of the expediency and propriety of a bill of rights, for we find them expressly declaring that the writ of habeas corpus and the trial by jury in criminal cases shall not be suspended or infringed. …

Whitehill: … Upon the whole, therefore, I wish it to be seriously considered, whether we have a right to leave the liberties of the people to such future constructions and expositions as may possibly be made upon this system; particularly when its advocates, even at this day, confess that it would be dangerous to omit anything in the enumeration of a bill of rights, and according to their principle, the reservation of the *habeas corpus* and trial by jury in criminal cases may hereafter be construed to be the only privileges reserved by the people.

Dallas' Notes.

Smilie: There is no security for our rights in this Constitution. Preamble to Declaration of Independence. Why did they [delegates to the Philadelphia Convention] omit a bill of rights?

With respect to trial by jury and habeas corpus there is a bill of rights. Without one, we cannot know when Congress exceed their powers. There is no check but the people. No security for the rights of conscience.

Wilson's Notes.

Smilie: … Trials by jury in criminal cases are reserved and the privilege of the habeas corpus act. There are mere parts of our bill of rights and all that are given to us. In this Constitution there is no security for the right of conscience.

Yeates's Notes.

THOMAS MCKEAN … Though Congress will have power to declare war, it is here stipulated that "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"…

Elliott, vol. 2, p. 417.

17.2.2.4.bNovember 30, 1787

ROBERT WHITEHILL … No satisfactory reason has yet been offered for the omission of a bill of rights; but, on the contrary, the honorable members are defeated in the only pretext which they have been able to assign, that every thing which is not given is excepted, for we have shown that there are two articles expressly reserved, the writ of *habeas corpus* and the trial by jury in criminal cases; and we have called upon them in vain, to reconcile this reservation with the tenor of their favorite proposition. …

Dallas' Notes.

THOMAS HARTLEY … Some articles indeed, from their preeminence in the scale of political security, deserve to be particularly specified, and these have not been omitted in the system before us. The definition of treason, the writ of *habeas corpus*, and the trial by jury in criminal cases are here expressly provided for; and in going thus far, solid foundation has been laid. …

Dallas' Notes.

JASPER YEATES …1st Objection: The want of a bill of rights.

Response: Our governments differ in their formation from England and therefore, tho necessary there, not so here. New Hampshire, Rhode Island, Connecticut, New York, New Jersey, South Carolina, Georgia, and perhaps Virginia have no bill of rights. Are they not free? Do they hold their liberties as tenants at will? But an enumeration would be dangerous; part might be omitted and therefore excluded. Whatever is not expressly ceded to the federal government is still reserved.

But it is said we have adopted part of the bill of rights, as in reserving the

trials by jury in criminal cases, and directing that the privilege of the *habeas corpus* act shall not be suspended except in time of immediate danger.

Response: This is restrictive of the general legislative powers of Congress. They might claim this right if not restrained. Their powers being enumerated, it became necessary to make exceptions. This clause does not form a bill of rights, but are the express exceptions from the general delegated powers of Congress.

Yeates's Notes.

17.2.2.4.cDecember 4, 1787

JAMES WILSON: Summary of Objections to the Constitution.

(1) There is no bill of rights. Many of the state have bills of rights. There are some reservations; why not more? Powers given, and powers and rights *reserved* ought all to be enumerated. What harm in a bill of rights?
(2) There is no check but the people. Our liberties are not secured but as to *habeas corpus*.

Wilson's Notes.

17.2.2.4.d December 18, 1787

THE DISSENT OF THE MINORITY OF THE CONVENTION

The first consideration that this review suggests is the emission of a BILL OF RIGHTS ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is necessary for a good government to have the control. The principal of which are the rights of conscience, personal liberty by the clear and unequivocal establishment of the writ of *habeas corpus*, jury trial in criminal and civil cases, by an impartial jury of the vicinage or county…

Storing, vol. 3, p. 157.

17.2.2.5Virginia

17.2.2.5.aJune 6, 1788

Mr. Nicholas.

… But it is complained, that they may suspend our laws. The suspension of the writ of *habeas corpus* is only to take place in cases of rebellion, or

invasion. This is necessary in those cases—in every other case, Congress is restrained from suspending it.—In no other case can they suspend our laws —and this is a most estimable security…

Elliot, vol. 3, p. 102.

17.2.2.5.bJune 10, 1788

Governor [Edmund] *Randolph*.

… It is also objected, that the trial by jury, the writ of habeas corpus, and the liberty of the press, are insecure. But I contend that the habeas corpus is at least on as secure and good a footing as it is in England. In that country it depends on the will of the Legislature. That privilege is secured here by the Constitution, and is only to be suspended in cases of extreme emergency. Is not this a fair footing? After agreeing that the Government of England secures liberty, how do we distrust this Government? Why distrust ourselves? …

Elliot, vol. 3, p. 467.

17.2.2.5.cJune 15, 1788

Mr. *Henry*,—Mr. Chairman—We have now come to the ninth section, and I consider myself at liberty to take a short view of the whole. I wish to do it very briefly. Give me leave to remark, that there is a Bill of Rights in that Government. There are express restrictions which are in the shape of a Bill of Rights: But they bear the name of the ninth section. The design of the negative expressions in this section is to prescribe limits, beyond which the powers of Congress shall not go. These are the sole bounds intended by the American Government. Where abouts do we stand with respect to a Bill of Rights? Examine it, and compare it to the idea manifested by the Virginian Bill of Rights, or that of the other States. The restraints in this Congressional Bill of Rights, are so feeble and few, that it would have been infinitely better to have said nothing about it. The fair implication is, that they can do every thing they are not forbidden to do. What will be the result if Congress, in the course of their legislation, should do a thing not restrained by this ninth section? It will fall as an incidental power to Congress, not being prohibited expressly in the Constitution. The first prohibition is, that the privilege of the writ of *habeas corpus* shall not be suspended, but when in cases of rebellion, or invasion, the public safety may require it. It results clearly, that if it had not said so, they could suspend it in all cases whatsoever. It reverses the position of the friends of

this Constitution, that every thing is retained which is not given up. For instead of this, every thing is given up, which is not expressly reserved.—It does not speak affirmatively, and say that it shall be suspended in those cases. But that it shall not be suspended but in certain cases; going on a supposition that every thing which is not negatived, shall remain with Congress. If the power remains with the people, how can Congress supply the want of an affirmative grant? They cannot do it but by implication, which destroys their doctrine. …

If Gentlemen think that securing the slave trade is a capital object; that the privilege of the *habeas corpus* is sufficiently secured; that the exclusion of ex post facto laws will produce no inconvenience; that the publication from time to time will secure their property; in one word, that this section alone will sufficiently secure their liberties, I have spoken in vain.—Every word of mine, and of my worthy coadjutor [George Mason], is lost. I trust that Gentlemen, on this occasion, will see the great objects of religion, liberty of the press, trial by jury, interdiction of cruel punishments, and every other sacred right secured, before they agree to that paper. These most important human rights are not protected by that section, which is the only safeguard in the Constitution.—My mind will not be quieted till I see something substantial come forth in the shape of a Bill of Rights.

Governor *Randolph*…

But the insertion of the negative restrictions has given cause of triumph it seems, to Gentlemen. They suppose, that it demonstrates that Congress are to have powers by implication. I will meet them on that ground. I persuade myself, that every exception here mentioned, is an exception not from general powers, but from the particular powers therein vested. To what power in the General Government is the exception made, respecting the importation of negroes? Not from a general power, but from a particular power expressly enumerated. This is an exception from the power given them of regulating commerce. He asks, where is the power to which the prohibition of suspending the habeas corpus is an exception. I contend that by virtue of the power given to Congress to regulate courts, they could suspend the writ of habeas corpus.—This is therefore an exception to that power. …

Elliott, vol. pp. 460–64.

17.2.2.5.dJune 21, 1788

Mr. *Grayson*… The conclusion then is, that they can hang any one they

please by having a jury to suit their purpose. They might on particular extraordinary occasions suspend the privilege. The Romans did it on creating a Dictator. The British Government does it, when the *habeas corpus* is to be suspended—when the *salus populi* is affected. I never will consent to it unless it be properly defined.

Elliott, vol. 3.

17.2.2.5.eJune 24, 1788

Mr. [Patrick] Henry … We have infinitely more reason to dread general warrants here, than they have in England; because there, if a person be confined, liberty may be quickly obtained by the writ of *habeas corpus*. But here a man living many hundred miles from the Judges, may rot in prison before he can get the writ. …

Elliott, vol. 3.

17.2.2.5.fJune 27, 1788

Mr. *Wythe* reported, from the Committee appointed, such amendments to the proposed Constitution of Government for the United States, as were by them deemed necessary to be recommended to the consideration of the Congress which shall first assemble under the said Constitution…

That there be a Declaration of Bill of Rights asserting and securing from encroachment the essential and unalienable rights of the people in some such manner as the following:

…

10th. That every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed.

Elliot, vol. 3, pp. 657–58.

17.2.3NEWSPAPERS AND PAMPHLETS

17.2.3.1Pinckney, Observations on the Plan of Government …, October, 1787 (dated May 28, 1787)

The next Article provides for the privilege of the Writ of Habeas Corpus—The Trial by Jury in all cases, Criminal as well as Civil—the Freedom of the Press, and the prevention of Religious Tests, as qualifications of Trust or Emolument: The three first essential in Free Governments; the last, a provision the world will expect from you, in the establishment of a System founded on Republican Principles, and in an age so liberal and enlightened as the present.

Farrand, vol. 3, p. 122 (Farrand suggests that, although dated May 28, the paragraph was written on August 20 or later, and published before October 14, 1787).

17.2.3.2Federal Farmer, No. 4, October 12, 1787

… If the federal constitution is to be construed so far in connection with the state constitutions, as to leave the trial by jury in civil causes, for instance, secured; on the same principles it would have left the trial by jury in criminal causes, the benefits of the writ of habeas corpus, &c. secured; they all stand on the same footing; they are the common rights of Americans, and have been recognized by the state constitutions: But the convention found it necessary to recognize or reestablish the benefits of that writ, and the jury trial in criminal cases. As to *expost facto* laws, the convention has done the same in one case, and gone further in another. It is part of the compact between the people of each state and their rulers, that no *expost facto* laws shall be made. But the convention, by Art. I Sect. 10 have put a sanction upon this part even of the state compacts. In fact, the 9th and 10th Sections in Art. I. in the proposed constitution, are no more nor less, than a partial bill of rights; they establish certain principles as part of the compact upon which the federal legislators and officers can never infringe. It is here wisely stipulated, that the federal legislature shall never pass a bill of attainder, or *expost facto* law; that no tax shall be laid on articles exported, &c. The establishing of one right implies the necessity of establishing another and similar one.

On the whole, the position appears to me to be undeniable, that this bill of rights ought to be carried farther, and some other principles established, as a part of this fundamental compact between the people of the United States and their federal rulers.

New-York Journal.

17.2.3.3John DeWitt, No. 2, October 29, 1787

[In opposition to ratification, De Witt II argued that a favorable vote meant that it is "proper and fit"] That should an insurrection or an invasion, however small, take place, in Georgia, the extremity of the Continent, it is highly expedient they should have the power of suspending the writ of Habeas Corpus in Massachusetts, and as long as they shall judge the public safety requires it: …

American Herald.

17.2.3.4Truth: Disadvantages of Federalism, Upon the New Plan, November 14, 1787

DISADVANATGES OF FEDERALISM, *Upon the NEW PLAN*

… 10. *Habeas Corpus* done away.

American Herald.

17.2.3.5A Georgian, November 15, 1787

That part of the same section [Article I, Section 9] respecting the *Writs of Habeas Corpus*, let it, by your leave, read thus: "The privilege of the Writ of Habeas Corpus shall remain. Without any exceptions whatever, inviolate forever."

Gazette of the State of Georgia.

17.2.3.6Truth, November 24, 1787

Mr. RUSSELL, The following ADVANTAGES which every *honest* man is convinced must result from the adoption of the proposed Constitution…

10th. HABEAS CORPUS necessarily retained, except in such cases as own Constitution warrants its suspension.

Massachusetts Centinel.

17.2.3.7A Briton, December 13, 1787

… The last trait which I remarked in the character of the Georgian was that he was averse to all such measures as would tend to restrain the enterprising. This is evident from his opposition to the suspension of the privilege of the writ of *habeas corpus*—an opposition that was surely well founded, for, if such a suspension was ever allowed, such worthy characters as Shays and Wheeler might be forced into prison, confined there till their trial, and at length be hung for attempting to introduce a *desirable* reformation in government. It may not be out of order to remark here that the Georgian has, with admirable foresight, given perpetuity to his system by insisting that the writ of *habeas corpus* shall remain inviolate *forever*. …

Gazette of the State of Georgia.

17.2.3.8Cassius, No. 6, December 18, 1787

Section 9th says, The writ of habeas corpus shall not be suspended, unless in case of rebellion, or the invasion of the publick safety may require it. It has been asserted by some, that a person accused of a crime, would be obliged to ruin himself, in order to prove his innocence; as he would be obliged to repair to the seat of federal government, in order to have his cause tried before a federal court, and be liable to pay all expense which might be incured [*sic*] in the undertaking. But the section beforementioned proves that assertion to be futile and false, as it expressly provides for securing the right of the subject, in regard to his being tried in his own state.

Massachusetts Gazette.

17.2.3.9Federal Farmer, No. 6, December 25, 1787

Of rights, some are natural and unalienable, of which even the people cannot deprive individuals: Some are constitutional or fundamental; these cannot be altered or abolished by the ordinary laws; but the people, by express acts, may alter or abolish them—These, such as the trial by jury, the benefits of the writ of habeas corpus, &c. individuals claim under the solemn compacts of the people, as constitutions, or at least under laws so strengthened by long usuage as not to be repealable by the ordinary

legislature—and some are common or mere legal rights, that is, such as individuals claim under laws which the ordinary legislature may alter or abolish at pleasure.

An Additional Number of Letters from the Federal Farmer (Thomas Greenleaf, 1788).

17.2.3.10Federal Farmer, No. 8, January 3, 1788

In England, the people have been led uniformly, and systematically by their representatives to secure their rights by compact, and to abolish innovations upon the government: they successively obtained Magna Charta, the powers of taxation, the power to propose laws, the habeas corpus act, bill of rights, &c. they, in short, secured general and equal liberty, security to their persons and property; and, as an everlasting security and bulwark of their liberties, they fixed the democratic branch in the legislature, and jury trial in the execution of the laws, the freedom of the press, &c.

An Additional Number of Letters from the Federal Farmer (Thomas Greenleaf, 1788).

17.2.3.11Brutus, January 17, 1788

In the same section it is provided, that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion and invasion, the public safety may require it." This clause limits the power of the legislature to deprive a citizen of the right of habeas corpus, to particular cases *viz.* those of rebellion and invasion; the reason is plain, because in no other cases can this power be exercised for the general good.

New-York Journal.

17.2.3.12Federal Farmer, No. 16, January 20, 1788

Security against expost facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to, even in judicial proceedings, by the

course of the common law. These may be secured in general words, as in New-York, the Western Territory, &c. by declaring the people of the United States shall always be entitled to judicial proceedings according to the course of the common law, as used and established in the said states. Perhaps it would be better to enumerate the particular essential rights the people are entitled to in these proceedings, as has been done in many of the states, and as has been done in England. In this case, the people may proceed to declare, that no man shall be held to answer to any offence, till the same be fully described to him; nor to furnish evidence against himself: that, except in the government of the army and navy, no person shall be tried for any offence, whereby he may incur loss of life, or an infamous punishment, until he be first indicted by a grand jury: that every person shall have a right to produce all proofs that may be favourable to him, and to meet the witnesses against him face to face: that every person shall be entitled to obtain right and justice freely and without delay: that all persons shall have a right to be secure from all unreasonable searches and seizures of their persons, houses, papers, or possessions; and that all warrants shall be deemed contrary to this right, if the foundation of them be not previously supported by oath, and there be not in them a special designation of persons or objects of search, arrest, or seizure: and that no person shall be exiled or molested in his person or effects, otherwise than by the judgment of his peers, or according to the law of the land.

An Additional Number of Letters from the Federal Farmer (Thomas Greenleaf, 1788).

17.2.3.13Martin, Genuine Information, January 22, 1788

See 17.2.2.1.

17.2.3.14Hampden, January 26, 1788

Mr. RUSSELL, I have had no hand in the productions respecting the proposed plan of government—but I feel interested as a citizen—I have waited to see if any motion might be made, or any disposition appear in the Convention, to prevent one of two evils taking place; the first is, *that of rejecting the Constitution*; the second is, *that of adopting it by a bare*

majority.

I am not contented with it as it now stands, my reasons are as assigned:—

…

The AMENDMENTS PROPOSED.

…

2*d. In the second clause of the ninth section insert the words*—"And the Supreme Judicial Courts of the several States, and either Judge thereof, shall have the power to issue this writ."

This secures the right of Habeas Corpus, without going to Pennsylvania for it.

Massachusetts Centinel.

17.2.3.15Martin, Reply to the Landholder, March 3, 1788

It was my wish that the general government should not have the power of suspending the privilege of the writ of habeas corpus, as it appears to me altogether unnecessary, and that the power given to it may and will be used as a dangerous engine of oppression, but I could not succeed.

Farrand, vol. 3, p. 290.

17.2.3.16Federalist, No. 83 (Hamilton), May 28, 1788

But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

Cooke, pp. 562–63.

17.2.3.17Federalist, No. 84 (Hamilton), May 28, 1788

Independent of those which relate to the structure of the government, we find the following: Article I, section 3, clause 7 “Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.” Section 9, of the same article, clause 2 “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.” Clause 3. “No bill of attainder or *ex post facto* law shall be passed.” Clause 7. “No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.” Article III, section 2, clause 3 “The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.” Section 3, of the same article “Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.” And clause 3, of the same section “The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.”

It may well be a question whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this state. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding provisions in our constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments have been in all ages the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone in reference to the latter, are well worthy of recital: “To bereave a man of life, (says he) or by violence to confiscate his

estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore *a more dangerous engine* of arbitrary government." And as a remedy for this fatal evil, he is every where peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls "the BULWARK of the British Constitution."

Cooke, pp. 576–77 (footnotes omitted).

17.2.4LETTERS AND DIARIES

17.2.4.1LOUIS GUILLAUME OTTO TO COMTE DE MONTMORIN, OCTOBER 20, 1787

… The Congress will suspend the writ of *habeas corpus* in case of rebellion; but if this rebellion was only a resistance to usurpation, who will be the Judge? The usurper…

Vol. 13, p. 424.

17.2.4.2Thomas Jefferson to James Madison, December 20, 1787

… I will therefore make up the deficiency by adding a few words on the Constitution proposed by our Convention. I like much the general idea of framing a government which should go on of itself peaceably, without needing continual recurrence to the state legislatures. I like the organization of the government into Legislative, Judiciary & Executive. I like the power given the Legislature to levy taxes, and for that reason solely approve of the greater house being chosen by the people directly. For tho' I think a house chosen by them will be very illy qualified to legislate for the Union, for foreign nations &c. yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves. I am

captivated by the compromise of the opposite claims of the great & little states, of the latter to equal, and the former to proportional influence. I am much pleased too with the substitution of the method of voting by persons, instead of that of voting by states: and I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power. There are other good things of less moment. I will now add what I do not like. First the omission of a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal & unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land & not by the law of Nations. To say, as Mr. Wilson does, that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved, might do for the Audience to whom it was addressed, but is surely a gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in express terms. It was a hard conclusion to say because there has been no uniformity among the states as to the cases triable by jury, because some have been so incautious as to abandon this mode of trial, therefore the more prudent states shall be reduced to the same level of calamity. It would have been much more just and wise to have concluded the other way that as most of the states had judiciously preserved this palladium, those who had wandered should be brought back to it, and to have established general right instead of general wrong. Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse or rest on inference. …

Boyd, pp. 439–40.

17.2.4.3Thomas Jefferson to Alexander Donald, February 7, 1788

… I wish with all my soul that the nine first Conventions may accept the new Constitution, because this will secure to us the good it contains, which I think great & important. but [*sic*] I equally wish that the four latest conventions, which they be, may refuse to accede to it till a declaration of

rights be annexed. this [*sic*] would probably command the offer of such a declaration, & thus give to the whole fabric, perhaps as much perfection as any one of that kind ever had by a declaration of rights I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by juries in all cases, no suspensions of the habeas corpus, no standing armies. these [*sic*] are fetters against doing evil which no honest government should decline.

Boyd, vol. 12, pp. 570–72.

17.2.4.4Thomas Jefferson to James Madison, July 31, 1788

I sincerely rejoice at the acceptance of our new constitution by nine states. It is a good canvas, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights. It seems pretty generally understood that this should go to Juries, Habeas corpus, Standing armies, Printing, Religion and Monopolies. I conceive there may be difficulty in finding general modification of these suited to the habits of all the states. But if such cannot be found then it is better to establish trials by jury, the right of Habeas corpus, freedom of the press and freedom of religion in all cases, and to abolish standing armies in time of peace, and Monopolies, in all cases, than not to do it in any. The few cases wherein these things may do evil, cannot be weighed against the multitude wherein the want of them will do evil.

Boyd, p. 442.

17.3DISCUSSIONS OF RIGHTS

17.3.1TREATISES

17.3.1.1Coke, 1642

CAP. XXIX.

Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut

utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae. Nulli vendemus, nulli negabimus, aut differemus [Ed. More commonly, justitiam, vel rectum].[1]

[Nullus liber, &c.] **This extends to Villeins, saving against their Lord, for they are free against all men, saving against their Lord. See the first part of the** Institutes, sect. 189.

[Nullus liber homo.] Albeit homo **doth extend to both sexes, men and women, yet by Act of Parliament it is enacted, and declared, that this Chapter should extend to Duchesses, Countesses, and Baronesses, but Marchionesses, and Vicountesses, are omitted, but not withstanding they are also comprehended within this Chapter.**[2]

Upon this Chapter, as out of a roote, many fruitfull branches of the Law of England have sprung.

And therefore first the genuine sense hereof is to be saene, and after how the same hath been declared, and interpreted. For the first, for more perspicuity, it is necessary to divide this Chapter into severall branches, according to the true construction and reference of the words.

This Chapter containeth nine severall branches.

1. That no man be taken or imprisoned, but per legem terrae, that is, by the Common Law, Statute Law, or Custome of England; for these words, Per legem terrae being towards the end of this Chapter, doe referre to all the precedent matters in this Chapter, and this hath the first place because the liberty of a mans person is more precious to him, them all the rest follow, and therefore it is great reason, that he should by Law be relieved therein, if he be wronged, as hereafter shall be shewed.[3]

2. No man shall be disseised, that is, put out of seison, or dispossessed of his freehold (that is) lands, or liveliood, or of his liberties, or frée-customes, that is, of such franchises, and fréedomes, and frée-customes, as belong to him by his frée birthright, unlesse it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the Law of the Land (that is, to speak it once for all) by the due course, and processe of Law.

3. No man shall be outlawed, made an exlex, put out of the Law, that is, deprived of the benefit of the Law, unless he be outlawed according to the Law of the Land.

4. No man shall be exiled, or banished out of his Country, that is, Nemo perdet patriam, no man shall lose his Country, unlesse he be exiled according to the Law of the Land.
5. No man shall be in any sort destroyed (Destruere. i. quod prius structum, & factum fuit, penitus evertere & diruere) unlesse it be by the verdict of his equals, or according to the Law of the Land.
6. No man shall be condemned at the Kings suite, either before the King in his Bench, where the pleas are Coram Rege, (and so are the words, Nec super eum ibimus, to be understood) nor before any other Commissioner, or Judge whatsoever, and so are the words, Nec super eum mittemus, to be understood, but by the judgement of his Peers, that is, equalls, or according to the Law of the Land.
7. We shall sell to no man Justice or Right.
8. We shall deny to no man Justice or Right.
9. We shall defer to no man Justice or Right.

The genuine sense being distinctly understood, we shall procéed in order to unfold how the same have been declared, and interpreted. 1. By authority of Parliament. 2. By our books. 3. By precedent.

[Nullus liber homo capiatur, aut imprisonetur.]

Attached and arrested are comprehended herein.

1. No man shall be taken, (that is) restrained of liberty, by petition, suggestion to the King, or to his Councell,* unlesse it be by indictment, or presentment of good, and lawfull men, where such deeds be done. This branch, and divers other parts of this Act have béen notably explained by divers [a] Acts of Parliament, &c. quoted in the margent.

2. No man shall be disseised, &c.

[b] Hereby is intended, that lands, tenements, goods, and chattells shall not be seised into the Kings hands, contrary to this great Charter, and the Law of the Land; Nor any man shall be disseissed of his lands, or tenements, or dispossessed of his goods, or Chattels, contrary to the Law of the Land.

[c]A custome was alledged in the town of C. that if the Tenant cease by two yeares, that the Lord should enter into the freehold of the Tenant, and hold the same untill he were satisfied of the arrerages, and it was adjudged a custome against the Law of the Land, to enter into a mans fréehold in that case without action or answer.

King H. 6. graunted to the Corporation of Diers within London,

power to search. &c. and if they found any cloth died with Logwood, that the cloth should be forfeit: and it was adjudged, that this Charter concerning the forfeiture, was against the Law of the Land, and this Statute: for no forfeiture can grow by Letters Patents.[4]

No man ought to be put from his livelihood without answer.

3. No man outlawed, that is, barred to have the benefit of the Law. Vide for the word, the first part of the Institutes.[5]

Note to this word utlagetur, these words, Nisi per legem terrae, do refer.

¶ De libertatibus.] This word, libertates, liberties, hath three significations:

1. First, as it hath béen said, it signifieth the Laws of the Realme, in which respect this Charter is called, Charta libertatum.

2. It signifieth the fréedomes, that the Subjects of England have; For example, the Company of the Merchant Tailors of England, having power by their Charter to make Ordinances, made an Ordinance, that every brother of the same Society should put the one half of his clothes to be dressed by some Clothworker frée of the same Company, upon pain to forfeit x. s. &c. and it was adjudged that this Ordinance was against Law, because it was against the Liberty of the Subject, for every subject hath fréedome to put his clothes to be dressed by whom he will & sic de similibus: And so it is, if such or the like graunt had béen made by his Letters Patents.[6]

3. Liberties signifieth the franchises, and priviledges, which the Subjects have of the gift of the King, as the goods, and Chattels of felons, outlawes, and the like, or which the subject claim by prescription, as wreck, waise, straie, and the like.

So likewise, and for the same reason, if a graunt be made to any man, to have the sole making of Cards, or the sole dealing with any other trade, that graunt is against the liberty, and fréedome of the Subject that before did, or lawfully might have used that trade, and consequently against this great Charter.[7]

Generally all monopolies are against this great Charter, because they are against the liberty and fréedome of the Subject, and against the Law of the Land.

¶ Liberis consuetudinibus.] Of Customes of the Realme, some be generall, and some particular. Of these reade in the first part of the

Institutes. And liberis is added, for that the Customes of England bring a fréedome with them.

4. No man exiled.

By the Law of the Land no man can be exiled, or banished out of his native Countrey, but either by authority of Parliament, or in case of abjuration for felony by the Common Law: and so when our books, or any Record speak of exile, or banishment, other then in case of abjuration, it is to be intended to be done by authority of Parliament: [*] as Belknap and other Judges, &c. banished into Ireland.[8]

This is a beneficially Law, and is construed benignly, and therefore the King cannot send any Subject of England against his will to serve him out of this Realme, for that should be an exile, and he should perdere patriam: no, he cannot be sent against his will into Ireland, to serve the King as his Deputy there, because it is out of the Realme of England: for if the King might send him out of this Realme to any place, then under pretence of service, as Ambassadour, or the like, he might send him into the furthest part of the world, which being an exile, is prohibited by this Act. And albeit it was accorded in the Upper-house of Parliament, Anno 6 E. 3. nu. 6. that such learned men in the Law, as should bee sent, as Justices, or otherwise, to serve in Ireland, should have no excuse, yet that being no Act of Parliament, it did not binde the Subject. And this notably appeareth by a Record, in 44. E. 3. Sir Richard Pembrughs Case, who was Warden of the Cinque Ports, and had divers offices annuities, and lands graunted to him for life, or in fee by the King under the great Seale, Pro servitio impenso, & impendendo, The King commanded Sir Richard to serve him in Ireland, as his Deputy there, which he absolutely refused, whereupon the King by advice of his Councell, seised all things graunted to him, pro servitio impendendo, (in respect of that clause) but he was not upon that resolution committed to prison, as by that Record it appeareth: And the reason was because his refusall was lawfull, and if the refusall was lawfull to serve in Ireland parcell of the Kings Dominions à fortiori, a refusall is lawfull to serve in any forein Country. And it séemeth to me, that the said seisure was unlawfull, for pro servitio impenso & impendendo, must be intended lawfull service within the Realme.[9]

5. No man destroyed, & c.

That is, forejudged of life, or limbe, disherited, or put to torture, or

death.[10]

The Mirror writing of the auncient Laws of England, saith, Soloient les Roys faire droit a touts, per eux, ou per lour Chiefe Justices, et ore les faits les Royes per lour Justices Comissaries errants assignes a touts pleas: En aid de tiels eires sont Tornes de Viscounts necessaries, & views de frankpl. & quant que bones gents a tiels inquests inditerent de peche mortel, soloient les Royes destruere sans respons &c. Accord est, que nul appelee, ne enditee soit destroy sans respons.[11]

Thomas Earle of Lancaster was destroyed, that is, adjudged to die, as a Traitor, and put to death in 14.E.2. and a Record thereof made: And Henry Earle of Lancaster his brother, and heire was restored for two principall errors in the proceeding against the said Thomas Earle, 1.Quod non fuit araniatus, & ad responsionem positus tempore pacis, eo quod cancellaria, & aliae curiae Regis fuer' apertae, in quibus lex fiebat unicuique, prout fieri consuevit, 2. Quod contra cartam de libertatibus, cum dictus Thomas fuit unus parium, & magnatum Regni, in qua continetur. (and reciteth this Chapter of Magna Charta, and specially. quod Dominus Rex non super eum ibit, rec mittet, nisi per legale judicum parium suorum, tamen per recordum praedictum, tempore pacis absqi aranamento, seu responsione, seu legali judicio parium suorum, contra legem, & contra tenorem Magnae Chartae.) he was put to death: More examples of this kinde might be shewed.[12]

Every oppression against Law, by colour or any usurped authority, is a kinde of destruction, for, Quando aliquid prohibetur, prohibetur, & omne, per quod devenitur ad illud: And it is the worst oppression, that is done by colour of Justice.[13]

It is to be noted, that to this Verb destruatur, are added aliquo modo, and to no other Verb in this Chapter, and therefore all things, by any manner of meanes tending to destruction, are prohibited: As if a man be accused, or indicted of treason, or felony, his lands, or goods cannot be graunted to any, no not so much as by promise, nor any of his lands, or goods seised into the Kings hands, before attainder: For when a Subject obtaineth a promise of the forfeiture, many times undue meanes and more violent prosecution is used for private lucre, tending to destruction, then the quiet and just procéeding of Law would permit, and the party ought to live of his own untill attainder.[14]

[Per judicium parium suorum.] By judgment of his Péers, Onely a Lord of Parliament of England shall be tried by his Peers being Lords

of Parliament: and neither noblemen of any other Country, nor others that are called Lords, and are no Lords of Parliament, are accounted Pares, Péérs within this statute, Who shall be said Pares, Péeres, or Equalls, see before Cap. 14. § per Pares.[15]

Here note, as is before this, that this is to be interested of the Kings sute for the words be, nec super eum ibimus, nec super mittemus, nisi per legale judicium parium suorum. Therefore, for example, if a Noble man be indicted for murder, he shall be tried by his Peeres, but if an appeale be brought against him, which is the suite of the party, there he shall not be tried by his Peeres, but by an ordinary jury of twelve men: and that for two reasons. First, for that the appeale cannot be brought before the Lord high Steward of England, who is the only Judge of Noble men, in case of Treason, or Felony. Secondly, this Statute extendeth only to the Kings suite.[16]

And it extendeth to the Kings suite in case of treason, or felony, or of misprision of treason, or felony, or being accessory to felony before, or after, and not to any other inferior offence. Also it extendeth to the triall it selfe, whereby he is to be convicted: but a Nobleman is to be indicted of treason, or felony, or of misprison, or being accessary to, in case of felony, by an inquest under the degree of Nobility: the number of the Noble men that are to be triers are, 12. or more.

And a Peer of the Realme may be indicted of treason, or felony, before, commissioners of Oier & Terminer, or in the Kings bench, if the treason or felony be committed in the county where the Kings bench sit: he also may be indicted of murder, or manslaughter, before the Coroner,&c. But if he be indicted in the Kings bench, or the indictment removed thither, the Noble man may plead his pardon there before the Judges of the Kings bench, and they have power to allow it, but he cannot confesse the indictment, or plead not guilty before the Judges of the Kings bench, but before the Lord Steward; and the reason of this diversity, that the triall or judgement must be before or by the Lord Steward, but the allowance of the pardon may be by the Kings bench, is because that is not within this Statute.[17]

If a Noble man be indicted, and cannot be found, process of Outlawrie shall be awarded against him per legem terrae, and be shall be Outlawed per judicium Coronatorum, but he shall be tried per judicium parium suorum, when he appeares and pleads to issue.[18]

¶ Per legale judicium.] By this word legale, amongst others, three

things are imputed, 1. That this manner of triall was by Law, before this Statute. 2. That their verdict must be legally given, wherein principally it is to be observed. 1. That the Lords ought to heare no evidence, but in the presence, and hearing of the prisoner. 2. After the Lords be gone together to consider of the evidence, they cannot send to the high Steward to aske the Judges any question of Law, but in the hearing of the prisoner, that he may heare, whether the case be rightly put, for de facto jus oritur; neither can the Lords, when they are gone together, send for the Judges to know any opinion in Law, but the high Steward ought to demand it in Court in the hearing of the prisoner. 3. When all the evidence is given by the Kings learned Councell, the high Steward cannot collect the evidence against the prisoner, or in any sort conferre with the Lords touching their evidence, in the absence of the prisoner, but he ought to be called to it; and all this is implied in this word, legale. And therefore it shall be necessary for all such prisoners, after evidence given against him, and before he depart from the Barre, to require Justice of the Lord Steward, and of the other Lords, that no question be demanded by the Lords, or speech or conference had by any with the Lords, but in open Court in his presence, and hearing, or else he shall not take any advantage thereof after verdict, and judgement given: but the handling thereof at large and of other things concerning this matter, belongs to another treatise, as before I have shewed, only this may suffice for the exposition of this Statute. See the 3. part of the Institutes, cap. Treason.[19]

And it is here called Judicium parium, and not veredictum, because the Noble men returned, and charged, are not sworne, but give their judgement upon their Honour, and ligeance to the King, for so are all the entries of record, separately beginning at the puisne Lord, and so ascending upward.

And though of ancient time the Lords, and Peeres of the Realms used in Parliament to give judgement, in case of treason and felony, against those, that were no Lords of Parliament, yet at the suite of the Lords it was enacted, that albeit the Lords and Peeres of the Realme, as judges of the Parliament, in the presence of the King, had taken upon them to give judgement, in case of treason and felony, of such as were no Peeres of the Realme, that hereafter no Peeres shall be driven to give judgement on any others, then on their Peeres according to the law.[20]

This triall by Peeres was very auncient, for I reade, that William the

Conqueror, in the beginning of his raigne, created William Fitzosberne (who was Earle of Bretevil in Normandy) Earle of Hereford in England, his sonne Roger succeeded him, and was Earle of Hereford, who under colour of his sisters marriage at Exninge, neare Newmarket in Cambridge shire, whereat many of the Nobility, and others were assembled, conspired with them to receive the Danes into England, and to depose William the Conqueror, (who then was in Normandy) from his Kingdome of England: and to bring the same to effect, he with others rose. This treason was revealed by one of the conspirators, *viz.* Walter Earle of Huntingdon an English man, sonne of that great Syward Earle of Northumberland: for which treason this Roger Earle of Hereford was apprehended, by Urse Tiptoft then Sheriffe of Worcester shire, and after was tried by his Peeres, and found guilty of the treason per judicium Parium suorum, **but he lived in prison all the daies of his life. You have heard in the exposition of the 14. Chapter, who are to be said Peeres, somewhat is necessary to be added thereunto. It is provided by the Statute of 20 H. 6. That Dutchesses, Countesses, and Baronesses, shall be tried by such Peeres as a Noble man, being a Péere of the Realme ought to be; which Act was made in declaration, and affirmance of the Common law: for Marquesses, and Vicountesses not names in the Act shall be also tried by their Peeres, and the Queene being the Kings consort, or dowager, shall also be tried, in case of treason, per Pares, as Queene Anne, the Wife of King Henry the eight was** Termino Pasch. anno 28. **H.8.in the Towre of London before the Duke of Norff. then high Steward.**[21]

If a Woman that is Noble by birth, doth marry under the degree of Nobility, yet shee shall be tried by her Peeres, but if shee be noble by marriage, and marry under the degree of Nobility shee loseth her Dignity, for as by marriage it was gained, so by marriage it is lost, and shee shall not be tried by her Peers. If a Duchesse by marriage doe marry a Baron, shee loseth not her dignity, for all degrees of Nobility, as hath been said, are Pares, **If a Queene Dowager marry any of the Nobility, or under that degree, yet loseth shee not her Dignity, as Katherine Queene Dowager of England, married Owen ap Meredith ap Theodore Esquire, and yet shee by the name of Katherine Queene of England, maintained an Action of Detinew, against the Bishop of Carlile.**[22]

And the Queene of Navarra marrying with Edmund the brother of

E. 1. sued for her Dower by the name of Queene of Navarra and recovered.[23]

[Nisi per Legem terrae] But by the Law of the Land. For the true sense and exposition of these words, see the Statute of 37 E. 3. cap. 8. **where the words, by the law of the Land, are rendred, without due proces of Law, for there it is said, though it be contained in the great Charter, that no man be taken, imprisoned, or put out of his freehold without process of the Law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the Common law.**

No man be put to answer without presentment before Justices, or thing of record, or by due process, or by writ originall, according to the old law of the land.

Wherein it is to be observed, that this Chapter is but declaratory of the old law of England. Rot. Parliament 42 E. 3. nu. 22.23. the case of Sir John a Lee, the Steward of the Kings house.

¶ Per legem terrae.] i. Per legem Angliae, and hereupon all Commissions are grounded, wherein is this clause, facturi quod ad justitiam pertinet secundum legem, & consuetudinem Angliae, &c. **And it is not said,** legem & consuetudinem Regis Angliae **lest it might be thought to bind the King only, nor** populi Angliae **left it might be thought to bind them only, but that the law might extend to all, it is said** per legem terrae, i. Angliae.

And aptly it is said in this Act, per legem terrae **that is, by the Law of England: For into those places, where the law of England runneth not, other lawes are allowed in many cases, and not prohibited by this Act. For example: If any injury, robbery, felony, or other offence be done upon the high sea,** Lex terrae **extendeth not to it, therefore the Admirall hath conusance thereof, and may proceed, according to the marine law, by imprisonment of the body, and other proceedings, as have been allowed by the lawes of the Realme.**[24]

And so if two English men doe goe into a foreine Kingdome, and fight there, and the one murder the other, lex terrae **extendeth not hereunto, but this offence shall be heard, and determined before the Constable, and Marshall, and such proceedings shall be there, by attaching of the body, and otherwise, as the Law, and custome of that court have beene allowed by the lawes of the Realme.**[25]

Against this ancient, and fundamentall Law, and in the face thereof,

I finde an Act of Parliament made, that as well Justices of Assise, as Justices of peace (without any finding or presentment by the verdict of twelve men) upon a bare information for the King before them made, should have full power, and authority by their discretions to heare, and determine all offences, and contempts committed, or done by any person, or persons against the forme, ordinance, and effect of any Statute made, and not repealed &c. By colour of which Act, shaking this fundamentall Law, it is not credible what horrible oppressions, and exactions, to the undoing of infinite numbers of people, were committeed by Sir Richard Empson **knight, and** Edm. Dudley **being Justices of peace, throughout England; and upon this unjust and injurious Act (as commonly in like cases it falleth out) a new office was erected, and they made Masters of the Kings forfeitures.**[26]

But at the Parliament, holden in the first yeare of H. 8. this Act of 11 H. 7. is recited, and made voide, and repealed, and the reason thereof is yeelded, for that by force of the said Act, it was manifestly known, that many sinister, and crafty, feigned, and forged informations, had been pursued against divers of the Kings subjects, to their great dammage, and wrongfull vexation: And the ill successe hereof, and the fearefull ends of these two oppressors, should deterre others from committing the like, and should admonish Parliaments, that in stead of this ordinary, and precious triall Per legem terrae **they bring not in absolute, and partiall trialls by discretion.**[27]

If one be suspected for any crime, be it treason, felony &c. And, the party is to be examined upon certaine interrogatories, he may heare the interrogatories, and take a reasonable time to answer the same with deliberation (as there the time of deliberation was tenne houres) and the examinate, if he will, may put his answere in writing, and keepe a Copie thereof: and so it was resolved in Parliament by the Lords Spirituall, and Temporall in the case of Justice Richill. **See the Record at large.**[28]

And the Lord Carew **being examined, for being privy to the plot, for the escape of** Sir Walter Rawleigh **attainted of treason, desired to have a copy of his examination, and had it, as** Per legem terrae **be ought.**[29]

Now here it is to be knowne, in what cases a man by the Law of the land, may be taken, arrested, attached, or imprisoned in case of treason or felony, before presentment, indictment, &c. Wherein it is to be understood, that Process of law is two fold, *viz.* By the kings Writ, or by

due proceeding, and warrant, either in deed, or in law without Writ.

As first where there any witnesse against the offendor, he may be taken and arrested by lawfull warrant, and committed to prison.

When treason and felony is committed, and the common fame and voice is, that A is guilty, it is lawfull for any man, that suspects him, to apprehend him.[30]

[a] **This same** Bracton **describeth well,** Fama quae suspicionem inducit, oriri debet apud bonos, & graves, non quidem malevolos, & maledicos, sed providas & fide dignas personas, non semel, sed saepius, quia clamor minuit & defamatio manifestat.

[b] **So it is of Hue and Cry, and that is by the Statute of** Winchester, **which is but an affirmance of the Common Law: Likewise if A. be suspected, and he fléeth, or hideth himselfe, it is a good cause to arrest him.**

[c] **If treason or felony be done, and one hath just cause of suspition this is a good cause, and warrant in Law, for him to arrest any man, but he must shew in certainty the cause of his suspition: and whether the suspition be just, or lawfull, shall be determined by the Justices in an action of false imprisonment brought by the party grieved, or upon a Habeas corpus, &c.**

A felony is done and one is pursued Hue and Cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be by a warrant in Law, attached and imprisoned by the Law of the Land.[31]

A Watchman may arrest a nightwalker by a Warrant in Law.[32]

If a man woundeth another dangerously, any may arrest him by a warrant in Law, untill it may be known, whether the party wounded shall die thereof, or no.[33]

If a man kéep the company of a notorious thiefe, whereby he is suspected, &c. it is a good cause, and a warrant in Law to arrest him.[34]

If an affray be made to the breach of the King's peace, any man may by a warrant in Law restrain any of the offenders, to the end the Kings peace may be kept, but after the affray ended, they cannot be arrested without an expresse warrant.[35]

Sée now the Statute of 1 & 2 Phil. & Mar. cap. 13. & 2 & 3 Phil. & Mar. cap. 10.

Now seeing that no man can be taken, attached, or imprisoned but by due processe of Law, and according to the Law of the Land, these

conclusions hereupon doe follow.
First, that a commitment by lawfull Warrant, either in déed or in Law, is accounted in Law due processe or procéeding of Law, and by the Law of the Land, as well as by processe by force of the Kings Writ.
2. That he or they, which doe commit them, have lawfull authority.
3. That his warrant, or Mittimus **be lawfull, and that must be in writing under his hand and seale.**
4. The cause must be contained in the warrant, as for treason, felony, &c. or for suspition of treason or felony, &c. otherwise if the Mittimus **contain no cause at all, if the Prisoner escape, it is no offence at all, whereas if the** Mittimus **contained the cause, the escape were treason, or felony, though he were not guilty of the offence; and therefore for the Kings benefit, and the Prisoner may be the more safely kept, the** Mittimus **ought to contain the cause.**
5. The Warrant or Mittimus **containing a lawfull cause, ought have a lawfull conclusion,** *viz.* **and him safely to kéep, untill he be delivered by Law, &c. and not untill the party committing doth further order. And this doth evidently appeare by the Writs of** Habeas corpus, **both in the kings Bench, and Common Pleas, Eschequer, and Chancery.**[36]

Rex Vicecon. London. salutem. Praecipimus vobis, quod corpus A. B. in custodia vestra detent. ut dicitur, una causa detentionis suae, quocunq; nomine praed. A. B. censeatur in eisdem, habeatis coram nobis apud Westm. die Jovis prox' post Octabis S. Martini, ad subjiciend. & recipiend ea, quae curia nostra de eo adtunc, & ibidem ordinar. contigerit in hac parte, & hoc nullatenus ommitatis, periculo incumbente, &c. habeatis ibi hoc breve, Teste Edw. Coke 20. Nov. anno Regni nostri 10.

This is the usuall forme of the Writ of Habeas corpus in the King's Bench, Vide Mich. 5. E. 4. Rot. 143. Coram Rege, Kefars Case, under the Teste of Sir John Markham.

Rex Vicecom London salutem. Praecipimus vobis, quod habeatis coram Justiciariis nostris, apud Westm. die Jovis prox' post quinque septiman. Pasche, corpus A.B. quocunque nomine censeatur, in prisona vestra, sub custodia vestra detent. ut dicitur, una cum die, & causa captionis & detentionis ejusdem, ut iidem Justiciar nostri, visa causa illa, ulterius fieri fac', quod de jure, & secundum legem, & consuetudinem Regni nostri Angliae foret faciend, & habeatis ibi hoc breve, Teste,&c.[37]

The like Writ is to be graunted out of the Chancery, either in the time of the Terme, (as in Kings Bench) or in the Vacation; for the

Court of Chancery is officina justitiae, **and is ever open, and neither adjourned, so as the Subject being wrongfully imprisoned, may have justice for the liberty of his person as well in the Vacation time, as in the Terme.**[38]

By these Writs it manifestly appeareth, that no man ought to be imprisoned, but for some certain cause: and these Words, Ad subjiciend. & recipiend, &c. **prove that cause must be shewed: for otherwise how can the Court take order therein according to Law.**

And this doth agrée with that which is fair in the holy History, Sine ratione mihi videtur, mittere vinctum in carcerem, & causas ejus non significare. **But since we wrote these things, and passed over to many other Acts of Parliament; sée now the Petition of Right,** Anno Tertio Caroli Regis, **resolved in full Parliament by the King, the, Lords Spirituall, and Temporall, and the Commons, which hath made an end of this question, if any were.**[39]

Imprisonment doth not onely extend to false imprisonment, and unjust, but for detaining of the Prisoner longer then be ought, where be was at the first lawfully imprisoned.

If the Kings Writ come so the Sheriffe, to deliver the Prisoner, if he detain him, this detaining is an imprisonment against the Law of the Land: If a man be in Prison, a warrant cannot be made to the Gaoler to deliver the Prisoner to the custody of any person unknown to Gaoler, for two causes; first, for that thereby the Kings Writ of Habeas corpus, or delivery, might be prevented. 2. The Mittimus ought to bee, as hath béene said, till hee bee delivered by Law.[40]

If the Sheriffe, or Gaoler detain a Prisoner in the Gaoler after acquitall, unlesse it be for his fées, this is false imprisonment.

In many cases a man may be by the Law of the Land taken, and imprisoned, by force of the Kings Writ upon a suggestion made.

Against these that attempt to subvert, and enervate the Kings Lawes, there lieth a Writ to the Sheriffe in nature of a commission, Ad capiendum impugnatores juris Regis, & ad ducendum eos ad Gaolam de Newgate; **which you may reade in the Register at large.** Ubi supra. **And this is** lex terrae **by Processe of Law, to take a man without answer, or summons in this case; and the reason is,** Merito beneficium legis amittit, qui legem ipsam subvertere intendit.[41]

If a Souldier after wages received, or press money taken, doth absent himself, or depart from the Kings service; upon the certificate thereof

of the Captain into the Chancery, there lieth a Writ to the Kings serjeants at Armes, if the party be vagrant, and hideth himselfe, Ad capiendum conductos proficiscend in obsequium nostrum, &c. qui ad dictum obsequium nostrum venire non curaverint. **And this is** lex terrae, **by processe of Law,** pro defensione Regis, & Regni, **or for the same cause, a Writ may be directed to the Sheriffe,** De arrestando ipsum, qui pecuniam recepit ad proficiscendum in obsequium Regis, & non est profectus.[42]

It a man had entred into Religion, and was professed, and after he departed from his house, and became vagrant in the Country against the rules of his Religion, upon the Certificate of the Abbot, or Prior thereof into the Chancery, a Writ should be directed to the Sheriffe, De apostata capiendo, whereby he was commanded in these words; Praecipimus tibi quod praesatum, &c. Sine dilatione arrestes, & praesat Abbat; Abbat &c. liberes secundum regulam ordinis sui castigand'; **And this was** Lex terrae, **by Processe of Law, in honorem religionis.**[43]

If any lay men with force and strong hand, doe enter upon, of kéep the possession either of the Church, or of any of the houses, of glebe, &c. belonging thereunto, the Incumbent upon certificate thereof of the Bishop, or without certificate upon his own surmise may have a Writ to the Sheriffe, De vi laica amovenda, **by which the Sheriffe is commanded in these words;** Praecipimus tibi quod omnem vim laicam seu armatam, quae se tenet in dicta Ecclesia, seu domibus eidem annexis, ad pacem nostrum in Com. tuo perturband, sine dilatione amoveas, & si quos in hac parte resistentes inveneris, eos per corpora sua attachias, & in prisona nostra salvo custodias, &c. **and this is** lex terrae, **by Processe of Law,** pro pace Ecclesiae.[44]

Also a Writ of Ne exeas Regnum may be awarded to the Sheriffe, or Justices of Peace, or to both, that a man of the Church shall not depart the Realme; the effect whereof is; Quia datum est nobis intelligere, quod A.B. clericus versus partes exteras, ad quamplurima nobis, & quamplurima de populo nostro praejudicialia, & damnosa, ibidem prosequend. transire proponit, &c. tibi praecipimus, quod praedict' A.B. coram te corporaliter venire facias, & ipsum ad sufficientes manucaptores, inveniend, &c. Et si hoc coram te facere recusaverit, tunc ipsum A.B. proximae gaolae committas salvo custodiend, quousque hoc gratis facere voluerit. **And there is another Writ in the Register directed to the party, either of the Clergy or Laity, And this is lex terrae, by Processe of Law,** Pro bono publico Regis et Regni; **Whereof you may reade more at large in the**

third part of the Institutes, Cap. Fugitives.[45]

Upon a surmise that a man is a Leper, one that hath morbum elephantiacum, **so called, because he hath a skin like to an Elephant, there may be a Writ directed to the Sheriffe,** Quia accepimus quod I. de N. leprosus existit, & inter homines Comitatus tui communiter conversatur, &c. ad grave damnum homin' praed, & propter contagionem morbi praed. periculum manifestum, &c., tibi praecipimus quod assumptis tecum aliquibus discretis & legalibus hominibus de Comitat praeđ non suspect, &c. ad ipsum I. accedas, &c. & examines, &c. & si ipsum leprosum inveveris, ut praedict' est, tunc ipsum honestiori modo, quo poteris à communione hominum praedict' amoveri, & se ad locum solitarium ad habitand' ibidem, prout moris est, transferre facias indilate, &c. **And this is** lex terrae, **by Processe of Law, for saving of the people from contagion and infection.**[46]

But if any man by colour of any authority, where he hath not any in that particular case, arrest, or imprison my man, or cause him to be arrested, or imprisoned, this is against this Act, and it is most batefull, when it is done by countenance of Justice.[47]

King Edw. **6. did incorporate the Town of S. Albons, and granted to them, to make ordinances, &c. they made an ordinance upon paine of imprisonment, and it was adjudged to be against this Statute of** Magna Charta; **So it is, if such an ordinance had béen contained in the patent it selfe.**

All Communication that are consonant to this Act, are, as hath béen said, Secumdum legem, & consuetudinem Angliae

A Communication was made under the great Seale to take I. N. (a notorious felon) and to seise his lands, and goods: This was resolved to the against the Law of the Land, unless he had béen endicted, or appealed by the party, or by other due Processe of Law.[48]

It is enacted, if any man be arrested, or imprisoned against the forme of this great Charter, that he bée brought to his answer, and have right.[49]

No man to be arrested, or imprisoned contrary to the forme of the great Charter.

Sée more of the severall Lawes allowed within this Land, in the first part of the Institutes Sect. 3.

The Philosophicall Poet doth notably describe the damnable, and damned procéedings of the Judge of hell,[50]

Gnosius hic Radamanthus habet durissima regna,
(Castigatque, auditque dolos, subigitque fateri.
And in another place,
——— leges fixit precio atque refixit.

First he Punisheth, and then he heareth: and lastly, compelleth to confesse and make and marre lawes at his pleasure; like as the Centurion in the holy history, did to S. Paul: For the text saith, Centurio apprehendi Paulum jussit, & se catenis ligari & tunc interrogabat, quis fuisset, & quid fecisset; **but good Judges and Justices abhorre these courses.**[51]

Now it may be demanded, if a man be taken, or committed to prison contra legem terrae, against the law of the land, what remedy hath the party grieved? To this it is answered: first, that every Act of Parliament made against any injury, mischiefe, or grievance doth either expresly, or impliedly give a remedy to the party wronged, or grieved: as in many of the Chapters of this great Charter appeareth; and therefore he may have an action grounded upon this great Charter. As taking one example for many, and that in a powerfull, and a late time. Pasch. 2. H. 8. coram Rege rot. 538. **against the Prior of S. Oswin in Northumberland. And it is provided, and declared by the Statute of 36. E. 3. that if any man feeleth himselfe grieved, contrary to any article to any Statute, he shall have present remedy in Chancery (that is, by originall Writ) by force of the said Articles and Statutes.**[52]

2 He may cause him to be indicted upon this Statute at the Kings suite, whereof you may see a Precedent Pasch. 3. H. 8. Rott. 71. coram Rege. Rob. Sheffields case.

3 [a] **He may have an** habeas corpus **out of the Kings Bench or Chancery, Though there be no priviledge, &c. or in the Court of Common pleas, or Eschequer, for any officer or privileged person there; upon which writ the goaler must retourne, by whom he was committed, and the cause of his imprisonment, and if it appeareth that his imprisonment be just, and lawfull, be shall be remaunded to the former Gaoler, but if it shall appeare to the Court, that he was imprisoned against the law of the land, they ought by force of this Statute to deliver him: if it be doubtfull and under consideration, he may be bailed.**

In 5 E. 4. coram Rege Rot.143. John Keasars **case, a notable Record and too long here to be recited.**

10. Eliz. Rot. Leas **case.**

In 1. & 2. Eliz. Dier. 175. Scrogs **case.**

In 18. Eliz. Dier. 175. Roland Hynds **case** in margine.

4. He may have an Action of false imprisonment 10. H. 7. fol. 17. **but it is entred in the Court of Common pleas** Mich. 11 H. 7. Rot. 327. **Hilarie Warners case, and it appeareth by the Record, that Judgement was given for the plaintife: a Record worthy of observation.**

5. [b] **He may have a Writ d**e homine replegiando.

Vide Marlebridge Cap. 8.

6 [c] **He might by the Common-law have had a** Writ De odio, & atia, **as you may see before.** Cap. 26. **but that was taken away by Statute, but now is revived againe by the Statute of** 42. E. 3. cap. 1. **as there if also appeareth. It is said in** [d] **W. 2.** Sed ne hujusmodi appellati, vel indictati diu detineantur in prisona, habeat breve De odio & atia, sicut in Magna Charta. & aliis Statutis dict. est **and by the said Act of** 42 E. 3. **all Statutes made against** Magna Charta **are repealed.**

[Nulli vendemus, &c.][e] **This is spoken in the person the King, who in judgement of Law, in all his Courts of Justice is present, and repeating these words,** Nulli vendemus **&c.**

And therefore, every Subject of this Realme, for injury done to him in bonis, terris, vel persona, **by any other Subject, be he Ecclesiasticall, or Temporall, Free, or Bond, Man, or Woman, Old, or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.**

Hereby it appeareth, that Justice must have three qualities, it must be Libera, quia nihil iniquius venali Justitia; Plena, quia Justitia non debet clandicare; & Celeris, quia dilatio est quaedam negatio; **and then it is both Justice and Right.**

[Nulli negabimus, aut differemus, &c.]. These words have beene excellently expounded by latter Acts of Parliament, that by no meanes common right, or Common law should be disturbed, or delayed, no, though it be commanded under the Great seale, or Privie seale, order, writ, letters, message, or commandement whatsoever, either from the King, or any other, and that the Justices shall proceede, as if no such Writs, letters, order, message, or other commandement, were come to

them. Judicium redditum per defaltum affirmatar, non obstante breve Regis de prorogatione judicii.[53]

That the Common lawes of the Realme should by no meanes be delayed, for the law is the surest sanctuary, that a man can take, and the strongest fortresse to protect the weakest of all; lex est tutissima cassis, **and** sub clypeo legis nemo decipitur: **but the King may stay his owne suite, as a** capias pro fine, **for the king may respite his fine and the like.**

All Protections that are not legall, which appeare not in the Register, nor warranted by our books, are expresly against this branch, nulli differemus: **As a Protection under the Great scale granted to any man, directed to the Sherifes, &c. and commanding them, that they shall not arrest him, during a certaine time at any other mans suite, which hath words in it,** per praerogativam nostram, quam nolumus esse arguendam; **yet such Protections have beene argued by the Judges, according to their oath and duty, and adjudged to be said: As** Mich. 11. H. 7. Rot. 124. **a Protection graunted to Holmes a Vintner of London, his factors, servants and deputies, &c. resolved to be against Law.** Pasch. 7. H. 8. Rot. 66. **such a Protection disallowed, and the Sherife amerced for not executing the Writ.** Mich. 13. & 14. Eliz. **in** Hitchcocks **case, and many other of latter time: and there is a notable * Record of ancient time in** 22. E. 1. John de Mershalls **case,** non pertinet ad vicecomitem de protectione Regis judicare imo ad curiam.

[Justitam vel rectum.] **Wee shall not sell deny, or delay Justice and right.** Justitiam vel rectum, **neither the end, which is Justice, nor the meane, whereby we may attaine to the end, and that is the law.**

Rectum, **right, is taken here for law, in the same sense that jus, often is so called. 1. Because it is the right line, whereby Justice distributative is guided, and directed, and therefore all the Commissions of Oier, and Terminer, of goale delivery, of the peace &c. have this clause,** Facturi quod ad justitiam peritinet, secundum legem, **and** consuetudinem, Angliae, **that is, to doe Justice and Right, according to the rule of the law and custome of England; and that which is called common right in 2. E. 3. is called Common law, in 14. E. 3. &c. and in this sense it is taken, where it is said,** ita qd. stet recto in curia, i. legi in curia. **2. The law is called** rectum, **because it discovereth that which is sort, crooked, or wrong, for as right signifieth law, so tort**, **crooked or wrong, signifieth injurie, and** injuria est contra jus, **against right:** recta linea est index sui,

& obliqui, **hereby the crooked cord of that, which is called discretion, appeareth to be unlawfull, unlesse you take it, as it ought to be,** Discretio est discernere per legem, quid fit justum. **3. It is called Right, because it is the best birthright the Subject hath, for thereby his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury, and wrong:** major haereditas venit unicuiq; nostrum à jure, & legibus, quam à parentibus.

4. Lastly, rectum **is sometime taken for the right it selfe, that a man hath by law to land: As when wee say there lieth** Breve de recto, **in so much that some old readers have supposed, that** rectun **in this Chapter, should be understood of a writ of** right, for which at this day no fine in the hamper is paid. As the goldfiner will not out of the dust, threds or shreds of gold, let passe the least crum, in respect of the excellency of the metall: so ought not the learned reader to let passe any syllable of this Law, in respect of the excellency of the matter.[54]

Coke Second Institute, Magna Charta c. 29, pp. 45–57.

17.3.1.2Care, 1721

CHAP. XXIX.

None shall be Condemned without Trial: Justice shall not be sold or deferred.

NO Freeman shall be taken or imprisoned, or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no Man, we will not deny or defer to any Man, either Justice or Right.

NOTES.

No Freeman shall be taken, &c. These Words deserve to be written in Letters of Gold, and I have often wondred that they are not inscribed in Capitals, in all our Courts of *Judicature*, *Town-halls*, and most Publick Edifices; they being so Essential to our English Freedom and Liberties, and because my *Lord Coke in the second part of his Institutes*, has many excellent Observations on this Chapter: I shall recite his very Words.

ss. This Chapter containeth nine several Branches.

(1.) That *no Freeman shall be taken, or imprisoned, but by the law of the Land*, (i. e.) by the Common Law, or by the Statute Law, for the Liberty of

a Man’s person is more dear to him than any Thing, and therefore if he be wronged in that Liberty, ’tis very reasonable he should be relieved.
(2.) *No Man shall be disseised*, (i. e.) put out of Seisin, or be dispossessed of his Freehold, (*i. e*.) of his Lands or Tenements, or Livelihood, or of his Liberties, or Free-Customs, which belong to him as his Birthright, unless it be by *Lawful Judgment* (i.e.) by a Verdict of his Equals, or Men of his own Condition, or by the *Law of the Land*, (i. e) to speak once for all, by the due Course and Process of Law, [*sic*]
(3.) *No Man shall be outlawed*, (i. e.) deprived of the Benefit of the Law, unless he is outlawed according to the Course of the Law of the Land.
(4.) *No Man shall be exiled*, (i. e) banished out of his Country, unless it be by the same Law.
(5.) *No Man shall in any sort be destroyed*, unless it be by the Verdict of his Equals, *&c*.
(6.) *No Man shall be Condemned* at this King’s Suit, in the Court of Bench, for so are the Words, (*nec supra cum ibimus*) to be understood; nor before any other Commissioner or Judge whatsoever, and that is implied by the Words *nec supra cum mittemus*, but by the Judgment of his Peers or Equals, or according to the Law of the Land.

7. *We shall sell to no Men Justice or Right*.
8. *We shall deny to no Men Justice or Right*.
9. *We shall defer to no Men Justice or Right*.

Each of these Branches we shall briefly explain.

1. *No Man shall be taken*, &c. (i. e.) restrained of his Liberty, by Petition, or Suggestion to the King or Council, unless it be by Indictment or Presentment, of good and lawful Men, living near the place where such deeds were done.

2. *No Man shall be disseised*, &c. Hereby is intended, that Lands, Tenements, goods and Chattels, shall not be seized into the Kings Hands, contrary to this great Charter, and the Law of the Land; nor any Man shall be diffeized of his Lands or Tenements, or dispossessed of his Goods or Chattels, contrary to the Law of the Land.

A Custom was alledged in the Town of C. that if the Tenant cease by two Years, that the Lord should enter into the Freehold of the Tenant, and hold the same until he were satisfyed of the Arrearages: It was adjudged a Custom against the Land, to enter into a Man’s Freehold in that case, without Action or Answer.

King *Henry* VI. granted to the Corporation off *Dyers* within *London*,

power to search, *&c*. And if they found any Cloth dyed with *Logwood*, that the Cloth should be Forfeit: And it was adjudged, that this Charter concerning the Forfeiture, was against the Law of the Land and this Statute; for no Forfeiture can grow by Letters Patents.

No Man ought to be put from his Livelihood without Answer.

3. *No Man outlawed*, that is, barred to have the Benefit of the Law. And note, to this Word *Outlawed*, these Words *Unless by the Law of the Land*, do refer. [*Of his Liberties*.] This Word hath three Sgnifications [*sic*]:

1. As it hath been said, it signifieth the Laws of the Realm, in which respect this Charter is called *Charta Libertatum*, as aforesaid.

2. It signifieth the Freedom the Subjects of *England* have. For Example, The Company of *Merchant-Taylors of England*, having power, by their *Chater*, *[sic]* to make Ordinances, made an Ordinance, that every Brother of the same Society, should put the one half of his *Cloths* to be dressed by some *Cloth-Workers* Free of the same Company, upon pain to Forfeit 10 *s*. *&c*. And it was adjudged, that this Ordinance was against Law, because it was against the Liberty of the Subject, for every Subject hath freedom to put his Cloths to be dressed by whom he will, *& sic de similibus*. And so it is, if such or the like Grant had been made by his Letters Patents.

3. *Liberties* signifie the *Franchises* and *Privileges* which the Subjects have of the Gift of the King, as the Goods and Chattels of Felons, Outlaws and like; or which the Subject claims by Prescription, as Wreck, Waif, Stray, and the like.

So likewise, and for the same reason, if a Grant be made to any Man, to have the sole making of Cards, or the sole dealing with any other Trade, that Grant is against the Liberty and Freedom of the Subject, that before did or lawfully might have used that Trade, and consequently against this great *Charter*.

Generally all *Monopolies* are against this great *Charter*, because they are against the Liberty and Freedom of the Subject, and against the Law of the Land.

4. *No Man exiled*, that is, Banish'd, or forced to depart or stay out to *England* without his consent. By the Law of the Land, no Man can be Exiled or Banished out of his Native Country, but either by Authority of Parliament, or in Case of Abjuration for Felony by the Common Law; And so when our Books, or any Record, speak of Exile, or Banishment, other than in case of Abjuration, it is to be intended to be done by Authority of Parliament, as *Belknap* and other Judges, *&c*. banished into *Ireland*, in the

Reign of *Richard* the II.

This is a Beneficial Law, and is construed benignly; and therefore the King cannot send any subject of *England* against his Will, to serve him out of this Realm, for that should be an Exile, and he should *perdere Pateriam:* No, he cannot be sent against his will into *Ireland*, to serve the King or his Deputy there, because it is out of his Realm of *England*: For if the King might send him out his Realm to any Place, then under pretence of Service, as Ambassador or the like, he might send him unto the farthest part of the World, which being an Exile, is prohibited by this Act.

5. *No Man destroyed*, that is forejudged of Life or Limb, or put to Torture, or Death, every Oppression against Law, by colour of any usurped Authority, is a kind of destruction. And the Words *Aliquo modo* (any otherwise) are added to this Verb *destroyed*, and to no other Verb in this Chapter, and therefore all things, by any manner of means, tending to Destruction, are prohibited; as if a Man be accused or indicted of Treason or Felony, his Lands or Goods cannot be granted to any, no not so much as by Promise, not any of his Lands or Goods seized into the King's Hands before he is attainted; for when a Subject obtained a Promise of the Forfeiture, many times undue Means, and more violent Prosecution is used for private Lucre, tending to Destruction, than the quiet and just Proceeding of the Law would permit, and the Party ought to live of his own until Attainder.

6. *By lawful Judgment of his Peers*, that is, by Equals, Men of his own Rank and Condition. The general Division of Persons, by the Law of *England*, is either *one that is Noble*, and in respect of his Nobility of the Lords House of Parliament, or *one of the Commons*, and in respect thereof, of the House of Commons in Parliament. And as there be divers degrees in Nobility, as Dukes, Marquesses, Earls, Viscounts and Barons, and yet all of them are comprehended under this word *Peers*, and are Peers of the Realm: So of the Commons, there be Knights, Esquires, Gentlemen, Citizens and Yeomen, and yet all of them Commons of the Realm. And as every of the Nobles is one a Peer to another, though he be of a several Degree; so it is of the Commons, and as it hath been said of Men, so doth it hold of Noble Women, either by Birth or Marriage.

And forasmuch, as this Judgment by Peers is called *lawful*, it shews the Antiquity of this manner of Trial: it was the ancient, accustomed, legal Course, long before this Charter.

Or by the Law of the Land, that is, by due Process of Law, for so the

Words are expertly expounded by the Statute of 37 *Edw*. 3. *c*. 8. And these Words are specially to be referred to those forgoing, to whom they relate. As none shall be condemned without a lawful Trial by his Peers, so none shall be taken, imprisoned, or put out of his Freehold, without due Process of the Law, that is, by the Indictment or Presentment of good and lawful Men of the Place, in due manner, or by Writ original of the Common Law.

Now, seeing that no Man can be taken, arrested, attached, or imprisoned, but by due Process of Law, and according to the Law of the Land, these Conclusions hereupon do follow.

1. That the Person or Persons who commit any, must have lawful Authority.
2. It is necessary that the warrant, or *Mittimus*, be lawful, and that must be in Writing under his Hand and Seal.
3. The Cause must be contained in the warrant, as for Treason, Felony, *&c*. Suspicion of Treason, or the like particular Crime; for if it do not thus specify the Cause, if the Prisoner bring his *Habeas Corpus*, he must be discharged, because no Crime appears on the Return; nor is it in such Case, any Offence at all, if the Prisoner make his Escape; whereas if the *Mittimus* contain the Cause, the Escape would respectively be Treason or Felony, though in Truth he were not guilty of the first Offence. And this mentioning the Cause, is agreeable to Scripture, *Acts* 5.
4. The Warrant or *Mittimus*, containing a lawful Cause, ought to have a lawful Conclusion, *&c*. and him safely to keep until he be delivered by Law, *&c*. and not until the Party committing shall farther order.

If any Man, by colour of Authority where he hath not any in that particular case, shall presume to arrest or imprison any Man, or cause him to be arrested or imprisoned, this is against this Act, and it is most hateful, when it is done by countenance of Justice. King *Edward* VI did incorporate the Town of St. *Albans*, and granted to them to make Ordinances, *&c*. they made a By-Law upon pain of imprisonment, and it was adjudged to be against the Statute of Magna Charta; so it has been, if such an Ordinance had been contained in the Patent it self.

We will sell to no Man, deny to no man, &c. This is spoken in the Person of the King, who in Judgment of the Law, in all his Courts of Justice, is present: And therefore every subject of this Realm, for Injury done to him, in Person, Lands or Goods, by any other Subject, Ecclesiastical or Temporal, whatever he be, may take his Remedy by the Course of the Law, and have Justice and Right for the Injury done him, freely, without Sale; fully, without denial; and speedily without delay; for Justice must have

three Qualities, it must be *Libera*, free; for nothing is more odious than Justice set to sale: *Plena*, full, for Justice ought not to limp, or be granted by piece-meal: And *Celeris*, speedy: *Quia Dilatio est quadam negatio*, Delay is a kind of denial: and when all these meet, it is both Justice and Right.

We will not deny nor delay any Man, &c. These Words have been excellently expounded by latter Acts of Parliament, that by no means common Right, or common Law, should be disturbed or delayed; no, though it be commanded under the Great Seal, or Privy Seal, Order, Writ, Letters, Message, or Commandment whatsoever, from the King, or any other; and that the Justices shall proceed, as if no such Writs, Letters, Order, Message, or other Commandment were come to them: All our Judges swear to this; for 'tis part of their Oaths: so that if any shall be found wresting the Law, to serve a Court-turn, they are Perjur'd as well as Unjust. The Common Laws of the Realm should by no means be delayed, for the Law is the surest Sanctuary that a Man can take, and the strongest Fortress to protect the weakest of all; Lex *est tutissima Cassis*, the Law is a most safe Head plece, and *sub Clypeo legis Nemo decipitur*, no Man is deceived whilst the Law is his Buckler: But the King may stay his own Suit, as a *Capias pro fine*, for the King may respite his Fine, and the like.

All Protections that are not legal, which appear not in the Register, nor warranted in our Books, are expresly against this Branch, *nulli differemus*, we will not delay any Man: As a Protection under the Great Seal, granted to any Man, directed to the Sheriffs, *&c*. and commanding them that they shall not arrest him, during a certain time, at any other Man's Suit, which hath Words in it, *By our Prerogative, which we will not have disputed*: Yet such Protections have been argued by the Judges, according to their Oath and Duty, and adjudged to be void. As *Mich*. 11 *H*. 7. *Rot*. 124. a Protection granted to *Holmes* a Vintner of *London*, his Factors, Servants and Deputies, *&c*. Resolved to be against Law, *Pasch*. 7 *H*. 8. *Rot*. 66. Such a Protection disallowed, and the Sheriff amerced for not executing the Writ, *Mich*. 13 and 14 *Eliz*. in *Hitchcock*'s Case, and many other of latter time: And there is a notable Record of ancient Time, in 22 *E*. 1. *John de Marshal*'s Case; *Non pertinet ad Vicecomitem de protectione Regis judicare imo ad Curiam*.

Justice or Right, We shall not sell, deny or delay, Justice or Right; neither the end, which is Justice, nor the mean whereby we may attain to the end, and that is the Law: Right is taken here for Law, in the same Sense that Justice often is so called. 1. Because it is the right Line, whereby Justice distributive is guided and directed; and therefore all Commissioners

of *Oyer* and *Terminer*, of Gaol-delivery, of the Peace, *&c*. have this Clause, *Facturi quod ad Justitiam pertinet, secundum Legem & Consuetudinem Angliae*, that is, to do Justice and Right, according to the Rule of the Law and Custom of *England*: And that which is called Common Right, in 2 *E*. 3. is called Common Law in 14 *E*. 3 *&c*. 2nd in this Sense it is taken, where it is said, *Ita quod stat Rectus in Curia, id est, Legi in Curia*,

2. The Law is called *Rectum*, because it discovereth that which is crooked or wrong; for as Right signifieth Law, so crooked or wrong signifieth Injuries; and *Injuria est contra jus*, Injury is against Right: *Recta Linea est index sui & obliqui*, a right Line is both declaratory of it self and the oblique. Hereby the crooked Cord of that which is called *Discretion*, appeaareth to be unlawful, unless you take it as it ought to be, *Discretio est discernere per Legem, quid sit Justum*, Discretion is to discern by the Law what is just.

3. It is called Right, because it is the best Birthright the Subject hath; for thereby his Goods, Lands, Wife and Children, his Body, Life, Honour and Estimation, are protected from Injury and Wrong: *Major Haereditas venit unicuique nostrum a Jure & Legibus, quam a Paretilus*: A greater Inheritance descends to us from the Laws, than from our Progenitors.

Thus far the very words of that Oracle of our Law, the Sage and Learned *Coke*, which so fully and excellently explains this incomparable Law, that it will be superfluous to add any thing further on this Chapter.

Care English Liberties, vol. I, Magna Charta, ch. 29, pp. 22–27

17.3.1.3Hale, 1736

III. The third usual writ for bailing of criminals is by *habeas corpus*, and this is a writ of a high nature, for if persons be wrongfully committed, they are to be discharged upon this writ returned; or if bailable, they are to be baild; if not bailable, they are to be committed.

This writ issues out of the great courts of *Westminster*, but hath different uses and effects.

1. It may issue out of the court of *Common-pleas* or *Exchequer*, but that is or ought to be always, where a person is privileged, or to charge him with an action.

If a person is sued in the common-pleas, or is supposed to be so sued,

and is arrested for a presupposed misdemeanor, yea or for felony, an *habeas corpus* lies in the court of *Common-pleas* or *Exchequer*, and if it appears upon the return, that the party is wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisond, the privilege shall be allowed, and the person discharged from that imprisonment; or if it be doubtful, he may be baild to appear in the court of *King's bench*, which hath conusance of the crime returned. *Coke Magn. Cart. cap*. 29. 2 *Instit. p*. 55.

And upon this account, *P*. 43 *Eliz. C. B*. in the case of *Bates*, that was imprisond by the council-table, for not bringing in his subscription to the *East-India* company, and this being returned upon the *habeas corpus* together with a writ against him out of the common-bench, they adjudged the privilege to be allowd, and the party to be discharged (*a*).

But if a man be sued in the common-bench, and is arrested and imprisond for felony, tho the gaoler upon the *habeas corpus* ought to return the causes, as well criminal as that wherewith he is charged out of that court, yet the court of common-pleas ought not to commit him to the *Fleet*, nor discharge him of the imprisonment, nor yet to take bail of him to answer there, for they have not conusance of such crimes; the like it is, if he be returned committed for a riot or surety of the peace by justices of peace; and therefore all they can do is to take his appearance; and take him to mainprise upon the action, and remand him as to the matter of crime, for which he was well committed by the justices, and to remand his body to the sheriff's custody upon his commitment for the crime. 2 *H*. 7. 2. *a*.

But now by the statute of 16 *Car*. I. *cap*. 10. they have an original jurisdiction to bail, discharge, or commit upon an *habeas corpus* for one committed by the council-table, as well as the king's bench, and that altho there be no privilege for the person committed.

2. As to the *King's-bench* and *Chancery*, they have an original power both to grant an *habeas corpus*, and to bail, or discharge, or remand, as the case requires, tho there be no privilege returned. *Coke* on *Mag. Cart. cap*. 29. 2 *Instit. p*. 55. but some things they differ in.

The *king's-bench* in matters civil grant their *habeas corpus ad faciendum & recipiendum*, and this is done as well in vacation as term, and returnable before any particular judge of that court, or into the court itself.

And if there be returned even upon that writ any civil action, and also a matter of crime, as if a person be arrested for debt, and also charged with a warrant of a justice of peace for felony, in that case, 1. If it appear to the

judge or court; that the arrest for debt or other civil action is fraudulent, they may remand him. *Dyer* 249. *b. Harrison*'s case. 2. If it be found real, they may commit him to the king's-bench with his causes, tho they are matters of crime, for that court hath conusance, as well of the crime, as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they see cause, as to the crime to be proceeded on below.

But upon the writ *ad faciendum & recipiendum* there ought not singly a matter of crime to be return'd, for that belongs to the *habeas corpus ad subjiciendum*.

The other writ is the *habeas corpus ad subjiciendum*, which is for matters only of crime, and is not regularly to issue nor be returnable but in the termtime, when the court may judge of the return, or bail, or discharge the prisoner (*b*).

Till the return filed the court may remand him, after it is filed the court is either to discharge, or bail, or commit him, as the nature of the cause requires.

If together with the *habeas corpus* there issue a *certiorari* to remove the indictment, yet in case of felony, tho the body and record be returned and filed, the court may remand him and the record by the statute of 6 *H*. 8. *cap*. 6. but in other cases the record cannot be remanded, but they must proceed in the king's bench both to pleading, trial, and judgment.

But if the body be removed by *habeas corpus*, and the record also by *certiorari*, but the record not filed, tho the return upon the *habeas corpus* be filed, a *procedendo* may issue to the court below.

And thus far for the *habeas corpus* in the king's bench.

By virtue of the statute of *Magna Carta*, and by the very common law an *habeas corpus* in criminal causes may issue out of the *Chancery*. *Coke* on *Magna Carta*, *cap*. 29. 2 *Instit. p*. 55.

But it seems regularly this should issue out of this court in the vacation time, but out of king's bench in the termtime, as in case of a *supersedeas* upon a prohibition. 38 *E*. 3. 14. *a. B. Supersedeas*, 13.

When the cause is returned, the chancellor may judge of the sufficiency or insufficiency thereof, and may discharge or bail the prisoner to appear in the king's bench, or may *propriis manibus* deliver the record into the king's bench, together with the body, and thereupon the court of king's bench may proceed to bail, discharge, or commit the prisoner.

But if the chancellor shall not discharge him, but bail him, this surety must be to appear in the king's bench, or if the chancellor shall do neither, it seems he may commit him to the *Fleet* till the term, and then he may be turned over to the king's bench, and there proceeded against, for the chancellor hath no power to proceed in criminal causes.

And if the *habeas corpus*, and also a *certiorari* be granted, returnable in *Chancery*, and the cause and body be returned there, they may be sent into the king's bench; if the body only be returnable with his causes by *habeas corpus* into the *Chancery*, and deliverd over into the king's bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record also, and thereupon commit or bail the prisoner, as there shall be cause.

But the sending an *habeas corpus ad faciendum & recipiendum* by the chancellor for persons arrested in civil causes, especially being in execution, is neither warrantable by law, nor antient usage, and particularly forbidden by the statute 2 *H*. 5. *cap*. 2. as to persons in execution.

And thus far of bailing by *habeas corpus*.

Hale Pleas of the Crown, vol. 2, pp. 143–48.

17.3.1.4Bacon, 1740

HABEAS CORPUS.

(A) Of the Nature and several kinds of Writs of *Habeas Corpus*.

(B) Of the *Habeas Corpus ad Subjiciendum:* And herein,

1. What Courts have a Jurisdiction of granting it.
2. To what Places it may be granted.
3. In what Cases it is to be granted, and where it is the proper Remedy.
4. How far the Courts have a Discretionary Power in granting or denying it: And therein of the *Habeas Corpus* Act.
5. Of the Manner of suing it out, and the Form of the Writ.
6. To whom it is to be directed.
7. By whom to be returned.
8. Of the Manner of compelling a Return, and the Offence of a false Return.
9. What Matters must be returned together with the Body of the Party.
10. Where the Return shall be said to be sufficient, and to warrant

the Commitment.
11. Whether the Party can suggest any Thing contrary to the Return.
12. Whether any Defect in the Return may be amended.
13. What is to be done with the Prisoner at the Return: And therein of bailing, discharging, or remanding him.
(C) Of the *Habeas Corpus ad faciendum & recipiendum*.

(A) OF THE NATURE AND SEVERAL KINDS OF WRITS OF *HABEAS CORPUS*.

WHEREVER a Person is restrained of his Liberty by being confined in a common Gaol, or by a private Person, whether it be for a Criminal or Civil Cause, he may regularly by *Habeas Corpus* have his Body and Cause removed to some superior Jurisdiction, which hath Authority to examine the Legality of such Commitment, and on the Return thereof either Bail, Discharge, or Remand the Prisoner.[1]

The *Habeas Corpus ad Subjiciendum* is that which issues in Criminal Cases, and is deemed (*a*)a Prerogative Writ, which the King may issue to any Place, as he has a Right to be informed of the State and Condition of the Prisoner, and for what Reasons he is confined. It is also in Regard to the Subject deemed his Writ of (*b*)Right, that is, such a one as he is intitled to (*c*) *ex debito Justitiae*, and is in Nature of a Writ of Error to examine the Legality of the Commitment; and therefore commands the Day, the Caption, and Cause of Detention to be returned.[2]

The *Habeas Corpus ad faciendum & recipiendum* issues (*d*) only in Civil Cases, and lies where a Person is sued, and in Gaol, in some inferior Jurisdiction, and is willing to have the Cause determined in some superior Court, which hath Jurisdiction over the Matter; in this Case the Body is to be removed by *Habeas Corpus*, but the Proceedings must be removed by *Certiorari*.[3]

There is likewise a Writ of *Habeas Corpus ad respondendum*, where a Person is confined in Gaol for a Cause of Action accruing within some inferior Court; and a third Person hath also a Cause of Action against him; in which Case he may have this Writ in order to charge him in such superior Court; for inferior Courts being tied down to Causes arising within their own Jurisdiction, the Party would be without Remedy, unless allowed to sue him in another Court; (*e*) but it seems, that regularly a Person confined in *B. R.* cannot be removed to the *C. B.* by this Writ, nor *vice*

versa; for in these Cases there can be no Defect of Justice, as these Courts have (*f*) Conusance as well of Local as Transitory Actions.[4]

There are also besides these (*g*) other Writs of *Habeas Corpus*, as a *Habeas Corpus ad deliberandum & recipiendum*, which lies (*h*) to remove a Person to the proper Place or County, where he committed some Criminal Offence.[5]

(B) OF THE HABEAS CORPUS AD SUBJICIENDUM: And herein,

1. WHAT COURTS HAVE JURISDICTION OF GRANTING IT.

It is clear, that both by the Common Law, as also by the Statute, the Courts of Chancery and King's Bench have Jurisdiction of awarding this Writ of *Habeas Corpus*, and that without any Privilege in the Person for whom it is awarded; but it seems, that by the Common Law the Court of King's Bench could only have awarded it in Termtime, but that the Chancery might have done it as well out as in Term, because that Court is always open.[6]

If the *Habeas Corpus* issues out of Chancery, and on the Return thereof the Lord Chancellor finds that the Party was illegally restrained of his Liberty, he may discharge him, or if he finds it doubtful he may bail him; but then it must be to appear in the Court of King's Bench, for the Chancellor hath no Power to proceed in Criminal Causes; or the Chancellor may commit the Party to the *Fleet*, and in Termtime may *Proprüs manibus* deliver the Record into the King's Bench, together with the Body; and thereupon the Court of King's Bench may proceed to bail, discharge, or commit the Prisoner.[7]

If the *Habeas Corpus*, and also a *Certiorari*, be granted returnable in Chancery, and the Cause and Body be returned there, they may be sent into the King's Bench; if the Body only be returned with his Causes, by *Habeas Corpus* into the Chancery, and delivered over into the King's Bench, they may proceed to the Determination of the Return, and either by *Procedendo* remand him, or grant a *Certiorari* to certify the Record also, and thereupon commit or bail the Prisoner, as there shall be Cause.[8]

But the sending an *Habeas Corpus ad faciendum & recipiendum* by the Chancellor for Persons arrested in Civil Causes, especially being in Execution, is neither warrantable by Law nor ancient Usage, and particularly forbidden by the Statute 2 *H*. 5. stat. 1. cap. 2 as to Persons in Execution.[9]

There are several strong Opinions, that no *Habeas Corpus ad Subjiciendum* could by the Common Law issue of the Courts of Exchequer or Common Pleas, unless it were in the Case of Privilege, because these Courts are confined to Civil Causes meerly; and therefore unless the Party were an Attorney, or intitled to the Privilege of the Court as an Officer, &*c*. or unless there had been a Suit commenced against him in those Courts, they could not grant a *Habeas Corpus ad Subjiciendum*, tho' they might any other Writ of *Habeas Corpus*.[10]

But notwithstanding these Opinions it was holden in *Bushel*'s Case, that the Court of Common Pleas may issue a *Habeas Corpus ad Subjiciendum*, and that if it appeared on the Return thereof that the Party was imprisoned and detained against Law, the Court might, tho' there was no Privilege in the Case, discharge him; for that to remand him would be an Act of Injustice in the Court, and contrary to *Magna Charta*.

Also by the Statute of 16 *Car*. 1. *cap*. 10. they have an original Jurisdiction to bail, discharge, or commit, upon an *Habeas Corpus* for one committed by the Council-Table, as well as the King's Bench, and that altho' there be no Privilege for the Person committed.[11]

Also by the *Habeas Corpus* Act, 31 *Car*. 2. any of the said Courts in Termtime, and any Judge of either Bench, or Baron of the Exchequer, being of the Degree of the Coif, in the Vacation, may award a *Habeas Corpus* for any Prisoner whatsoever, and on the Return thereof discharge him, if it shall clearly appear that the Commitment was against Law, as being made by one who had no Jurisdiction of the Cause, or for a Matter for which no Man ought by Law to be punished; or bail him, if it shall be doubtful whether the Commitment were legal or not; or remand him, according to the Nature and Circumstances of the Case.[12]

2. TO WHAT PLACES IT MAY BE GRANTED.

It hath been already observed, that the Writ of *Habeas Corpus* is a Prerogative Writ, and that therefore by the Common Law it lies to any Part of the King's Dominions; for the King ought to have an Account why any of his Subjects are imprisoned, and therefore no Answer will satisfy the Writ, but to return the Cause with *Paratum habeo Corpus*, &*c*.[13]

Hence it was held, that this Writ lay to (*a*) *Calice* at the Time it was subject to the King of *England*.[14]

It hath been held, that this Writ lies to the *Marches of Wales*, as it does to all other Courts which derive their Authority from the King, as all the

Courts exercising Jurisdiction within his Dominions do, and that it being a Prerogative, it does not come within the Rule *Brevia Domini Regis non currunt, &c.* for that must be understood of Writs between Party and Party.[15]

Also it hath been adjudged that (*b*) this Writ lies to the (*c*) Cinque Ports, to *Berwick*, altho' objected to have been Part of *Scotland*, and to the (*d*) County Palatine.[16]

Also by the *Habeas Corpus* Act, 31 *Car*. 2. *cap.—par*. 11. it is enacted and declared, 'That an *Habeas Corpus*, according to the Intent and true Meaning of the Act, may be directed and run into any County Palatine, the Cinque Ports, or other privileged Places within the Kingdom of *England*, Dominion of *Wales*, or Town of *Berwick* upon *Tweed* and the Isles of *Jersey* or *Guernsey;* any Law, *&c*.'

3. IN WHAT CASES IT IS TO BE GRANTED, AND WHERE IT IS THE PROPER REMEDY.

A *Habeas Corpus* is a Writ of Right, which the Subject may demand and is the most usual Remedy by which a Man is restored again to his Liberty, if he hath been against Law deprived of it.[17]

By the 31 *Car*. 2. *cap*. 2. *par*. 9. it is enacted, 'That if any Subject of this Realm shall be committed to any Prison, or in Custody of any Officer or Officers whatsoever, for any criminal or supposed criminal Matter, that the said Person shall not be removed from the said Prison and Custody into the Custody of any other Officer or Officers, unless it be by *Habeas Corpus*, or some other legal Writ; or where the Prisoner is delivered to the Constable, or other inferior Officer, to carry such Prisoner to some common Gaol; or where any Person is sent by Order of any Judge of Assise, or Justice of the Peace, to any common Workhouse or House of Correction; or where the Prisoner is removed from one Prison or Place to another within the same County, in order to a Trial or Discharge by due Course of Law; or in case of sudden Fire or Infection, or other Necessity, upon Pain, that he who makes out Signs or Countersigns, or obeys or executes such Warrants, shall forfeit to the Party grieved One hundred Pounds for the first Offence, Two hundred Pounds for the second, *&c*.'

If a Party be imprisoned against Law, tho' he is intitled to a *Habeas Corpus*, yet may he have an Action of false Imprisonment, in which he shall recover Damages in Proportion to the Injury done him.[18]

But it was held in *Bushel*'s Case, who together with the other Jurors appointed to try an Indictment for a Riot between the King and *Pen* and

Mead, were fined at the *Old Baily*, because they found a Verdict *contra plenam evidentiam & directionem curiae in Materia legis*; and for Nonpayment of the Fine, divers of them being committed to Prison, who brought their *Habeas Corpus* in *C. B.* and the Imprisonment (*a*) held illegal; in several Conferences with all the Judges, that yet no Action lay against the Commissioners, because they acted as Judges and Commissioners of *Oyer* and *Terminer*, can no more be punished for an erroneous Commitment, than they can be for an erroneous Judgment; and the highest Remedy the Party in this Case can have is a Writ of *Habeas Corpus*.[19]

If a Husband confine his Wife, she may have a *Habeas Corpus*; but the Judges on the Return of it cannot remove the Wife from her Husband.[20]

A Motion was made for a *Habeas Corpus* to the Lord *Leigh*, for having in Court the Body of his Wife; and the Case was, the Parties were married in 1669, and because they were both within Age, no Settlement was made; in 1671; Lord *Leigh* persuades his Wife to levy a Fine of some Lands of 900 *l. per Ann*. whereof she had the Inheritance, to him and his Heirs; and because she prayed to advise with her Friends, he confined her until her Mother had petitioned the King and Council, and there the Matter was referred to three Lords of the Council; and they made an Award, which the Lady *Leigh* was ready to perform; but the Lord *Leigh* brought to her an Instrument to be sealed, upon which she made the same Request as before, that she might advise with her Friends, but he refused to permit it, and presently compelled his Wife to go with him to his House in the Country, where he made her his Prisoner; and tho' by the barbarous Usage of her Husband she fell Sick, yet he would not let her have Physicians or Servants to attend her, or to be visited by her Friends; *& per Cur*. a *Habeas Corpus* was granted, for this is a Writ of Right, which the Subject may demand, and the King ought to have an Account of his Subject; and tho' it was objected that here was no Affidavit but of such Complaint as the Lady *Leigh* had made in a Letter to her Mother, yet the *Habeas Corpus* shall go to put the Lady in a Condition to make Oath of this Matter herself, and to exhibit Articles against her Husband; for here is sufficient Matter to compel him to find Sureties of the Peace, and of his good Behaviour also; for this Treatment the Lady may sue out a Divorce *propter saevitiam;* and in a like Case between Sir *Philip Howard* and his Wife a *Habeas Corpus* was granted; and in this Case an Attachment may be granted against my Lord *Leigh*, if he refuses Obedience to the Writ, for being a Contempt, a Peer has no Privilege.[21]

If a Person be taken in the Manner within a Forest killing or chasing Deer, *&c*. and the Officer upon Tender of sufficient Sureties refuses to bail him, he may have a *Habeas* out of the Courts at *Westminster*, which Courts may bail him to appear at the next Eyre holden for the Forest; and this the rather, because Justice-Seats are but seldom holden, and the Party, without this Remedy, might be obliged to continue a long Time in Confinement.[22]

If a Person be excommunicated, and the *Significavit* does not express that the Cause of Excommunication is for any of the Offences within the Statute 5 *Eliz*. cap. 23 the Remedy expresly appointed upon that Statute is a *Habeas Corpus*, and upon the Return of it the Parties shall be discharged.[23]

If the Chief Justice of the King's Bench commit one to the Marshal by his Warrant, he ought not to be brought to the Bar by Rule, but by *Habeas Corpus*.[24]

A Person convicted of Horse-stealing, and in Gaol at *St. Albans*, was brought by *Habeas Corpus* and *Certiorari* to *B. R.* and the Court demanded of him what he could say why Execution should not be done upon the Indictment; and because he could not shew good Cause to stay the Execution, he was committed to the Marshal, who was commanded to do Execution, and the next Day he was hanged.[25]

If a Person be in Custody, and also indicted for some Offence in the inferior Court, there must, beside the *Habeas Corpus* to remove the Body, be a *Certiorari* to remove the Record; for as the *Certiorari* alone removes not the Body, so the *Habeas Corpus* alone removes not the Record it self, but only the Prisoner with the Cause of his Commitment; and therefore, altho' upon the *Habeas Corpus*, and the Return thereof, the Court can judge of the Sufficiency or Insufficiency of the Return and Commitment, and bail or discharge, or remand the Prisoner, as the Case appears upon the Return; yet they cannot upon the bare Return of the *Habeas Corpus* give any Judgment, or proceed upon the Record of the Indictment, Order or Judgment, without the Record it self be removed by *Certiorari;* but the same stands in the same Force it did, tho' the Return should be adjudged insufficient, and the Party discharged thereupon of his Imprisonment; and the Court below may issue new Process upon the Indictment.[26]

But it is otherwise in an *Habeas Corpus* in Civil Causes, which suspends the Power of the inferior Court; so that if they proceed after, their Proceedings are *coram non judice*.[27]

4. HOW FAR THE COURTS HAVE A DISCRETIONARY POWER IN GRANTING OR DENYING IT: AND THEREIN OF THE HABEAS CORPUS ACT.

Notwithstanding the Writ of *Habeas Corpus* be a Writ of Right, and what the Subject is intitled to, yet the Provision of the Law herein being in a great Measure illuded by the Judges being only enabled to award it in Termtime, as also by an imagined Notion in the Judges, that they had a Discretionary Power of granting or refusing it; but especially by the Art and Contrivance of Officers, to whom it was directed, who used great Delays in making any Return to it.[28]

By the 31 *Car*. 2. *cap*. 2. commonly called the *Habeas Corpus* Act, reciting, ‘That great Delays had been used by Sheriffs, Gaolers, and other Officers, to whose Custody the King’s Subjects had been committed for Criminal or supposed Criminal Matters, in making Return of Writs of *Habeas Corpus*, by standing out an *Alias* and *Pluries*, and sometimes more, and by other Shifts, to avoid their yielding Obedience to such Writs, contrary to their Duty and the known Laws of the Land, whereby many Subjects had been detained in Prison in such Cases, where by Law they were bailable.’

Thereupon it is enacted, ‘That whensoever any Person shall bring any *Habeas Corpus*, directed unto any Person whatsoever, for any Person in his Custody, and the said Writ shall be served on the said Officer, or left at the Gaol or Prison with any of the Under-Officers, UnderKeepers, or Deputy of the said Officers or Keepers, that the said Officer or Officers, his or their Under-Officers, UnderKeepers, or Deputies, shall within three Days after such Service thereof, (unless the Commitment were for Treason or Felony, plainly and specially expressed in the Warrant of Commitment) upon Payment or Tender of the Charges of bringing the said Prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed on the said Writ, not exceeding 12 *d. per* Mile, and on Security given by his own Bond to pay the Charges of carrying back the Prisoner, if he should be remanded, and that he will not make any Escape by the Way, make Return of such Writ, and bring or cause to be brought the Body of the Party so committed or restrained unto or before the Lord Chancellor, or the Lord Keeper, or the Judges or Barons of the Court from which the said Writ shall issue, or such other Persons before whom the said Writ is made returnable, according to the Command thereof; and shall then likewise certify the true Causes of his Detainer or Imprisonment, unless the Commitment be in a Place beyond twenty Miles Distance, *&c*. and if beyond the Distance of twenty, and not above one Hundred Miles, then within the Space of ten Days; and if beyond the Distance of one Hundred Miles, then within the

Space of twenty Days.’

And it is further enacted, *par*. 3. ‘That all such Writs shall be marked in this Manner, *Per stat’um tricesimo primo Caroli Secundi Regis*, and shall be signed by the Person that awards the same; and if any Person shall be or stand committed or detained as aforesaid for any Crime, unless for Treason or Felony, plainly expressed in the Warrant of Commitment, in the Vacation-time, it shall be lawful for such Person so committed or detained, (other than Persons convict or in Execution by legal Process) or any one on his Behalf, to complain to the Lord Chancellor, or Lord Keeper, or any Justice of either Bench, or Baron of the Exchequer, of the Degree of the Coif; and the said Lord Chancellor, *&c*. Justice or Baron, on View of the Copy of the Warrant of the Commitment, or otherwise on Oath that it was denied, are authorized and required, on Request in Writing, by such Person, or any in his Behalf, attested and subscribed by (*a*) two Witnesses who were present at the Delivery of the same, to grant an *Habeas Corpus* under the Seal of the Court, whereof he shall be one of the Judges, to be directed to the Officer in whose Custody the Party shall be, returnable *immediate*’ before the said Lord Chancellor, *&c*. Justice or Baron; and on Service thereof as aforesaid, the Officer, *&c*. in whose Custody the Party is, shall, within the Times respectively before limited, bring him before the said Lord Chancellor, Justice, or Baron, before whom the said Writ is returnable; and in cafe of his Absence, before any other of them, with the Return of such Writ, and the true Causes of the Commitment and Detainer; and thereupon, within two Days after the Party shall be brought before them, the said Lord Chancellor, Justice, or Baron, before whom the Prisoner shall be brought as aforesaid, shall discharge the said Prisoner from his Imprisonment, taking his Recognizance, with one or more Sureties, in any Sum, according to their Discretions, having Regard to the Quality of the Prisoner, and Nature of the Offence, for his Appearance in the King’s Bench the Term following, or in such other Court where the Offence is properly cognizable, as the Case shall require; and then shall certify the said Writ, with the Return thereof, and the Recognizance into such Court, unless it be made appear to the said Lord Chancellor, *&c*. that the Party so committed is detained upon a legal Process, Order or Warrant, out of some Court that hath Jurisdiction of Criminal Matters, or by some Warrant signed and sealed with the Hand and Seal of any of the said Justices or Barons, or some Justice or Justices of the Peace, for such Matters or Offences, for the which by Law the Prisoner is not bailable.’[29]

But it is provided, *par*. 4. ‘That if any Person shall have wilfully neglected, by the Space of two whole Terms after his Imprisonment, to pray a *Habeas Corpus* for his Enlargement, he shall not have a *Habeas Corpus* to be granted in Vacation-time in Pursuance of this Act.’

And it is further enacted by the said Statute, *par*. 6. ‘That no Person, who shall be set at large upon any *Habeas Corpus*, shall be again imprisoned for the same Offence by any Person whatsoever, other than by the legal Order and Process of such Court, wherein he shall be bound by Recognizance to appear, or other Court having Jurisdiction of the Cause, on Pain of 500 *l*.’

And it is further enacted, *par*. 7. ‘That if any Person, who shall be committed for Treason or Felony, plainly and specially expressed in the Warrant of Commitment, upon his Prayer or Petition in open Court the (a) first Week of the (b) Term, or the first Days of the Sessions of *Oyer* and *Terminer*, or General Gaol-Delivery, to be brought to his Trial, shall not be indicted some Time in the next Term, Sessions of *Oyer* and *Terminer*, or General Gaol-Delivery, after such Commitment, the Justices of the said Court shall, upon Motion in open Court, the last Day of the Term, or Sessions, set at Liberty the Prisoner upon Bail, unless it appear upon Oath, that the Witnesses for the King could not be produced the same Term; and if such Prisoner upon his Prayer, *&c*. shall not be indicted and tried the second Term of Sessions, he shall be discharged from his Imprisonment.’[30]

Provided, *par*. 8. ‘That nothing in this Act shall extend to discharge out of Prison any Person charged in Debt, or other Action, or with Process in any Civil Cause, but that after he shall be discharged of his Imprisonment for such his Criminal Offence, he shall be kept in Custody according to Law for such other Suit.’

And it is further enacted, *par*. 10. ‘ That it shall be lawful for any Prisoner, as aforesaid, to move and obtain his *Habeas Corpus*, as wel out of the Chancery or Exchequer, as the King’s Bench or Common Pleas; and if the said Lord Chancellor, or Lord Keeper, or any Judge or Judges, Baron or Barons, for the Time being, of the Degree of the Coif, of any of the Courts aforesaid, in the (*c*) Vacation-time, upon View of the Copy of a Warrant of Commitment or Detainer, or Oath made that such Copy was denied, shall deny any Writ of *Habeas Corpus* by this Act required to be granted, being moved for as aforesaid, they shall severally forfeit to the Party grieved the Sum of 500 *l*.’

It is provided, *par*. 18. ‘That after the Assises proclaimed for that County where the Prisoner is detained, no Person shall be removed from the

common Gaol upon any *Habeas Corpus* granted in Pursuance of this Act, but upon such *Habeas Corpus* shall be brought before the Judge of Assise in open Court, who thereupon shall do what to Justice shall appertain.'

But it is provided, *par*. 19. 'That after the Assises are ended, any Person detained may have his *Habeas Corpus*, according to the Direction of this Act.'

In the Construction of this Statute it was held by two Judges, in the Absence of one, and contrary to the Opinion of the other, that Persons committed by Rule of Court are not intitled to the Benefit of this Act; and that none are intitled to make their Prayer but such as are committed by a Warrant of a Justice of Peace, or Secretary of State, and not those committed by Rule of Court, for that is not within the Meaning of the Act, which speaks of a Commitment by Warrant.[31]

5. OF THE MANNER OF SUING IT OUT, AND FORM OF THE WRIT.

By the (*a*) 1 & 2 *Ph. & M. cap*. 13. 'No Writ of *Habeas Corpus* or *Certiorari* shall be granted to remove any Prisoner out of any Gaol, or to remove any Recognizance, except the same Writs be (*b*) signed with the proper Hands of the Chief Justice, or in his Absence, of one of the Justices of the Court, out of which the same Writ shall be awarded or made, upon Pain that he that writeth any such Writs, not being signed, as is aforesaid, to forfeit for every such Writ 5 *l*.'

A *Habeas Corpus* was prayed to the Gaoler of the County Gaol of *Worcester*, to remove one *Fox* in *B. R.* to assign Errors in Person, upon the Record of his Conviction of a *Praemunire* for Recusancy; but this was not granted till the Writ of Error was brought into Court under Seal, and the Record certified.[32]

Every *Habeas Corpus ad Subjiciendum* must in Termtime be awarded on Motion and Leave of the Court, but a *Habeas Corpus ad faciendum & recipiendum* is usually granted without Motion, as it relates to a Civil Affair only.[33]

So where Debt was brought against Husband and Wife on an Obligation sealed by them both, and both being taken by *Capias*, it was moved for an *Habeas Corpus* to bring them into Court, to the Intent that the Husband only might be committed in Custody, and the Wife discharged; and it was held by the Court, that this *Habeas Corpus* for removing the Bodies might have been for them without Motion, but where the Party is committed for a Crime, there it ought to be on Motion.[34]

6. TO WHOM IT IS TO BE DIRECTED.

Wherever a Person is imprisoned by any Person whatsoever, whether he be one concerned in the Administration of Justice, as a Sheriff, Gaoler, *&c*. or a private Person, such as a Doctor of Physick, who confines a Person under Pretence of curing him of Madness, *&c*. the *Habeas Corpus* must be directed to him.[35]

A *Habeas Corpus* was directed to the Chancellor of *Durham*, by which he was directed to make a Precept to the Sheriff to have the Body of *J. S*. with the Cause of his Commitment, *coram Domino Rege apud Westm'*; the Chancellor returned, that he made a Precept to the Sheriff to have his Body before him, with the Cause of, *&c*. who accordingly returned the Cause and the Body before him, and sets out the Cause, *& haec est Causa detentionis; & per Hale* C. J. A *Habeas Corpus ad faciendum & recipiendum* directed in this Manner is good; *secus* of a *Habeas Corpus ad Subjiciendum*; for the King may send his Writ to whom he pleases, and he must have an Answer of his Prisoner wherever he be; there is a great deal of Difference between a *Habeas Corpus ad Subjiciendum* and other *Habeas Corpus*; for this is the Subject's Writ of Right, in which Case the County Palatine hath no Privilege; in 31 *E*. 1. a *Habeas Corpus ad Subjiciendum* was directed to the Bishop of *Durham*, who returned, that he was a Count Palatine, and therefore was not bound to Answer the Writ, for which he was fined 4000 *l*. *Hill*. 17 *Car*. 1. a *Habeas Corpus* was directed to the Bishop of *Durham* to return the Body of one *Rickoby*; and resolved, that the Writ did well run thither: In this Case the Writ is directed to the Chancellor, to command the Sheriff to have his Body here; but he commands him to have the Body before himself, which is ill; again, the Chancellor doth not return the Body to us, for here is no *Cujus Corpus Parat' habeo*; it is not enough for him to say, that the Sheriff returned the Body to him, but he ought to return it to us here; we have nothing before us, therefore he must be remanded, for he is brought up without a Warrant.[36]

A *Habeas Corpus* directed in the Disjunctive to the Sheriff or Gaoler is wrong; but where a Man is taken on a Warrant of the Sheriff, in Pursuance of a Writ to the Sheriff, the *Habeas Corpus* ought to be directed to the Sheriff, for the Party is in his Custody, and the Writ it self must be returned; otherwise it is where one is committed to the Gaoler immediately, as in Cases Criminal.[37]

7. BY WHOM IT IS TO BE RETURNED.

This Writ must be returned by the very same Person to whom it is directed.

A *Habeas Corpus* was awarded to the Sheriff of—— who before the Return leaves the Office, and a new Sheriff is made, who returns *Languidus*; this Return is not good, but it ought to be returned by them two, the first that he had the Body, and had delivered it to the new Sheriff, and the new Sheriff may then return *Languidus*.[38]

8. OF THE MANNER OF COMPELLING A RETURN, AND THE OFFENCE OF A FALSE RETURN.

The Method to compel a Return to a *Habeas Corpus* is by taking out an *Alias* and *Pluries*, which if disobeyed, an Attachment issues of Course; also the Court may make a Rule on the Officer to return his Writ, and if disobeyed, the Court may proceed against such Disobedience in the same Manner as they usually do against the Disobedience of any other Rule.[39]

And by the 31 *Car*. 2. *cap*. 2. *par*. 2. it is enacted, 'That if any Officer, *&c*. shall neglect or refuse to make Returns, as by the Act is directed, or to bring the Body of the Prisoner, according to the Command of the Writ, or shall not within six Hours after Demand deliver a true Copy of the Commitment, *&c*. he shall forfeit for the first Offence 100 *l*. for the second Offence 200 *l*. and be made incapable to hold his Office.'

A *Habeas Corpus* went to the *Stannary* Court, to which an insufficient Return was made, and therefore disallowed; *& per Cur*. the Warden of the *Stannaries* must be amerced, and you may go to the Coroners and get it affeered, and escheat it, and an *Alias Habeas Corpus* must go for the Insufficiency of the Return of the first, and upon that the Body and Cause must be removed up; if another Excuse be returned, we will grant an Attachment.[40]

And as a Gaoler, *&c*. is obliged to bring up the Prisoner at the Day prefixed by the Writ, it is no Excuse for not obeying of a Writ of *Habeas Corpus ad Subjicieudum*, that the Prisoner did not tender the Fees due to the Gaoler; nor yet is the Want of such Tender an Excuse for not obeying a Writ of *Habeas Corpus ad faciendum & recipiendum*; but if the Gaoler bring up the Prisoner by Virtue of such *Habeas Corpus*, the Court will not turn him over till the Gaoler be paid all his Fees.[41]

For a false Return there is regularly no Remedy against the Officer, but an (a) Action on the Case at the Suit of the Party grieved, and an Information or Indictment at the Suit of the King.[42]

But it has been held, that if a Gaoler return one *Languidus* when the

Party himself brings his *Habeas Corpus*, and is in good Health, an Attachment shall issue against him; *secus* if the *Habeas Corpus* was brought by another.

9. WHAT MATTERS MUST BE RETURNED TOGETHER WITH THE BODY OF THE PARTY.

As upon the Return of the Writ the Court is to judge, whether the Cause of the Commitment and Detainer be according to Law or against it; so the Officer or Party, in whose Custody the Prisoner is, must, according to the Command of the Writ, certify on the Return thereof the Day, Cause of Caption and Detainer.[43]

A *Habeas Corpus* was directed to remove one *J. S.* to which no Return was made; then an *Alias* was granted, and it was returned *quod traditur in ballium ante adventum istius Brevis*; and the Truth of the Case was, that between the first and second Writ the Party was bailed; *& per Cur.* after an *Habeas Corpus* delivered, the Party cannot be bailed; and if it happens otherwise, yet the Cause of the Commitment ought to be returned, tho' the Body cannot be brought into Court; and in this Case the Officer having on the first Writ of *Habeas Corpus* taken 5 *l.* to have the Body in Court, and yet making no Return, the Court granted an Attachment against him.[44]

Where a Commitment is in Court to a proper Officer there present, there is no Warrant of Commitment; and therefore to a *Habeas Corpus* he cannot return a Warrant *in haec verba*, but must return the Truth of the whole Matter, under Peril of an Action; but if he be committed to one that is not an Officer, there must be a Warrant in Writing, and where there is one it must be returned; for otherwise it would be in the Power of the Gaoler to alter the Case of the Prisoner, and make it either better or worse than it is upon the Warrant; and if he may take upon him to return what he will, he makes himself Judge; whereas the Court ought to judge, and that upon the Warrant itself.[45]

If a Person in Custody on an *Excommunicato capiendo* brings a *Habeas Corpus*, the Writ of *Excommunicato capiendo* itself must be returned, as well as the Sheriff's Warrant for taking him, because the Warrant may be wrong when the Writ is right; and tho' the Warrant be wrong, yet if the Writ is right, the Party is rightfully in Custody of the Sheriff.[46]

Upon a *Habeas Corpus* directed to the Constable of *Windsor-Castle*, to remove the Body of one Mr. *Taylor* a Barrister, at the Day of the Return of the Writ, a Soldier brought in the Prisoner into Court, and the Writ, and the Warrant by which he was committed; but the Court held it no Manner of

Return, for it ought to be entred in *Latin*, and engrossed in due Form.[47]

10. WHERE THE RETURN SHALL BE SAID TO BE CERTAIN AND SUFFICIENT TO WARRANT THE COMMITMENT.

It is said in general, that upon the Return of the *Habeas Corpus* the Cause of the Imprisonment ought to appear as specifically and certainly to the Judges, before whom it is returned, as it did to the Court or Person authorized to commit.[48]

For if the Commitment be against Law, as being made by one who had no Jurisdiction of the Cause, or for a Matter for which by Law no Man ought to be punished, the Court are to discharge him, and therefore the Certainty of the Commitment ought to appear; and the Commitment is liable to the same Objection where the Cause is so loosely set forth, that the Court cannot adjudge whether it were a reasonable Ground of Imprisonment or not.[49]

Rudyard an Attorney of *C. B.* being committed to *Newgate* by the Lord Mayor and Sir *John Robinson*, for refusing to give Security for his good Behaviour, was brought by *Habeas Corpus* to the *C. B.* and it was returned as the Cause of his Commitment, that whereas he had been complained of to my Lord Mayor and Sir *John Robinson* for several Misdemeanors, particularly for inciting his Majesty's Subjects to the Disobedience of his Majesty's Laws, more particularly of an Act of Parliament made in the 22d Year of his Reign, against seditious Conventicles and whereas he had been examined before them for abetting such as abetted seditious Conventicles, contrary to the Statute 22 *Car*. 2. and upon his Examination they found Cause to suspect him, therefore they requested Sureties of him for his good Behaviour, and for Refusal committed him. *Wild*, Justice, was of Opinion, that by abetting such as frequented seditious Conventicles, must be intended abetting them in that Particular, and signifies as much as encouraging them to frequent such Conventicles, and finding Cause to suspect him, *&c*. (which cannot now be questioned, for the Return is admitted) they may well send him to Prison, and therefore he ought to be remanded. But *Vaughan* C. J., *Tyrrel*, and *Archer*, were of a contrary Opinion: 1. Because it does not appear but that he might abet the Frequenters of Conventicles in a Way which the Law allows, as by solliciting an Appeal for them, or the like 2. To say that he was complained of, or that he was examined, is no Proof that he was guilty; and then to say, that they had Cause to suspect him, is too cautious; for who can tell what they may count a Cause of Suspicion, and how can that ever be tried? At

this Rate they would have Arbitrary Power, upon their own Allegation, to commit whom they pleased, whereas they cannot require Sureties for any Man's Behaviour, and consequently not commit for Refusal, unless the Justices have any Thing against him of their own Knowledge, or by Proofs of Witnesses that tend to a Breach of the Peace; upon this Return *Archer* declared his Opinion to be, that he should not be remanded, but give his own Recognizance to appear in Court the next Term, to answer any Thing that should be alledged against him; but *Vaughan* and *Tyrrel* were for his absolute Discharge; for seeing by the Return it did not appear there was any Cause for his Commitment, they thought they had no Reason to require a Recognizance of him. Thereupon *Wild* moved, that he could not be discharged, there being but two for it. But *Archer* replied, that it had been several times ruled, that where there were three Opinions, that was taken to be *per Cur*. which had two of the Judges for it: And accordingly *Rudyard* was discharged. *Vaughan* and *Tyrrel* made another Objection to the Return, *viz*. that they should have expressed the Sum in which they required him to give Security, (which they had not done;) for they said that those Persons, that might be willing to be bound for him in 40 *l*. might not be willing to be bound for him in 100 *l. &c*. and therefore till he knew the Sum he could not know whom to provide. But as to this it was said, that *Rudyard* had refused absolutely to give any Security, and therefore it was to no purpose to tell him of the Sum; if he had consented to give Security, then the Justices ought to have told him the Sum.[50]

11. WHETHER THE PARTY CAN SUGGEST ANY THING CONTRARY TO THE RETURN.

It seems to be agreed, that no one can in any Case controvert the Truth of the Return to a *Habeas Corpus*, or plead or suggest any Matter repugnant to it: Yet it hath been holden, that a Man may confess and avoid such a Return by admitting the Truth of the Matters contained in it, and suggesting others not repugnant, which take off the Effect of them.[51]

Upon a *Habeas Corpus* it was returned, that *Swallow*, a Citizen of *London*, was fined for Alderman, and was committed for his Fine by the Judgment of the Court in *London. Swallow* alledged, that he was an Officer of the Mint, and by an antient Charter of Privilege granted to the Minters or Moneyers he ought to be exempted. It was at first doubted whether he might not plead this to the Return, it being a Matter consistent with it. Upon the Statute *W*. 2. it is held the Parties may come in and plead, and so upon 5 *Eliz*. but here there is a Difference; for he might have pleaded this in the

Court below, but now that is past, and here is a Judgment and Execution. Another Day *Swallow* brought into Court a Writ of Privilege upon that Charter, and the Recorder prayed that it might not be allowed against the antient Customs of the City; for if such a Way might exempt Men, they should have little Benefit by Fines in such Cases: But *per Cur*. the Privilege ought to be allowed, for it is very antient, and it appears he has an Office of necessary Attendance elsewhere, which makes the Privilege reasonable. The King may by his Charter exempt from Juries, if there be enough besides, much more here; and it there be not sufficient besides, upon showing of that, the Privilege ought to be suspended; and *Swallow* may be discharged by this Court now as well as he could at first, or as if he had taken upon him the Aldermanship. This Court is supreme and mandatory in such Cases. And he was accordingly discharged.[52]

Also the Court will sometimes examine by Affidavit the Circumstances of a Fact, on which a Prisoner brought before them by an *Habeas Corpus* hath been indicted, in order to inform themselves, on Examination of the whole Matter, whether it be reasonable to bail him or not: And agreeably hereto (a), where one *Jackson*, who had been indicted for Piracy before the Sessions of Admiralty on a malicious Prosecution, brought his *Habeas Corpus* in the said Court, in order to be discharged or bailed, the Court examined the whole Circumstances of the Fact by Affidavits; upon which it appeared that the Prosecutor himself, if any one, was guilty, and carried on the present Prosecution to skreen himself: And thereupon the Court, in Consideration of the Unreasonableness of the Prosecution, and the Uncertainty of the Time when another Sessions of Admiralty might be holden, admitted the said *Jackson* to Bail, and committed the Prosecutor till he should find Bail to answer the Facts contained in the Affidavits.[53]

12. WHETHER ANY DEFECT IN THE RETURN MAY BE AMENDED

It seems that, before the Return is filed, any Defect in Form, or the Want of an Averment of a Matter of Fact may be amended; but this must be at the Peril of the Officer, in the same manner as if the Return were originally what it is after the Amendment.[54]

But after the Return is filed it becomes a Record of the Court, and cannot be amended.[55]

So after a Rule to have the Return filed; as where a *Habeas Corpus, Alias & Pluries* was directed to Sir *Robert Viner*, Mayor of *London*, to have the Body of *Bridget*, Daughter and Heir of Sir *Thomas Hyde*, deceased; and

upon the *Pluries* he returned *quod tempore receptionis hujus Brevis nec unquam postea non fuit infra custodiam meam*; and the Counsel of the Lord Mayor expounded this Return that she was within the House of the Lord Mayor, but not detained in Custody *prout per Breve supponitur; & per Cur*. this is an insufficient Return; for he ought to say not only *tempore receptionis hujus Brevis, sed alieujus*, upon Return of a *Pluries*. Then a Question was if the Return could be amended; for tho' a Rule was made that the Return should be filed, yet this was not actually done; but *per Cur*. this is filed by the Rule of the Court, and after cannot be amended; and this Return the Court held to be equivocal, for it is well enough known that the is not detained *in Ferris*; but tho' she hath the Liberty of the House, if she cannot go out of the House, or not without a Keeper, she is within his Custody; and the Court shall adjudge what sort of Custody is intended by the Writ.

13. WHAT IS TO BE DONE WITH THE PRISONER AT THE RETURN; AND THEREIN OF BAILING, DISCHARGING, OR REMANDING HIM.

Upon the Return of the *Habeas Corpus* the Prisoner is regularly to be discharged, bailed, or remanded; but if it be doubtful which the Court ought to do, it is said that the Prisoner may be bailed to appear *de Die in Diem* till the Matter is determined.[56]

By the Petition of Right, or (a) 17 *Car*. 1. *cap*. 10. the Court must within three Days after the (b) Return of the *Habeas Corpus* either discharge, bail, or remand the Prisoner. But it seems that a Commitment by the Court of King's Bench to the Marshalsea is a Remanding, being an Imprisonment within the Statute.[57]

Also it hath been ruled, that the Court of King's Bench may, after the Return of the *Habeas Corpus* is filed, remand the Prisoner to the (c) same Gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely.[58]

And tho' in doubtful Cases the Court is to bail or discharge the Party on the Return of the *Habeas Corpus*; yet if a Person be convicted, and the Conviction on the Return of the *Habeas Corpus* appears only defective in Point of Form, it is at the Election of the Court either to discharge the Party, or oblige him to bring his Writ of Error.[59]

If on the Return of the *Habeas Corpus* it appears that the Contest relates to the Right of Guardianship, tho' the Court will not determine that Point, yet will it set the Infant at Liberty, so as to let him chuse where he will go

till that Matter is determined; or if there be any Danger of Abuse, will order him into such Hands as will take effectual Care of him.[60]

(C) OF THE HABEAS CORPUS AD FACIENDUM & RECIPIENDUM.

THE *Habeas Corpus ad faciendum & recipiendum* is used only in Civil Causes, and lies for removing Suits out of an inferior to some superior Court, at the Application of the Defendant, who may imagine himself injured by the Proceedings of such inferior Court.[61]

This Writ suspends the Power of the Court below; so that if they proceed after, the Proceedings are (a) void, and *coram non Judice*.[62]

By this Writ the Proceedings in the inferior Court are at an End; for the Person of the Defendant being removed to the superior Court, they have lost their Jurisdiction over him, and all the Proceedings in the superior Court are *de novo*, and (b) Bail *de novo* must be put in the superior Court.[63]

And altho' this Writ be a Writ of Right, yet where it is to abate a rightful Suit the Court may refuse it; as where an Action of Debt was brought against a Feme Sole in the Palace Court, who, after Appearance and Plea pleaded, married, and then removed the Cause by *Habeas Corpus* to *B. R.* where she pleaded her Coverture in Abatement; and the Court held, that if this Matter had been moved on the Return of the *Habeas Corpus*, they would have granted a *Procedendo*; but that now the Plea in Abatement must be held good; for the Proceedings are *de novo*, and the Court takes not Notice of the Proceedings below, or of what preceded the *Habeas Corpus*.[64]

After an Interlocutory, and before final Judgment in an inferior Court, a *Habeas Corpus cum Causa* was brought; before the Return of the Writ the Defendant died, and a *Procedendo* was awarded; because by the 8 & 9 *W.* 3. *cap.* 11. the Plaintiff may have a *Scire facias* against the Executors, and proceed to Judgment, which he cannot have in another Court; and by this means he would be deprived of the Effect of his Judgment, which would be unreasonable.[65]

If an Action be brought in *London* for calling a Woman Whore, this cannot be removed by *Habeas Corpus*, because the Words not actionable elsewhere; and if allowed to be removed, the Custom would be destroyed.[66]

Bacon Abridgment, vol. III, pp. 1–15.

17.3.1.5Viner, 1745

Habeas Corpus.

(A) HABEAS CORPUS CUM CAUSA *AD SUBJICIENDUM. WHOM* IT MAY BE *DIRECTED, AND BY WHOM*.

1. IT seems that the king has supreme Power over all Courts, within the Dominions of the king, delegated by the king, and therefore if any man be Imprisoned by any, a Corpus cum Causa may be granted to them who Imprisoned him; for the King ought to have an Account given to him of the Liberty of his Subjects, and of the Restraint of it. P. 3 Ja. B. R. Resolved per Curiam between Wetherley and Wetherley. … . Tr. 5 Ja. B. R. Resolved per Curiam, in Case of Omer v. Mansel.[1]

2. If a Man be imprisoned by the Counsel of the Marches of Wales, B. R. may award a Corpus cum Causa to remove him, and this ought to be obeyed. P. 3 Jac. B. R. between Wetherley and Wetherley, adjudged upon great Controversy between the said Courts, and upon award of the king himself accordingly.

3. It shall always be directed *to him that has the Custody of the Body* Godb. 44. Pl. 52. Anon.——It lies to any Person, as well as to the Gaoler; per Holt Ch. J. 5 Mod. 21. in Case of the King v. Bethell.

4. 31 *Car*. 2. *cap*. 2. *S*. 11. *Writs of Habeas Corpus shall run into any Liberties, and into the Counties Palatine, the Cinque Ports, Wales, Berwick, Guernsey and Jersey*.[2]

5. Habeas Corpus was granted to the *County Palatine* of Chester, but afterwards superseded on Motion, two Precedents being cited. 1 Salk. 354. Mich. 4 Annae. Anon.

(B) HABEAS CORPUS CUM CAUSA, *AD FACIENDUM & RECIPIENDUM. [IN WHAT CASES] AND TO WHAT COURTS*[†]

1. If an Action he brought in London for these words, Thou art a Whore, and my Husband's Whore, this ought not be removed by a habeas Corpus. For at Common Law, no Action lies for those words, But in London Action lies, (as is pretended) by the Custom of the City, for the same words, because they use by the Custom of the City to Cart Whores, and for such words, a Suit may be in the ecclesiastical Court, and no Prohibition lies, and therefore this may be a good Custom in London, and Convenient for them, † that it is the Law of the Place. But if it be dubious whether it be a good Custom, it is better not to remove it; for if it be removed, it is final, and no writ of Error nor Appeal lies upon it, but the Party is without further Remedy. But if they proceed upon this in London, and a Judgment is given

upon it, a Writ of Error lies in the Hustings by Commission, and so the Party may have a legal Remedy. Trin. 1650. between Penton and Harrison, per Curiam adjudged, and a Procedendo granted accordingly. M. 13 Car. B. R. between[*] Bavoize and his wife Plaintiffs, and Cooper Defendant. A Procedendo granted per Curiam, except Barkley, where the Words were, Thou art a Whore, and wilt play the Whore for two Pence. And another Judgment was vouched Trin. 8 Car. B. R. between Bond and Watson. Contra 4 Rep. Oxford.[3]

2. 21 *Jac*. 1. *cap*. 23. *S*. 4. *When the Thing in demand exceeds not 5 l. the Suit shall not be removed by any Writ, save only by Writs of Error or Attaint*.

3. Habeas Corpus Ad faciendum & recipiendum lies to the *Cinque Ports*. Sid. 431. pl. 21. Anon.

(B. 2) THE SEVERAL SORTS.

1. AN Habeas Corpus *ad respondendum is when* any *one is imprisoned* at the Suit of another, upon a legal Process *in* the Fleet or *any* other *Prison except the King's Bench Prison*, and a third Person would sue that Prisoner in the Court of B. R. and can't, because he is not in Custody of the Marshal of this Court. There he may have an Habeas Corpus to remove the Prisoner out of the Prison, where he is, into this Court, returnable at a Day certain, to answer unto this Action here; and for that Cause *it is called* Habeas Corpus ad respondendum, *because he is to answer the Party's Action*; Also, where a Person is in Custody in an inferiour Jurisdiction, the Plaintiff may bring his Habeas Corpus ad respondendum returnable in this Court; and then the Defendant cannot Nonsuit the Plaintiff, nor be bailed, but only by the Court of B. R. or be committed to the Custody of the Marshal. 2 L. P. R. 4.

2. There are *three Sorts* of Habeas Corpus's *in C. B.* 1. A Habeas Corpus *ad Respondendum*, and that is, when a Man hath a Cause of Suit against one that is in Prison, he may bring him up hither by Habeas Corpus, and charge him with a Declaration at his own Suit. 2. There is a Habeas Corpus *Ad faciendum & recipiendum*, and this Defendants may have that are sued in Courts below, to remove their Causes before us. Both these Habeas Corpus's are with Relation to the Suits properly be longing to the Court of C. B, So if an inferiour Court will proceed against the Law, in a Thing of which C. B. has Cognizance, and commit a Man C. B. may discharge him upon Habeas Corpus. 3. A third Sort of Habeas Corpus is *for privileg'd Persons*. But a Habeas Corpus *Ad subjiciendum* is not warranted by any

Precedents that I have seen; per North. Hill. 28 & 29 Car. 2. in C. B. 1 Mod. 235. pl. 23. Anon.

3. 2. L. P. R. 2. takes Notice of a Habeas Corpus *Ad satisfaciendum*.[4]

(B. 3) GOOD OR NOT. AND QUASH'D FOR WHAT.

1. A Habeas Corpus, being *directed to the Sheriff or Goaler* in the *Disjunctive*, was held to be wrong, and that all the Precedents were otherwise, and therefore the Writ was quash'd. 1 Salk. 350. The King v. Fowler.

(C) * *WHAT* IT IS, AND *HOW GRANTED*, AND † *BY WHOM*.

1. 1 & 2 *P. & M. cap*. 13. *S*. 7. *Habeas Corpus must be* signed by a Judge.

2. This is a *Prerogative Writ* which concerns the King's Justice to be administer'd to his Subjects; For he ought to have Account why any of his Subjects are imprisoned, and it is agreeable to all Persons and Places, per Montague Ch. J. Cro. J. 543. in Bourn's Case.

3. All Habeas Corpus's *in C. B.* are *Ad faciendum & recipiendum*, and they *issue of Course and without Motion. But otherwise in B. R.* for they are Ad subjiciendum, which are in criminal Causes, and not to be granted without Motion; Per the Ch. J. Pasch. 30 Car. 2. C. B. 2 Mod. 306. Penrice and Wynn's Case.

4. Where the Party is committed for a *Crime*, there must be a *Motion* for the Habeas Corpus; but for the bringing in the Body of a *Feme Covert arrested*, and committed with her Baron in order to discharge the Feme, it may be had without Motion. Lev. 1. Mich. 12 Car. 2. B. R. Slater v. Slater & Ux.

5. Habeas Corpus *is* a Writ which lies to bring the Body of the Person into Court; who is committed to any Goal, either in civil or criminal Causes. 2 L. P. R. 1.[5]

6. A Habeas may be granted by the Court of B. R. or *by a single Judge at his Chamber*, to any private Person, who keeps another in his House, or elsewhere, in Custody against his Will, by Virtue of the Habeas Corpus Act. 2 L. P. R. 2.

7. By Newdigate Justice, Trin. 1659. If a Habeas Corpus be granted, to give Liberty to a Prisoner that lies in Prison upon an Execution *longer than for one Day*; this is not according to Law. 2 L. P. R. 3.

8. The Court *useth not to put the Reason* into a Habeas Corpus, why they

send for the Prisoner; for it may be for Treason or great Conspiracy. By Catline J. 2 L. P. R. 3.

(C. 2) BY WHAT *COURT* GRANTED.

1. IF a Man be *impleaded in C. B. and* be *imprison'd in the Marshalsea, upon Suit in B. R.—C. B. shall send for him to the Marshal,* and he shall bring him, *and when he has made Answer be shall be remanded*; and this *where he is impleaded by Writ*. Br. Imprisonment, pl. 28. cites 38 H. 6 30. per Prisot.[6]

2. A Man may have an Habeas Corpus out of *B. R.* or *Chancery, tho' there be no Privilege*, &c. or in the Court of *C. B.* or the *Exchequer for* any *Officer or privileged Person there*. 2 Inst. 55.

3. Habeas Corpus is *not an original Writ*, and if it be in the Nature of a Judicial Writ, there must be a Cause for it. *C. B. may grant* an Habeas Corpus, *but it is more natural for B. R. to do it*, not in Point of Right, but Consequence; For if we send one, and it be a criminal Cause we can proceed no farther, but remand it. But B. R. may try it, if it be return'd for Felony, &c. per Vaughan Ch. J. to which Wild J. said, that in Q. Elizabeth's Time, one Court granted it as well as the other, and thought that in the principal Case they could not deny it, Salvo Juramento; But Vaughan answered, that they would find none in C. B. more ancient than Q. Elizabeth's Time. The other three Justices however granted the Habeas Corpus, which was for one imprisoned for Contumacy, for not paying Tithes upon a Certificate by the Bishop, according to 27 H. 8. 20. Cart. 221. Pasch. 23. Car. 2. Anon.

4. The Court of C. B. said, that they had often directed that no Habeas Corpus should be moved for in that Court, except it concerned a *Civil Cause*. Because, when the Party is brought in, and the Cause shewn, *C. B.* cannot proceed upon it, and therefore the proper Place for them is B. R. but they permitted it in the principal Case, (tho' it was a *Commitment for abetting, &c. his Majesty's Subjects to the Disobedience of his Laws, and abetting &c. such as meet in seditious &c. Conventicles, contrary to the Form of the Statute &c.)* because the Party was an Attorney of that Court. 2 Vent. 22. 24. Trin. 22 Car. 2. C. B. Rudyard's Case.

(D) IN WHAT *CASES*.

1. Habeas Corpus lies *of Plea*, which is *in Court of Record*. Br. Privilege,

pl. 5. cites 9 H. 6. 58.

2. *A Sheriff was committed* to the Fleet by the Barons of the Exchequer *for an Amercement*, put upon him of 40 *l. for a false Return*, and the *King pardoned him*, and he had special Writ out of Chancery into B. R. in Nature of Aud. Quer. and therefore the Justices of B. R. sent for him by Writ of Habeas Corpus. Quod Nota. Br. Privilege, pl. 27. cites 36 H. 6. 21.

3. One was *arrested by Warrant* of the Peace *by a Justice of Peace of Middlesex, and sent to Newgate*, (which is the Prison for London, and also for Middlesex,) and *Plaint was affirmed against him in London for Debt*, to which he answered, and after brought Corpus cum Causa, alleging that the Suit was by Covin; And by the Chancellor, Needham, Choke and all the Court, the Prisoner shall be dismissed, because he was imprisoned for Middlesex and not for London; and therefore tho' this Prison serves as well for London as Middlesex, yet *when he is imprisoned in Middlesex, Plaint cannot be taken against him in London*; For if a Sheriff of London arrests a Man in London by Capias directed to the Sheriffs of Middlesex, Writ of false Imprisonment lies against him. Br. Privilege, pl. 44. cites 16 E. 4, 5.[7]

4. A *Prohibition* was granted *to the Admiralty*, and *delivered* by one G. *to the Judge* of that Court *when he was hearing of a Cause, who* commanded *him to call a Register, which G. refusing to do*, the Judge again commanded him to do it, and G. said that he would not, because he was not so commanded to do by the Writ; therefore *the Judge committed the said G. to Prison*. G. made Affidavit thereof, and prayed an Habeas Corpus, which was granted. Coke thought it was not sufficient Cause to imprison him for Refusal, and so the Prisoner was delivered. Roll. R. 315, 316. Hill. 13 Jac. B. R. Bruistone v. Baker.

5. It is not the Usage of the Court of B. R. to deliver one *committed by the Decree of one of the Courts of Justice*, and therefore the Prisoner was remanded. Cro. C. 168. Mich. 5 Car. B. R. in Chambers's Case.[8]

6. A Prisoner *attainted for Felony*, (viz. for Horse-stealing) was *brought to the Bar of B. R. from St Albans* by Habeas Corpus and Certiorari. And it was demanded of him, what he could say why Execution should not be done upon the Indictment; and because he could not shew good Cause to stay the Execution, he was *committed to the Marshall, who was commanded to do Execution*. And he was hanged the next Day. Cro. C. 176. Mich. 5 Car. B. R. R. C's. Case.

7. If the *Sheriff arrests* a Man *upon Process, and lets him to Bail, and* after *returns a Cepi Corpus, and* then a *Habeas Corpus* comes to the Sheriff *to remove the Body*, the Sheriff cannot justify the *retaking of him upon this*

Writ, after he had let him to Bail before; but he ought to aid himself upon the Bail. Mich. 10 Car. B. R. between Lay and Strut, per Curiam, in an Action of false Imprisonment upon such retaking. See Trespass (C. a) pl. 1.

8. It was granted to the Prisoners in the King's Bench and Fleet, *in Regard of the Pestilence increasing* in London, and the Places adjacent. Hill. 11 Car. B. R. Cro. C. 466.

9. A Habeas Corpus was granted to bring up a Person *arrested by a Latitat* out of B. R. and who was carried to a Town in the same County, where the Arrest was, and there *arrested by a Serjeant of the Town, by a Writ out of the Corporation*, where the Plaintiff proceeded against him upon that Writ, and not upon the Latitat; and this being a Contempt, an Attachment also was granted. Sti. 239. Mich. 1650. B. R. Brian v. Stone

10. A Habeas Corpus was denied for a Prisoner to have him for a *Witness at* the *Assises*; by the Court. Trin. 1657. 2 L. P. R. 3.[9]

11. *At Common Law* if the Sheriff had arrested any Man by the King's Writ, he *could not be delivered but by a Homine replegiando*. 2 Saund. 60. Hill. 21 & 22 Car. 2. B. R. in Case of Postern v. Hanson.

12. J. S. a Parson libels for Tithes against *J. D*. he is *certified Contumax*; the *Bishop*, according to 27 H. 8. cap. 20. *certifies to two Justices to imprison him* without Bail or Mainprise. They do so. It was moved for an Habeas Corpus in C. B. and it was granted by three Justices, but the Ch. Justice was against it; because it was more properly grantable by the King's Bench. Cart. 221. Pasch. 23 Car. 2. C. B. Anon.

13. The 12 *Car*. 2. 23. *of Excise*, prohibits the bringing a Certiorari, but not a Habeas Corpus. 1 Mod. 102, 103. pl. 10. Mich. 25 Car. 2. B. R. Anon.

14. Two Persons were *committed to the Poultry Compter by Commissioners of Bankrupts for refusing to be examined* and sworn touching their Knowledge of the Bankrupt's Estate. The *Process against them in C. B. was an Attachment of Privilege*, which was a civil Plea; And on a Motion for a Habeas Corpus, the Ch. J. said, that it might be granted without Motion; because all the Habeas Corpus's in that Court were ad Faciendum & Recipiendum, and they issue of Course. 2 Mod. 306. Pasch. 30. Car. 2. C. B. Penrice and Wynn's Case.

15. Habeas Corpus was denied, on *Suggestion* that the Party was *detained by a private Person*. Cumb. 35. Mich. 2 Jac. 2. B. R. Anon.

16. Habeas Corpus was denied for one committed to *Bridewell for Lewdness*. Cumb. 74. Hill. 3 & 4 Jac. 2. B. R. Anon.

17. None ought to take out a Habeas Corpus for a Prisoner *without his Consent*. Trin. 23 Car. B. R. unless it be *to turn him over to the King's*

Bench, or charge him with an Action in Court. 2 L. P. R. 2.
18. Before Bushell's Case no Man was ever delivered by Habeas Corpus, *without Writ of Error* delivered, from a *Commitment of a Court of Oyer and Terminer*; Per Cur. 1 Salk. 348. Trin. 7 W. 3. B. R. in Bethel's Case.
19. Whether Commitment by either House of Parliament be within the Habeas Corpus Act. See 12 Mod. 606. Mich. 13 W. 3. B. R. Paulhill v. Powell.
20. A Person was committed by the *Admiralty* in Execution upon a Sentence, and a Habeas Corpus issued to bring him into B. R. *ad Respondendum* to an Action to be brought against him; it was moved upon the Return to commit the Defendant here, because there was no other way to sue him; for that he was not chargeable in the Admiralty, and that there was no other way to sue him, and so there would be a Failure of Justice; To which Holt Ch. J. said, that this was new, and that though the Proceeding in the Admiralty was by the Civil Law, yet it was supported by the Custom of the Realm, and this Court must not elude their Process; and enquiring into the Action, and thinking it only a Pretence, he said, there being *no Action pending in B. R.* they ought not to commit him, and the Plaintiff could not declare against him till in Custody; otherwise, if an Action had been depending, and so the Defendant was remanded. 1 Salk. 351. Trin. 1 Annae. B. R. Keach's Case.
21. The *Defendant* was *out on Bail* in an Action in B. R. and *was taken on an Extent at the Queen's Suit*; the Bail brought him upon a Habeas Corpus, and prayed he might be committed to the Marshal in Discharge of his Bail; and notwithstanding great Opposition was made by the Attorney General, he was turned over, because the Action here was precedent to the Queen's Extent. 1 Salk. 353. Mich. 3 Annae. B. R. French's Case.
22. The *Defendant pending an Action against him* in B. R. *was taken upon a Warrant in a criminal Matter*, and committed to the Compter, *and afterwards* was there *charged with an Extent for the Queen*; And he was brought up by Habeas Corpus at the Suit of the Plaintiff in the Action, in order to be declared against in Custody of the Marshal, and Mr. Attorney General opposed it; because the Custody of the Marshal was precarious, and he would let him escape as he did French; and this Case differed from that, because by the late Act of Parliament the Plaintiff might declare against him in Custodia Vicecomitis, whereas the Bail had been without Remedy if French had not been committed; and as to the Defendant's being arrested on criminal Process, that was nothing; for tho' one so arrested cannot be charged at the Suit of a Subject in any Action, without Leave of

the Court, yet the Queen may charge him. And the Defendant was remanded. 1 Salk. 353, 354. Mich. 4 Annae. B. R. Crackall v. Thompson.
23. Tho' a Habeas Corpus be a Writ of Right, yet where it is to *abate a rightful Suit*, the Court may *refuse* it. 1 Salk. 8. Mich. 6 Annae. B. R. Hetherington v. Reynolds.
24. *Husband and Wife* agreed to *live separate*, and he being willing afterwards to be reconciled to her, she refused; whereupon *he and an Assistant* forced her into a Coach as she was coming from Church on a Sunday, and *carried her into the Mint*. She being brought into Court by Habeas Corpus, it was moved that the Court would not interpose between Husband and Wife, &c. But the Court discharged her out of her Husband's Custody, upon her desiring to be so, and held, that the Agreement to live separate, shall bind both till they both agree to cohabit again. 8 Mod. 22. Mich. 7 Geo. Lister's Case.—— alias Lady Rawleigh's Case.
25. If a Person appear to be *imprisoned for an Excommunication* in a Cause of which the Spiritual Court hath no Conusance, he may be delivered either upon a Habeas Corpus, or by quashing or superseding the Writ of Excommunicato capiendo. 2 Hawk. Pl. C. 98. cap. 15. S. 40.

(D. 2) IN WHAT CASES; *IN RESPECT OF PRIVILEGE.*[10]

1. A *Commission* being granted *to examine the Right of the Office of Exigenter of London*, which belonged to the Chief Justice, and by him was granted to Scroggs; And a Bill thereupon exhibited against him before the Commissioners, Scroggs *demurred upon their Jurisdiction*, and would not answer, for which they committed him to the Fleet; But in that Case the Justices of the Common Pleas granted him a Habeas Corpus, because he was a necessary Minister to the Court. Hughe's Abr. 473. pl. 2. cites Mich. 2 Eliz. D. 175. Scroggs v. Coleshill.
2. The Defendant coming to *execute a Commission* was arrested, and had a Corpus cum Causa, and set him at Liberty. Toth. 218. cites Trin. 23 Eliz. Jackson v. Vaughan.
3. *So* the Plaintiff, having a Writ of Privilege, was taken in Execution, and ordered to go abroad by Habeas Corpus, and the Party that arrested him to be committed. Toth. 219. cites Hill. 17 or 18 Jac. Morgan v. Richardson.
4. S. was *elected Alderman* of London, and being summoned by the Court of *Aldermen* into Court, he there *refused to take the Oath*, wherefore they committed him to Gaol, and upon Habeas Corpus they returned the Custom of London, &c. But he was discharged by the Privilege of being *Mint-*

master. Sid. 287. Trin. 18 Car. 2. B. R. Swallow v. the City of London.[11]

(D. 3) *DIRECTED* TO WHOM, AD FACIENDUM, &C.

1. THE Habeas Corpus shall always be directed *to him who hath the Custody of the Body*. Godb. 44. pl. 52. Mich. 28 & 29 Eliz. B. R. Anon.

2. *Therefore* where it was directed *to the Mayor, Bailiffs, and Burgesses*, an Exception was taken, because the Pleas were holden before the Mayor, Bailiffs and Steward; but the Exception was disallowed; But otherwise it is in a Writ of Error, for that shall be directed to those before whom the Judgment was given. Godb. 44. pl. 52. cites Wickham's Case.

3. *And in London* it shall be directed *Majori & Vicecomitibus London*, because they have the Custody, and not the whole Corporation. Godb. 44. pl. 52. ——— But the Reporter says, he conceives that the Course is, that the Writ be directed *Majori, Aldermannis, & Vicecomitibus, &c*. Ibid.

(E) AT WHAT *TIME* GRANTED AND ALLOWED.

1. Habeas Corpus was allowed *after the Body was in Execution*, but he was not dismissed, but was *sent to the Fleet and had Aud. Quer*. Quod Nota. Br. Privilege, pl. 49. cites 22 H. 6.

2. *By* 43 *El. cap. 5. No Writ of Habeas Corpus*, or * other Writ *to remove a Cause* out of an inferior Court *shall be allowed, except* the same be *delivered to the Judge* of the Court, *before the Jury* who are to try the Cause *have appeared, and one* of the Jury be *sworn*.[12]

3. *By* 21 *Jac*. 1. *cap* 23. *No Writ, to remove a Suit* commenced *in an inferior Court* of Record, *shall be obeyed, unless delivered to the Steward* of the Court *before Issue or Demurrer joined, so as* the said Issue or Demurrer be *not joined within six Weeks after the Arrest or Appearance* of the Defendant.

4. *Judgment was entered against B.* and afterwards the *Bail of B. brought Habeas Corpus* to the Marshalsea, where B. was Prisoner, *to have his Body* before the Judges of C. B. *to be committed in Execution in discharge of the Bail; but before the Return* of the Habeas Corpus, *B. brought a Writ of Error* returnable the Day following; and when he came to be committed, the Court doubted that their Hands were tied up by the Writ of Error, because he could not be committed upon the Judgment, and yet they would have discharged the Bail if they could tell which way; therefore Quaere. Brownl. 61. Pasch. 14 Jac. Whickstead v. Bradshaw.

5. A Judge of the Court of B. R. will *not* grant a Habeas Corpus *in the Vacation* for a Prisoner *to follow his Suits; but* the Court may grant a special Habeas Corpus for a Prisoner *to be at his Trial* in the Vacation Time. P. 1650. 24 May, B. R. For this may concern him more than the other can. 2 L. P. R. 3.

6. The Court will grant a Habeas Corpus to one to have a Prisoner who is *not in Execution*, out of Prison, *to be a Witness for him at the Trial*, but at the Charge of him that desires the Habeas Corpus, and at his Peril, to take Care that the Prisoner do not make an Escape. 2 L. P. R. 3. cites 29 June 1640. Trin. B. R.

7. If a Prisoner doth not *make his Prayer* the first Term, when the *Law is open*, he cannot do it afterwards on the Habeas Corpus Act; But where the *Act is suspended*, it must be understood, that he must do it the first Term after the Suspension determined. Per Cur. Cumb. 421. 9 W. 3. B. R. the King v. the Earl of Aylsbury.

8. One *removed into B. R.* by Habeas Corpus *ad Respondendum shall not* be removed *into any other Court till he has answered* the Cause in B. R. and shall not compel the Plaintiff to follow a prolling Defendant, and so *vice versa* of C. B. so that each Court, in which he is first attached, shall retain the Defendant; and after he has answered there, you may carry him where you will. 1 Salk. 350. Mich. 11 W. 3. B. R. Anon.——And said, that this was fit to be the settled Course, if there be any Difference between the two Courts. Ibid.

9. *After an interlocutory* Judgment, *and before final Judgment in an inferior Court*, a Habeas Corpus was brought, but *before the Return* of the Writ, the *Defendant died*, and a Procedendo was awarded; because by the 8 & 9 W. 3. 11. the Plaintiff may sue a Sci. Fa. against the Executors, and proceed to Judgment, which he cannot have in another Court; and by this Means he would be depriv'd of the Effect of his Judgment, which would be unreasonable. 1 Salk. 352. Hill. 1 Annae. B. R. Anon.[13]

(E. 2) TO WHAT *PLACE*.

1. A Habeas Corpus was directed *to the Bishop of Durham*, to bring a Prisoner into B. R. and he making no Return, another Writ was moved for, with a * Penalty in it; And one of the Clerks of the Crown said, that Certioraries had been frequently returned from Durham; But before the Bishop would make a Return on this Writ, he insisted to have his Privileges recited in the Writ. But Dodderidge and the Court said, that they would not

change the ancient Course, and Forms, and Usages. Lat. 160. Johnson's Case.

2. Habeas Corpus's have gone *beyond Sea*; Dr. Prujean was to cure a Madman, Sir R. Carr's Brother; Common Pleas sent an Habeas Corpus for him beyond Sea. Per Wild J. Cart. 222. Pasch. 23 Car. 2. C. B. Anon.

3. In Error on a Judgment in *Ireland*, it was suggested that the Plaintiff was in Execution upon the Judgment in Ireland. And the Court seem'd to be of Opinion, that a Habeas Corpus might be sent thither to remove him as Writs Mandatory had been awarded to *Calais*, and now to *Guernsey and Jersey*, *&c*. Mich. 33 Car. 2. B. R. 1 Vent. 357. Anon.[14]

(F) ***RETURNS. HOW, AND WHAT,*** **IN GENERAL.**

1. Where one is committed by one of the *Privy Council*, the *Cause of Commitment* ought to be set down in the Return, but not where the Commitment is by the whole Privy Council. Le. 71. Mich. 29 & 30 El. C. B. Howell's Case.

2. If on a Corpus cum Causa the *Cause returned be sufficient, but false*, the Court must *remand* the Prisoner, and he is at no Mischief; For if they have not Authority, or the Cause be false, he may have a Writ of *false Imprisonment*, and where the Party is only removed, and a false Return is made, the Party grieved may have *special Action on his Case*. 11 Rep. 99. b. Trin. 13 Jac. B. R. Bagg's Case.

3. It was *returned* upon an Habeas Corpus, *that there is a Custom in London, that if any Freeman devise any Legacy to an Orphan, that the Executor shall* be constrained to *find* sufficient *Sureties to pay* the Legacy, *or be imprisoned*. Roll. R. 316. Hill. 13 Jac. B. R. Spencer's Case.

4. No Answer can satisfy it, but to return *the Cause with a Corpus Paratum habeo*, &c. per Montague Ch. J. Cro. J. 543. Mich. 17 Jac. B. R. in Bourne's Case.

5. Habeas Corpus's *are always* returned *in the Preterperfect Tense*. Sid. 273. Trin. 17 Car. 2. B. R. the King v. Wagstaff & al.

6. Where a Writ of Habeas Corpus *Ad Satisfaciendum* issues out of B. R. the Attorney for the Plaintiff must *endorse the Number Roll of the Judgment* on the Back of the Habeas Corpus. And in the Case of one Sadler Mich. 21 Jac. Car. 2. the Court granted a *Pluries Habeas Corpus*, with Penalty of 100 *l*. returnable immediate. 2 L. P. R. 2.

7. The *Writ commands the Day, and* the *Cause of the Caption and Detaining* of the Prisoner, *to be certified* upon the Return, which if not

done, the Court cannot possibly judge whether the Cause of the Commitment and Detainer be according to Law, or against it. Therefore the Cause of the Imprisonment ought by the Return *to appear as specially and certainly* to the Judges of the Retorn, as it did appear to the Court or Person authorised to commit, otherwise the Retorn is insufficient. Vaugh. 137. about 22 Car. 2. in Bushell's Case.[15]

8. Where the *Cause is returned without the Body*, yet that is supplied by the *Defendant's Appearance* and Bail enter'd here; Per Holt. Cumb. 332. Trin. 7 W. 3. B. R. Coxall v. Manucaptors of Colecroft.

9. *Conusance of Pleas*, or *exempt Jurisdiction*, were never returned to a Habeas Corpus; For then they might return a Falsity to support their Jurisdiction, which would not be traversable, and so a Subject would be ousted of the Privilege of suing, or being sued in the King's superiour Court, without any Opportunity of controverting the Matter; and the Case of Bishop v. Percival in Hard. was quoted per Holt Ch. J. 12 Mod. 666. Hill. 13 W. 3. B. R. Taylor v. Reignolds.

10. If one be in Custody upon a *Criminal and also upon a civil Matter*, and he would move himself by Habeas Corpus, there *ought to be but one Habeas Corpus* either of the Crown Side or of the Plea Side, and *both Causes ought to be returned*. 6 Mod. 133. per Cur. Pasch. 3 Annae. B. R. Anon.

(F. 2) RETURN THEREOF. *GOOD* OR NOT; AND *EXCEPTIONS* TO RETURNS OF COMMITMENTS.

1. A Habeas Corpus issued out of C. B. to the Steward and Marshal of the House, &c. for W. S. which was returned thus, *viz. Quod Domina Regina per Literas Patentes suas suscepit in Protectionem suam J. M. and his Sureties, et* ex Uberiori Gratia *voluit, that if any Person should arrest* or cause to be arrested the said John Mabb, or any of the Sureties, then the *Marsbal of her House*, &c. *might arrest every such Person, and detain them in Prison until* such Person should answer before the Privy Council for the Contempt; *And that W. S. caused one J. P. a Surety of the said J. M. to be arrested*, &c. And upon this Return W. S. was discharged. And because, after such Discharge, the Parties caused W. S. to be again arrested for the same Cause, *viz.* by Colour of the said Protection, an Attachment was granted against them. Le. 71. Mich. 29 & 30 Eliz. pl. 93. Search's Case.[16]

2. Pasch. 34 Eliz. All the Judges and Barons delivered their Opinions in Writing, and signed by them; That if any Person be committed *by her* * *Majesty's Commandment from her Person*, or by Order from ‡ *the Council-*

Board, or if any † *one or two of her Council* commit one *for High-Treason*, such Persons, so in the Case before committed, may not be deliver'd by any of her Courts, without due Tryal by the Law and Judgment of Acquittal had. Nevertheless the Judges may award the Queen's Writ to bring the Bodies of such Persons before them; and if, upon Return thereof, the Causes of their Commitment be certified to the Judges as it ought to be, then the Judges in the Cases before ought not to deliver him, but to remand the Prisoner to the Place from whence he came, which cannot be conveniently done unless *Notice in Generality or else specially be given to the Keeper, or Gaoler*, that shall have the Custody of such Prisoner. 1 And. 297, 291. pl. 305.

3. One having a Suit pending in B. R. and coming to London was committed to Newgate, and on a Habeas Corpus to the Gaoler of Newgate, he returned that the Party *was committed to his Custody by Warrant from the Lord Chancellor of England for certain Matters concerning the King, there to remain until the Lord Chancellor delivered him; and for that Cause he could not have his Body here*. And Hutton moved that the Return was not good, because it is *too general*: For it *shews not for what* * *Causes* he was committed; For it might be for a Cause which would not hinder him of his Privilege. Here also the Return is, that he ought *to remain there until* he were *delivered by the Lord Chancellor*; therefore he said it was ill. And the Court thereto said, it was the first Time that such Exceptions had been taken. Therefore they would consider of the Case. And. 9 H. 6. 44. was cited, and 33 H. 6. 28. & 29. and 4 E. 4. 15. and 16. Cro. J. 219. Hill. 6 Jac. B. R. Addis's Case.

4. Divers Brewers were committed to Prison by the Council, and upon an Habeas Corpus the Cause was returned to be *by Force of a Warrant importing, that they were committed per Concilium Regis, pro quibusdam Causis Regem & Servicium suum tangentibus*. Exception was taken, because it is per Concilium Regis, and does *not shew what Council* it was, whether Council of State or Counsel at Law, and so uncertain. But it was answered, that it shall be *intended the Council of State*. And Coke Ch. J. said, that the Statute of W. 1. is, that a Man committed *by Command of the King* is not bailable, and that Stamf. expounds Command to be per Concilium Regis; For the Council is incorporate in the King. cites 33 H. 6. 28. b. Hill. 12 Jac. B. R. 1 Roll. R. 134. the Brewer's Case.

5. R. was brought to the Bar by Habeas Corpus; the Cause returned was two Warrants; 1. because he was *committed by the Lord Conway Secretary of State*, and there no Cause shewn. 2. There was *another Warrant from the*

same Secretary, which recited the first Warrant, and said, that now *upon further Examination, he commanded the Gaoler to keep him for Suspicion of High Treason*. And it was said, that this second Warrant is no Cause to detain, because it is with Reference to the first Warrant, which is no Warrant; and there is no special Cause of Suspicion alleged, as that false Gold was found with him, or the like; nor is it shewn what Treason; And he who is *taken upon Suspicion* shall be let to Bail. Palm. 558. Trin. 4 Car. B. R. Melvine's Case.

6. A. was committed to the Marshalsea of the Houshold for Words. Upon an Habeas Corpus, the Return was, that he was committed by the Lords of the Council; and the Warrant was *that he was committed for insolent Behaviour and Words spoken at the Council Table*, which was subscribed by the Lord Keeper, and 12 others of the Council; and because it did *not mention what the Words were*, so as the Court might judge of them, the Return was held insufficient, and the Marshal advised to amend it. Cro. C. 133. Mich. 4 Car. B. R. Chambers's Case.[17]

7. *So* where the * Return was, *that he was committed* to the Gaol of O. by the Earl of Danby *to remain there without Bail or Mainprise, until he should be delivered by the Justices in Eyre*. It was ordered that he should be bailed for 12 Days, and that the Return in the Interim should be amended; For being *General*, and *no special Cause shewn*, it was held to be absolutely void; and if not amended and good Cause shewn at the Day, it was ordered that he should be absolutely dismissed. Cro. C. 593. Mich. 16 Car. B. R. Brice's Case.

8. The Steward of Windsor-Court, who was *Surveyor* [also] *of the Castle was committed by the Lord M. Lieutenant of the said Castle*, and after three Habeas Corpus's, Lord M. made Return that he was committed *by the immediate Warrant of the King, because he refused to deliver certain Rooms in the Timber Yard there, when the King commanded them*. And it was moved that he ought to continue committed. But per Cur. he was discharged; For tho' the Detainer of the King's Castles be Treason, yet Quarrels among his Servants concerning their Rights, does not make any Offence against the Publick. Sid. 278. Pasch. 18 Car. 2. B. R. the King v. Taylor.

9. The Return was that the Defendants were *committed by Sir W. T, Secretary of State, for High Treason, for aiding Sir Ja. Montgomery to escape, who was committed to the Custody of a Messenger for Suspicion of High Treason*. The Court held, 1st. That the Commitment by a Secretary of State was good. 2. That the Commitment to a Messenger was good; For

they would intend it only in Order to carry him to Gaol. 3. That Sir James Montgomery's Treason ought to have been inserted in the Warrant with an Allegation, that Sir James did the Fact, because the Defendants by breaking the Prison are guilty of the same specifick Treason and Offence; and therefore they were bailed. 1 Salk. 347. Tr. 7 W. 3. The King v. Kendall and Roe. ——— 5 Mod. 78. S. C.

10. The Return upon a Habeas Corpus was, that the Party was committed for a *Contempt for not performing a Decree made in the Court of Requests*, and no other Cause appear'd in the Return. The Court were of Opinion, that they could not deliver him, because no Cause appeared in the Return to warrant their Delivery of him. And they said, that if the *Return be false*, yet they cannot deliver the Party, but the Party may have his Action of *false Imprisonment*, if the Imprisonment be not lawful. Godb. 198. Tr. 10 Jac. C. B. Lea v. Lea.[18]

11. A. was committed to the Fleet for disobeying a Decree in Chancery upon a Bill exibited there after a Judgment of the fame Matter in Bank, and affirmed in this Court; and upon an Habeas Corpus the Return was such, *Certifico quod A. commissus fuit* 28 *Novembris* 1608. *propter contemptum extra Curiam Cancellariae eidem Curiae commissum & per Mandatum Domini Cancellarii*; It was moved that the Return is not good, because it is Propter contemptum extra Curiam Cancellariae, which is *utterly uncertain*, which was agreed per Coke and Cur. and because it is that he was committed per Mandatum Domini Cancellarii, which is *too general*. 1 Roll. Rep. 192. Pasch. 13 Jac. B. R. Apsley's Case.[19]

12. C. was brought in upon a Habeas Corpus, and the Return was that he was committed *by the High Commission*, and the Warrant of the Commitment was, that he was committed *because he had used diverse reproachful Words against the Proceedings of the High Commission, and this being drawn into Form of Law in diverse Articles, he refused to answer*. It was moved that the Return is insufficient, because it is *too general*. Per Coke, the Return is not good, because it is not shewn what the Articles were; For Peradventure, they were Articles concerning Matters at the Common Law; also it is too general, that he was committed for divers reproachful Words, &c. 22 E. 4. *Propter Multiplicem Contumaciam* is not good; besides *no Time* is *alleged when the Words were spoken*, and perhaps they are pardoned by some Act of Parliament, if the Time had appeared. The Court held the Return not good, and so he was bailed. 1 Roll. R. 245. Mich. 13 Jac. B. R. Codde's Case.

13. The Return to an Habeas Corpus was, *that he was committed by Order*

of the Exchequer 9 Car. *for not paying a Fine imposed* upon him *by the Ecclesiastical Commissioners*; and altho' it was *not shewn for what* the Fine was imposed; yet because the Commitment was *by a judicial Court*, this Court would neither bail nor discharge him. Cro. C. 579. Pasch. 16 Car. B. R. Anon.

14. A. was imprisoned by the Court of Admiralty, and prayed a Habeas Corpus, upon which was this Return, *viz.* First, The *Custom of the Admiralty* is set forth, which is *to attach Goods in Causa civili & Maritimo, in the Hands of a third Person; and that upon four Defaults made, the Goods* so attached *should be delivered to the Plaintiff, upon Caution put to restore them, if the Debt or other Cause of Action be disproved within the Year; and after four Defaults made, if the Party in whose Hands the Goods were attached refuse to deliver them, that the Custom is to imprison him until, &c.* Then is set forth how *that one Kent was indebted to J. S. in such a Sum upon Agreement made super altum mare*, and *that Kent died*, and *that afterwards J. S. attached certain Goods of Kent's in the Hands of the said A. for the said Debt*; and *that after, upon Summons, four Defaults were made*, and *that J. S. did tender Caution for Re-delivery* of the Goods so attached and condemned, if the Debt were disproved within the Year; and *that notwithstanding the said A. would not deliver the Goods; for which he was imprisoned* by the Court of Admiralty until, &c. Bramston Ch. J. asked the Proctor of the Admiralty, then present, this Question, Whether by their Law the Death of the Party did not abate the Action, and he said it did; then said the Ch. J. it is clear that an Attachment cannot be against the Goods, the Party being dead; wherefore, by the whole Court, the *Custom to attach Goods after the Death of the Party* is no good Custom, therefore they gave Judgment that the Prisoner should be discharged. Mar. 204. Pasch. 18 Car. B. R. Heaman's Case.[20]

15. The Return was that the Party *was convicted of publishing a false Petition, supposed to be delivered to the King with a Subscription that the King was content to discharge the Fine of J. S.* who was sued in the Court of the Marches, made *in Deceptionem Curiae, & in Defraudationem Regis de debito suo*, and that he, *being present in Court, was committed* to the Gaoler *till he paid* 100 l. to the King, and 40 l. to the Attorney of the Court for Costs; *and that he was detained also* * *Virtute Ordinis decreti Curiae*, &c. And this was held to be good without shewing the Proceedings, and that Virtute Ordinis, &c. was sufficient. And that tho' two Causes of Imprisonment and Detainment were alleged, and tho' in the second he shewed no Imprisonment, but only that he was detained Virtute Decreti,

&c. yet Sir James Ley Ch. J. held it good; For it was shewn before that he was committed, and that he being before imprisoned for Cause, &c. was also detained; but that if it had been in Justification in Trespass, it had not been good. 2 Roll. R. 307. 21 Jac. B. R. Hancock's Case.

16. Upon a Habeas Corpus directed to the Keepers of the Porters Lodge, (being the Prison for the Council of the Marches of Wales) it being returned, that they were committed to him by Virtue of a Decree of the said Council, upon Information against them, that the one of them inveigled the Son and Heir of J. S. being of the Age of 17 Years, in the Night, and when he was drunk, to marry the Sister of another of the Defendants, whereupon they were every of them severally fined to the King; some of them 100 Marks, some 40 *l.* and 100 Marks Damages to the Father who was the Prosecutor, and committed to Prison for a Year, and until the said Fines paid and the said 100 Marks Damages satisfied to the said J. S. and until they entered into a Recognizance for their good Behaviour, and until the said Court took further Order; and it was returned also, that they were *committed by Virtue of an Order from the Lords of the Council*. And this Return was held utterly insufficient for the last Part; because it was *not mentioned what was the Order* of the Council. It was moved by Grimston that the Return was ill, *to award to Prison, to remain there* **until further Order taken*, which is utterly incertain. It was doubted whether the Marches of Wales might meddle with a *clandestine Marriage* to punish it, being a meer Spiritual Act. As also about the *Sentence for Damages* to the Party, altho' it be within the express Words of the Instructions, &c. Whereupon Day was given until Octabis Michaelis. And in the Interim the Parties were bailed. Cro. C. 557. Trin. 15 Car. B. R. Seele's Case.[21]

17. The Return to a Habeas Corpus, directed to the Mayor of St Albans, was that *He was committed to the Gaol by the Justices of the Peace of the said Liberty, at the Sessions of the Peace* holden 11 Julii 1639. *till he should obey an Order for taking the Office of Constable upon him; for that he being an Inhabitant within the Hundred of Casho, within the Liberty of St. Albans, had refused to execute the said Office:* And because it was informed on the Part of the Prisoner, that he *denied he was within the Liberty of St. Albans, but affirmed he was within the County of Hertford out of the said Liberty*, All the Court held, that he was unjustly committed; because they ought not to have committed him, when he denied to be Constable, especially pretending he was not within the Liberty, but should have caused him to be indicted upon this Refusal; and if he were found to be within the Liberty should have assessed a good Fine, and then have

committed him for that Cause. See 8 Rep. 38. Greisley's Case. But as it is now returned, the Imprisonment was not lawful; wherefore he, by the Opinion of the whole Court, was absolutely discharged without any Bail. Cro. C. 567. Hill. 15 Car. B. R. Crawley's Case.[22]

18. One was committed for not taking upon him the Office of a Livery-man, being chosen thereto, &c. Upon a Habeas Corpus to the Keeper of Newgate, he did *not* in his Return *set forth his Warrant in Haec Verba*, but only that *Per quoddam Warrantum in Scriptis secundum Consuetudinem, &c*. the Defendant was committed. The Court said, that the Warrant is always set forth at large *upon an extrajudicial Commitment*. But when a Man is committed by a Court of Record, there is no Warrant at all, and therefore the Court of Aldermen (who committed the Person) cannot be intended to *proceed judicially*, because the Commitment is per Warrantum in Scriptis; that they are the proper Judges of an Excuse, why Defendant will not take upon him the Livery, and if they adjudge it insufficient, and appoint him to accept it, and he refuses, it is a Contempt of their Authority, and they may commit him. 5 Mod. 156. to 162. Hill. 7 W. 3. B. R. Vintner's Company v. Clerk.[23]

19. In the Case above, another Exception was taken; that in the Return a *Custom was laid* for the Mayor *to commit* the Offender *to* the Custody of *the Sheriffs of London, or other Officer*; and the *Keeper of Newgate*, who was the Gaoler *had returned*, that he was *committed Custodiae meae*, when it doth *not appear that he was either Sheriff or Officer at that Time*. And the Court held, that tho' the Keeper of Newgate may be an Officer of the City, yet he may not be one attending the Court of Aldermen; so that it does not appear that he is a proper Officer of that Court to receive the Prisoner; neither did it appear that Newgate was in London, but if it did, he ought to be committed to the Sheriffs, and not to the Keeper of Newgate, tho' they might have taken him for their Officer. 5 Mod. 156. to 162. Vintner's Company v. Clerk.[24]

20. If a Cause be returned *out of the City Courts* by Habeas Corpus, *the Custom must be returned*, or no Procedendo can ever be granted. 10 Mod. 440. Trin. 5 Geo. 1. B. R. in Case of Asgill v. Hunt.

21. Upon the Return of an Habeas Corpus, it was certified that the *Mayor of L. imprisoned one H. (Quia se Male gessit) and for* using of *undecent Speeches to him*, and that in his Hall with a Spit, insultum fecit, & conatus fuit eum vulnerare; this he certifies for the Cause of his Imprisonment by way of Justification; and upon Exception taken to the Certificate of the Mayor, it was held by Haughton, Dodderidge and Croke J. that the Return

is insufficient, because it *ought to have shewed the certain Cause* of his being imprisoned by him, and also to have *expressed, for* * *how long Time, and what sort of Imprisonment* it was; wherefore by Rule of the whole Court, H. was absolutely discharged of his Imprisonment. 2 Buls. 139, 140, 141. Mich. 11 Jac. Hodges v. Humkin the Mayor of Liskerret.[25]

22. The Return was that the Prisoners were *committed by R. a Justice of Peace of the said County by force of the Statute of 5 R.* 2. 7. *upon Complaint of J. S. that he claimed Common in a Meadow of the said J. S.* called Monk's Meadow, and *that the Prisoners entered* into the said Meadow *and kept him out with Force and Arms from his Common*, and that he came thither and found them holding the said Meadow with Force, whereupon he by Virtue of the said Statute committed them to Goal; and it was held by all the Court (absente Brampston) that this Commitment was not waranted by the Statute; For a Man cannot be indicted or committed for Entering his own Land with Force, or holding it with Force against a Commoner. Cro. C. 486. Mich. 13 Car. B. R. Sydnam and Parr's Case.

23. W. and 7 others were committed by the Mayor of London to Newgate, for *refusing to enter into a Recognizance to appear before the Lords of the Council*; and upon an Habeas Corpora returned by the Mayor and Sheriffs, it appeared, that *by an Order from the Council Table, they were appointed to come before the Mayor and Sheriff's to treat concerning foreign Matters; and when they appeared being required by the Mayor* then in Commission of Oyer and Terminer for the City, *to perform the Order* of the Lords of the Council, *and to enter into Recognisance in a reasonable Sum, they refused*, whereupon he Committed them. And Peard, Maynard and Keeling, jun., argued, that this Return was not good; 1st. Because it doth *not mention the Order, nor shew what the Order was*; so as the Court might adjudge thereof. 2dly. Because the Recognisance is demanded for them to appear before the Lords of the Council, but *no Time nor Place is appointed nor Cause shewn why it was demanded*; and because the Kings Counsel prayed Time to maintain the Return the Parties were bailed untill the next Term. Cro. C. 552. Trin. 15 Car. B. R. Wolnough's Case.[26]

24. P. was committed by the *Lord Mayor of London*, for that *contemptuously and unseasonably he served him with a* Process of *Subpaena* out of this Court *when he was executing his Office as a Magistrate, and examining Offences of High Treason*, in derogation of Magistracy, and in disturbance of the due Execution of Justice, till such Time as he should find Sureties for his good Behaviour. It was moved that he might be set at Liberty, because there did not appear (as was alleged)

any good Cause of Commitment. But Hale held that he could not be remanded, because it does *not appear* by the Return *that the Lord Mayor was then a Justice of Peace*; but because the Process was unduly served upon such a Person, at such a time, the Court would not discharge him; but there was no Exception taken to the Lord Mayors committing a Person for an Affront done to himself. Hard. 182. Pasch. 13 Car. 2. in Scacc. Prince's Case.

25. Upon the Return of an Habeas Corpus it appeared that C. had *forestalled a great Number of Lobsters*, whereupon the Mayor, &c. of London caused him to appear, and he confess'd the same, and they Ordered him to desist from such forestalling; but he *said Obstinately and in Contempt of the Court, that he would not obey their Order*, whereupon they *committed him* to Newgate *until he should Signify to the Court that he would conform himself*, or otherwise be delivered by due Course of Law. This was moved to be insufficient; to which it was answered, that the Imprisonment in this Case was not for forestalling, but for the Contempt to the Court, which, per Twisden, they have Power to do; wherefore the Court remanded the Prisoner, he promising to make Submission at the next Court, and the Sheriff promising he should be discharged thereupon. Vent. 115, 116. Pasch. 23 Car. 2. B. R. City of London v. Coates.

26. A Justice of Peace *committed a Brewer for not paying the Duty of Excise*, and he being brought into Court, an Exception was taken that it *ought to appear that he was a common Brewer*. Hale Ch. J. said that the Statute 12 Car. 2. 23. prohibits the bringing a Certiorari, but not a Habeas Corpus; and *want of Averment of a Matter of Fact may be amended in a Return in Court*; and if it be *not true* at their Peril be it, and so it was amended. 1 Mod. 102, 103. pl. 10. Mich. 25 Car. 2. B. R. Anon.

27. An Habeas Corpus being brought upon a Commitment by the *College of Physicians*, it was excepted against, because it was *Pro mala Praxi* which is *uncertain*. 2dly, The Conclusion is ill, because it was *to remain without Bail till discharged by the President and College, or others authorised, or by due Course of Law*; For if a Commitment be for a Fine it ought to be *Quousque be paid the Fine*; and if for a *Contempt, till he had submitted himself*. 3dly. The Offence is pardoned; For tho' the King has granted Fines to the Corporation he might however *Pardon the Offence*, and the King in this Case has pardoned all that he can Pardon; and if the Commitment had been *for a Punishment, it ought to have been* a distinct Commitment, *& ulterius quod committatur* for 4 Months, and the *Commitment ought to recite the Judgment*; and per Cur. he was discharged. Skin. 676. Hill. 8 W.

3. B. R. the King v. Bowerbank.[27]
28. The Return was, that the Parties were *committed by a Warrant under the Hands and Seals of the Commissioners of Bankrupts for refusing to be examined and sworn touching their Knowledge of the Bankrupt's Estate*, and an Exception was taken to it for *not averring their Refusal to come and be sworn*; For it did not appear that they did refuse, and that it should have been positively averred, *viz.* That they did refuse and still do; For if they are willing at any Time, they ought to be discharged, and so they were; but the Process against them being an Attachment of Privilege they were order'd to put in Bail upon the Attachment. Pasch. 30 Car. 2. C. B. 2 Mod. 306. Penrice and Wynn's Case.
29. A. and four others of the Parish of St. Bartholomew were brought to the Bar by Habeas Corpora, and by the Return it appeared that they were *committed to a Messenger for Contempt to the Ecclesiastical Commissioners for not performing of their Order in paying the Parish Clerk his Wages, rated by their Order* at 4*d*. the Quarter for every House in Great St. Bartholomew's, which they refused to pay but according to their Custom as they were rated by their Churchwardens and Vestry. And now Doctor Merrick and Doctor Ecleston moved, that they should be Remanded; For they said this Order was [*] *grounded upon the King's Letters Patents*, wherein it is Provided, that the Clerks should gather and receive their Wages as should be ordered by the High Commissioners, and pretended that for any Contempt they might Fine and Imprison; but upon this Return they were bailed untill the first Tuesday next Term. Cro. C. 582. Pasch. 16 Car. B. R. Torle's Case.[28]
30. Upon a Habeas Corpus was return'd the Warrant from the Sheriff, for taking the Prisoner, which was upon a Writ of *Excomunicato Capiendo* for *Substraction of Tythes and other Ecclesiastical Duties*; Resolv'd, that this Return was uncertain, and the (other Duties) might be such Matters as were out of their Jurisdiction, and they *must shew the Matter to be within their Jurisdiction*; and also that the *Writ of Excom. cap. it self ought to be Returned*, and it is not sufficient to return the Warrant; because that may be Wrong when the Writ is Right, and tho' the Warrant may be Wrong, yet if the Writ is Right the Party is Rightfully in Custody of the Sheriff, and the Writ was Quash'd. 1 Salk. 350. Trin. 12 W. 3. B. R. the King v. Fowler.
31. The Return was, that the Parties, being *Jurors, refused to find Gosse and others indicted on the late Statute of Conformity, Guilty contrary to their Evidence which was full and pregnant*, and upon this the Court fined them and ordered them to be Imprisoned till they paid the Fine; and upon

mature Consideration they were remanded. Raym. 138. Tr. 17 Car. 2. B. R. the King v. Wagstaff & al.[29]

32. The Return was, that the Prisoner, *being a Juryman among others charged at the Sessions Court of the Old-Baily to try the Issue between the King and Penn and Mead upon an Indictment for Assembling unlawfully and tumultuously, did* Contra plenam & manifestam Evidentiam *openly given in Court acquit the Prisoner indicted, in Contempt of the King*, &c. This was held Insufficient, because the Evidence it self was not express'd so as that the Court might Judge of it. Vaugh. 135. to 158. about 22 Car. 2. Bushell's Case.

33. Where the Return was, *that upon the Party's Examination they found just Cause to suspect him to be Guilty of the said Misdemeanors* (mentioned before of incouraging Conventiclers and stirring up People to Disobedience) *and that thereupon they did require him to find Sureties to be of the good Behaviour, which he refused*, this was held an insufficient Retorn, *neither shewing the Cause of Suspicion, nor the certainty of the Sum in which* he and his Sureties *should be bound*. 2 Vent. 22, 23, 24. Trin. 22 Car. 2. C. B. Rudyard's Case.[30]

34. A Habeas Corpus issued to bring in the Body of an Heiress being in Custody (as was suggested in the Writ) of Sir R. V. then Lord Mayor of London; afterwards a *Pluries issued*, and thereupon he return'd *Nullam habeo talem Personam in Custodia mea nec habui die Impetrationis hujus brevis vel unquam Postea*. This was adjudged an ill Return; For tho' he had, no such Person then in his Custody at the Time of the Pluries, yet is might be that he had her at the Time of obtaining the first Writ. 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. the King v. Sir Robert Viner.

35. A Return was, that *Issue was joined before the Writ came* to him, but did *not say* that Issue *was not joined within 6 Weeks*, &c. as it ought to be by the Statute, and therefore ill. Comb. 127. Trin. 1 W. & M. B. R. Anon.[31]

36. *And* there was another Fault, because, it being in an Inferiour Court, it is not returned, *that the Cause of Action arose within the Jurisdiction*. Comb. 127. Anon.

37. Where an Action is founded on the Custom of London, and removed by Habeas Corpus a *Difference* was taken *between* an *Action* brought *on a By-Law, and* removed here into B. R. and an Action brought *on the Custom of London*; For in the Case of the *By-Law, the special Matter* of such Law ought in certain to be returned upon the Habeas Corpus, &c. otherwise the Court cannot take Notice of such a private Law; *but* 'tis not so in an Action founded on a *Custom of London*, because the *Court ex Officio* will take

Notice of those Customs. Carth. 75. Mich. 1 W. & M. B. R. Watson v. Clerk.

(G) PROCEEDINGS.

1. No Habeas Corpus shall be *made out in the Vacation Time to remove a Cause out of* an Inferior Court, other than the Courts in London, Middlesex, or the Marshalsea, or other *Courts within* 10 *Miles of London, retornable immediate, but at a Day certain* in Court; and that every such Habeas Corpus, retornable *in Trin. or Hill. Term*, be *not* retornable *after the second Return of the Term*; Per Magistr. Livesay and Alios, Pasch. 21 Car. 2. 2 L. P. R. 1.

2. If a Cause be *removed in the Vacation out of* London, Middlesex; or the Marshalsea, or other *Courts within 5 Miles of London* by Habeas Corpus *retornable immediate*, and Bail put in by the first Retorn of the next Term, if the Declaration be delivered 8 Days before the end of the Term, then the Defendant is to plead to enter; and *in Mich. Term*, if it be delivered before the Retorn-day of Crastin. Anim. and *in Easter Term*, before the Retorn-day of Mens. Pasch. then the Defendant is to plead to Trial the same Term, per Magist. Livesay and Alios, Pasch. 21 Car. 2. Regis. 2 L. P. R. 1, 2.

3. After the Retorn of a Habeas Corpus is read and *filed* in Court, it *cannot be amended*. Trin. 23 Car. B. R. For it is then a Record of the Court, but before it be filed, it may. 2 L. P. R. 2.—S. P. Gibb. 266. Pasch. 4 Geo. 2. B. R. the King v. Catterall.

4. Every Habeas Corpus retornable at a Day certain, to remove a Cause out of an *Inferior Court*, must not be made *retornable further than the second Retorn in Hillary and Trinity Terms*; so that the Defendants may plead to Issue that Term, and the Cause may be tried at the Assises, and in Default of pleading to Trial, the Plaintiff may take his Judgment. 2 L. P. R. 3.[32]

5. Note, Holt Ch. J. made it a *Rule*, that when one is brought up by Habeas Corpus the *Return should remain in Court* and a Copy of it only given the Marshall, and so of a Committitur. 6 Mod. 180. Trin. 3 Annae. B. R. Anon.

6. Upon a Habeas Corpus a *Rule* may be made *to bring the Prisoner up any Day in the same Term without filing it*, but *not* to bring him up at a Day *in another Term*, unless the Return thereof be filed. 12 Mod. 441. Hill. 12 W. 3. B. R. the King v. Margason.

7. A Prisoner was brought up by Habeas Corpus *returnable at a Day certain*, and the *Gaoler did not bring him into Court*, but carried him back,

and *brought him in the next Day*. In this Case, the Writ being returnable at a Day certain, the Gaoler could not bring him in at another Day by Virtue of it; *but upon a Writ returnable immediate* it is otherwise, and the Gaoler was ruled to be at the Charge of a new Writ. 12 Mod. 564. Mich. 13 W. 3. Anon.

8. On a Habeas Corpus to the Sheriffs of London they returned an Action on a By-Law with a Penalty for not weighing at the City Beam. Holt. Ch. J. held, that the *Return* in this Case may be *filed; because the very Record below is not returned, and therefore will not be filed*, and consequently a *Procedendo* may be granted, because it will not send out any Record filed in this Court but *takes off the Suspension they were under by the Habeas Corpus*; and the Writ was filed and a Procedendo awarded accordingly. 1 Salk. 352. Trin. 3 Annae B. R. Fazakerly v. Baldo.

(H) *EFFECT.* OR WHAT REMOVED.

1. AN Habeas Corpus cum Causa removes the *Body* of the Party for whom it is granted, *and all the Causes which are then depending against him*. 2 L. P. R. 2. cites 21 Car. B. R. and says, that for that Reason it is a Habeas Corpus cum Causa, and that the word *Causa* is *Nomen Collectivum*, and implies all Causes.

2. If a Habeas Corpus be directed to an Inferiour Court, *returnable two Days after the end of the Term*, yet the *Inferiour Court cannot proceed* contrary to the Writ. 1 Mod. 195. per Cur. Hill. 26 & 27 Car. 2. B. R. Haley's Case.

3. It was said that the Warden of the Fleet might *detain a Prisoner* after a Habeas Corpus directed to him out of B. R. *for his Fees*, but *not for Chamber-Rent*, &c. Comb. 109. Pasch. 1 W. & M. B. R. the Warden of the Fleet's Case.

4. The *Record it self is never removed* by a Habeas Corpus, as it is on a Certiorari, *but remains below*, and the Return *is only an Account or History of their Proceedings* stated and sent up to the Superiour Court to Judge and Determine the Matter there, therefore if a Cause be removed hither by Habeas Corpus, the Plaintiff here must begin de novo, and declare against the Defendant as in Custod. Marr. per Holt Ch. J. Trin. 3 Ann. B. R. 1 Salk. 352. in Case of Fazacharly v. Baldo.

5. The Habeas Corpus *suspends the Power of the Court below*, so that if they proceed, the Proceeding would be void, & coram non judice; per Holt Ch. J. 1 Salk. 352. in Case of Fazacharly v. Baldo.

6. When a Person comes to the Court of B. R. upon an Hab. Corp. and this Court thinks fit to *turn him over to the Marshal*, they commit him for no other Matter, than for the Cause or *Causes returned on the Hab. Corp*. 11 Mod. 52. pl. 24. Pasch. 4. Annae. Anon.

(H. 2) *ABUSE* THEREOF. *WHAT* SHALL BE SAID TO BE.

1. IT was resolved by 10 Judges, upon Conference with the Ld Keeper, (the other two Judges being out of Town), That an Habeas Corpus was an ancient and legal Writ; but that *under colour thereof*, the Warden of the Fleet and Marshal of B. R. ought not *to suffer Prisoners to go at large*, and that such Permission is an Abuse of the said Writ, and *is an Escape* in the Keeper of the Prison. Cro. C. 466. Trin. 12 Car. B. R. Anon.

2. A Habeas Corpus to the Town *of* N. was *delivered to the Proper Officer in open Court, to remove a Plaint* from that Court *before Trial*, notwithstanding which, the Court below *went on to Trial*. Defendant moved for an Attachment against the Sheriff of N. for proceeding to Trial after the Habeas Corpus delivered, as aforesaid, and a Rule was made to shew Cause; but upon shewing Cause, it appearing that *Issue was joined* April 27 *before the Habeas Corpus delivered*; the Court below was warranted by the Act of Parliament to proceed. Notes of Cases in C. B. 146. Mich. 8 Geo. 2. Hornbuckle v. Eaton.

(I) *OBEYED. HOW* IT MUST BE OBEYED,

1. IF the Steward of an *Inferiour Court proceeds* after an Habeas Corpus delivered, all their Proceedings are void, and the Court awarded a *Supersedeas*. Co. Car. 79 pl. 1. Mich. 3 Car. C. B. Clapham's Case.[33]

2. A Habeas Corpus was directed to the *Bishop of Durham*, who made no Return, whereupon Noy moved for another Writ, and to have a * *Penalty contained in it*. The Bishop insisted on having his *Privileges recited in the Writ*, before he would make a Return of it. But Doderidge and the Court said, they would not change the ancient Course and Forms in Forms and Usages. Lat. 160. Jobson's Case.

3. If a Prisoner will remove himself, he shall *pay the Costs* of the Removal; But if the Plaintiff will remove the Prisoner, he shall pay reasonable Charges. Mar. 89. pl. 143. Pasch. 15 Car. Anon.

4. On a Habeas Corpus, the *Gaoler* is bound to bring the Body, tho' he has not his *Charges tendered* him; but he may move the Court, and they shall rule, that he shall have his Charges first. 2 Show. 172. Mich. 33 Car. 2. B.

R. the King v. Greenaway.

5. The Sheriffs of *London and Middlesex*, where the Writ is *Returnable immediate*, must make their *Return the same Day that the Writ is delivered and bring the Body immediately*, as the Writ requires, and not suffer the Prisoner to wander abroad upon pretence thereof. *So* likewise where a Habeas Corpus is directed to the *Warden of the Fleet*. 2 L. P. R. 2.

6. A Rule was made to shew Cause, why an *Attachment* should not go against a Gaoler for denying to return a Habeas Corpus, and *extorting a Note* from the Prosecutor in his Custody, so as *by Menaces*, and Duress, he was forced to comply, and give the Note for Payment of the Money to the Gaoler. 8 Mod. 226. Hill. 10 Geo. The King v. Colvin.

(K) *NECESSARY*. IN WHAT CASES.

1. IF the *Chief Justice of B. R.* commits one to the Marshal *by his Warrant*, he ought not to be brought to the Bar *by Rule*, but by Habeas Corpus; per Holt Ch. J. 1 Salk. 349. pl. 4. Hill. 8 W. 3. B. R. Anon.

2. One *committed to the Marshal by the Court* may be brought up by Rule of Court; *but* one *committed by a Judge in his Chamber* cannot be brought up without a Habeas Corpus, to which a Return may be made; per Cur. 12 Mod. 641. Hill. 13 W. 3. B. R. Anon.

(L) PUNISHMENT OF *INSUFFICIENT, OR NO RETURNS*, AND WHAT IS TO BE DONE THEREUPON.

1. IN a Corpus cum Causa to the *Warden of the Fleet*, if he will not bring before the Justices of the Bank the Prisoner condemned, it is a Cause to *seise his Office*; per Babb. But Paston e Contra; For it may be he is escaped, and then the Warden shall pay the Condemnation. Br. Reseiser. pl. 41. cites 9 H. 6. 55.

2. W. was committed to the Fleet by the Lord Treasurer of England, and the Prisoner was brought to the Common Pleas by Habeas Corpus, which was returned, and *no Cause of the Commitment expressed*; and for that Cause the Prisoner was set at Liberty and Bailed. 1 Brownl. 44. Mich. 15 Jac. Warter's Case.

3. A Habeas Corpus having been awarded to the Cinque Ports to remove the Body cum Causa, and the Lord Warden pretending such Writ was not awardable to the Cinque Ports, or returnable by him, it was held by the whole Court, that a Habeas Corpus *with a great Penalty*, should be awarded returnable at another Day. Cro. J. 543. Mich. 17 Jac. B. R. Bourn's Case.

4. A Habeas Corpus went *to the Stannary Court*, to which an insufficient Return was made, and therefore disallowed. And the Court said, that the *Warden* of the Stanneries must be *amerced*, and you may go to the Coroners, and get it *affeered and estreat it*, (you know my Ld. Bath's Amercement is 5 1.) and an *alias Habeas Corpus* must go for the insufficiency of the Return of the first, and *upon that, the Body and Cause* must be removed up. And if *another Excuse* be returned, we will grant an *Attachment*. 1 Salk. 350. Trin. 12 W. 3. B. R. Anon.

(M) *RETURNABLE AT WHAT TIME*, AND OF AN[*] *ALIAS* AND *PLURIES*.

1. Habeas Corpus *to all Prisons, except London and Middlesex*, commanding the Sheriffs to bring the Prisoners must be returnable *at a Day certain* in Court. 2 L. P. R. 2.

(N) IN WHAT CASES THE PARTY SHALL *NOT* BE *DISCHARGED* ON HABEAS CORPUS, *BUT* SHALL BE PUT TO BRING *WRIT OF ERROR*.

1. ONE *indicted for buying and selling old Money, was convicted* at the Old-Baily, and *fined* 1000 *l.* and on a Habeas Corpus, the Return was, that he was *committed by Order of the Sessions Court at the Old-Baily* to his Custody, *tenor cujus ordinis* sequitur in Haec Verba, *viz. W. B. convictus, &c. Ideo Consideratum est*, that he be fined 1000 *l. & quod ibidem, viz. in Custodia* of the Keeper of Newgate in Gaola *remaneat sub salva Custodia, quousque finem persolvet*. The Commitment was held naught, because it was *not to the Sheriff*, who is the legal and immediate Officer to every Court of Oyer and Terminer, and because the Word (*Committitur*) is necessary to the Form of a legal Commitment. And per Cur. where a *Commitment was without Cause*, a Prisoner may be delivered by Habeas Corpus; *But* where there appears to be *good Cause*, as in the present Case, (which differences it from **Bushell's** Case), *and a Defect only in the Form*, as in this Case, he ought not to be discharged. 1 Salk. 348. Trin. 7 W. 3. B. R. Bethell's Case.[34]

2. *And tho' the Commitment ought to be to the Sheriff*, yet a Gaoler is a known Officer in the Law, and his Custody is the Custody of the Sheriff to many Purposes. Therefore the Court refused to discharge him on the Habeas Corpus, and left him to bring his Writ of Error. 1 Salk. 348. Bethel's Case.

3. Before Bushel's Case, no Man was ever delivered by Habeas Corpus, without Writ of Error from a Commitment of a *Court of Oyer and*

Terminer; per Cur. 1 Salk. 348. in Bethel's Casé.

(O) THE *DIFFERENCE BETWEEN* A *HABEAS CORPUS AND* A *CERTIORARI*. AND WHEN, AND HOW BAIL IS TO BE PUT IN.

1. A *Certiorari removes the Record cum Omnibus ea tangentibus*, but upon a Habeas Corpus, the Body only is removed, and they shall begin de Novo. Arg. Comb. 2. and that it was so at the Common Law, cites 3 H. 6. 3.

2. No Bail shall be put in upon a Writ of Habeas Corpus *before the Writ be returned*, and *every Attorney* of the Court of B. R. who shall put in any special Bail, before any Judge of the said Court, at the Time of the putting in of such Bail, *shall deposite* into the Hands of the Judge's Clerk of the said Court, before whom such Bail is put in, *the due Fee* for filing of that Bail, *viz.* For every Bail upon a Writ of Habeas Corpus 4s. 10d. and for every Bail upon a Cepi Corpus 2 s. 6d. and the Judges Clerks, whose Hands the Bails are put into, within 6 Days after the End of every Term, shall give a *Note in Writing to the Secondary* of the said Court, of all the Bails of the Vacation and precedent Term so put in, together with the Names of the Attorneys who put in those Bails, and they shall pay to the said Secondary the aforesaid Fee, by him received for those Bails in Manner aforesaid; per Cur. Pasch. 29 Car. 2. B. R. L. P. R. 172.

3. *Holt* Ch. J. said, he *wondered that People did not bring a Habeas Corpus and not a Certiorari*; For the Defendant might well say, I will not be sued in this Inferior Court, but will be sued above, and there I will put you in such Bail as the Court above will reach, tho' your Process cannot come at them, and that I cannot give you such Bail as you can reach, and so he may well remove the Cause by Habeas Corpus. And in such Case, if he do not *put in such Bail above, as the Action would require below*, a *Procedendo* should be granted; For if by the Course below there ought to be special Bail, tho' common Bail would do if it had commenced above originally, yet special Bail must be given above, or a Procedendo shall go. And if *one Action require special Bail, and another not*, and that do not appear to be done fraudulently to hold to special Bail, there we will hold it to special Bail or grant a Procedendo; *but if Fraud appear* we will retain it. 12 Mod. 646. Hill. 13 W. 2. in Case of Crosse v. Swift.

3. There is a Difference between a Habeas Corpus and a Certiorari, as to the *removing a Record*; For upon a Habeas Corpus we have not the Record itself, here in B. R. as we have upon a Certiorari; per Holt Ch. J. 6 Mod. 177. Trin. 3 Annae. B. R. in Case of Fazakerly v. Baldo.—Therefore, if the Cause be to be removed hither by Habeas Corpus, the Plantiff here must

begin de Novo, and *declare against the Defendant, as in Custodia Mareschalli*. 1 Salk. 352. S. C.

(P) PLEADINGS.

1. THE Error assigned of a Judgment in an Inferior Court was, because *after an Habeas Corpus* cum Causa sued out of B. R. and *delivered to the Mayor and Principal Officer* of that Court, and Acceptance and Allowance thereof, *they*, notwithstanding, *proceeded to Trial and Judgment*. Defendant pleaded in nullo est erratum, and it was moved not to be Error; because he does not allege the Habeas Corpus to be upon Record, so as the Error now assigned is not triable. But it was held, that this Proceeding was Error & *Coram non Judice*, which is confessed by the Pleading in Nullo est Erratum. And that *if it was not* true, that the Habeas Corpus was *delivered* to the Mayor, and allowed, *it should have been denied*, and the *Delivery or not Delivery is triable per Pais*. But because it is not denied, it is a manifest Error, whereupon the Judgment was reversed. Cro. C. 261. Trin. 8 Car. B. R. Ellis v. Johnson.

2. *So where* a Habeas Corpus issued out of C. B. to the Palace Court, and was delivered to the Judges, and *prayed to be allowed*, and yet they proceeded to Judgment, and a *Writ of Error* being brought thereupon, it was insisted, that the bringing the Writ of Error had *affirmed the Jurisdiction of the Court below*; But the Court held, that it was manifest Error, and the Writ well lies. But the Chief Justice said, that it is merely a Matter of *Favour, that Judgments in Inferiour Courts*, in Causes not arising within their Jurisdiction, *are not avoided without Writ of Error*, and that such was the Opinion of the Court of C. B. and Judgment was reversed accordingly. 2 Jo. 209. Pasch. 34 Car. 2. B. R. Copping v. Fulford.

3. Upon a Habeas Corpus *Returnable in Mich. Term*, if the *Declaration be delivered before Crastinum Animarum*, the Defendant must plead to try; but upon a Cepi Corpus, he is only to plead to enter. So in *Easter* Term, if the Declaration be delivered *before Mense Paschae*, the Defendant on a Habeas Corpus must plead to try; but on a Cepi Corpus, to enter only. 2 Salk. 515. Mich. 8 W. 3. B. R. Hall v. Englestone.

(Q) *RETURN AMENDED*, IN WHAT CASES.

1. ONE that practised Physick in London, being committed by the College of Physicians, brought an Habeas Corpus. In the Return *no Cause was shewn*, for which Reason it was held insufficient. It was moved to amend

the Return; but per Doderidge J. *Matter of Form only is amendable*, but *not* * *Matter of Fact*, which goes *in Justification of the Impisonment and Fine*. 2 Buls. 259. Mich 12 Jac. Dr. Alphonso v. the College of Physicians:[35]

2. The Court allowed the Officer to amend the Return of a Habeas Corpus, and to *make it Special*, because if a Procedendo should be granted, the Action would be lost. Carth. 76. Mich. 1 W. & M. B. R. Watson v. Clerk.

(R) ***REMANDED, BAIL'D, OR DISCHARGED.*** **IN WHAT CASES THE PRISONER SHALL BE.**

1. AUDITA Querela. The Party was in Newgate, and removed by Habeas Corpus into C. B, and the *Sheriff* of London came when the Party had pleaded Release * to the Issue, and *said that he was also condemned in* 200 *l. in Writ of Account, at the Suit of the same Conusee, and pray'd to have him remanded*; and it was said, that when this Matter is try'd, he shall be remanded. Br. Privilege. pl. 20. cites 24 E. 3. 27.

2. A Man was *Outlaw'd in Debt* for 19 l. in Banco, and after was *taken in London at the Suit of the same Plaintiff, and* was *condemned for the same Debt*, and committed to the Warden for Execution, and after *was removed in Banco* by Habeas Corpus, *and shewed Acquittance* of the same Debt, and prayed to go quit, sed non Allocatur, but was remanded to London, and there he may have Sci. fa. upon his Acquittance, against the Plaintiff; *But* upon his Removal, he *had Sci. fa. upon Charter of Pardon of the Outlawry*, and the Plaintiff warn'd and did not come, by which the Charter was allowed, *but he was remanded upon the Condemnation*, Br. Privilege. pl. 10. cites 48 E. 3. 22.

3. 2 *H.* 5. *Stat.* 1. *cap.* 2. *If a Corpus cum Causa or Certiorari be granted out of the Chancery* to remove one that is in Prison upon an Execution at another Man's Suit, *he shall be remanded*.

4. If one be *impleaded in London before he be impleaded in Bank*, he shall be * brought to answer and *remanded; but if* he be impleaded *in Bank before* he be impleaded *in London*, he shall be *dismissed*. Br. Privilege, pl. 53. cites 10 H. 6. 10.

5. Habeas Corpus was allowed after the Body was in Execution, but was not dismissed, but was *sent to the Fleet and to have Aud. Quer*. Quod Nota. And so the Practice is at this Day, that if a Man be *condemned in London, and Matter is against him in B. R.* they will send for him, and if he be *condemned there, he shall be sent to the Marshalsea, and there remain for both Executions*; but the Highest Court shall have the keeping of him, and so the first Plaintiff shall not lose his Execution. Br. Privilege, pl. 49. cites

22 H. 6.

6. One *in Execution upon Statute Merchant* was removed by Corpus cum Causa, and was *awarded to the Fleet* and not dismissed, because in Execution and cannot plead Release there but in Chancery. Br. Privilege, pl. 50. cites 22 H. 6. 56.

7. One came into B. R. by Cepi Corpus cum Causa to have the Privilege; because a *Clerk of the Bank had Bill against him upon Obligation, and* had *Attachment of Privilege against him*; and the *Prisoner was arrested in London after the Attachment awarded*, by which the Plaintiff prayed to be dismissed in London, and the Plaintiff in the Attachment shewed to him his Obligation, and the Defendant could not deny it, and therefore *Judgment* was given, *that he recover* his Debt and Damages, *and that he be sent back to London* as a Man condemned, *and that he answer to others who have Action against him in London*; Quod Nota; Quaere the Reason. Br. Privilege, pl. 46. cites 22 E. 4. 36.

8. A. is condemned in London for Debt, and is in Execution there; afterwards there is an Indictment and Verdict against him in the King's Bench for Trespass; A. is brought there by Habeas Corpus, and pleads Not Guilty to the Indictment, and afterwards is remanded to London; and after divers Processes of Distringas issued against the Jury, the Jury appears; and afterwards he is again removed into the King's Bench by Habeas Corpus; and the Jury being Sworn, he confesses the Indictment, and the Jury is discharged. Altho' this Indictment was by his own Procurement, and was Covinous; yet he was fined and committed to the Marshalsea for the said Fine, and for the Execution in London; by all the Judges of England, Volenti non fit injuria. Jenk. 169. pl. 31. cites 1 H. 7. 22.[36]

9. If the Sheriff *returns* Writ of Privilege, *that the Party is retained for Surety of the Peace in London taken by J. N.* in this Case J. N. shall be demanded, and if he comes, the Party shall *find Surety in Bank*, and *if J. N. makes Default, the Prisoner shall be dismissed* without Surety; per Bryan. Quod non negatur. Br. Privilege, pl. 52. cites 2 H. 7. 4.

10. When it *appears upon the Return that the Imprisonment is not lawful*, the Court may discharge the Prisoner. Resolved, per tot. Cur. 12 Rep. 83. Pasch. 9 Jac. Sir William Chancey's Case.

11. Where the Return of an Habeas Corpus was held Insufficient for not shewing Cause of the Imprisonment, the Party by Rule of Court was Bailed till the next Term, then to appear again, the Court conceiving it best for him; For if they should discharge him for the Insufficiency of the Return, then they would presently take him again and commit him, and then would

amend their Return and make it better; and so by Rule of Court he *was Bailed and not absolutely discharged for his own good to prevent his being taken up again if discharged, and then the Return amended*. 2 Buls. 259. Mich. 12 Jac. Dr. Alphonso v. the College of Physicians.

12. On an *Habeas Corpus*, the Return was read and spoken to, and the Prisoner ordered to be remanded. Twisden said, the Return should have been first filed, and the Prisoner committed to the *Marshalsea*; For otherwise the Court have no Power over him, and he cited 1 H. 7. Humphry Stafford's Case, who being brought to the Bar upon an *Habeas Corpus* by the Lieutenant of the Tower, was committed to the *Marshalsea*, and afterwards remanded to the Tower; but the other Judges differed as to the Commitment, and said it was not necessary to *keep the Prisoner in the Marshalsea* until the Matter was determined, but he might be sent from Time to Time to the same Prison, and brought up by Rule of Court until he is either bailed, discharged, or remanded; and so they said it was lately done in the Earl of Shaftsbury's Case. Vent. 330. Trin. 30 Car. 2. B. R. Anon.

13. Where a *Commitment is without Cause* a Prisoner may be delivered by Habeas Corpus, but where there appears to be good Cause and a *Defect in the Form* only of Commitment, he ought not to be discharged. 1 Salk. 348. Trin. 7 W. 3 B. R. Bethell's Case.

14. Defendant was brought to the Bar by Habeas Corpus returnable in one Month from the Day of St Michael to be committed to the Fleet, and the Court committed him, tho' the *Day of the Return was past*. Notes of Cases in C. B. Mich. 8 Geo. 2. Hewit v. Powell.

Viner Abridgment, vol. 14, pp. 209–233.

17.3.1.6Jacob, 1750

Habeas Corpora, Is a Writ for the Bringing up a Jury, or so many of them as refuse to appear upon the *Venire facias*, for the Trial of any Cause brought to Issue. *Old Nat. Br*. 157. And the *Habeas Corpora Juratorum* in the Court of *C. B*. serves for the same Purpose as the *Distringas Jurator*. in *B. R*. It commands the Sheriff to have the Jurors before the Judges at such a Day, to pass on the Trial of certain Parties, in such a Cause, *&c. Practis. Solic*. 308, 309.

Habeas Corpus, The great Writ of *English Liberty*, lies where one is indicted for any Crime or Trespass before Justices of Peace, or in a Court of

any Franchise, and being imprisoned for the same, hath offer'd sufficient Bail, but it is refused where bailable; he may then have this Writ out of the *King's Bench* to remove himself thither, and answer the Cause there. *F. N. B.* 250. And the Course in this Case is first to procure a *Certiorari* out of the *Chancery*, directed to the Justices for removing the Indictment into *B. R.* And upon that to procure this Writ to the Sheriff, for the Causing his Body to be brought at a Day. *Reg. Jud.* 81. This Writ is also used to bring the Body of a Person into Court, who is committed to any Gaol, either in Criminal or Civil Causes; and a *Habeas Corpus* will remove a Person and Cause from one Court and Prison to another. The Writ of *Habeas Corpus* was originally ordained by the *Common Law* of the Land, as a Remedy for such as were unjustly imprisoned, to procure their Liberty; and it is a mistaken Notion that this Writ is of a modem *Date*, and introduced with the Reign of King *Charles* 2. But before the Statute 31 *Car.* 2. 'tis true it was difficult to be obtained, because the Judges who had Authority to issue it, pretended to have Power either to grant or deny it; and the Sheriffs and Gaolers to whom the Writ was directed frequently put poor Prisoners to the Charges of a second, and third *Habeas Corpus*, before they would yield Obedience to the first; which being grievous to the People, the *Stat.* 31 *Car.* 2. was enacted to prevent Abuses of this Nature, and further our Laws for the Benefit of the Liberty of the Subject. *Laws of Liberty, pag.* 44, 45. By the Statute 31 *Car.* 2. *c.* 2. a Person in Prison may have an *Habeas Corpus* from any Judge, on Complaint made and View of the Copy of the Warrant of Commitment, (unless he be committed for Treason or Felony especially expressed in the Warrant, or other Offences or Matters not bailable) which *Habeas Corpus* shall be returnable immediately; and upon Certificate of the Cause of Commitment, the Prisoner shall be discharged on Bail to appear in the Court of *B. R.* the next Term, or at the next Assises, *&c.* where the Offence is cognisable: And Persons committed for Treason or Felony, (especially expressed in the Warrant) on Prayer in open Court, the first Week of the Term, or Day of Sessions, *&c.* are to be brought to Trial; and if not indicted the next Term, or Sessions after Commitment, upon Motion the last Day of the Term, *&c.* they shall be let out upon Bail; except it appears upon Oath, that the King's Witnesses are not ready; and if on Prayer they are not indicted or tried the second Term after Commitment, they shall be discharged. No Persons who shall be delivered upon an *Habeas Corpus*, shall be committed again for the same Offence, other than by legal Order and Process of such Court where they shall be bound to appear, or other Court having Jurisdiction of the Cause; on Pain of 500*l.* And if any Person

be in Prison, or any Officer's Custody, for any Criminal Matter, he shall not be removed by him into the Custody of any other Officer but by *Habeas Carpus*, upon Pain of incurring the Penalty of 100*l*. for the first Offence, and 200*l*. for the second Offence, and, being disabled to execute his Office. No Person shall be sent Prisoner to *Ireland, Scotland*, or any Place beyond the Seas in the King's Dominions; which will be false Imprisonment, on which the Prisoner may recover treble Costs, and not less than 500*l*. Damages, *&c*. and the Party committing or detaining him also shall incur the Penalty of a *Praemunire*. Judges denying a *Habeas Corpus* shall forfeit 500*l*. And the Officer refusing to obey it, or to deliver a true Copy of the Commitment Warrant, is liable to a Forfeiture of 100*l*. for the first Offence, *&c. Stat. Ibid*. This is the Substance of the *Habeas Corpus Act*; which hath been suspended several Times in late Reigns, on Rebellions, *&c*. No Writ of *Habeas Corpus*, or other Writ to remove a Cause out of an Inferior Court, shall be allowed, except delivered to the Judge of the Court, before the Jury to try the Cause have appeared, and before any of them are sworn. 43 *Eliz. cap*. 5. And Writs to remove Suits commenced in an Inferior Court of Record shall not be obeyed, unless delivered to the Steward of the Court before Issue or Demurrer joined, *&c*. And a Suit shall never be removed again, after a *Procedendo* is allowed. 21 *Jac*. 1. 23. Nor shall any Suit be removed where the Thing in Demand doth not exceed 5*l*. or where the Freehold, Inheritance, Title of Land, *&c*. are concerned. And Judges are to proceed in Suits in Inferior Courts laid not to exceed the Sum of 5*l*. although there may be Actions against the Defendant, wherein the Plaintiff's Demands may exceed that Sum, by *Stat*. 12 *Geo*. 1. *cap*. 29. If the Steward of an Inferior Court proceeds after an *Habeas Corpus* delivered and allowed, the Proceedings are void; and the Court of *B. R*. will award a *Supersedeas*; and grant an Attachment against the Steward for the Contempt. *Cro. Car*. 79, 296. A *Habeas Corpus* suspends the Power of the Court below, so that if they proceed, it is void, and *coram non judice*. And on a *Habeas Corpus*, if the Record be filed, no *Procedendo* can go to the Court below; but where a Record below is not filed, or not returned, it may be granted. 1 *Salk*. 352. A *Habeas Corpus cum Causa* removes the Body of the Party for whom granted, and all the Causes depending against him; and if upon the Return thereof the Officer doth not return all the Causes, *&c*. it is an Escape in him. 2 *Lill. Abr*. 2. A Judge will not grant a *Habeas Corpus* in the Vacation, for a Prisoner to follow his Suits; but the Court may grant a special *Habeas Corpus* for a Prisoner to be at his Trial in the Vacation time. *Ibid*. 3. And the Court may grant a *Habeas Corpus* to bring a Prisoner, not

in Prison on Execution, out of Prison, to be a Witness at a Trial; though it is at the Peril of the Party suing out the Writ, that the Prisoner do not escape. *Style* 119. *Trin.* 1640. But no Person ought to take out a *Habeas Corpus* for any one in Prison, without his Consent; except it be to turn him over to *B. R.* or charge him with an Action in Court. 2 *Lill.* A Man brought into *B. R.* by *Habeas Corpus*, shall not be removed thence till he has answered there; he shall be detained until then, and after he may be removed. 1 *Salk.* 350. A Person is in Custody upon a Criminal, and also on a Civil Matter, if he would move himself by *Habeas Corpus*, there ought to be but one *Habeas Corpus* of the Crown Side or Plea Side, and both Causes are to be returned. *Mod. Cas.* 133. If there be Judgment against a Defendant in the Court of *B. R.* and another in *C. B.* on which he is in Execution in the *Fleet*, he may have an *Habeas Corpus* to remove himself into *B. R.* where he shall be in Custody of the Marshal for both Debts. *Dyer* 132. Where the Chief Justice of the Court of King's Bench commits a Person to the Marshal of the Court by his Warrant, he ought not to be brought to the Bar by Rule, but by *Habeas Corpus*. 1 *Salk.* 349. In extrajudicial Commitments, the Warrant of Commitment ought to be returned *in haec verba* on a *Habeas Corpus*; but when a Man is committed by a Court of Record, it is in the Nature of an Execution for a Contempt, and in such Case the Warrant is never returned. 5 *Mod.* 156. The Cause of the Imprisonment must be particularly set forth in the Return of the *Habeas Corpus*, or it will not be good; for by this the Court may judge of it, and with a *Paratum habeo*, that they may either discharge, bail, or remand the Prisoner. 2 *Nels. Abr.* 915. 2 *Cro.* 543. If a Commitment is without Cause, or no Cause is shewn, a Prisoner may be delivered by *Habeas Corpus*. 1 *Salk.* 348. But on a *Habeas Corpus* granted by the Court of *B. R.* a Difference was made as to a Return; that where a Prisoner is committed by one of the Privy Council, there the Cause of his Commitment is to be returned particularly; but when he is committed by the whole Council, no Cause need be alledged. 1 *Leon.* 70, 71. And it has been adjudged, that on a Commitment by the House of Commons, of Persons for Contempt and Breach of Privilege, no Court can deliver on a *Habeas Corpus:* But *Holt* Ch. Just. was of a contrary Opinion. 2 *Salk.* 503, 404. A Writ of Error may be allowed by the King in such a Case, *&c.* and it is not to be denied *ex debitio Justitiae*; though it has been a Doubt, whether any Writ of Error lay upon a Judgment given on a *Habeas Corpus. Ibid.* A Man may not be delivered from the Commitment of a Court of *Oyer* and *Terminer* by *Habeas Corpus*, without Writ of Error: And where there appears to be good Cause, and a Defect only in the Form of the

Commitment, he ought not to be discharged. 1 *Salk*. 348. If a Person be committed by the Admiralty in Execution, he is not removeable by *Habeas Corpus* into *B. R.* to answer an Action brought against him there; but it might be otherwise if an Action had been before depending. *Ibid*. 351. Where there is a precedent Action in *B. R.* to the King's Suit, on which the Party is out on Bail, *Habeas Corpus* may be brought by the Bail, *&c*. and the Prisoner turned over; though this was greatly opposed in Favour of the King's Execution. *Ibid*. 353. A *Habeas Corpus* is a prerogative Writ, which concerns the Liberty of the Subject, and must be obeyed in *Counties Palatine, &c*. If it is not, an *Alias Habeas Corpus* will issue with a great Penalty. And on the Insufficiency of the Return of an *Habeas Corpus*, an *Alias Habeas Corpus* shall be granted. 2 *Cro*. 543. 12 *W*. 3. *B. R*. Where an Action is founded on the Custom of *London*, for a Thing actionable there, and not elsewhere; if it be removed by *Habeas Corpus*, a *Precedendo* shall be granted: But the Declaration itself ought to be returned upon the *Habeas Corpus*, and then the Court will see what was the Cause, *&c*. For the Special Matter and all the Proceedings are to be in the Return in this Case; as well as in an Action on a By-Law, to take Notice thereof. *Carth*. 75, 76. Before a *Habeas Corpus* is returned and filed, it may be amended; but not afterwards. 2 *Lill. Abr*. 2. A *Habeas Corpus* is grantable, without Motion, to remove a Person upon an Arrest; but not where committed for a Crime. 1 *Lev*. 1. In the suing out these Writs in *B. R.* to remove a Cause, *&c*. they are first to be carried to the other Court to be allowed; and some few Days after the Delivery, the Return must be called for, and special Bail put in at a Judge's Chamber; which being done, within four Days in Term, and six Days in the Vacation, the Cause is removed to the Superior Court. *Practis. Solic*. 262. And if the Defendant be actually a Prisoner, he shall not be delivered from Prison till the Bail on the *Habeas Corpus* be accepted, or justified in Court. *Ibid*. If a Defendant arrested cannot find Bail, and would be removed to the *King's Bench* or *Fleet* Prison, a *Habeas Corpus* is to be delivered there; and they will make out a Return, and send an Officer with the Defendant to a Judge's Chamber, and there a *Committitur* is made, whereupon the Judge's Tipstaff takes the Prisoner into Custody, and charges him in Prison; and he may agree with the Marshal or Warden, for the Liberty of the Rules, *&c. Practis. Attorn. Edit*. 1. *p*. 124. When the Defendant is in the Custody of a Bailiff, or in any other Prison, and would be turned over to the *King's Bench*, the Practice is the same; the *Habeas Corpus* directed to the Sheriff of *London* and *Middlesex* is to be delivered, and he, after Search in his Office for what Writs he hath against the

Defendant, will make Return of them, and then the Bailiff or Keeper of the other Prison, who hath the Defendant in Custody, is to carry him to a Judge's Chamber, where he will be turned over, *at supra*. Ibid.

Form of a *Habeas Corpus* returnable *immediate*.

GEORGE *the Second, &c. To the Mayor, Aldermen, &c. Greeting: We command you, that the Body of* A. B. *in our Prison under your Custody detained, as 'tis said, together with the Day and Cause of his Taking and Detaining, by whatsoever Name the said* A. B. *shall be charged in the same, you have under safe and secure Conduct, before our beloved and faithful* Philip *Lord* Hardwick, *our Chief Justice assigned to hold Pleas before us, at his Chamber situate in* Serjeants Inn *in* Chancery Lane, *immediately after the Receipt of this Writ, to do and receive all those Things which the same our Chief Justice shall then and there consider of in this Particular, &c.*

The *Habeas Corpus cum Causa*, to remove the Body and Cause is made out as follows:

A Writ of *Habeas Corpus* to remove a *Cause*.

GEORGE *the Second*. &c. *To the Mayor, Aldermen, and Sheriffs of the City of* London, *Greeting: We command you, that you have before as at* Westminster *on* Tuesday *next after the* Octave *of St*. Hillary, *under safe and secure Conduct, the Body of* C. D. *who is said to be detained in our Prison under your, or one of your Custodies, together with the Day and Cause of his being taken and detained, (by whatsoever Name the said* C. D. *be therein charged) to answer to* A. B. *of a Plea, or in an Action of Debt, &c. And further to do and receive all and singular those Things, which our Court before us shall then and there consider of in this Behalf: And have you then there this Writ*. Witness, *&c*.

Habeas Corpus ad prosequendum, Is to remove a Man in order to Prosecution and Trial in the proper County, *&c*.

Habeas Corpus ad faciendum a Recipiendum, A Writ issuing out of the *Common Pleas* for Defendants that are sued in Courts below, to remove their Causes into this Court: And if an Inferior Court will proceed against the Law, in a Thing of which the Justices of *C. B.* have Cognisance, and commit a Man thereon, they may discharge him by *Habeas Corpus*. 1 *Mod*. 235.

Habeas Corpus ad Respondendum, Lies where a Person is imprisoned upon Process at the Suit of another, in any Prison, except the *King's Bench* Prison; and a third Person would sue the Prisoner in *B. R.* this Writ removes the Prisoner from the Prison where he was into the *King's Bench*, to *answer* the Action in that Court; and for that Reason it is called *Habeas Corpus ad Respondend*. 2 *Lill. Abr*. 4. And where a Person is in Custody in an Inferior Jurisdiction, the Plaintiff may bring his Writ returnable in *B. R.* and then the Defendant cannot nonsuit the Plaintiff, nor be bailed but by the Court of *B. R. &c. Ibid*. There is Mention in some of our Books of a *Habeas Corpus ad Subjiciendum*, for a Criminal to *submit* to the Order of the Court.

Habeas Corpus ad satisfaciendum, Is had against a Man in the *Fleet* Prison, *&c*. to charge him in Execution; which being delivered to the Warden will be sufficient. *Practis. Attorn. Edit*. 1. *pag*. 173.

17.3.1.7Wood, 1754

V. *Liberty*, consists in a Power to do as one thinks fit, unless restrained by Force, or the Law. [a] Imprisonment is a Restraint of a Man's Liberty under the Custody of another. One may be *lawfully* imprisoned by the King's Writ, *&c*. or *unlawfully*. [b] An *unlawful* Imprisonment is not only an unjust Imprisonment at the first, but when one is detained longer than he ought, though he was at first lawfully imprisoned. For if a Sheriff, or Gaoler detains a Prisoner in Gaol after his Acquittal (unless it be for his Fees, not for Meat, Drink, or Lodging) this is an unlawful Imprisonment. An Action of false Imprisonment doth lie against a Bailiff for Arresting One after the Return of the Writ is past, it being now without Writ. [c] He that is put into the Stocks, or is under an Arrest, is said to be in Prison. Unlawful Imprisonment is sometimes called *Duress of Imprisonment* (from *Durities*) [d] where one is wrongfully imprisoned or detained, 'till he seals a Bond, *&c*. But not where a Man is lawfully imprisoned for another Cause, and for his Delivery seals a Bond, *&c*. nor where being arrested at the Suit of another; and in Prison on such an Arrest, willingly seals a Bond to a Stranger. [e] A Son shall avoid the Action by Reason of the unlawful Imprisonment of His Father; a Husband by Reason of the unlawful Imprisonment of the Wife. So If One's Beasts are unlawfully imprisoned till He Seals a Deed, He may Avoid the Action. So if one is under a just [f] *Fear* of being imprisoned, killed, maimed, *&c*. and he seals a Bond to him that *menaces* him, it is *Duress per Minas*, and in both Cases he may plead the *Duress*, and avoid the Action. If it be only a *Threatning* of a Battery, which may be light, or to take away my Goods, or to burn my House, *&c*. this will not make the Deed made upon that occasion to be by *Duress*; for there One may have Satisfaction by Recovery of Damages. There must be some Threatning of Life, or Member, or of Imprisonment, and to the End of obtaining the Deed, and thereupon the Deed must be made. To threaten another to kill or maim, or imprison him if he will not seal a Deed to a third Person, and thereupon he do it, this is as voidable as if it were made to the Party himself.[1]

Even *lawful* Imprisonment is so far pitied, that by several Statutes, as well as by Common Law, Defaults are saved on that Account.

The Law [g] favours Liberty, and the Freedom of a Man from Imprisonment; and therefore kind Interpretations shall be made on its Behalf. If a Man is unlawfully imprisoned, he may have an Action of Trespass for false Imprisonment, and recover Damages: [a] Or he may have the Writ of *Habeas Corpus*, and upon Return of this Writ by the Gaoler,

setting forth by whom he was committed, and for what Cause, He ought to be discharged if it appears to be against Law. [See *Magna Charta, chap*. 29.] But if the Case be doubtful, he may be bailed. If the Imprisonment appears to be just, He shall be remanded to the Prison, or bailed. [See Of *Bail, Book* 4. *chap*. 4. and 5.][2]

The King cannot send any Subject of *England* [b] against his Will to serve him out of the Kingdom; for that would be Banishment: No, he cannot send one into *Ireland*, against his Will, to serve as his Deputy there. [See the 7 *Rep*. 7, 8. *Calvin*'s Case.][3]

By the 31 Car. 2. chap. 2. [*called the* Habeas Corpus *Act, and entituled*, An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond Seas.] *A Prisoner may have an* Habeas Corpus *from any* Judge, *returnable immediately* (*unless committed for* Treason *or* Felony, *plainly and specially expressed in the Warrant, or for other Offences not bailable*) *and upon Certificate of the Cause of his Imprisonment may be discharged upon Bail, to appear in the King's Bench next Term, or the next Assizes or Sessions, or General Gaol-Delivery, or in any other Court where the Offence is cognizable*.

And Persons committed for Treason *or* Felony, *plainly and specially expressed in the Warrant, upon Prayer in* open Court *the first Week of the Term, or Day of the* Sessions *of* Oyer *and* Terminer, *or* Gaol-Delivery, *to be brought to Trial: If not indicted the next Term, or Sessions, after such Commitment, shall upon Motion the last Day of the Term, or Sessions, be let out upon Bail; unless it appear upon Oath that the King's Witnesses could not be ready that Term, or Sessions: And if such Persons, upon such Prayer, shall not be indicted, or tried the second Term after Commitment, they shall be discharged*.

A Subject committed for any Crime, shall not be removed into the Custody of any other Officer, unless by Writ, &c.

This Act shall not extend to any Person charged in any Civil *Cause*. [This Statute has been several Times suspended by Act of Parliament. The last Suspension was by 20 *Geo*. 2. *chap*. 1. See of *Praemunire, Book* 3. *chap*. 3. and see of *Habeas Corpus*, in the Catalogue of *Writs, Book*. 4. *chap*. 4.]

Wood Institute, bk. 1, ch. 2, pp. 16–17

17.3.1.8Cunningham, 1765

Habeas Corpora, Is a writ that lies for the bringing-in of a jury, or so many of them as refuse to come upon the *venire facias*, for the trial of a cause brought to issue. *Old Nat. Brev. fol.* 157. See great diversity of this writ in the table of the *Register Judicial*, verbo *Habeas Corpora*, and the *New Book of Entries, verbe eodem*. Cowell.

Habeas Corpus, Is a writ which a man, indicted of a trespass before justices of peace, or in a court of franchise; and being apprehended for the same, may have out of the King's Bench to remove himself thither at his own costs, and to answer the cause there. *F. N. B. fol.* 250. And the order in this case is, first to procure a *certiorari* out of the *Chancery* directed to the said justices, for the removing the indictment into the King's Bench, and upon that to procure this writ to the sheriff, for the causing his body to be brought at a day, *Reg. Jud. fol.* 81. where you may find divers cases, wherein this writ is to be used. *Cowell.*

Wherever a person is restrained of his liberty by being confined in a common gaol, or by a private person, whether it be for a criminal or civil cause, he may regularly by *habeas corpus* have his body and cause removed to some superior jurisdiction, which hath authority to examine the legality of such commitment, and on the return thereof either bail, discharge, or remand the prisoner. *Vaugh*. 136. *Bushel*'s case.

The *habeas corpus ad subjiciendum* is that which issues in criminal cases, and is deemed a prerogative writ, which the King may issue to any place, as he has a right to be informed of the state and condition of the prisoner, and for what reasons he is confined. It is also in regard to the subject deemed his writ of right, that is, such a one as he is intitled to *ex debito justitiae*, and is in nature of a writ of error to examine the legality of the commitment; and therefore commands the day, the caption, and cause of detention to be returned. 2 *Inst.* 55. 4 *Inst.* 182. *Cro. Jac*. 543. 2 *Roll. Abr*. 69.

The *habeas corpus ad faciendum & recipiendum* issues only in civil cases, and lies where a person is sued, and in gaol, in some inferior jurisdiction, and is willing to have the cause determined in some superior court, which hath jurisdiction over the matter; in this case the body is to be removed by *habeas corpus*, but the proceedings must be removed by *certiorari*. 3 *Bac. Abr*. 2. If upon this writ a civil action, and also a matter of crime be returned; as if a person be arrested for debt, and also charged with a warrant of a justice of peace for felony. 1. If it appears to the judge or

court, that the arrest for debt, or other civil action, is fraudulent, they may remand him. 2. If it be found real, they may commit him to the King's Bench with his causes, tho' they are matters of crime; for that court has conusance as well of the crime as of the civil action; but then in the term the court may take his appearance or bail to the civil action, and remand him, if they see cause, as to the crime to be proceeded on below; but upon the writ *ad faciendum & recipiendum*, there ought not singly a matter of crime to be returned, for that belongs to the *habeas corpus ad subjiciendum*. 2 *Hal. Hist. P. C.* 145. and see 6 *Mod*. 133.

There is likewise a writ of *habeas corpus ad respondendum*, where a person is confined in gaol for a cause of action accruing within some inferior court; and a third person hath also a cause of action against him; in which case he may have this writ in order to charge him in such superior court; for inferior courts being tied down to causes arising within their own jurisdiction, the party would be without remedy, unless allowed to sue him in another court; but it seems, that regularly a person confined in *B. R.* cannot be removed to the *C. B.* by this writ, nor *vice versa*; for in these cases there can be no defect of justice, as these courts have conusance as well of local as transitory actions. *Dyer* 197. *a*. 249. *pl*. 84, 296, 307. 1 *Mod*. 235. *Styl. Pract. Regist*. 330.

There are also, besides these, other writs of *habeas corpus*, as a *habeas corpus ad deliberandum & recipiendum*, which lies to remove a person to the proper place or county, where he committed some criminal offence. 3 *Bac. Abr*. 2, 3.

There is also a writ of *habeas corpus ad satisfaciendum* after a judgment; and on this writ the attorney for the plaintiff must indorse the number roll of the judgment on the back of the writ. *Styl. Regist*. 331.—— *Habeas corpus* upon a *cepi*, where the party is taken in execution in the court below.—So upon an attachment out of Chancery, and a *cepi corpus* returned by the sheriff, the next step is a *habeas corpus*; for the sheriff having executed the command of the writ of attachment by taking the body, he cannot carry him out of the county without the King's writ.—There is also a writ of *habeas corpus ad testificand'*, which is to remove a person in confinement, in order to give his testimony in some court of justice; for which *vide Styl*. 119, 126, 230. 3 *Keb*. 51. *Comb*. 17, 48. A person committing a crime in *Barbadoes*, and apprehended here, may be sent thither by *habeas corpus*, and tried. 3 *Keb*. 560, 566, 568. *Warner*'s case.—Also since the *habeas corpus* act, a person committing a criminal offence in *Ireland* being here, may be sent to

Ireland, and tried there. 2 *Vent*. 314. Colonel *Lundy*'s Case. Also Justices of Gaol-delivery may send prisoners by *habeas corpus* to the Sheriff of another County, and a precept to the Sheriff of that other County to receive them, namely, for a felony committed in that county, though that county be out of the circuit of the justice that sends them. 2 *Hale's Hist. P. C.* 37.—That if any *habeas corpus* come to receive a prisoner from another gaol, the gaoler is to take notice of the offence for which he stood committed at the other gaol, and to inform the court, that if he shall happen to be acquitted, or have his clergy, he may yet be remanded to the former gaol if there be cause. *Kelynge* 4. And that if any *habeas corpus* come to the gaolers to remove a prisoner, that with the prisoner they also certify the cause for which he stood there committed. *Kelynge* 4.

1. *What courts have jurisdiction of granting the* habeas corpus ad subjiciendum; *how far they have a discretionary power in granting or denying it; and of the* habeas corpus *act*.
2. *In what cases, and to what places, it may be granted*.
3. *Of the manner of suing it out; to whom to be directed; by whom to be returned; manner of compelling a return, and remedy for a false return*.
4. *What matters must be returned, together with the body of the party; and where the return shall be deemed certain and sufficient to warrant the commitment*.
5. *Of suggesting any thing contrary to the return; of amending any defect in the return; and of bailing, discharging or remanding the prisoner*.
6. *Of the* habeas corpus ad faciendum & recipiendum.

1. *WHAT COURTS HAVE JURISDICTION OF GRANTING THE HABEAS CORPUS AD SUBJICIENDUM; HOW FOR THEY HAVE A DISCRETIONARY POWER IN GRANTING OR DENYING IT; AND OF THE* HABEAS CORPUS *ACT*.

It is clear, that both by the Common law, as also by the statute, the courts of Chancery and King's Bench have jurisdiction of awarding this writ of *habeas corpus*, and that without any privilege in the person for whom it is awarded; but it seems, that by the Common law the court of King's Bench could only have awarded it in termtime, but that the Chancery might have done it as well out of as in term, because that court is always open. 2 *Inst*. 55. 4 *Inst*. 290. 2 *And*. 297. 2 *Jon*. 13, 14, 17.

If the *habeas corpus* issues out of Chancery, and on the return thereof the Lord Chancellor finds that the party was illegally restrained of his liberty, he may discharge him, or if he finds it doubtful he may bail him; but then it must be to appear in the court of King's Bench, for the Chancellor hath no power in criminal causes; or the Chancellor may commit the party to the

Fleet, and in termtime may *propriis manibus* deliver the record into the King's Bench, together with the body; and thereupon the court of King's Bench may proceed to bail, discharge, or commit the prisoner. 2 *Hal. Hist. P. C.* 147. 2 *Hawk. P. C.* 114-5.

If the *habeas corpus*, and also a *certiorari* be granted, returnable in Chancery, and the cause and body be returned there, they may be sent into the King's Bench; if the body only be returned with his causes, by *habeas corpus* into the Chancery, and delivered over into the King's Bench, they may proceed to the determination of the return, and either by *procedendo* remand him, or grant a *certiorari* to certify the record also, and thereupon commit or bail the prisoner, as there shall be cause. 2 *Hal. Hist. P. C.* 147-8.

But the sending an *habeas corpus ad faciendum & recipiendum* by the Chancellor for persons arrested in civil causes, especially being in execution, is neither warrantable by law nor ancient usage, and particularly forbidden by the statute 2 *Hen.* 5. *cap*. 2. as to persons in execution. 2 *Hal. Hist. P. C.* 148.

There are several strong opinions, that no *habeas corpus ad subjiciendum* could by the Common law issue out of the court of Exchequer or Common Pleas, unless it were in the case of privilege, because these courts are confined to civil causes merely; and therefore unless the party were an attorney, or intitled to the privilege of the court as an officer, *&c*. or unless there had been a suit commenced against him in those courts, they could not grant a *habeas corpus ad subjiciendum*, tho' they might any other writ of *habeas corpus. Dyer* 175. *b. pl.* 26. 2 *Inst.* 55. 3 *Leon*. 18. 4 *Inst.* 70, 182, 290. 1 *Mod*. 235. *Vaugh*. 155. *Carter* 221. 2 *Vent*. 22.

But notwithstanding these opinions, it was holden in *Bushel*'s case, that the court of Common Pleas may issue a *habeas corpus ad subjiciendum*, and that if it appeared on the return thereof that the party was imprisoned and detained against law, the court might, tho' there was no privilege in the case, discharge him; for that to remand him would be an act of injustice in the court, and contrary to *Magna Charta. Vaugh*. 155.

Also by the statute of 16 *Car*. 1. *cap*. 10. they have an original jurisdiction to bail, discharge, or commit, upon an *habeas corpus* for one committed by the Council-Table, as well as the King's Bench, and that altho' there be no privilege for the person committed. 2 *Hal. Hist. P. C.* 144.

Also by the *habeas corpus* act, 31 *Car*. 2. Any of the said courts in

termtime, and any judge of either bench, or baron of the Exchequer, being of the degree of the coif, in the vacation, may award a *habeas corpus* for any prisoner whatsoever, and on the return thereof discharge him, if it shall clearly appear that the commitment was against law, as being made by one who had no jurisdiction of the cause, or for a matter for which no man ought by law to be punished; or bail him, if it shall be doubtful whether the commitment were legal or not; or remand him, according to the nature and circumstances of the case. 2 *Jon*. 14, 17.

Notwithstanding the writ of *habeas corpus* be a writ of right, and what the subject is intitled to, yet the provision of the law herein being in a great measure eluded by the judges being only enabled to award it in termtime, as also by an imagined notion in the judges, that they had a discretionary power of granting or refusing it; but especially by the act and contrivance of officers, to whom it was directed, who used great delays in making any return to it. 4 *Inst*. 290. 3 *Buls*. 27.

By the 31 *Car*. 2. *cap*. 2. commonly called the *habeas corpus* act, reciting, "That great delays had been used by sheriffs, gaolers and other officers, to whose custody the King's subjects had been committed for criminal or supposed criminal matters, in making return of writs of *habeas corpus*, by standing out an *alias* and *pluries*, and sometimes more, and by other shifts, to avoid their yielding obedience to such writs, contrary to their duty, and the known laws of the land, whereby many subjects had been detained in prison in such cases where by law they were bailable:" Therefore be it enacted, "That whensoever any person shall bring any *habeas corpus*, directed to any person whatsoever, for any person in his custody, and the said writ shall be served on the said officer, or left at the gaol or prison with any of the under officers, under keepers, or deputy of the said officers or keepers, that the said officer or officers, his or their under officers, under keepers or deputies, shall within three days after such service thereof, (unless the commitment were for treason or felony, plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same, and indorsed on the said writ, not exceeding 12 *d. per* mile, and, on security given by his own bond to pay the charges of carrying back the prisoner, if he should be remanded, and that he will not make any escape by the way, make return of such writ, and bring or cause to be brought the body of the party so committed or restrained, unto or before the Lord Chancellor or the Lord-keeper, or the Judges or Barons

of the court from which the said writ shall issue, or such other persons before whom the said writ is made returnable, according to the command thereof; and shall then certify the true causes of his detainer or imprisonment, unless the commitment be in a place beyond twenty miles distance, *&c*. and if beyond the distance of twenty miles, and not above one hundred miles, then within the space of ten days; and if beyond the distance of one hundred miles, then within the space of twenty days.[”]

And it is further enacted, *sect*. 3. “That all such writs shall be marked in this manner, *per stat’um tricesimo primo Caroli Secundi Regis*, and shall be signed by the person that awards the same; and if any person shall be or stand committed or detained as aforesaid, for any crime, unless for treason or felony plainly expressed in the warrant of commitment, in the vacation time, it shall be lawful for such person so committed or detained, (other than persons convict or in execution by legal process) or any one on his behalf, to complain to the Lord Chancellor or Lord-keeper, or any justice of either bench, or Baron of the Exchequer, of the degree of the Coif; and the said Lord Chancellor, *&c*. Justice or Baron on view of the copy of the warrant of the commitment, or otherwise on oath that it was denied, are authorised and required, on request in writing, by such person, or any in his behalf, attested and subscribed by two witnesses who were present at the delivery of the same, to grant an *habeas corpus* under the seal of the court whereof he shall be one of the Judges, to be directed to the officer in whose custody the party shall be, returnable immediately before the said Lord Chancellor, *&c*. Justice or Baron; and on service thereof as aforesaid, the officer, *&c*. in whose custody the party is, shall, within the time respectively before limited, bring him before the said Lord Chancellor, Justice or Baron, before whom the said writ is returnable; and in case of his absence, before any other of them, with the return of such writ, and the true causes of the commitment and detainer; and thereupon, within two days after the party shall be brought before them, the said Lord Chancellor, Justice, or Baron, before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his recognizance, with one or more sureties, in any sum, according to their discretions, having regard to the quality of the prisoner, and nature of the offence, for his appearance in the King’s Bench the term following, or in such other court where the offence is properly cognizable, as the case shall require; and then shall certify the said writ, with the return thereof, and the recognizance, into such court, unless it be made appear to the said Lord Chancellor, *&c*. that the party so committed is detained upon a legal

process, order or warrant, out of such court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences, for the which by law the prisoner is not bailable. [”]

But it is provided, *sect*. 4. [“]That if any person shall have wilfully neglected, by the space of two whole terms after his imprisonment, to pray a *habeas corpus* for his enlargement, he shall not have a *habeas corpus* to be granted in vacation-time in pursuance of this act.[”]

And it is further enacted, *sect*. 6. [“]That no person, who shall be set at large upon any *habeas corpus*, shall be again imprisoned for the same offence by any person whatsoever, other than by the legal order and process of such court, wherein he shall be bound by recognizance to appear, or other court having jurisdiction of the cause, on pain of 500 *l*.[”]

And it is hereby further enacted, *sect*. 7. “That if any person, who shall be committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court the first week of the term, or the first day of the sessions of oyer and terminer, or general gaol-delivery, to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer, or general gaol-delivery, after such commitment, the justices of the said court shall, upon motion in open court, the last day of the term or sessions, set at liberty the prisoner upon bail, unless it appear upon oath, that the witnesses for the King could not be produced the same term; and if such prisoner upon his prayer, *&c*. shall not be indicted and tried the second term or sessions, he shall be discharged from his imprisonment.[”]

Provided, *sect*. 8. “That nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody according to law for such other suit.[”]

And it is further enacted, *sect*. 10. [“]That it shall be lawful for any prisoner as aforesaid, to move and obtain his *habeas corpus*, as well out of the Chancery or Exchequer, as the King’s Bench or Common Pleas; and if the said Lord Chancellor or Lord Keeper, or any judge or judges, baron or barons, for the time being, of the degree of the coif, of any of the courts aforesaid, in the vacation-time, upon view of the copy of a warrant of commitment or detainer, or on oath made that such copy was denied, shall

deny any writ of *habeas corpus* by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the party grieved the sum of 500 *l*.[”]

It is provided, *sect*. 18. “That after the assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol upon any *habeas corpus* granted in pursuance of this act, but upon such *habeas corpus* shall be brought before the judge of assize in open court, who thereupon shall do what to justice shall appertain.[”]

But it is provided, *sect*. 19. “That after the assizes are ended, any person detained may have his *habeas corpus*, according to the direction of this act.”

Sect. 3. *Attested and subscribed by two witnesses*] One witness, with an affidavit that the other is sick, is sufficient. *Comb*. 6.

Sect. 7. *The first week of the term*] A person need not enter his prayer the first week, if there be an act of parliament which suspends the *habeas corpus* act; and takes away the power of bailing for a time. 1 *Salk*. 103.—The grand sessions of *Wales* is in nature of a *term*; so that the party entring his prayer there on the want of prosecution for a term, *B. R.* may bail him. *Comb*. 6.

Sect. 10. *In the vacation time*] And therefore this statute makes the judges liable to an action at the suit of the party grieved in one case only, which is the refusing to award a *habeas corpus* in vacation-time, but leaves it to their discretion, in all other cases, to pursue its directions in the same manner as they ought to execute all other laws, without making them subject to the action of the party, or to any other express penalty or forfeiture, 2 *Hawk. P. C*. 92.

In the construction of this statute it was held by two judges, in the absence of one, contrary to the opinion of the other, that persons committed by rule of court are not intitled to the benefit of this act; and that none are intitled to make their prayer but such as are committed by a warrant of a justice of peace, or secretary of state, and not those committed by rule of court, for that is not within the meaning of the act, which speaks of a commitment by warrant. *Cases in Law and Equity* 429. See Bail.

2. *IN WHAT CASES, AND TO WHAT PLACES, IT MAY BE GRANTED.*

A *habeas corpus* is a writ of right, which the subject may demand, and is the most usual remedy by which a man is restored again to his liberty, if he

hath been against law deprived of it. *Vaugh*. 136.

By the 31 *Car*. 2. *cap*. 2. *sect*. 9. it is enacted, “That if any subject of this realm shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers, unless it be by *habeas corpus*, or some other legal writ; or where the prisoner is delivered to the constable, or other inferior officer, to carry such prisoner to some common gaol; or where any person is sent by order of any judge of assize, or justice of the peace, to any common workhouse or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to a trial or discharge by due course of law; or in case of sudden fire or infection, or other necessity; upon pain, that he who makes out, signs or countersigns, or obeys or executes such warrants; shall forfeit to the party grieved one hundred pounds for the first offence, two hundred pounds for the second offence, *&c*.[”]

If a party be imprisoned against law, tho’ he is intitled to a *habeas corpus*, yet may he have an action of false imprisonment, in which he shall recover damages in proportion to the injury done him. *Fitz. Corpus cum Causa* 2. 9 *H*. 6. 44. *a*. 2 *Inst*. 55. 10 *H*. 7. 17. 5 *Co*. 64. 11 *Co*. 98, 99.

But it was held in *Bushel*’s case, (who together with the other juror appointed to try an indictment for a riot between the *King* and *Pen and Mead*, were fined at the *Old Bailey*, because they found a verdict *contra plenam evidentiam & directionem curiae in materia legis*; and for nonpayment of the fine, divers of them being committed to prison, who brought their *habeas corpus* in *C. B.* and the imprisonment held illegal, in several conferences with all the judges;) that yet no action lay against the commissioners, because they acting as judges and commissioners of oyer and terminer, can no more be punished for an erroneous commitment, than they can be for an erroneous judgment; and the highest remedy the party in this case can have is a writ of *habeas corpus*. 1 *Mod*. 119. 3 *Keb*. 322, 358. *Vaugh*. 153. 2 *Jon*. 13. 1 *Sid*. 273.

If a husband confine his wife, she may have a *habeas corpus*; but the judges on the return of it, cannot remove the wife from her husband. 2 *Lev*. 128.

A motion was made for a *habeas corpus* to the Lord *Leigh*, for having in court the body of his wife; and the case was, The parties were married in 1669, and because they were both within age, no settlement was made till

1671; Lord *Leigh* persuades his wife to levy a fine of some lands of 900 *l. per ann*. whereof she had the inheritance, to him and his heirs; and because she prayed to advise with her friends, he confined her until her mother had petitioned the King and council, and there the matter was referred to three lords of the council; and they made an award, which the Lady *Leigh* was ready to perform; but the Lord *Leigh* brought to her an instrument to be sealed, upon which she made the same request as before, that she might advise with her friends, but he refused to permit it, and presently compelled his wife to go with him to his house in the country, where he made her his prisoner; and tho' by the barbarous usage of her husband she fell sick, yet he would not let her have physicians or servants to attend her, or to be visited by her friends; *& per cur*. a *habeas corpus* was granted, for this is a writ of right, which the subject may demand, and the King ought to have an account of his subject; and tho' it was objected, that here was no affidavit but of such complaint as the Lady *Leigh* had made in a letter to her mother, yet the *habeas* shall go to put the Lady in a condition to make oath of this matter herself, and to exhibit articles against her husband; for here is sufficient matter to compel him to find sureties of the peace, and of his good behaviour also; for this treatment the Lady may sue out a divorce *propter saevitiam*; and in a like case between Sir *Philip Howard* and his wife, a *habeas corpus* was granted; and in this case an attachment may be granted against my Lord *Leigh*, if he refuses obedience to the writ, for being a contempt, a peer has no privilege. *Lady Leigh*'s case, *Mich*. 26 *Car*. 2. *in B. R*. 2 *Lev*. 128. 3 *Keb*. 433. *S. C*.

If a person be taken in the manner within a forest killing or chasing deer, *&c*. and the officer upon tender of sufficient sureties refuses to bail him, he may have a *habeas* out of the courts at *Westminster*, which courts may bail him to appear at the next *eyre* holden for the forest; and this is the rather, because justice-seats are but seldom holden, and the party, without this remedy, might be obliged to continue a long time in confinement. 4 *Inst*. 290.

If a person be in custody, and also indicted for some offence in the inferior court, there must, besides the *habeas corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, so the *habeas corpus* alone removes not the record itself, but only the prisoner with the cause of his commitment; and therefore, although upon the *habeas corpus*, and the return thereof, the court can judge of the sufficiency or insufficiency of the return and commitment, and bail or

discharge, or remand the prisoner, as the case appears upon the return, yet they cannot upon the bare return of the *habeas corpus* give any judgment, without the record itself be removed by *certiorari*; but the same stands in the same force it did, though the return should be adjudged insufficient, and the party discharged thereupon of his imprisonment; and the court below may issue new process upon the indictment. 2 *Hal. Hist.* 210, 211. 1 *Salk.* 352. *Comb*. 2.

But it is otherwise in a *habeas corpus* in civil causes, which suspends the power of the inferior court; so that if they proceed after, their proceedings are *coram non judice*. 1 Salk. 352.

If a person be excommunicated, and the significarit does not express that the cause of excommunication is for any of the offences within the statute 5 *Eliz.* the remedy expressly appointed upon that statute is a *habeas corpus*, and upon the return of it the parties shall be discharged. 1 *Vern*. 24. *Dominus Rex* v. *Sneller*; & *vid*. 2 *Sid*. 181. 1 *Keb*. 683.

If the Chief Justice of the King's Bench commit one to the marshal by his warrant, he ought not to be brought to the bar by rule, but by *habeas corpus*. 1 Salk. 349. Per Holt *Ch. J.*

A person convicted of horse-stealing, and in gaol at St. *Albans*, was brought by *habeas corpus* and *certiorari* to *B. R.* and the court demanded of him what he could say why execution should not be done upon the indictment; and because he could not shew good cause to stay execution, he was committed to the marshal, who was commanded to do execution, and the next day he was hanged. *Cro. Car*. 176.

It hath been already observed, that the writ of *habeas corpus* is a prerogative writ, and that therefore by the Common law it lies to any part of the King's dominions; for the King ought to have an account why any of his subjects are imprisoned, and therefore no answer will satisfy the writ, but to return the cause with *paratum habeo corpus, &c*. 2 Rol. Abr. 69. Cro. Jac. 543.

Hence it was held, that this writ lay to *Calice* at the time it was subject to the King of *England*. Palm. 54.

It hath been held, that this writ lies to the marches of *Wales*, as it does to all other courts which derive their authority from the King, as all the courts exercising jurisdiction within his dominions do, and that it being a prerogative writ, it does not come within the rule *Brevia Domini Regis non currunt, &c*. for that must be understood of writs between party and party. 2. *Rol. Abr*. 69. *Wetherly* and *Wetherly*.

Also it hath been adjudged, that this writ lies to the cinque ports and to *Berwick*, although objected to have been part of *Scotland*. *Palm*. 54, 96. *Cro. Jac*. 543. *S. C*. 2 *Rol. Abr*. 69. and this writ lies to a county palatine. *Latch* 160. *Jobson*'s case. 3 *Keb*. 279.

Also by the *habeas corpus* act, 31 *Car*. 2. *cap.*—. *par*. 11. it is enacted and declared, "That an *habeas corpus*, according to the intent and true meaning of the act, may be directed and run into any county palatine, the cinque ports, or other privileged places within the kingdom of *England*, dominion of *Wales*, or town of *Berwick* upon *Tweed*, and the isles of *Jersey* or *Guernsey*; any law, *&c*.["]

3. *OF THE MANNER OF SUING IT OUT; TO WHOM TO BE DIRECTED; BY WHOM TO BE RETURNED; MANNER OF COMPELLING A RETURN, AND REMEDY FOR A FALSE RETURN.*

By the 1 & 2 *Ph. & M. cap*. 13. No writ of *habeas corpus* or *certiorari* shall be granted to remove any prisoner out of any gaol, or to remove any recognizance, except the same writ be signed with the proper hands of the Chief Justice, or in his absence, of one of the justices of the court, out of which the same writ shall be awarded or made; upon pain that he that writeth any such writs, not being signed, as aforesaid, to forfeit for every such writ 5 *l*.

A *habeas corpus* was prayed to the gaoler of the county gaol of *Worcester*, to remove one *Fox* in *B. R*. to assign errors in person, upon the record of his conviction of a *praemunire* for recusancy; but this was not granted till the writ of error was brought into court under seal, and the record certified. *Mich*. 26 *Car*. 2. *Fox*'s case.

Every *habeas corpus ad subjiciendum* must in termtime be awarded on motion and leave of the court, but a *habeas corpus ad faciendum & recipiendum* is usually granted without motion, as it relates to a civil affair only. 2 *Mod*. 306.

So where debt was brought against husband and wife on an obligation sealed by them both, and both being taken upon a *capias*, it was moved for an *habeas corpus* to bring them into court, to the intent that the husband only might be committed into custody, and the wife discharged; and it was held by the court, that this *habeas corpus* for removing the bodies might have been for them without motion, but where the party is committed for a crime, there it ought to be on motion. 1 *Lev*. 1. *Slater* and *Slater*.

Wherever a person is imprisoned by any person whatsoever, whether he be one concerned in the administration of justice, as a sheriff, gaoler, &c. or

a private person, such as a doctor of physick, who confines a person under pretence of curing him of madness, *&c*. the *habeas corpus* must be directed to him. *Godb*. 41.

A *habeas corpus* was directed to the Chancellor of *Durham*, by which he was directed to make a precept to the sheriff to have the body of *J. S.* with the cause of his commitment, *Coram Domino Rege apud Westm'*; the Chancellor returned, that he made a precept to the sheriff to have the body before him, with the cause of, *&c*. who accordingly returned the cause and the body before him, and sets out the cause, *& haec est causa detentionis; & per Hale* Ch. J. a *habeas corpus ad faciendum & recepiendum* directed in this manner is good; *secus* of a *habeas corpus ad subjiciendum*; for the King may send his writ to whom he pleases, and he must have an answer of his prisoner where-ever he be; there is a great deal of difference between a *habeas corpus ad subjiciendum* and other *habeas corpus*; for this is the subject's writ of right, in which case the county palatine has no privilege; in 31 *Ed*. 1. a *habeas corpus ad subjiciendum* was directed to the bishop of *Durham*, who returned, that he was a count palatine, and therefore was not bound to answer the writ, for which he was fined 4000 *l. Hill*. 17 *Cor*. 1. a *habeas corpus* was directed to the bishop of *Durham* to return the body of one *Rickoby*; and resolved, that the writ did well run thither: In this case the writ is directed to the Chancellor, to command the sheriff to have his body here; but he commands him to have the body before himself, which is ill; again, the Chancellor doth not return the body to us, for here is no *cujus corpus parat' habeo*; it is not enough to say, that the sheriff returned the body to him, but he ought to return it to us here; we have nothing before us, therefore he must be remanded, for he is brought up without a warrant. *Hill*. 25 & 26 *Car*. 2. in *B. R*. 3 *Bac. Abr*. 9. 3 *Keb*. 279. *S. C.*

A *habeas corpus* directed in the disjunctive to the sheriff or gaoler is wrong; but where a man is taken on a warrant of the sheriff, in pursuance of a writ to the sheriff, the *habeas corpus* ought to be directed to the sheriff, for the party is in his custody, and the writ itself must be returned, otherwise it is where one is committed to the gaoler immediately, as in cases criminal. 1 *Salk*. 350. *per curiam*.

This writ must be returned by the very same person to whom it is directed. A *habeas corpus* was awarded to the sheriff of ———, who before the return leaves the office, and a new sheriff is made, who returns *Languidus*; this return is not good, but it ought to be returned by them two, the first that he had the body, and had delivered it to the new sheriff, and

the new sheriff may then return *Languidus*. Pasch. 26 Car. 2. Peck *and* Cresset, 3 Bac. Abr. 10.

The method to compel a return to a *habeas corpus* is by taking out an *alias* and *pluries*, which if disobeyed, an attachment issues of course; also the court may take a rule on the officer to return his writ, and if disobeyed, the court may proceed against such disobedience in the same manner as they usually do against the disobedience of any other rule. *F. N. B.* 68. 11 *H*. 4. 86. 1 *Mod*. 195. 2 *Lev*. 128-9. 5 *Mod*. 21.

And by the 31 *Car*. 2. *cap*. 2. *sect*. 2. it is enacted, "That if any officer, *&c*. shall neglect or refuse to make returns, as by the act is directed, or to bring the body of the prisoner, according to the command of the writ, or shall not within six hours after demand deliver a true copy of the commitment, *&c*. he shall forfeit for the first offence 100 *l*. for the second offence 200 *l*. and be made incapable to hold his office.["]

A *habeas corpus* went to the *Stannary* court, to which an insufficient return was made, and therefore disallowed; *& per cur*. The warden of the *Stannaries* must be amerced, and you may go to the coroners and get it affected, and estreat it, and an *alias habeas corpus* must go for the insufficiency of the return of the first, and upon that the body and cause must be removed up; if another excuse be returned, we will grant an attachment. 1 *Salk*. 350.

And as a gaoler, *&c*. is obliged to bring up the prisoner at the day prefixed by the writ, it is no excuse for not obeying of a writ of *habeas corpus ad subjiciendum*, that the prisoner did not tender the fees due to the gaoler; nor yet is the warrant of such tender an excuse for not obeying a writ of *habeas corpus ad faciendum & recipiendum*; but if the gaoler brings up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees. 2 *Jon*. 178. *March* 89. 1 *Keb*. 272, 280. 2 *Show*. 172.

For a false return there is regularly no remedy against the officer, but an action on the case at the suit of the party grieved, and an information or indictment at the suit of the King. 6 *Mod*. 90. 1 *Salk*. 349. But no action lies until the return be filed. 1 *Salk*. 352.

But it has been held, that if a gaoler return one *Languidus* when the party himself brings his *habeas corpus*, and is in good health, an attachment shall issue against him; *secus* if the *habeas corpus* was brought by another. 3 *Bac. Abr*. 11.

As upon the return of the writ the court is to judge, whether the cause of the commitment and detainer be according to law, or against it; so the officer or party in whose custody the prisoner is, must, according to the command of the writ, certify on the return thereof the day, cause of caption and detainer. *Vaugh*. 137.

A *habeas corpus* was directed to remove one *J. S*. to which no return was made; then an *alias* was granted, and it was returned *quad traditur in ballium ante adventum istius brevis*; and the truth of the case was, that between the first and second writ the party was bailed; *& per cur*. after an *habeas corpus* delivered, the party cannot be bailed; and if it happens otherwise, yet the cause of the commitment ought to be returned, though the body can't be brought into court; and in this case the officer having on the first writ of *habeas corpus* taken 5 *l.* to have the body in court, and yet making no return, the court granted an attachment against him. 3 *Bac. Abr*. 11. *Hill*. 25 *&* 26 *Car*. 2. in *B. R. Salmon* ver. *Slade*.

Where a commitment is in court to a proper officer there present, there is no warrant of commitment; and therefore to a *habeas corpus* he cannot return a warrant in *haec verba*, but must return the truth of the whole matter, under peril of an action; but if he be committed to one that is not an officer, there must be a warrant in writing, and where there is one, it must be returned; for otherwise it would be in the power of the gaoler to alter the case of the prisoner, and make it either better or worse than it is upon the warrant; and if he may take upon him to return what he will, he makes himself judge; whereas the court ought to judge, and that upon the warrant itself. 1 *Salk*. 349.

If a person in custody on an *excommunicato capiendo* brings a *habeas corpus*, the writ of *excommunicato capiendo* itself must be returned, as well as the sheriff's warrant for taking him, because the warrant may be wrong when the writ is right; and though the warrant be wrong, yet if the writ is right, the party is rightfully in custody of the sheriff. 1 *Salk*. 350.

Upon a *habeas* directed to the constable of *Windsor* Castle to remove the body of one Mr. *Tayler*, a barrister, at the day of the return of the writ, a soldier brought in the prisoner into court, and the writ, and the warrant by which he was committed; but the court held it no manner of return, for it ought to be entered in *Latin*, and ingrossed in due form. *Pasch*. 18 *Car*. 2. *Taylor*'s case. 3 *Bac. Abr*. 12.

It is said in general, that upon the return of the *habeas corpus* the cause

of the imprisonment ought to appear as specifically and certainly to the judges, before whom it is returned, as it did to the court or person authorised to commit. *Vaugh*. 137.

For if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge him, and therefore the certainty of the commitment ought to appear; and the commitment is liable to the same objection where the cause is so loosely set forth, that the court cannot adjudge whether it were a reasonable ground of imprisonment or not. But for this title **Commitment** and **Bail** in criminal cases, and 1 *Hal. Hist. P. C.* 584. *Skin*. 676. 12 *Co*. 130-1.

Rudyard an attorney of *C. B.* being committed to *Newgate* by my Lord Mayor and Sir *John Robinson*, for refusing to give security for his good behaviour, was brought by *habeas corpus* to the *C. B.* and it was returned as the cause of his commitment, that whereas he had been complained of to my Lord Mayor and Sir *John Robinson* for several misdemeanors, particularly for inciting his Majesty's subjects to the disobedience of his Majesty's laws; more particularly of an act of parliament made is the 22d year of his reign, against seditious conventicles; and whereas he had been examined before them for abetting such as frequented seditious, conventicles, contrary to the statute 22 *Car*. 2. and upon his examination they found cause to suspect him, therefore they requested sureties of him for his good behaviour, and for refusal committed him. *Wild*, justice, was of opinion, that by abetting such as frequented seditious conventicles, must be intended abetting them in that particular, and signifies as much as encouraging them to frequent such conventicles, and finding cause to suspect him, *&c*. (which cannot now be questioned, for the return is admitted) they may well send him to prison, and therefore he ought to be remanded. But *Vaughan* Ch. Just. *Tyrrel* and *Archer*, were of a contrary opinion: 1. Because it does not appear but that he might abet the frequenters of conventicles in any way which the law allows, as by soliciting an appeal for them, or the like. 2. To say that he was complained of, or that he was examined, is no proof that he was guilty; and then to say, that they had cause to suspect him, is too cautious; for who can tell what they may count a cause of suspicion, and how can that ever be tried? at this rate they would have arbitrary power, upon their own allegation, to commit whom they pleased; whereas they cannot require sureties for any man's behaviour, and consequently not commit for refusal, unless the Justices have any thing

against him of their own knowledge, or by proof of witnesses, that tend to a breach of the peace. Upon this return, *Archer* declared his opinion to be, That he should not be remanded, but give his own recognizance to appear in court the next term, to answer any thing that should be alledged against him; but *Vaughan* and *Tyrrel* were for his absolute discharge; for seeing by the return it did not appear there was any cause for his commitment, they thought they had no reason to require a recognizance of him. Thereupon *Wild* moved, that he could not be discharged, there being but two for it. But *Archer* replied, that it had been several times ruled, that where there were three opinions, that was taken to be *per cur*. which had two of the judges for it; and accordingly *Rudyard* was discharged. *Vaughan* and *Tyrrel* made another objection to the return, *viz*. that they should have expressed the sum in which they required him to give security, (which they had not done;) for they said that those persons, that might be willing to be bound for him in 40 *l*. might not be willing to be bound for him in 100 *l. &c*. But as to this it was said, that [ed. *Rudyard*] had refused absolutely to give any security, and therefore it was to no purpose to tell him of the sum; if he had consented to give security, then the justices ought to have told him the sum. *Trin*. 22 *Car*. 2. *in B. R. Rudyard*'s case. 3 *Bac. Abr*. 12.

5. *OF SUGGESTING ANY THING CONTRARY TO THE RETURN; OF AMENDING ANY DEFECT IN THE RETURN; AND OF BAILING, DISCHARGING, OR REMANDING THE PRISONER.*

It seems to be agreed, that no one can in any case controvert the truth of the return to a *habeas corpus*, or plead or suggest any matter repugnant to it; yet it hath been holden, that a man may confess and avoid such a return by admitting the truth of the matters contained in it, and suggesting others not repugnant, which take off the effect of them. *Cro. Eliz*. 821. 5 *Co*. 71. *b*. 2 *Hawk. P. C*. 113.

Upon a *habeas corpus* it was returned, that *Swallow*, a citizen of *London*, was fined for alderman, and was committed for his fine by the judgment of the court in *London. Swallow* alleged, that he was an officer of the mint, and by an ancient charter of privilege granted to the minters or moneyers, he ought to be exempted. It was at first doubted whether he might not plead this to the return, it being a matter consistent with it. Upon the statute *W*. 2. it is held the parties may come in and plead, and so upon 5 *Eliz*. But here there is a difference; for he might have pleaded this in the court below, but now that is past, and here is a judgment and execution. Another day *Swallow* brought into court a writ of privilege upon that charter, and the recorder prayed that it might not be allowed against the ancient customs of

the city; for if such a way might exempt men, they should have little benefit by fines in such cases: But *per cur*. The privilege ought to be allowed, for it is very ancient, and it appears he has an office of necessary attendance elsewhere, which makes the privilege reasonable; the King may by his charter exempt from juries, if there be enough besides, much more here; and if there be not sufficient besides, upon shewing of that, the privilege ought to be suspended; and *Swallow* may be discharged by this court now as well as he could at first, or as if he had taken upon him the aldermanship. This court is supreme and mandatory in such cases. And he was accordingly discharged. *Pasch*. 18 *Car*. 2. *in B. R. Swallow*'s case, 1 *Sid*. 287. 2 *Keb*. 50, 54, *&c*.

Also the court will sometimes examine by affidavit the circumstances of a fact, on which a prisoner brought before them by an *habeas corpus* hath been indicted, in order to inform themselves, on an examination of the whole matter, whether it be reasonable to bail him or not: And agreeably hereto, where one *Jackson*, who had been indicted for piracy before the sessions of Admiralty on a malicious prosecution, brought his *habeas corpus* in the said court, in order to be discharged or bailed, the court examined the whole circumstances of the fact by affidavits; upon which it appeared that the prosecutor himself, if any one, was guilty, and carried on the prosecution to skreen himself: And thereupon the court, in consideration of the unreasonableness of the prosecution, and the uncertainty of the time when another sessions of Admiralty might be holden, admitted the said *Jackson* to bail, and committed the prosecutor till he should find bail to answer the facts contained in the affidavits. 5 *Mod*. 323, 454. 2 *Jon*. 222. *Trin*. 4 *Geo* 1.

It seems that, before the return filed, any defect in form, or the want of an averment of a matter of fact may be amended; but this must be at the peril of the officer, in the same manner as if the return were originally what it is after the amendment. 1 *Mod*. 102, 103.

But after the return is filed it becomes a record of the court, and cannot be amended. 1 *Mod*. 102, 103.

So after a rule to have the return filed; as where a *habeas corpus, alias & pluries* was directed to Sir *Robert Viner*, mayor of *London*, to have the body of *Bridget*, daughter and heir of Sir *Thomas Hyde*, deceased; and upon the *pluries* he returned *quod tempore receptionis hujus brevis nec unquam postea non fuit infra custodiam meam*; and the counsel of the lord mayor expounded this return that she was within the house of the lord mayor, but

not detained in custody *prout per breve suppenitur; & per cur*. this is an insufficient return; for he ought to say not only *tempore receptionis hujus brevis, sed alieujus*, upon return of a *pluries*. Then a question was, if the return could be amended; for though a rule was made that the return should be filed, yet this was not actually done; but *per cur*. this is filed by the rule of the court, and after cannot be amended; and this return the court held to be equivocal; for it is well enough known that she is not detained *in ferris*; but though she hath the liberty of the house, if she cannot go out of the house, or not without a keeper, she is within his custody; and the court shall adjudge what sort of custody is intended by the writ. *Hill*. 26 & 27 *Car*. 2. in *B. R. Emerton* v. Sir *Robert Vinere [sic]*. 2 *Lev*. 128. 3 *Keb*. 434, 447. *S. C*. 3 *Mod*. 164. *S. C*. cited.

Upon the return of the *habeas corpus* the prisoner is regularly to be discharged, bailed or remanded; but if it be doubtful which the court ought to do, it is said that the prisoner may be bailed to appear *de die in diem* till the matter is determined. 5 *Mod*. 22. *Styl*. 16.

By the petition of right, or 17 *Car*. 1. *cap*. 10. the court must within three days after the return of the *habeas corpus* either discharge, bail or remand the prisoner. But it seems that a commitment by the court of King's Bench to the Marshalsea is a remanding, being an imprisonment within the statute. 5 *Mod*. 22. 3 *Bac. Abr*. 14.

Also it hath been ruled, that the court of King's Bench may, after the return of the *habeas corpus* is filed, remand the prisoner to the same gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely. 1 *Vent*. 330.

And tho' in doubtful cases the court is to bail or discharge the party on the return of the *habeas corpus*; yet if a person be convicted, and the conviction on the return of the *habeas corpus* appears only defective in point of form, it is at the election of the court either to discharge the party, or oblige him to bring his writ of error. 1 *Salk*. 348. 5 *Mod*. 19, 20.

If on the return of the *habeas corpus* it appears that the contest relates to the right of guardianship, tho' the court will not determine that point, yet will it set the infant at liberty, so as to let him choose where he will go till that matter is determined; or if there be any danger of abuse, will order him into such hands as will take effectual care of him. 3 *Keb*. 526. 2 *Lev*. 128. *Stran*. 982.

6. *OF THE* HABEAS CORPUS AD FACIENDUM & RECIPIENDUM.

The *habeas corpus ad faciendum & recipiendum* is used only in civil causes, and lies for removing suits out of an inferior to some superior court, at the application of the defendant, who may imagine himself injured by the proceedings of such inferior court. 1 *Mod*. 235. 2 *Mod*. 198.

This writ suspends the power of the court below; so that if they proceed after, the proceedings are void, and *coram non judice*. 1 *Salk*. 352.

By this writ, the proceedings in the inferior court are at an end, for the person of the defendant being removed to the superior court, they have lost their jurisdiction over him, and all the proceedings in the superior court are *de novo*, and bail *de nevo* must be put-in in the superior court. *Skin*. 244.

And altho' this writ be a writ of right, yet where it is to abate a rightful suit, the court may refuse it; as where an action of debt was brought against a feme sole in the Palace court, who, after appearance and plea pleaded, married, and then removed the cause by *habeas corpus* to *B. R*. where she pleaded her coverture in abatement; and the court held, that if this matter had been moved on the return of the *habeas corpus*, they would have granted a *procedendo*; but that now the plea in abatement must be held good; for the proceedings are *de novo*, and the court takes not notice of the proceedings below, or of what preceded the *habeas corpus*. 1 *Salk*. 8. *Hetherington* v. *Reynold*.

After an interlocutory, and before final judgment in an inferior court, a *habeas corpus cum causa* was brought; before the return of the writ the defendant died, and a *procedendo* was awarded; because by the 8 & 9 *W*. 3. *cap*. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable. 1 *Salk*. 352.

If an action be brought in *London* for calling a woman a whore, this cannot be removed by *habeas corpus*, because the words are not actionable elsewhere; and if allowed to be removed, the custom would be destroyed. 2 *Rol. Abr*. 69. and see *Carth*. 75. See 14 *Viz. Abr*. tit. *Habeas Corpus*.

Cunningham Law Dictionary, unpaginated

17.3.1.9Blackstone, 1765

17.3.1.9.a Of Persons

The absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarassments, and, as soon as the convulsions consequent on the struggle have been over, the ballance of our rights and liberties has settled to it's proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

FIRST, by the great charter of liberties, which was obtained, sword in hand, from king John; and afterwards, with some alterations, confirmed in parliament by king Henry the third, his son. Which charter contained very few new grants; but, as sir Edward Coke [h] observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterwards by the statute called *confirmatio cartarum* [i], whereby the great charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel act contrary thereto, or in any degree infringe it. Next by a multitude of subsequent corroborating statutes, (sir Edward Coke, I think, reckons thirty two [k],) from the first Edward to Henry the fourth. Then, after a long interval, by *the petition of right*; which was a parliamentary declaration of the liberties of the people, assented to by king Charles the first in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the second. To these succeeded *the bill of rights*, or declaration delivered by the lords and commons to the prince and princess of Orange 13 February 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words; "and they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties." And the act of parliament itself [l] recognizes "all and

singular the rights and liberties asserted and claimed in the said declaration to be the true, antient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century, in the *act of settlement* [m], whereby the crown is limited to his present majesty's illustrious house, and some new provisions were added at the same fortunate aera for better securing our religion, laws, and liberties; which the statute declares to be "the birthright of the people of England;" according to the antient doctrine of the common law[n].

THUS much for the *declaration* of our rights and liberties. The rights themselves thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no other, than either that *residuum* of natural liberty, which is not required by the laws of society to be sacrificed to public convenience; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty[,] and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

I. THE right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. LIFE is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter [o]. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemesnor [p].

AN infant *in ventre sa mere*, or in the mother's womb, is supposed in law

to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it [q]; and it is enabled to have an estate limited to it's use, and to take afterwards by such limitation, as if it were then actually born [r]. And in this point the civil law agrees with ours [s].

2. A MAN's limbs, (by which for the present we only understand those members which may be useful to him in fight, and the loss of which only amounts to mayhem by the common law) are also the gift of the wise creator; to enable man to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

B OTH the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, are totally void in law, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance [t]. And the same is also a sufficient excuse for the commission of many misdemesnors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, of which there are two sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non,*" as Bracton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitae periculum, aut corporis cruciatum* [u]." A fear of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burnt, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages [w]: but no suitable atonement can be made for the loss of life, or limb. And the indulgence shewn to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of

the civil law; *ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit* [x].

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with every thing necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life, from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the emperor Constantine, commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our foundling hospitals, though comprized in the Theodosian code[y], were rejected in Justinian's collection.

These rights, of life and member, can only be determined by the death of the person; which is either a civil or natural death. The civil death commences if any man be banished the realm [z] by the process of the common law, or enters into religion; that is, goes into a monastery, and becomes there a monk professed: in which cases he is absolutely dead in law, and his next heir shall have his estate. For, such banished man is entirely cut off from society; and such a monk, upon his profession, renounces solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life, and the commands of the temporal magistrate, the genius of the English law would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to it's regulations [a]. A monk is therefore accounted *civiliter mortuus*, and when he enters into religion may, like other dying men, make his testament and executors; or, if he makes none, the ordinary may grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators shall have the same power, and may bring the same actions for debts due *to* the religious, and are liable to the same actions for those due *from* him, as if he were naturally deceased [b]. Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due [c]. In short, a monk or religious is so effectually dead in law, that a lease made

even to a third person, during the life (generally) of one who afterwards becomes a monk, determines by such his entry into religion: for which reason leases, and other conveyances, for life, are usually made to have and to hold for the term of one's *natural* life [d].

THIS natural life being, as was before observed, the immediate donation of the great creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority. Yet nevertheless it may, by the divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which, we may hereafter more conveniently enquire in the concluding book of these commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. "*Nullus liber homo*, says the great charter [e], *aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terrae.*" Which words, "*aliquo modo destruatur*," according to sir Edward Coke [f], include a prohibition not only of *killing*, and *maiming*, but also of *torturing* (to which our laws are strangers) and of every oppression by colour of an illegal authority. And it is enacted by the statute 5 Edw. III. c. 9. that no man shall be forejudged of life or limb, contrary to the great charter and the law of the land: and again, by statute 28 Ed. III. c. 3. that no man shall be put to death, without being brought to answer by due process of law.

3. BESIDES those limbs and members that may be necessary to man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled by the same natural right to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

4. THE preservation of a man's health from such practices as may

prejudice or annoy it, and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is intitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come) it will suffice to have barely mentioned among the rights of persons; referring the more minute discussion of their several branches, to those parts of our commentaries which treat of the infringement of these rights, under the head of personal wrongs.

II. Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals. This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article; that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and, that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws. Here again the language of the great charter [g] is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes [h] expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king, or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shewn, to which he may make answer according to law. By 16 Car. I. c. 10. if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2. commonly called *the habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding

unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M. st. 2. c. 2. that excessive bail ought not to be required.

Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, (as in France it is daily practiced by the crown) there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing. As the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, nequid respublica detrimenti capiat,*" was called the *senatus consultum ultimae necessitatis*. In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it's liberty for a while, in order to preserve it for ever.

The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment [i]. And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may alledge this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and either to procure his discharge, or on any other

fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it [k]. To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the goaler is not bound to detain the prisoner [l]. For the law judges in this respect, saith sir Edward Coke, like Festus the Roman governor; that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

A NATURAL and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence [m]. This may be necessary for the public service, and safeguard of the commonwealth. But no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no not even a criminal. For exile, or transportation, is a punishment unknown to the common law; and, wherever it is now inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter[n] declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II. c. 2. (that second *magna carta*, and stable bulwark of our liberties) it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas; (where they cannot have the benefit and protection of the common law) but that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a praemunire, and be incapable of receiving the king's pardon and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

THE law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king may command

the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign embassador [o]. For this might in reality be no more than an honorable exile.

Blackstone Commentaries, book 1, ch. 1, pp. 123–134.

17.3.1.9.b Of Wrongs and their Remedies

4.THE writ of *habeas corpus*, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the courts above [o]. Such is that *ad satisfaciendum* when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution [p]. Such also are those *ad prosequendum, testificandum, deliberandum, &c*; which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such is, lastly the common writ *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster-hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum causa*) to *do and receive* whatsoever the king's court shall confider in that behalf. This is a writ grantable of common right, without any motion in court [q]; and it instantly supersedes all proceedings in the court below. But, in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. & M. c. 13. that no *habeas corpus* shall issue to remove any prisoner out of any gaol, unless signed by some judge of the court out of which it is awarded. And, to avoid vexatious delays by removal of frivolous causes, it is enacted by statute 21 Jac. I. c. 23. that, where the judge of an inferior court of record is a barrister of three years standing, no cause shall be removed from thence by *habeas corpus* or other writ, after issue or demurrer deliberately joined: that no cause, if once remanded to the inferior

court by writ of *procedendo* or otherwise, shall ever afterwards be again removed: and that no cause shall be removed at all, if the debt or damages laid in the declaration do not amount to the sum of five pounds. But an *expedient* [r] having been found out to elude the latter branch of the statute, by procuring a nominal plaintiff to bring another action for five pounds or upwards, (and then by the course of the court the *habeas corpus* removed both actions together) it is therefore enacted by statute 12 Geo. I. c. 29. that the inferior court may proceed in such actions as are under the value of five pounds, notwithstanding other actions may be brought against the same defendant to a greater amount.

But the great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do, submit to, and receive, whatsoever the judge or court awarding such writ shall consider in that behalf [s]. This is a high prerogative writ, and therefore by the common law issuing out of the court of king's bench not only in termtime, but also during the vacation [t], by a *fiat* from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained [u], wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon [w]; unless the term should intervene, and then it may be returned in court [x]. Indeed, if the party were privileged in the courts of common pleas and exchequer, as being an officer or suitor of the court, an *habeas corpus ad subjiciendum* might also have been awarded from thence [y]: and, if the cause of imprisonment were palpably illegal, they might have discharged him [z]; but, if he were committed for any criminal matter, they could only have remanded him, or taken bail for his appearance in the court of king's bench [a]; which occasioned the common pleas to discountenance such applications. It hath also been said, and by very respectable authorities [b], that the like *habeas corpus* may issue out of the court of chancery in vacation: but, upon the famous application to lord Nottingham by Jenks, notwithstanding the most diligent searches, no precedent could be found where the chancellor had issued such a writ in vacation [c], and therefore his lordship refused it.

In the court of king's bench it was, and is still, necessary to apply for it by motion to the court [d], as in the case of all other prerogative writs (*certiorari*,

prohibition, *mandamus*, &*c*) which do not issue as of mere course, without shewing some probable cause why the extraordinary power of the crown is called in to the party's assistance. For, as was argued by lord chief justice Vaughan [e], "it is granted on motion, because it cannot be had of course; and there is therefore no *necessity* to grant it: for the court ought to be satisfied that the party hath a probable cause to be delivered." And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner [f]. So that, if it issued of mere course, without shewing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a relation, or a domestic, confined for insanity or other prudential reasons, might obtain a temporary enlargement by suing out an *habeas corpus*, though sure to be remanded as soon as brought up to the court. And therefore sir Edward Coke, when chief justice, did not scruple in 13 Jac. I. to deny a *habeas corpus* to one confined by the court of admiralty for piracy; there appearing, upon his own shewing, sufficient grounds to confine him [g]. On the other hand, if a probable ground be shewn, that the party is imprisoned without just cause [h], and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other [i]."

In a former part of these commentaries [k] we expatiated at large on the personal liberty of the subject. It was shewn to be a natural inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, nor ought to be abridged in any cafe without the special permission of law. A doctrine co-eval with the first rudiments of the English constitution; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest: asserted afterwards and confirmed by the conqueror himself and his descendants: and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *magna carta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering it's protection impossible: but the glory of the English law consists in clearly defining the times, the

causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an *habeas corpus* may examine into it's validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I, the court of king's bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined [l] that they could not upon an *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on a parliamentary enquiry, and produced the *petition of right*, 3 Car. I. which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when, in the following year, Mr Selden and others were committed by the lords of the council, in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And, when at length they agreed that it was, they however annexed a condition of finding sureties for the good behaviour, which still protracted their imprisonment; the chief justice, sir Nicholas Hyde, at the same time declaring [m], that "if they were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present; according to Mr Selden's own account of the matter, whose resentment was not cooled at the distance of four and twenty years [n].

These pitiful evasions gave rise to the statute 16 Car. I. c. 10. §.8. whereby it was enacted, that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the court of king's bench *or common pleas*; who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still in the case of Jenks, before alluded to[o], who in 1676 was committed by the king in council for a turbulent speech at Guildhall [p],

new shifts and devices were made use of to prevent his enlargement by law; the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum, &c*, whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party: and many other vexatious shifts were practiced to detain state-prisoners in custody. But whoever will attentively consider the English history may observe, that the flagrant abuse of any power, by the crown or it's ministers, has always been productive of a struggle; which either discovers the exercise of that power to be contrary to law, or (if legal) restrains it for the future. This was the case in the present instance. The oppression of an obscure individual gave birth to the famous *habeas corpus* act, 31 Car. II. c. 2. which is frequently considered as another *magna carta* [q] of the kingdom; and by consequence has also in subsequent times reduced the method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty.

The statute itself enacts, 1. That the writ shall be returned and the prisoner brought up within a limited time according to the distance, not exceeding in any case twenty days. 2. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them [r]. 3. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant, or for suspicion of the same, or as accessory thereto before the fact, or convicted or charged in execution by legal process) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority (specified in the act) shall for the first

offence forfeit 100*l*. and for the second offence 200*l*. to the party grieved, and be disabled to hold his office. 5. That no person, once delivered by *habeas corpus*, shall be recommitted for the same offence on penalty of 500*l*. 6. That every person committed for treason or felony shall, if he requires it the first week of the next term or the first day of the next session of *oyer* and *terminer*, be indicted in that term or session, or else admitted to bail; unless the king's witnesses cannot be produced at that time: and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence: but that no person, after the assises shall be opened for the county in which he is detained, shall be removed by *habeas corpus*, till after the assises are ended; but shall be left to the justice of the judges of assise. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the chancery or exchequer, as out of the king's bench or common pleas; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l*. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported; or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions: on pain that the party committing, his advisors, aiders, and assistants shall forfeit to the party grieved a sum not less than 500*l*. to be recovered with treble costs; shall be disabled to bear any office of trust or profit; shall incur the penalties of *praemunire;* and shall be incapable of the king's pardon.

THIS is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charge, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to antient precedents [§] and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue. By which admirable regulations, judicial as well as parliamentary, the remedy is now complete for *removing* the injury of unjust and illegal confinement. A remedy the more necessary, because the oppression does not always arise from the ill-nature, but sometimes from

the mere inattention, of government. For it frequently happens in foreign countries, (and has happened in England during temporary suspensions [t] of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.

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

Blackstone Commentaries, bk. 3, ch. 8, pp. 129–138.

17.3.1.9.c Of the Rise, Progress, and Gradual Improvement of the Laws of England

V. Fifth period, which I am next to mention, *viz*. after the restoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, were taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the royal government was restored, and with it our antient constitution, deserves no commendation from posterity, yet in his reign, (wicked, sanguinary, and turbulent as it was) the concurrence of happy circumstances was such, that from thence we may date not only the reestablishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since it's total abolition at the conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *habeas corpus* act. These two statutes, with regard to our property and persons, form a second *magna carta*, as beneficial and effectual as that of Runing-Mead. That only pruned the luxuriances of the feodal system; but the statute of Charles the second extirpated all it's slaveries: except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice. *Magna carta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *habeas corpus* act points him out

effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

Blackstone Commentaries, bk. 4, 33, pp. 431–432.

17.3.1.10Reeves, 1787

Of all the provisions made by this charter for the security of the person and property of the subject, none has so much engaged the attention and claimed the reverence of posterity as chap. 29, which contains a very plain and explicit declaration as to the protection every man might expect from the laws of his country. “No freeman shall be taken or imprisoned; or be disseised of his freehold, or liberties, or free customs; or be outlawed, or exiled, or any otherwise destroyed;” “nor will we pass upon him” (says the statute, in the name of the king), that is, he shall not be condemned in the court, *coram rege;* “nor will we send to him,” that is, he shall not be condemned before any other commissioner or judge; *nisi per legale judicium parium suorum, vel per legem terrae*, that is, by a lawful *trial:* either that by jury, which it was intended to promote and patronize; or by the ancient modes long known to the law of the land; namely, those mentioned just before, *per legem manifestam, per juramentum, per duellum*, or whatever it might be: though, in a larger sense, *per legem terrae* may comprehend every lawful process and proceeding, in contradistinction to that of trial by jury. The statute goes on and says, *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam;* whereby the king in his own person declares, that he will neither sell, deny, or delay to any man a due administration of the law.[1]

Reeves English Law, vol. 1, pp. 249–250.

17.3.2CASE LAW

17.3.2.1Chambers’s Case, 1629

Chambers's Case.

A prisoner committed to the King's Bench prison, and brought up by *hab. cor*. may be remanded and brought up again without a new *hab. cor*. by rule or order of the Court; and if the commitment be by the Privy Council "for words" spoken at their board, without specifying what the words were, he shall be bailed. *Post*. 507. 579. 593.

Cro. Jac. 81. 2 Inst. 55. Vaugh. 137. Moor, 839. Jones, 15. 2 Leon. 175. 3 Leon. 194. 4 Leon. 21. 5 Mod. 85. 1 Salk. 347. 2 Vent. 23. Stra. 404. Fitzg. 266. Fort. 272. 3 Com. Dig, 458. 2 Hawk. P. C. 166. 170. 185.

Chambers, being in prison in the *Marshalsea del hostel de roy*, desired a *habeas corpus*, and had it; which being returnable upon the fifteenth day of October, the marshal returned that he was committed to prison the twenty-eighth day of September last by the command of the Lords of the Council. The warrant *verbatim* was, that he was "committed for insolent behaviour and words spoken at the Council table;" which was subscribed by the Lord Keeper and twelve others of the Council.—And because it was not mentioned what the words were, so as the Court might adjudge of them, the return was held insufficient, and the marshal advised to amend his return before the twenty-first of October following.

And he was, by rule of the Court, appointed to bring his prisoner then, without a new *habeas corpus;* and the prisoner was advised, that in the mean time he should submit to the Lords, and petition them for his enlargement. Upon the said 21st of October the marshal had his prisoner there; but because the great case of *Sir William Withipole* was to be debated that day, and time would not permit to treat of this matter, the marshal was commanded to bring again his prisoner, and have him in Court the 23d day of October.

Germine, for the prisoner, then moved, that forasmuch as it appeared by the return, that he was not committed for treason or felony, nor doth it appear what the words were, whereto he might give answer, he therefore prayed he might be dismissed or bailed.

But the King's attorney moved, that he might have day until the 25th of October to consider of the return, and be informed of the words, and that in the *interim* the prisoner might attend the Council-table and petition.

But the prisoner affirmed, that he oftentimes had assayed by petition, and could not prevail, although he had not done it since the beginning of October; and he prayed the justice of the law and the inheritance of a subject.

Whereupon, at his importunity, the Court commanded him to be bailed;

and he was bound in a recognizance of four hundred pounds, and four good merchants his sureties were bound in recognizances of one hundred pounds a-piece, that be should appear here in *Crastino Animarum*, and in the *interim* should be of good behaviour; and advertised him, that they might for contemptuous words cause an indictment or information in this Court to be drawn against him, if they would.

Cro. Car. [Croke's King's Bench Reports tempore Charles I]133.

17.3.2.2Bushell's Case, 1670

Bushell's Case.

The King's writ of habeas corpus, dat. 9 die Novembris, 22 Car. 2, issued out of this Court, directed to the then Sheriffs of London, to have the body of Edward Bushell, by them detained in prison, together with the day and cause of his caption and detention, on Friday then next following, before this Court, to do and receive as the Court should consider; as also to have then the said writ in Court.

Of which writ, Patient Ward and Dannet Foorth, then Sheriffs of London, made the return following, annex'd to the said writ.

That at the King's Court of a Session of Oyer and Terminer, held for the City of London, at Justice Hall in the Old Baily, London, in the parish of St. Sepulchres in Farringdon Ward without London, on Wednesday 31 die August, 22 Car. 2, before Sir Samuel Sterling then Mayor of London, and divers other His Majesties Justices, by virtue of His Majesties letters patents, under the Great Seal of England, to them, any four or more of them, directed to enquire, hear, and determine, according to the tenor of the said letters patents, the offences therein specified: and amongst others, the offences of unlawful congregating and assemblies, within the limits appointed by the said commission within the said city, as well within liberties as without. Edward Bushel, the prisoner at the Barr, was committed to the gaol of Newgate, to be there safely kept, under the custody of John Smith Knight, and James Edwards, then sheriffs of the said city, by virtue of a certain order, then, and there made by the said Court of Sessions, as followeth:

Ordinatum est per Curiam hic quod Finis 40 Marcarum separatim ponatur super Edwardum Bushell, and other eleven persons particularly named, and upon every of them, being the twelve jurors, then, and there

sworn, and charg'd to try several issues, then, and there joyn'd between our Lord the King, and William Penn and William Meade, for certain trespasses, contempts, unlawful assemblies and tumults, made and perpetrated by the said Penn and Mead, together with divers other unknown persons, to the number of three hundred, unlawfully and tumultuously assembled in Grace-Church-Street in London, to the disturbance of the peace, whereof the said Penn, and Mead were then indicted before the said justices. Upon which indictment, the said Penn and Mead pleaded they were not guilty. For that they, the said jurors, then, and there, the said William Penn and William Mead, of the said trespasses, contempts, unlawful assemblies and tumults, Contra legem hujus Regni Angliae, & contra plenam & manifestam evidentiam, & contra directionem Curiae in materia legis, hic, de & super praemissis eisdem Juratoribus versus praefatos Will. Penn & Will. Mead, in Curia hic aperte datam, & declaratam de praemissis, iis impositis in Indictamento praedicto acquietaverunti, in contemptum Domini Regis nunc. legumque suarum, & ad magnum impedimentum & obstructionem Justitiae, necnon ad malum exemplum omnium aliorum Juratorum in consimili casu delinquentium. Ac super inde modo ulterius ordinatum est per Curiam hic quod praefatus Ed. Bushell, capiatur & committatur Gaolae, dicti Domini Regis de Newgate, ibidem remansurus quousque solvat dicto Domino Regi 40 Marcas pro fine suo praedicto, vel deliberatus fuerit, per debitum legis Cursum. Ac eodem Edwardo Bushell ad tunc, & ibidem capto & commissio existente ad dictam Gaolam de Newgate, sub custodia praefat. Johannis Smith & Jacobi Edwards adtunc Vic. Civitatis Lond. praedict. & in eorum Custodia in Gaola praedict. existente & remanente virtute ordinis praedict. idem Johannes Smith & Jacobus Edwards, postea in eorum exitu ab officio Vic. Civitatis Lond. praedict. scilicet 28 die Septembris, Anno 22, supra dicto eundem Edwardum Bushell in dicta Gaola dicti Domini Regis adtunc existentem, deliberaverunt nobis praefatis nunc Vicecomitibus Civitatis praedict. in eadem Gaola, salvo custodiendum secundum Tenorem, & effectum ordinis praedictae. Et quia praedictus Edwardus, nondum solvit dicto Domino Regi praedictum finem 40 Marcarum, nos iidem nunc Vicecomites Corpus ejusdem Edwardi in Gaola praedicta, hucusque detinuimus, & haec est causa captionis & detentionis praefati Edwardi, cujus quidem Corpus coram praefatis Justitiariis paratum habemus.

The writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it.

Therefore the writ commands the day, and the cause of the caption and detaining of the prisoner to be certified upon the retorn, which if not done, the Court cannot possibly judge whether the cause of the commitment and detainer be according to law, or against it.

Therefore the cause of the imprisonment ought, by the retorn, to appear as specifically and certainly to the Judges of the retorn, as it did appear to the Court or person authorized to commit; else the retorn is insufficient, and the consequence must be,

That either the prisoner, because the cause retorn'd of his imprisonment is too general, must be discharg'd; when as if the cause had been more particularly retorn'd, he ought to have been remanded; or else he must be remanded, when if the cause had been particularly retorn'd, he ought to have been discharg'd: both which are inconveniences not agreeing with the dignity of the law. (There is a specious exception to this rule, but doth not materially vary it, as shall appear.)

In the present case it is retorn'd, that the prisoner, being a juryman, among others charg'd at the Sessions Court of the Old Baily, to try the issue between the King, and Penn, and Mead, upon an indictment, for assembling unlawfully and tumultuously, did contra plenam & manifestum evidentiam, openly given in Court, acquit the prisoners indicted, in contempt of the King, &c.

The Court hath no knowledge by this retorn, whether the evidence given were full and manifest, or doubtful, lame, and dark, or indeed evidence at all material to the issue, because it is not retorn'd what evidence in particular, and as it was deliver'd, was given. For it is not possible to judge of that rightly, which is not expos'd to a mans judgment. But here the evidence given to the jury is not exposed at all to this Court, but the judgment of the Court of Sessions upon that evidence is only expos'd to us; who tell us it was full and manifest. But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs.

It was said by a learned Judge, if the jury might be fined for finding against manifest evidence, the retorn was good, though it did not express what the evidence particularly was, whereby the Court might judge of it, because retorning all the evidence would be too long. A strange reason: for if the law allow me remedy for wrong imprisonment, and that must be by judging whether the cause of it were good, or not, to say the cause is too long to be made known, is to say the law gives a remedy which it will not let me have, or I must be wrongfully imprison'd still, because it is too long

to know that I ought to be freed? What is necessary to an end, the law allows is never too long. Non sunt longa quibus nihil est quod demere possis, is as true as any axiom in Euclid. Besides, one manifest evidence retorn'd had suffic'd, without retorning all the evidence. But the other Judges were not of his mind.

If the retorn had been, that the jurors were committed by an order of the Court of Sessions, because they did, minus juste, acquit the persons indicted.

Or because they did, contra legem, acquit the persons indicted.

Or because they did, contra sacramentum suum, acquit them.

The Judges cannot upon the present more judge of the legal cause of their commitment, than they could if any of these causes, as general as they are, had been retorn'd for the cause of their commitment. And the same argument may be exactly made to justifie any of these retorns, had they been made as to justifie the present retorn, they being equally as legal, equally as certain, and equally as far from possessing the Court with the truth of the cause: and in what condition should all men be for the just liberty of their persons, if such causes should be admitted sufficient causes to remand persons to prison.

To those objections made by the prisoners council against the retorn, as too general.

1. It hath been said, that institutum est quoad non inquiratur de discretione judicis.

2. That the Court of Sessions in London, is not to be look'd on as an Inferiour Court, having all the Judges commissioners. That the Court having heard the evidence, it must be credited, that the evidence given to the jury of the fact was clear, and not to be doubted.

As for any such institution pretended, I know no such, nor believe any such, as it was applyed to the present cause; but taking it in another, and in the true sense, I admit it for truth: that is, when the King hath constituted any man a Judge under him, his ability, parts, fitness for his place, are not to be reflected on, censured, defamed, or vilified by any other person, being allowed and stampt with the King's approbation, to whom only it belongs to judge of the fitness of his ministers.

And such scandalous assertions or inquiries upon the Judges of both Benches, is forbidden by the Statute of Scandalum Magnatum, 2 R. 2, c. 5. Nor must we, upon supposition only, either admit Judges deficient in their office, for so they should never do any thing right; nor on the other side,

must we admit them unerring in their places, for so they should never do any thing wrong.

And in that sense the saying concerns not the present case.

But if any man thinks that a person concern'd in interest, by the judgment, action, or authority exercis'd upon his person or fortunes by a Judge, must submit in all, or any of these, to the implyed discretion and unerringness of his Judge, without seeking such redress as the law allows him, it is a perswasion against common reason, the received law, and usage both of this kingdome, and almost all others.

If a Court, inferiour or superiour, hath given a false or erroneous judgment, is any thing more frequent than to reverse such judgments by writs of false judgment, of error, or appeals, according to the course of the kingdome.

If they have given corrupt and dishonest judgments, they have in all ages been complained of to the King in the Starr-Chamber, or to the Parliament.

Andrew Horne, in his mirror of justices, mentions many Judges punisht by King Alfred before the Conquest, for corrupt judgments, and their particular names and offences, which could not be had but from the records of those times.

Our stories mention many punisht in the time of Edward the First, our Parliament Rolls of Edward the Third's time, of Richard the Second's time, for the pernicious resolutions given at Nottingham Castle, afford examples of this kind: in latter times, the Parliament Journals of 18 and 21 Jac. the judgment of the ship-mony in the time of Charles the First, question'd, and the particular Judges impeacht. These instances are obvious, and therefore I but mention them.

In cases of retorns too general upon writs of habeas corpus, of many I could urge, I will instance in two only.

One Astwick brought by habeas corpus to the Kings Bench, was retorn'd to be committed, per Mandatum Nicholai Bacon Militis, domini Custodis Magni Sigilli Angliae virtute cujusdam Contemptus in Curia Cancellar. facti, and was presently bail'd.

One Apsley, prisoner in the Fleet, upon a habeas corpus, was retorn'd to be committed, per considerationem Curiae Cancellar. pro contemptu eidem Curiae illato, and upon this retorn set at liberty.

In both these cases, no inquiry was made, or consideration had, whether the contempts were to the law Court, or equitable Court of Chancery, either

was alike to the Judges, lest any man should think a difference might arise thence.

The reason of discharging the prisoners upon those retorns, was the generality of them being for contempts to the Court, but no particular of the contempt exprest, whereby the Kings Bench could judge, whether it were a cause for commitment or not.

And was it not as supposeable, and as much to be credited, that the Lord Keeper and Court of Chancery, did well understand what was a contempt deserving commitment, as it is now to be credited, that the Court of Sessions did understand perfectly what was full and manifest evidence against the persons indicted at the sessions, and therefore it needed not to be reveal'd to us upon the retorn?

Hence it is apparent, that the commitment and retorn pursuing it, being in it self too general and uncertain, we ought not implicitly to think the commitment was re vera, for cause particular and sufficient enough, because it was the act of the Court of Sessions.

And as to the other part, that the Court of Sessions in London is not to be resembled to other Inferiour Courts of Oyer and Terminer, because all the Judges are commission'd here (which is true) but few are there, at the same time, and as I have heard, when this tryal was, none of them were present. However persons of great quality are in the commissions of oyer and terminer, through the shires of the Kingdom, and always some of the Judges; nor doth one commission of oyer and terminer differ in its essence, nature, and power from another, if they be general commissions; but all differ in the accidents of the commissioners, which makes no alteration in their actings in the eye of law,

Another fault in the retorn is, that the jurors are not said to have acquitted the persons indicted, against full and manifest evidence corruptly, and knowing the said evidence to be full and manifest against the persons indicted, for bow manifest soever the evidence was, if it were not manifest to them, and that they believ'd it such, it was not a finable fault, nor deserving imprisonment, upon which difference the law of punishing jurors for false verdicts principally depends.

A passage in Bracton is remarkable to this purpose concerning attainting inquests.

Committit Jurator per jurium propter falsum Sacramentum, ut si ex certa scientia aliter Juraverit quam res in veritate se habuerit, si autem Sacramentum fatuum fuerit licet falsum, tamen non committit perjurium

licet re vera res aliter se habeat quam juraverat, & quia jurat secundum conscientiam eo quod non vadit contra mentem. Sunt quidam qui verum dicunt. mentiendo, sed se pejerant—quia contra mentem vadunt.

The same words, and upon the same occasion, are in effect in Fleta. Committit enim Jurator perjurium quandoqu epropter falsum Sacramentum, ut si ex certa scientia aliter juraverit quam res in veritate se habuerit secus enim propter factum quamvis falsum; and lest any should think that these passages are to be understood only of jurymens perjuries in foro conscientiae, it is clearly otherwise by both those books, which shew how, by the discreet examination of the Judge, the error of the jury not wilfull, may be prevented and corrected, and their verdict rectified.

And in another place of Bracton, in the same chapter: Judex enim sive Justiciarius ad quem pertinet examinatio, si minus diligenter examinaverit, occasionem prebet perjurii Juratoribus. And after,

Et si examinati cum justo deducantur errore dictum suum emendaverint, hoc bene facere possunt, ante judicium & impune, sed post judicium non sine paenâ.

After these authorities,

I would know whether any thing be more common, than for two men students, barristers, or Judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that two men should inferr distinct conclusions from the same testimony: Is any thing more known than that the same author, and place in that author, is forcibly urg’d to maintain contrary conclusions, and the decision hard, which is in the right? Is any thing more frequent in the controversies of religion, than to press the same text for opposite tenents? How then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing: must therefore one of these merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the Judge and jury.

I conclude therefore, that this retorn, charging the prisoners to have acquitted Penn and Mead, against full and manifest evidence first and next, without saying that they did know and believe that evidence to be full and manifest against the indicted persons, is no cause of fine or imprisonment.

And by the way I must here note, that the verdict of a jury, and evidence of a witness are very different things, in the truth and falshood of them: a

witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a juryman swears to what he can inferr and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a Judge, out of various cases consider'd by him, inferrs to be the law in the question before him. Therefore Bracton,

Et licet narratio facti contraria sit Sacramento, & dicto praecedenti, tamen falsum non faciunt Sacramentum licet faciunt fatuum Judicium, quia loquuntur secundum conscientiam quia falli possunt in Judiciis suis, sicut ipse Justitiarius.

There is one objection which hath been made by none, as I remember, to justifie this general retorn, I would give answer to.

A man committed for treason or felony, and bringing a habeas corpus, hath retorn'd upon it, that he was committed for high treason or felony; and this is a sufficient retorn to remand him, though in truth this is a general retorn: for if the specifical fact for which the party was committed, were expressed in the warrant, it might then perhaps appear to be no treason or felony, but a trespass, as in the case of *The Earl of Northumberland*, 5 H. 4, question'd for treason in raising power. The Lords adjudg'd it a trespass; for the powers raised were not against the King, but some subjects.

Why then by like reason may not this retorn be sufficient, though the fact for which the prisoners stood committed particularly express'd, might be no cause of commitment?

The cases are not alike; for upon a general commitment for treason or felony, the prisoner (the cause appearing) may press for his tryal, which ought not to be denied or delayed, and upon his indictment and tryal, the particular cause of his imprisonment must appear, which proving no treason or felony, the prisoner shall have the benefit of it. But in this case, though the evidence given were no full nor manifest evidence against the persons indicted, but such as the jury upon it ought to have acquitted those indicted, the prisoner shall never have any benefit of it, but must continue in prison, when remanded, until he hath paid that fine unjustly impos'd on him, which was the whole end of his imprisonment.

We come now to the next part of the retorn, *viz.* that the jury acquitted those indicted against the direction of the Court in matter of law, openly given and declared to them in Court.

1. The words, that the jury did acquit, against the direction of the Court,

in matter of law, literally taken, and de plano, are insignificant, and not intelligible; for no issue can be joyn'd of matter in law, no jury can be charg'd with the tryal of matter in law barely, no evidence ever was, or can be given to a jury of what is law, or not; nor no such oath can be given to, or taken by, a jury, to try matter in law; nor no attaint can lye for such a false oath.

Therefore we must take off this vail and colour of words, which make a shew of being something, and in truth are nothing.

If the meaning of these words, finding against the direction of the Court in matter of law, be, that if the Judge having heard the evidence given in Court (for he knows no other) shall tell the jury, upon this evidence, the law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do; every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the tryals by them may be better abolish'd than continued; which were a strange new-found conclusion, after a tryal so celebrated for many hundreds of years.

For if the Judge, from the evidence, shall by his own judgment first resolve upon any tryal what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all?

But if the jury be not oblig'd in all tryals to follow such directions, if given, but only in some sort of tryals (as for instance, in tryals for criminal matters upon indictments or appeals) why then the consequence will be, though not in all, yet in criminal tryals, the jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in civil tryals.

And how the jury should, in any other manner, according to the course of tryals us'd, find against the direction of the Court in matter of law, is really not conceptible.

True it is, if it fall out upon some special tryal, that the jury being ready to give their verdict, and before it is given, the Judge shall ask, whether they find such a particular thing propounded by him? or whether they find the matter of fact to be as such a witness, or witnesses have depos'd? and the jury answer, they find the matter of fact to be so; if then the Judge shall declare, the matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him.

If notwithstanding they find for the defendant, this may be thought a finding in matter of law against the direction of the Court; for in that case the jury first declare the fact, as it is found by themselves, to which fact the Judge declares how the law is consequent.

And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the Judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they found for the plaintiff, or è contrario, and thereupon they rectifie their verdict.

And in these cases the jury, and not the Judge, resolve and find what the fact is.

Therefore alwaies in discreet and lawful assistance of the jury, the Judge his direction is hypothetical, and upon supposition, and not positive, and upon coercion. *viz.* if you find the fact thus (leaving it to them what to find) then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant.

But in the case propounded by me, where it is possible in that special manner, the jury may find against the direction of the Court in matter of law, it will not follow they are therefore finable; for if an attaint will lye upon the verdict so given by them, they ought not to be fined and imprisoned by the Judge for that verdict; for all the Judges have agreed upon a full conference at Serjeants Inn, in this case. And it was formerly so agreed by the then Judges in a case where Justice Hide had *fined a jury at Oxford, for finding against their evidence in a civil cause*. That a jury is not finable for going against their evidence, where an attaint lies; for if an attaint be brought upon that verdict, it may be affirmed and found upon the attaint a true verdict, and the same verdict cannot be a false verdict, and therefore the jury fined for it as such by the Judge, and yet no false verdict, because affirmed upon the attaint.

Another reason that the jury may not be fined in such case, is, because until a jury have consummated their verdict, which is not done until they find for the plaintiff or defendant, and that also be entred of record; they have time still of deliberation, and whatsoever they have answered the Judge upon an interlocutory question or discourse, they may lawfully vary from it if they find cause, and are not thereby concluded.

Whence it follows upon this last reason, that upon tryals wherein no attaint lies, as well as upon such where it doth, no case can be invented; wherein it can be maintained that a jury can find, in matter of law, nakedly

against the direction of the Judge.

And the Judges were (as before) all of opinion, that the retorn in this latter part of it, is also insufficient, as in the former, and so wholly insufficient.

But that this question may not hereafter revive if possible, it is evident by several resolutions of all the Judges, that where an attaint lies, the Judge cannot fine the jury for going against their evidence or direction of the Court, without other misdemeanour.

For in such case, finding against, or following the direction of the Court barely, will not barr an attaint, but in some case the Judge being demanded by, and declaring to, the jury, what is the law, though he declares it erroneously, and they find accordingly, this may excuse the jury from the forfeitures; for though their verdict be false, yet it is not corrupt, but the judgment is to be revers'd however upon the attaint; for a man loseth not his right by the Judges mistake in the law.

Therefore if an attaint lies for a false verdict upon indictment not capital (as this is) either by the common or statute law, by those resolutions, the Court would not fine the jury in this case, for going against evidence, because an attaint lay.

But admitting an attaint did not lye (as I think the law clear it did not) for there is no case in all the law of such an attaint, nor opinion, but that of Thirnings, 10 H. 4, Attaint, 60 & 64, for which there is no warrant in law, though there be other specious authority against it, toucht by none that argued this case.

The question then will be, whether before the several Acts of Parliament, which granted attaints, and are enumerated in their order in the Register, the Judge by the common law, in all cases, might have fined the jury, finding against their evidence and direction of the Court, where no attaint did lye, or could so do, yet if the statutes which gave the attaints were repeal'd.

If he could not in civil causes before attaints granted in them, he could not in criminal causes, upon indictment (wherein I have admitted attaint lies not) for the *fault in both was the same, viz. finding against evidence and direction of the Court*, and by the common law; the reason being the same in both, the law is the same.

That the Court could not fine a jury at the common law, where attaint did not lye (for where it did, is agreed he could not) I think to be the clearest position that ever I consider'd, either for authority or reason of law.

After attaints were granted by statutes generally; as by Westminster the

First, c. 38, in pleas real, and by 34 E. 3, c. 7, in pleas personal, and where they did lye at common law (which was only in write of assise) the examples are frequent in our books of punishing jurors by attaint.

But no case can be offer'd, either before attaints granted in general, or after, that ever a jury was punish'd by fine and imprisonment by the Judge, for not finding according to their evidence, and his direction, until Popham's time, nor is there clear proof that he ever fined them for that reason, separated from other misdemeanor. If juries might be fined in such case before attaints granted, why not since? for no statute hath taken that power from the Judge. But since attaints granted, the Judges resolved they cannot fine where the attaint lies, therefore they could not fine before. Sure this latter age did not first discover that the verdicts of juries were many times not according to the Judges opinion and liking.

But the reasons are, I conceive, most clear, that the Judge could not, nor can fine and imprison the jury in such cases.

Without a fact agreed, it is as impossible for a Judge, or any other, to know the law relating to that fact, or direct concerning it, as to know an accident that hath no subject.

Hence it follows, that the Judge can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot go against his direction in law, for he could not direct.

But the Judge, quà Judge, cannot know the fact possibly, but from the evidence which the jury have, but (as will appear) he can never know what evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is.

It is true, if the jury were to have no other evidence for the fact, but what is depos'd in Court, the Judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the Judge and jury might honestly differ in the result from the evidence, as well as two Judges may, which often happens.

But the evidence which the jury have of the fact is much other than that; for,

1. Being return'd of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in

Court, but to this evidence the Judge is a stranger.
2. They may have evidence from their own personal knowledge, by which they may be assur'd, and sometimes are, that what is depos'd in Court, is absolutely false; but to this the Judge is a stranger, and he knows no more of the fact than he hath learn'd in Court, and perhaps by false depositions, and consequently knows nothing.
3. The jury may know the witnesses to be stigmatiz'd and infamous, which may be unknown to the parties, and consequently to the Court.
4. In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the Judge is a stranger.
5. If they do follow his direction, they may be attainted, and the judgment revers'd for doing that, which if they had not done, they should have been fined and imprisoned by the Judge, which is unreasonable.
6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punisht by distinct judicatures for the same offence, which the common law admits not.
A fine revers'd in Banco Regis for infancy, per inspectionem & per testimonium del 4 fide dignorum. After upon examination of divers witnesses in Chancery, the suppos'd infant was prov'd to be of age, tempore finis levati, which testimonies were exemplified, and given in evidence after in Communi Banco, in a writ of entry in the quibus there brought. And though it was the opinion of the Court, that those testimonies were of no force against the judgment in the Kings Bench, yet the jury found, with the testimony in Chancery, against direction of the Court, upon a point in law, and their verdict after affirmed in an attaint brought, and after a writ of right was brought, and battle joyn'd.
7. To what end is the jury to be retorn'd out of the vicinage, whence the cause of action ariseth? To what end must hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? To what end are they challeng'd so scrupulously to the array and pole? To what end must they have such a certain freehold, and be probi & legales homines, and not of affinity with the parties concern'd? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge:

A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or inferr the thing to be resolv'd by anothers understanding or reasoning; and though the verdict be right the jury give, yet they being not assur'd it is so from their own understanding, are forsworn, at least in foro conscientiae.

9. It is absurd a jury should be fined by the Judge for going against their evidence, when he who fineth knows not what it is, as where a jury find without evidence in Court of either side, so if the jury find, upon their own knowledge, as the course is if the defendant plead solvit ad diem, to a bond prov'd, and offers no proof. The jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea.

And it is as absurd to fine a jury for finding against their evidence, when the Judge knows but part of it; for the better and greater part of the evidence may be wholly unknown to him; and this may happen in most cases, and often doth, as in *Graves and Shorts case*.

Error of a judgment in the Common Bench, the error assign'd was, the issue being, whether a feoffment were made? and the jurors being done together to conferr of their verdict, one of them shew'd to the rest an escrow pro perentibus, not given in evidence by the parties per quod, they found for the demandant upon demurrer adjudg'd no error; for it appears not to be given him by any of the parties, or any for them, it must be intended he had it as a piece of evidence about him before, and shew'd it to inform himself and his fellows, and as he might declare it as a witness, that he knew it to be true. They resolv'd, if that might have avoided the verdict, which they agreed it could not, yet it ought to have been done by examination, and not by error.

That decantatum in our books, ad quaestionem facti non respondent judices, ad quaestionem legis non respondent juratores, literally taken is true: for if it be demanded, what is the fact? the Judge cannot answer it: if it be asked, what is the law in the case, the jury cannot answer it.

Therefore the parties agree the fact by their pleading upon demurrer, and ask the judgment of the Court for the law.

In special verdicts the jury inform the naked fact, and the Court deliver the law; and so is it in demurrers upon evidence, in arrest of judgments upon challenges, and often upon the Judges opinion of the evidence given in Court, the plaintiff becomes nonsuit, when if the matter had been left to

the jury, they might well have found for the plaintiff.

But upon all general issues; as upon not culpable pleaded in trespass, nil debet in debt, nul tort, nul disseisin in assize, ne disturba pas in quare impedit, and the like; though it be matter of law whether the defendant be a trespassor, a debtor, disseisor, or disturber in the particular cases in issue; yet the jury find not (as in a special verdict) the fact of every case by it self, leaving the law to the Court, but find for the plaintiff or defendant upon the issue to be tryed, wherein they resolve both law and fact complicately, and not the fact by it self; so as though they answer not singly to the question what is the law, yet they determine the law in all matters where issue is joyn'd, and tryed in the principal case, but where the verdict is special.

To this purpose the Lord Hobart in *Needlers case* against *The Bishop of Winchester*, is very apposite—legally it will be very hard to quit a jury that finds against the law, either common law, or several statute law, whereof all men were to take knowledge, and whereupon verdict is to be given, whether any evidence be given to them or not. As if a feoffment or devise were made to one imperpetuum, and the jury should find cross, either an estate for life, or in fee-simple against the law, they should be subject to an attaint, though no man informed them what the law was in that case.

The legal verdict of the jury to be recorded, is finding for the plaintiff or defendant, what they answer, if asked to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives wherefore, as well as Judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary.

I conclude with the statute of 26 H. 8, c. 4, that if any jurors in Wales do acquit any felon, murderer, or accessary, or give an untrue verdict against the King, upon the tryal of any traverse, recognizance, or forfeiture, contrary to good and pregnant evidence ministred to them by persons sworn before the Kings Justiciar. That then such jurors should be bound to appear before the Council of the Marches, there to abide such fine or ransome for their offence, as that Court should think fit.

If jurors might have been fined before, by the law, for going against their evidence in matters criminal, there had been no cause for making this statute against jurors, for so doing in Wales only.

Objections out of the Ancient and Modern Books.

1. A juror kept his fellows a day and night, without any reason or

assenting, and therefore awarded to the Fleet.

This book rightly understood is law, that he staid his fellows a day and a night, without any reason or assenting, may be understood, that he would not in that time intend the verdict all, more if he had been absent from his fellows, but wilfully not find for either side: in this sense it was a misdemeanor against his oath, for his oath was truly to try the issue, which he could never do, that resolv'd not to confer with his fellows.

And in this sense it is the same with the case 34 E. 3, where twelve being sworn, and put together to treat of their verdict, one secretly withdrew himself, and went away, for which he was justly fined and imprison'd; and it differs not to withdraw from a mans duty, by departing from his fellows, and to withdraw from it, though he stay in the same room, and so is that book to be understood.

But if a man differ in judgment from his fellows for a day and a night, though his dissent may not be as reasonable as the opinion of the rest that agree, yet if his judgment be not satisfied, one disagreeing can be no more criminal than four or five disagreeing with the rest.

2. A juror would not agree with his fellows for two dayes, and being demanded by the Judges, if he would agree; said, he would first die in prison; whereupon he was committed, and the verdict of the eleven taken; but upon better advice the verdict of the eleven was quasht, and the juror discharg'd without fine, and the justices said, the way was to carry them in carts, until they agreed, and not by fining them; and as the Judges err'd in taking the verdict of eleven, so they did in imprisoning the twelfth; and this case makes strongly that the juror was not to be fined, who disagreed in judgment only.

Much of the office of jurors, in order to their verdict, is ministerial, as not withdrawing from their fellows, after they are sworn, not withdrawing after challenge, and being tryed in before they take their oath; not receiving from either side evidence after their oath not given in Court, not eating and drinking before their verdict, refusing to give a verdict, and the like; wherein if they transgress, they are finable; but the verdict it self, when given, is not an act ministerial, but judicial, and according to the best of their judgment, for which they are not finable, nor to be punisht, but by attaint.

3. The case of 7 R. 2, title Coronae, Fitz. 108, was cited, where upon acquittal of a common thief, the Judge said, the jury ought to be bound to his good behaviour, during his life: but saith the book, quere per quel ley,

but that was only gratis dictum by the Judge, for no such thing was done, as binding them.

4. *Bradshaw and Salmons case* was urg'd, where a jury had given excessive damages upon a tryal in an action of covenant, and the Court of StarChamber gave damages to the complainant almost as high as the jury had given upon the tryal: but the jury, who gave the damages, were not question'd: though, saith the book, they might have been, because they receiv'd briefs from the plaintiff, for whom they gave damages, which was a misdemeanor; but the express book is, that the jury could not be punisht by information for the excessive damages, but only by attaint, therefore not for their false verdict without other misdemeanor; which answers some other cases alledg'd.

Nor can any man shew (though it was said) that a jury was ever punisht upon an information, either in law, or in the StarChamber, where the charge was only for finding against their evidence, or giving an untrue verdict, unless imbracery, subordination, or the like, were joyn'd.

5. It was said, a perjury in facie Curiae is punishable by the Judge; and such is it if jurors go against their evidence; perhaps a witness may be punisht for perjury in facie Curiae (which I will not maintain to be law), but a jury can never be so punisht, because the evidence in Court is not binding evidence to a jury, as hath been shew'd.

6. Some records were cited, of fines pro concelamento; no doubt it is an article inquirable in every oyer and terminer, and one jury may find it upon another.

7. *Braynes case* was urg'd, but the jurors were there fined for a manifest combination to delude the Court, by agreeing upon two verdicts, and concealing the latter, if the Court would be satisfied with the former.

8. *Wharton's case*, reported by two reporters, Yelverton saith, that the Judges, whereof Popham was one, and a Privy Counsellor, were very angry, and fined the jury for their verdict, and finding against direction.

In those Reports that pass under the name of Noy's, the same case is reported with this, that the Judges conceiv'd the jury had been unlawfully dealt with to give that verdict; which, if true, the fining was lawful, and the case therein reported, short by Yelverton.

9. *Wagstaff's case*, in the King's Bench lately, was the same with the present case; but by the record it is reasonable to think the jurors committed some fault besides going against their evidence, for they were unequally fined.

But however, all the Judges having, upon this retorn, resolved, that finding against the evidence in Court, or direction of the Court barely, is no sufficient cause to fine; the jury answers all these cases, if not answered before.

10. There remains *Southwell's case*, reported by Leonard; some cases out of the Court of Wards in *Lannoy's case*, reported by Serjeant Moore, f. 730, where jurors were sent to the Fleet, or threatned to be sent, for not finding offices according to direction of the Court.

1. An inquest of office is not subject to an attaint.
2. It neither determines any mans right, nor doth any party put any tryal upon them.
3. They are only to find naked matter of fact, as the books are of 3 H. 7, f. 10 b. and 2 H. 4, f. 5 a. but principally an office for the King is in many cases, as necessary, as an entry for a common person, without which he can never come by, or try his right, nor can the King, without an office, know whether he hath a right to a ward, a mortmain, or the like; and as it is an injury to hinder a man from his entry, whereby his right may be tryed, so it is not to find an office for the King, whereby his right may be tryed, which concludes no man, but enables the, King to a tryal of his right, and in truth is only a finding of matter of fact, and no more.

Therefore perhaps it may be an offence, as of a witness refusing his testimony, not to find an office for the King, when clear proof is made of the matter of fact; but if proof be not made at all, or be altogether doubtful, or that the matter be matter of law, the inquest may find an ignoramus, which a jury, upon a tryal, can never do: but of this I shall say no more, it concerning not the case in question.

Presidents. That the Court of Common Pleas, upon Habeas Corpus, hath Discharg'd Persons Imprison'd by other Courts, upon the Insufficiency of the Retorn only, and not for Priviledge.

Sir Anthony Roper, committed by the High Commission Court discharg'd absolutely in the Common Pleas, as unlawfully committed and detain'd, without any mention of priviledge.

George Milton, imprisoned for contempt, scandalous words of the Court, and convicted of drunkenness; the causes resolv'd insufficient, and therefore dimittitur à prisona, and the goaler discharg'd of him; but he gave bayl to attend the pleasure of the Court.

Elizabeth Ash committed by High Commission, pro lenocinio, in like manner discharg'd; the cause being insufficient to detain her in prison, or to hinder her from the priviledge of that Court, but no other mention of priviledge put in bayl.

Richard Hayes, for refusing to do penance, as injoyn'd, committed by the High Commission, the cause judg'd insufficient to commit, but gave bayl as before; he demanded a habeas corpus by reason of priviledge.

But it is to be observ'd, that priviledge lies only where a man is officer of the Court, or hath a prior suit in the Common Pleas depending, and is elsewhere arrested to answer, and molested, that he cannot prosecute his suit, he is then priviledged justly, and without wrong, because his prosecutor elsewhere might have sued, if he pleas'd, in the Common Pleas.

All priviledge is either for officers, clerks, or attorneys of the Court, not to be sued elsewhere; or for persons impleading or impleaded, having priority of suit in the Common Pleas, arrested or sued in other jurisdictions; or for the menial servants of such officers.

These priviledges are not detrimental to any, because whoever hath occasion to sue an officer, or any other, having priority of suit as before, is not restrained to sue them in the Common Pleas, but is restrained from suing elsewhere. And this is the true priviledge of the Court.

And the way of enjoying this priviledge, was, by writs of priviledge to supersede the proceeding of other Courts against such, who had the priviledge of the Common Pleas, as is yet ordinary in the cases of attorneys, officers, and clerks.

And in such writs the cause of priviledge is mentioned, and as to their menial servants, if not true, may be travers'd. As 22 H. 6, 38. Debt was brought against baron and feme, and a supersedeas out of the Chancery, was cast for the baron, as menial servant to an officer of Chancery; whereupon the plaintiff said it was contain'd in the writ that the husband was menial servant to R. J. del Chancery, whereas he was not his menial servant, and thereupon issue was taken. But quere of the officers appearing of record in the Court may be travers'd.

Hence it follows, though proceeding in other Courts against a person priviledged in Banco, might be superseded, yet it was when the matter proceeded upon in such Courts, might as well be prosecuted in the Common Bench; but if a priviledg'd person, in Banco, were sued in the Ecclesiastical Courts, or before the High Commission, or constable and marshal, for things whereof the Common Pleas had no conuzance, they

could not supersede that proceeding by priviledge. And this was the ancient reason and course of priviledge.

1. Another way of priviledge, by reason of suit depending in a Superior Court, is, when a person impleading or impleaded, as in the Common Bench, is after arrested in a civil action or plaint in London, or elsewhere, and by habeas corpus is brought to the Common Pleas, and the arrest and cause retorn'd; if it appear to the Court, that the arrest in London was after the party ought to have had the priviledge of the Common Pleas; he shall have his priviledg allow'd, and be discharg'd of his arrest, and the party left to prosecute his cause of action in London, in the Common Pleas, if he will.
2. If the cause of the imprisonment retorn'd, be a lawful cause, but which cannot be prosecuted in the Common Pleas, as felony, treason, or some cause wherein the High Commission, Admiralty, or other Court, had power to imprison lawfully, then the party imprison'd which did implead, or was impleaded in the Common Bench before such imprisonment, shall not be allow'd priviledge, but ought to be remanded.
3. The third way is, when a man is brought by habeas corpus to the Court, and upon retorn of it, it appears to the Court, that he was against law imprison'd and detain'd, though there be no cause of priviledge for him in this Court, he shall never be by the act of the Court remanded to his unlawful imprisonment, for then the Court should do an act of injustice in imprisoning him, de novo, against law, whereas the great charter is, quod nullus libet homo imprisonetur nisi per legem terrae; this is the present case, and this was the case upon all the presidents produc'd and many more that might be produc'd, where upon habeas corpus, many have been discharg'd and bail'd, though there was no cause of priviledge in the case.

This appears plainly by many old books, if the reason of them be rightly taken, for insufficient causes are as no causes retorn'd; and to send a man back to prison for no cause retorn'd, seems unworthy of a Court.

If a man be impleaded by writ in the Common Pleas, and is after arrested in London upon a plaint, there upon a habeas corpus he shall have priviledge in the Common Pleas, if the writ, upon which he is impleaded, bear date before the arrest in London, and be retorn'd, although the plaintiff in the Common Pleas be nonsuit, essoin'd, or will not appear, and consequently the case of priviledge at an end before the corpus cum causa retorn'd; but if the first writ be not retorn'd, there is no record in Court that there is such a defendant.

The like where a man brought debt, in Banco, and after for the same debt arrested the defendant in London, and became nonsuit in Banco; yet the defendant, upon a habeas corpus, had his priviledge, because he had cause of priviledge at the time of the arrest, 14 H. 7, 6, Br. Priviledge, n. 19.

The like case 9 E. 4, where a man appear'd in Banco, by a cepi corpus, and found mainprise, and had a day to appear in Court, and before his day was arrested in London, and brought a corpus cum causa in Banco Regis, at which day the plaintiff became nonsuit, yet he was discharg'd from the serjeant at London, because his arrest there was after his arrest in Banco, and consequently unlawful, 9 E. 4, f. 47, Br. Priviledge, 24, and a man cannot be imprison'd at the same time lawfully in two Courts.

The Court of Kings Bench cannot pretend to the only discharging of prisoners upon habeas corpus, unless in case of priviledge, for the Chancery may do it without question.

And the same book is, that the Common Pleas or Exchequer may do it, if upon retorn of the habeas corpus, it appear the imprisonment is against law.

An habeas corpus may be had out of the Kings Bench or Chancery, though there be no priviledge, &c. or in the Court of Common Pleas, or Exchequer, for any officer or priviledg'd person there; upon which writ the gaoler must retorn by whom he was committed, and the cause of his imprisonment; and if it appeareth that his imprisonment be just and lawful, he shall be remanded to the former gaoler; but if it shall appear to the Court that he was imprisoned against the law of the land, they ought, by force of this statute, to deliver him; if it be doubtful and under consideration, he may be bayl'd.—The Kings Bench may bayl, if they please, in all cases; but the Common Bench must remand, if the cause of the imprisonment retorn'd be just.

The writ de homine replegiando, is as well retornable in the Common Pleas, as in the Kings Bench.

All prohibitions for incroaching jurisdiction issue as well out of the Common Pleas as Kings Bench.

Quashing the order of commitment upon a certiorari, which the Kings Bench may do, but not the Common Pleas, is not material in this case.

1. The prisoner is to be discharg'd or remanded barely upon the retorn, and nothing else, whether in the Kings Bench, or Common Pleas.
2. Should the Kings Bench have the order of commitment certified and quash'd, before the retorn of the habeas corpus, or after, what will it avail

the prisoners; they cannot plead nul tiel record, in the one case or the other.
3. In all the presidents shew'd in the Common Pleas, or in any that can be shew'd in the King's Bench, upon discharging the prisoner by habeas corpus, nothing can be shew'd of quashing the orders or decrees of that Court, that made the wrong commitment.
4. It is manifest, where the Kings Bench hath, upon habeas corpus, discharg'd a prisoner committed by the Chancery, the person hath been again recommitted for the same cause by the Chancery, and re-deliver'd by the Kings Bench; but no quashing of the Chancery order for commitment ever heard of.
5. In such cases of recommitment, the party hath other and proper remedy besides a new habeas corpus; of which I shall not speak now.
6. It is known, that if a man recover in assise, and after in a re-disseisin, if the first judgment be revers'd in the assise, the judgment in the re-disseisin is also revers'd. So if a man recover in waste, and damages given, for which debt is brought (especially if the first judgment be revers'd before execution) it destroys the process for the damages in debt, though by several originals. But it may be said, that in a writ of error in this kind, the foundation is destroy'd, and no such record is left.

But as to that in *Drury's case*, 8 Rep. an outlawry issued, and process of capias upon the outlawry, the sheriff retorn'd, non est inventus; and the same day the party came into Court and demanded oyer of the exigent, which was the warrant of the outlawry; and shew'd the exigent to be altogether uncertain and insufficient, and consequently the outlawry depending upon it to be null. And the Court gave judgment accordingly, though the record of the outlawry were never revers'd by error; which differs not from this case, where the order of commitment is judicially declar'd illegal, though not quasht or revers'd by error, and consequently whatever depends upon it, as the fine and commitment doth, and the outlawry in the former-case was more the Kings interest, than the fine in this.

The Chief Justice deliver'd the opinion of the Court, and accordingly the prisoners were discharg'd.

Vaughan's Reports [Reports and Arguments of John Vaughan], p. 135.

17.3.2.3Opinion on the Writ of Habeas Corpus, 1758

Die Martis, 9° Maij 1758. Opinion on the Writ of Habeas Corpus.

Upon the second reading of the bill, intituled, “An Act for giving a more Speedy Remedy to the Subject upon the Writ of Habeas Corpus” (a)3, it is ordered by the Lords Spiritual and Temporal, in Parliament assembled, that the Judges do attend this House, the first Thursday after the approaching recess, to deliver their opinions seriatim, with their reasons, upon the following questions:

1st. Whether, in cases not within the Act 31 Car. II. writs of habeas corpus ad subjiciendum, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?

2. Whether, in cases not within the said Act, such writs of habeas corpus, by the law as it now stands, may issue in the vacation by fiat from a Judge of the Court of King’s Bench, returnable before himself?

3d. What effect will the several provisions proposed by this bill, as to the awarding, returning, and proceeding upon returns to such writs of habeas corpus, have in practice; and how will the same operate to the benefit or prejudice of the subject?

4th. Whether, at the common law, and before the Statute of Habeas Corpus in the 31st of King Charles II. any, and which, of the Judges could regularly issue a writ of habeas corpus ad subjiciendum, in time of vacation, in all or in what cases particularly?

5th. Whether the Judges, at the common law and before the said statute, were bound to issue such writ of habeas corpus ad subjiciendum, in time of vacation, upon demand of any person under restraint; or might they refuse to award such writ, if they thought proper?

6th. Whether the Judges, at the common law and before the said statute, were bound to make such writs, so issued in time of vacation, returnable immediaté; and could they [ed. *sic*; enforce] obedience to such writ issued in time of vacation, if the party served therewith should neglect or refuse to obey the same, and by what means?

7th. Whether, if a Judge, before the said statute, should have refused to grant the said writ, upon the demand of any person under any restraint, the subject had any remedy at law, by action or otherwise, against the Judge for such refusal?

8th. Whether, in case a writ of habeas corpus ad subjiciendum at the common law be directed to any person returnable immediaté, such person may not stand out an alias & pluries habeas corpus, before due obedience thereto can be regularly enforced by the course of the common law?

9th. Whether the said statute of the 31st of King Charles II. and the several provisions therein made, for the immediate awarding and returning the writ of habeas corpus, extend to the case of any man compelled against his will in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters?

10th. Whether in all cases whatsoever, the Judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the Judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty, by the most unwarrantable means, and in direct violation of law and justice?

ANSWER of Mr. Justice Wilmot (*a*) to the questions proposed to the Judges by the House of Lords, on the second reading of the bill, intituled, "An Act for giving a more Speedy Remedy to the Subject, upon the Writ of Habeas Corpus."

1st. Question. "Whether in cases, not within the Act 31 Car. II. writs of habeas corpus ad subjiciendum, by the law as it now stands, ought to issue of course, or upon probable cause verified by affidavit?"

Answer. I am of opinion, that in cases not within the Act of the 31 Car. II. writs of habeas corpus ad subjiciendum, by the law as it now stands, ought not to issue of course, but upon probable cause verified by affidavit.

A writ which issues upon a probable cause, verified by affidavit, is as much a writ of right, as a writ which issues of course.

There are many other writs, besides the writ of habeas corpus, which fall exactly under the same circumstances: writs of mandamus, prohibition, 1 Syd. 65. Sir R. Raymond, 4. Supplicavit, ne exeat regnum, the writ of homine replegiando;—are all writs of right; but a proper case must be laid before the Court by affidavit, before the parties, praying such writs, may be entitled to them. They are the birthright of the people, subject to such provisions as the law has established for granting them. Those provisions are not a check upon justice, but a wise and provident direction of it.

The very learned and able men who framed the 31 Car. II. could not avoid taking these writs of habeas corpus for private custody, into their consideration. Three or four years before that Act passed, there had been two very great cases, extremely agitated in Westminster Hall, upon writs of

habeas corpus for private custody, *viz.* the cases of *Lord Leigh*, 2 Lev. 128, and *Sir Robert Viner, Lord Mayor of Kingdom*, 3 Keb. 434, 447, 470, 504. 2 Lev. 128. Freem. 389. But they wisely drew the line between civil constitutional liberty, as opposed to the power of the Crown, and liberty as opposed to the violence and power of private persons. They thought this power of judging might be abused in favour of the Crown, but they saw no damage of an abuse of it as between one subject and another; and therefore they applied the remedy to the evil they had seen and experienced, and left the law as they found it in respect of private persons.

There is no such thing in the law, as writs of grace and favour issuing from the Judges: they are all writs, of right; but they are not all writs of course.

Writs of course, are those writs which lie between party and party, for the commencement of civil suits: and if they are sued without a good foundation, the common law punishes the plaintiff for suing out the writ vexatiously, by amercing him “pro falso clamore.” And by the statute law, he is to pay the costs of the suit.

But the writ of habeas corpus is not the commencement of a civil suit, where the party proceeds at the peril of costs, if his complaint is a groundless one: it is a remedial mandatory writ, by which the King’s Supreme Court of Justice, and the Judges of that Court, at the instance of a subject aggrieved, commands the production of that subject, and inquires after the cause of his imprisonment; and it is a writ of such a sovereign and transcendent authority, that no privilege of person or place can stand against it. It runs, at the common law, to all dominions held of the Crown. It is accommodated to all persons and places. 2 Cro. 543. Palmer, 54. And, as all these remedial mandatory writs were, originally, rather the suits of the King than of the subject, the King’s Courts of Justice would not suffer them to issue upon a mere suggestion; but upon some proof of a wrong and injury done to a subject.

Writs of habeas corpus, upon imprisonment for criminal matters, were never writs of course: they always issued upon a motion, grafted on a copy of the commitment; and cases may be put in which they ought not to be granted. 1 Lev. 1. Comber. 74. Habeas corpus was denied to one committed to Bridewell for lewdness. 3 Bul. 27. 2 Mod. 306. If malefactors, under sentence of death in all the gaols in the kingdom, could have these writs of course, the sentence of the law might be suspended, and perhaps totally eluded by them.

The 31 Car. II. makes no alteration in the practice of the Courts in granting them: they are still moved for, in term time, upon the same foundation as they were before: and when a single Judge in vacation grants them under the 31 Car. II. in criminal cases, a copy of the commitment, or an affidavit of the refusal of it, must be laid before him. He must judge, even in that case, whether treason or felony is specially expressed in the warrant of commitment: and there have been a great number of cases where a doubt has arisen on the frame and wording of the warrant; so that even upon the Act, the probable cause of bailing is really disclosed to the Judge, unless the copy of the commitment is refused, and then the law will presume every thing against it; and in cases out of the Act, which take in all kinds of confinement and restraint, not for criminal, or supposed criminal, matter, and to which this question relates, it has been the uniform uninterrupted practice, both of the Court of King's Bench, and of the Judges of that Court, that the foundation, upon which the writ is prayed, should be laid before the Court or Judge who awards it.

The reasons of guarding the writ in this manner, I take to be these: there are many kinds of private restraint that are lawful. There was a much greater number formerly. The Reformation opened the doors of religious prisons; and the abolition of military tenures unfettered an unhappy class of men, called villeins, who lived in a state of captivity under their masters.

There are many kinds of restraint that exist at this day; some in the nature of punishments. In domestic government, which takes in the ease of husbands, fathers, guardians, and masters, the law authorizes restraints, in order to enforce a performance of those natural, moral, and civil duties, which wives, children, wards, and apprentices, owe to their superiors, in their several relative capacities. These domestic governments could not subsist without such authorities; and therefore all States have endeavoured most anxiously, some in a greater degree, and others in a less degree, to preserve the greatest reverence for them.

The wisdom of our ancestors would not suffer this kind of authorities to be broken in upon wantonly, upon mere suggestion, and without seeing some reason for an interposition; because they saw it would have encouraged disobedience and rebellion in private families; and, at all events, must have abated that awe and respect which act so materially in the support of those authorities. They may be abused: if they are, the law says, let it be shewn, and the party shall have relief; but if he cannot shew they are abused, he is entitled to none. The legal presumption is certainly in

favour of these authorities; the law will not presume they are unduly or irregularly executed.

But if these writs were to have issued without any case made, they must have issued indiscriminately, in the cases of lawful restraints, as well as unlawful ones; which would have been levelling all distinction between them, and have been subjecting the authority of fathers, husbands, guardians, and masters, to be canvassed and questioned in the same manner, and upon the same suggestions, as the extravagant outrages of persons acting without any authority at all.

It would have been proceeding upon an inversion of the legal presumption, and would thereby have destroyed all that order, discipline, and subordination in private families, which lead men into a habit of obedience, and dispose them early to obey the laws of their country.

When a Judge is called upon for a habeas corpus, in order to bail a man for a bailable offence, the injustice of the imprisonment is obvious and self-evident: for imprisonment before trial, being only to secure his being amenable to justice; if that security can be obtained by bail, in bailable offences, it is unjust that he should be kept in prison. The authority which committed him ought to have bailed him.

The authorities I have mentioned are equally legal, and therefore within the spirit and reason of the Habeas Corpus Act itself. The injustice of the imprisonment ought to appear in the first instance, before the party has a right to demand the remedy.

The law laid this check, to prevent that scene of disorder and confusion which must arise, if wives, children, wards, and apprentices, or any other person in their name, and on their behalf, were to be at liberty, without any foundation or cause shewn, to force a production of them in Westminster Hall, or before a Judge, where-ever he should happen to be, whenever they pleased, and as often as they pleased, at a risk of having them rescued out of their hands, “in transitu,” and without a possibility of a satisfaction from any body.

There are many other lawful restraints besides those arising under the authorities I have mentioned:—All persons who are in custody upon civil process, or under special authorities, created by Act of Parliament, proceeding “civiliter,” and not “criminaliter,” against the persons who are the objects of them:—Persons who are bailed, paupers in hospitals or workhouses, madmen under commissions of lunacy, or confined by parish officers, under the Vagrant Act of 17 Geo. II. are all under a lawful

confinement.

If all these persons were to have had these writs of habeas corpus of course, without shewing any cause or foundation for granting them, it would have been suffering this great remedial mandatory writ to have been used as an instrument of vexation and oppression; it would have become a weapon in the hands of madmen, and of dissolute, profligate and licentious people, to harrass and disturb persons acting under the powers which the law had given them.—One most frightful instance occurs: the case of a crew performing quarantine.—If this writ were to issue of course, it might bring back pestilence and death along with it.

The check upon the writ, by requiring a probable cause to be shewn before it issues, is only saying, "shew you want redress, and you shall have it:" and if a person cannot disclose such a case himself, as to shew he is aggrieved when he tells his own story, and is not opposed or contradicted by any body; it is decisive against his being in such a condition as to want relief.

Besides the practice, which is a decisive evidence of the law, it appears from a case [(a)], Hilary, 8th King William, called *Griffiths's case*, that the Court would not grant this writ, until a probable cause was laid before the Court that the party was entitled to it.

When this writ was first applied to relieve against private restraints, does not appear; but whenever it was, the manner of issuing it seems to have been adopted from that of the writ of homine replegiando, which was the true common law remedy for the assertion of liberty against a private person: and that writ never issued of course, but was applied for by petition to the Great Seal, and an affidavit made, disclosing the foundation on which it was prayed. State Trials, 3 vol. 632. 2 Lill. Pr. Reg. 23. 2 Freeman, 27, *Jennings's case*, upon affidavit made, that Jennings had got a young heiress into his custody without the consent of the guardian, upon the motion of the Attorney-General, a homine replegiando was granted. And as the law checked that writ of homine replegiando; the habeas corpus, which seems by practice to have been substituted in its place, took the check along with it.

Careful as the law is to prevent this writ from being abused, it cannot always prevent it: for if a man does not disclose the whole case, it may issue sometimes where it would not have issued, if the case had been fairly stated.

I will mention one case, which happened last term, and which shews the

reason of the law, in expecting to see a full state of the case before the writ issues.

A gentleman applied to a Judge of the Court of King's Bench in vacation time, for a habeas corpus to his wife's mother, to bring up his wife, upon an affidavit of detention of her from him. As it was near term, the writ was returnable first day of term.

The fact was, that they had entered into articles of separation, which had determined his right to the custody of his wife; the mother brought the wife into Court, and returned the articles of separation. The return was of great length, and the mother was put to a very great expence in the making it, and if she had brought her daughter from the remotest part of the Kingdom, she could have had no satisfaction at all.

If the affidavit had disclosed the articles of separation, as it ought to have done, the Court, or Judge, would have said, "You have no right to the relief you pray, and therefore must not put the parties to costs and vexation, in a case which is remediless of your own shewing."

2d Question. Whether in cases, not within the said Act, such writs of habeas corpus, by the law as it now stands, may issue in the vacation by fiat from a Judge of the Court of King's Bench, returnable before himself?

Answer. I am of opinion that in cases, not within the Act of the 31st Car. II. writs of habeas corpus ad subjiciendum, by the law as it now stands, may issue in the vacation by fiat from a Judge of the Court of King's Bench, returnable before himself.

From the best inquiry I can make, writs of habeas corpus, in criminal cases, have been awarded by the Chief Justice of the King's Bench, and the Judges of that Court, long before the 31st Car. II.

The files of the fiats for writs made out in the Crown Office before the reign of Car. II. are not to be found there, except for four or five terms in Queen Elizabeth's time, one or two in James I. and for six or seven terms in Car. I.

No information is to be had from the records; but there are traces from cases in print, and from fiats since the Restoration, and before the 31st Car. II. that there had been a kind of unsettled practice for the Chief Justice, and Judges of the Court of King's Bench, granting them in vacation; and as the Judges of that Court are justices of peace all over the kingdom, they have a power of bailing, as incident to that authority; and I don't see how that power of bailing could well be exercised, without removing the person to be bailed before them by habeas corpus.

Catesby's case in vacation, is in Hilary, 43 Eliz. in the 7th vol. of the State Trials, 175.

I have a list of fiats for habeas corpus, since the Restoration, and before the 31 Car. II. Thirty of them appear to have been granted and made returnable before the Judges in vacation. Since the 31 Car. II. these writs have issued, in criminal cases, under that Act, when granted at the instance of a subject.

As to writs of habeas corpus in cases of private custody, I cannot ascertain the commencement of their being first issued by the Court.

By the common law, the liberty of a man's person against private persons, acting without any legal authority, was protected in this manner:
1st. First, the law gave every man a right to repel force by force, and to defend his liberty in the same manner as he might his life.
2d. As every unlawful imprisonment was a breach of the peace, it must be proceeded against as such, by justices of peace; and the delivery of the party perhaps enforced by a rigorous execution of that authority. It might also be punished by indictment. Satisfaction might likewise be recovered for the injury, by an action of false imprisonment.

The writ of homine replegiando, as mentioned before, was the only specific remedy provided by the common law, for the protection and defence of his liberty, against any private invasion of it.

Though there is an "obiter" saying by Justice Wild, in Carter, 222, of a case where the Court sent a habeas corpus to Dr. Prujean, beyond sea, for Sir Robert Carr's brother, yet it is so loosely stated, I lay no stress upon it.

The first case is the case of *Sir Philip Howard*, mentioned in *Lord Leigh's case*, and therefore must have been before that time. *Lord Leigh's case* was in the 27 Car. II. where habeas corpus was granted to bring up his wife. And the case of *Viner and Emmerion* was in the 27th year of Car. II. where a habeas corpus was granted to Viner to bring up his daughter-in-law, *viz.* his wife's daughter by a first husband. From that time to this, the Court has constantly granted them.

When the practice of the Chief Justice, and the Judges of the Court of King's Bench, granting these writs in vacation, in cases of private custody, first began, does not appear; but in all probability, it was either coeval with what the Court did, or very soon followed it; because the principle which supports the one, concludes as forcibly to the supporting the other: and the principle is this; if the writ is applicable to one species of unlawful imprisonment, it is in reason equally applicable to another. They are cases

“ejusdem generis;” and therefore let the usage of issuing this writ have begun sooner or later, it was in the first instance a warrantable extension of a legal remedy in one case, to another case of the same nature; and I consider the usage in this case as the voice and testimony of the Judges, for near eighty years together, to the legality of the very first application of it.

The principle upon which the usage was founded, lay in the law; and the usage is nothing but a drawing that principle out into action, and a legal application of it to attain the ends of justice. It is upon this foundation only, that an infinite variety of forms, rules, regulations, and modes of practice in all Courts of Justice must stand, and can only be supported.

In many instances, an usage for some time is considered as an evidence of an antecedent immemorial usage, and therefore may be called the common law. 2 Co. 16 b., *Lane’s case*. “The customs and courses of the King’s Courts are as a law. The course of a Court makes a law.”

But when the commencement of an usage can be fixed and ascertained, it cannot be supported by a presumption, and the legality of the usage must then depend upon some other principle; and that principle is this, “ubi eadem est ratio, ibi idem est jus;” a writ applicable to one kind of imprisonment, is in reason equally applicable to another.

It would be endless to enumerate instances where the King’s Supreme Courts of Justice in Westminster Hall have, for the ease and benefit of the suitors of the Court, reformed, amended, and new moulded and modified their practice, as from experience and observation they found it would best advance, improve, and accelerate the administration of justice; and all acts done by Judges at their chambers, and by officers of the Court, either in term or out of term, are under a delegated authority from the Court. They are controulable by the Court, and obedience to them must be enforced by the Court. And the acts done in Court and out of Court, taken together, form that system of practice by which the benefit of the law is dealt out to the people.

I will mention an instance where a writ has been extended by usage to a purpose much beyond the original intention of it, *viz.* “ne exeat regnum;” which is a State writ to restrain people from going abroad; first used to hinder the clergy from going to Rome; then extended to laymen, machinating and concerting measures against the State; now applied to prevent a subterfuge from the justice of the nation, though in matters of private concernment, in order to get bail for an equitable demand, upon affidavit of intention to go abroad.

The legality of that application was settled in Car. II.'s time, upon an usage first begun in the time of James I. 1 Ch. Ca. 115. *Read* against *Read*, 2 Ch. Ca. 245. If usage, where the commencement of it was known, could legitimate a process which is to take away a man's liberty, surely usage, founded upon a legal principle, will legitimate a process which is applied to protect it.

I will mention a case in the Year Book 13 Hen. VII. fol. 17, where the mode of proceeding, in one kind of action, was translated to another, in favour of liberty. Action of trespass.—Plaintiff sets forth that he was a freeman, and that the defendant claimed him to be a villein, so that he durst not go about his business, and that the defendant had taken some of his goods; and he prayed that the defendant might give security to deliver them, and not take any more of them, or his body, pending the writ. This was the practice in a "homine replegiando;" and in a "homine replegiando," the plaintiff was to give security to deliver his body in case the action was determined against him.

It was resolved they should find security to one another, as if it had been a "homine replegiando;" and the Court said, "it was good discretion to favour liberty as much as might be by reason." They applied the provisions applicable to one writ, to another writ, because it fell under the same reason, and was to favour liberty.

It has been lately said, that the practice of issuing these writs by the Judges in vacation, was taken up under an apprehension of their being within the 31 Car. II. and that they have been marked in the Crown Office by that statute. How such an apprehension or practice could have prevailed, is to me inexplicable! No man could ever have such an apprehension who had ever read the Act: it is confined in words, and by the nature almost of every provision in it, to criminal, or supposed criminal, matter.

As to marking them by the statute, as there were fifty writs in criminal cases, for one writ in the case of private custody, the mistake might easily be made; if observed, could do no harm: it might quicken the returns; or be an inaccuracy in the office: I lay no stress upon it; because we see some few writs of habeas corpus, issued by the Court, marked by the statute, and yet the Act gives the Court of King's Bench no power of awarding these writs, but leaves that power exactly as it found it; and therefore it might as well be inferred, that the Court thought their power was by the statute, when their writ was marked by the statute, as that a single Judge thought his power was by the statute, because the writ was marked so.

I will never offer such an indignity to the very great and eminent men who have presided in that Court, and to the succession of Judges who have sat in it for near eighty years, as to say, that they founded this practice upon a mistake which could not have infected the meanest capacity.

I must say they never read the Act if they thought so. And *Griffiths cases*, already cited, shews that these kinds of habeas corpus were understood not to be within the Act.

Lord Chief Justice Hale does say, in second volume of Pleas of the Crown, 145, that this writ is not regularly to issue but in the term time, when the Court may judge of the return, or bail or discharge the prisoner; and in page 147, he says, it seems, "regularly," is writ should issue out of the Court of Chancery in vacation time, and out of the King's Bench in term time.

That word " regularly," alludes to some unsettled practice of the Judges issuing that writ in vacation.

This was a noble, but a posthumous, work, not fitted by him for the press, nor corrected; and, I have heard, a collection of notes made by him before the Restoration.

If it was, then the precedents and practice since the Restoration, were not taken into his consideration; and yet the practice after the Restoration, and even his own practice, varied the law extremely from what he asserted it to be in his book: for he says, that this writ issues for matter only of crime; and that assertion is confuted by his own practice, because he was Chief Justice when the writs were awarded in *Lady Leigh's case*, and *Viner's case*, in the 27 Car. II. which were not for matters of crime, but for private custodies; and *Viner's case* seems to have been as much agitated as any case could be, and there never was the least objection to the Court's right of awarding the writ. That circumstance is decisive against his authority upon the nature of this writ; or rather a declaration that he changed his opinion, and thought it might issue for other matters.

In 2 Ins. 53, and 4 Ins. 81, 182, Lord Coke says, "It ought to issue out of the Court of King's Bench in term time, and out of Chancery either in term time or vacation." All writs, in supposition of law, do issue in the term; and he might mean no more, than that Judges could not grant them by their own proper authority, as separate and detached from the Court, as they issue warrants.

First, this was no judicial determination; a mere "prolatum," which, as to the Court of Chancery, is very doubtful. For no writ of habeas corpus can

be found to have ever issued out of the Court of Chancery, except some returnable in the House of Lords. The 16 Car. I. takes no notice of the Court of Chancery, which it is most probable it would have done, if it had been thought that the writ had issued out of that Court in vacation. And the 31 Car. II. seems to proceed upon a supposition, that it could not issue out of the Court of Chancery, because the 10th section expressly empowers the Court of Chancery to grant it, which would have been unnecessary, if it could have granted the writ before; and it only shews, what I really take to be the truth of the case, that there was no settled fixed practice, then established, of their issuing in vacation; but if they could not, nor ever did issue out of the Court of Chancery, it is the strongest reason that can be urged in support of the practice of issuing these writs by the Judges of the Court of King's Bench, in vacation, before the statute, because there could not otherwise have been a perfect and complete remedy at all times for the subject against imprisonment, for a bailable offence at the common law, and before the Statute of 31 Car. II.

That Act proceeds upon a supposition of a practice of that kind then prevailing. To what purpose is the writ to be marked by the statute, if the Judges, in vacation, could issue no writ of habeas corpus ad subjiciendum, but under this statute? That direction was to distinguish this writ, when issued at the suit of a subject to be bailed, from every other writ of this nature, which the Judges in vacation might issue: not meant to give a power which they did not exercise before, but to reduce an unsettled, informal, vague practice, into a formal regular system, as to the bailing for bailable offences, and to correct the abuse of any power which they bad in fact exercised.

But upon Lord Coke's own principles, suppose no such practice when he wrote, yet a subsequent practice, founded upon legal principles, and an experience of its utility, has made the law; "per varios actus legem experientia fecit." Lord Coke's averment has not the weight it would have had, if made after 31 Car. II.; according to his own principles, the practice would have made it law; and as it appears by the fiats between the Restoration and the 31 Car. II. that three Chief Justices, Foster, Hyde, Keyling, and four Judges of the Court, Morton, Twisden, Mallet, and Wyld, granted these writs in vacation, and the practice is warranted by legal principles, and it is admitted they were always grantable "pro Rege," (which establishes the vacation right) the opinion both of Lord Hale and Lord Coke may be true; and, upon Lord Coke's own principle, if he had

written twenty years after the Restoration, instead of thirty years before it, he must have been of the opinion I now give.

As to the 4th (a) and 5th questions upon your Lordships paper, *viz.*

4th question. Whether, at the common law, and before the Statute of Habeas Corpus in the 31 King Car. II. any, and which, of the Judges could regularly issue a writ of habeas corpus ad subjiciendum, in time of vacation, in all or in what cases particularly?

5th question. Whether the Judges at the common law, and before the said statute, were bound to issue such writs of habeas corpus ad subjiciendum, in time of vacation, upon the demand of any person under restraint, or might they refuse to award such writ if they thought proper?

Answer. I think the Chief Justice of the Court of King's Bench, and the other Judges of that Court, did in fact issue them in vacation, before 31 Car. II. in criminal cases, and might do so on principles of law; possibly it might be done at first for the King only, and afterwards for the subject; but I do not think there was any settled course of practice observed in granting them before the statute, and that such unsettled manner of practice produced the statute in the cases of bailable offences: and, in cases out of the Act, usage has now fixed a regular course or manner of granting them; but I desire to be understood, that the present usage of granting them must be supported upon such principles of law, as would have supported the granting them when such usage first began. And I think they were not bound to grant them upon the demand of any person under restraint, at the common law, and before the statute, any more than they are bound to grant them now upon demand. There must have been some case made, before they could be bound to grant them at any time.

6th question. Whether the Judges, at the common law, and before the said statute, were bound to make such writs, so issued in time of vacation, returnable "immediaté;" and could they enforce obedience to such writ so issued in time of vacation, if the party served therewith, should neglect or refuse to obey the same, and by what means?

Answer. I am of opinion, that the Judges at the common law, and before the said statute, were not bound to make writs of habeas corpus ad subjiciendum, issued in vacation time, returnable "immediaté;" because I find by the files of fiats for these writs before the statute, that they were sometimes made returnable "immediaté," and sometimes in term time; and I think the Judges cannot enforce obedience to any writs of habeas corpus, issued in time of vacation, (whether they issue in cases within the 31 Car.

II. or in cases out of that Act) if the party served therewith, should neglect or refuse to obey the same, by any means but by attachment for a contempt, which can only issue out of Court in term time.

7th question. Whether, if a Judge, before the said statute, should have refused to grant the said writ upon the demand of any person under any restraint, had the subject any remedy at law, by action or otherwise, against the Judge for such refusal?

Answer. I think that the subject had no remedy at law, by action or otherwise, against the Judge for such refusal. The denying a writ stands upon the same ground as any other breach of duty.

8th question. Whether, in case a writ of habeas corpus ad subjiciendum, at the common law, be directed to any person returnable "immediaté," such person may not stand out an alias and pluries habeas corpus, before due obedience thereto can be regularly enforced by the course of the common law?

Answer. I am of opinion, that in case a writ of habeas corpus ad subjiciendum, at the common law, be directed to any person returnable "immediaté," the Court, upon the affidavit of the service of the writ, will grant a rule for an attachment.

By the course of the common law, he might have stood out an alias and pluries; but by practice the course is now altered, and in many cases the Court has enforced obedience to a writ for private restraints, in the first instance, by attachment, for the furtherance of justice. The method of proceeding by alias and pluries, is gone into disuse, in almost all cases, and the process by attachment substituted in its stead; and that practice stands upon this legal principle;—that disobeying the King's writ is a contempt, and equally a contempt to disobey the first writ as the last.

9th question. Whether the said Statute of the 31 Car. II. and the several provisions therein made for the immediate awarding and returning the writ of habeas corpus, extend to the case of any man compelled, against his will, in time of peace, either into the land or sea service, without any colour of legal authority; or to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal, matters?

Answer. I think they do not extend to the case of a man so compelled; because the person who compels a man against his will, in time of peace, either into the land or sea service, without any colour of legal authority, is the criminal, and not the man impressed. And I think that Act doth not

extend to any cases of imprisonment, detainer, or restraint whatsoever, except cases of commitment for criminal, or supposed criminal, matters.

10th question. Whether, in all cases whatsoever, the Judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought up before them, although it should appear most manifestly to the Judges, by the clearest and most undoubted proof, that such return is false in fact, that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice?

Answer. I am of opinion, that no cases whatsoever, the Judges are so bound by the facts set forth in the return to the writ of habeas corpus, that they cannot discharge the person brought up before them, if it shall most manifestly appear to the Judges, by the clearest and most undoubted proof, that such return is false in fact, and that the person so brought up is restrained of his liberty by the most unwarrantable means, and in direct violation of law and justice. But by the clearest and most undoubted proof, I mean the verdict of a jury, or judgment on demurrer, or otherwise in an action for a false return: and in case the facts averred in the return to a writ of habeas corpus, are sufficient in point of law to justify the restraint, I am of opinion, that the Court or Judge, before whom such writ is returnable, cannot try the facts averred in such return, by affidavits, in any proceeding grafted upon the return to such writ of habeas corpus.

The clearest and most undoubted proof in the law, is the verdict of a jury; and if the facts, set forth in a return, are disproved by a verdict, I think the Judges are not bound by those facts in any case whatsoever, from discharging the person brought up before them; but as I presume the question means, “proof by affidavit,” in order to examine the truth or falsity of a return; I shall consider the question in that view.

To get at the bottom of it, the nature of this writ must first be considered: it is a demand by the King’s Supreme Court of Justice to produce a person under confinement, and to signify the reason of his confinement.

In imprisonment for criminal offences, the Court can act upon it only in one of these three manners:

1st. If it appears clearly that the fact, for which the party is committed, is no crime; or that it is a crime, but he is committed for it by a person who has no jurisdiction, the Court discharges.

2d. If doubtful whether a crime or not, or whether the party be committed by a competent jurisdiction; or it appears to be a crime, but a bailable one, the Court bails him.

the Court bails him.
3d. If an offence not bailable, and committed by a competent jurisdiction, the Court remands or commits.

The nature and quality of the fact with which the party is charged, and the jurisdiction which has taken cognizance of it, are to be considered on the return; but the existence of the fact, that is, whether such a fact was committed, or whether there is such a warrant of commitment as the gaoler has returned, is a matter which belongs “ad aliud examen.” The Court says, “Tell the reason why you confine him.” The Court will determine whether it is a good or bad reason; but not whether it is a true or a false one. The Judges are not competent to this inquiry; it is not their province, but the province of a jury, to determine it: “ad questionem juris, non facti, judices respondent.” The writ is not framed or adapted to litigating facts: it is a summary short way of taking the opinion of the Court upon a matter of law, where the facts are disclosed and admitted; it puts the case exactly in the same situation as if an action of false imprisonment had been brought, and the defendant had set forth a series of facts to justify the imprisonment, and the plaintiff had demurred to the plea. A return is the same as the justification demurred to; but, in both cases, if the facts are controverted, they must go to a jury; and when the return to a habeas corpus is made and filed, there is an end of the whole proceeding, and the parties have “no day” in Court; and therefore it is impossible that a proceeding, by way of trial, should be grafted upon it.

All the arguments upon the habeas corpus, in the seventh volume of the State Trials, 123, 156, take it for granted that it is impossible to go out of the return; and Mr. Calthorp, who was recorder of London, a very ingenious man, and argued for the subject, lays it down, “that it ought to be precise and direct, so as to be able to judge of the cause, whether sufficient or not. For there may not any doubt be taken to the return, be it true or false; but the Court is to accept the same as true; and if it be false, the party must take his remedy by action upon the case.”

Mr. Selden likewise in his argument in the same book, page. 156, says, “The keeper of the prison returns by what warrant he detains the prisoner, and with his return fixed to his writ, brings the prisoner to the Bar at the time appointed: when the return is thus made, the Court judgeth of the sufficiency or insufficiency of it, only out of the body of it, without having respect to any other thing whatsoever, that is, they suppose the return to be true, whatever it be; if it be false, the prisoner may have his action on the case against the gaoler that brought him.” And it is for this reason the law

requires such exact critical certainty in returns, because the party can have no answer to it upon the return. Nothing can be pleaded to it. It must be taken to be true, until twelve men, upon their oaths, have said that it is false.

To enter into a disquisition of this sort upon affidavits, would be confounding the offices of judge and jury, and introducing a mode of trial where no issue is or can be joined. The parties, in such a summary way of trial, must lose the benefit of a “viva voce” examination, where the looks, the manner, and deportment of the witness, are extremely material to confirm or discredit his testimony: it is found by the experience of ages, that nothing does so effectually explore the truth as a cross-examination, which strikes so suddenly that fiction can never endure it.

Another decisive reason against this mode of trial, is, that there is no compulsory method of forcing men to swear affidavits; so that if a person were obliged to prove the truth of his return by affidavit, he is totally destitute of any means of obliging men to make affidavits to prove them.

Another reason is, that the parties are entitled to no costs upon the return to a habeas corpus; and if the Court pronounces a wrong judgment upon the facts, there is no method of controverting it. But in an action for a false return, witnesses may be compelled to appear, and must be examined “viva voce.” Costs will follow the event of the trial. If the verdict is false, or contrary to evidence, the law has established a legal method of controuling it.

Writs of mandamus stood exactly upon the same foundation. They are both the King’s mandatory writs, issued at the instance and for the relief of the subject. The answer to them shall be taken to be true, till it has undergone that examination which the wisdom of our ancestors has established for the decision of facts. And the law gave such credit to returns of these writs, that they would not even suffer the facts to be denied and brought to trial before a jury in that course of proceeding. “You have asked a question; you shall take the answer as it is given you: if it is insufficient in point of law, the Judges will give instantaneous relief; if it is false in fact, you have received an injury; vindicate yourself against that injury by an action, and when you have proved the fact to be false, you will be entitled to a complete relief.”

This rule was adhered to so strictly, that even in the case of annual offices in corporations, where the offices would expire before the truth or falsity of a return to a mandamus could be tried in an action for a false return, the law would not suffer the return to be traversed.

In 9th Queen Anne, an Act of Parliament was obtained, to permit the traversing returns to mandamus's for such offices as are within that Act; and all offices, not within that Act, stand as they did at the common law; and the facts, though ever so false, cannot be disproved but in an action for a false return, or in some cases by an information.

This is a strong Parliamentary declaration of what the law is, upon returns to writs of mandamus, which are always considered as standing upon the same foundation as returns to writs of habeas corpus.

I have looked through the books as carefully as I can, and so far from finding an instance of their being controverted by affidavit, where a person has been in custody of an officer under a legal authority, there is not an instance where the party is let in upon the record of the return to traverse any of the facts contained in it; but if that might have been done, yet it does not contradict my assertion, because a traverse carries it to its proper manner of trial, a trial by jury.

There are two cases, *King and Gardiner*, Cro. Eliz. 821. Trem. 354. *Swallow and The City of London*, 1 Syd. 287, where facts, consistent with the return, have been let in to be averred: I will cite them, because they shew that even facts, confessing the truth of the return, and avoiding it, must go to the jury.

A bailiff going to arrest a justice of the peace, he carried with him a hand gun: the 33 Hen. VIII. prohibits all persons from carrying such weapons. The justice sends out his servant and apprehends him for carrying this hand-gun; the justice convicts him upon the statute for the penalty, and sends him to gaol till he paid the penalty. Gardiner brings a habeas corpus, and removes himself into Court. The return was the warrant of execution, where the fact of his being a sheriff's officer did not appear; but the matter being disclosed to the Court, it was thought to be no offence, and that a minister of justice might carry a hand-gun. How was it to be come at? This was a fact which did not contradict the return, but confessed and avoided it; and yet the Court would not interpose by affidavit: they ordered a plea to be put in, comprising the whole matter, and upon the King's coroner and attorney confessing the plea, the man was discharged. But if it had been controverted, the plea put it into such a method, as would bring the fact to that form of trial, which the law has established as the best for investigating truth.

In the other case, Swallow was committed by the Court of Aldermen to Newgate, for refusing to accept the office of alderman, to which he had

been elected by the ward where he lived; he was brought up by habeas corpus; after the return filed, it was moved for him to have leave to plead to the return, that he was an officer of the Mint, and by charter exempt from all offices—not a hint at an affidavit, and they put him to a writ of privilege, besides the plea; and as facts confessed and avoided the return, it was admitted: but still it brought the point to trial by jury; and it was agreed in that case, that matter, contrary to the return, could not be pleaded, but the party is put to his action for the false return.

It appears by Sir G. Treby's report, February 1688, that the House of Commons came to twenty-eight resolutions, to be carried into the Bill of Rights. Many of them were afterwards dropped, and amongst the rest, the twenty-fifth, which was, "that the subject should have liberty to traverse returns to writs of habeas corpus and mandamus."

This doctrine is echoed through all the books for three or four hundred years together. Y. B. 9 Hen. VI. fol. 44. Babington, who was then Chief Justice; "If the cause appear to us sufficient in itself, notwithstanding it be false, it is enough for us upon the return, which the whole Court agreed. And if he had returned that he was his villein, this shall not make an issue here, whether he be his villein or not: wherefore, if you cannot prove but that the cause is sufficient in itself, he shall be sent back again." 11 Coke 99, *Bagges's case*. 12 Coke 129, *Hawkeridges case:* "that upon an insufficient return, the party must be bailed or discharged; otherwise, if return shall be sufficient, when it is false." Godbolt, 129. If the return is false, the party cannot be delivered. 8 Co. 127 b.

I find no authority which warrants a difference between returns, when filed to writs of habeas corpus in cases of private custody, and of public custody, where the facts justifying the imprisonment have been set forth; that is, where there has been a full, complete, sufficient return.

For as to returns of process, which are to bring parties into Court, in order to have the right tried and examined, when the Court is proceeding not "legem dicere," but only "sistere in judicio," the Court often proceeds in a summary way upon such returns for the expedition of justice; the Court will not see their process disobeyed and eluded by tricks and falsities; and the case of *Emerton and Viner*, which was in Hilary term, 26 and 27 Car. II. and Easter and Trinity terms, 27 Car. II. seems to have proceeded upon this principle. It is reported in 3 Keb. 434, 447, 470, and 504. 2 Lev. 128. Freeman, 389, 401, 522.

I will state the case particularly, as it appears upon the record. In Hilary

term, 26 and 27 Car. II. a habeas corpus issued to Sir Robert Viner, Lord Mayor of London, for the body of Bridget, the only daughter and heir of Sir Thomas Hyde. (Note, Sir Robert Viner had married Lady Hyde, the mother of Bridget, who was then dead.) In the same Hilary term, an “alias” habeas corpus issued under the penalty of £40; and afterwards in the same term, a “pluries” habeas corpus issued under the penalty of £500.

Sir Robert Viner to the “pluries” returned, that Bridget, the only daughter and heir of Sir Thomas Hyde, Knight, mentioned in the writ, at the time of the receipt of the aforesaid writ, or ever afterwards to that time, was not in his custody, as by the said writ is supposed; and for that reason he could not have the said Bridget before the King at the day and place mentioned in the writ, as by the said writ he was commanded.

A rule was then made that the return should be filed, and counsel be heard thereupon the next day. Upon that next day, the day after was given to Sir Robert Viner’s counsel to speak to the return, and upon that next day, which was Saturday, this rule was made. “Upon the undertaking of Mr. Jefferys, as counsel for Sir Robert Viner, upon the writ of habeas corpus for the body of Bridget Hyde, that the said Robert Viner should bring the said Bridget into Court on Wednesday next, it is ordered, that no process in the mean time should be made out thereupon against the said Sir Robert Viner.”

Upon the Wednesday, the following entry was made: “Bridget the only daughter and heir of Sir Thomas Hyde, Knight, being brought here into Court, in the custody of Sir Robert Viner, Knight, desired to remain in the custody of the said Sir Robert Viner.” Upon the Friday afterwards, which was either the last day of the term, or very near the last day of the term, the following rule appears to have been made: “It is ordered, that Sir Robert Viner, before the end of next week, shall bind himself before the justices of this Court, or one of them, in a recognizance of £40,000 upon condition that the said Sir Robert Viner, before the end of the next week, between the entering into that recognizance, and one month next after Easter then next ensuing, should not, directly or indirectly, cause or procure, or knowingly consent, that the said Bridget, then being in the house of the said Sir Robert Viner, should be married or contracted in marriage with or to any person whatsoever, or should be solicited in order to marry with any person whatsoever, or should be delivered into the hands or custody of any person whatsoever, out of the custody of the said Sir Robert Viner; and if the said Sir Robert Viner shall not enter into such recognizance before the end of

the next week, then let a writ of attachment issue against him for a contempt: and it is further ordered, that the said Sir Robert Viner shall permit Lady Acheson, the godmother, and the uncles and aunts of the said Bridget, and the sons and daughters of the said uncles and aunts (except John Emerton, one of her cousins) to have access to her, in order only to visit her, every Monday, Wednesday, and Friday, in every week, between the time of entering into the said recognizance and one month next after Easter, between the hours of four and seven in the afternoon: and it is further ordered" by the consent of counsel on both sides, "that the several affidavits now delivered here into Court, of and concerning the said Bridget, should be filed here in Court upon record." No affidavits are mentioned or taken notice of in any of the subsequent rules.

These are all the rules which appear to have been made in Hilary term; but Emerton brought an ejectment in that Hilary term, upon the demise of himself and Bridget his wife, for a messuage and some lands in North Mymms, in the county of Hertford, in order to establish his marriage, and that ejectment appears by the record to have been tried upon Tuesday next after five weeks from the Feast of Easter; and after this trial at Bar, by which Mr. Emerton established his marriage with Bridget Hyde, and upon the very same day of the trial, a habeas corpus issued to Sir Robert Viner, tested 11th May, to bring up the body of Bridget, the wife of John Emerton, lately called Bridget Hyde, the only daughter and heir of Sir Thomas Hyde, returnable on Friday next after the morrow of the Ascension; then an "alias" issued, tested 14th of May, and then a "pluries" issued, tested 15th May; and to all these writs of habeas corpus Sir Robert Viner made the same return, which was, "that Bridget, the wife of John Emerton, lately called Bridget Hyde, the only daughter and heir of Sir Thomas Hyde, in the said writ mentioned, at the time of the receipt of the aforesaid writ, or of any other writ of the King to him directed, or ever afterward to this time, was not, nor yet is, in his custody, as by the said writ is supposed, and for that reason he could not have the said Bridget at the day and place mentioned in the said writ, as by the said writ he was commanded." And upon the same day that these writs were returned, it was ordered, that the returns should be filed; and it does not appear that there were any other proceedings on those returns in that term.

But in the beginning of Trinity term, there appears to have been a rule made in the following words: "It is ordered, that unless Sir Robert Viner shall immediately permit William Emerton and Owen Davies to see

Bridget, the wife of John Emerton, the son of the said William Emerton, or shall give notice to the said William Emerton and Owen Davies, where the said Bridget now is, that the said Robert Viner should attend the Court tomorrow;" and the next day, which was Saturday, a rule was made, "that the said Sir Robert Viner do attend the Court on Tuesday next without any further notice." But upon the Monday a rule was made, whereby "it was ordered, that the said Sir Robert Viner should attend the Court on Wednesday next peremptorily."

Upon the Thursday afterwards, "it was ordered, that Sir Robert Viner should attend the Court the next day, and that Mr. Francis Woodward, one of the officers of the Court, should give him notice of the order." Upon that next day, which was Friday, a rule was made, "that Sir Robert Viner should attend the Court upon the day after, to inform the Court where Bridget Emerton, wife of John Emerton, then was; otherwise a tipstaff should take him up and bring him into Court; and it was ordered, that Mr. Barrington should attend the Court the same day." Upon the Wednesday afterward a rule was made, "that the marshal should take up Sir Robert Viner upon the 30th day of October then next ensuing (the day after Lord Mayor's Day, when he would have been out of office) or as soon afterwards as he could take him, and bring him into Court." Early in Michaelmas term, to wit on Wednesday after one month of St. Michael, a rule was made, "that the marshal should take up Sir Robert Viner on the 13th November then next ensuing, or so soon afterward as he could take him; and that Mr. Emerton and his wife, and the other relations of the said Bridget, should, in the mean time, have free access to her at all convenient times."

By these proceedings it appears, that the Court was proceeding against him for a contempt in disobeying the writ; and as Sir Robert Viner had returned, that the said Bridget was not in his possession at the receipt of any writ, which was disproved by the record of their own Court, (for the rules I have stated shew she was in his possession) the fact, averred by the return upon the record, was falsified by evidence of equal dignity, *viz.* the records of the Court, grafted upon Sir Robert Viner's own acts and admissions.

In the next place, it does not appear by any acts of the Court, that any affidavits were read; for though the last rule of Court in Hilary term mentions, that the several affidavits delivered into Court concerning the said Bridget Emerton, should be filed; yet it does not appear from the records that they were ever read; and it is observable, that they were filed by consent of both parties; and if any affidavits were read, it could only be

the affidavits mentioned in that rule; because no notice is taken of any affidavit in the subsequent rules, and consequently none could have been read to contradict the return to the second habeas corpus, because they were made two months before the second habeas corpus issued.

But suppose there had been no such proceedings upon the record, and affidavits had been read to shew that Bridget was in the custody of Sir Robert Viner, it would not encounter the doctrine I lay down; for it was not a return, averring facts justifying the cause of imprisonment, but only an excuse for not obeying the writ; and if it be false, the Court proceeds for a contempt in a summary way in this case as they would in all others. In Godbolt, 219, Smith, one of the officers of the Court of Admiralty, was committed by the Court of Common Pleas to the prison of the Fleet, because he had made return of a writ, contrary to what he had said in the same Court the day before. And to bring it home to my point, I would suppose there had been no verdict, evidencing the marriage of Bridget with Emerton, and that Sir Robert Viner had returned, that Bridget was not the wife of Emerton, but his own wife: in case there had been no legal disability, would the Court, upon affidavits, have tried the fact of that marriage?—If it were a case of that nature, it had been in point—I apprehend clearly they could not, without usurping a power which the law has not given them.

And it is further observable in that case, that there never was any rule made upon Sir Robert Viner to produce her. The compulsory rule was, that unless he should permit William Emerton and Owen Davies to see her, or give them notice where she was, he should attend the Court.

The next compulsory rule is, “that he should attend to inform the Court where she was, or otherwise that a tipstaff should take him up and bring him into Court;” and the two subsequent rules, for the marshal to take him up, and to bring him into Court, were in consequence of his non-attendance.

If they had considered the return as duly falsified by affidavit, and had proceeded upon that principle, they would have issued an attachment for the contempt in the first instance, as they had ordered in Hilary term upon the insufficiency of the first writ. And as Sir Robert Viner was indictable for making a false return, the affidavits might be properly read, as a foundation for the apprehending him; and the rather, because the marriage was established, and the Court saw he was guilty of a great offence in secreting and withholding a wife from her husband.

Affidavits may be read to collateral purposes; as in order to bail, or adjust

the sum for which bail is to be given; and in the cases of madmen, when they have been brought up without any formal return at all, or only a return, "that I have the body ready according to the command of the writ." 22 Ass. pl. 56, battery and false imprisonment: defendant says plaintiff was in a rage, and did great mischief, whereupon the defendant and his other relations took him and bound him, and put him into a house, and chastised and beat him with a stick or rod.

As there was no return of a fact justifying the cause of imprisonment, the Judges were at liberty to look into it, and read affidavits, to direct them what to do upon it. For as the facts do not appear upon every return, the Court, or Judge, can be enabled only from affidavits to know whether they should interpose or not;—if satisfied the party was mad; though under no legal custody—they would not interpose. If doubtful,—they would direct an application for a commission, or put it into some way of inquiry; if quite satisfied it was a scene of oppression,—they would set the party at liberty.

So in cases of wives, children, and wards—all the Court, or Judge, does, is to see that the party is under no illegal restraint. The law so laid down, 1 Str. 445. 2 Str. 982, *The King and Smith*.

In the case of *The King and Smith*, habeas corpus was brought by the father against an aunt, for a child near fourteen; the return was only "ready in Court." She made an affidavit that the uncle had devised an estate to trustees, upon trust to pay her a yearly sum for the child's maintenance, and directed the money should be paid only to her; that the child had lived with her from its birth; that it was the uncle's desire it might so continue, the father being a very extravagant person.

The noble Lord (a), who then presided in the Court, said, "The detention being undefended, we must set the child at liberty: we can take no notice of the justification in the affidavit; we can determine nothing about the possession of the child: all the Court can do is to see that persons are not unlawfully confined."

In all these cases, the parties have opportunities of asserting their title at law, and may have the benefit of a writ of error. If we should take upon us the summary determination of this question, it would debar the parties of their writ of error, and such other privilege as the law has given.

The remedies, which the law has provided in different cases, should not be confounded. If there are any cases where facts have been entered into by affidavit, upon habeas corpus, yet unless there have been returns to such writs filed, and those returns have set forth a sufficient cause of the

imprisonment, and affidavits have been read to contradict that cause in point of fact, such cases will not encounter the position I am now advancing.

A difference is made between the case of an officer and a mere private person—a difference in favour of interposing upon the return of an officer, rather than of a private person, because an officer is a minister of justice, and more under the controul of the Court than a mere stranger. If said to be a wrong-doer—that is begging the question; for it depends upon the truth or falsity of the return, whether he is a wrong-doer.

If a lawful cause of restraint is not returned, the party will be discharged for the insufficiency of it; but the facts, evidencing the legality, must not be presumed to be false, in order to warrant an examination whether they be false or not.

But suppose there was a distinction between custody by a public officer, and a private person acting without any authority whatsoever; yet, in regard to pressed men, they are in the custody of public officers, acting under an authority given by Act of Parliament; they are under a necessity of receiving them; they take them as persons within the description of the Act; and if they return them to be so, they have a right to have that fact tried by a jury as well as any other person. But it is not the privilege of an officer, but of an Englishman, to have a fact, justifying his conduct, and which he has averred upon record, tried by a jury.

It is said, that it is a very hard case, and that a man may be sent to the West Indies before the falsity of the return is proved in an action.—If there be any particular hardship, the Act which produces the case, must provide for it.

Judges will construe the law as liberally as possible in favour of liberty, but they cannot make laws; they are only to expound them: particular cases must yield to the law, and not the law to particular cases.

There is no difference between facts in a return, and any other facts averred upon record.

Suppose an action brought upon a bond for any given sum of money, and the party is arrested upon it, and he pleads that he never executed the bond; suppose he could shew by affidavits ever so clearly, that he did not execute the bond, or, by a copy of the register, that he was not born when it is dated. The Court could not interpose; why? Because the law says, the fact must be tried by a jury: the Judges have no more cognizance or power to try it than if they were not Judges.

If they were to do it where there was the clearest and most undoubted proof, they must do it in every case: for the degree of proof cannot alter or vary the mode of trial, and translate the examination of the fact from the jury to the Judge.

If a man is arrested and in custody, in a civil action, upon an affidavit made by the plaintiff of the debt, the Court will not, even for the purpose of discharging him out of custody, enter into any examination of the reality of the debt, though there is the most clear and undoubted proof laid before the Court of the falsity of the demand; it must be tried by a jury. The Court cannot look at it. We must administer justice, not as we wish the law to be, but as it is.

Laws are framed upon principles of general utility, and adapted to such cases as most frequently happen. Judges cannot set up natural reason against the reason of the law—cannot dispense with the law, for the sake of a particular case, arising upon an act which will expire with the session, and perhaps may never be enacted again; and in a case, where the hardship may be prevented by making a rule upon all the parties concerned in supporting the right to the recruit, that he shall not be carried away till the merits are tried in an action; or by letting him out, on security to return, if the merits are against him: and if the case was ever so remediless, I think we are not warranted to impeach, by affidavits, the truth of the return of an officer, acting under an Act of Parliament, which the law says ought to be impeached by a verdict.

But the case is not a remediless one: by the common law, the writ of "homine replegiando" will clearly relieve him. That writ, which is obtained out of the Court of Chancery upon an affidavit, goes to the sheriff, and commands him to replevy the man. If he cannot replevy him, he returns it, and a process goes out instantly to seize the body of the person who is supposed to have him in custody, and he is imprisoned himself till he produces the body. Fitzherbert, Nat. Bre. 67 b. (edition 1616), 5 Hen. 7, 3.

If a person is seized by virtue of the first writ, and the party, who has him in custody, claims any right to the detention of him, still he is to be delivered, upon giving security for his appearance, and to try the right in a Court of Justice; and if the point is determined against him, to deliver himself up to the person in whose custody he was: so that, by this writ, the party may be instantly set at liberty, without violating any rule of law whatsoever; and where a person is in actual custody, the sheriff will be sure to find him and deliver him; and it is a more sure and certain remedy in that

case, than where a man is imprisoned by a mere private person, and may be shifted about so secretly, that the sheriff cannot find him.

There is another method by which a man impressed may get at his liberty, laying the gaoler and the return quite out of the case: and that is, by appealing to that summary jurisdiction, which the Court of King's Bench exercises over all inferior jurisdictions, powers, and authorities whatsoever.

The authority given to the commissioners, being a particular, special authority, if it is abused, they are answerable to the Court for it; and the Court will relieve the party oppressed by it in a summary way, by affidavits. But in that case, the complaint is founded on affidavits, and therefore must be answered by affidavits; and the fact is tried, between the persons who did the wrong, and the person who sustained it.

The Crown, being interested in the recruit, is likewise heard "pro interesse." The gaoler is no party to that complaint or inquiry; and as to him, the fact, which he has averred upon record, stands unimpeached; and if it is false, he must and can only be answerable for it in an action: and by this mode of proceeding, the party acquires such a discharge as will completely work a manumission of him from his condition of a soldier.

For if a gaoler should let a man go, or return only that he had his body ready, without shewing any cause of his imprisonment, or should make an insufficient return, or a false return; no man can say that an act of the gaoler can affect the right which the public have in the recruit. That must and can only be determined between the commissioners and the Crown on the one side, and the party imprisoned on the other.

The distinction, between a proceeding by habeas corpus and upon motion, I take to be this: In a proceeding by motion, the Court goes upon affidavits; and it may take its rise collaterally, various ways, out of disputes which come before the Court upon record. For instance, the return to a habeas corpus cannot be tried and set aside by affidavits; but the Court may take the matter up "diverso intuitu," in order to grant an information against a man who has seized another by outrage and violence, and detains him without any colour of authority; or perhaps to proceed against such person by way of information for a false return, which Hale says is an indictable offence; or in order to commit him for an outrageous breach of the peace.

Suppose habeas corpus for a maid taken away, according to the Statute of Philip and Mary, or of 3 Henry VII.; by the one, a great misdemeanor,—by the other a felony; and the party returns that he is married, that she is his wife. The fact, or validity of the marriage, cannot be controverted upon the

return; but upon affidavits the Court might commit him for a misdemeanor in one case, and for a felony in the other. And in cases where the Court has a discretion as to bailing, the Court might put such terms upon him as would force the immediate relief of the person imprisoned and agreeable to these principles, is *The King and White*, Trin. 1745, where the Court would not discharge the impressed man, T. Reynolds, upon the affidavits contradicting the return; but being brought up on a Monday, and the writ and return, which was full and sufficient, being filed, the Court ordered him to be brought up again on Wednesday; and upon reading the several affidavits of Reynolds and others on his behalf, made a rule upon the commissioners and the Master, to shew cause the next day, why he should not be discharged out of the custody of the said Richard White. The rule was as follows:

Monday, 1st July 1745. "The defendant being brought here into Court, in custody of Richard White, Esquire, Major of the Tower of London, by virtue of His Majesty's writ of habeas corpus, it is ordered, by consent of counsel on both sides, that the name Thomas White, mentioned in the said writ, be made Richard White: and it is further ordered, that the said writ and returns thereto be filed, and that the said Richard White bring into this Court the body of the said defendant Thomas Reynolds on Wednesday next; and upon reading the several affidavits of Thomas Kell and others, George Stewart and others, Thomas Reynolds and John Mangaar, it is further ordered, that Thomas Bedwell, Francis Bedwell, Charles Scriven, John West, and John Robinson (commissioners under the Act) do tomorrow shew cause why the said defendant should not be discharged out of the custody of the said Richard White, upon notice of this rule to be given to them respectively in the mean time."

There is a decisive mark upon this rule, which shews the Court industriously avoided twisting the complaint against the commissioners with the return; because they ordered the rule on the commissioners to come on at a different day: whereas, if the affidavits had been levelled and pointed at the return, the Court would have directed them to have come on together; and it is extremely material, that Major White is not so much as a party to that part of the rule which is upon the commissioners; the Court considered the return with regard to him as sacred, and not to be litigated by affidavits against him.

If the Court had meant to have impeached the truth of the return by affidavits, as between Reynolds the man impressed, and White the gaoler,

they would have certainly given White an opportunity of supporting the truth of his return by affidavits.

Wednesday. Sir John Strange for Major White, said, the question was of great consequence to the liberty of the subject on the one hand, and to the service of the public on the other, and that there had not been time for him to be sufficiently prepared: he proposed therefore, without prejudice to the question, to admit him to bail. The rule upon the commissioners was discharged; and it appears that the defendant's recognizance was afterwards discharged.

I have searched for writs of habeas corpus and returns to them, in Queen Anne's time. There are many; eight of the persons are remanded, seven are discharged; as to some, it does not appear what was done. And in every case where the party was remanded, the return appears to be good upon the face of it; where discharged, insufficient upon the face of it.

I directed a search to be made for affidavits, or for any rules that might have been made upon the discharge or remanding of the parties. The affidavits were stolen many years ago out of the office; and there are no rules to be found in the rule-book except one, in *Bolton's case*, which I will mention by and by, and submit to your Lordships, as the most decisive instance which can be produced, that the return was sacred, and could not be touched but by consent.

As no more light could be got from that inquiry, I then examined the returns where the parties were remanded and where they were discharged; and if I could have found two returns in the same words, one where the person was remanded, and another where he was discharged, it would have afforded a very strong reason to have believed that some extrinsic collateral evidence had been received, which had produced a remand in the one case, and a discharge in the other; but as all the returns where the parties were remanded are sufficient, and all the discharges are in cases where the returns are insufficient, it demonstrates most clearly to my satisfaction, that the Court proceeded only upon the sufficiency or insufficiency of the return, on the face of it.

There is one return of an enlisted soldier, Alexander James, committed by the captain to the Savoy, plainly insufficient. The captain is not stated to have had any authority to commit, and no offence is stated for which the soldier was committed; he is not so much as said to be a captain of the regiment in which he was enlisted.

The case of *Bolton* is in Hil. 3d of Queen Anne. A rule (a)1 was made by

consent to refer it to arbitrators, to determine whether he was such a person as was within the description of the Act. If the Court could have discharged upon reading affidavits, why put it into any other mode of enquiry? They saw it could be done only by action for a false return; but upon consent, they might have directed an issue to try, or fixed upon referees, who are a jury of the party's own choosing, to try whether he was within the Act or not: it is nothing more than if the parties, upon a return to a mandamus, should agree to refer the fact to referees, instead of going to trial by a jury: it is so far from proving, that the Court could try the question by affidavits, it proves that they could not; and that inference is strengthened by seeing no traces of such an examination. There is no mention of it in any books of that time; and it is not to be conceived that it should by accident have happened, that all the men, remanded upon good returns, had no evidence, and that all the persons discharged, had.

I am clearly of opinion that Judges are not bound down by any fact set forth on a return, if disproved by a verdict; but that the Court can look at no other proof, as to any facts averred on a return, admitting and justifying the imprisonment.

The other Judges delivered their opinions "seriatim" on the same questions, the 25th, 26th, and 30th May 1758; and on the 2d June,

It was ordered, that the bill, intituled, "An Act for giving a more Speedy Remedy to the Subject upon the Writ of Habeas Corpus," be

Rejected (a)2.

Wilmot's Opinion [Wilmot's Notes and Opinions of King's Bench], p. 77.

17.3.2.4Brass Crosby's Case, 1771

THE CASE OF BRASS CROSBY, ESQ. Lord Mayor of London. C. B. [The Court of C. P. will not bail or discharge a prisoner, committed by warrant of the Speaker of the House of Commons, for a breach of privilege of that House, expressed in the warrant.]

2 Black. Rep. 754, S. C.

The Lieutenant of the Tower of London was commanded to have before the Justices of the Bench here, the body of Brass Crosby, Esq. Lord-Mayor of London, by him detained in the King's prison, in the Tower of London,

by whatsoever name he was called, together with the day, and cause of his caption and detention, on Monday next, after three weeks from Easter-Day; that the said justices seeing the cause, might do that which of right, and according to the law and custom of England, ought to be done; and further, to do and receive what the same justices here should then consider in that behalf. And now here, at this day, (to wit) Monday* next, after three weeks from Easter-Day, in this term cometh the said Brass Crosby, in his proper person, under the custody of Charles Rainsford, Esq. Deputy-Lieutenant of the Tower of London, brought to the Bar here; and the said deputy-lieutenant then here returneth, that before the coming of the said writ, (to wit) on the 27th day of March last, the said Brass Crosby was committed to the Tower of London, by virtue of a certain warrant under the hand of Sir Fletcher Norton, Knt., Speaker of the House of Commons, which follows in these words: "Whereas the House of Commons have this day adjudged, that Brass Crosby Esq. Lord Mayor of London, a member of this House, having signed a warrant for the commitment of the messenger of the House, for having executed the warrant of the Speaker, issued under the order of the House, and held the said messenger to bail, is guilty of a breach of privilege of the House; and whereas the said House hath this day ordered, that the said Brass Crosby Esq. Lord-Mayor of London, and a member of this House, be for his said offence committed to the Tower of London: these are therefore to require you to receive into your custody the body of the said Brass Crosby Esq. and him safely keep during the pleasure of the said House, for which this shall be your sufficient warrant. Given under my hand, the twenty-fifth day of March, one thousand seven hundred and seventy-one." And that this was the cause of the caption and detention of the said Brass Crosby in the prison aforesaid; the body of which said Brass Crosby he hath here ready, as by the said writ he was commanded, &c. Whereupon, the premises being seen, and fully examined and understood by the justices here, it seemeth to the said justices here, that the aforesaid cause of commitment of the said Brass Crosby Esq. to the King's prison of the Tower of London aforesaid, in the return above specified, is good and sufficient in law to detain the said Brass Crosby Esq. in the prison aforesaid; therefore the said Brass Crosby Esq. is by the Court here remanded to the Tower of London, &c.

Serjeants Glynn and Jephson argued, that it appeared by the return of this habeas corpus, that the cause of commitment of the Lord-Mayor to the Tower of London was insufficient in law for the detention of him there; and therefore this Court ought to discharge him out of the custody of the

Lieutenant of the Tower of London.

Here follows the substance of Serjeant Glynn's argument, after the writ and return were filed.

Serjeant Glynn.—The question now before the Court, is, whether it does not appear by the return of this writ, that the lord-mayor ought to be discharged? and is a very important and constitutional question indeed.

The return states, that the imprisonment of his lordship is by virtue of a certain warrant under the hand of Sir Fletcher Norton Knt. Speaker of the House of Commons, reciting, that whereas the House had adjudged, that his lordship having signed a warrant for the commitment of a messenger of the House, for having executed the warrant of the Speaker, issued under the order of the House, and held that messenger to bail, is guilty of a breach of privilege of the House; and also reciting, that the House had ordered, that his lordship, a member of the House, should for his said offence be committed. So that it appears what that breach of privilege is.

When any person is brought to this Bar by the King's writ of habeas corpus, the Judges must look into, see and consider the cause of his detention, and are bound to do that which of right, and according to the law and custom of England, ought to be done.

Acts done by the highest authority are subject to the inquiry of the Courts in Westminster-Hall; whose jurisdiction extends not only to inquire into, control and correct the acts of inferior, but also of co-ordinate and superior powers.

A breach of privilege of the House of Commons is stated, and also in what manner, and by what fact their privilege was broken; therefore this Court must determine, whether the fact charged is by law a contempt or breach of privilege. When it is returned, that a person was committed by any other Court in this Hall, for a contempt generally, without specifying the fact or nature of the contempt, this Court cannot inquire into the matter, but must remand the prisoner. Every Court of Justice of Record in the Hall, must necessarily have absolute power to enforce obedience to their own orders, or justice could not possibly be administered to the King's subjects. The House of Commons is not a Court of Justice of Record, for it cannot administer an oath; it has a certain limited jurisdiction; and this Court must judge, whether it has not transgressed, and gone beyond the bounds of its jurisdiction, and must pronounce upon it. If the King doth exercise any power which is not conformable to law, this Court will remedy it; the old writ de homine replegiando did not comprehend the mandates of the King;

but the habeas corpus extends to them, and to all acts of power not conformable to law. If the Court of Chancery, which is a Superior Court in civil causes, should exceed it's jurisdiction, and interefere by injunction in criminal cases, the Inferior Court would determine against the Court of Chancery, and would discharge any one from imprisonment whom that Court should commit for disobedience to such injunction.

This Court must inquire, whether the House of Commons has not exceeded its lawful jurisdiction. The lord-mayor is charged with a contempt: the question is, whether he is guilty of a contempt? that is to say, whether the fact charged upon him, amounts by law to a contempt? The House of Commons makes an order for committing a printer, and that order expresses who shall take him into custody, namely, the serjeant, or deputy serjeant at arms of the House: the printer is taken into custody by a messenger, within the City of London; he complains to the lord-mayor; who examines into his complaint, proceeds judicially and according to law; and after such examination, according to the best of his judgment, is of opinion, that the warrant of Sir Fletcher Norton does not justify the taking the printer into custody by a messenger of the House, in the City of London. How does this interfere with the lawful jurisdiction of the House of Commons? And how does it exceed the lawful jurisdiction of the lord-mayor, within the City of London? The jurisdiction of the House must be limited to some particular objects: the claim of an unlimited power in this country is absurd, and destroys itself. In the great question, in *Ashby and White*, about the Aylesbury men, we find, that in a conference between the Lords and Commons, it was agreed, that the Commons cannot, by any vote or resolution of their own, assume or acquire any new jurisdiction or privilege. Here is a warrant under the hand of Sir Fletcher Norton, Speaker. Sir Fletcher Norton has no personal authority to commit whom he pleases. The Speaker, as such, has no official authority; whatever authority he can have, must be merely as the instrument of the House of Commons: his act can be valid only by the order of the House; but that the warrant is made contrary to the order of the House, appears to this Court by the return of the habeas corpus; consequently, the Speaker having no authority of his own, and the warrant being contrary to the order, the same is invalid. The messenger executed the warrant in the city; the Speaker had no authority to impower him to execute it in the City of London. The House of Commons have not an unlimited jurisdiction; the lord-mayor was therefore obliged to examine, whether the act of power exerted by them within the city, was within their jurisdiction. The printer had been charged with printing the speeches of

some members of the House, for which he was ordered to be taken into custody; the lord-mayor thought the House of Commons had no right to order the printer to be taken into custody by their messenger in the City of London, and that the printer ought not to be committed for the act with which he was charged. There is nothing to be pretended in favour of this proceeding of the House of Commons, but their assumed transcendent power: now it would totally destroy all the benefit, and the very end of the habeas corpus, if the transcendency of any power whatever could blind the eyes of a Court of Justice, and prevent their inquiry into its acts; such a decision by Judges sworn to administer faithfully the laws, would be fatal to every thing that is worth preserving in our boasted constitution, and would leave the unhappy subjects of this country in a state much worse than a state of savage nature. The great Chief Justice Holt was clearly of opinion, and held it for good law, that if it appeared upon the face of the return of a habeas corpus, that what the House of Commons called a contempt, was not by law a contempt, the person committed for it must be discharged; that the privileges of the House of Commons are part of the law of the land, and therefore the Courts here must take notice of them incidentally; and though this was the opinion of a single Judge against three others, yet it was agreed to and supported by the House of Lords, who, in those days, remembered that they were the hereditary guardians of the people. Again.—Holt held, that the order of the House of Commons forbidding any one to seek or pursue a legal remedy against their orders, was illegal and naught; and boldly said so: and accordingly he was of opinion, that the persons committed for contempt of that order ought to have been discharged; though the three other Judges were of a contrary opinion; and the persons were remanded to Newgate. Upon petition to the Queen, a writ of error was allowed, and brought; and before it was argued, the Parliament, for good reasons, was dissolved: but I will venture to say, if it had been argued, there would have been judgment given by the House of Lords according to Holt’s opinion. If the lex et consuetudo Parliamenti, of which we hear so much and know so little, be indeed a part of the law of the land, the Judges are bound to take notice of it, and to decide upon it, as they do upon every other part of the law. It has been said, that Lord Chief Justice Holt was single in his opinion; nevertheless, I may venture to say, that his opinion, in the judgment of every honest and unprejudiced mind, will not be found light in the scale, against that of the three other Judges. He was single: but he had truth and integrity with him, as well as the strongest arguments on his side, which the conference with the Lords demonstrated;

arguments which have never yet been, and which cannot now be answered. The other three Judges differing in opinion from him, there was a writ of error (as I said before) granted, returnable in Parliament; and if the temper of the times would have permitted it to have been proceeded in, and the Parliament had not been then dissolved, it may easily be collected, from the arguments above referred to, that it would have had from the Lords a most solemn and just decision.

Lord Chief Justice de Grey.—Brother Glynn! that writ of error you mention, was never brought before the Lords.

Serjeant Glynn.—It is true, my Lord! it was never brought directly in question before them; because doubts were started, whether it was a writ of right, or of favour, which might be refused by the particular officer. This occasioned a petition to the Queen, who in answer to the petition said, she was come to a resolution to grant a writ of error, because she was desirous to have the matter of law settled for the good of her subjects; but unhappily for us, the particular circumstances of those times prevented it; and the Parliament was dissolved.

Lord Chief Justice de Grey.—In all cases, except treason and felony, I think a writ of error is grantable of right; the two Houses addressed the Queen for different purposes, the Lords said, it was time enough to decide upon the writ of error, when it came before them.

Serjeant Glynn.—My Lord! it is for that reason I said, I collect it from other arguments, which make it very reasonable to suppose, that the subject would have had satisfaction and redress from the decision of the House of Lords.

The question at present is, whether this Court has not power to examine into the jurisdiction of the House of Commons? I submit it, with deference to the Court, that you have lawful power to inquire, whether the House of Commons had any jurisdiction in this case, and that their privileges are not to be supposed so transcendent and mystical, as to exclude all inquiry. My Lord! I deny that the mayor’s act is a breach of privilege of the House of Commons, the lord-mayor was in full possession of jurisdiction in the case; he was obliged to decide upon the question before him; he was obliged to form an opinion upon a case within his jurisdiction: shall his opinion be adjudged a contempt? Is this the law of the land; that when different Courts, having jurisdiction of the same nature, differ in their decisions, they are guilty of contempts one against the other, and may be punished for such contempts? It is no contempt in me, a private man, to have an opinion

different from the greatest authorities in this kingdom; it was the lord-mayor's opinion upon the case before him, he was bound by his oath to act pursuant to that opinion, it was his bounden duty to act accordingly: he would have been perjured, if, out of respect for any persons, he had not obeyed the call of his conscience. It was no crime for him to entertain the opinion; entertaining it, he was bound to declare it, and it was his duty to act in consequence of it. The conscientious act of a magistrate, within the limits of his jurisdiction, can never be a contempt, or punishable; unless a magistrate acts wrong from corrupt motives, he cannot be punished. But suppose for a moment, the lord-mayor did not act from his opinion, but from some corrupt motive, it is not the House of Commons, but a jury, that must judge of it. The duty of a magistrate differs widely from that of an officer; from the latter, a full and ready obedience is required to be paid to the orders of the Court, whose officer and minister he is, and such orders, rightly pursued and executed by him, are his sufficient justification; but the magistrate is bound by his oath, and has an opinion and judgment of his own which he must follow; and he is answerable to the law, and cannot be justified for the breach of his oath and the law, by any order or resolution of the greatest authority.

Your Lordships are now called upon to say, whether the Lord-Mayor of London, in a case where he bad indisputable jurisdiction, acting by his opinion, and according to his oath, is guilty of a contempt of the House of Commons, and can by law be imprisoned.

Serjeant Jephson.—My Lords! as I shall not have an opportunity of answering any argument from the Bench, nor can possibly know the objections your Lordships may have, to discharging the lord-mayor out of custody, I shall endeavour to anticipate and answer such objections against discharging him, as occur to me, and may possibly be made by the Court.

The question is, whether sufficient cause appears to the Court upon the return of this writ, to imprison the lord-mayor? if no legal cause appears for detaining him in custody, he must be discharged.

I shall consider the nature, the return, and the consequence of the writ of habeas corpus. It is a prerogative writ of right, to inquire into the cause of the imprisonment of any of the King's subjects; if a legal cause of detention doth not appear upon the return of the writ, the subject must be discharged, and set at liberty: therefore, if a legal cause does not appear upon the return of this writ, the lord-mayor must be discharged out of custody; this position cannot be denied.

It appears from the cases of *Sir William Thicknesse*, 4 Inst. 434, *Sir William Chancey*, 12 Rep. 83, and from *Bushel's case*, Vaugh. 135, &c. that the cause of imprisonment ought to be as specifically returned to those who judge upon the writ of habeas corpus, as it did to those who first committed the party. Again, *Bethell's case*, 1 Salk. 348, where the commitment is not to the legal and immediate officer, it is naught. Again, *Search's case*, 1 Leon. 70, where the Queen had taken a person into her protection, who, notwithstanding, was arrested, and the person arresting committed, and on a habeas corpus was discharged. See again *Doctor Alponso's case*, 2 Bulst. 259, where the return was bad, no cause being therein shewed; also, *Thomas Barkham's case*, Cro. Car. 507, the like case, ibid. 579. 1 Rol. Rep. 192, 218, *Apsley's case*, and *Ruswell's case*, ibid. 245. *Codde's case*. The determination in all the cases the same; if the legal charge is not returned, the person must be discharged: the Court must judge of the cause of commitment returned; if not, why should the writ command the return of the cause? the cause is returned, that the Court may judge, whether the person is intitled to his liberty, or not. It is no objection in this case, to say, that the House of Commons having a power to commit, therefore this Court must not judge of the cause of commitment returned; for this would prove too much; because it would go to every other Court having jurisdiction to commit. Suppose the Court of King's Bench, which is equal, and perhaps superior in some respect to this Court, should commit a person; and the person committed should be brought here by habeas corpus; this Court would certainly take notice, and inquire into the cause returned; and if this Court thought it not a sufficient cause, would discharge the person; otherwise how would the end of bringing the writ of habeas corpus be answered?

It is no objection in this case, to say, that the Court cannot examine the cause as stated in the return, because the Court would then determine upon the privileges of the House of Commons: the Court must, and doth frequently determine upon the privileges of Parliament, when they come incidentally before them. See *The Earl of Banbury's case*, 2 Ld. Raym. 1247. Salk. 512. 2 Stra. 987, 8. This Court made no sort of hesitation to determine in *Wilkes's case*, upon the privilege of Parliament. 2 Wilson 151. Why then should they not now enter into this question, touching the privilege of Parliament? In Lord Shaftesbury's and Mr. Murray's cases, the returns were general, for contempts of the House, without stating the particular facts; but the facts of the supposed contempt in this case appear, which we contend cannot by any legal construction amount to a contempt,

and therefore that the lord-mayor must be discharged. The House of Commons having determined it to be a contempt does not alter the case: a fact does not become a contempt by being recited to be such. The Court must consider, whether the warrant for my lord-mayor's commitment is the warrant of the Speaker as Speaker of the House of Commons, as Sir Fletcher Norton may act in a double capacity; (whereupon a loud laugh).

Lord Chief Justice de Grey.—Sir Fletcher Norton signs himself Speaker.

Serjeant Jephson.—His signing himself Speaker will not help the warrant, if the cause is not sufficient; and the Court may rather suppose, the mistake committed by Sir Fletcher Norton, in his private capacity, than by the House of Commons. Suppose some future Speaker, of some future House of Commons, should recite in his warrant, that the House of Commons had adjudged it a breach of privilege, and contempt, to sue out a Statute of Bankrupt against one of their members, which by Act of Parliament any one is permitted to do; and should, in consequence, commit a person for such legal act; if the person was brought by writ of habeas corpus before this Court, would not the Court take cognizance of the commitment? Would they not determine it no breach of privilege? Are Acts of Parliament of less force than such a recital in a Speaker's warrant? Suppose a person is committed by a similar warrant, for proceeding according to Act of Parliament against a member of the House in an action of debt; shall he have no remedy from the law, which led him into the supposed transgression? Suppose a justice of peace should commit a member of the House of Commons, for treason, felony, or breach of the peace, and the Speaker's warrant should recite it to be a contempt, will this Court say, they can take no cognizance of such a commitment by the House of Commons? Suppose all the officers of this Court should be recited in the Speaker's warrant, to be in contempt, for executing the process of this Court, will this Court give no remedy? and must this and every other Court of Justice be annihilated, whenever the Speaker's warrant declares all its officers in contempt? How is it possible to distinguish the present case from those I have mentioned, if you must not examine the cause returned, but say it is sufficient, if a contempt is charged? Serjeant Hawkins, in his 2 vol. 110, gives us clearly enough his thoughts upon this subject; he says there, (among other things) that if a subject should be committed by either of the Houses of Parliament, it cannot be imagined that the law, which favours nothing more than the liberty of the subject, should give us a remedy against commitments by the King himself, appearing to be illegal, and give

us no manner of redress against a commitment by our fellow-subjects, equally appearing to be unwarranted.

I think I have now sufficiently cleared this case from all the objections that can be brought against its being inquired into. The question therefore is, whether on the return there appears sufficient cause of detention? Three causes are mentioned, and all urged as breaches of privilege. 1. For discharging a printer; 2. For having signed a warrant for the commitment of the messenger; and 3. For holding him to bail.

To make the lord-mayor guilty of the first supposed contempt, it ought surely to appear to the Court, that Miller the printer was in the legal custody of the messenger: now, Miller never was in the legal custody of the messenger; for the warrant to take up Miller was directed to the serjeant at arms of the House of Commons, or his deputy, and not to the messenger, so that Miller was in the illegal custody of the messenger, therefore the lord-mayor did right.—Miller was ordered into the custody of the serjeant at arms, or his deputy, but the contrary appears upon the return, in the recital of the order; for that intimates, that he was taken into custody by the messenger, by virtue of the warrant of the Speaker of the House, issued under the order of the House. Miller was taken into custody by the messenger in the City of London, neither the serjeant at arms or his deputy being present; the messenger, I say, was guilty of false imprisonment, having no warrant directed to himself, nor acting in aid and assistance of the serjeant at arms, or his deputy, to whom the warrant to take up Miller was directed, for neither of them were present; so that if an action of false imprisonment was to be brought against the messenger, he could not justify what he has done; and if he cannot justify in an action of false imprisonment, how could he justify before the lord-mayor? As for the other supposed contempt, of signing a warrant against the messenger and holding him to bail; the messenger had been guilty of an assault and false imprisonment, in taking Miller the printer into custody, in the City of London, without any legal warrant or authority; what contempt is it to sign a warrant against the messenger?

Gould Justice.—The messenger was committed for having executed a warrant of the Speaker.

Serjeant Jephson.—That does not appear; your Lordships cannot know that; for the return only says, for signing a warrant against the messenger. For these reasons, I pray the lord-mayor may be discharged out of the custody of the Lieutenant of the Tower of London.

Lord Chief Justice de Grey.—If either myself, or any of my brothers on the Bench, had any doubt in this case, we should certainly have taken some time to consider, before we had given our opinions; but the case seems so very clear to us all, that we have no reason for delay.

The writ by which the lord-mayor is now brought before us, is a habeas corpus at common law, for it is not signed per statutum; it is called a prerogative writ for the King; or a remedial writ; and this writ was properly advised by the counsel for his Lordship, because all the Judges (including Holt) agreed, that such a writ as the present case required, is not within the statute: this is a writ by which the subject has a right of remedy to be discharged out of custody, if he hath been committed, and is detained contrary to law; therefore the Court must consider, whether the authority committing is a legal authority; if the commitment is made by those who have authority to commit, this Court cannot discharge or bail the party committed, nor can this Court admit to bail, one charged or committed in execution. Whether the authority committing the lord-mayor, is a legal authority or not, must be adjudged by the return of the writ now before the Court; the return states the commitment to be by the House of Commons, for a breach of privilege, which is also stated in the return; and this breach of privilege or contempt is, as the counsel has truly described it, threefold; discharging a printer in custody of a messenger by order of the House of Commons; signing a warrant for the commitment of the messenger, and holding him to bail; that is, treating a messenger of the House of Commons as acting criminally, in the execution of the orders of that House. In order to see whether that House has authority to commit, see Co. 4 Inst. 23. Such an assembly must certainly have such authority, and it is legal because necessary: Lord Coke says they have a judicial power; each member has a judicial seat in the House, he speaks of matters of judicature of the House of Commons. 4 Inst. 23. The House of Commons, without doubt, have power to commit persons examined at their Bar touching elections, when they prevaricate or speak falsly; so they have for breaches of privilege, so they have in many other cases. Thomas Long gave the Mayor of Westbury 41. to be elected a burgess; he was elected, and the mayor was fined and imprisoned, and Long removed. Arthur Hall, a member, was sent to the Tower, for publishing the conferences of the House. 4 Inst. 23. This power of committing must be inherent in the House of Commons, from the very nature of its institution, and therefore is part of the law of the land; they certainly always could commit in many cases: in matters of elections, they can commit sheriffs, mayors, officers, witnesses, &c. and it is now agreed

that they can commit generally for all contempts. All contempts are either punishable in the Court contemned, or in some higher Court; now the Parliament has no Superior Court; therefore the contempts against either House can only be punished by themselves. The stat. 1 Jac. 1, cap. 13, sect. 3, sufficiently proves, that they have power to punish, it is in these words, *viz.* "Provided always, that this Act, or any thing therein contained, shall not extend to the diminishing of any punishment to be hereafter by censure in Parliament inflicted upon any person which hereafter shall make, or procure to be made, any such arrest as is aforesaid." So that it is most clear, the Legislature have recognized this power of the House of Commons. In the case of *The Aylesbury men*, the counsel admitted, Lord Chief Justice Holt owned, and the House of Lords acknowledged, that the House of Commons had power to commit for contempt and breach of privilege. Indeed, it seems, they must have power to commit for any crime, because they have power to impeach for any crime. When the House of Commons adjudge any thing to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment in consequence, is execution; and no Court can discharge or bail a person that is in execution by the judgment of any other Court. The House of Commons therefore having an authority to commit, and that commitment being an execution, the question is, what can this Court do? It can do nothing when a person is in execution, by the judgment of a Court having a competent jurisdiction; in such case, this Court is not a Court of Appeal.

It is objected; 1, that the House of Commons are mistaken, for that they have not this power, this authority; 2, that supposing they have, yet in this case they have not used it rightly and properly; and 3, that the execution of their orders was irregular. In order to judge, I will consider the practice of the Courts in common and ordinary cases. I do not find any case where the Courts have taken cognizance of such execution, or of commitments of this kind; there is no precedent of Westminster-Hall interfering in such a case. In *Sir J. Paston's case*, 13 Rep. there is a case recited from the Year-Book, where it is held that every Court shall determine of the privilege of that Court; besides, the rule is, that the Court of remedy must judge by the same [law] as the Court which commits: now this Court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the Commons judge of their privileges is unknown to us. If the Court of Common Pleas should commit a person for a contempt, the Court of King's Bench would not inquire into the legality or particular cause of commitment, if a contempt was returned; yet in some

cases the Court of King’s Bench is a Court of inquiry, but in this case is only co-ordinate with this Court. In the case of *Chambers*, Cro. Car. 168, Chambers was brought up by habeas corpus out of the Fleet; and it was returned, that he was committed by virtue of a decree in the StarChamber, by reason of certain words he used at the council-table, &c. for which he was censured to be committed to the Fleet, till he made his submission at the council-table, and paid a fine of 20001. and at the Bar he prayed to be delivered, because the sentence was not warranted by any law or statute: for the Statute 3 Hen. 7, which is the foundation of the Court of StarChamber, doth not give them any authority to punish for words only. But all the Court informed him, that the Court of StarChamber was not erected by the Stat. 3 Hen. 7, but was a Court many years before, and one of the most high and honourable Courts of Justice; and to deliver one who was committed by the decree of one of the Courts of Justice, was not the usage of this Court, and therefore he was remanded. The Courts of B. R. or C. B. never discharged any person committed for contempt, in not answering in the Court of Chancery, if the return was for a contempt; if the Admiralty Court commits for a contempt, or one be taken up and committed on an excommunicato capiendo, this Court never discharges the persons committed. Formerly, when many abuses were committed, and the people could not obtain a remedy, the subject was not contented with the ancient habeas corpus, but did not complain of the Courts for refusing them what they could not by law grant them; instead of that, they sought redress by petition to the Throne. In Chief Justice Wilmot’s time, a person was brought by habeas corpus before this Court, who had been committed by the Court of Chancery of Durham; that Court being competent, and having jurisdiction, the man was not discharged, but recommitted. How then can we do any thing in the present case, when the law by which the lord-mayor is committed, is different from the law by which he seeks to be relieved? He is committed by the law of Parliament, and yet he would have redress from the common law; the law of Parliament is only known to Parliament-men, by experience in the House. Lord Coke says, Every man looks for it, but few can find it. The House of Commons only know how to act within their own limits; we are not a Court of Appeal; we do not know certainly the jurisdiction of the House of Commons; we cannot judge of the laws and privileges of the House, because we have no knowledge of those laws and privileges; we cannot judge of the contempts thereof, we cannot judge of the punishment therefore.

I wish we had some code of the law of Parliament; but till we have such a

code, it is impossible we should be able to judge of it. Perhaps a contempt in the House of Commons, in the Chancery, in this Court, and in the Court of Durham, may be very different; therefore we cannot judge of it, but every Court must be sole judge of its own contempts. Besides, as the Court cannot go out of the return of this writ, how can we inquire into the truth of the fact, as to the nature of the contempt? We have no means of trying whether the lord-mayor did right or wrong: this Court cannot summon a jury to try the matter; we cannot examine into the fact; here are no parties in litigation before the Court: we cannot call in any body; we cannot hear any witnesses, or depositions of witnesses; we cannot issue any process; we are even now hearing ex parte, and without any counsel on the contrary side. Again, if we could determine upon the contempts of any other Court, so might the other Courts of Westminster-Hall; and what confusion would then ensue! none of us knowing the law by which persons are committed by the House of Commons. If three persons were committed for the same breach of privilege, and applied severally to different Courts, one Court perhaps would bail, another Court discharge, a third recommit.

Two objections have been made, which I own have great weight; because they hold forth, if pursued to all possible cases, consequences of most important mischief. 1st, it is said, that if the rights and privileges of Parliament are legal rights, for that very reason the Court must take notice of them, because they are legal. And 2dly, if the law of Parliament is part of the law of the land, the Judges must take cognizance of one part of the law of the land, as well as of the other. But these objections will not prevail. There are two sorts of privileges which ought never to be confounded; personal privilege, and the privilege belonging to the whole collective body of that assembly. For instance, it is the privilege of every individual member, not to be arrested; if he was arrested, before the Stat. 12 & 13 W. 3, the method in Westminster-Hall was, to discharge him by writ of privilege under the Great Seal, which was in the nature of a supersedeas to the proceedings; and as soon as it came into the Court of B. R. and was pleaded there, then it became a record, and the pleading concluded, si Curia domini Regis placitum praedictum cognoscere velit aut debeat. The Stat. 11 & 12 W. 3, has altered this, and there is now no occasion to plead the privilege of a member of Parliament. 2 Stran. 985, *Holiday & Al.* versus *Colonel Pitt*. There is a great difference between matters of privilege coming incidentally before the Court, and being the point itself directly before the Court; in the first case the Court will take notice of them, because it is necessary, in order to prevent a failure of justice; as in *Lord*

Banbury's case, where the Court of King's Bench determined against the determination of the House of Lords; but in that case they considered the legality and validity of the letters patent, without regarding the other right of a seat in the House of Lords, with which the Court did not concern themselves. The counsel at the Bar have not cited one case where any Court of this Hall ever determined a matter of privilege which did not come incidentally before them. If a question is to be determined in this Court touching a descent, whereby property is to be determined, and which depends upon legitimacy; that is, whether the father and mother were married lawfully; this Court must determine by the bishop's certificate; but in some cases, where the legitimacy of marriage does not come in question, but cohabitation only for a great length of time, which is evidence of a marriage, comes in question, this Court will determine according to the verdict of a jury, although the Courts of Westminster-Hall go by a different rule from the Spiritual Courts. But the present case differs much from those which the Court will determine; because it does not come incidentally before us, but is brought before us directly, and is the whole point in question; and to determine it, we must supersede the judgment and determination of the House of Commons, and a commitment in execution of that judgment.

Another objection has been made, which likewise holds out to us, if pursued in all its possible cases, some dreadful consequences; and that is, the abuses which may be made by jurisdictions from which there is no appeal, and for which abuses there is no remedy: but this is unavoidable; and it is better to leave some Courts to the obligation of their oaths. In the case of a commitment by this Court or the King's Bench, there is no appeal. Suppose the Court of B. R. sets an excessive fine upon a man for a misdemeanor; there is no remedy, no appeal to any other Court. We must depend upon the discretion of some Courts. A man not long ago was sentenced to stand in the pillory, by this Court of Common Pleas, for a contempt. Some may think this very hard, to be done without a trial by jury; but it is necessary. Suppose the Courts should abuse their jurisdiction, there can be no remedy for this: it would be a public grievance; and redress must be sought from the Legislature. The laws can never be a prohibition to the Houses of Parliament; because, by law, there is nothing superior to them. Suppose they also, as well as the Courts of Law, should abuse the powers which the constitution has given them, there is no redress, it would be a public grievance. The constitution has provided checks to prevent its happening; it must be left at large; it was wise to leave it at large: some

persons, some Courts, must be trusted with discretionary powers; and though it is possible, it is in the highest degree improbable, that such abuses should ever happen, and the very supposal is answered by Serjeant Hawkins, in the place cited at the Bar. As for the case of the Chancery committing for crimes, that is a different thing, because the Chancery has no criminal jurisdiction; but if that Court commits for contempts, the persons committed will not be discharged by any other Court. Many authorities may be drawn from the reign of Charles, but those were in times of contest. At present, when the House of Commons commits for contempt, it is very necessary to state what is the particular breach of privilege; but it would be a sufficient return, to state the breach of privilege generally: this doctrine is fortified by the opinion of all the Judges, in the case of Lord Shaftesbury, and I never heard this decision complained of till 1704: though they were times of heat, the Judges could have no motive in their decision, but a regard to the laws: the Houses disputed about jurisdiction, but the Judges were not concerned in the dispute. As for the present case, I am perfectly satisfied, that if Lord Holt himself were to have determined it, the lord-mayor would be remanded. In the case of Mr. Murray, the Judges could not hesitate concerning the contempt by a man who refused to receive his sentence in a proper posture: all the Judges agreed, that he must be remanded, because he was committed by a Court having competent jurisdiction: Courts of Justice have no cognizance of the Acts of the Houses of Parliament, because they belong ad aliud examen. I have the most perfect satisfaction in my own mind in that determination. Sir Martin Wright, who felt a generous and distinguished warmth for the liberty of the subject; Mr. Justice Denison, who was so free from connections and ambition of every kind; and Mr. Justice Foster, who may be truly called the magna charta of liberty of persons, as well as fortunes; all these revered Judges concurred in this point: I am therefore clearly and with full satisfaction of opinion, that the lord-mayor must be remanded.

Gould Justice.—I entirely concur in opinion with my Lord Chief Justice, that this Court hath no cognizance of contempts or breach of privilege of the House of Commons: they are the only judges of their own privileges; and that they may be properly called judges, appears in 4 Inst. 47, where my Lord Coke says, an alien cannot be elected of the Parliament, because such a person can hold no place of judicature. Much stress has been laid upon an objection, that the warrant of the Speaker is not conformable to the order of the House, and yet no such thing appears upon the return, as has been pretended. The order says that the lord-mayor shall be taken into the

custody of the serjeant or his deputy; it does not say, by the serjeant or his deputy. This Court cannot know the nature and power of the proceedings of the House of Commons; it is founded on a different law; the lex et consuetudo Parliamenti, is known to Parliament-men only. *Trewynnard's case*, Dier 59, 60. When matters of privilege come incidentally before the Court, it is obliged to determine them to prevent a failure of justice. It is true this Court did, in the instance alluded to by the counsel at the Bar, determine upon the privilege of Parliament in the case of a libel; but then that privilege was promulged and known; it existed in records and law-books, and was allowed by Parliament itself; but even in that case, we now know that we were mistaken, for the House of Commons have since determined, that privilege does not extend to matters of libel. The cases produced respecting the High Commission Court, &c. are not to the present purpose, because those Courts had not a legal authority; the resolution of the House of Commons is an adjudication, and every Court must judge of its own contempts.

Blackstone Justice.—I concur in opinion, that we cannot discharge the lord-mayor; the present case is of great importance, because the liberty of the subject is materially concerned. The House of Commons is a Supreme Court, and they are judges of their own privileges and contempts, more especially with respect to their own members: here is a member committed in execution by the judgment of his own House. All Courts, by which I mean to include the two Houses of Parliament, and the Courts of Westminster-Hall, can have no controul in matters of contempt. The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective Court. Infinite confusion and disorder would follow, if Courts could by writ of habeas corpus, examine and determine the contempts of others. This power to commit results from the first principles of justice; for if they have power to decide; they ought to have power to punish: no other Court shall scan the judgment of a Superior Court, or the principal seat of justice; as I said before, it would occasion the utmost confusion, if every Court of this Hall should have power to examine the commitments of the other Courts of the Hall, for contempts; so that the judgment and commitment of each respective Court, as to contempts, must be final, and without controul. It is a confidence, that may, with perfect safety and security, be reposed in the Judges, and the Houses of Parliament. The Legislature since the Revolution (see 9 & 10 W. 3, c. 15) have created many new contempts. The objections which are brought of abusive consequences prove too much, because they

are applicable to all Courts of dernier resort: et ab abusu ad usum non valent consequentia, is a maxim of law as well as of logic. General convenience must always outweigh partial inconvenience; even supposing (which, in my conscience, I am far from supposing) that in the present case the House has abused its power. I know, and am sure, that the House of Commons are both able and well inclined to do justice. How preposterous is the present murmur and complaint! the House of Commons have this power only in common with all the Courts of Westminster-Hall: and if any persons may be safely trusted with this power, they must surely be the Commons, who are chosen by the people; for their privileges and powers are the privileges and powers of the people. There is a great fallacy in my brother Glynn's whole argument, when he makes the question to be, whether the House have acted according to their rights or not? Can any good man think of involving the Judges in a contest with either House of Parliament, or with one another? and yet this manner of putting the question would produce such a contest. The House of Commons is the only judge of its own proceedings: Holt differed from the other Judges in this point, but we must be governed by the eleven, and not by the single one. It is a right inherent in all Supreme Courts: the House of Commons have always exercised it. Little nice objections of particular words and forms, and ceremonies of execution, are not to be regarded in the acts of the House of Commons; it is our duty to presume the orders of that House, and their execution, are according to law. The habeas corpus in *Murray's case* was at common law. I concur intirely with my Lord Chief Justice.

Nares Justice.—I shall ever entertain a most anxious concern for whatever regards the liberty of the subject; I have not the vanity to think I can add any thing to the weight of the arguments used by my Lord Chief Justice and my brothers: I have attended with the utmost industry, to every case and argument that has been produced, and most heartily and readily concur with my Lord Chief Justice and my brothers.

The lord-mayor was remanded to the Tower.

Wilson's K.B. [Wilson's King Bench Reports], vol. 3, p. 188

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1 Preamble.

2 Habeas corpus, prisoner to be produced by sheriff on writ of.

3 Issuance of writs during vacation time.Court to admit prisoner to bail for the next general sessions or gaol delivery.

4 Penalty for refusal by sheriff or other officer to obey writ of habeas corpus.

5 Persons discharged not to be rearrested on same charge, except as specified.

6 Person praying to be tried, if not tried at first term, to be let to bail; if not at second term, to be discharged

7 Proviso: discharge not to affect other process.

8 Prisoner not to be removed from custody or prison except by writ of habeas corpus or order of court.

9 Penalty for refusal of writ of habeas corpus.

10 Citizens of this State not to be sent out of State for trial for acts done in this State; penalties recoverable in such case.

11 Proviso: not to affect contracts where earnest paid.

12 Id.: not affect transportation for felony.

13 Id.: not to affect treason against other States.

14 Prosecutions for offenses against this act to be brought within two years.

15 Pleadings in defense of actions brought under this act.

16 Writs of habeas corpus, when only to be heard before justice of gaol delivery.

17 Person arrested for felony, bailing of.

18 *Habeas Corpus* to be granted by Justices of Supreme Court, and the President of the Court of Common Pleas of the several counties. Form of writ. Process of service, and time and manner of returning the writ. The Judge or Justice to discharge the prisoner from imprisonment, taking a proper recognizance for appearance, or to remand him, if not bailable. The return may be amended.

19 *Habeas Corpus* may be moved for in term time.

20 Person committed for treason or felony, not indicted at the next court, may be discharged, unless delayed for want of witnesses, or by his own act.

21 This act not to operate with respect to crimes in other states, or committed in violation of the laws of nations.

22 This act not to release from imprisonment in any civil action.

23 No person to be removed upon *Habeas Corpus*, within fifteen days next before the court, where the offence is cognizable.

24 After the said court it may be issued.

25 Forfeiture, in case Judge or Justice aforesaid refuse to grant writ of *Habeas Corpus*, and mode of recovery.

26 Penalty on officer, to whom the writ is directed, refusing to execute.

27 Penalty on refusing a copy of warrant of commitment.

28 No person to be recommitted for the same offence, after discharge.

29 Penalty on removing persons imprisoned for any criminal matter, unless by *Habeas Corpus*, or other legal writ.

30 Persons, not committed for any criminal matter, but confined or restrained of their liberty, under any colour or pretext whatever, may proceed under this act.

31 The proceedings upon a writ of *Habeas Corpus*, when taken out for any person restrained of his liberty without a warrant of commitment, to be the same as in other cases. Penalty.

32 Penalty under this act to be sued for within two years.

33 The general issue, and the special matter, to be given in evidence.

* *[Ed. "The Act for the better securing the Liberty of the Subject… the Habeas Corpus Act" is reprinted after the "Act… to Execute and Put in Force."]*

34 Preamble. That the within mentioned persons are impowered to put in execution the Habeas Corpus Act.

35 The provost-marshal or gaoler to give due obedience in the execution of a writ of *Habeas Corpus*.

36 Penalty on officers neglecting the duties required of them by this act.

37 All persons in this province to have the same benefit of the *Habeas Corpus* Act as if in England.

38 *Writs of Habeas Corpus within 3 days after service to be returned, and the body brought, if within 20 miles, &c.Vin. V. 14. 209, &c.*

39 Such writs how to be marked.Writs of Habeas Corpus, and the proceedings thereon in vacation time.

40 Persons neglecting 2 terms to pray a Habeas Corpus, shall have none in vacation-time, in pursuance of this act.

41 Officers how to be proceeded against for not obeying such writs.

42 Persons set at large not to be recommitted but by order of court.

43 Persons committed for treason or felony, shall be indicted the next term, or let to bail.

And tried the term, &c. after or discharged. 1 Vent. 346.

44 The penalty for denying a Habeas Corpus.

* Persons who incur those pains, penalties, &c. are put out of the King's protection, their lands and goods forfeited, and their bodies attached to answer to the King and his Council; or process of praemunire facias shall be made out against them, as in other cases of provisors.

45 No subjects shall be sent to foreign prisons. 2 Vent. 314. The penalty. 16 R. 2. c. 5.

46 Persons receiving earnest upon contracts to be transported, excepted.

47 Persons convicted of felony, and praying transportation, excepted.

48 Offenders may be sent to be tried where their offences were committed.

49 Prosecutions for offences within what time to be made.

50 After the assizes proclaimed, no prisoner to be removed, but before the Judge of assize.

51 *Rot. Parl.* no. 1.

52 Reciting that by 34 Ed. J. st. 4. c. 1. by Authority of Parliament holden 25 Ed. III. and by other Laws of this Realm, the King's Subjects should not be taxed but by Consent in Parliament.

a Interlined on the Roll.

53 II. and that Commissions have of late issued on which Proceedings have been had contrary to Law.

54 III. Reciting 9 Hen. III. M. C. c. 29.

55 IV. 28 Edw. III. c. 3.

56 V. and that divers Subjects have been imprisoned without Cause shewn, or Cause of Detainer certified.

57 VI. and that Soldiers have been dispersed in divers Counties, and Inhabitants compelled to receive them.

58 VII. 25 E. III.

59 Interlined on the Roll.

60 and that Commissions have issued under the Great Seal for Proceedings according to Martial Law.

61 VIII. The Petition.

62 Regulating of.

63 *Rot. Parl*. 16 Car. 1, c. 10. Magna Charta, 9 H. III. c. 29.

64 5 E. III. c. 9.

65 Lymne. [sic]

66 25 E. III. 5. c.4.

67 Interlined on the Roll.

68 28 E. III. c. 3.

69 42 E. III. c. 3

70 36 E. III. c. 15.

71 3 H. VII. c. 1.

72 21 H. VIII. c. 20.

73 All Matters examinable in the Star Chamber may be examinable and redressed by the Common Law. Council Table has assumed a Power contrary to Law. Court of Star Chamber and all its Powers dissolved.

74 II. Like Jurisdiction in several other Courts repealed and taken away. No Court or Council to have the like Jurisdiction.

75 III. The King or his Privy Council shall have no Jurisdiction over any Man’s Estate.

76 annexed to the Original Act in a separate Schedule.

77 IV. Great Officers and others offending:

First Offence, Penalty £500.

Second Offence, Penalty £1000.

Third Offence, Disabled.

78 V. Treble Damages to the Party grieved.

79 Annexed to the Original Act in a separate schedule.

80 VI. Every Person committed contrary to this Act shall have an Habeas Corpus for the ordinary Fees.

Cause of Detainer certified by Sheriff, &c. and thereupon Court to proceed. Default by Judge, &c. Damage

81 VII. To what Courts this Act shall extend.

82 annexed to the Original Act in a separate Schedule.

83 VIII. Limitation of Information, &c.

84 *Rot. Parl. 31 C. II. nu.* 2

85 Recital that Delays had been used by Sheriffs in making. Returns of Writs of Habeas Corpus, &c. Sheriff, &c, within Three Days after Service of Habeas Corpus, with the Exception of Treason and Felony, as and under the Regulations herein mentioned, to bring up the Body before the Court to which the Writ is returnable; and certify the true Causes of Imprisonment. Exceptions in respect of Distance.

a annexed to the Original Act in a separate Schedule.

b and

c or

d then likewise

e The word “the” was struck through and the word “such” inserted.

86 II. How Writs to be marked. Persons committed, except for Treason and Felony, &c. may appeal to the Lord Chancellor, &c. Proceedings thereon. Habeas Corpus may be awarded: and upon Service thereof the Officer to bring up the Prisoners as before mentioned: and thereupon within Two Days Lord Chancellor, &c. may discharge upon Recognizance; and certify the Writ with the Return and Recognizance. Proviso for Process not bailable.

f in

g either.

h [that].

i their

87 III. Habeas Corpus not granted in Vacation to Prisoners who have neglected to pray the same.

88 IV. Officer neglecting, &c. to make the said Returns, &c. or upon Demand to deliver a Copy of Warrant of Commitment First Offence, Penalty £100. Second Offence, £200 and Incapacity. Judgment at Suit of Party sufficient Conviction.

89 V. Proviso as to Imprisonment of Party after having been set at large upon Habeas Corpus. Unduly recommitting such discharged Persons or assisting therein; Penalty to the Party £500.

90 VI. If Persons committed for High Treason or Felony plainly expressed in Warrant shall not on Petition be indicted as herein mentioned, Judges, &c. may discharge upon Bail; Proviso and if not indicted and tried as herein mentioned then to be discharged.

91 VII. Proviso respecting Persons charged in Debt, &c.

92 VIII. Persons committed for criminal Matter not to be removed but by Habeas Corpus or other legal Writ. Unduly making out, &c. Warrant for Removal; Penalty.

* Interlined on the Roll.

93 IX. Proviso for Application for and granting Habeas Corpus in Vacation-time. Lord Chancellor, &c. unduly denying Writ; Penalty to Party £500.

94 X. Habeas Corpus may be directed into Counties Palatine, &c.

d And by.

95 XI. No Subject to be sent Prisoner into Scotland, &c. or any Parts beyond the Seas. Persons so imprisoned may maintain Action against the Person committing or otherwise acting in respect thereof, as herein mentioned; and the Person so committing or acting disabled from Office, and incur Premunire 16 R. 11. c. 5. and be incapable of Pardon.

96 XII. Proviso for Contracts for Transportation.

97 XIII. And for Transportation of Persons convicted of Felony and praying to be transported.

98 XIV. Proviso respecting Imprisonment of Persons before 1st June 1679.

99 XV. Proviso for sending Persons to be tried in Places where any Capital Offence committed.

100 XVI. Limitation of Prosecution for Offences against this Act.

101 XVII. After Assizes proclaimed, no Person to be removed from Common Gaol upon Habeas Corpus, but brought before Judge of Assize.

102 XVIII. After Assizes Persons detained may have Habeas Corpus.

103 XIX. In Informations, &c. brought for Offence against this Law; General Issue.

104 XX. Proviso as to Removal or Bail of Persons charged as Accessories before the Fact to Petty Treason or Felony.

1 See the Statute anno 34. E. 1. de tallagio, &c. an excellent Law.

2 20 H. 6. cap. 9. Stamf. pl. Cor. 152. b. 25 E. 3. 43. b. li. 6. fol. 52. The Countesse of Rutlands case. 11 H. 4. 15. 3 H. 6. 58. 48 E. 3. 30. 35 H. 6. 46.

3 See W. 1. ca. 15.

* See W. 1. ca. 15.

a 5 E. 3. cap. 9. 25 E. 3. ca. 4. 37 E. 3. ca. 8. 38 E. 3. ca. 9. 42 E. 3. ca. 3. 17 R. 2. cap. 6. Rot. Parl. 43 E. 3. Sir Jo. [of] Lees case. nu. 21, 22, 23. &c. lib. 10. fol. 74. in case del Marshalsea.

b See 43 Ass. p. 25 where this branch of Magna Charta, and other Statutes are cited, nota bene, the usurpation to an advowson is within this Act. 5 E. 3. cap. 9. 25 E. 3. cap. 4. c. 43 E. 3. 32.

c 43 E. 3. 32.

4 Lib. 8. Tr. 41 El. f. l. 125. Case de Londres.

5 2 & 3 Ph. et Mar. Dier. 114, 115.

6 Tr. 41 Eliz. Coram Rege. Rot. 92 in trns int. Davenant & Hurdes.

7 Tr. 44 Eliz. Coram Rege. lib. 11. fol. 84, 85, &c. Edw. Darcies case.

8 Rot. Parliam. 19 E. 1. Rot. 12. Boilands case. 31. E. 1. Cui in vitl 31. 18 E. 3. 54. Matravers case. Parliam. 15 E. 2. Exilium Hugonis.

* Rot. Parliam. 13 R. 2. nu. 28. Stam. Pl. Cor. 116, 117. 35 E. 1. cap. 1

9 Rot. claus. Anno 44 E. 3. Sir Richard Pembrughs Case.

10 5 E. 3. cap. 9. 28 E. 3. cap. 3. Fortescue cap. 22.

11 Mirror cap. 2. §3.

12 Pase. 39. E. 3. Coram Rege, John of Gaunts case. Rot. Parl. 4. E. 3. nu. 13. Countee de Arund. Case. Rot. Parl. 42 E. 3. nu. 23. Sir Jo. Of Lees case.

13 Lib. 10. fol. 74. In the case of the Marshalsea. Regula.

14 Rot. Parl. 15 E. 3. nu. 6, &c.

15 11 E. 3. breve. 173. 6 R. 2, proces. Pl. ultimo. 20 E. 4. 6. 20 Eliz. Dier, 260. Lib. 9. fol. 17. Seignior Zanchars case.

16 1 H. 4. 1. 13 H. 8. 1. 10 E. 4. 6.

17 19 H. 7. Edm. de la Pole Earle of Suff.case. Hil. 13. Jacob. the Lord Norrice case coram Rege.

18 Stamf. pl. cor. 130.

19 Pasch. 26 H. 8. in the case of the L.Dacres of the north, resolved by all the Judges of England as Justice Spelman report. Sec the 3. part of the Institutes cap. treason.

20 Rot. Parliam. 4 E. 3. nu. 6.

21 Anno 8 Will. conq. Anno 8 W. 1 Anno 8 W. 1. 20 H. 6. cap. 9. Pasch. 28. H. 8. Spelmans report.

22 22 H. 6. 47. 11 H. 6. 5. 1.

23 Rot. Parliam. 26 E. 1. Rot. 1. 25 E. 3. cap. 4. 28 E. 3. cap. 3. 37 E. 3. cap. 8. 42 E. 3. cap. 3.

24 19 H. 6. 7.

25 13 H. 4. 5.

26 11 H. 7. cap. 3.

27 1 H. 8. cap. 6.

28 Rot. pl. 1. H. 4. memb. 2. nu. 1.

29 Anno 16 Jacobi Regis.

30 7 E. 4. 20. 8 E. 4. 3. 9 E. 4. 27. 11 E. 4. 2. 2 H. 7. 15. b. 4. 4 H. 7. 18. 5 H. 7. 5. a. 26 H. 8. 9. 27 H. 8. 23.

a Bracton. fo. 143.

b 29 E. 3. 9. 39 E. 3. 39. 26 E. 3. 71 W. 1. cap. 9.

c 11 H. 4. 4. b. 20 E. 4. 6. b. 14 H. 8. 16. 27 H. 8. 23. 29 E. 3. 39.

31 29 E. 3. 39.

32 4 H. 7. 2. 5 H. 7. 5.

33 10 H. 7. 20.

34 26 E. 3. 71.

35 38 H. 8. faux imprisonment. Br. 6.

36 13 H. 7. Kelway 34. b. See more before hereof in the Exposition upon the Statute of 1 E. 2.De frangentibus prisonam. Out of the Kings Bench, though there be not any priviledge, &c.

37 In the Common Pleas,for any man priviledged in that Court, and the like in the Eschequer.

38 Out of the Chancery generally, thought there be not any priviledge, &c. 4 E. 4.

39 Act. Apost. ca. 25. ver. ult.

40 Hil. 32 E. 1. Coram Rege. Rot. 71 & 79. So it was holden Pasch. 34. Eliz. by all the Justices. 8 H. 4. 18. 20 E. 4. 6.

41 Regist. 64. Rot Pat. 21. E. 3. pt. 1. impugnatores jurium Regis.

42 Regist. 24 &c. 19.

43 Regist. fol. 267. F. N. B. 233, 234. 20 E. 2. Cor. 233. 6 E. 3. 17. 22 E. 3. 2.

44 Registr. 59, 60. F. N. B. 54. 15 R. 2. ca. 2. Vide Regist. 284, 289, 290. for the arresting of Purveyors, which make purveyance of the men of the Church.

45 Registr. 89. F. N. B. 85. 31 H. 8. Dier 43. 1 Mar. 92. 1 Eliz. 165.

46 Regist. 267 F. N. B. 234. Bract. li. 5. fo. 411. Brit. fo. 39. 88 Fleta. li. 6. ca. 39. Hil. 7 H. 5. coram. Rege. Rot. 7. Rot. claus. 22 E. 3 in dors. 20. pte. m. 14.

47 Lib. 10. fo. 74. in the case of the Marshalsea. Rot. Parl. 42 E. 3. nu. 23. Sir John a Lees Case. Lib. 5. fol. 640 Clarks case.

48 2 Ass. pl. 5. Rot. Parliam. 17 R. 2. nu. 37.

49 Rot. Parliam. 2 H. 4. nu. 60.

50 Virgil.

51 Act. Apost. c. 22. v. 24. 27.

52 36 E. 3. cap. 9.

a See the resolution of all the Judges of Englád in the answere to the articles of the Clergy hereafter at large in the exposition of the statute of artic. Cler. to the 21. and 22. artic. of the Writ of Habeas corpus see more in the exposition upon the stat. of W. 1. cap. 15.

b Regist. 77. F. N. B. 66. Bract. l. 3. f. 185.

c Regist. 83. 268. F. N. B. 249. 258. Bract. l. 3. f. 154.

d W. 2. c. 29. Gloc. cap. 9.

e Mirror. c. 1. § 5. cap. 2. § 13. cap. 5. § 1. 2. Fleta. l. 2. c. 12. Ocham cap. quid. sponte offerentibus F. N. B. 96. Rot. Parliam. 8 E. 3. nu. 7. 38 E. 3. nu. 23. 45 E. 3. nu. 19. 51 E. 3. nu. 58. 5 H. 4. nu. 32. 20 R. 2. fines 134. 34 H. 6. 38. 2 E. 3. c. 10. 1 E. 4. cap. 1. 26 H. 8. cap. 3. 27 H. 8. cap. 11.

53 2 E. 3. c. 8. 14 E. 3. c. 14. 20 E. 3. 1. 2. 11 R. 2. cap. 11. Rot. Parl. 2 R. 2. nu. 51. Rot. Parl. 2 H. 4. nu. 64. Regist. 186. 1 E. 3. f. 25. 2 E. 3. 3. 14 E. 3. tit. Jour. 24. 18 E. 3. 47. 29 E. 3. 47. 29 E. 3. 7. L. 5 E. 4. 132. Pasch. 3 H. 4. coram Rege. Rot. 16 Warwik. Rot. Parl. 5 H. 4. nu. 33. 11 Ass. pl. 9. 9 H. 6. 50. b. Fortesc. cap. 51. F. N. B. 237. 240. 11 H. 4. 76. 31 E. 3. quare Imp. 161. Mich. 11 H. 7. Rot. 124. in com. banc. Pasch. 7 H. 8. Rot. 66. in com. banc. Mich. 13 & 14. Elia. in. com. banc. Hitchcock's case. 11 H. 4. 57. 39 H. 6. 38. * Pasch. 22 E. 1. Rot. 39. coram Rege. Essex. W. 1. cap. 1. 1 E. 3. cap. 14. 2 H. 3. cap. 8. 7 E. 3. cap. 14. 1 H. 4. cap. 1. 2 H. 4. cap. 1. 2 H. 4. cap. 1. 4 H. 4. cap. 1. 7 H. 4. cap. 1. See the 1. part of the Institut. sect. 234. Injuria esti in, seu contra jus.

54 Cicero.

(a) See Moor 838. & seq.

(b) By the statute of 31 Car. 2. cap. 2. such writ may issue in the vacation time on behalf of any person, who stands committed for any crime, (unless for felony or treason plainly exprest in the warrant of commitment, or as accessary before to any petit-treason, or felony, or upon suspicion thereof,) other than persons convict or in execution; for by that statute it is provided, "That if any such person, or any one on his behalf, complain to the lord chancellor or lord keeper, or any one of his majesty's justices either of the one bench or of the other, or the barons of the exchequer of the degree of the coif, and the said lord chancellor, &c. or any of them, upon view of the copy of the warrant of commitment or detainer, or otherwise upon oath made, that such copy was denied to be given by such person in whose custody the prisoner is detaind, are hereby authorizd [sic] and required under the penalty of 500 l. upon request made in writing by such person or any on his behalf, attested and subscribed by two witnesses, who where present at the delivery of the same, to award an habeas corpus under the seal of such court, whereof he shall then be one of the judges, to be directed to the officer, in whose custody the party so committed or detained shall be, returnable immediatè before the said lord chancellor or such justice, &c. and upon service thereof, as aforesaid, the officer or his under officer shall (within three days after such service, if not beyond the distance of twenty miles, or ten days, if above twenty miles, and not beyond the distance of an hundred miles, or twenty days, if above the distance of one hundred miles,) under the penalty of 100 l. bring such prisoner before the said lord chancellor, or such justice, &c. before whom the said writ is made returnable, and in case of his absence before any other of them, with the return of such writ and the true causes of the commitment and detainer, and thereupon, within two days after the party shall be brought before them, the said lord chancellor, &c. before whom the prisoner shall be brought, as aforesaid, shall discharge him from his imprisonment, taking his recognizance with one or more sureties in any sum according to their discretions, having regard to the quality of the prisoner, and nature of the offense, for his appearance in the court of king's bench the term following, or at the next assizes, &c. or in such other court, where the said offense is properly cognizable, as the case shall require, and then shall certify the said writ with the return thereof, and the said recognizances into the said court, unless it shall appear unto the said lord chancellor, &c. that the party so committed is detained upon a legal process, order, or warrant out of some court, that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices, or barons, or some justice of the peace for such matters or offences, for which by law the prisoner is not bailable.

"No person to be intitled to the benefit hereof, unless he first pay or cause to be paid or tenderd the charges of bringing, to be ascertained by the judge or court, that awarded the writ, and indorsed thereon, not exceeding 12 d. per mile, and give security by his own bond to pay the charges of carrying back, if remanded by the court or judge, and that he will not make any escape by the way."

It is further provided by this statute, "That no person set at large upon any habeas corpus shall be recommitted for the same offense, but by order of court having jurisdiction of the cause; any person knowingly offending herein to forfeit 500 l."

This writ to run into counties palatine and privileged places.

"That no subject to England be sent prisoner into Scotland, or any place beyond the sea, either within or without his Majesty's dominions, under the penalty of a praemunire, except persons orderd to be transported, or offenders sent to be tried, where their offenses were committed.

"That after the assizes proclaimed and during the continuance thereof no prisoner be removed but before the judge of assise in open court, nor at any other time, but by habeas corpus, or other legal writ, except where the prisoner is delivered to the constable, &c. to be carried to the common gaol; or where any person is sent by order of any judge of assise, or justice of peace, to any common workhouse or house of correction; or is removed from one place to another within the same county in order for his trial or discharge in due course

of Law; or in case of sudden fire, infection, or other necessity."

1 Vaugh. 136. Bushel's [ed. It is spelled elsewhere as Bushell's] Case. And that it is at this Day the most usual Remedy to be relieved against a wrongful Imprisonment.

2 2 Inst. 55. 4 Inst. 182.

(a) Cro. Jac. 543. 2 Rol. Abr. 69.

(b) That it is an ancient and legal Writ. Cro. Car. 466. But it is no original Writ. Carter 221. per Vanghan.

(c) 4 Inst. 290.

3 For this vide Infra.

(d) If upon this Writ a Civil Action, and also a Matter of Crime be returned; as if a Person be arrested for Debt, and also charged with a Warrant of a Justice of Peace for Felony. 1. If it appear to the Judge or Court, that the Arrest for Debt, or other Civil Action, is fraudulent, they may remand him. 2. If it be found Real, they may commit him to the King's Bench with his Causes, tho' they are Matters of Crime; for that Court hath Conusance as well of the Crime as of the Civil Action; but then in the Term the Court may take his Appearance or Bail to the Civil Action, and remand him, if they see Cause, as to the Crime to be proceeded on below; but upon the Writ ad faciendum & recipiendum, there ought not singly a Matter of Crime to be returned, for that belongs to the Habeas Corpus ad Subjiciendum. 2 Hal. Hist. P. C. 145. & vide 6 Mod. 153.

4 Dyer 197. a. 249. pl. 84. 296, 307. 1 Mod. 235. Styl. Pract. Regist. 330.

(e) If one in Prison in the Counter be removed into the King's Bench by Habeas Corpus, and intending to go over to the Fleet, procures him some Friend to bring a Habeas Corpus to remove him thither, he shall not be removed thither till he has answered to the Cause in B. R. for he shall not compel the Plaintiff to follow after a Prolling Defendant; and so vi e versa of the Common Pleas, each Court shall retain the Defendant where he is first attached, and after he has answered there, he may be carried any where. 1 Salk. 350.

(f) And therefore this Writ lies not to a County Palatine. 1 Salk. 354.—nor to the Cinque Ports, unless the Action be local, so that they cannot have Conusance of it. 1 Mod. 20.

5 (g) There is also a Writ of Habeas Corpus ad satisfactendum after a Judgment; and on this Writ the Attorney for the Plaintiff must indorse the Number-Roll of the Judgment on the back of the Writ. Styl. Regist. 331.—Habeas Corpus upon a Cepi, where the Party is taken and in Execution in the Court below.—So upon an Attachment out of Chancery, and a Cepi; Corpus returned by the Sheriff, the next Step is a Habeas Corpus; for the Sheriff having executed the Command of the Writ of Attachment by taking the Body, he cannot carry him out of the County without the King's Writ.—There is also a Writ of Habeas Corpus ad testificand[um], which is to remove a Person in Confinement in order to give his Testimony in some Court of Justice; for which vide Styl. 119, 126, 230. 3 Keb. 51. Comb. 17, 48.

(h) A Person committing a Crime in Barbadoes, and apprehended here, may be sent thither by Habeas Corpus and tried. 3 Keb. 560, 566, 568. Warner's Case.—Also since the Habeas Corpus Act, a Person committing a criminal Offence in Ireland being here, may be sent to Ireland and tried there. 2 Vent. 314. Colonel Lundy's Case.—Also Justices of Gaol Delivery may send Prisoners by Habeas Corpus to the Sheriff of another County, and a Precept to the Sheriff of that other County to receive them, namely, for a Felony committed in that County, tho' that County be out of the Circuit of the Justice that sends them. 2 Hale's Hist. P. C. 37.—That if any Habeas Corpus come to receive a Prisoner from another Gaol, the Gaoler to take Notice of the Offence for which he stood committed at the other Gaol, and to inform the Court, that if he shall happen to be acquitted, or have his Clergy, he may yet be remanded to the former Gaol, if there be Cause. Kelynge 4 —— And that if any Habeas Corpus come to the Gaolers to remove a

Prisoner, that with the Prisoner they also certify the Cause for which he flood there committed. Kelynge 4.

6 2 Inst. 55. 4 Inst. 290. 2 And. 297. 2 Jon. 13, 14, 17.

7 2 Hal. Hist. P. C. 147. 2 Hawk. P. C. 114-5.

8 2 Hal. Hist. P. C. 147.

9 2 Hal Hist. P. C. 148.

10 Dyer 175. b. pl. 26. 2 Inst. 55. 3 Leon. 18. 4 Inst. 70, 182, 290. 1 Mod 235. 2 Mod. 198. Vaugh. 155. Carter 221. 2 Vent. 22. Vaugh. 155. and several Precedents of Writs of Habeas Corpus of this kind out of the Court of C. B. See Wilke's Case in Digest of Law concerning Libels, 49. &c. with L. C. J. Camden's Argument at large.

11 2 Hal. Hist. P. C. 144.

12 2 Jon. 14. 17.

13 2 Rol. Abr. 69. Cro. Ja. 543.

14 Palm. 54.

(a) Error of a Judgment in the King's Bench in Ireland; it was suggested, that the Plaintiff was in Execution upon the Judgment in Ireland; and the Court seemed to be of Opinion, that a Habeas Corpus might be sent thither to remove him, as Writs Mandatory had been awarded to Calais, and now to Jersey, Guernsey. 1 Vent. 357.——A Habeas Corpus granted to Jersey. 1 Sid. 386.

15 2 Rol. Abr. 69. Wetherley and Wetherley.

16 (b) But a Habeas Corpus ad faciendum & recipiendum does not lie to the Cinque Ports. 1 Sid. 431.

(c) Palm. 54-5. 96. Bourne's Case. Cro. Jac. 543. S. C. adjudged. 2 Rol. Abr. 69.

(d) Latch 160. Jobson's Case. 3 Keb. 279.

17 Vaugh. 136.

18 Fitz. corpus cum causa 2. 9 H. 6. 44. a. 2 Inst. 55. 10 H. 7. 17. 5 Co. 64. March 117. 11 Co. 98, 99.

19 1 Mod. 119. 3 Keb. 322, 358.

(a) Vaugh. 153. 2 Jon. 13. Sid. 273.

20 2 Lev. 128.

21 Lady Leigh's Case. Mich. 26 Car. 2. in B. R. 2 Lev. 128. 3 Keb. 433. S. C. Bur. Rep. 632. Earl Ferrer's Case.

22 4 Inst. 290.

23 1 Vern. 24. Dominus Rex ver. Sneller; & vide 1 Sid. 181. 1 Keb. 683.

24 1 Salk. 359. per Holt C. J.

25 Cro. Car. 176.

26 2 Hal. Hist. 210, 211. 1 Salk 352. Comb. 2.

27 1 Salk. 352.

28 4 Inst. 290. 3 Buls. 27.

29 (a) One Witness with an Affidavit that the other is sick is sufficient. Comb. 6.

30 (a) Need not enter his Prayer the first Week, if there be an Act of Parliament which suspends the Habeas Corpus Act, and takes away the Power of bailing for a Time. 1 Salk. 103.

(b) That to this Purpose the Grand Sessions of Wales is in the Nature of a Term so that the Party entering his Prayer there on the Want of Prosecution for a Term, B. R. may bail him. Comb. 6.

(c) And therefore this Statute makes the Judges liable to an Action at the Suit of the Party grieved in one Case only, which is the Refusing to award a Habeas Corpus in Vacation-time but leaves it to their Discretion, in all other Cases, to pursue its Directions in the same Manner as they ought to execute all other Laws, without making them subject to the Action of the Party, or to any other express Penalty or Forfeiture. 2 Hawk. P. C. 92.

31 Cases in Law and Equity 429.

(a) And the 31 Car. 2. supra, every Habeas Corpus pursuant to that Statute shall be marked in this Manner, Per statutum tricesimo primo Caroli Secundi Regis, and shall be signed by the Person that awards the same.—for the form of the Writ vide 2 Inst. 53-4

(b) Vide 1 Salk. 150. pl. 19.

32 Mich. 26 Car. 2. Fox's Case.

33 2 Mod. 306.

34 1 Lev. 1. Slater and Slater.

35 Godb. 44.

36 Hill 25 & 26 Car. 2. in B. R. 3 Keb. J. S. 279. S. C.

37 1 Salk. 350. per curiam.

38 Pasch. 26 Car. 2. Peck and Cresset.

39 F. N. B. 68. 11 H. 4. 86. 1 Mod. 195. 2 Lev. 128-9. 5 Mod. 21.

40 1 Salk. 350.

41 2 Jon. 178. March 89. 1 Keb. 272, 280. 2 Show. 172.

42 6 Mod. 90. 1 Salk 349. 1 Salk. 352.

(a) But no Action lies until the Retum be filed.

43 Vaugh. 137.

44 Hill 25 & 26 Car. 2. in B. R. Salmon ver. Slade.

45 1 Salk. 349.

46 1 Salk. 350.

47 Pasch. 18 Car. 2. Talyor's Case.

48 Vaugh. 137.

49 But for this vide Head of Commitment, Head of Bail in Criminal Cases, and 1 Hal. Hist. P. C. 584. Skin. 676. 12 Co. 130-1.

50 Trin. 22 Car. in C. B. Rudyard's Case.

51 Cro. Eliz. 821. 5 Co. 71. b. 2 Hawk. P. C. 113.

52 Pasch. 18 Car. 2. in B. R. Swallow's Case, 1 Sid. 287. 2 Keb. 50, 54, &c.

53 5 Mod. 323, 454. 2 Jon. 222.

(a) Trin. 4. Georg. 1.

54 1 Mod. 102, 103.

55 1 Mod. 102, 103. Hill. 26 & 27 Car. 2. in B. R. Emerton ver. Sir Rob. Viner, 2 Lev. 128. 3 Keb. 434, 447. S. C. 3 Mod. 164. S. C. cited.

56 5 Mod. 22. Styl. 16.

57 (a) By the Habeas Corpus Act 31 Car. 2. cap. 2. par. 3. the Lord Chancellor, &c. shall within two Days after the Return of the Habeas Corpus take Order, &c. and bail or remand the Prisoner.

(b) That is, after the Return filed, for before then there is nothing before the Court. 5 Mod. 22.

58 3 Vent. 330.

(c) As was done in Rob. Peyton's Case, who was remanded to the Tower.

59 1 Salk. 348. 5 Mod. 19, 20.

60 3 Keb. 526. 2 Lev. 128.

61 1 Mod. 235. 2 Mod. 198.

62 1 Salk. 352

(a) That after serving a Writ of Habeas Corpus it is Error to proceed after. Cro. Car. 261. Ellis ver. Johnson. 2 Jon. 209. S. P. adjudged. That if a Habeas Corpus be directed to an inferior Court returnable two Days after the End of the Term, yet the inferior Court cannot proceed contrary to the Writ of Habeas Corpus. 1 Mod. 195

63 Skin. 244.

(b) That tho' the Sum be under 10 l. yet if in the inferior Court special Bail was requisite, there shall be special Bail in the Court above. But for this vide Tit. Bail, Letter B.

64 1 Salk. 8. Hetherington and Reynolds.

65 1 Salk. 352.

66 2 Rol. Abr. 69 & vide Carth. 75.

1 This Writ is a Prerogative Writ, which concerns the King's Justice to be administred to his Subjects, and it is agreeable to all Persons and Places, and no answer can satisfy it but to return the Cause with a Paratum Habea Corpus, &c. Cro. J. 543, in Bourn's Case.——— * Cro. J. 543. in Bourn's Case.

2 So it was to Berwick, tho' it was pretended that the King's Writ ran not there, as being Part of Scotland and not of England, and an exempted Jurisdiction after it was annexed to the Crown of England, cited Cro. J. 543. as 43 Eliz. Browley's Case.

So a Hab. Corp. was directed to the Governour of Jersey, to bring hither the Body of O. who had been Prisoner there several Years. Sid. 386. The King v. Overton.

It has been awarded to Calais, and all other Places within the Kingdom. Cro. J. 543. in Bourn's Case.

* One was imprisoned at Dover by the Lord Warden of the Cinque Ports, because he took Anchor and Cable as Wreck, in the Liberty of the Rape of Hasting, which the Lord Warden pretended to be within the Liberty of the Rape of Hasting, and to appertain to him, because he hath the Jurisdiction of the Admiralty there, and he being for 23 Weeks imprisoned there, a Hab. Corp. was granted, to remove the Body cum Causa. And because the Lord Warden refused to obey it, a Habeas Corpus, with a great* Penalty, was awarded returnable at another Day. M. 17 Jac. B. R. Cro. J. 543. Rd. Bourn's Case.——— * See (E. 2.) Johnson's Case.

So one was brought up by Hab. Corp. out of the Cinque Ports, upon an Information for breaking Prison, where he was in upon an Execution for Debt, and it was allow'd. Mich. 21 Car. 2. 1 Mod. 20. pl. 53. Anon. It lies to the Cinque Ports, ad faciendum & subjiciendum, but not ad faciendum & recipiendum. Sid. 431. pl. 21. Mich. 21 Car. 2. B. R. Anon.

† Orig. (que est la ley de cest lieu.)—*

3 *Cro. C. 436. S. C. by the Name of Bower, and Ux. V. Cooper.—A Procedendo was denied by the Whole Court; For such Custom to maintain Action for such Brabling Words is against Law. 4 Rep. 18. a. pl. 13. Oxford v. Cross.So where the Words were, that she was an arrant Whore, and went from Chamber to Chamber playing the Whore, a Procedendo was denied. Hill. 9 Car. 1. Cro. C. 350. Hart's Case.But notwithstanding Oxford's Case. 4 Rep. 18. a. a Procedendo was granted, and there it was said and agreed by the Ch. J. and Mallet J. that of late Times there had many Procedendo's been granted in the like Case in B. R. Mar. 107. Trin. 17 Car. Anon. —— So it was allowed, Carth. 75. Mich. 1 W. & M. B. R. Watson v. Clerk.The Privilege of the Cinque Ports, that the King's Writ runs not there, is to be intended between Party and Party. Cro. J. 543. in Bourn's Case. ——— A Corpus cum Causa to remove the Plaintiff out of the Cinque Ports. Toth. 216. cites Pasch. 4 & 5 El. Blackley v. Laneston.

4 See (F).

† See * (B. 2)—— † (A).

5 And it is now the most usual Remedy by which a Man is restor'd again to his Liberty, if he has been against Law depriv'd of it. Vaugh. 136. in Bushell's Case. ——— An Habeas Corpus and Certiorari is a Writ of Right, the highest Writ the Party can bring, and is in the Nature of a Writ of Error; Per Hale Ch. J. 1 Mod. 119. Anon. —— But seems to be the Case of Hammond v. Howell.

6 Contra by him, if he be impleaded by Plaint; Brook makes a Quaere if this Suit by Writ or Plaint shall be intended of the Suit in B. R. or of the Suit in C. B. Ibid. C. B. may grant Habeas Corpus for Persons not within the Privilege of the Court; per 3 Justices, contra Vaughan Ch. J. 2 Jo. 13. Bushell's Case.

7 Br. Imprisonment, pl. 104. cites 16 E. 4. 6.—Br. Plaint, pl. 24. cites S. C.

8 Cro. C. 579. S. P. Anon.

9 It was granted, but to be at the Peril and Charge of the Party. Sti. 230. Trin. 1650. B. R. Treton v. Squire. ——— It was denied to bring up one in Execution to be a Witness, because it seems to be an Escape. Comb. 17. Pasch. 2 Jac. 2. B. R. Anon. ——— A Habeas Corpias ad Testificandum is grantable for one in Prison on Mesne Process, but not if he be in Execution. Comb. 48. Pasch. 3 Jac. 2. B. R. Anon.

10 See (C. 2) Rudyard's Case.

11 2 Keb. 50. & 54. S. C. City of London v. Swallow.

12 See Inferior Courts (G).

* This Statute means Certioraries, by the Words (other Writs,) and it is remarkable, that the Thing

complained of there is not that the Writs were used, when in Truth they did not lie, but that an Abuse was made of them, *viz.* that they were brought after Trial; and therefore it provides, that no Certiorari or Habeas Corpus shall be brought or allowed, unless it be delivered before the Jury sworn. And again, the Stat. of 21 Jac. 1. cap. 23. takes Notice of Certiotari, and only complains of the oppressive Manner of using them, *viz.* after the Party had proceeded a considerable Way below, and likewise where the Certiorari or Habeas Corpus is not delivered before Issue joined, so that it be not joined in six Weeks after, &c. both which Statutes shew this Writ was lawful, but abused, and the Abuses are only cured; And if the Writ were not legal, the Parliament would have condemned it as well as the Abuse of it; Per Holt Ch. J. in delivering the Opinion of the Court. Hill. 13 W. 3. 12 Mod. 645. in Case of Cross v. Smith

13 So [though the Party was living,] the Court thought it too late to grant an Habeas Corpus after such Judgment, and made a Rule for a Procedendo absolute. Notes of Cases in C. B. Trin. 7 & 8 Geo. 2. Wyatt v. Markham.

* See (A) Bourn's Case.

14 A Habeas Corpus was returned from Bourdeaux; per Noy Arg. who cited 43 E. 3. —— This Writ hath been awarded to Calais out of B. R. Pasch. 17 Jac. B. R. Cro. J. 533. per Mountague Ch. J.

15 The Gaoler must return by whom he was committed, and the Cause of his Imprisonment. 2 Inst. 55.

16 By the King, Lords of the Council, &c.

* S. P. by Coke Ch. J. who said, that the Statute of Westminster 1. is, that a Man committed by command of the King is not bailable. Roll. R. 134. in the Brewer's Case.——

‡ Upon an Habeas Corpus of one P. the Return was, that he was imprisoned by Virtue of a Warrant from the Council, and it was held by all the Justices, that he was not bailable, tho' two of the Council only committed him. 1 Roll. R. 134. cited by Coke, as 33 H. 6. 28. b. Poynes's Case. —— And 18 El. such Question was, and Coke said, that 6 Jac. his Brother Haughton was assigned to be the Counsel for a Prisoner, who was committed by the Council of the King, and he came there in Court, (viz. in Banco) and said that he could not maintain that he was bailable, because the Book of 33 H. 6. stopped his Mouth. Ibid. cites it as one Hacket's Case.——

† S. P. and C. cited per Holt Ch. J. 5 Mod. 81. in mase of Roe and Kendal, & al.

* So where one was committed by the College of Physicians for practicing Physick in London, but in the Return, no cause being shewn, the Return was held insufficient. Mich. 12 Jac. B. R. 2 Buls. 259. Dr. Alphonso v. the College of Physicians.

17 He was afterwards bailed. Cro. C. 168. Mich. 5 Car. B. R. S. C.

* S. P. on a Commitment by the Lords of the Council to remain till further Order given. Cro. C. 507. Barkham's Case—Ibid. Lawson's Case. —— So where the Commitment was by a Secretary of State. Le. 175. Hellyard's Case.—— S. P. and a Distinction was taken between a Commitment by one or by all the Council. Le. 70, 71. Howell's Case.—— S. C. cited Arg. 5 Mod. 83. —— Where the Return was that he was committed by the Lords of the Privy Council for divers Causes and Misdemeanors, until they give Orders to the contrary. It was held not good. Pasch. 16 Car. 2. Cro. C. 579. Freeman's Case.

18 Orders of Courts.

19 1 Roll. R. 218. Trin. 13 Jac. B. R. S. C. where Coke delivered the Resolutions of the Judges that the Return was insufficient according to Astweeke's Case. 9 El. which is all one with this; wherefore they awarded that the Warden of the Fleet be discharged of the Prisoner and that he be committed to the Marshal, & quod tradatur in ballium. ——— So where the Return was that G. was committed 7 May 1615. 13 Jac. Per Mandatum Thomae Ellesmere Cancellarii Anglia, and no Cause of the Commitment returned,

and so is all one with a President in 19 El. one Mitchell's Case. where the Return was that he was committed 16 February, per Nich. Bacon, Custodem magni sigilli, & traditur in Ballium. 1 Roll. Rep. 219. Trin. 13 Jac. B. R. Glanvill's Case.

20 By Court of Admiralty, and Marches of Wales.

* S. P. cited to be held good in Chancellor Egerton's Time, where the Commitment was for Contempt of a Decree, but where a Return was Virtute Mandati of the Chancellor, the Parties were discharged. 2 Roll. R. 307. per Haughton and Chamberlainé J. in Hancock's Case.

21 Mar. 52. pl. 80. S. C. by Name of **Shielde's** Case. Reports that the Woman was a Servant Maid, and that the Parties were remanded, because it appeared that they had not paid the Fines, and that nothing was said of the Matter of the Return.—* S. P. Pasch. 16 Car. Cro. C 579. Freeman's Case.—See Brice's Case, and the Notes there.

22 For not obeying Orders of inferior Courts.

23 Where a Commitment is in Court to a proper Officer there present, there is no Warrant of Commitment, and in such Case he cannot return a Warrant in Haec Verba, but he must return the Truth of the whole Matter under Peril of an Action. But if he be committed to one that is not an Officer, as in the principal Case, there must be a Warrant in Writing, and where there is one it must be returned; For otherwise the Gaoler may alter the Case of the Prisoner, and make it either better or worse than it is upon the Warrant. 1 Salk. 349. Hill. 8 W. 3. B. R. S. C. by the Name of King v. Clerk.

24 1 Salk. 349. S. C. by Name of King v. Clerk—12 Mod. 113, 114. S. C.

25 By Justices of Peace Mayors, &c.

* S. P. Hill. 23 Car. B. R. Sty. 90. Smith's Case.

26 See Noy 156. S. C. where the Exceptions and the Reasons are particularly set forth, but there is nothing said to be done upon it; & it is by Name of the Grand Case of the Habeas Corpus.

27 By College of Physicians and Commissioners of Bankrupts.

28 Of Ecclesiastical Matters.

* The King's Letters Patents alone are not sufficient to give Power to Imprison. See 12 Rep. 82, 83. Sir Wm. Chancey's Case.

29 Relating to Jurymen. 1 Sid. 272. S. C.

30 In general.

31 See Inferiour Courts (G).

32 The Secondary said that in Trin. and Hill. Term, they could not compell the Party to plead and go to Trial the same Term, but in Mich. and Easter Term they could. Mich. 21 Car. 2. B. R. 1 Mod. 1. pl. 2.

33 And the Steward of Windsor hardly escaped being commited for Proceeding after a Hab. Corp. delivered to him, tho' the Value was under 5 l. and would not make a Return of it. cited per North Ch. J. 1 Mod. 195. as Staples's Case.

* And so it was done to the Cinque Ports. Cro. J. 543. M. 17 Jac. in Bourn's Case.

* See (L) pl. 1.

34 5 Mod. 19. S. C. by Name of the King v. Bellet.

35 Vid. (R) S. C. but D. P.

* Want of Averment of a Matter of Fact may be amended in a Return in Court; and if it be not true, at their Peril be it; per Hale Ch. J. Mod. 103. Pl. 10 Mich. 25. Car. B. R. Anon.

* Orig. (at issue)

* Orig. [mesne]—If a Man be condemned in London and in Execution, and is impleaded in Bank, he shall be brought into Bank to answer, and when he has made Attorney he shall be remanded into London; but if he be arrested only and not condemned, he shall be dismissed. Note he Diversity. Br. Privilege, pl. 29. cites 38. H. 6. 12.

36 So where the Defendant procured himself by Fraud to be indicted of Felony to the Intent to defraud his Creditors of their Debts; and procured himself to be removed out of the Fleet by Corpus cum Causa directed out of the King's Bench to the Warden of the Fleet, to be committed to the Marshal; and all these Causes supra returned into B. R. and the King perceiving, by credible Information, the Intent of the Defendant, and of divers other Practisers of such Fraud to deceive their Creditors by such Procurement of Indictment of Felony, and to be Arraigned thereupon, and then to confess the Felony, and betake themselves to their Clergy to the Intent to be out of the Temporal Laws; and after make their Purgations and depart, &c. the King by Privy-Seal, directed to the Justices of his Bench, commanded them to Surcease to proceed to the Arraignment till they had commandment from him, and his Council to the contrary. D. 245. pl. 65, 66. cites 34 H. 6. Verney als. Joyner's Case.

1 Liberty.

a 1 Inst. 253.b. 2 Inst. 590.

b 2 Inst. 53, 482.

c 2 Inst. 492, 589. 2 Roll. Abr. 74.

d 2 Inst. 482, 483. 3 Inst. 91. 4 Inst. 97.

e 1 Roll. Abr. 687.

f 1 Inst. 162.a. 253. b. 2 Inst. 483.Nemo tenetur exponere se infortuniis et periculis. 1 Inst. 162. a. 253. b. Talis [ed. enim?] debet esse metus, qui cadere potest in virum constantem, non meticulosum. Ibid. Qui non cadunt in constantem virum, vani timores sunt. 2 Inst. 483. 7 Rep. 27.

2 2 Inst. 42, 115. 9 Rep. 56.

g 1 Inst. 124.b.

a 2 Inst. 55. 4 Inst. 181.

3 2 Roll. Abr. 166.

b 2 Inst. 47, 48.

h 2 Inst. proem.

i 25 Edw. I.

k 2 Inst. proem.

l 1 W. and M. st. 2. c. 2.

m 12 & 13 W. III. c. 2.

n Plowd. 55.

o Si aliquis mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam; si puerperium jam formatum fuerit, et maxime si fuerit animatum, facit homicidium: Bracton. l. 3. c. 21.

p 3 Inst. 90.

q Stat. 12 Car II. c. 24.

r Stat. 10 & 11 W. III. c. 16.

s Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur. Ff. 1. 5. 26.

t 2 Inst. 483.

u l. 2. c. 5.

w 2 Inst. 483.

x Ff. 48. 21. 1.

y l. 11. t. 27.

z Co. Litt. 133.

a This was also a rule in the feodal law, l. 2. t. 21. desat esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad cum qui non debet gerere officium.

b Litt. §. 200.

c Co. Litt. 133 b.

d 2 Rep. 48. Co. Litt. 132.

e c. 29.

f 2 Inst. 48.

g C.29

h 5 Edw. III. c. 9. 25 Edw. III. st. 5. c. 4. and 28 Edw. III. c. 3.

i 2 Inst. 589.

k 2 Inst. 482.

l 2 Inst. 52, 53.

m F. N. B. 85.

n cap. 29.

o 2 Inst. 47.

o 2 Mod. 198. [ed. This footnote belongs to 17.1.3.9.b.]

p 2 Lilly prac. reg. 4.

q 2 Mod. 306.

r Bohun instit. legal. 85. edit. 1708.

s St. Trials. viii. 142.

t The pluries habeas corpus directed to Berwick in 43 Eliz. (cited 4 Burr. 856.) was teste'd die Jovis prox'

post quinden' sancti Martini. It appears, by referring to the dominical letter of that year, that this quindena (Nov. 25.) happened that year on a saturday. The thursday after was therefore the 30th of November, two days after the expiration of the term.

u Cro. Jac. 543.

w 4 Burr. 856.

x Ibid. 460. 542. 606.

y 2 Inst. 55. 4 Inst. 290. 2 Hal. P.C. 144. 2 Ventr. 22.

z Vaugh. 155.

a Carter. 221. 2 Jon. 13.

b 4 Inst. 182. 2 Hal. P. C. 147.

c Lord Nott. MSS Rep. July 1676.

d 2 Mod. 306. 1 Lev. 1.

e Bushell's case. 2 Jon. 13.

f Cro. Jac. 543.

g 3 Bulstr. 27.

h 2 Inst. 615.

i Com. journ. 1 Apr. 1628.

k Book I. ch. 1.

l State Tr. vii. 136.

m Ibid. 240.

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

o pag. 132.

p State Trials. vii. 471.

q See book I. ch. 1.

r These two clauses seem to be transposed, and should properly be placed after the following provisions.

s 4 Burr. 856.

t See Vol. I pag. 136.

1 Nullus liber homo, &c.

"And be it further enacted by the authority aforesaid, that the several penalties inflicted by this Act shall be recovered by the party grieved, his or her executors or administrators, against the offender, his or her executors or administrators, in like manner as the penalties inflicted by the said Act are to be recovered.

"And, to the intent that no person may pretend ignorance of the import of any such writ, be it enacted, that all writs of habeas corpus, awarded or to be returned under the authority of this Act, shall be marked by the

Court, or person respectively awarding the same, in this manner:

" 'By an Act passed in the thirty-first year of the reign of King George the Second.' And shall also be signed by order of the Court, or by the person respectively awarding the same.

"And be it further enacted by the authority aforesaid, that if any action, plaint, suit, or information, shall be commenced or prosecuted against any person or persons for any offence against this Act, the same shall be commenced within twelve calendar months after the time of the offence committed, unless the party grieved be then under confinement or restraint; and if he or she shall be then under confinement or restraint, then within the space of twelve calendar months after the decease of the party so confined or restrained, or his or her delivery from such confinement or restraint, which shall first happen; and such person or persons so sued in any Court whatsoever, shall and may plead the general issue, not guilty, or that he or she owes nothing; and upon any issue joined, may give the special matter in evidence: and if the plaintiff or prosecutor shall become nonsuit, or forbear further prosecution, or suffer a discontinuance; or if a verdict pass against him or her, the defendant shall recover his or her costs; for which he or she shall have the like remedy as in any case where costs by the law are given to defendants."

(a) The following was found among Sir Eardley Wilmot's Papers, endorsed by him, "State of the case on the Press Act. April 1758."

"A little before Hilary term twelvemonth, some applications having been made to Mr. Justice Foster by persons in the Savoy, raised under the annual Act then in force, *viz.* 29 Geo. II. c. 4, for the speedy and effectually recruiting of His Majesty's Land Forces and Marines, he issued writs of habeas corpus, upon which the men were brought up, and let go by acquiescence or consent, without any return ever being made: but conceiving it to be a matter of doubt and consequence how to proceed in such cases, he desired the assistance of all the other Judges of the Court of King's Bench, to consider the said Act and what ought to be done.

"All the Judges of the Court accordingly met, and the great object of their deliberation was how they might relieve with expedition and effect, in case the great power given by the Act was abused, without defeating the end of the Act and the view of the Legislature where the power was not abused.

"They considered the matter together and separately; they talked with some of the most eminent counsel, and it has since been sifted to the bottom. The more it is examined, the more it will be found that what the Court did, was not only the best, but the sole remedy that could be devised to relieve the subject under immediate oppression from an abuse of the great power given by that Act, until the Parliament should expressly declare their pleasure in the new bill for the next year, which, from the ordinary course of business, was expected to pass in about six weeks or two months. To shew this, it may be proper,

"1st. To consider the nature of the Act.

"2d. How men, wronged by the commissioners in the first instance, might afterwards be speedily and effectually relieved.

"1st.—The Act is founded in the violation of private liberty; and the cause alledged for such violation, is the want of a speedy and effectual recruit.

"There cannot be a speedy and effectual recruit, unless the law receives a speedy and immediate execution; therefore the Parliament entrusted commissioners, named by the Act, to execute the powers therein mentioned.

"The power given to the commissioners, is to change the condition of men, under certain descriptions, into the condition of soldiers, against their will.

"The Act requires several circumstances to be observed before the condition of the recruit is to be

completely changed: but when those circumstances are observed, the Act declares him a soldier to all intents and purposes whatsoever.

“The custody or imprisonment in any secure place, whether private house or prison authorized by the Act, is temporary, casual, and a mere consequence of the man’s condition being changed into that of a soldier. It is only a detention, to secure him till he can join the corps; and gives him no other right to controvert his being a soldier, than he would be entitled to when he has joined the corps.

“It seems from the words and meaning of the Act, that where all the circumstances have been observed, the persons under whose care or authority the recruit happens to be delivered, are authorized to treat him as a soldier, to all intents and purposes, without being obliged to prove him within the description.

“1st. From the words:—

“Every clause is studiously penned, to avoid the possibility of a supposition that the recruit’s being within the description was necessary to be proved by every person to whom he was delivered, and that the change of his condition was for ever to depend upon proving that he was within such description.

“The parish officers are directed ‘to bring before the commissioners all such persons as they can find, who are or shall appear to them to be within the description of the Act.’

“And the commissioners are strictly to examine all such persons as shall be so brought before them; and if, upon examination, they shall find that such persons shall come within the descriptions therein mentioned; and the commissioners, and the officer who shall be appointed to receive the recruits, shall judge them to be such as shall be thereby intended to be entertained as soldiers in His Majesty’s service, then the commissioners are to cause such persons to be delivered over to the person appointed to receive them.

“The clause enabling the parish officers, after the second meeting of the commissioners, to take up and detain, without any warrant, such persons as they should find, or should appear to them to be within the description of the Act, directs the lifting and delivering of them over at the next meeting, if judged within the description of the Act.

“The clause relating to the age, size, religion, and bodily condition of the recruits, refers to what shall appear in the opinion of the commissioners and officer appointed to receive them.

“The clause relating to the voters, is conceived in such terms as shews the validity of the lifting was not to depend upon the right to vote; but upon the recruits making it appear to the satisfaction of the commissioners then present, that he had a right to vote.

“After reading the Articles of War, the Act says, ‘He shall be deemed a soldier to all intents and purposes, and shall be subject to the discipline of war, and in case of desertion, shall be proceeded against as a deserter.’

“The Acts directs many entries to be made; but directs no entry of the examination or grounds upon which the commissioners find him to be within the description of the Act.

“2dly. From the intention of the Act.

“The cause of the Act was a speedy and effectual recruit; but after all the trouble and expence the public has been at, they would scarce have the benefit of a single man against his will, if the persons to whom he is delivered, were obliged to prove him within the description: they are strangers to the proof upon which the commissioners proceeded; and if they knew it, they could not avail themselves of the same kind of proof, which the Act authorizes the commissioners to receive; for they are warranted by the Act to proceed upon the examination of the persons themselves, and to judge from what they do or do not say; but a person cannot be examined against himself in any legal proceeding.

“No officer could inquire into the qualifications of recruits brought from all parts of the kingdom. In what condition must they be, if they could not justify treating or punishing the recruit as a soldier, without proving he was within the description?

“Upon the perusal of the Pressing Acts which passed in Queen Anne’s reign, many observations occur:

“The 5th of Queen Anne gives a power of review to the commissioners, at any time, which was not in the former Acts.

“The 7th of Queen Anne omits the power of review; and the proviso as to voters is varied, and describes such persons as shall make it appear that they have a vote.

“The 10th of Queen Anne is the same as the 7th; but restores the clause of review, limiting it to six weeks.

“The clause of review was omitted in the 29th George II. and in all the Acts made in this King’s reign, before the 29th George II.

“The execution of the special powers given by this Act, for the purposes therein mentioned, is like no other case whatsoever. It is not like a conviction: it is not in writing: it is not by way of punishment for an offence. There is no other evidence required than what the man says, or does not say, upon his examination. If it was to be compared to an order, then the evidence need not be set forth; and there never was an instance, upon any of those Acts, of an application for a certiorari.

This being the nature and intent of the Act;

“2d.—The second question is, what relief a man, who complained that he was wrongfully pressed by the commissioners, could have by writ of habeas corpus?

“When he was at liberty, with the regiment to which he was delivered, he could have no habeas corpus. If he happens to be secured in a private house, or public prison, or other safe place, the accidental custody gives a pretext to apply for a habeas corpus to be set at large from that restraint.

“The officer or keeper must in his return, either aver, not only that all the circumstances required by the Act were observed, but that the man was within the description; or else, that all the circumstances were observed, and rely upon them as a sufficient cause and justification, without averring the man to be within the description.

“The first form of return could only be made upon the credit of what the commissioners had done, and a presumption that they had done right.

“It is impossible for the officer or gaoler to proceed upon any other ground; and in execution of the trust reposed in him, he ought to give credit to their judgment, and proceed upon that foundation.

“In this case, the only remedy of the recruit would be an action for a false return; and no jury would give more than trifling damages against an officer acting ‘bonâ fide,’ and making a return in support of the trust which was reposed in him, the truth of which he could no otherwise come to the knowledge of.

“Suppose the return made in the other form, the observations before mentioned tend to shew that it would be sufficient. In that case, no man who admitted all the circumstances in the Act to have been observed, could be entitled to relief by habeas corpus; because upon his own shewing there appeared sufficient cause.

“In this form the King’s Counsel had prepared and settled the draft of a return: suppose that form not sufficient; the other must have been followed of course, as the only one possible to be made by the officer or gaoler.

“But to go farther; suppose the man set at large by virtue of the habeas corpus, from the custody of his temporary keeper for want of cause, or sufficient cause, shewn by the officer or gaoler, or upon any other

reason; he would be in no better condition than if he had never been secured at all, and would be liable to be taken up, prosecuted, and shot for desertion.

“The end of the habeas corpus is only to set him loose from the custody, not to determine whether he is a soldier. The merits of that question could not be determined in proceeding upon a writ of habeas corpus against the gaoler or temporary keeper. The gaoler’s acquiescence to let men go, by making no defence to a writ of habeas corpus, could no more release them from being soldiers, than his voluntarily giving them leave to go.

“In this light, a discharge by habeas corpus, for want of defence by the keeper, might be a cruel snare to poor and ignorant men: no effectual relief can be given, but in some way which may, as between proper parties, decide the question whether the man’s condition was changed into that of a soldier. If such a way cannot be devised, a recruit so raised by the commissioners, must be absolutely without remedy.

“In other cases, if a man be treated as a soldier, who is not duly lifted or subject to military discipline, he has his action; nay, the officer who so treats him, may, according to the nature of the case, be criminally liable. But where a man is raised under the Act by the commissioners, though wrongfully, yet, the circumstances of the Act being observed, it is a sufficient justification for treating him as a soldier. The officer is a stranger to the grounds upon which the commissioners proceeded.

“Diligent inquiry has been made into the practice under the former annual Acts of the like kind, and no cases have been discovered of more than two or three instances, from the 2d of Queen Anne to the year 1746, of applications for writs of habeas corpus, by men pressed under the authority given by any of the Acts during that period.

“Only one return has been found, The Queen and Chamberlayne; and there, upon the face of the return, the Court sent the man back without any other inquiry.

“In the year 1746, in the case of King and White, the Lieutenant of the Tower made a return in the same form.

“It was impossible to say the return was not sufficient. The Court could not admit affidavits to contradict the return; for though in the case of a wife, where the cause is totally immaterial; or of a lunatic, where no legal custody under a commission is returned, affidavits may have been let in for collateral purposes; yet the truth of a return, setting forth the execution of a special authority, jurisdiction, or power, cannot be contradicted by affidavits. It is contrary to all the principles and authorities of law; and in the year 1746 there never had existed an instance.

“Had the Court then made a precedent to contradict the truth of the facts contained in a return by affidavits, it could only have been justified by the end; but it would have been dangerous, as a deviation from a general rule of law, and applicable to other eases.

“The Court took another way: upon reading affidavits, they made a rule upon the commissioners to shew cause; and for want of cause being shewn, discharged the man. After a sufficient return to the habeas corpus, the use of the writ was at an end. No relief could be given by it. The relief was given in consequence of the rule, and by virtue of the rule only.

“We were glad to follow and improve the plan of this precedent, by directing notice likewise to be given to the officers of the Crown, that Mr. Attorney General might be heard in behalf of His Majesty. The King, in behalf of the public, is alone concerned in the question, whether the recruit’s condition be changed into that of a soldier.

“If that question were determined in any method where the King was really, not nominally a party, and by his officers substantially heard or consenting; we thought the man might be discharged from the condition of a soldier, and set at liberty.

“An intimation was given to the practisers, and also in Court, of the Judges conference.

“In the first case, the then Attorney General being ill, Mr. Solicitor General came into Coart and declared on behalf of the Crown, that there was no objection to discharging such men as should appear to the Court to have been unjustly pressed.

“No person ever applied afterwards for a habeas corpus, who, upon being asked which he meant, did not change his application into a motion for the rule.

“No counsel desired to argue the question, whether they ought not to have a habeas corpus instead of the rule; if they had, they would certainly have been heard; had it been insisted upon, for the more solemn determination of the question, a habeas corpus would have been granted; but it would have been cruel to the particular person not to have given notice of the result of the consultation among the Judges, or to have put a poor man to the delay and expence of litigating a point, contrary to the opinion the Court had once conceived, when he had another and easy remedy.

“The consent given on the part of the Crown was never retracted; the most eminent counsel who practise in the Court of King’s Bench, have publicly averred, that the Court in fact never refused a writ of habeas corpus to any pressed man in custody; and no man, who pretended to know any thing of the matter, has from his own knowledge said the contrary. The Legislature, by the bill now in force, made alterations tending to explain the law in the same way; for they have directed that the commissioners should levy such able bodied men, who could not, upon examination, prove themselves not to be within the description of the Act.

“They have given a power of review to the commissioners themselves within ten days; and if the recruit is discharged, the levy money is directed to be returned; and they have likewise prescribed a particular form of entries to be made in columns; but no entry is required of the proof or examination upon which the recruit is raised.

“By this Act the Legislature gave more than a silent sanction to what the Court has done, and strengthened the reasons for pursuing it. There is now depending a case upon the rule, in which no habeas corpus could possibly have issued.”

(a) From a manuscript of Lord Raymond, in possession of Mr. Filmer.

(a) At the request of the Judges, the 3d question was waived by their Lordships.

(a) Lord Hardwicke.

(a)1 Die Merc. &c. S. Hill. Anno 3 Annae Reginae. Nicolaus Bolton ductus fuit iterum hic in Curia supra Breve de Habeas Corpus ad subjiciendum, &c. sub custodia Jer. Mahone generosi; Et ordinatum est, “ex assensu ambarum partium,” quod referetur Arbitrio & finali determinatione Wilhelmi Harvey, armigeri, Carew Harvey alias Mildmay, armigeri, & Thomae Dawtry, armigeri, tribus Justiciariis Pacis Com. Essex conjunct, cum Johanne Green, Servient. ad Legem, Johanne Wroth, arm. & Wilhelmo Stane, arm. tribus aliis Justiciariis Pacis Comitat. predict. Utrum predict. Nich. Bolton, sit talis persona, qualis per Actum Parliamenti, intitulat. “An Act for Raising Recruits for the Land Service,” &c. secundum formam Acti praedict. intens. est retineri, Anglice, “to be entertained” in servitio Dominae Reginae; quodque dictus Jeremias Mahone ducat predictum Nich. Bolton, personaliter coram Justic. predict. ad tempus et locum appunctuat. pro assemblatione Justic. illorum: et si appareat Justic. predict. vel majori parti eorum supra examinationem quod predict. N. Bolton, sit talis persona ut prefertur, tunc predict. N. Bolton remittatur custodiae predict. J. Mahone, aliter exoneretur e custodia per Justiciarios predictos.

(a)2 Lords Journals, 29th vol. p. 353.

(a)3 Which “bill” was as follows: “Whereas the writ of habeas corpus hath, in all times, been deemed to be the most effectual security for the liberty of the subject, against every kind of wrongful imprisonment or restraint: and whereas any delay in the awarding or returning of such writ may be attended with the most fatal consequences to the person under restraint; and, by reason of such delay, the relief intended to be given may come too late for such person to be discharged from his restraint, or to receive any benefit from such writ; be it therefore 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 the several provisions which, by an Act made in the thirty-first year of King Charles the Second, intituled, ‘An Act for the Better Securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas,’ are made for the awarding of writs of habeas corpus, in cases of commitment or detainer for any criminal or supposed criminal matter, shall, in like manner, extend to all cases where any person, not being committed or detained for any criminal or supposed criminal matter, shall be confined or restrained of his or her liberty, under any colour or pretence whatsoever; and that upon oath being made by such person so confined or restrained, or by any other on his or her behalf, of any actual confinement or restraint, and that such confinement or restraint, to the best of the knowledge and belief of the person so applying, is not by virtue of any commitment or detainer for any criminal or supposed criminal matter; an habeas corpus directed to the person or persons so confining or restraining the party as aforesaid, shall be awarded and granted in the same manner as is directed, and under the same penalties as are provided, by the said Act, in the ease of persons committed or detained for any criminal or supposed criminal matter; and that the person or persons before whom the party so confined or restrained shall be brought by virtue of any habeas corpus granted in the vacation time under the authority of this Act, may and shall, within three days after the return made, proceed to examine into the facts contained in such return, and into the cause of such confinement or restraint; and thereupon either discharge, or bail, or remand the parties so brought, as the case shall require, and as to justice shall appertain.

“And be it further enacted by the authority aforesaid, that whensoever any writ of habeas corpus, granted either in term or vacation time, on the behalf of any party so confined or restrained without a commitment for any criminal or supposed criminal matter, shall be served upon the person so confining or restraining such party, or shall be left at the place where such party shall be so confined or restrained, the person so confining or restraining such party shall make return of such writ, and bring or cause to be brought the body or bodies, according to the command thereof, within the respective times limited, and under the provisions prescribed by the said Act to sheriffs and other officers, in case of commitment or detainer for criminal or supposed criminal matters; and every such person neglecting or refusing so to make return of such writ, or to bring or cause to be brought the body or bodies, according to the command thereof, within the times respectively limited, and under the provisions prescribed by the said Act to sheriffs and other officers, shall be guilty of a contempt of the Court under the seal of which the said writ of habeas corpus shall issue; and shall also for the first offence, forfeit to the party grieved the sum of three hundred pounds, and for the second offence, the sum of five hundred pounds.

CHAPTER 18

ARTICLE IV, SECTION 2, CLAUSE 1

PRIVILEGES AND IMMUNITIES CLAUSE

18.1TEXTS

18.1.1DRAFTS IN PHILADELPHIA CONVENTION

18.1.1.1Proposal by Pinckney, May 29, 1787

12

The Citizens of each state shall be entitled to all privileges & immunities of Citizens in the several states—

Farrand, vol. 3, p. 601.

18.1.1.2Committee of Detail “Report” No. III, After July 26, 1787

3 Mutual Intercourse—Community of Privileges—Surrender of Criminals —Faith to Proceedings &c.

Farrand, vol. 2, p. 135.

18.1.1.3Committee of Detail “Report,” After July 26, 1787

The free (inhabs) Citizens of each State shall be intitled to all Privileges & Immunities of free Citizens in the Sevl States

Farrand, vol. 2, pp. 173–74.

18.1.1.4Report of Committee of Detail, August 6, 1787

XIV [XIII]

The Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Madison's Notes, Farrand, vol. 2, p. 187.

18.1.1.5Motion, August 28, 1787

On the question to agree to the 14 article as reported it passed in the affirmative [Ayes—9; noes—1; divided—1.]

Journal, Farrand, p. 437.

18.1.1.6Reference to Committee of Style and Arrangement, September 10, 1787

XIV.

The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.

Farrand, vol. 2, p. 577.

18.1.1.7Report of Committee of Style and Arrangement, September 12, 1787

IV.

…

Sect. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Farrand, vol. 2, p. 601.

18.1.1.8Printed Version, September 15, 1787

ARTICLE. IV.

…

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Farrand, vol. 2, pp. 661–62.

18.1.2STATE CONSTITUTIONS AND LAWS; COLONIAL CHARTERS AND LAWS

18.1.2.1Connecticut

18.1.2.1.aDeclaration of Rights, 1776

An Act containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and securing the same.

THE People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; and having from their Ancesters derived a free and excellent Constitution of Government, whereby the Legislature depends on the free and annual Election of the People, they have the best Security for the Preservation of their civil and religious Rights and Liberties. And for as much as the free Fruition of such Liberties and Privileges as Humanity, Civility and Christianity call for, as is due to every Man in his Place and Proportion, without Impeachment, and Infringement, hath ever been, and will be the Tranquility and Stability of Churches and Commonwealths; and the denial thereof, the Disturbance, if not the Ruin of both.[1]

…

That all the free Inhabitants of this or any other of the United States of *America*, and Foreigners in Amity with this State, shall enjoy the same Justice and Law within this State, which is general for the State, in all Cases, proper for the Cognizance of the Civil Authority and Courts of Judicature within the same, and the without Partiality or Delay.[2]

Connecticut Acts, 1786, pp. 1–2.

18.1.2.1.bAct for Promoting and Encouraging the Commerce of this State, 1784

Be it further enacted by the Authority aforesaid, That Foreigners and Citizens of any of the United States, who shall come into or reside in either of said Ports or Cities, shall be holden to pay no other or greater Duties or Taxes, than the Citizens of this State residing in said Cities, shall by Law be holden to pay.[3]

Connecticut Acts, 1786, p. 268.

18.1.2.2Delaware

18.1.2.2.aCharter of Privileges, 1701

The Charter of Privileges, granted by William Penn, esq. to the inhabitants of Pennsylvania, and territories.

WILLIAM PENN, Proprietary and Governor of the province of Pennsylvania and territories thereunto belonging, to all to whom these presents shall come, sendeth greeting.[4]

…

And whereas, for the encouragement of all the freemen and planters, that might be concerned in the said province and territories, and for the good government thereof, I the said William Penn, in the year One Thousand Six Hundred Eighty and Three, for me, my heirs and assigns, did grant and confirm unto all the freemen, planters and adventurers therein, divers liberties, franchises and properties, as by the said grant, entituled, *The frame of the government of the province of Pennsylvania, and territories thereunto belonging, in America*, may appear;

…

Know ye therefore, That for the further well being and good government of the said province, and territories; and in pursuance of the rights and powers before mentioned, I the said William Penn do declare, grant and confirm, unto all the freemen, planters and adventurers, and other inhabitants in this province and territories, these following liberties, franchises and privileges, so far as in me lieth, to be held, enjoyed and kept, by the freemen, planters and adventurers, and other inhabitants of and in the said province and territories thereunto annexed, for ever.

I. *Because* no people can be truly happy, though under the greatest enjoyment of civil liberties, if abridged of the freedom of their consciences,

as to their religious profession and worship: And Almighty God being the only Lord of conscience, Father of lights and spirits; and the Author as well as Object of all divine knowledge, faith and worship, who only doth enlighten the minds, and persuade and convince the understandings of people, I do hereby grant and declare, That no person or persons, inhabiting in this province or territories, who shall confess and acknowledge One Almighty God, the Creator, Upholder and Ruler of the world; and profess him or themselves obliged to live quietly under the civil government, shall be in any case molested or prejudiced, in his or their person or estate, because of his or their conscientious persuasion or practice, nor be compelled to frequent or maintain any religious worship, place or ministry, contrary to his or their mind, or to do or suffer any other act or thing, contrary to their religious persuasion.[5]

And that all persons who also profess to believe in Jesus Christ, the Saviour of the world, shall be capable (notwithstanding their other persuasions and practices in point of conscience and religion) to serve this government in any capacity, both Legislatively and Executively, he or they solemnly promising, when lawfully required, allegiance to the King as Sovereign, and fidelity to the Proprietary and Governor, and taking the attests as now established by the law made at New-Castle, in the year One Thousand and Seven Hundred, entitled, *An act directing the attests of several officers and ministers*, as now amended and confirmed this present Assembly.[6]

II. *For* the well governing of this province and territories, there shall be an Assembly yearly chosen, by the freemen thereof,[7]

…

Which Assembly shall have power to chuse a Speaker and other their officers; and shall be judges of the qualifications and elections of their own Members; sit upon their own adjournments; appoint Committees; prepare bills in order to pass into laws; impeach criminals, and redress grievances; and shall have all other powers and privileges of an Assembly, according to the rights of the freeborn subjects of England, and as is usual in any of the King’s plantations in America.[8]

…

V. *That* all criminals shall have the same privileges of witnesses and council as their prosecutors.[9]

VI. *That* no person or persons shall or may, at any time hereafter, be obliged to answer any complaint, matter or thing whatsoever, relating to

property, before the Governor and Council, or in any other place, but in ordinary course of justice, unless appeals thereunto shall be hereafter by law appointed.[10]

VII. *That* no person within this government, shall be licensed by the Governor to keep an ordinary, tavern, or house of public entertainment, but such who are first recommended to him, under the hands of the Justices of the respective counties, signed in open court; which Justices are and shall be hereby impowered, to suppress and forbid any person keeping such public house as aforesaid, upon their misbehaviour, on such penalties as the law doth or shall direct; and to recommend others, from time to time, as they shall see occasion.[11]

VIII. *If* any person, through temptation or melancholy, shall destroy himself, his estate, real and personal, shall notwithstanding descend to his wife and children, or relations, as if he had died a natural death; and if any person shall be destroyed or killed by casualty or accident, there shall be no forfeiture to the Governor by reason thereof.[12]

And no act, law or ordinance whatsoever, shall at any time hereafter, be made or done, to alter, change or diminish the form or effect of this charter, or of any part or clause therein, contrary to the true intent and meaning thereof, without the consent of the Governor for the time being, and six parts of seven of the Assembly met.[13]

But, because the happiness of mankind depends so much upon the enjoying of liberty of their consciences, as aforesaid, I do hereby solemnly declare, promise and grant, for me, my heirs and assigns, That the first article of this charter relating to liberty of conscience, and every part and clause therein; according to the true intent and meaning thereof, shall be kept and remain, without any alteration, inviolably for ever.[14]

And lastly, I the said William Penn, Proprietary and Governor of the province of Pennsylvania, and territories thereunto belonging, for myself, my heirs and assigns, have solemnly declared, granted and confirmed, and do hereby solemnly declare, grant and confirm, That neither I, my heirs or assigns, shall procure or do any thing or things whereby the liberties in this charter contained and expressed, nor any part thereof, shall be infringed or broken: And if any thing shall be procured or done, by any person or persons, contrary to these presents, it shall be held of no force or effect.[15]

…

Delaware Laws, Appendix, pp. 37–42.

18.1.2.2.b Constitution, 1776 Art. 25. The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, &*c*. agreed to by this convention.[16]

Delaware Laws, Appendix, p. 89.

18.1.2.3Georgia

18.1.2.3.aCharter, 1732

GEORGE the second, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth. To all to whom these presents shall come, greeting.

Whereas we are credibly informed, that many of our poor subjects are, through misfortunes and want of employment, reduced to great necessity, insomuch as by their labor they are not able to provide a maintenance for themselves and families; and if they had means to defray their charges of passage, and other expences, incident to new settlements, they would be glad to settle in any of our provinces in America where by cultivating the lands, at present waste and desolate, they might not only gain a comfortable subsistence for themselves and families, but also strengthen our colonies and increase the trade, navigation and wealth of these our realms. And whereas our provinces in North America, have been frequently ravaged by Indian enemies; more especially that of South-Carolina, which in the late war, by the neighboring savages, was laid waste by fire and sword, and great numbers of English inhabitants, miserably massacred, and our loving subjects who now inhabit them, by reason of the smallness of their numbers, will in case of a new war, be exposed to the late calamities; inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages—And whereas we think it highly becoming our crown and royal dignity, to protect all our loving subjects, be they never so distant from us; to extend our fatherly compassion even to the meanest and most infatuated of our people, and to relieve the wants of our above mentioned poor subjects; and that it will be highly conducive for accomplishing those ends, that a regular colony of the said poor people be settled and established in the southern territories of Carolina. And whereas

we have been well assured, that if we will be graciously pleased to erect and settle a corporation, for the receiving, managing and disposing of the contributions of our loving subjects; divers persons would be induced to contribute to the purposes aforesaid—Know ye therefore, that we have, for the considerations aforesaid, and for the better and more orderly carrying on of the said good purposes; of our special grace, certain knowledge and mere motion, willed, ordained, constituted and appointed, and by these presents, for us, our heirs and successors, do will, ordain, constitute, declare and grant, that our right trusty and well beloved John, lord-viscount Purcival, of our kingdom of Ireland, our trusty and well beloved Edward Digby, George Carpenter, James Oglethorpe, George Heathcote, Thomas Tower, Robert Moore, Robert Hucks, Roger Holland, William Sloper, Francis Eyles, John Laroche, James Vernon, William Beletha, esquires, A. M. John Burton, B. D. Richard Bundy, A. M. Arthur Bedford, A. M. Samuel Smith, A. M. Adam Anderson and Thomas Corane, gentlemen; and such other persons as shall be elected in the manner herein after mentioned, and their successors to be elected in the manner herein after directed; be, and shall be one body politic and corporate, in deed and in name, by the name of the Trustees for establishing the colony of Georgia in America; and them and their successors by the same name, we do, by these presents, for us, our heirs and successors, really and fully make, ordain, constitute and declare, to be one body politic in deed and in name forever; and that by the same name, they and their successors, shall and may have perpetual succession; and that they and their successors by that name shall and may forever hereafter, be persons able and capable in the law, to purchase, have, take, receive and enjoy, to them and their successors, any manors, messuages, lands, tenements, rents, advowsons, liberties, privileges, jurisdictions, franchises, and other hereditaments whatsoever, lying and being in Great Britain, or any part thereof, of whatsoever nature, kind or quality, or value they be, in fee and in perpetuity, not exceeding the yearly value of one thousand pounds, beyond reprises; also estates for lives, and for years, and all other manner of goods, chattels and things whatsoever they be; for the better settling and supporting, and maintaining the said colony, and other uses aforesaid;

…

—Know ye, that we greatly desiring the happy success of the said corporation, for their further encouragement in accomplishing so excellent a work have of our aforesaid grace, certain knowledge and mere motion,

given and granted by these presents, for us, our heirs and successors, do give and grant to the said corporation and their successors under the reservation, limitation and declaration, hereafter expressed, seven undivided parts, the whole in eight equal parts to be divided, of all those lands, countrys and territories, situate, lying and being in that part of South-Carolina, in America, which lies from the most northern part of a stream or river there, commonly called the Savannah, all along the sea coast to the southward, unto the most southern stream of a certain other great water or river called the Alatamaha, and westterly from the heads of the said rivers respectively, in direct lines to the south seas; and all that share, circuit and precinct of land, within the said boundaries, with the islands on the sea, lying opposite to the eastern coast of the said lands, within twenty leagues of the same, which are not inhabited already, or settled by any authority derived from the crown of Great-Britain: together with all the soils, grounds, havens, ports, gulfs and bays, mines, as well royal mines of gold and silver, as other minerals, precious stones, quarries, woods, rivers, waters, fishings, as well royal fishings of whale and sturgeon as other fishings, pearls, commodities, jurisdictions, royalties, franchises, privileges and preeminences within the said frontiers and precincts thereof and thereunto, in any sort belonging or appertaining, and which we by our letters patent may or can grant, and in as ample manner and sort as we may or any of our royal progenitors have hitherto granted to any company, body politic or corporate, or to any adventurer or adventurers, undertaker or undertakers, of any discoveries, plantations or traffic, of, in, or unto any foreign parts whatsoever; and in as legal and ample manner, as if the same were herein particularly mentioned and expressed: to have, hold, possess and enjoy, the said seven undivided parts, the whole into eight equal parts, to be divided as aforesaid, of all and singular the lands, countries and territories, with all and singular other the premises herein before by these presents granted or mentioned, or intended to be granted to them, the said corporation, and their successors forever, for the better support of the said colony, to be holden of us, our heirs and successors,

…

Georgia Laws, pp. 369–73.

18.1.2.3.bConstitution, 1777

Whereas the conduct of the legislature of Great-Britain for many years past, has been so oppressive on the people of America, that of late years, they

have plainly declared, and asserted a right to raise taxes upon the people of America, and to make laws to bind them in all cases whatsoever, without their consent; which conduct being repugnant to the common rights of mankind, hath obliged the Americans, as freemen, to oppose such oppressive measures, and to assert the rights and privileges they are entitled to, by the laws of nature and reason; and accordingly it hath been done by the general consent of all the people of the States of New-Hampshire, Massachusetts-Bay, Rhode-Island, Connecticut, New-York, New-Jersey, Pennsylvania, the counties of New-Castle, Kent, and Sussex on Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, given by their representatives met together in General Congress, in the city of Philadelphia;

…

We therefore the representatives of the people, from whom all power originates, and for whose benefit all government is intended, by virtue of the power delegated to us, Do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State.

…

ART. XXIV. The governor's oath:

"I, A B, elected governor of the State of Georgia, by the representatives thereof, do solemnly promise and swear, that I will, during the term of my appointment, to the best of my skill and judgment, execute the said office faithfully and conscientiously, according to law, without favor, affection, or partiality; that I will, to the utmost of my power, support, maintain, and defend the State of Georgia, and the constitution of the same; and use my utmost endeavors to protect the people thereof in the secure enjoyment of all their rights, franchises and privileges; and that the laws and ordinances of the State be duly observed, and that law and justice in mercy be executed in all judgments. And I do further solemnly promise and swear, that I will peaceably and quietly resign the government to which I have been elected, at the period to which my continuance in the said office is limited by the constitution: And, lastly, I do also solemnly swear, that I have not accepted of the government whereunto I am elected, contrary to the articles of this constitution. So help me God."

…

ART. LVIII. No person shall be allowed to plead in the courts of law in this State, except those who are authorized so to do by the house of assembly; and if any person so authorized shall be found guilty of mal-practice [*sic*] before the house of assembly, they shall have power to suspend them. This is not intended to exclude any person from that inherent privilege of every *freeman*, the liberty to plead his own cause.

Georgia Laws, pp. 7, 11–12, 15.

18.1.2.4Maryland

18.1.2.4.aCharter, 1632

Charles, by the Grace of God, of England, Scotland, France, and Ireland, king, Defender of the Faith, &c. To all to whom these Presents come, Greeting.

II. Whereas our well beloved and right trusty Subject Caecilius Calvert, Baron of Baltimore, in our Kingdom of Ireland, Son and Heir of George Calvert, Knight, late Baron of Baltimore, in our said Kingdom of Ireland, treading in the steps of his Father, being animated with a laudable, and pious Zeal for extending the Christian Religion, and also the Territories of our Empire, hath humbly besought Leave of us, that he may transport, by his own Industry, and Expense, a numerous Colony of the English Nation, to a certain Region, herein after described, in a Country hitherto uncultivated, in the Parts of America, and partly occupied by Savages, having no knowledge of the Divine Being, and that all that Region, with some certain Privileges, and Jurisdiction, appertaining unto the wholesome Government, and State of his Colony and Region aforesaid, may by our Royal Highness be given, granted and confirmed unto him, and his Heirs.

. . .

IV. Also We do grant and likewise Confirm unto the said Baron of Baltimore, his Heirs, and Assigns, all Islands and Inlets within the Limits aforesaid, all and singular the Islands, and Islets, from the Eastern Shore of the aforesaid Region, towards the East, which had been, or shall be formed in the Sea, situate within Ten marine Leagues from the said shore; with all and singular the Ports, Harbours, Bays, Rivers, and Straits belonging to the Region or Islands aforesaid, and all the Soil, Plains, Woods, Marshes, Lakes, Rivers, Bays, and Straits, situate, or being within the Metes, Bounds, and Limits aforesaid, with the Fishings of every kind of Fish, as well of Whales, Sturgeons, and other royal Fish, as of other Fish, in the Sea, Bays, Straits, or Rivers, within the Premises, and the fish t here taken; And moreover all Veins, Mines, and Quarries, as well opened as hidden, already found, or that shall be found within the Region, Islands, or Limits aforesaid, of Gold, Silver, Gems, and precious Stones, and any other whatsoever, whether they be of Stones, or Metals, or of any other Thing, or Matter whatsoever; And furthermore the Patronages, and Advowsons of all Churches which (with the increasing Worship and Religion of Christ) within the said Region, Islands, Islets, and Limits aforesaid, hereafter shall

happen to be built, together with License and Faculty of erecting and founding Churches, Chapels, and Places of Worship, in convenient and suitable places, within the Premises, and of causing the same to be dedicated and consecrated according to the Ecclesiastical Laws of our Kingdom of England, with all, and singular such, and as ample Rights, Jurisdictions, Privileges, Prerogatives, Royalties, Liberties, Immunities, and royal Rights, and temporal Franchises whatsoever, as well by Sea as by Land, within the Region, Islands, Islets, and Limits aforesaid, to be had, exercised, used, and enjoyed, as any Bishop of Durham, within the Bishoprick or County Palatine of Durham, in our Kingdom of England, ever heretofore hath had, held, used, or enjoyed, or of right could, or ought to have, hold, use, or enjoy.

. . .

X. We will also, and of our more abundant Grace, for Us, our Heirs and Successors, do firmly charge, constitute, ordain, and command, that the said Province be of our Allegiance; and that all and singular the Subjects and LiegeMen of Us, our Heirs and Successors, transplanted, or hereafter to be transplanted into the Province aforesaid, and the Children of them, and of others their Descendants, whether already born there, or hereafter to be born, be-and shall be Natives and LiegeMen of Us, our Heirs and Successors, of our Kingdom of England and Ireland; and in all Things shall be held, treated, reputed, and esteemed as the faithful LiegeMen of Us, and our Heirs and Successors, born within our Kingdom of England; also Lands, Tenements, Revenues, Services, and other Hereditaments whatsoever, within our Kingdom of England, and other our Dominions, to inherit, or otherwise purchase? receive, take, have, hold, buy, and possess, and the same to use and enjoy, and the same to give, sell, alien and bequeath; and likewise all Privileges, Franchises and Liberties of this our Kingdom of England, freely, quietly, and peaceably to have and possess, and the same may use and enjoy in the same manner as our LiegeMen born, or to be born within our said Kingdom of England, without Impediment, Molestation, Vexation, Impeachment, or Grievance of Us, or any of our Heirs or Successors; any Statute, Act, Ordinance, or Provision to the contrary thereof, notwithstanding.

. . .

XIV. Moreover, left in so remote and far distant a Region, every Access to Honors and Dignities may seem to be precluded, and utterly barred, to Men well born, who are preparing to engage in the present Expedition, and

desirous of deserving well, both in Peace and War, of Us, and our Kingdom; for this Cause, We, for Us, our Heirs and Successors, do give free and plenary Power to the aforesaid now Baron of Baltimore, and to his Heirs and Assigns, to confer Favors, Rewards and Honors, upon such Subjects, inhabiting within the Province aforesaid, as shall be well deserving, and to adorn them with whatsoever Titles and Dignities they shall appoint; (so that they be not such as are now used in England) also to erect and incorporate Towns into Boroughs, and Boroughs into Cities, with suitable Privileges and Immunities, according to the Merits of the Inhabitants, and Convenience of the Places; and to do all and singular other Things in the Premises, which to him or them shall seem fitting and convenient; even although they shall be such as, in their own Nature, require a more special Commandment and Warrant than in these Presents may be expressed.

. . .

XVI. And furthermore, of our more ample special Grace, and of our certain Knowledge, and mere Motion, We do, for Us, our Heirs and Successors, grant unto the aforesaid now Baron of Baltimore, his Heirs and Assigns, full and absolute Power and Authority to make, erect, and constitute, within the Province of Maryland, and the Islands and Islets aforesaid, such, and so many SeaPorts, Harbors Creeks, and other Places of Unlading and Discharge of Goods and Merchandizes out of Ships, Boats, and other Vessels, and of Lading in the same, and in so many, and such Places, and with suck Rights, Jurisdictions, Liberties, and Privileges, unto such Parts respecting aS to him or them shall seem most expedient: And, that all and every the Ships, Boats, and other Vessels whatsoever, coming to, or going from the Province aforesaid, for the Sake of Merchandizing, shall be laden and unladen at such Ports only as shall be so erected and constituted by the said now Baron of Baltimore, his Heirs and Assigns, any Usage, Custom, or other Thing whatsoever to the contrary notwithstanding, Saving always to Us, our Heirs and Successors, and to all the Subjects of our Kingdoms of England and Ireland, of Us, our Heirs and Successors, the Liberty of Fishing for Sea-Fish, as well in the Sea, Bays, Straits, and navigable Rivers, as in the Harbors, Bays, and Creeks of the Province aforesaid; and the Privilege of Salting and Drying Fish on the Shores of the same Province; and, for that Cause, to cut down and take Hedging-Wood and Twigs there growing, and to build Huts and Cabins, necessary in this in the same Manner, as heretofore they reasonably might, or have used to do.

Which Liberties and Privileges, the said Subjects of Us, our Heirs anal Successors, shall enjoy, without notable Damage or Injury in my wise to be done to the aforesaid now Baron of Baltimore, his Heirs or Assigns, or to the Residents and Inhabitants of the same Province in the Ports, Creeks, and Shores aforesaid, and especially in the Woods and Trees there growing. And if any Person shall do Damage or Injury of this Kind, he shall incur the Peril and Pain of the heavy Displeasure of Us, our Heirs and Successors, and of the due Chastisement of the Laws, besides making Satisfaction.

. . .

Maryland Charter, MSA, pp. 1–2, 5, 13, 17, 19.

18.1.2.4.bConstitution, 1776

The DECLARATION of RIGHTS, *And The* CONSTITUTION *and* Form *of* Government of The State of Maryland.

A DECLARATION of RIGHTS.

THE parliament of Great-Britain, by a declaratory act, having assumed a right to make laws to bind the Colonies in all cases whatsoever, and, in pursuance of such claim endeavored by force of arms to subjugate the United Colonies to an unconditional submission to their will and power, and having at length constrained them to declare themselves independent States, and to assume government under the authority of the people;—Therefore we, the delegates of Maryland, in free and full convention assembled, taking into our most serious consideration the best means of establishing a good constitution in this State, for the surer foundation and more permanent security thereof, declare,

…

21. That no free man ought to be taken, or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner, destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.

…

37. That the city of Annapolis ought to have all its rights, privileges and benefits, agreeable to its Charter, and the acts of Assembly confirming and regulating the same, subject nevertheless to such alteration as may be made by this Convention, or any future legislature.

…

I. THAT the Legislature consist of two distinct branches, a senate and house of delegates, which shall be styled, The General Assembly of Maryland.

…

XII. That the house of delegates may punish, by imprisonment, any person who shall be guilty of a contempt in, their view, by any disorderly or riotous behaviour, or by threats to, or abuse of, their members, or by any obstruction to their proceedings; they may also punish, by imprisonment, any person who shall be guilty of a breach of privilege, by arresting on civil process, or by assaulting, any of their members, during their sitting, or on their way to or return from the house of delegates, or by any assault of or obstruction to their officers, in the execution of any order or process, or by assaulting or obstructing any witness, or any other person, attending on, or on their way to or from, the house, or by rescuing any person committed by the house: and the senate may exercise the same power, in similar cases.

…

Maryland Laws, pp. 601–05.

18.1.2.5Massachusetts

18.1.2.5.aCharter of Massachusetts Bay, 1691

***The CHARTER of the Province of the* Massachusetts-Bay *in* New England.**

WILLIAM and *MARY*, by the Grace of GOD, King and Queen of *England*, *Scotland*, *France* and *Ireland*, Defenders of the Faith, *&c*. To all to whom these Presents shall come, Greeting. Whereas His late Majesty King *James* the first, Our Royal Predecessor, by his Letters Patents under the Great Seal of *England*, bearing Date at *Westminster* the third Day of *November*, in the eighteenth Year of his Reign, did give and grant unto the Council established at *Plymouth* in the County of *Devon*, for the Planting, Ruling, Ordering and Governing of *New England* in *America*, and to their Successors and Assigns, all that Part of *America* lying and being in Breadth from forty Degrees of Northerly Latitude, from the Equinoctial Line to the forty eighth Degree of the said Northerly Latitude, inclusivsively, and in Length of and within all the Breadth aforesaid throughout all the Main

Lands, from Sea to Sea, together also with all the firm Lands, Soils, Grounds, Havens, Ports, Rivers, Waters, Fishings, Mines and Minerals, as well Royal Mines of Gold and Silver, as other Mines and Minerals, Precious Stones, Quarries, and all and singular other Commodities, Jurisdictions, Royalties, Priviledges, Franchises and Preheminences, both within the said Tract of Land, upon the Main, and also within the Islands and Seas adjoining: Provided always, that the said Lands, Islands, or any the Premises by the said Letters Patents intended or meant to be granted, were not then actually possessed or inhabited by any other Christian Prince or State, or within the Bounds, Limits or Territories of the Southern Colony, then before granted by the said late King *James* the first, by divers of his Subjects in the South Parts: To have and to hold,possess and enjoy, all and singular the aforesaid Continent Lands, Territories, Islands, Hereditaments, and Precincts, Seas, Waters, Fishings, with all and all manner of their Commodities, Royalties, Liberties, Preheminences and Profits that should from thenceforth arise from thence, with all and singular their Appurtenances, and every Part and Parcel thereof, unto the said Council, and their Successors and Assigns for ever, to the sole and proper Use and Benefit of the said Council, and their Successors and Assigns for ever: To be holden of his said late Majesty King *James* the first, his Heirs and Successors, as of his Mannor of East *Greenwich* in the County of *Kent*, in free and common Sockage, and not in *Capile*, or by Knights Service: Yielding and Paying therefore to the said late King, his Heirs and Successors, the fifth Part of the Oar of Gold and Silver, which should from Time to Time, and at all Times then after happen to be found, gotten, had and obtained, in, at, or within any of the said Lands, Limits, Territories or Precincts, or in, or within any Part or Parcel thereof, for or in Respect of all and all manner of Duties, Demands and Services whatsoever, to be done, made or paid to the said late King *James* the first, his Heirs and Successors (as in and by the said Letters Patents, amongst sundry other Clauses, Powers, Priviledges and Grants therein contained, more at large appeareth:) and whereas the said Council established at *Plymouth* in the County of *Devon*, for the Planting, Ruling, Ordering and Governing of *New England* in *America*, did by their Deed indented under their Common Seal, bearing Date the Nineteenth Day of *March*, in the third Year of the Reign of Our Royal Grand-Father King *Charles* the first, of ever blessed Memory, give, grant, bargain, sell, enfeoff, alien and confirm to Sir *Henry Roswell*, Sir *John Young*, Knights, *Thomas Southcott, John Humphreys, John Endicott*, and *Simon Whetcombe*, their Heirs and Assigns, and their Associates for

ever, all that Part of *New England* in *America* aforesaid, which lies and extends between a great River there, commonly called *Monomack*, alias *Merimack*, and a certain other River there called *Charles River*, being in a Bottom of a certain Bay there commonly called *Massachusetts*, alias *Mattachusetts*, alias *Massachusetts-Bay*, and also all and singular those Lands and Hereditaments whatsoever, lying within the space of three *English* Miles on the South Part of the said *Charles River*, or of any and every Part thereof; and also all and singular the Lands and Hereditaments whatsoever, lying and being within the space of three *English* Miles to the Southward of the southernmost Part of the said Bay called the *Massachusetts*, alias *Mattachusetts*, alias *Massatusetts-Bay*; and also all those Lands and Hereditaments whatsoever which lie and be within the space of three *English* Miles to the Northward of the said River called *Monomack* alias *Merimack*, or to the Northward of any and every Part thereof, and all Lands and Hereditaments whatsoever lying within the Limits aforesaid North and South in Latitude, and in Breadth, and in Length, and Longitude, of and within all the Breadth aforesaid throughout the Main Lands there, from the *Atlantick* and Western Sea and Ocean on the East Part to the South Sea on the West Part, and all Lands and Grounds, Place and Places, Soil, Woods and Wood-Grounds, Havens, Ports, Rivers, Waters, Fishings and Hereditaments whatsoever, lying within the said Bounds and Limits, and every Part and Parcel thereof; and also all Islands lying in *America* aforesaid, in the said Seas, or either of them on the Western or Eastern Coasts or Parts of the said Tracts of Land, by the said Indenture mentioned to be given and granted, bargained, sold, enfeoffed, alien'd and confirmed, or any of them; and also all Mines and Minerals, as well Royal Mines of Gold and Silver, as other Mines and Minerals whatsoever in the said Lands and Premisses, or any Part thereof, and all Jurisdictions, Rights, Royalties, Liberties, Freedoms, Immunities, Priviledges, Franchises, Preheminences and Commodities whatsoever, which they the said Council established at *Plymouth* in the County of *Devon*, for the Planting, Ruling, Ordering and Governing of *New England* in *America*, then had, or might use, exercise or enjoy, in or within the said Lands and Premises, by the same Indenture mentioned to be given, granted, bargained, sold, enfeoffed and confirmed, in or within any Part or Parcel thereof … [17]

Massachusetts Bay Charter, pp. 1–2.

18.1.2.5.b Constitution, 1780

PART THE FIRST.

ART. XII. …And no subject shall be arrested, imprisoned, despoiled, or deprived or his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land… .

PART THE SECOND.

CHAPTER I.

SECTION 2.—SENATE

ART. II. And the inhabitants of plantations unincorporated … who are or shall be empowered and required to assess taxes upon themselves toward the support of government, shall have the same privilege of voting for councilors and senators, in the plantations where they reside, as town inhabitants in their respective towns…

CHAPTER II.

SECTION 3.—HOUSE OF REPRESENTATIVES

ART. II. …That each town now incorporated, not having one hundred and fifty ratable polls, may elect one representative; but no place shall hereafter be incorporated with the privilege of electing a representative, unless there are within the same one hundred and fifty ratable polls… .

ART. XI. …And the senate and house of representatives may try and determine all cases where their right and privileges are concerned, and which, by the constitution, they have authority to try and determine, by committees of their own members, or in such other way as they may, respectively, think best.

Massachusetts Perpetual Laws (1801), pp. 21.

18.1.2.6New Hampshire

18.1.2.6.aGrant of New Hampshire, 1629

This indenture, made the seventh day of November, Anno Domini one thousand six hundred twenty-nine, and in the fifth year of the reign of our Sovereign Lord, Charles, by the grace of God, king of England, Scotland, France, and Ireland, defender of the faith, &c. between the President and Council of New-England, on the one part, and Captain John Mason, of

London, esquire, on the other party: witnesseth, That whereas our late Sovereign Lord, of famous memory, King James, for the making of a plantation, and establishing of a colony or colonys, in the country called or known by the name of New-England, in America, did by His Highness's letters-pattents, under the great seal of England, bearing date at Westminster, the third day of November, in the eighteenth year of his reign, give and grant and confirm unto the right-honourable Lodiwick, Duke of Lenox; George, Marques of Buckingham; James, Marques Hamilton; Thomas, Earl of Arundel; Robert, Earl of Warwick; Sir Ferdinando Gorges, Knight, and divers others, whose names are expressed in the said letters-pattents, their heirs and assigns, that they shall be one body politick and corporate perpetuall, and that they should have perpetuall succession, and one common seal or seals to serve for the said body; and that they and their successors shall be known, called, incorporated by the name of the President and Council, established at Plymouth, for the planting, ruling, and governing of New-England, in America: and also did, of his especial grace, certain knowledge, and meer motion, for him, his heirs and successors, give, grant, and confirm unto the said President and Council, and their successors, under the reservations, limitations, and declarations, in the said Letters-pattents expressed, all that part and portion of that country, now commonly called New-England, which is situate, lying, and being between the latitudes of forty degrees and forty eight northerly latitude; together with the seas and islands, lying within one hundred miles of any part of the said coast of the country aforesaid; and also all the said soyle, ground, havens, ports, rivers, mines, as well royal mines of gold and silver as other mines and minerals, pearls and precious stones, woods, quarries, marshes, waters, fishings, huntings, hawkings, fowlings, commodities, and hereditaments whatsoever; together with all prerogatives, jurisdictions, royalties, privileges, franchises, and preheminences within any of the said territories and the precincts thereof whatsoever: To have, hold, possess and enjoy, all and singular the said lands and premisses in the said letters-pattents granted, or mentioned to be granted, unto them the said President and Council, their successors and assigns forever, to be holden of His Majesty, his heirs and successors, as of his highness's manor of East-Greenwich, in the county of Kent, in free and common soccage, and not in capite, or by knights service; yielding and paying to the King's Majesty, his heirs and successors, the one-fifth part of all gold and silver oare, that from time to time, and at all times from the date of the said letters-pattents shall be thus gotten, had, or obtained, for all services, duties, or demands, as in

and by His Highness's said letters-pattents amongst divers other things therein contained, more fully at large it doth and may appear. And whereas the said President and Council, have upon mature deliberation thought fitt, for the better furnishing and furtherances of the plantation in those parts, to appropriate and allot to several and particular persons, diverse parcels of Lands within the precincts of the aforesaid granted premisses by His Majesty's said letters-pattents: Now this Indenture witnesseth, that the said President and Council, of their free and mutual consent, as well to the end, that all the lands, woods, lakes, rivers, waters, islands and fishings, with all the traffick, profits, and commodities whatsoever, to them or any of them belonging, and hereafter in these presents mentioned, may be wholly and entirely invested, appropriated, served and settled, in and upon the said Captain John Mason, his heires and assigns forever, as for divers special services for the advancement of the said plantation, and other good and sufficient causes and considerations them especially thereunto moving, have given, granted, bargained, sold, assigned, aliened, set over, enfeoffed, and confirmed, and by these presents, do give, grant, bargain, sell, assign, aliene, set over, enfeof, and confirm unto the said captain john mason, his heires and assigns, all that part of the main land in New-England, lying upon the sea coast, beginning from the middle part of Merrimack river, and from thence to proceed northwards along the sea coast to Piscataqua River, and so forwards up within the said river, and to the furthest head thereof, and from thence northwestwards, until three score miles be finished from the first entrance of Piscataqua River and also from Merrimack through the said river, and to the furthest head thereof, and so forwards up into the lands westwards until three score miles be finished; and from thence to cross over land to the three score miles, and accompted from Piscataqua River, together with all islands and islets within five leagues distance of the premisses, and abutting upon the same or any part or parcel thereof; as also all lands, soyles, grounds, havens, ports, rivers, mines, minerals, pearls, precious stones, woods, quarries, marshes, waters, fishings, huntings, hawkings, fowling, and other commodities and hereditaments whatsoever, with all and singular their appurtenances; together with all prerogatives, rights, royalties, jurisdictions, privileges, franchises, liberties, preheminences, marine power, in and upon the said seas and rivers; as also all escheats and casualties thereof, as flotsam, jetson, lagan, with anchorage, and other such duties, immunities, Scotts islets, and appurtenances whatsoever, with all the estate, right, title, interest, claim, and demand whatsoever, which the said President and Council, and their

successors, of right ought to have or claim in or to the said portions of lands, rivers, and other the premisses as is aforesaid, by reason or force of his Highness's said letters-pattents, in as free, large, ample, and beneficial manner, to all intents, constructions, and purposes whatsoever, as in and by the said letters-pattents the same are amongst other things granted to the said President and Council aforesaid, hereafter expressed, which said portions of lands, with the appurtenances, the said Capt. John Mason, with the consent of the President and Council, intends to name New-Hampshire.

New Hampshire Laws.

18.1.2.6.bGrant of New Hampshire, 1635

To all christian people unto whom these presents shall come, the councell for the affayres of New England, in America, send greeteing in our lord god everlasting. whereas our late soueraign Lord King James, of blessed memory, by his Highness's letters-pattents vnder the great seal of england, beareing date at westminster, the third day of november, in the eighteenth yeare of his reign over his Highness's realme of England, for the consideration in the said letters pattents expressed and declared, hath absolutely giuen, granted, and confirmed vnto the said counsell, and their successors for euer, all the land of New England in America lying and being in breadth from fourty degrees of northerly latitude from the equinoctiall lyne, to fourty eight degrees of the said northerly latitude inclusively; and in length of and within all the breadth aforesaid, from sea to sea, togeather alsoe with all the firme lands, soyles, grounds, havens, ports, rivers, waters, fishings, mines, and mineralls, as well royall mines of gould and silver, as other mines and mineralls, pretious stoons, quaries, and all and singular other commoditys, jurisdictions, royaltys, priviledges, franchises, preheminences, both within the said tract of land upon the mayn, and alsoe within the yslands and seas adjoyneing, as the said letters-pattents, amongst divers other things therein contayned, more at large doth and may appeare. Now know all men by these presents, that the said counsell of New England, in America, being assembled in publick court, according to an act made and agreed vpon the third day of february last past, before the date of these presents, for diverse good causes and considerations them there vnto espetially moveing, have given, granted, aliened, barganed and sould, and in and by these presents do for them and their successors, give, grant, alien, bargane sell and confirm vnto Capt. John Mason, esq; his heyres and assignes, all that part of the mayn land of New England aforesaid, beginning from the middle part of Naumkeck River, and

from thence to proceed eastwards along the sea coast to cape anne, and round about the same to Pischataway Harbour, and soe forwards vp within the river of Newgewanacke, and to the furthest head of the said river, and from thence northwestwards till sixty miles bee finished, from the first entrance of Pischataqua Harbor, and alsoe from Naumkecke through the river thereof vp into the land west sixty miles, from which period to cross over land to the sixty miles end, accompted from Pischataway, through Newgewanacke River to the land northwest aforesaid; and alsoe all that the South halfe of the ysles of sholes, all which lands, with the consent of the counsell, shall from henceforth be called New-hampshyre: And alsoe ten thousand acres more of land in New England aforesaid, on the southeast part of sagadihoc, at the mouth or entrance thereof, from henceforth to bee called by the name of massonia; togeather with all and singular havens, harbors, cricks, and yslands inbayed, and all islands and isletts lying within five leagues distance of the mayne land opposite and abbutting upon the premises or any part thereof, not formerly lawfully granted to any by spetiall name; and all mines, mineralls, quaries, soyles, and woods, marshes, waters, rivers, lakes, fishing, hawkings, hunting, and fowling, and all other royaltys, jurisdictions, priviledges, preheminences, profitts, comoditys, and haereditaments whatsoever, with all and singular theire and every of theire appurtenances, and togeather alsoe with all rents reserved, and the benefitt of all profitts due to the said Counsell, and theire successors, with power of judicature in all causes and matters whatsoever, as well criminall, capitall, and civil, ariseing or which may hereafter arise within the lymitts, bounds, and precincts aforesayd, to bee exercised, and executed according to the laws of England as neere as may bee, by the said capt. John Mason, his heyers and assignes, or his or their Deputys, Leeftenants, Judges, Stewards, or Officers thereunto by him or them assigned, deputed or appoynted from tyme to tyme, with all other priviledges, frantises, lybertys, immunitys, escheats, and causuallitys, thereof ariseing or which shall or may hereafter arise within the said lymitts and precincts, with all the right, title, claime, and demand whatsoever, which the said Counsell and their successors now of right have or ought to have, or claim, or may have or acquire hereafter in or to the said portions of lands, or Islands, or any the premisses, and in as large, free, ample, benefitiall a manner, to all intents, constructions, and purposes whatsoever, as the said Counsell, by virtue of his Majesty’s said letters patents may or can grant the same …

New Hampshire Grants, pp. 33–34.

18.1.2.6.cConstitution, 1776

WE, the members of the Congress of New-Hampshire, Chosen and Appointed by the Free Suffrages of the People of said Colony, and Authorized and Impowered by them to meet together, and use such means and Pursue Such Measures as we Should Judge best for the Public Good; and in Particular to establish Some Form of Government, Provided that Measure should be recommended by the Continental Congress; And a Recommendation to that purpose having been Transmitted to us From the Said Congress: Have taken into our Serious Consideration the Unhappy Circumstances, into which this Colony is Involved by means of many Grievous and Oppressive Acts of the British Parliament, Depriving us of our Natural and Constitutional rights [*sic*] and Privileges; To Enforce Obedience to which Acts A Powerful Fleet and Army have been Sent to this Country by the ministry of Great Britain, who have Exercised a Wanton and Cruel Abuse of their Power, in Destroying the Lives and Properties of the Colonists in many Places with Fire and Sword; Taking the Ships and Lading from many of the Honest and Industrious Inhabitants of this Colony Employed in Commerce, agreeable to the Laws and Customs a long time used here.

The Sudden and Abrupt Departure of his Excellency *John Wentworth*, Esq.,r our Late Governor, and Several of the Council, Leaving us Destitute of Legislation, and no Executive Courts being open to Punish Criminal Offenders; whereby the Lives and Properties of the Honest People of this Colony are Liable to the Machinations and Evil Designs of wicked men, Therefore, for the Preservation of Peace and good order, and for the Security of the Lives and Properties of the Inhabitants of this Colony, We Conceive ourselves Reduced to the Necessity of establishing A Form of Government to Continue During the Present Unhappy and Unnatural Contest with Great Britain; Protesting and Declaring that we Never Sought to throw off our Dependance upon Great Britain, but felt ourselves happy under her Protection, while we Could Enjoy our Constitutional Rights and Privileges. — And that we Shall Rejoice if Such a reconciliation between us and our Parent State can be Effected as shall be Approved by the Continental Congress, in whose Prudence and Wisdom we confide.

New Hampshire Constitution, 1776, pp. 2–3.

18.1.2.6.d Constitution, 1784 (1783)

…

XV. No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him; or be compelled to accuse or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favourable to himself; to meet the witnesses against him face to face; and to be fully heard in his defence, by himself, and counsel. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

…

XXI. In order to reap the fullest advantage of the inestimable privilege of the trial by Jury, great care ought to be taken, that none but qualified persons should be appointed to serve; and such ought to be fully compensated for their travel, time and attendance.

New Hampshire Constitution, pp. 13–14, 17.

18.1.2.7New Jersey: Constitution, 1776

I. That the Government of this Province shall be vested in a Governor, Legislative Council, and General Assembly.

II. That the Legislative Council, and General Assembly, shall be chosen, for the first Time, on the second *Tuesday* in *August* next; the Members whereof shall be the same in Number and Qualifications as are herein after mentioned; and shall be and remain vested with all the Powers and Authority to be held by any future Legislative Council and Assembly of this Colony, until the second *Tuesday* in *October*, which shall be in the year of our Lord One Thousand Seven Hundred and Seventy-Seven.

III. That on the second *Tuesday* in *October* yearly, and every year forever (with the Privilege of adjourning from Day to Day as Occasion may require) the Counties shall severally choose one Person, to be a Member of the Legislative Council of this Colony, who shall be, and have been, for one whole Year next before the Election, an Inhabitant and Freeholder in the County in which he is chosen, and worth at least *One Thousand Pounds* Proclamation Money, of Real and Personal Estate, within the same County;

…

VI. That the Council shall also have Power to prepare Bills to pass into Laws, and have other like Powers as the Assembly, and in all Respects be a free and independent Branch of the Legislature of this Colony; save only, that they shall not prepare or alter any Money Bill—which shall be the Privilege of the Assembly; that the Council shall, from Time to Time, be convened by the Governor or Vice-President, but must be convened, at all Times, when the Assembly sits; for which Purpose the Speaker of the House of Assembly shall always, immediately after an Adjournment, give Notice to the Governor, or Vice-President, of the Time and Place to which the House is adjourned.

…

XVI. That all Criminals shall be admitted to the same Privileges of Witnesses and Counsel, as their Prosecutors are or shall be entitled to.

XVII. That the Estates of such Persons as shall destroy their own Lives, shall not, for that Offence, be forfeited; but shall descend in the same Manner as they would have done, had such Persons died in the natural Way; nor shall any Article, which may occasion accidentally the Death of any one, be henceforth deemed a Deodand, or in anywise forfeited, on Account of such Misfortune.

XVIII. That no Person shall ever, within this Colony, be deprived of the inestimable Privilege of worshipping Almighty God in a Manner agreeable to the Dictates of his own Conscience; nor, under any Pretence whatever, be compelled to attend any Place of Worship, contrary to his own Faith and Judgment; nor shall any Person, within this Colony, ever be obliged to pay Tithes, Taxes, or any other Rates, for the Purpose of building or repairing any other Church or Churches, Place or Places of Worship, or for the Maintenance of any Minister or Ministry, contrary to what he believes to be Right, or has deliberately or voluntarily engaged himself to perform.

XIX. That there shall be no Establishment of any one religious Sect in this Province, in Preference to another; and that no Protestant Inhabitant of this Colony shall be denied the Enjoyment of any civil Right, merely on Account of his religious Principles; but that all Persons, professing a Belief in the Faith of any Protestant Sect, who shall demean themselves peaceably under the Government, as hereby established, shall be capable of being elected into any Office of Profit or Trust, or being a Member of Either Branch of the Legislature, and shall fully and freely enjoy every Privilege and Immunity, enjoyed by others their Fellow-Subjects.

…

XXII. That the Common Law of England, as well as so much of the Statute Law, as have been heretofore practised in this Colony, shall still remain in Force, until they shall be altered by a future Law of the Legislature; such Parts only excepted, as are repugnant to the Rights and Privileges contained in this Charter; and that the inestimable Right of Trial by Jury shall remain confirmed as a Part of the Law of this Colony, without Repeal, forever.

New Jersey Acts, 1776, pp. 4–5, 8–9.

18.1.2.8New York: Constitution, 1777

IX. That the assembly thus constituted, shall chuse [*sic*] their own speaker, be judges of their own members, and enjoy the same privileges, and proceed in doing business, in like manner as the assemblies of the colony of New-York of right formerly did; and that a majority of the said members, shall, from time to time, constitute a house, to proceed upon business.

…

XIII. And this convention doth further, in the name, and by the authority of the good people of this state, ordain, determine, and declare, That no member of this state shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this state, by this constitution, unless by the law of the land, or the judgment of his peers.

…

XXXVI. AND BE IT FURTHER ORDAINED, That all grants of lands within this STATE, made by the king of Great-Britain, or persons acting under his authority, after the fourteenth day of October, one thousand seven hundred and seventy-five, shall be null and void; But that nothing in this constitution contained shall be construed to affect any grants of land within this state, made by the authority of the said King or his predecessors, or to annul any charters to bodies politic, by him or them, or any of them, made prior to that day. And that none of the said charters shall be adjudged to be void by reason of any non-user or misuser of any of their respective rights or privileges, between the nineteenth day of April, in the year of our Lord one thousand seven hundred and seventy-five, and the publication of this constitution. And further, That all such of the officers described in the said charters, respectively, as by the terms of the said charters, were to be appointed by the governor of the colony of New-York, with or without the

advice and consent of the council of the said king, in the said colony, shall henceforth be appointed by the council established by this constitution, for the appointment of officers in this state, until otherwise directed by the legislature.

New York Laws, pp. 8–9, 13.

18.1.2.9North Carolina

18.1.2.9.aCharter to Sir Walter Raleigh, 1584

ELIZABETH by the Grace of God of England, Fraunce and Ireland Queene, defender of the faith, &c. To all people to whome these presents shall come, greeting. Knowe yee that of our especial grace, certaine science, and meere motion, we haue given and graunted, and by these presents for us, our heires and successors, we giue and graunt to our trustie and welbeloued seruant *Walter Ralegh*, Esquire, and to his heires and assignes for euer, free libertie and licence from time to time, and at all times for euer hereafter, to discouer, search, finde out, and view such remote, heathen and barbarous lands, countreis, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People, as to him, his heires and assignes, and to euery or any of them shall seeme good, and the same to haue, holde, occupie and enjoy to him, his heires and assignes for euer, with all prerogatiues, commodities, jurisdictions, royalties, priuileges, franchises, and preheminences, thereto or thereabouts both by sea and land, whatsoeuer we by our letters patents may graunt, and as we or any of our noble progenitors haue heretofore graunted to any person or persons, bodies politique or corporate: and the said *Walter Ralegh*, his heires and assignes, and all such as from time to time, by licence of us, our heires and successors, shall goe or trauaile thither to inhabite or remaine, there to build and fortifie, at the discretion of the said *Walter Ralegh*, his heires and assignes, the statutes or acte of Parliament made against fugitiues, or against such as shall depart, remaine or continue out of our Realme of England without licence, or any other statute, acte, lawe, or any ordinance whatsoeuer to the contrary in anywise notwithstanding …

North Carolina Charters.

18.1.2.9.bFirst Charter of Carolina, 1663

CHARLES the Second, by the grace of God, king of England, Scotland, France, and Ireland, Defender of the Faith, &c., To all to whom these present shall come: Greeting:

…

2d. And whereas the said Edward Earl of Clarendon, George Duke of Albemarle, William Lord Craven, John Lord Berkley, Anthony Lord Ashley, Sir George Carteret, Sir William Berkley, and Sir John Colleton, have humbly besought us to give, grant and confirm unto them and their heirs, the said country, with priviledges and jurisdictions requisite for the good government and safety thereof …

3d. And furthermore, the patronage and advowsons of all the churches and chappels, which as Christian religion shall increase within the country, isles, islets and limits aforesaid, shall happen hereafter to be erected, together with license and power to build and found churches, chappels and oratories, in convenient and fit places, within the said bounds and limits, and to cause them to be dedicated and consecrated according to the ecclesiastical laws of our kingdom of England, together with all and singular the like, and as ample rights, jurisdictions, priviledges, prerogatives, royalties, liberties, immunities and franchises of what kind soever, within the countries, isles, islets and limits aforesaid. …

And that the country, thus by us granted and described, may be dignified by us with as large titles and priviledges as any other part of our dominions and territories in that region…

7th

… And we will also, and of our more special grace, for us, our heirs and successors, do streightly enjoin, ordain, constitute and command, that the said province of Carolina, shall be of our allegiance, and that all and singular the subjects and liege people of us, our heirs and successors, transported or to be transported into the said province, and the children of them and of such as shall descend from them, there born or hereafter to be born, be and shall be denizons and lieges of us, our heirs and successors of this our kingdom of England, and be in all things held, treated, and reputed as the liege faithful people of us, our heirs and successors, born within this our said kingdom, or any other of our dominions, and may inherit or otherwise purchase and receive, take, hold, buy and possess any lands, tenements or hereditaments within the same places, and them may occupy, possess and enjoy, give, sell, aliene and bequeathe; as likewise all liberties, franchises and priviledges of this our kingdom of England, and of other our dominions aforesaid, and may freely and quietly have, possess and enjoy, as our liege people born within the same, without the least-molestation, vexation, trouble or grievance of us, our heirs and successors, any statute, act, ordinance, or provision to the contrary notwithstanding …

10th. And furthermore, of our own ample and especial grace, certain knowledge, and meer motion, we do for us, our heirs and successors, grant unto the said Edward Earl of Clarendon, George Duke of Albemarle, William Lord Craven, John Lord Berkley, Anthony Lord Ashley, Sir George Carteret, Sir William Berkley and Sir John Colleton, their heirs and assigns, full and absolute power and authority, to make, erect and constitute, within the said province of Carolina, and the isles and islets aforesaid, such and so many seaports, harbours, creeks and other places, for discharge and unlading of goods and merchandises, out of ships, boats and other vessels, and for lading of them, in such and so many places, and with such jurisdiction, priviledges and franchises unto the said ports belonging, as to them shall seem most expedient, and that all and singular the ships, boats and other vessels, which shall come for merchandises and trade into the said province, or shall depart out of the same, shall be laden and unladen at such ports only, as shall be erected and constituted by the said

Edward Earl of Clarendon, George Duke of Albemarle, William Lord Craven, John Lord Berkley, Anthony Lord Ashley, Sir George Carteret, Sir William Berkley, and Sir John Colleton, their heirs and assigns, and not elsewhere, any use, custom or any other thing to the contrary, in any wise notwithstanding. …

14th. And further also, we do by these presents, for us, our heirs and successors, give and grant license to them, the said Edward Earl of Clarendon, George Duke of Albemarle, William Lord Craven, John Lord Berkley, Anthony Lord Ashley, Sir George Carteret, Sir William Berkley, and Sir John Colleton, their heirs and assigns, full power, liberty and license to erect, raise and build within the said province and places aforesaid, or any part or parts thereof, such and so many forts, fortresses, castles, cities, buroughs, towns, villages and other fortifications whatsoever, and the same or any of them to fortify and furnish with ordinance, powder, shot, armory, and all other weapons, ammunition, habilements of war, both offensive and defensive, as shall be thought fit and convenient for the safety and welfare of the said province and places, or any part thereof, and the same, or any of them from time to time, as occasion shall require, to dismantle, disfurnish, demolish and pull down, and also to place, constitute and appoint in and over all or any of the castles, forts, fortifications, cities, towns and places aforesaid, governors, deputy governors, magistrates, sheriffs and other officers, civil and military, as to them shall seem meet, and to the said cities, buroughs, towns, villages, or any other place or places within the said province, to grant "letters or charters of incorporation," with all liberties, franchises and priviledges, requisite and usefull, or to or within any corporations, within this our kingdom of England, granted or belonging …

North Carolina Charters and Constitutions, 1578-1698, pp. 76–86.

18.1.2.9.cSecond Charter of Carolina, 1665

CHARLES the Second, by the grace of God, of Great-Britain, France and Ireland, King, Defender of the Faith, &c. WHEREAS, by our Letters Patents, bearing date the twenty-fourth day of March, in the fifteenth year of our reign, We were graciously pleased to grant unto our right trusty and right well-beloved Cousin and Counsellor Edward Earl of Clarendon, our High Chancellor of England …

…

NOW Know ye, That We, at the humble request of the said grantees, in the aforesaid Letters Patents named, and as a further mark of our especial favour to them, we are graciously pleased to enlarge our said grant unto them, … And furthermore, the patronage and advowsons of all the churches and chapels, which, as Christian religion shall increase within the province, territory, isles, and limits aforesaid, shall happen hereafter to be erected; together with licence and power to build and found churches, chapels and oratories, in convenient and fit places, within the said bounds and limits; and to cause them to be dedicated and consecrated, according to the ecclesiastical laws of our kingdom of England; together with all and singular the like and as ample rights, jurisdictions, privileges, prerogatives, royalties, liberties, immunities, and franchises of what kind soever, within

the territory, isles, islets and limits aforesaid …

AND that the province or territory hereby granted and described, may be dignified with as large tythes and privileges, as any other parts of our dominions and territories in that region; Know ye, That we, of our further grace, certain knowledge, and mere motion, have thought fit to annex the same tract of ground or territory unto the same province of Carolina; and out of the fullness of our royal power and prerogative, we do, for us, our heirs and successors, annex and unite the same to the said province of Carolina.

AND forasmuch as we … do grant , , , the said Edward Earl of Clarendon, … full power and authority, to erect, constitute, and make several counties, baronnies, and colonies, of and within the said provinces, territories, lands, and hereditaments, in and by the said Letters Patents, granted, or mentioned to be granted, as aforesaid, with several and distinct jurisdictions, powers, liberties, and privileges: …

AND we will also, and of our especial grace, for us, our heirs and successors, do straitly enjoin, ordain, constitute, and command, that the said province and territory shall be of our allegiance; and that all and singular the subjects and liege people of us, our heirs and successors, transported, or to be transported into the said province, and the children of them, and such as shall descend from them there born, or hereafter to be born be, and shall be denizens and lieges of us, our heirs and successors, of this our kingdom of England, and be in all things, held, treated, and reputed, as the liege faithful people of us, our heirs and successors, born within this our said kingdom, or any other of our dominions; and may inherit or otherwise purchase and receive, take, hold, buy and possess, any lands, tenements, or hereditaments, within the said places, and them may occupy and enjoy, sell, alien, and bequeath; as likewise, all liberties, franchises, and privileges, of this our kingdom, and of other our dominions aforesaid, may freely and quietly have, possess, and enjoy, as our liege people, born within the same, without the molestation, vexation, trouble, or grievance, of us, our heirs and successors: Any act, statute, ordinance, or provision, to the contrary, notwithstanding.

…

AND furthermore, of our more ample and especial grace, certain knowledge, and mere motion, we do, for us, our heirs and successors, grant unto the said Edward Earl of Clarendon, … full and absolute power and authority, to make, erect, and constitute, within the said province or

territory, and the isles and islets aforesaid, such and so many seaports, harbours, creeks, and other places, for discharge and unlading of goods and merchandises, out of ships, boats and other vessels, and for lading of them, in such and so many places, with such jurisdictions, privileges and franchises, unto the said ports belonging, as to them shall seem most expedient …

AND further also, we do, by these presents, for us, our heirs and successors, give and grant … And to the said cities, boroughs, towns, villages, or any other place or places, within the said province or territory, to grant letters or charters of incorporation, with all liberties, franchises, and privileges, requisite or usual, or to or within this our kingdom of England granted or belonging …

North Carolina Laws, pp. 1–5.

18.1.2.9.dThe Fundamental Constitutions of Carolina, 1669

Our sovereign Lord the King, having, out of his royal grace and bounty, granted unto us the Province of Carolina, with all the royalties, properties, jurisdictions, and privileges of a County Palatine, as large and ample as the County Palatine of Durham, with other great Privileges; for the better settlement of the government of the said place, and establishing the interest of the Lords Proprietors with equality, and without confusion; and that the government of this Province may be made most agreeable to the Monarchy under which we live, and of which this Province is a part; and that We may avoid erecting a numerous democracy: We, the Lords and proprietors of the Province aforesaid, have agreed to this following form of government, to be perpetually established amongst us, unto which we do oblige ourselves, our heirs and successors, in the most binding ways that can be devised.

…

Five. At any time before the year one thousand seven hundred and one, any of the lords proprietors shall have power to relinquish, alienate, and dispose to any other person his proprietorship, and all the signiories, powers, and interest thereunto belonging, wholly and entirely together, and not otherwise. But after the year one thousand seven hundred, those who are then Lords Proprietors shall not have power to alienate or make over their proprietorship, with the signiories and privileges thereunto belonging, or any part thereof, to any person whatsoever, otherwise than in section eighteen …

…

Eighteen. The lords of signiories and baronies shall have power only of granting estates not exceeding three lives, or twenty-one years, in two-thirds of said signiories or baronies, and the remaining third shall be always demesne.

Nineteen. Any lord of a manor may alienate, sell, or dispose to any other person and his heirs forever, his manor, all entirely together, with all the privileges and leetmen thereunto belonging, so far forth as any colony lands; but no grant of any part thereof, either in fee, or for any longer term than three lives, or one-and-twenty years, shall stand good against the next heir.

Twenty. No manor, for want of issue male, shall be divided amongst coheirs; but the manor, if there be but one, shall all entirely descend to the eldest daughter and her heirs. If there be more minors than one, the eldest daughter first shall have her choice, the second next, and so on, beginning again at the eldest, until all the manors be taken up; that so the privileges which belong to manors being indivisible, the lands of the manors, to which they are annexed, may be kept entire and the manor not lose those privileges which, upon parcelling out to several owners, must necessarily cease.

Twenty-one. Every lord of a manor, within his own manor, shall have all the rights, powers, jurisdictions, and privileges which a landgrave or cazique hath in his baronies.

North Carolina Colonial Records, vol. i, pp. 187–91.

18.1.2.9.eConstitution, 1776

A DECLARATION of RIGHTS, made by the Representatives of the Freemen of the State of North-Carolina.

I. THAT all political Power is vested in and derived from the People only.

II. That the People of this State ought to have the sole and exclusive Right of regulating the interal Government and Police thereof.

III. That no Man or Set of Men are entitled to exclusive or separate Emoluments or Privileges from the Community, but in Consideration of public Services.

…

XII. That no Freeman ought to be taken, imprisoned, or disseized of his Freehold, Liberties or Privileges, or outlawed, or exiled, or in any Manner

destroyed, or deprived of his Life, Liberty, or Property, but by the Law of the Land.

…

XXII. That no hereditary Emoluments, Privileges or Honors ought to be granted or Conferred in this State.

North Carolina Laws, pp. 275–76.

18.1.2.10Pennsylvania

18.1.2.10.aCharter for the Province of Pennsylvania, 1681

CHARLES the Second, by the Grace of God, King of *England*, *Scotland*, *France*, and *Ireland*, Defender of the Faith, *&c*. To all whom these presents shall come, *Greeting*. WHEREAS Our Trustie and well-beloved Subject William Penn, Esquire, Sonne and heire of Sir William Penn deceased, out of a commendable Desire to enlarge our *English* Empire, and promote such usefull comodities as may bee of Benefit to us and Our Dominions, as also to reduce the savage Natives by gentle and just manners to the Love of Civil Societie and Christian Religion, hath humbley besought Leave of Us to transport an ample Colonie unto a certairie Countrey hereinafter described, in the Partes of *America* not yet cultivated and planted; And hath likewise humbley besought Our Royall Majestie to Give, Grant, and Confirme all the said Countrey, with certaine Privileges and Jurisdictions, requisite for the good Government and Safetie of the said Countrey and Colonie, to him and his Heires forever: KNOW YE THEREFORE,

…

AND Wee doe further, for us, our heires and Successors, Give and grant unto the said *William Penn*, his heires and. assignes, free and absolute power, to Divide the said Countrey and Islands into Townes, Hundreds and Counties, and to erect and incorporate Townes into Borroughs, and Borroughs into Citties, and to make and constitute ffaires and Marketts therein, with all other convenient priviledges and munities, according to the meritt of the inhabitants, and the ffitnes of the places, and to doe all and every other thing and things touching the premisses, which to him or them shall seeme requisite and meet; albeit they be such as of their owne nature might otherwise require a more especiall comandment and Warrant then in these presents is expressed.

…

AND FURTHERMORE, of our most ample and esspeciall grace, certaine knowledge, and meere motion, Wee doe, for us, our heires and Successors, Grant unto the said *William Penn*, his heires and assignes, full and absolute power and authoritie to make, erect, and constitute within the said Province and the Isles and Islets aforesaid, such and soe many Seaports, harbours, Creeks, Havens, Keyes, and other places, for discharge and unladeing of goods and Merchandizes, out of the shipps, Boates, and other Vessells, and ladeing them in such and soe many Places, and with such rights, Jurisdictions, liberties and priviledges unto the said ports belonging, as to him or them shall seeme most expedient;

…

Penn Charter.

18.1.2.10.bFrame of Government of Pennsylvania, 1683

To *all persons*, to whom these presents may come. *Whereas* king *Charles* the Second, by his letters patents, under the great seal of *England*, bearing date the fourth day of March, in the thirty and third year of the king, for divers considerations therein mentioned, hath been graciously pleased to give and grant unto me *William Penn* (by the name of *William Penn*, Esquire, son and heir of Sir *William Penn*, deceased) and to my heirs and assigns for ever, all that tract of land or province called *Pennsylvania*, in *America*, with divers great powers, preheminencies, royalties, jurisdictions and authorities, necessary for the well-being and government thereof. And *whereas*, the king's dearest brother *James*, duke of *York* and *Albany*, &c., by his deeds of feoffment, under his hand and seal, duly perfected, bearing date the four and twentieth day of August, one thousand six hundred eighty and two, did grant unto me, my heirs and assigns, all that tract of land, lying and being from twelve miles northward of *Newcastle*, upon Delaware river, in *America*, to Cape Hinlopen, upon the said river and bay of *Delaware* southward, together with all royalties, franchises, duties, jurisdictions, liberties and privileges thereunto belonging.

Penn Charter.

18.1.2.10.cCharter of Privileges for Pennsylvania, 1701

WILLIAM PENN, Proprietary and Governor of the Province of *Pensilvania* and Territories thereunto belonging, To all to whom these Presents shall come, sendeth Greeting. WHEREAS King *CHARLES the Second*, by His

Letters Patents, under the Great Seal of *England*, bearing Date the *Fourth* Day of *March*, in the Year *One Thousand Six Hundred and Eighty-one*, was graciously pleased to give and grant unto me, and my Heirs and Assigns for ever, this Province of *Pensilvania*, with divers great Powers and Jurisdictions for the well Government thereof.[18]

…

KNOW YE THEREFORE, That for the further Well-being and good Government of the said Province, and Territories; and in Pursuance of the Rights and Powers beforementioned, I the said *William Penn* do declare, grant and confirm, unto all the Freemen, Planters and Adventurers, and other Inhabitants of this Province and Territories, these following Liberties, Franchises and Privileges, so far as in me lieth, to be held, enjoyed and kept, by the Freemen, Planters and Adventurers, and other Inhabitants of and in the said Province and Territories thereunto annexed, for ever.

FIRST.

…

II.

FOR the well governing of this Province and Territories, there shall be an Assembly yearly chosen, by the Freemen thereof, to consist of *Four* Persons out of each County, of most Note for Virtue, Wisdom and Ability, (or of a greater number at any Time, as the Governor and Assembly shall agree) upon the *First* Day of *October* for ever; and shall sit on the *Fourteenth* Day of the same Month, at *Philadelphia*, unless the Governor and Council for the Time being, shall see Cause to appoint another Place within the said Province or Territories: Which Assembly shall have Power to chuse a Speaker and other their Officers; and shall be Judges of the Qualifications and Elections of their own Members; sit upon their own Adjournments; appoint Committees; prepare Bills in order to pass into Laws; impeach Criminals, and redress Grievances; and shall have all other Powers and Privileges of an Assembly, according to the Rights of the freeborn Subjects of *England*, and as is usual in any of the King's Plantations in *America*.

…

V.

THAT all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors.

…

AND NOTWITHSTANDING the Closure and Test of this present Charter as aforesaid, I think fit to add this following Proviso thereunto, as Part of the same, *That is to say*, That notwithstanding any Clause or Clauses in the abovementioned Charter, obliging the Province and Territories to join together in Legislation, I am content, and do hereby declare, that if the Representatives of the Province and Territories shall not hereafter agree to join together in Legislation, and that the same shall be signified unto me, or my Deputy, in open Assembly, or otherwise from under the Hands and Seals of the Representatives, for the Time being, of the Province and Territories, or the major Part of either of them, at any Time within *Three* Years from the Date hereof, that in such Case, the Inhabitants of each of the *Three* Counties of this Province, shall not have less than *Eight* Persons to represent them in Assembly, for the Province; and the Inhabitants of the Town of *Philadelphia* (when the said Town is incorporated) *Two* Persons to represent them in Assembly; and the Inhabitants of each County in the Territories, shall have as many Persons to represent them in a distinct Assembly for the Territories, as shall be by them requested as aforesaid.

NOTWITHSTANDING which Separation of the Province and Territories, in Respect of Legislation, I do hereby promise, grant and declare, That the Inhabitants of both Province and Territories, shall separately enjoy all other Liberties, Privileges and Benefits, granted jointly to them in this Charter, any Law, Usage or Custom of this Government heretofore made and practised, or any Law made and passed by this General Assembly, to the Contrary hereof, notwithstanding.

WILLIAM PENN.

THIS CHARTER of PRIVILEGES *being distinctly read in Assembly; and the whole and every Part thereof, being approved of and agreed to, by us, we do thankfully receive the same from our Proprietary and Governor, at* Philadelphia, *this* Twenty-Eighth *Day of* October, One Thousand Seven Hundred and One. *Signed on Behalf, and by Order of the Assembly*,

per Joseph Growdon, *Speaker*.

Edward Shippen, *Griffith Owen*, Proprietary and Governor’s Council.

Phineas Pemberton, Caleb Pusey,

Samuel Carpenter, Thomas Story.

Penn Charter.

18.1.2.10.d. Constitution, 1776

PLAN OR FRAME OF GOVERNMENT.

SECTION 1. The commonwealth or state of Pennsylvania shall be governed hereafter by an assembly of the representatives of the freemen of the same, and a president and council, in manner and form following—

SECT. 2. The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or state of Pennsylvania.

SECT. 3. The supreme executive power shall be vested in a president and council.

…

SECT. 10. A quorum of the house of representatives shall consist of two-thirds of the whole number of members elected; and having met and chosen their speaker, shall each of them before they proceed to business take and subscribe, as well the oath or affirmation of fidelity and allegiance hereinafter directed, as the following oath or affirmation, viz:

I ——— do swear (or affirm) that as a member of this assembly, I will not propose or assent to any bill, vote, or resolution, which shall appear to me injurious to the people; nor do or consent to any act or thing whatever, that shall have a tendency to lessen or abridge their rights and privileges, as declared in the constitution of this state; but will in all things conduct myself as a faithful honest representative and guardian of the people, according to the best of my judgment and abilities.

And each member, before he takes his seat, shall make and subscribe the following declaration, viz:

I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration.

And no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this State.

…

SECT. 45. Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution: And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this state.

Pennsylvania Acts (Dallas).

18.1.2.11Rhode Island: Charter of Rhode Island and Providence Plantations, 1663

CHARLES THE SECOND, by the grace of *God*, King of England, Scotland, France and Ireland, Defender of the Faith, &c., to all to whome these presents shall come, greeting:

…

And that they may bee in the better capacity to defend themselves, in theire just rights and libertyes against all the enemies of the Christian ffaith, and others, in all respects, wee have further thought fit, and at the humble petition of the persons aforesayd are gratiously pleased to declare, That they shall have and enjoye the benefitt of our late act of indempnity and ffree pardon, as the rest of our subjects in other our dominions and territoryes have; and to create and make them a bodye politique or corporate, with the powers and priviledges hereinafter mentioned.

…

And ffurther, our will and pleasure is, and wee doe, ffor us, our heires and successours, ordeyn, declare and graunt, unto the sayd Governour and Company, and their successours, that all and every the subjects of us, our heires and successours, which are already planted and settled within our sayd Collony of Providence Plantations, or which shall hereafter goe to inhabit within the sayd Collony, and all and every of theire children, which have byn borne there, or which shall happen hereafter to bee borne there, or on the sea, goeing thither, or retourneing from thence, shall have and enjoye all libertyes and immunityes of ffree and naturall subjects within any the dominions of vs, our heires or successours, to all intents, constructions and purposes, whatsoever, as if they, and every of them, were borne within the realme of England. And ffurther, know ye, that wee, of our more abundant grace, certain knowledge and meere motion, have given, graunted and confirmed, and, by these presents, for us, our heires and successours, doe give, graunt and confirme, unto the sayd Governour and Company, and theire successours, all that parte of our dominiones in New-England, in America, … together with all firme lands, soyles, grounds, havens, ports, rivers, waters, ffishings, mines royall, and all other mynes, mineralls, precious stones, quarries, woods, wood-grounds, rocks, slates, and all and singular other commodities, jurisdictions, royalties, priviledges, franchises, preheminences and hereditaments, whatsoever, within the sayd tract, bounds, landes, and islands, aforesayd, or to them or any of them

belonging, or in any wise appertaining: *to have and to hold the same*, …

Rhode Island Acts.

18.1.2.12South Carolina

18.1.2.12.aConstitution, 1776

VII. That the legislative authority be vested in the president and commander-in-chief, the general assembly and legislative council. All money-bills for the support of government shall originate in the general assembly, and shall not be altered or amended by the legislative council, but may be rejected by them. All other bills and ordinances may take rise in the general assembly or legislative council, and may be altered, amended, or rejected by either. Bills having passed the general assembly and legislative council may be assented to or rejected by the president and commander-in-chief. Having received his assent, they shall have all the force and validity of an act of general assembly of this colony. And the general assembly and legislative council, respectively, shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly, but the legislative council shall have no power of expelling their own members.

…

XIX. That justices of the peace shall be nominated by the general assembly and commissioned by the president and commander-in-chief, during pleasure. They shall not be entitled to fees except on prosecutions for felony, and not acting in the magistracy, they shall not be entitled to the privileges allowed to them by law.

…

XXXI. That the president and commander-in-chief, the vice-president of the colony, and privy council, respectively, shall have the same personal privileges as are allowed by act of assembly to the governor, lieutenant-governor, and privy council.

South Carolina Constitution.

18.1.2.12.bConstitution, 1778

XVI. That all money bills for the support of government shall originate in the house of representatives, and shall not be altered or amended by the

senate, but may be rejected by them, and that no money be drawn out of the public treasury but by the legislative authority of the State. All other bills and ordinances may take rise in the senate or house of representatives, and be altered, amended, or rejected by either. Acts and ordinances having passed the general assembly shall have the great seal affixed to them by a joint committee of both houses, who shall wait upon the governor to receive and return the seal, and shall then be signed by the president of the senate and speaker of the house of representatives, in the senate-house, and shall thenceforth have all the force and validity of a law, and be lodged in the secretary's office. And the senate and house of representatives, respectively, shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly.

…

XXVI. That justices of the peace shall be nominated by the senate and house of representatives jointly, and commissioned by the governor and commander-in-chief during pleasure. They shall be entitled to receive the fees heretofore established by law; and not acting in the magistracy, they shall not be entitled to the privileges allowed them by law.

…

XXXVIII. That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges. To accomplish this desirable purpose without injury to the religious property of those societies of Christians which are by law already incorporated for the purpose of religious worship, and to put it fully into the power of every other society of Christian Protestants, either already formed or hereafter to be formed, to obtain the like incorporation, it is hereby constituted, appointed, and declared that the respective societies of the Church of England that are already formed in this State for the purpose of religious worship shall still continue incorporate and hold the religious property now in their possession. And that whenever fifteen or more male persons, not under twenty-one years of age, professing the Christian Protestant religion, and agreeing to unite themselves in a society for the purposes of religious worship, they shall, (on complying with the terms hereinafter mentioned,)

be, and be constituted, a church, and be esteemed and regarded in law as of the established religion of the State, and on a petition to the legislature shall be entitled to be incorporated and to enjoy equal privileges. That every society of Christians so formed shall give themselves a name or denomination by which they shall be called and known in law, and all that associate with them for the purposes of worship shall be esteemed as belonging to the society so called. But that previous to the establishment and incorporation of the respective societies of every denomination as aforesaid, and in order to entitle them thereto, each society so petitioning shall have agreed to and subscribed in a book the following five articles, without which no agreement or union of men upon pretence of religion shall entitle them to be incorporated and esteemed as a church of the established religion of this State:

1st. That there is one eternal God, and a future state of rewards and punishments.

2d. That God is publicly to be worshipped.

3d. That the Christian religion is the true religion.

4th. That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.

5th. That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth.

…

XLI. That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land.

South Carolina Constitution.

18.1.2.13Vermont

18.1.2.13.a Constitution, 1777

CHAPTER I.

A declaration of the rights of the inhabitants of the state of vermont.

…

XVII. That all people have a natural and inherent right to emigrate from one State to another, that will receive them; or to form a new State in vacant

countries, or in such countries as they can purchase, whenever they think that thereby they can promote their own happiness.

Vermont Acts.

18.1.2.13.b Constitution, 1786

CHAP. II.

PLAN OR FRAME OF GOVERNMENT.

…

XII. The representatives, having met, and chosen their speaker and clerk, shall each of them, before they proceed to business, take and subscribe, as well the oath or affirmation of allegiance herein after directed (except where they shall produce certificates of their having heretofore taken and subscribed the same) as the following oath or affirmation, *viz.*

You ——— do solemnly swear, (or affirm) that, as a member of this Assembly, you will not propose or assent to any bill, vote, or resolution, which shall appear to you injurious to the people; nor do nor consent to any act or thing whatever, that shall have a tendency to lessen or abridge their rights and privileges as declared by the Constitution of this State; but will, in all things, conduct yourself as a faithful, honest representative and guardian of the people, according to the best of your judgment and abilities. (In case of an oath) So help you God. (And in case of an affirmation) Under the pains and penalties of perjury.

And each member, before he takes his seat, shall make and subscribe the following declaration, *viz.*

You do believe in one God, the Creator and Governor of the Universe, the rewarder of the good, and punisher of the wicked. And you do acknowledge the scriptures of the Old and New Testament to be given by divine inspiration; and own and profess the Protestant religion.

And no further or other religious test shall ever hereafter be required of any civil officer or magistrate, in this State.

XVIII. Every man, of the full age of twenty-one years, having resided in this State, for the space of one whole year, next before the election of representatives, and is of a quiet and peaceable behaviour, and will take the following oath, (or affirmation) shall be entitled to all the privileges of a freeman of this State.

You solemnly swear, (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will

do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favour of any man.

…

XXXVIII. Laws for the encouragement of virtue, and prevention of vice and immorality, ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town for the convenient instruction of youth; and one or more grammar schools be incorporated, and properly supported in each county in this State. And all religious societies, or bodies of men, that may be hereafter united or incorporated, for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the General Assembly of this State shall direct.

Vermont Acts.

18.1.2.14Virginia

18.1.2.14.aThe Second Charter of Virginia, 1609

JAMES, by the Grace of God, King of *England*, *Scotland*, *France*, and *Ireland*, Defender of the Faith, *&c*. To all, to whom these Presents shall come, Greeting. Whereas, at the humble Suit and Request of sundry our loving and well-disposed Subjects, intending to deduce a Colony, and to make Habitation and Plantation of sundry our People in that Part of *America*, commonly called Virginia, and other Parts and Territories in *America*, either appertaining unto Us, or which are not actually possessed of any *Christian* Prince or People, within certain Bounds and Regions, We have formerly, by our Letters patents, bearing Date the tenth Day of *April*, in the fourth Year of our Reign of *England, France*, and *Ireland*, and of *Scotland* the nine and thirtieth, Granted to Sir *Thomas Gates*, Sir *George Somers*, and others, for the more speedy Accomplishment of the said Plantation and Habitation, that they should divide themselves into two Colonies (the one consisting of divers Knights, Gentlemen, Merchants, and others, of our City of *London*, called the First Colony; And the other consisting of divers Knights, Gentlemen, and others, of our Cities of *Bristol, Exeter*, and Town of *Plimouth*, and other Places, called the Second Colony). And have yielded and granted many and sundry

Privileges and Liberties to each Colony, for their quiet settling and good Government therein, as by the said Letters-patents more at large appeareth.

Now, forasmuch as divers and sundry of our loving Subjects, as well Adventurers, as Planters, of the said first Colony, which have already engaged themselves in furthering the Business of the said Colony and Plantation, and do further intend, by the Assistance of Almighty God, to prosecute the same to a happy End, have of late been humble Suitors unto Us, that (in Respect of their great Charges and the Adventure of many of their Lives, which they have hazarded in the said Discovery and Plantation of the said Country) We would be pleased to grant them a further Enlargement and Explanation of the said Grant, Privileges, and Liberties, and that such Counsellors, and other Officers, may be appointed amongst them, to manage and direct their Affairs, as are willing and ready to adventure with them, as also whose Dwellings are not so far remote from the City of *London*, but they may, at convenient Times, be ready at Hand, to give their Advice and Assistance, upon all Occasions requisite.

… And we do also of our special Grace, certain Knowledge, and mere Motion, give, grant and confirm, unto the said Treasurer and Company, and their Successors, … And also all the Islands lying within one hundred Miles along the Coast of both Seas of the Precinct aforesaid; Together with all the Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones, Quarries, Woods, Rivers, Waters, Fishings, Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences within the said Territories, and the Precincts thereof, … ALSO we do for Us, our Heirs and Successors, DECLARE by these Presents, that all and every the Persons being our Subjects, which shall go and inhabit within the said Colony and Plantation, and every their Children and Posterity, which shall happen to be born within any of the Limits thereof, shall HAVE and ENJOY all Liberties, Franchizes, and Immunities of Free Denizens and natural Subjects within any of our other Dominions to all Intents and Purposes, as if they had been abiding and born within this our Realm of *England*, or in any other of our Dominions. … AND further, our Will and Pleasure is, that in all Questions and Doubts that shall arise upon any difficulty of Construction or Interpretation of any Thing contained either in this, or in our said former Letters-patents, the same shall be taken and interpreted in most ample and beneficial Manner for the said Treasurer and Company, and their Successors, and every Member thereof. AND further, we do, by these Presents RATIFY and CONFIRM unto the said Treasurer and

Company, and their Successors, all the Privileges, Franchises, Liberties, and Immunities granted in our said former Letters-patents, and not in these our Letters-patents, revoked, altered, changed, or abridged. AND finally our Will and Pleasure is, and we do further hereby for Us, our Heirs, and Successors, GRANT and AGREE, to and with the said Treasurer and Company, and their Successors, that all and singular Person and Persons, which shall at any Time or Times hereafter adventure any Sum or Sums of Money, in and towards the said Plantation of the said Colony in *Virginia*, and shall be admitted by the said Council and Company, as Adventurers of the said Colony in Form aforesaid, and shall be enrolled in the Book or Records of the Adventurers of the said Company, shall and may be accounted, accepted, taken, held, and reputed Adventurers of the said Colony, and shall, and may enjoy all and singular Grants, Privileges, Liberties, Benefits, Profits, Commodities and Immunities, Advantages and Emoluments whatsoever, as fully, largely, amply, and absolutely, as if they and every of them, had been precisely, plainly, singularly, and distinctly named and inserted in these our Letters-patents.

Virginia Acts.

18.1.2.14.bThe Third Charter of Virginia, 1611–12

JAMES, by the Grace of God, King of *England*, *Scotland*, *France*, and *Ireland*, Defender of the Faith; To all to whom these Presents shall come, Greeting. … And whereas also for the greater Good and Benefit of the said Company, and for the better Furtherance, Strengthening, and Establishing of the said Plantation, we did further Give, Grant and Confirm, by our Letters-patents unto the said Company and their Successors, for ever, all those Lands, Countries or Territories, situate, lying and being in that Part of *America* called *Virginia*, from the Point of Land called *Cape* or *Point Comfort* all along the Sea Coasts to the Northward two hundred Miles; and from the said Point of *Cape Comfort* all along the Sea Coast to the Southward two hundred Miles; and all that Space and Circuit of Land lying from the Sea Coast of the Precinct aforesaid, up into the Land throughout from Sea to Sea West and Northwest; and also all the Islands lying within one hundred Miles along the Coast of both the Seas of the Precinct aforesaid; with divers other Grants, Liberties, Franchises and Preheminences, Privileges, Profits, Benefits, and Commodities granted in and by our said Letters-patents to the said Treasurer and Company and their Successors for ever. … together with all and singular Soils, Lands, Grounds, Havens, Ports, Rivers, Waters,

Fishings, Mines and Minerals, as well Royal Mines of Gold and Silver, as other Mines and Minerals, Pearls, precious Stones, Quarries, and all and singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, and Preheminences, both within the said Tract of Land upon the Main, and also within the said Islands and Seas adjoining whatsoever and thereunto or thereabouts, both by Sea and Land being or situate;

And further, Our Will and Pleasure is, and We do by these Presents, grant and confirm, for the Good and Welfare of the said Plantation, and that Posterity may hereafter know who have adventured and not been sparing of their Purses in such a noble and generous Action for the general Good of their Country, and at the Request and with the Consent of the Company aforesaid, that Our trusty and well-beloved Subjects *George* Lord Archbishop of *Canterbury*, *Henry*, Earl of *Huntington*, *Edward* Earl of *Bedford*, *Richard* Earl of *Clanrickard*, &c. who since Our said last Letters-Patents are become Adventurers, and have joined themselves with the former Adventurers and Planters of the said Company and Society, shall from henceforth be reputed, deemed, and taken to be, and shall be Brethren and free Members of the Company; and shall and may respectively, and according to the Proportion and Value of their several Adventures, have, hold, and enjoy, all such Interest, Right, Title, Privileges, Preheminences, Liberties, Franchises, Immunities, Profits, and Commodities whatsoever, in as large and ample and beneficial Manner, to all Intents, Constructions, and Purposes, as any other Adventures nominated and expressed in any our former Letters-Patents, or any of them have or may have by Force and Virtue of these Presents, or any our former Letters-Patents whatsoever.

And We do, for Us, our Heirs and Successors, further give and grant to the said Treasurer and Company, or their Successors forever, that the said Treasurer and Company, or the greater Part of them for the Time being, so in a full and general Court assembled as aforesaid, shall and may from Time to Time, and at all times forever hereafter, elect, choose and admit into their Company, and Society, any Person or Persons, as well Strangers and Aliens born in any Part beyond the Seas wheresoever, being in Amity with us, as our natural Liege Subjects born in any our Realms and Dominions: And that all such Persons so elected, chosen, and admitted to be of the said Company as aforesaid, shall thereupon be taken, reputed, and held, and shall be free Members of the said Company, and shall have, hold, and enjoy all and singular Freedoms, Liberties, Franchises, Privileges, Immunities, Benefits, Frofits, and Commodities whatsoever, to the said

Company in any Sort belonging or appertaining, as fully, freely and amply as any other Adventurers now being, or which hereafter at any Time shall be of the said Company, hath, have, shall, may, might, or ought to have and enjoy the same to all Intents and Purposes whatsoever.

…

And lastly, we do, by these Presents, ratify and confirm unto the said Treasurer and Company, and their Successors, for ever, all and all Manner of Privileges, Franchises, Liberties, Immunities, Preheminences, Profits, and Commodities, whatsoever, granted unto them in any our former Letters-patents, and not in these Presents revoked, altered, changed, or abridged.

Virginia Acts.

18.1.2.14.cBill of Rights, 1776

SEC. 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

Virginia Acts.

18.1.3OTHER TEXTS

18.1.3.1Articles of Confederation, 1777

ARTICLES

OF

CONFEDERATION *AND* PERPETUAL UNION,

BETWEEN

The States of *New-Hampshire*, *Massachusetts-Bay*, *Rhode-Island* and *Providence Plantations*, *Connecticut*, *New-York*, *New-Jersey*, *Pennsylvania*, *Delaware*, *Maryland*, *Virginia*, *North-Carolina*, *South-Carolina* and *Georgia*.

…

Art. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free

inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be intitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

Constitutions, pp. 193–94.

18.1.3.2Thomas Jefferson, A Bill Declaring Who Shall Be Deemed Citizens of the Commonwealth, 1779

THE FOUNDERS CONSTITUTION

Be it enacted by the General Assembly, that all white persons born within the territory of this commonwealth and all who have resided therein two years next before the passing of this act, and all who shall hereafter migrate into the same; and shall before any court of record give satisfactory proof by their own oath or affirmation, that they intend to reside therein, and moreover shall give assurance of fidelity to the commonwealth; and all infants wheresoever born, whose father, if living, or otherwise, whose mother was, a citizen at the time of their birth, or who migrate hither, their father, if living, or otherwise their mother becoming a citizen, or who migrate hither without father or mother, shall be deemed citizens of this commonwealth, until they relinquish that character in manner as herein after expressed: And all others not being citizens of any the United States of America, shall be deemed aliens. The clerk of the court shall enter such oath of record, and give the person taking the same a certificate thereof, for which he shall receive the fee of one dollar. And in order to preserve to the citizens of this commonwealth, that natural right, which all men have of relinquishing the country, in which birth, or other accident may have thrown them, and, seeking subsistance and happiness wheresoever they may be able, or may hope to find them: And to declare unequivocably what circumstances shall be deemed evidence of an intention in any citizen to exercise that right, it is enacted and declared, that whensoever any citizen of

this commonwealth, shall by word of mouth in the presence of the court of the county, wherein he resides, or of the General Court, or by deed in writing, under his hand and seal, executed in the presence of three witnesses, and by them proved in either of the said courts, openly declare to the same court, that he relinquishes the character of a citizen, and shall depart the commonwealth; or whensoever he shall without such declaration depart the commonwealth and enter into the service of any other state, not in enmity with this, or any other of the United States of America, or do any act whereby he shall become a subject or citizen of such state, such person shall be considered as having exercised his natural right of expatriating himself, and shall be deemed no citizen of this commonwealth from the time of his departure. The free white inhabitants of every of the states, parties to the American confederation, paupers, vagabonds and fugitives from justice excepted, shall be intitled to all rights, privileges, and immunities of free citizens in this commonwealth, and shall have free egress, and regress, to and from the same, and shall enjoy therein, all the privileges of trade, and commerce, subject to the same duties, impositions and restrictions as the citizens of this commonwealth. And if any person guilty of, or charged with treason, felony, or other high misdemeanor, in any of the said states, shall flee from justice and be found in this commonwealth, he shall, upon demand of the Governor, or Executive power of the state, from which he fled, be delivered up to be removed to the state having jurisdiction of his offence. Where any person holding property, within this commonwealth, shall be attainted within any of the said states, parties to the said confederation, of any of those crimes, which by the laws of this commonwealth shall be punishable by forfeiture of such property, the said property shall be disposed of in the same manner as it would have been if the owner thereof had been attainted of the like crime in this commonwealth.

Boyd, vol. 2, pp. 476–78.

18.1.3.3Patterson, New Jersey Plan, June 15, 1787

Whereas it is necessary in Order to form the People of the U. S. of America into a Nation, that the States should be consolidated, by which means all the Citizens thereof will become equally intitled to and will equally participate in the same Privileges and Rights, and in all waste,

uncultivated, and back Territory and Lands; it is therefore resolved, that all the Lands contained within the Limits of each State individually, and of the U. S. generally be considered as constituting one Body or Mass, and be divided into thirteen or more integral Parts.

Farrand, vol. 3, p. 613.

18.1.3.4Hamilton, June 18, 1787

ARTICLE IX

…

§ 5. The citizens of each State shall be entitled to the rights privileges and immunities of citizens in every other State; and full faith and credit shall be given in each State to the public acts, records and judicial proceedings of another.

Farrand, vol. 3, p. 629.

18.2DISCUSSIONS OF DRAFTS AND PROPOSALS

18.2.1PHILADELPHIA CONVENTION

18.2.1.1June 19, 1787

Mr. Madison. … Examine Mr. P.s plan, & say whether it promises satisfaction in these respects.

3. Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens (of other states) are entitled to equality of privileges by the Articles of Confederation. He considered the emissions of paper money (& other kindred measures) as also aggressions. The States relatively to one an [*sic*] other being each of them either Debtor or Creditor; The Creditor States must suffer unjustly from every emission by the debtor States. We have seen retaliating acts on

this subject which threatened danger not to the harmony only, but the tranquillity of the Union. The plan of Mr. Paterson, not giving even a negative on the Acts of the States, left them as much at liberty as ever to execute their unrighteous projects agst. each other.

Madison's Notes, Farrand, vol. 1, pp. 316–18.

18.2.1.2August 28, 1787

Art. XIV was taken up.

Genl. Pinkney was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves.

On the question (on art: XIV.)

N. H. ay. Mas. ay. Ct. ay. N. J. ay— Pa. ay. Del. ay. Md. ay— Va. ay. N — C— ay. S— C. no. Geo. divided [Ayes—9; noes—1; divided—1.]

Madison's Notes, Farrand, vol. 2, p. 443.

18.2.1.3September 15, 1787

The 4th article, respecting the extending the rights of the Citizens of each State, throughout the United States; the delivery of fugitives from justice, upon demand, and the giving full faith and credit to the records and proceedings of each, is formed exactly upon the principles of the 4th article of the present Confederation, except with this difference, that the demand of the Executive of a State, for any fugitive, criminal offender, shall be complied with. It is now confined to treason, felony, or other high misdemeanor; but, as there is no good reason for confining it to those crimes, no distinction ought to exist, and a State should always be at liberty to demand a fugitive from its justice, let his crime be what it may.

Farrand, vol. 3, p. 112.

18.2.3NEWSPAPERS AND PAMPHLETS

18.2.3.1The Federal Farmer, No. 6, December 2, 1787

The free inhabitants of one state are intitled to the privileges and immunities of the free citizens of the other states—Credit in each state shall be given to the records and judicial proceedings in the others.

New York Journal.

18.2.3.2Cassius, No. 6, December 21, 1787

Section 2, of article IV. provides, that the citizens of each state shall be intitled to all the privileges and immunities of citizens in the several states. This section must also be a source of much advantage to the inhabitants of the different states, who may have business to transact in various parts of the continent, as being equally intitled to the rights of citizenship in one as well as another. They will find less difficulty in pursuing their various concerns than if it were otherwise.

Massachusetts Gazette.

18.2.3.3A Freeman, No. 1, January 23, 1788

The consolidation of the United States into one government by the operation of the proposed constitution (in contradistinction from a confederacy) appears to you to be the consequence of the system, and the intention of its framers. This is the point of difference which I mean to treat of, and for the present I shall confine my observations to it alone.

Were the parts of the fœderal government which you have particularized as much of the nature of consolidation as you seem to suppose, real nature and design, and the state sovereignties, would indeed be finally annihilated. The appearances which have misled you I shall remark on in the course of these papers, and I shall endeavour to exhibit clear and permanent marks and lines of *separate sovereignty*, which must ever distinguish and circumscribe each of the several states, and *prevent their annihilation* by the fœderal government, or any of its operations.

When the people of America dissolved their connexion with the crown of Britain, they found themselves separated from all the world, but a few powerless colonies, the principal of which indeed they expected to induce

into their measures. The crown having been merely a centre of *union*, the act of independence dissolved the political ties that had formerly existed among the states, and it was attended with no absolute confederacy; but many circumstances conspired to render some new form of connexion desirable and necessary. We wished not to continue distinct bodies of people, but to form a respectable nation. The remains of our ancient governments kept us in the form of thirteen political bodies, and from a variety of just and prudent considerations, we determined to enter into an indissoluble and perpetual *union*. Though a confederacy of sovereign states was the mode of connexion which was wisely desired and actually adopted, yet in that feeble and inadequate bond of union to which we assented, articles strongly partaking of the nature of consolidation are observable.

We see, for example, that the free inhabitants of each state were rendered, to all intents and purposes, *free citizens of all the rest*. Persons fleeing from justice in one state were to be *delivered up* by any other in which they might take *refuge*, contrary to the laws prevailing among *distinct* sovereignties, whereby the jurisdiction of one state pervaded the territories of all the rest, to the effectual length of trial, condemnation and punishment. The right to judge of *the sums that should be expended for the use of the nation* lies, even under the old confederation, *solely* with Congress, and after the demand is fixed by them, and formally made, the states are *bound*, as far as they can be bound by any compact, to pay their respective quotas into the fœderal treasury, by which the power of the purse is fully given to them; nor can the states *constitutionally* refuse to comply. It is very certain that there is not in the present fœderal government vigor enough to carry *this actually delegated* power into execution; yet, if Congress had possessed energy sufficient to have done it, there is no doubt but they would have been justifiable in the measure, though the season of invasion was unfavorable for internal contests.

Pennsylvania Gazette.

18.2.3.4The Federal Farmer, No. 18, January 25, 1788

ARTICLE IV.

Sect. 1. *Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and*

proceedings shall be proved, and the effect thereof.

Sect. 2. *The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States*.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labour in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

The convenience, justice, and utility, of these sections, are obvious.

At present, slaves absconding and going into some of the northern States, may thereby effect their freedom: But under the Federal Constitution they will be delivered up to the lawful proprietor.

Virginia Independent Chronicle.

18.2.3.5A Native of Virginia, April 2, 1788

Further, the federal city and districts, will be totally distinct from any state, and a citizen of a state will not of course be a subject of any of them; and to avail himself of the privileges and immunities of them, must he not be naturalized by congress in them? and may not congress make any proportion of the citizens of the states naturalized subjects of the federal city and districts, and thereby entitle them to sue or defend, in all cases, in the federal courts? I have my doubts, and many sensible men, I find, have their doubts, on these points; and we ought to observe, they must be settled in the courts of law, by their rules, distinctions, and fictions.

Petersburg, Virginia

18.2.3.6The Federalist, No. 80, Publius (Hamilton), May 28, 1788

It may be esteemed the basis of the union, that “the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.” And if it be a just principle that every government *ought to*

possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

Cooke

18.2.4LETTERS AND DIARIES

A Legislature without corresponding Judicial Courts is of no Consequence to the People—That this must result from the System; that the State Legislatures will have no Judicial Courts, is not difficult to make apparent —The continental Judicial is to decide on Controversies between Citizens of different States—A Citizen of Masstts. commences Process against a fellow Citizen—Altho the Plaintiff is not in fact a Citizen of New hampshire, yet in Law he is so, & entitled to all the Priviledges & Immunities of a Citizen of New hampshire, one of which is to try a Massachusetts Man before a continental Court.—Therefore the ingenious Lawyer, will always make one appear before the Court as a Citizen in Law, & the other as a Citizen in fact—which will give the continental Court Cognizance of Controversies between two Citizens of the same State— What Use then for a State Judicial? of what Consequence will be the State Bill of Rights—The continental Judicial are not bound by it.

Samuel Osgood to Samuel Adams, January 5, 1788.

18.3DISCUSSIONS OF RIGHTS

18.3.1TREATISES

18.3.1.1Cowell, 1672

Priviledge, *Privilegium*, Is defined by *Cicero* in his Oration *pro domo sua*, to be *lex privata homini irrogata*. It is, Sayes another, *Jus singulare*, whereby a private man, or a particular Corporation, is exempted from the rigor of the Common Law. It is sometimes used in the Common Law for a place that hath any special immunity, *Kitchin, fol.* 118. *Priviledge* is either personal or real; a *personal priviledge* is that which is granted to any person either against or beyond the course of the Common Law: As for example, A Member of Parliament may not be arrested, nor any of his Servants, during the sitting of the Parliament; nor for a certain time before and after. *A priviledge real*, is that which is granted to a place, as to the *universities*, that none of either may be called to *Westminster-Hall*, upon any Contract made within their own Precincts, or prosecuted in other Courts: And one belonging to the *Court of Chancery* cannot be sued in any other Court, certain Cases excepted, and if he be, he may remove it by *Writ of Priviledge*, grounded upon the Stat. 18 *E*. 3. See the *New Book of Entries*, verbo *Priviledge*.

Cowell's Interpreter.

18.3.1.2Jacob, 1750

18.3.1.2.aImmunities

Immunities. King *Hen*. 3. by Charter granted to the Citizens of *London*, a general *Immunity* from all Tolls, &*c*. except Customs and Prisage of Wine. *Cit. lib*. 94.

Jacob Law Dictionary, unpaginated.

18.3.1.2.bPrivileges

Privilege, *(Privilegium)* Is defined to be a private or particular Law, whereby a private Person or Corporation is exempted from the Rigour of the Common Law; or it is some Benefit or Advantage granted or allowed to any Persons contrary to the Course of Law, and is

sometimes used for a Place that hath a special Immunity: A *Privilege* is therefore *Personal,* or *Real; Personal,* as of Members of Parliament, and of Convocation, and their menial Servants, not to be arrested in the Time of Parliament or Convocation, nor for certain Days before or after; Peers, Ambassadors and their Servants, *&c. Real,* that which is granted to a Place, as to the King's Palaces, the Courts at *Westminster,* the Universities, *&c.* that their Members or Officers must be sued within their Precincts or Courts, and not in other Courts. *Cowel.* 2 *Roll. Abr.* 272. *Finch* 321. Also the Counties Palatine, Cinque Ports, and many Cities and Towns, *&c.* have *Privileges* as to Pleas, that none shall be compelled to appear or answer out of their Jurisdiction. 4 *Inst.* 212. *Crompt. Jurisd.* 137. The King's Servants are *privileged* from Arrests; for that the King shall not be deprived of them, without Leave. *Raym.* 152. And the Queen's Servants are the King's, and his Chamberlain may *privilege* them. 2 *Keb.* 455. A Member of Parliament is *privileged,* as well in his Lands and Goods, as in his Person; because being disturb'd in any of them, he is hinder'd in serving of the Commonwealth, which is to be preserr'd before all private Interests. 2 *Lill. Abr.* 370. The Lord Mayor of *London* is *privileged* from all Actions, that he may not be hindered in the Government of the City: And so is an Alderman from serving Offices, *&c. Ibid. Cro. Car.* 585. *Privileges* are of *Parliament*; of *Courts,* and their *Officers* and *Suitors*; and of *Attornies,* &c. 2 *Lill. Abr.* 368. According to *Holt* Chief Justice, *Privilege* is either of Court or of Process; as in the Court of *Common Pleas,* every Person who belongs to that Court, such as Attornies, and their Clerks, *&c.* shall have the *Privilege* of being sued there, and not elsewhere; and this is the *Privilege* of the Court: But none shall be allowed the *Privilege* of Process but those who are the Officers of the Court, and are supposed to be always attending therein. 3 *Salk.* 283. And there are two Kinds of *Privileges* in the Court of *C. B.* the one is of the Officers of the Court, to be sued there by Bill; and the other of the Clerks to be sued there by Original. *Ibid.* In the Court of *Exchequer* **there are three Sorts of Persons who** are *privileged,* **i. e. Debtors to the King, Accountants,** and Officers; **against the first of these Persons, any Man who has a *Privilege* in another Court, as an Officer or Attorney thereof, shall have his *Privilege*; for the *Privilege* of a Person as Debtor, is but a general *Privilege:* But if an Accountant begin his Suit here, he hath in such Case a special *Privilege,* and no other *Privilege* shall be allowed against him, because of his Attendance to pass his Account, in which the King**

hath a particular Concern; and it is the same in an Officer of the Court, who commences a Suit here, no *Privilege* shall prevail against him: Though where the Account is closed and reduced to a Debt, there the Accountant hath only the general *Privilege* as Debtor; and the like of a Servant to an Officer or Minister of the Court, he has no *Privilege* against a *privileged* Person elsewhere. *Hardr*. 267, 507. By *Hale* Chief Baron, a general *Privilege* of a Person as a Member of the University, of a Clerk in *Chancery*, doth not take away the particular *Privilege* of the Court of *Exchequer*, where the Person is Debtor and Accountant to the King. *Ibid*. 189. But one who was Receiver General of the Revenues of the Crown in *W*. being sued in the *Common Pleas*, brought a Writ of *Privilege* out of the *Exchequer*, and it was disallowed by the Court. *Dyer* 328. 2 *Nels. Abr*. 1296. And the King's Debtors shall not be *privileged* by Parliament. *Stat.* 12 *W*. 3. In the *Exchequer* it hath been held, that there are two Ways of pleading *Privilege*; **one is, if the Party is an** Officer on Record, **to go to Trial, and at the Trial to produce the Record; and if he is no Officer, but Attendant on the Court, that must be tried by a Jury: The other Way is, if he be an Officer on Record, then to produce a *Writ of Privilege*, at the Time of the Plea pleaded, upon which there can be no Issue joined; and being otherwise pleaded, *&c*. Judgment may be given to answer over. *Mod. Cas*. 305. Writ of *Privilege* lies for an Officer of the Courts at *Westminster*, that is sued in any other Court than where he attends, to remove the Cause to his own Court. 2 *Inst.* 551. *Stat.* 18 *Ed*. 3. A Defendant pleaded his *Privilege*, that he was an Attorney of *C. B*. and upon Demurrer to his Plea, it was objected, that it ought to be concluded with a *Prosert hic in Curia* the Writ of *Privilege* testifying him to be an Attorney, which is true, and that he ought to have said *prout patet per Recordum*; but that must be in such Case where he sets forth the Writ, and he may plead *Privilege* upon the Writ, or Exemplification of the Record of his Admission, or without it. 2 *Salk*. 545. If *Privilege* of an Attorney be pleaded with a Writ, the Defendant cannot be denied to be an Attorney; if without, he may, and then a *Certiorari* shall be awarded to certify whether he be an Attorney or not. *Ibid*. By Order of the Court of *C. B*. the Clerk of the Warrants is to certify that an Attorney's Name is upon the Roll of Attornies, before he shall have a Writ of *Privilege*; and Writs of *Privilege* are to be signed by the Clerk of the Warrants, to shew the Person is an Attorney of the Court, or they shall not be allowed. *Trin*. 29 *Car*. 2. *Trin*. 9 *W*. 3. And to save Arrest upon Process, an Attorney**

must deliver his Writ of *Privilege* to the Sheriff, and allow it with him; otherwise the Sheriff will not discharge him upon the Writ of *Privilege*, unless it be on Process issuing out of an inferior Court, but he must plead his *Privilege sub pede sigilli*. Pract. Solic. 322. *Privilege* is not to be pleaded in the Negative; as that an Attorney or Clerk, ought not to be sued elsewhere but in such a Court, without saying it is usual for them to be sued there, *&c*. and it should not be pleaded too general. 2 *Sid*. 164. But see 2 *Salk*. 543. In Trespass against an Attorney of *C. B*. be pleaded his *Privilege per Attornatum*, to which Plea the Plaintiff demurred; because he ought to have pleaded it in Person, and pleading by Attorney destroys the very Reason of his *Privilege*, which is his Attending the Court in Person; but the Plea was adjudged good, for he may be sick, or have Business in another Court to attend. *Style* 413. But an Information being brought against a *Custos Brevium* of *B. R*. for several Abuses in his Office, he insisted not to appear in Person, but by Attorney; and it was ruled that he should appear in Person, because he is an Officer of the Court, and is presumed to be always present; and if he doth not appear, Judgment shall be given against him without any other Process. *Sid*. 134. *Privilege* has been allowed for a Clerk in the Office of *Custos Brevium*, and a Writ of *Privilege* signed by the Justices of *C. B*. to exempt him from being arrested or pressed, *&c*. It being the Custom and *Privilege* of that Court, that the Attornies and Clerks shall not be pressed, nor chose in any Office, *sine voluntate*, but ought to attend the Service of the Court. *Cro. Car*. 8. Though it is said an Attorney shall not be excused by *Privilege* from Offices which may be executed by Deputy; only those which require personal Duty, as that of Churchwarden, Constable, *&c. March* 30. 2 *Lill. Abr*. 374. A *Filizer's* Clerk claimed to be *privileged* in *B. R*. but was denied it; for though the Master may be *privileged*, the Court takes no Notice of the Servant, he having no necessary Dependence on the Court. *Mich*. 23 *Car*. And *Privilege* extends only to such Attornies, *&c*. who have an immediate Dependance on the Court; and not so their Servants: It hath been held, that although an Attorney doth not practise, he shall have *Privilege* so long as he continues an Attorney upon Record. *Lutw*, 1667. Attornies or Filizers of the Common Pleas, if sued in *B. R*. may plead their *Privilege*, because they owe a personal Attendance to that Court: But a Serjeant at Law being sued in the Court of *B. R*. cannot plead *Privilege* of *C. B*. for he may sign Pleas, be of Counsel, and Practice in other Courts in *Westminster-Hall*, and is not confined to Practice in the *C. B*. though if

he is sued in any inferior Court, he shall have his *Privilege*. 2 *Lev*. 129. 1 *Mod*. 298. And yet formerly a Serjeant at Law claiming his *Privilege* to be sued in the Court of *C. B*. had his *Privilege* allowed; so a Serjeant's Clerk. *Trin*. 6 *Ed*. 6. and 28 *Hen*. 8. *Dyer* 24. *Cro. Car*. 59. A Barrister at Law, attending on the Court, ought to have *Privilege* to be sued in all transitory Actions in *Middlesex:* And an Attorney of *C. B. &c*. may chuse whether he will sue or be sued out of the County of *Middlesex*; because his Attendance is always supposed to be there. 2 *Lill*. 370. Where an Attorney is sued as Executor or Administrator, he shall not be allowed his *Privilege*; nor in a joint Action, with another not *privileged*; though if the Action may be severed, the Want of *Privilege* of one shall not take away the *Privilege* of the other. 1 *Salk*. 2, 245. 2 *Nels. Abr*. 1295. *Privilege* shall not be allowed to a Man, where his Wife is joined in the Action with him: The Wife of an Attorney of *B. R*. if she be arrested, shall not have *Privilege*; but her Husband is to put in Bail for her, or for Want thereof she is to be committed to Prison; for the Husband is *privileged* only in Regard of his personal Attendance upon the Court, and his *Privilege* is annexed to his Person, and concerns not his Wife. *Noy* 68. 2 *Lill. Abr*. 371. An Attorney of the *Common Pleas* was indebted to *A. B*. who was indebted to *C. D*. who according to the Custom of *London* attached the Money in the Attorney's Hands; and he brought a Writ of *Privilege*, which was allowed by the Court, because the Attorney was not indebted to *C. D*. but only by Custom; and the *Privileges* of those attending the Courts at *Westminster*, shall not be impeach'd by any Custom whatsoever. 2 *Leon*. 156. But where Money was attached in *London*, in the Hands of an Attorney of *B. R*. it was held, he shall not have his Writ of *Privilege*, because the Plaintiff cannot follow his Attachment against him in the *King's Bench*, but only in the Court of *London*; and if this Court should stay Proceedings there, then there would be a Failure of Justice. 2 *Lill Abr*. 371, 372. One that hath a Suit depending in *B. R. &c*. is *privileged* from being arrested in coming to the Court from his House or Lodging, to follow his Cause, and also in going back again directly to his House or Lodging; and if he be arrested in so doing, the Court upon Motion made to inform them of it, will set the Party at Liberty, and punish the Person that arrested him, if he knew the other had a Suit depending here, and came hither to attend it. 2 *Lill*. 371. One that was coming to the Court of *King's Bench* to attend upon his Cause, was arrested as he was coming, and forced to put in Bail; and on Motion, making it appear to the Court, he

and his Bail were both discharged; and the Party that arrested him had been also punished, had he not alleged that he knew not that the Party arrested came about his Business depending in the Court. *Mich.* 22 *Car. B. R.* An Action of Assault, *&c.* was brought in the *Common Pleas*, and the Parties were at Issue, and after the Trial, when the Jury went out to consider of their Verdict, the Defendant in this Action arrested the Plaintiff by Process out of *B. R.* for an Assault made before that Time on him; and this appearing to the Court, they order'd him to release the Party from the Arrest, and they set a Fine upon him for the Contempt, which he immediately paid in Court: And the Court declared, that the Suitors ought safely to come and go, by the *Privilege* of the Court, without Vexation elsewhere. *Golds.* 33. One arrested in *Westminster Hall sedente Curia*, may be discharged upon Motion, if the Arrest was on Mesne Process; but not if he was taken in Execution, though even in that Case, the Officer is punishable *per Curiam*. Bulst. 85. Where a Man is arrested in an inferior Court, coming to *Westminster* upon a Suit brought for or against him, he shall have the *Privilege* to be discharged from the Suit below: But this ought to appear by the Examination of the Party. *Jenk. Cent.* 172. And if the Defendant be in Execution in any such inferior Court, and he had Cause of *Privilege* at that Time; if the Writ of *Privilege* be delivered before it, he shall be discharged: 'Tis otherwise if not delivered till after the Execution. *Ibid. Privilege* of the Court was prayed to protect a Witness from being arrested in coming to and going from the Court, which was granted. *Hill.* 1655. 2 *Lill.* 370. In Treason, Felony, or Breach of the Peace, no *Privilege* shall be allowed; nor on an Indictment, *&c.* It has been adjudged, that where Proceedings are merely at the Suit of the King, as upon Indictments or Informations brought by the Attorney General, in such Cases *Privilege* shall not be allowed; but where the Proceedings are at the Suit of the King and the Party, as in Case of a common Informer, *&c.* there the Defendant may have his *Privilege*. 1 *Lutw.* 193. If a *privileged* Person in one Court, do sue a *privileged* Person in another, in a Civil Action, the Person sued shall not have his *Privilege*. 2 *Leon.* 41. 2 *Lill. Abr.* 368. A *privileged* Person shall not be generally allowed his *Privilege* upon Motion; but he must plead it, and on Pleading it shall be allowed. *Mich.* 23 *Car. B. R.* But there is no Need to plead the *Privilege* of the *Exchequer*; for it shall be granted upon producing the Red Book of the *Exchequer* by a Baron of the Court. 1 *Lutw.* 46. And of later Times, the Party hath been

admitted to *Privilege* upon Prayer to the Court. 2 *Lill.* 370. By some Opinions, *Privilege* may be allowed, after Bail put in; and not after Imparlance: By others, that *Privilege* of Attornies may not be pleaded after Bail given in, which allows the Jurisdiction. *&c.* 3 *Lev.* 343. 1 *Salk.* 1, 2. To sue an Attorney *privileged*, or any Clerk or Officer of the Court of *B. R.* they are not to be arrested, but be proceeded against as follows: A Declaration is to be filed against the Party *privileged*, and a Copy of it delivered to him, and then Rules given in order for his Plea; and the Declaration and Rules being delivered and served in Time, he will be obliged to plead the same Term; and if he do not appear and plead, after called in Court, *&c.* he may be *forejudged* the Court: If such Attorney, Clerk or Officer be Plaintiff, and his Declaration is delivered, and the Rules given in Time, the Defendant is to plead the same Term, and cannot imparl over to the next; which ought to be remember'd, for fear of Executions when not thought of. *Pract. Solic.* 259, 260. In *B. R.* where an Attorney is Plaintiff, he cannot by his *Privilege* have special Bail where other Persons cannot have it; except it be for Fees, as a Minister of the Court, in which Case he may. In the Court of *C. B.* if an Attorney is Defendant in any Suit, it is not required that he shall give in Bail; and by giving Bail, he waves his *Privilege:* Yet by the Usage of the Court, on Attachment at the Suit of an Attorney Plaintiff, though the Debt be but 40 *s.*special Bail shall be given. *Ibid.* 260, 323. A Bill must be filed, though an Attorney agrees to appear and dispense with it; but it may in such Case be filed afterwards: And a Bill cannot be filed against a Person *privileged* in Vacation, for then he is not present in Court. *Hill.* and *Pasch.* 9 *W.* 3. *B. R.* If without filing a Declaration, an Action is brought against an Attorney, *&c.* he may bring *Attachment of Privilege*, and supersede the Action.

A *Bill* filed against a *Member of Parliament*, &c. having *Privilege*.

A. B. *complains of* C. D. *Esq*; &c. *the said* C. D. *having* Privilege *of Parliament; for that*, to wit, *That whereas the said* A. *the Day*, &c. *in the Year of the Reign*, &c. *at* Westminster *is the County of* M. *aforesaid, accounted with the said* C. *of and concerning divers Sums of Money, before that Time due and owing by the said* C. *to the said* A. *and then being in Arrear and unpaid; and upon that Account, the said* C. *was then and there found in Arrearage to the said* A. *in sixty-five Pounds of lawful Money of* Great Britain; *and being so found in Arrear, the said* C. *afterwards, that is to say, the same Day of*, &c. *in the Year aforesaid, at*

Westminster *aforesaid, in Consideration thereof did undertake, and to the said* **A.** *then and there faithfully promise, that he the said* **C.** *would well and truly pay and content to the said* **A.** *the said sixty four Pounds, when after he should be thereto required: And also whereas afterwards, that is to say, the Day of,* **&c.** *in the Year,* **&c.** *at* **W.** *aforesaid, he the said* **C.** *was indebted to the said* **A.** *in three hundred Pounds of like lawful Money of* **Great Britain,** *for so much Money of the said* **A.** *before that Time had and received by the said* **C.** *to the Use of the said* **A.** *And being so indebted, he the said* **C.** *afterwards, that is to say, the same Day and Year last abovesaid, at,* **&c.** *aforesaid, in Consideration thereof undertook, and to the said* **A.** *then and there faithfully promised, that he the said* **C.** *would well and truly pay the said three hundred Pounds to the said* **A.** *whenever after he should be thereunto required,* **&c.** *Nevertheless the said* **C.** *not regarding his said several Promisses and Undertakings, made in Manner as above, but contriving and fraudulently intending, craftily and subtilly to deceive and defraud the said* **A.** *in this particular, hath not paid the said* **A.** *the said several Sums of Money, or any Part thereof, nor in any Manner made him Satisfaction for the same, although the said* **C.** *was thereto required by the said* **A.** *afterwards,* **to wit,** *on the Day of,* **&c.** *in the Year,* **&c.** *abovementioned, and often after, at* **W.** *aforesaid; but he the said* **C.** *hath hitherto refused, and still doth refuse so to do, to the Damage of the said* **A.** *five hundred Pounds; and therefore he brings his Suit,* **&c.** *And thereupon the same* **A.** *prays the Process of the Lord the King to be thereof made according to the Form of the Statute in such Case made and provided; and it is granted to him,* **&c.**

Form **of the Writ of** ***Summons*** **thereon.**

GEORGE the Second, *&c. To the Sheriff of* **M.** *Greeting: We command you, that you summon* **C. D. (***having* **Privilege** *of Parliament***)** *that he be before us at* **Westminster,** *on the Day,* **&c.** *next after,* **&c.** *to answer to* **A. B.** *of a Plea of Debt, or Trespass upon the Case, as reasonably shewn may be, that be ought to answer; and have you there this Writ.* **Witness,** *&c.*

Form *of a Writ of* **Attachment of Privilege.**

GEORGE the Second, *&c. To the Sheriff of* **S.** *Greeting: We command you, that you attach* **A. B.** *and* **C. D.** *if they are to be found in your Bailiwick, and safely keep them, so that you have their Bodies before as at* **Westminster,** *on the Day,* **&c.** *next after,* **&c.** *to answer to* **E. F.** *Gentleman, one of the Clerks of* **Edward Ventris,** *Esq; our chief Clerk,*

***assigned to inrol Pleas in our Court before us, according to the Liberties and Privileges of such chief Clerk and his Clerks, used and approved of in the same Court, from the Time whereof the Memory of Man is not to the contrary: in an Action of Trespass, &c. And have you then there this Writ.* Witness, *&c*.**

Jacob Law Dictionary, unpaginated.

18.3.1.3Blackstone, 1865

Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust[e]. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term *"prescribed."* But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

Blackstone Commentaries, book I, ch. 1, vol. I, p. 46.

18.3.1.4Cunningham, 1765

Privilege, *(Privilegium,)* Is defined by *Cicere* in his oration *pro domo sua,* to be *lex privata homini irrogata*. It is, says another, *Jus singulare,* whereby a private man, or a particular corporation is exempted from the rigour of the Common law. It is sometimes used in the Common law for a place that hath some special immunity. *Kitchin, fol.* 118.

Privilege is either personal or real: A personal privilege is that which is granted to any person, either against, or beyond the course of the Common law: As for example, A member of parliament may not be arrested, nor any of his servants, during the sitting of the parliament; nor for a certain time before and after. A *privilege real* is that which is granted to a place, as to the *universities*, that none of either may be called to *Westminster Hall*, upon any contract made within their own precincts, or prosecuted in other courts: And one belonging to the court of *Chancery* cannot be sued in any other court, certain cases excepted; and if he be, he may remove it by *writ of privilege*, grounded upon the statute 18 *E*. 3. *Cowell.*

***Privilege* is an exemption from some duty, burthen or attendance, to which certain persons are intitled, from a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their time and care; and that therefore without this indulgence it would be impracticable to execute such offices to that advantage which the publick good requires. 4 *Bac. Abr*. 215.**

1. ***Of privilege in suits allowed officers and attendants in the courts of justice.***
2. ***Of the privilege of peers and members of parliament.***
3. ***Of the proceedings in courts by and against persons intitled to privilege of parliament.***

1. OF PRIVILEGE IN SUITS ALLOWED OFFICERS AND ATTENDANTS ITS THE COURTS OF JUSTICE.

The officers, ministers and clerks of the courts in *Westminster Hall* are allowed particular privileges in respect of their necessary attendance on those courts; they are regularly to sue and be sued in the courts they respectively belong to, and cannot, except in certain cases, be impleaded elsewhere; which privilege arises from a supposition of law, that the business of the court or their clients causes would suffer by their being drawn into another, than that in which their personal attendance is required. 2 *Inst.* 551. 4 *Inst.* 71. *Vaugh*. 154. *Dyer* 377. *a: pl.* 30.

***Anderson* Ch. J. of *C. B*. brought trespass by bill for breaking his house in the city of *Worcester*, against a citizen of the said city; the mayor and commonalty came and shewed a charter granted by *Edward* VI. and demanded conusance of pleas; but it was refused, because the privilege of that court, of which the plaintiff was a chief member, is more ancient than the patent; for the justices clerks and attornies of**

this court ought to be here attending to do their business, and shall not be impleaded or compelled to implead others elsewhere; and this privilege was given this court upon the original erection of it. 3 *Leon*. 149. Lord *Anderson's* case.

An attorney so long as he remains on record, shall have his privilege; and therefore where it was moved, that *J. S*. shall put in special bail, being an attorney at large, and having discontinued his practice, the court said, that attornies at large have the same privilege with the clerks of the courts, and are to appear *de die in diem*; and they were not satisfied that he had discontinued his practice. *Bro*. tit. *Attorney* 67. *Tit. Bill* 24. 1 *Vent*. 1. Sir *John How* v. *Walley*.

But where *J. S*. was arrested in *B. R*. and after the arrest he procured himself to be made an attorney of *C. B*. and prayed his privilege, it was disallowed, because it accrued *pendente lite*. 2 *Rol. Rep*. 115.

In debt against the warden of the *Fleet*, by bill of privilege, he refused to appear; the court doubted how they could compel him, as they could not forejudge him the court, he having an inheritance in his office; but it being surmised that he made a lease of his office, it was held, that he should not have his privilege, for that the lessee, and not he, was the officer during the lease. 2 *Leon*. 173. *Gittinson* v. *Tyrrel*.

So if the marshal of *B. R*. grants his place for life; the grantor has no privilege during that time. 1 *Vent*. 65.

A clerk of *B. R*. was sued in an inferior court for a debt under five pounds, and had a writ of privilege allowed; for the stat. 21 *Jac*. 1. *cap*. 23. never intended to take away the privilege of attornies. *Palm*. 403.

In the court of Exchequer there are three sorts of privilege: 1st, As debtor. 2dly, As accountant. 3dly, As officer. *Hard*. 365.

***J. S*. was sued in an action of battery in *London*, which he removed into *B. R*. and afterwards prayed his privilege of the court of Exchequer; and upon the puisne Baron's coming into court, and bringing the red book of the Exchequer, which shewed that he was an escheator, and so an accountant to the King, the privilege was allowed. *Noy* 40. *Walrend* v. *Winroll*.**

If one holds of the Queen as of her manor, he shall not have the privilege of the Exchequer for that cause; but if the King grants tithes, and thereupon reserves a rent nomine decima, and a tenure of him, there he shall have privilege. 2 *Leon*. 21. *Lightfood* v. *Butler*.

On a *latitat's* being sued out against the commissioners of the Treasury, the puisne Baron of the Exchequer came into the court of *B. R.* and brought into court the red book of the Exchequer, which is deemed a record in that court; and thereby it appeared, that the Treasurer had privilege of being sued only in that court; and the patent being produced in court which constituted the defendants, *&c.* and granted them the office of Treasurer of *England*, their privilege was allowed them without putting them to bring a writ of privilege; the court grounding themselves on the record before them. 2 *Show.* 299. *Lampen* v. Sir *Edward Deering & al'.*

It hath been held, that the Treasurer of the navy is eo *ipso* an accountant; and that an accountant's privilege will hold against a special privilege in another court, as officer of the court or otherwise; though it be not alleged, that such an accountant is entred upon his account; for that every accountant may be attached by the court to make up his account, and must attend for that purpose *de die in diem*. Hard. 316. *See* Moor 753. 2 Inst. 23, 551. Bro. Privilege. 16.

In debt in *B. R.* against *J. S.* be pleaded to the jurisdiction, That none of the privy chamber ought to be sued in any other court, without the special licence of the lord chamberlain of the houshold, and that he was one of the privy chamber; on demurrer to this plea, the court overruled it with great resentment, and awarded a *Respondeas ouster. Raym.* 34. 1 *Keb.* 137. *Barrington* v. *Venables.*

It was agreed in Serjeant *Scrogg's* case, That the privilege of the court of *C. B.* which Serjeants claimed, extended only to inserior courts, not to the courts in *Westminster-Hall*; and that he essy be sued in any of these, because he is not confined to that court alone, but may practise in any other court; but it is otherwise as to attornies or philazers, who cannot practise in their own name in any other court but such as they respectively belong to; and that therefore a Serjeant at law is to be sued by original, and not by bill of privilege, 2 *Lev.* 129. 3 *Keb.* 42. *Moor* 296. S. C.

So in action by bill brought in *C. B.* against a Serjeant at law, for work done, he pleaded that he ought to have been sued by original, and not by bill; and on demurrer, the court held, that the case of a serjeant and prothonotary's clerk were upon the same foot, neither of them being bound to personal attendance, as prothonotaries and attornies were; and that therefore be ought to have been sued by original, and

accordingly gave a judgment for the defendant. *Trin*. 7 *Geo*. 2. Serjeant *Girdler*'s case.

***J. S*. being arrested by a writ out of *C. B*. brought his writ of privilege as clerk of the crown office; but it appearing that he was only a clerk to Mr. *Ward* (clerk of that office) and not an immediate clerk of the office, a *supersedeas* to the writ of privilege was granted on motion; the court having agreed, That he had no more privilege than an attorney's clerk. 2 *Show*. 287. *Ward* v. *Lawrence*.**

A Serjeant at law, barrister, attorney or other privileged person, whose attendance is necessary in *Westminster-Hall*, may lay his action in *Middlesex*, though the cause of action accrued in another county; and the court on the usual affidavit will not change the venue. *Stil*. 460. *Moor* 64. 2 *Show*. 242.

But it hath been held, That if a privileged person be sued, and the action brought against him in the right county, his privilege will not intitle him to have it tried in *Middlesex*. *Carth*. 126. 1 *Show*. 148. *Bisse* v. *Harcourt*.

If an attorney lays his action in *London*, the court will change the venue on the usual affidavit; for by not laying it in *Middlesex*, he seems regardless of his privilege, and ist o [*sic;* is to]be considered as a person at large. 2 *Vent*. 47. *Salk*. 668.

On a motion to discharge a rule which had been obtained for changing the venue, it appeared, That the plaintiff was a barrister and master in Chancery; and the court held that he had a privilege, by reason of his attendance, to lay his action in *Middlesex*, and therefore discharged the rule. 2 Lord *Raym*. 1556. *Fitz*. 40. S. C. *Burroughs* v. *Willis*.

2. OF THE PRIVILEGE OF PEERS AND MEMBERS OF PARLIAMENT.

All peers, without any distinction as to degree or rank, are intitled to privilege; for they are equally obliged to attend the service of the publick, and are always supposed amenable, and to have sufficient property to answer in suits and actions brought against them, and on these grounds are not to be arrested or molested in their persons. This privilege extended formerly to abbots, as it does to bishops, members of the convocation, and members of the house of commons at this day. 4 *Inst*. 24. *Stil*. 222, 253. *Dyer* 314. 1 *Mod*. 66. *Bro. Exig*. 3 *Moor* 767. *Scobel's memorials* 88, 103. *Sir Simon Dew's Journals* 414. *Finch* 355.

Dyer 60. *a*. in margin. *Noy* 102. *Moor* 78. *Stamdf. P. C.* 38.

The privilege of parliament according to the law of parliament is of a very extensive nature; but all that is here intended to be treated of is only the taking notice of and pointing out such cases and resolutions relative hereto, as are to be found in the books of law; not to determine concerning this privilege as settled by the rules and orders of each house, of which they themselves are the sole judges, though the King's Courts incidently take notice thereof, and are bound to determine in matters of privilege when so directed by act of parliament. Lord *Coke* says of this law, *ab omnibus quaerenda est,* a multis ignorata, a paucis cognita. 4 Inst. 15. 13 Co. 63. 4 Inst. 23, 50, 363. Prinne's Animad. on 4 Inst. 12. Cro. Car. 181, 604. 2 Lord Raym. 1111. See 1 Mod. 66.

This privilege extends only to the peers of *Great Britain*; so that a nobleman of any other country, or a lord of *Ireland,* hath not any other privileges in this kingdom than a common person; also the son and heir apparent of a nobleman is not entitled to the privilege of being tried by his peers, which is confined to such person as is a lord of parliament at the time; but it seems that an infant peer is privileged from arrests, his person being held sacred. *Co. Lit.* 156. 2 *Inst.* 48. 3 *Inst.* 30.

The peers of *Scotland* had no privilege in this kingdom before the union, but now by the 23d article of the union, the sixteen elected peers shall have all the privileges of the peerage of *England,* excepting only that of sitting and voting in parliament. 9 *Co*. 117. 1 *P. Will*. 583.

A peeress by birth is intitled to privilege; so of a peeress by marriage, and that as well during the coverture as after; but as a peeress by marriage is said to lose her dignity by marrying a commoner, Q. If after such marriage she is intitled to any privilege. 2 *Inst.* 50. *Still*. 222, 234, 252. 2 *Cha. Ca*. 224. *Co. Lit.* 16. 6 *Co*. 53. *Dyer* 79.

It was holden by my Ld. Ch. J. *Holt,* in the case of the Lord *Banbury*, that where a person is called by writ to the house of Peers, he is no peer 'till he sits in parliament, the writ giving him no nobility or honour; but that it was the sitting in the house of *Lords,* and associating himself with them that ennobled his blood; and that therefore, if the King or he dies before a parliament meets, the writ is determined, and the party remains as commoner; but he held it otherwise in a creation by letters patents, by which the party is immediately noble without any other act or ceremony; and though the parliament never meets, or the King dies, the nobility remains to him and his posterity, according to the

limitations in the patent. 4 *Bac. Abr*. 229.

A member of parliament shall have privilege of parliament, not only for his servants, but for his horses, &*c*. or other goods distrainable. 4 *Inst.* 24.

***J.S*. brought debt for rent against *H*. who pleaded that he was tenant and servant to Lord *Moon*, and prayed his writ of privilege might be allowed him; the plaintiff demurred; it was argued, that the matter of the plea was against the Common statute law; but *per Roll* Ch. J. you ought not to argue generally against the privilege of parliament; every court hath its privilege; I conceive a writ of privilege belongs to a parliament man, so far as to protect his lands and estate; and you have admitted his privilege by your demurrer. *Stil*. 139. *Smith* v. *Hale*. See *Latch* 150, and the S. C. *Stil*. 167, 223. 1 *Jon*. 155.**

The warden of the *Fleet* insisted on a writ of privilege, alleging that he was obliged to attend the house of Lords; but it appearing that he was sued upon an escape, and the court considering the great inconvenience that would ensue, and being of opinion that it was in their discretion whether they would grant such a writ or no, upon a motion they said he might plead it if he would, but they would not award such a writ, or if his privilege was infringed, he might complain to the house of Lords. 2 *Vent*. 154.

In debt, the defendant pleads he was a servant to a member of parliament, and *ideo capi seu arrestari non debet*; the plaintiff prays judgment, and *quia videtur quod tale privilegium quod magnates, &c. & eorum familiares capi seu arrestari non debent; sed nullum habetur privilegium quod non debent implacitari, ideo respondeat ouster*. 1 Mod. 146.

Defendant after a general imparlance pleaded, That he was a servant to a peer, *viz*. the Earl of *Pembroke*; and by *North* Ch. J. it is not receivable, for it is the privilege of the master and not the servant's; but the defendant ought to sue his writ of privilege, for perhaps his master will not protect him; and if he will not, he is then left to answer; like to the case of a counsellor, where it is the privilege of the client that he shall not be compelled to discover the secrets of his client; but if the client be willing, the court will compel the counsel to discover what he knows; which Serjeant *Maynard* said was his father's case before the Lord *Cecil*, in the court of Wards. *North* said, as it was a matter of great consequence, he would advise with Lord Chancellor and the rest

of the judges, what used to be done in such cases; afterwards it was moved again, and *North* said it was moved in the house of Lords, and that they had left it to the judges; and therefore the plea was rejected. *Pasch*. 30 *Car*. 2. in *C. B. Lea* v. *Wheatley*.

By an order of the 24th of *January* 1696, in the house of Lords, it was resolved, That no common attorney or solicitor, though employed by any peer, should have the privilege of this house.

By an order of the 24th of *May* 1724, this privilege was restrained to menial servants, and others necessarily employed about the estates of peers.

By an order of the 22d of *January* 1715, it was resolved, That every peer should upon his honour certify to the house, that the persons protected were within the privilege of the house; and should by letter acquaint the party, arresting such privileged person, with the same.

An attorney was taken in execution upon a *ca. sa.* about two years ago, but upon a letter under the hand and seal of the Lord *Say and Seal*, the sheriff discharged him as steward to his lordship; a rule was obtained at the side-bar for the return of the writ; and now on motion in court to discharge this rule, it was urged in behalf of the sheriff, that this privilege belonged only to the peer, and not to the party, and was not returnable to the process; and that therefore the court ought not to insist upon a return, as the sheriff could not justify the detention of the defendant, but under peril of the house of peers; but on consideration of the abovementioned orders, and on considering the nature of this case, that the plaintiff was within the ordinary justice of the court intitled to a return of his writ; that without such return he might be debarred from any further execution; but principally from the great inconveniency that might arise by allowing attornies, who are officers to the courts in which they respectively practise, and therefore amenable to those courts, this kind of privilege; the court gave the plaintiff liberty to proceed against the sheriff, but gave him time 'till next term to make his return. *Mich*. 10 *Geo*. 2. in *B. R. Wickham* v. *Hobart*, 4 *Bac. Abr*. 230.

In all civil causes this privilege is regularly to be allowed; so that a peer of the realm, or a member of the house of Commons, is not to be arrested or molested in his person or estate. *Bro. Exigent.*

But privilege of parliament doth not extend to high treason, felony, breach of the peace, or surety of the peace. 4 *Inst.* 25. *Prinn's Survey of*

Parliament Writs.

And therefore in an indictment for treason or felony, trespass *vi & armis*, assault or riot, process of outlawry shall issue against a peer of the realm; for the suit is for the King, and the offence is a contempt against him; but in civil actions between party and party, regularly a *capias* or *exigent* lies not against a lord of parliament. 2 *Hal. Hist. P. C.* 199. 2 *Hawk. P. C.* 424.

If a peer of parliament be convicted of a disseisin with force, a *capias pro fine* and *exigent* shall issue; for the fine is given by statute, in which no person is exempted. *Cro. Eliz.* 170. Lord *Stafford* v. *Thynne*. See *Dyer* 314.

So in debt upon an obligation against the Earl of *Lincoln*, who pleaded *non est factum*, which being found against him, the judgment was *ideo capiatur*; which on a writ of error brought by him was objected to, in that a *capias* does not lie against a peer of the realm; *sed non allocatur*; for by this plea found against him, a fine is due to the King, against whom none shall have any privilege. *Cro. Eliz.* 503. *Earl of Lincoln* v. *Flower.*

An information was exhibited in *B. R.* against the Earl of *Devonshire*, for striking in the King's palace; which being in time of parliament, he insisted on his privilege of a peer, and refused to plead in chief, but put in his plea of privilege, to which there was a demurrer, and the plea overruled, and he was fined 30000 *l. Comb.* 49. *The King* v. *Earl of Devonshire*.

In the case of the seven bishops it was insisted, that peers of the realm could not be committed in the first instance, for a misdemeanor before judgment; and that no precedent could be shewed where a peer had been brought in by a *capias*, which is the first process for a bare misdemeanor; and they put in a plea in writing of their being peers, *&c.* but the plea was rejected. 3 *Mod.* 215.

Also peers of the realm are punishable by attachment for contempts in many instances; as for rescuing a person arrested by due course of law; for proceeding in a cause against the King's writ of prohibition; for discharging other writs, wherein the King's prerogative, or the liberty of the subject are nearly concerned; and for other contempts which are of an enormous nature. 2 *Hawk. P. C.* 152.

If a peer be returned on a jury, on his bringing a writ of privilege he may be discharged; also it seems the better opinion, that without such

writ he may either challenge himself, or be challenged by the party. *Dyer* 314. *Moor* 767. 9 *Co*. 49. *Co. Lit.* 157. 1 *Jon*. 153.

Also in the case of Sir *Edward Bainton*, who being returned on a jury, the court would not force him to be sworn against his will, he being a parliament man, and the parliament then sitting. *Pasch*. 27 *Car*. 2. in *B. R*.

A day of grace shall not be given against a lord of parliament; for he is presumed to be attendant on the service of the publick. 9 *Co*. 49. *a*.

So if a peer be made steward of a base court, or ranger of a forest, he may from the dignity of his person, and the presumption that he is engaged in the more weighty affairs of the Commonwealth, exercise these offices by deputy; though there are no words for this purpose in his creation. 9 *Co*. 49. *a*.

So if a licence be granted to a peer to hunt in a chase or forest, he may take such a number of attendants with him as are suitable to his state and dignity. 9 *Co*. 49. *b*.

A peer or lord of parliament cannot be an approver; for it is against *Magna Charta* for him to pray a coroner. 3 *Inst.* 129.

If a peer of the realm bring an appeal, the defendant shall not be admitted to wage battle, by reason of the dignity of his person. 2 *Hawk. P. C*. 427.

In *Jenkins* the following privileges are laid down as belonging to peers: 1. They are intitled to a letter missive. 2. They have a knight to try an issue which concerns them. 3. They are not to be arrested for debt, trespass or any personal action. 4. They are exempted from serving on juries. 5. To have no day of grace against them. 6. Upon the trial of a peer for treason or felony, they try him upon their honour only, and not upon oath. 7. When they pass through any of the King's forests to attend upon the King, upon blowing a horn they may have a buck or doe, as the season of the year is. 8. They have power in their house to reverse judgments given in the King's Bench. 9. They have the benefit of clergy, tho' they cannot read. 10. They are not liable to find carriages for the King when he removes from one place to another. *Jenk*. 107.

In the case of Colonel *Pit*, the parliament was prorogued the 16th of *April* 1734, dissolved the 17th, and the new writs bore *teste* the 18th following, and the defendant *Pit*, who was a member of that parliament, was arrested on the 20th; one of the questions in this case

was, Whether the arrest was within the time of privilege? And it was determined that it was, although the defendant had lived for two years before no farther distant from *London* than *Hammersmith*; but the court did not think it necessary, in the determination of this cause, to ascertain the exact time of privilege that members of the house of Commons were intitled to after a dissolution of parliament. *Trin*. 8 *Geo*. 2. in *B. R*. Col. *Pit's* case. See *Stran. Rep*. 985. and *Reports in Time of Lord Hardwicke* 16—27.

3. OF THE PROCEEDINGS IN COURTS BY AND AGAINST PERSONS INTITLED TO PRIVILEGE OF PARLIAMENT.

By the statute 12 & 13 *W*. 3. *cap*. 13. *sect*. 1. It is enacted, That any person may prosecute any suit in any of his Majesty's courts at *Westminster*, or Chancery, or Exchequer, or the Dutchy court, or in the court of Admiralty; and in all causes matrimonial and testamentary in the courts of arches, the prerogative courts of *Canterbury* and *York*, and the delegates, and all courts of appeal, against any lord of parliament, or any of the knights, citizens and burgesses of the house of Commons, or their servants, or any other person intitled to privilege of parliament, at any time immediately after the dissolution or prorogation of parliament until a new parliament shall meet, or the same be re-assembled, and immediately after any adjournment of both houses for above fourteen days until both houses shall meet; and the said courts may after such dissolution, prorogation or adjournment, proceed to give judgment, and to make final Decrees and sentences thereupon; any privilege of parliament notwithstanding.

***Sect*. 2. Provided, That this act shall not subject the person of any of the knights, citizens and burgesses, or any other person intitled to privilege of parliament, to be arrested during the time of privilege; nevertheless if any person have cause of action or complaint against any peer, such person after such dissolution, prorogation or adjournment as aforesaid, or before any sessions of parliament, may have such process out of his Majesty's courts of King's Bench, Common Pleas and Exchequer against such peer, as he might have had out of time of privilege; and if any person have cause of action against any of the knights, citizens or burgesses, or any other person intitled to privilege of parliament, after any dissolution, prorogation or such adjournment, *&c*. such person may prosecute such knight, citizen or burgess, or other person intitled to privilege, in his Majesty's courts of King's Bench, Common Pleas and Exchequer, by summons and**

distress infinite, or by original bill and summons, attachment and distress infinite, which the said courts are impowered to issue, until they enter a common appearance, or file common bail; and any person having cause of suit or complaint may in the times aforesaid exhibit any bill or complaint against any peer, or against any of the said knights, citizens or burgesses, or other person intitled to privilege, in the Chancery, Exchequer or Dutchy court, and proceed thereupon by letter or *subpœna* as usual; and upon leaving a copy of the bill with the defendant, or at his last place of abode, may proceed thereon; and for want of an appearance or answer, or for non-performance of any order or decree, may sequester the estate of the party, as is used where the defendant is a peer, but shall not arrest the body of any of the said knights, citizens and burgesses, or other privileged person, during the continuance of privilege of parliament.

***Sect.* 3. Where any plaintiff shall by reason of privilege of parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution, but shall upon the rising of the parliament be at liberty to proceed.**

***Sect.* 4. No suit or proceeding in law or equity against the King's original and immediate debtor, for the recovery of any debt originally and immediately due to his Majesty, or against any person liable to render an account to his Majesty for any part of his revenues, or other original or immediate duty, or the execution of any such process, shall be impeached or delayed by privilege of parliament; yet so that the person of such debtor or accountant, being a peer, shall not be liable to be arrested, or being a member of the house of Commons, shall not, during the continuance of privilege, be arrested by any such proceeding. See the *stat.* 2 & 3 *Ann. cap.* 18. 11 *Geo.* 2. *cap.* 24.**

***Sect.* 5. This act shall not give any jurisdiction to any court to hold plea of any real or mixed action in other manner than such court might have done before.**

It hath been always held, that a peer is to put in his answer to a bill in equity, on his honour only, and not on his oath; but when he is examined as a witness, he must be sworn.

Also if a peer is by order of court to be examined on interrogatories, or to make an affidavit, the same must be on oath. *Salk. 513. & vid. Preced. Chan.* 92.

As where the Lord *Stourton* brought a bill against Sir *Thomas Meers*, to compel him to a specifick performance of articles for the purchasing of Lord *Stourton's* estate, Sir *Thomas* in his defence insisted, that there were defects in Lord *Stourton's* title to the estate; and it being ordered that Lord *Stourton* should be examined on interrogatories touching his said title; it was objected, that Lord *Stourton* being a peer of the realm ought to answer upon honour only; but it was ruled by Lord *Harcourt*, that tho' privilege of peerage did allow a peer to put in his answer upon honour only, yet this was restrained to an answer; and as to all affidavits, or where a peer is examined as a witness, he must be upon oath; and that this examination upon interrogatories, being in a cause wherein his Lordship was plaintiff, to enforce the Execution of an agreement, as his lordship would have equity, so he should do equity, and allow the other side the benefit of a discovery, and that in a legal manner; and accordingly ordered Lord *Stourton* to put in his examination on oath. 1 *P. Will*. 145. *Salk*. 513. S. C. *Sir Tho. Meers* v. *Lord Stourton*.

It hath been held, that though a court of equity will not proceed against a member that hath privilege of parliament, yet if a parliament man sues at law, and a bill is brought here to be relieved against that action, the court will make an order to stay proceedings at law 'till answer or further order. 1 *Vern*. 329.

***R. T*. being chose a burgess for *Buckingham*, and having a trial at bar to be had on *Tuesday* before the sitting of the parliament, moved to have his privilege allowed him; but was denied, in regard the parliament was not sitting, nor to sit 'till after the trial had. *Raym*, 12. 1 *Sid*. 42. S. C.**

It hath been held, that in an action founded on the abovementioned statute 12 *W*. 3. the defendant shall have an imparlance; and it was said in this case, that the practice is to file a bill in nature of a special *capias* against the defendant, and then to summon him; and if he appers [sic] upon such summons, the plaintiff may declare against him, as *in custodia marescalli*, Hill. 10 Geo. 1. in B. R. Wadsworth *v*. Handiside.

Peers are intitled to a letter missive, which method was introduced upon a presumption that peers would pay obedience to the Chancellor's letter; and is founded on that respect that is due to the peerage. *Jenk*. 107.

If the lord doth not appear upon the letter, a *subpœna* on motion is

awarded against him; because no subsequent process can be awarded but upon a contempt to the Great seal, and the Chancellor's letter is only *ex gratia*.

If on the service of the *subpoena*, the peer doth not appear, or if he appears, and does not put in his answer, no attachment can be awarded against him, because his person cannot be imprisoned; but the proceedings must be by sequestration, unless cause, *&c*. and this is regularly made out, upon affidavit made of the service of the letter and the *subpœna*, though sometimes it is moved for without, since the peer may shew want of service at the day assigned to shew cause why the sequestration should not issue; and this order for a sequestration is never made absolute without an affidavit of the service of the order to shew cause, and a certificate of no cause shewn. 2 *Vent.* 342.

A bill being filed against a peer or peeress, the first application is for my Lord Chancellor's letter returnable in term time; or it may be *immediate*, if the peer or peeress lives in town; but in this case there must be an affidavit, that the original letter is left with the peer at his house, with a copy of the petition as answered; and therewith also is left an office copy of the bill signed by the six clerk; for if the bill is not signed, the service is irregular. 4 *Bac. Abr.* 238.

This letter is only a compliment, and no process to found proceedings on; so that the peer may appear or not, as he pleases; if he fails a *subpœna* issues against him, and his time for appearing and answering being out, an attachment must be actually sealed and entred against him, though never executed, to ground a sequestration upon. It is a motion of course for a sequestration upon an attachment for want of an answer. 4. *Bac. Abr.* 238.

The peer must be personally served with this order, and he hath eight days to shew cause after personal service of the order; if no cause, the order is absolute; but if the sequestration is for want of an appearance, and he appears, the plaintiff must run the same race over again for want of an answer, and the peer must pray time to answer, as suitors do. 4 *Bac. Abr.* 238.

The same proceeding is against a member of the house of Commons; there the party proceeds by way of sequestrations, only with this difference, that instead of a letter, there is always a *subpœna* sued out; and when a cause either against a peer or a commoner stands in the paper, and is called, and cannot proceed (privilege being in) the court

never strikes it out as they do in other cases; where the party is not ready, they let it stand over from one term to another, till privilege is out, and never put the party to sue out a *subpœna* to hear judgment; and the direction of the court to the register is to put privileged causes (which have been put off on that account) the very first causes in the paper when the court sits after privilege is out. 4 *Bac. Abr.* 238.

A sequestration was granted, unless cause, against the Lord *Clifford* for want of an answer; he afterwards put in an answer, which being reported insufficient, it was moved for a sequestration absolutely, an insufficient answer being as no answer; but the court thought it a hardship in the case of a peer or member of the house of Commons, that a sequestration, which in some respects is in nature of an execution, should be the first process against them; and therefore allowed, that in case of an answer which is reported insufficient, the plaintiff is to move again *de novo*, for a sequestration *nisi*. 2 *P. Will.* 385. Lord *Clifford's* case.

It was moved for a sequestration *nisi*, for want of an answer, against a menial servant of a peer of the realm, as the first process for contempt, in the same manner as in the case of the peer himself; and though the motion was granted by the Master of the Rolls, yet the register refused to draw it up as thinking it against the course of the court; which being moved again before the Lord Chancellor, his Lordship, upon reading the statute 12 *W.* 3. likewise granted the motion, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons; consequently there would be no remedy against them, and they would have a greater privilege than their lord, if the process against such menial servant were to be a *subpoena*. 1 P. Will. 535.

***For more learning on this subject, see* 17 Vin. Abr. *and* 4 Bac. Abr. *tit.* Privilege.**

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18.3.2CASE LAW

18.3.2.1Bayard v. Singleton

Ejectment. This action was brought for the recovery of a valuable house and lot, with a wharf and other appurtenances, situate in the town of New Bern.

The defendant pleaded *not guilty*, under the common rule.

He held under a title derived from the State, by a deed, from a Superintendent Commissioner of confiscated estates.

At May Term, 1786, *Nash* for the defendant, moved that the suit be dismissed, according to an act of the last session, entitled an act to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose, 1785, 7, 553.

The act requires the Courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the Commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

The Court made a few observations on our constitution and system of government.

ASHE, J., observed, that at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people ship wrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system or those fundamental principles comprised in the constitution, dividing the powers of government into separate and distinct branches, to wit: the legislative, the judicial and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaries: this he said without disclosing a single sentiment upon the cause of the proceeding, or the law introduced in support of it.

CURIA ADVISARE VULT.

At May term, 1787, Nash's motion was resumed, and produced a very lengthy debate from the bar.

Whereupon the Court recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant, the uncertainty, that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present act, (which would probably happen sooner or later) suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid act. The Court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the Legislature and the Judicial powers of the State, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously for overruling the aforementioned motion for the dismission of the said suits.

In the course of which the Judges observed, that the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly have incurred, against their maintaining or prosecuting any suits in the Courts of this State; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, or citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly.

That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die,

without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Nash's motion was overruled.

And at this term the cause was tried.

Both the plaintiffs and the defendant admitted the title of the premises to have been in Samuel Cornell, Esq., at and before the time when the independence of this State commenced.

The case appeared to be this: Mr. Cornell, once an inhabitant of New Bern, leaving his family, together with the premises in question, and a variety of property in this town, took shipping on the 19th of August, 1775, and went to Great Britain, where he continued till some time in the latter part of the year 1777, when he came to New York, then occupied by a British garrison; and as a British subject came from thence and arrived in New Bern, on the 11th of December, 1777, and under the protection of a British flag.

His principal design, in coming to this State at that time, was to take his wife and family with him, to reside under the British Government, if he did not find our new government agreeable to his wishes. Not being pleased with the appearance of things here, and thereupon preparing to leave the State, and to carry with him his wife and family, he executed on board the vessel he came in, a deed to his daughter, one of the plaintiffs (under which they claim) for the premises in question, on the 19th of December, 1777.

This deed for the purpose of execution had been handed to him without a date, and being asked what date he chose it should bear, he hesitated and said he would look at the copy of a bill which was then in his possession, which bill he understood to be on its passage in the legislature, for

confiscating the property of all persons of his description, who should not within a limited time come into this State, and be made citizens thereof, which bill afterwards in the same session passed into a law. After looking at the aforesaid copy of that bill, he chose that the deed should bear date on the 11th of the same month, being the day he arrived in the harbour of New Bern; which deed was accordingly dated that day. After which Mr. Cornell returned with his family from this State, and from thenceforth lived and died a British subject, under the British Government.

The Court, ASHE, J., SPENCER, J., and WILLIAMS, J., gave their opinion *seriatim*, but unanimously.

They observed that the cause turned chiefly on the point of *alienage* in Mr. Cornell. For this gentleman, having from his birth to the time of his death, been always a British subject, and having always lived under the British government, he owed allegiance to the King of Great Britain, and consequently was never a citizen of this, or any other of the United States, nor owed allegiance thereto. For when here, at the time of the transaction aforementioned, he was under the protection of a British flag. That he was therefore, in contemplation of law, as much an *alien*, and at the time of executing the deed, and, from the time of our independence as much an *alien* ENEMY, as if we had been a separate and independent nation, for any number of years or ages before the commencement of the war which was then carried on.

That it is the policy of all Nations and States, that the lands within their government should not be held by foreigners. And therefore it is a general maxim, that the allegiance of a person who holds land ought to be as permanent to the government who holds it, as the tenure of the soil itself.—That therefore by the civil, as well as by the common law of England, *aliens* are incapacitated to hold lands. For that purpose the civil law has made the contracts with *aliens* void. The law of England, which we have adopted, allows them to purchase, but subjects them to forfeiture immediately; and does not allow an *alien* ENEMY any political rights at all.

That the premises in question, upon these invariable principles of law, could not from the time our government commenced, have been held by Mr. Cornell; because that in consequence of his owing no allegiance to the State, he had no capacity to hold them, and according to the letter of the law of the land, they must have consequently been forfeited to the sovereignty of the State. That the act of confiscation, in which Mr. Cornell was

expressly named, and more particularly the act which especially directed the sale of the very premises in question, must have been at least as effectual in vesting them in the State, as any *office found*, according to the practice in England can be, for vesting any forfeited property in the King.

That the circumstances and limited privileges of persons who were sent out of this State under a particular act of our General Assembly, are not applicable to this case. That the case in Vattel, of the majority of the inhabitants of any country deliberately dissolving their old government, and setting up a new one, is neither in reason, nor in the most essential circumstances, anyways similar to this case. That *Calvin's* case, reported in Coke, does by no means reach the leading and characteristic circumstances of this case.

The jury found a verdict for the defendant.

1 N.C. 42 (1787).

18.3.2.2Apthorp v. Backus

In this action, the plaintiff was described by the name of "Henrietta Apthorp, of the island of Jamaica, in the West Indies, a minor, of the age of sixteen years, who sues by Perez Morton, Esq. of Boston, in the county of Suffolk, and commonwealth of Massachusetts, her next friend and guardian."–Then followed the declaration, in these words:–"That to the plaintiff the defendant render the seisin and peaceable possession of a certain lot or parcel of land, with the buildings thereon; which lot consists of about one-eighth part of an acre in quantity, is situated at a place called Chelsea, or Norwich Landing (then describing the boundaries) and is the same estate which, on the 18th day of February, A. D. 1768, was, by deed of mortgage, conveyed by Eleazer Fitch, Esq. of Windham, in the county of Windham, to Mr. Stephen Apthorp, then of Bristol, in the kingdom of Great Britain, but late of said island of Jamaica, now deceased, as by the records of said town of Norwich may appear; which said Stephen, when in life, was parent of the said Henrietta. Of which described premises the said Stephen being in full life, on the 2d day of May, A. D. 1770, became well and legally seised, in his own right, in fee, and so thereof continued to be seised and possessed, until the day of his death, which happened on or about the 1st day of January, A. D. 1773, when the said Stephen died, leaving issue and only heir the forenamed Henrietta; who thereupon, at the death of her

said parent, by virtue of her right of inheritance in the demanded premises, by her said next friend, became immediately well and legally seised, in her own right in fee, of the same estate, and thereof continued seised and possessed, until on or about the 1st day of January, A. D. 1774; at which time the defendant, with force and arms, entered into said described premises, against law and without right, and disseised the plaintiff thereof, and put her out therefrom, and every part thereof, described as aforesaid (excepting two stores standing on said land, and the land covered by said stores;) and ever since the defendant hath and still doth continue to deforce and hold the plaintiff out therefrom, taking to himself the whole profits, use, and improvements of the demanded premises, to this time; to the damage of the plaintiff the sum of, *etc.* to recover which, together with the seisin and quiet possession of said demanded premises, and his cost, she brings this suit," *etc.*

The general issue was pleaded, and a verdict for the plaintiff.–The defendant moved in arrest of judgment, and assigned five reasons:–

…

2. That the declaration is insufficient to found any judgment upon; for that it appears the plaintiff is an alien;–and therefore, cannot, by law, hold or recover any real estate.

…

But the motion was ruled insufficient.

…

By Law, C. J., and Ellsworth, J.

The second exception moved in arrest, is–That the declaration is ill; because the plaintiff is an alien; and cannot, therefore, maintain a real action:–

A state may exclude aliens from acquiring property within it of any kind, as its safety or policy may direct; as England has done, with regard to real property, saving that in favor of commerce, alien merchants may hold leases of houses and stores, and may, for the recovery of their debts, extend lands, and hold them, and upon ouster have an assize. Dyer, 2, 6.–Bac. Abrid. 84.–But it would be against right, that a division of a state or kingdom should work a forfeiture of property, previously acquired under its laws, and that by its own citizens; which is the case here.–The plaintiff's title to the land in question accrued while she was not an alien, nor could she be affected by the disability of an alien, but was as much a citizen of the now state of Connecticut, as any person at present within it, and her descent

was cast under its laws;–her title is also secured by the treaty of peace, which stipulates, that there should be no further forfeitures or confiscations, on account of the war, upon either side.

The subsequent statute of this state, declaring aliens incapable of purchasing or holding lands in this state, does not affect the plaintiff's title, otherwise than by recognizing and enforcing it; for it hath a proviso, that the "act shall not be construed to work a forfeiture of any lands which belonged to any subjects of the king of Great Britain before the late war, or to prevent proprietors of such lands from selling and disposing of the same to any inhabitant of any of the United States."–It is not, indeed, expressly said, that the proprietors of such lands may maintain actions for the possession of them, but this is clearly implied; for lands without the possession are of no use; and wherever the law gives or admits a right, it gives or admits also everything incident thereto, as necessary to the enjoyment and exercise of that right:–And besides, they cannot sell their lands till they first get possession of them; for all sales of land in this state, whereof the grantor is dispossessed, except to the person in possession, are, by express statute, void–So that the plaintiff is not barred of her title, or right of action, either at common law, or by statute.

…

So the motion in arrest was ruled insufficient.

Sherman and Pitkin, JJ., contra.

We are of opinion, that the motion in arrest is sufficient.–

…

As to the second and fifth exceptions–We agree in opinion with the chief justice and Judge Ellsworth, for the reasons given by them.

…

But if, notwithstanding these reasons to the contrary, judgment shall be rendered for the infant, we think that the execution ought to be stayed, until she arrive at full age, or until a guardian legally appointed appears to take possession of the estate for her benefit.

Kirby 407 (Conn. 1788).

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1 Preamble

2 Equal justice to be administred

3 Foreigners &c. to pay no greater Duties &c. than the Citizens.

4 Preamble.

5 No person believing in One God, &c. shall be molested on account of his religious persuasion; nor be compelled to frequent or maintain any worship contrary to his mind, &c.

6 Christians of all denominations are capable of offices, promising allegiance to the King, &c.

7 An Assembly shall be chosen yearly.

8 Their powers and privileges.

9 Criminals may have council, &c.

10 None shall be obliged to answer, but in ordinary course of justice.

11 Tavern-keeper &c. to be recommended before licensed,

12 The estate of persons destroying themselves, shall descend to their heirs.

13 No law, &c. shall alter this charter, without, &c.

14 The article relating to liberty of conscience shall be inviolable for ever.

15 The Proprietary solemnly confirms this charter.

16 Of the common law;

17 Recital That K. *James* I. granted to the Council at *Plymouth* in *Devon*. All that Part of *America* from 40 to 48 Degrees Nor, Latitude. To hold in Fee. Paying the fifth Part of the Oar of Gold and Silver. That the Council at *Plymouth* granted to Sir *Henry Roswell* and others. Part of *New England* by certain Bounds. To hold in Fee.

18 This charter was granted by William Penn, with the approbation of the general assembly, and remained in force until the Revolution.

e Such laws among the Romans were denominated *privilegia*, or private laws, of which Cicero *de leg*. 3. 19. and in his oration *pro domo*, 17. thus speaks; "*Vetant leges sacratae, vetant duodecim tabulae, leges privatis hominibus irrogari*; *id enim est privilegium. Nemo unquam tulit, nihil est crudelius, nihil perniciosius, nihil quod minus haec civitas ferre possit.*"

APPENDIX

Bill of Rights[1]

Article the third … Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press,[2] or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article the fourth … A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.[3]

Article the fifth … No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner prescribed by law.[4]

Article the sixth … The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[5]

Article the seventh … No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any

person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.[6]

Article the eighth … In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Article the ninth … In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.[7]

Article the tenth … Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article the eleventh … The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the twelfth … The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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1 These ten articles were ratified by 1791. Article the First was never ratified. Article the Second was ratified in 1992 and became the Twenty-Seventh Amendment.

2 In some transcriptions, there is a semicolon and not a comma after “press.”

3 In some transcriptions, the first letters of *militia* and *arms* are capitalized. However, while the first letters of each word are slightly elevated above the remaining letters, they are not nearly as elevated as letters that are plainly capitalized.

4 In some transcriptions, the first letters of *soldier* and *owner* are capitalized. But see footnote 3.

5 In some transcriptions, the first letters of *warrant* and *oath* are capitalized. But see footnote 3.

6 In some transcriptions, the first letters of *militia* and *war* are capitalized. But see footnote 3.

7 In some transcriptions, the first letter of *suits* is capitalized. But see footnote 3.

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