WILLIAM DYER. 1830

A

DIGEST OF LAWS

RELATING TO THE

OFFICES AND DUTIES

OF

SHERIFF, CORONER AND CONSTABLE.

BY JOSEPH BACKUS, Counsellor at Law.

IN TWO VOLUMES.

VOL. I.

NEW-YORK:
PRINTED FOR THE AUTHOR.
1812.

I. I.

DISTRICT OF CONNECTICUT, *To wit:*

[*L. S.*] BE IT REMEMBERED, that on the thirteenth day of July, in the thirty-seventh year of the Independence of the United States of America, Joseph Backus of the said District, hath deposited in this Office the title of a Book the right whereof he claims as Author, in the words following, to wit:

"*A Digest of the Laws relating to the Offices and Duties of Sheriff, Coroner and Constable. By Joseph Backus, Counsellor at Law. In two Volumes. Vol. I.*"

In Conformity to the act of the Congress of the United States, entitled, "An Act for the encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies, during the terms therein mentioned.

HENRY W. EDWARDS, Clerk of the District of Connecticut.

A true Copy of Record, examined and sealed by me, H. W. Edwards, Clerk of the District of Connecticut.

RECOMMENDATION.

I HAVE perused with much satisfaction the first Volume of "A Digest of the Laws relating to the Office and Duties of Sheriff," &c. by J. Backus, esq. It is a compilation that must have required great labor, and it appears to me to have been made with care and ability. I think the Profession will find it a very useful Book, and that we are much indebted to Mr. Backus for having collected for us a mass of information relative to the Subjects on which it treats, which is not to be found in any other volume.

CADWALLADER D. COLDEN.

New-York, 7th September, 1812.

W. A. Davis, Print.

RECOMMENDATIONS.

I HAVE inspected a Treatise by Joseph Backus, esq. entitled, "A Digest of Laws relating to the Offices and Duties of Sheriff, Coroner and Constable;" *and am of opinion that the Plan is good, the Compilation faithful, and that the Book will be useful to Magistrates, to Gentlemen of the profession of the Law, and to Ministerial Officers. It contains much valuable information on the subjects above mentioned, collected and arranged with Order and Perspicuity.*

DAVID DAGGETT.

January 6th, 1812.

I HAVE inspected with much satisfaction a Treatise by Joseph Backus, esq. entitled, "A Digest of Laws relating to the Offices and Duties of Sheriff, Coroner and Constable." *The subject appears to me to be treated in a manner very judicious, and has great merit in point of due Arrangement and Perspicuity; and have no doubt but that it will be found not only useful to Ministerial Officers, but will also be a valuable Acquisition to Gentlemen of the Profession of the Law.*

TAPPING REEVE.

July 8th, 1812.

ADVERTISEMENT.

THE following Digest is compiled from English elementary writers' Digests, Abridgments, and Reports, from Reports of Cases adjudged in the Supreme Courts of and United States, and of the States of New-York, Massachusetts, and Vermont; and in the Superior and Supreme Courts of Connecticut:* from books of practice, English and American, and from the Statutes of New-York, Massachusetts, Connecticut, New-Hampshire, Vermont, and Rhode-Island. The Statutes of Vermont concerning the office of High Bailiff, and of Rhode-Island as to those of Town Sergeant are also included.

The forms of Returns, Inquisitions, Declarations, Bonds, &c. are some of them framed from the Statutes of each of those States respectively, and others collected from various American and English books of Precedents and Forms varied, however, in such respects as the Compiler deemed expedient.

* No reports have been published in the States of New-Hampshire and Rhode-Island. Since the work was in the press, the Author has digested a number of cases from the Pennsylvania Reporters, and some from those of more Southern States, and inserted them in the Addenda to the second volume.

ADVERTISEMENT.

In a work designed for use in so many different States, it became necessary, carefully to distinguish between the Laws peculiar to each: this the Compiler has done as far as was practicable, by digesting the Statutes of each respective State, into a single chapter divided into sections, under appropriate heads.

In the other parts of the work, for the like purpose, the Compiler has through all the sections, introduced his authorities and cases adjudged, in the following order, viz. first English, then New-York, then Massachusetts, then Connecticut, and last Vermont. He has presumed that the English Common Law, upon the subjects treated of, is recognized in all cases where it is applicable, and has not been superceded by some Constitutional Provision or Legislative Act. In the State of New-York it is so declared by their Constitution; in the State of Vermont the same is done by Statute: the terms and phraseology of the Constitutions and Statutes of the other States, authorizing and regulating the *appointment* of Sheriffs, Coroners and Constables, clearly demonstrate that their respective offices, were before the existence of those Constitutions and Statutes, well known, and their duties understood; in fact they were derived from the Common Law. Repeated adjudications of the Supreme Courts of Massachusetts and Connecticut authorize the same presumption. In digesting of Statutes the Compiler has introduced a narrating, instead of the enacting style, and carefully retained the legal dialect of each particular State.

The Compiler's care to preserve the true meaning of his different authorities, and his intention of transcribing the work himself, and in so doing to endeavour to give it a greater uniformity of style before sent to the press, induced

him at first to copy from his originals wherever convenient: but want of health sufficient for so laborious a task in any proper time, and his inability to superintend the impression, have in some measure prevented the completion of his original design, and the making those corrections he should otherwise have done.

THE AUTHOR.

Bridgeport, 8th September, 1812.

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1	17	For *chargeables* read *chargeable.*
2		Note § for *officers* read *office of.*
9	19	For *break* read *breaks,* and for *flee* read *flies.*
	15	For *be* read *is.*
13	26	For *granted* read *granteth.*
18		From the last bottom note dele *k.*
25	25	For *pacis* read *pais.*
75	18	Dele *the* before attachment.
84	20	For *concerning* read *concurring.*
94		In side note for *or* read *on.*
105	14	For *on* read *or.*
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110	5	For *utlegatus* read *utlagatus.*
	15	For *utlegata* read *utlagata.*
111	22	For *on* read *or.*
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BOOK I.

OF THE

OFFICES AND DUTIES

OF

SHERIFF, CORONER AND CONSTABLE.

CHAP. I.

Appointment, and general Powers and Duties.

I. SHERIFF.

SHERIFF.

THE sheriff is an officer of very great antiquity. According to sir Edward Coke, the name is compounded of two Saxon words, *shire* and *reeve*. Shire comes *from the verb shiram partiri*, to part; for that the whole realm is divided into shires. And *reeve* is *præfectus*, or *præpositus*, so as *shirieve* is *reeve* of the *shire*, *præfectus*, *satrapiæ*, *provinciæ*, or *comitatus*. He is called prefect, because he is the chief officer of the king within the shire: for the words of his commission are, *commisimus vobis custodiam comitatus nostri*, &c. We commit to you the keeping of our county of, &c. And he has a threefold custody, *triplicem custodiam*. First, *vitæ justitiæ*, for no suit begins, and no process is served but by the sheriff: he is also to return indifferent juries for the trial of men's lives, liberties, lands, goods, &c. Secondly, *vitæ legis*, he is, after long suits, and chargeables, to make execution; which is the life and fruit of the law. Thirdly, *vitæ reipublicæ*, he is *principalis con-*

The name, whence derived.

How great his authority and power.

SHERIFF.

*servator pacis,** within the county, which is the life of the commonwealth, *vita reipublicæ pax.*† He is called *vice comes*, i. e. *vice comitis*, instead of the earl of that county, who, in ancient time had the regiment of the county under the king. For it is said, that it appeared by the ordinance of ancient kings, before the conquest, that the earls of the counties had the guard and custody of them. And when the earls left their custodies or guards, then was the custody of counties committed to viscounts, who are therefore called vice comites, because they supply the place of earls or counts.

Succeeds to the power of the earl.

An office of high dignity.

Marculphus saith, This office is *judiciaria dignitas.*‡ Lampridius, That it is *officium dignitatis.*§ Fortescue saith, *Quod vice comes est nobilis officiarius.*‖ But to confirm all that hath been said touching the point, and to conclude the same, among the laws of Edward the Confessor, I find it thus recorded: *Verum quod modo vocatur comitatus, olim apud Britannos temporibus Romanorum in regno isto Britanniæ vocabantur consulatus, et qui modo vocantur vice comites tunc temporis vice consules vocabantur: ille vero dicebatur vice consul qui consule absente ipsius vices supplebat in jure et in foro.*¶ Herein many things are worthy of observation. First, The antiquity of counties. Secondly, That which we called *comitatum*, the Romans more latinly called *consulatum*. Thirdly, Whom the Saxons afterward called shreve or earl, the Romans called consul. Fourthly, That the sheriff was deputy of the consul or earl.

Derived from the Romans, who called it by a different name.

* Principal keeper of the peace.
† Peace, the life of the Commonwealth.
‡ A judiciary dignity.
§ An official dignity.
‖ That the vice count is a noble officer.
¶ But what is now called a county, formerly among the Britons, in the times of the Romans, in this kingdom of Britain, were called consulships, and those who are now called viscounts, in those times were called vice consuls; he was truly called vice consul, who, the consul being absent, supplied his place in law, and in court.

and therefore the Britons called him *vice comul*, as we at this day call him *vice comes*. Fifthly, That the sheriff in the Romans' time, and before, was a minister to the king's court of law and justice, and had then a court of his own, which was the county court, then called *curia consulatus*, as appears by these words, *ipsius vicus supplebat in jure et in foro*. Sixthly, That the realm was divided into shires and counties, and those shires into cities, boroughs, and towns, by the Britons; so that king Alfred's division into shires and counties, was but a renovation, or more exact description of the same.(*a*)

Burn says, that the word *comes*, or count, came first into Europe out of the eastern countries, probably from the Hebrew *cone* or *cune*, which denotes strength, firmness, or stability. And the word county, in latin *comitatus*, seems to be nothing else but a division, or allotment, over which the *comes* or count had jurisdiction. And when the counts or earls left the custody of the counties, then was the custody thereof committed to the *vicecomits*, or *vice comites*; so called, because they supply the place of the *comes*, or earl. The earl was otherwise called by the Saxons, eorl, ealder, ealderman, (elder or alderman,) because they were usually men of age and experience, by a like derivation as that of Senatores among the Romans.(*b*) Agreeably thereto, sir Edward Coke further says, that amongst the laws of the same king, (Edward the Confessor,) it appears that those whom they called (and now we call) aldermen or earls, the Romans called *Senatores: et similiter, olim apud Britones temporibus Romanorum in regno isto Britanniæ vocabantur Senatores, qui postea temporibus Saxonum vocabantur Aldermani, non propter ætatem sed propter*

(*a*) Inst. I. 168. (*b*) Burn. jus. IV. 172, 173.

SHERIFF. *sapientiam et dignitatem, cum quidam adolescentes essent juris periti tamen, et hoc super experti.**(c)

If Speed is, however, of opinion, that Alfred first divided the kingdom into several counties, (or shires,) instituted a prefect or lieutenant in every of those counties, which then were called *custodes*, keepers; and afterwards, *comites*, earls, who were to keep the county in obedience to the king, and to suppress the outrages of notorious robbers.(d)

The most dignified title and office in the kingdom, from the conquest to the eleventh year of Edward the third, was that of the earl or count. Those in whom that title and office were confirmed, were of the blood royal, and were considered as the companions of the king: hence their name *comites*, companions, *a comitatu*, or as some have it, *comites nomen acceperunt a comitando, quia principem comitarentur ad bella publica negotia, ejus lateri, semper hærentes.*†(e) It is also said, that kings called them companions, for that both out of their love they will, and from their knowledge can, and by reason of their courage, (the true ground of ancient nobility,) they dare advise boldly and truly upon every occasion.(f)

It seems that earls or counts in process of time, by reason of their high employments, and attendance on the king's person, not being able to transact the bu-

* Senators, and in like manner, formerly, among the Britons, in the times of the Romans, in this kingdom of Britain, those were called Senators, who afterwards, in the time of the Saxons, were called aldermen, not on account of their age, but for their wisdom and dignity; when although young, they were yet learned in the law, and upon this experienced.

† The counts received their name from comitando, (accompanying,) because they accompanied the prince to wars and public negotiations, always adhering to his side.

(c) Inst. I. 168. (d) Speed. 4.
(e) Coke IX, 49, 97. (f) Dalt. Sher. 1.

siness of the county, were delivered of that burden; reserving to themselves the honour, while the labour was laid on the sheriff: so that now the sheriff does all the king's business in the county, and though still called *vice comes*, is entirely independent of the earl, deriving all his authority immediately from the king, by whose letters patent the custody of the county is committed to the sheriff alone. (g)

SHERIFF.

Their election.

Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by stat. 28. Edw. I. c. 8. that the people should have election of sheriff in every shire where the shrievalty is not of inheritance. For anciently in some counties, the sheriffs were hereditary, and still continue in the county of Westmoreland, to this day. The reason of these popular elections assigned, is, that the commons might choose such as would not be a burthen to them: and herein appears plainly a strong trace of the democratical part of the English constitution: in which form of government it is an indispensable requisite that the people should choose their own magistrates. (h) But the popular elections growing tumultuous, were put an end to by stat. 9. Edw. II. st. 2. which enacted, that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges, as being persons in whom the same trust might with confidence be reposed. Divers other statutes were past in different reigns on the same subject; but the custom now is, (and has been at least ever since the time of Fortescue, who was chief justice and chancellor of Henry the sixth,) that all the judges, together with the other great officers and privy counsellors, meet in the exchequer on the morrow of St. Martin, and then and there the judges propose three persons to be reported

(g) Dalt. Sher. 2. IX. Coke, 49. (h) Montesq. Sp. L. b. 2. c. 2.

SHERIFF.

(if approved of) to the king, who afterwards appoints one of them to be sheriff.(*i*)

Continuance in office.

Sheriffs, by virtue of several old statutes, are to continue in office no longer than one year; but it has been said, that a sheriff may be appointed *durante bene placito*, or during the king's pleasure; and so is the form of the royal writ.(*j*) Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king; in which last case, it was usual for the successor to send a new writ to the old sheriff: but now, by the 1. Anne, st. 1, c. 8, all officers appointed by the preceding king, hold their offices for six months after the king's demise, unless sooner displaced by the successor. No man who has served the office of sheriff for one year, can be compelled to serve the same again, within three years after.(*k*)

Office cannot be divided.

The office of sheriff cannot be apportioned or divided; and therefore when the king appoints a sheriff *durante bene placito*, he cannot determine it in part, as for one town, or any other part; neither can he abridge the sheriff of any thing incident or belonging to his office; for the office is entire, and so it must continue for the whole county without any fraction or diminution, except it be by act of parliament, or that the king shall constitute a new town, &c. a county of itself, and shall there appoint a sheriff with all things belonging to that office, within the same town, &c. Neither can the office of sheriff be determined, nor any part thereof, without, and until a new sheriff is appointed and qualified to exercise the office for the same county.(*l*)

(*i*) Bl. Com. I. 338, 340, 341.
(*j*) Dalt. Sher. 8.
(*k*) Bl. Com. I. 342, 343.
(*l*) Dalt. Sher. 6, 7. Coke IV. 33.

SHERIFF.

The sheriff, as his name imports, is the keeper or governor of the county; his patent is *commissimus tibi custodiam comitatus*, thereby he has the keeping of the king's rights within the county, and also the keeping of the peace. As the keeper of the king's peace both by common law and by special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office. He may apprehend and commit to prison all persons who break the peace, or attempt to break it: he may, and is bound *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody; he is also to defend his country against any of the king's enemies when they come into the land; and also against any rebellion, insurrection, or riotous assembly of the people; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him, which is called the *posse comitatus*, or, power of the county. And this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning, under pain of fine and imprisonment. (*m*)

His charge.

To justify the sheriff in arresting a man on the suspicion of felony, there must have been a felony actually committed. (*n*)

Whenever the sheriff or other officer may take the *posse comitatus*, or has authority to execute the king's process, or to apprehend felons, rioters, or other breakers of the king's peace, if the sheriff or other officer finds resistance, it seems he may arrest and imprison all such offenders; and whensoever the

May arrest & imprison offenders, when resisted in execution of, &c.

(*m*) Dalt. Sher. 5, 355, 26, 27. Bl. Com. I. 343, 344.
(*n*) Dalt. Sher. 28.

SHERIFF. sheriff shall take the *posse comitatus* with him, though without sufficient cause, yet his servant or any other person may justify the same by the sheriff's command; for such their doing was by authority. And whensoever the party against whom any lawful process, writ, or warrant is granted, shall, after he is arrested, or other execution of such warrant be done, make resistance, or shall make an assault upon the officer, the officer may justify the beating of him, and of all others who shall disturb the officer in the execution of such process, writ, or warrant, and may imprison him or them.(*o*)

His duty as king's bailiff. As the king's bailiff, it is the duty of the sheriff to preserve the rights of the king within his *bailiwick*, for so his county is frequently called in the writs; a word introduced by the princes of the Norman line, in imitation of the French, whose territory was divided into bailiwicks, as that of England into counties. He must seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, or estrays, and the like, unless they be granted to some subject; and must also collect the king's rents within his bailiwick, if commanded by process from the exchequer. He is bound to execute all process issuing from the king's courts in criminal matters; he arrests and imprisons; he returns the jury; he has the custody of the delinquent; and executes the sentence of the court though it extend to death itself.(*p*)

As a peace officer. At common law the sheriff may commit any one for an affront or breach of the peace in his presence.(*q*) Such persons as he may apprehend on suspicion of

(*o*) Dalt. Sher. 32.
(*p*) Bl. Com. I. 344.
(*q*) Fitz. N. B. 81.

treason or felony, upon fresh suit, or hue and cry, he may commit to gaol. But of his own authority he may not arrest any man upon suspicion of felony, unless a felony be in fact committed, and he suspects the person whom he arrests. (*r*)

Duty as a minister of the courts.

By the common law, the sheriff is the same officer to the court of king's bench, as the constable is to the justices of the peace.(*s*) Courts considering the nature of the sheriffs' office, will never give the law a rigid construction against them, where they have acted intentionally right, though by an inadvertence to the letter of the law their conduct was wrong: as where one in execution break the prison and flee into another county, and the sheriff, on fresh pursuit retake him, if, before action brought, it be no escape. (*t*)

If sheriff, &c. be killed in execution of office, it is murder.

If the sheriff, under sheriff, or other officer, who has the execution of process, is slain in doing his duty, it is murder in him who kills him, though there was *no* former malice between them; nor shall the offender take any advantage from any mistake or error in awarding the process, any more than a sheriff who suffers any prisoner to escape shall take such advantage; (*u*) but though the sheriff is thus favoured and respected in the law, yet, for not observing the order of law in executing a condemned malefactor, he shall be guilty of homicide. (*v*)

But where the sheriff upon a bill of Middlesex, made his precept to the bailiff of Westminster, to arrest J. Ferris, kt. where in truth he was not a knight

(*r*) Comp. Sher. 7.
(*s*) Salk. Rep. I. 175, 380.
(*t*) Comp. Sher. 9, 10.
(*u*) Cro. Jac. 280.
(*v*) Comp. Sher. 14.

SHERIFF.

but a baronet, it was held not a good warrant; and the deputy bailiff being killed by sir John's servant, it was not found murder in the servant, who was acquitted on account of the defect of the warrant. (w)

To serve writs, to arrest, &c.

At the commencement of civil causes, the sheriff is to serve the writ, to arrest, and take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. (x)

Has under him many inferior officers.

To perform the various duties belonging to his office, the sheriff has under him many inferior officers; an under sheriff, who is a general deputy; bailiffs, (or special deputies,) and gaoler; who may neither buy, sell, nor farm their offices, under the penalty of five hundred pounds. The under sheriff usually performs all the duties of the office; a few only excepted, where the personal presence of the high sheriff is necessary. (y) The under sheriff possesses all the powers and authority of the high sheriff, (in matters ministerial,) save only that he cannot make a deputy, because it implies an assignment of his whole power, which he cannot assign over. (z)

Must make a deputy of record in the king's courts.

Every sheriff, yearly before he returns any writs, makes a deputy of record in every of the king's courts; of his chancery; of the king's bench; the common pleas; and in the exchequer, to receive all manner of writs and warrants to be delivered to them.

Must make & proclaim four deputies at least.

And every sheriff of any shire (being no city nor town made shire) at his county day, or within two months next after he shall have received his patent

(w) Comp. Sher. 101.
(x) Bl. Com. 344.
(y) Ibid. 345.
(z) Salk. I. 95, 96.

of his office of sheriffwick, must depute, appoint, and proclaim in the shire town within this bailiwick, four deputies at least, dwelling not more than twelve miles distant one from another, (within the county where he is sheriff,) under the penalty of five pounds for every month he shall lack such deputy or deputies. And every of the said deputies so appointed and proclaimed, may in the sheriff's name make replevies and deliverance of distresses, in such form and manner as the sheriff may and ought to do. And the sheriff may make his under sheriff, bailiff, and deputies, without any deed or writing. (*a*)

Under sheriff, deputy, &c. must be sworn.

Every under sheriff, deputy, bailiff, and clerk of every sheriff, must be sworn according to the form by law prescribed, before the justices of assize, or one of them, of the same circuit; or before the keeper of the rolls, or two justices of the peace, *quorum unus*, of the same county whereof the said under sheriff, deputy, bailiff, or other officer shall be. (*b*)

Sheriff answerable for acts of his under sheriff, &c.

And the act and deed of the under sheriff or his deputy, in the name of the sheriff shall charge the sheriff, and for their act the sheriff shall be amerced, and none other. (*c*)

Under sheriff.

The under sheriff in ancient times was called *senescallus vice comitis*, and in the st. of W. 2. ch. 39. first called under sheriff. (*d*)

His charge.

These under sheriffs have at this day to them committed by the high sheriff, the whole or most part of exercising and executing of the office of the high sheriff, and may be called the sheriffs' general depu-

(*a*) Dalt. Sher. 456, 457.
(*b*) Ibid. 453.
(*c*) Ibid. 455.
(*d*) Ibid.

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ties. And accordingly by the book 20. H. 7. the under sheriff is said to be but the high sheriff's deputy or bailiff, and one who uses and occupies the place or office in right of the high sheriff, and does all things in the name of the high sheriff. (*e*)

If it shall come to issue whether he that made the array be under sheriff or not, this shall be tried by the county, and not by the examination of the officer: and the array impannelled and returned by the under sheriff in the name of the sheriff, shall bind the sheriff. (*f*)

And if a return made by the under sheriff be denied, that shall be tried by the under sheriff; and the high sheriff cannot disavow the same, if he confess him to be his under sheriff. (*g*)

If any under sheriff make a return, whereupon an amercement shall be inflicted, it shall be upon the high sheriff. He shall be amerced, for the return is made expressly in his name. But if it be a false return, whereupon an action of deceit lieth, in that case it may be brought against the under sheriff. (*h*)

An under sheriff took goods on a *fi. fa.* and did not sell them for half their value: and upon motion, it appeared to the court, that he had persuaded the jury to undervalue the goods, and according to his persuasion, the jury appraised them for the sum at which they were so appraised. The court held that this was a great oppression, and thereupon ordered an indictment against the sheriff. (*i*)

(*e*) Dalt. Sher. 455, 456.
(*f*) Ibid. 456.
(*g*) Ibid. 456. Co. IX. 31.
(*h*) Ibid. 456. Dr. & St. 134.
(*i*) Ibid. 530.

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Under sheriff's power cannot be restricted.

The sheriff in appointing his under sheriff, cannot restrict his power or authority; for it is essentially incident to a deputy to have as full power to do any act or thing as his principal: and if his principal make him covenant that he will not do any particular thing which his principal may do, the covenant is void and repugnant. And though the under sheriff must act in the name of the high sheriff, because the writs are directed to him, and for other reasons, yet any other deputy may act either in his own name or in the name of his principal. And though a deputy cannot make a deputy, yet he may empower another to do a particular act: (such as to serve a writ, execute a warrant, make an arrest, and the like.) (*j*)

Sheriff may make any number of deputies.

The sheriff may also constitute as many other deputies as he may think fit, each possessing all the powers of the sheriff as a ministerial officer.(*k*) At common law the sheriff is not more limited as to the number of his deputies, than he can limit their powers while in office. His power of appointing deputies results from the nature of his office, so far as it is ministerial: and in that respect only can he depute any to act under him. All officers whose power and authority are merely ministerial, may at common law act by deputy. (*l*)

Dalton says, although the king by his letters patent granted to the sheriff *custodiam comitatus* without any express words to make a deputy, yet hath the sheriff power to make a deputy or under sheriff, who may execute all the ministerial parts of the office. But such deputy hath not, nor ought to have any estate in the office, but is only a shadow of the officer,

(*j*) Salk. I. 95, 96.
(*k*) Ibid.
(*l*) Dalt. Sher. 3. Salk. I. 95, 96.

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and doth all things in the name of the officer himself, and for whom he must answer. And though the sheriff can neither limit nor abridge the power of his deputy while in office, yet he may revoke such deputation at pleasure; the deputy holding his office by no more permanent tenure than the will of the sheriff. And as the sheriff may make as many deputies as he pleases, and dismiss them whenever he wills to do it, so he may, if he finds himself equal to the task, execute it wholly by himself. (*m*)

Has the custody of common gaols.

The sheriff has also the custody of all the common gaols in the county,(*n*) and appoints gaolers to each, who are his servants, and for whose conduct he is responsible. The business of the gaoler is to keep safe all persons committed to him by lawful warrant; and if they suffer any such to escape, the sheriff must answer it to the king, if it be a criminal matter, or in a civil cause, to the party injured. (*o*)

It is meet, says Dalton, for the high sheriff to take good security from his under sheriff and other officers, before he trust them with their offices. And for this, commonly the high sheriff takes bonds from the under sheriff and friends, and also of his bailiffs and gaoler. (*p*)

A bond from a deputy to save harmless the sheriff from all escapes of persons arrested by such deputy, is good; but a bond or covenant to the sheriff from his deputy, that he will not serve executions above £20 without his special warrant, is void; but though such covenant is void in law, yet the bond may be

(*m*) Dalt. Sher. 3, 514.
(*n*) Ibid. 5.
(*o*) Bl. Com. I. 346.
(*p*) Dalt. Sher. 445.

good for the rest of the covenants which are agreeable to law. (*q*)

Can appoint no more than one under sheriff extraordinary.

The high sheriff can appoint no more than one under sheriff extraordinary. The case was trespass for taking and carrying away an anchor: judgment by *nil dicit*, and a writ of enquiry awarded; executed before two under sheriffs extraordinary, appointed by deputation under the hand and seal of the high sheriff, and a motion to set aside the inquisition, because the sheriff cannot appoint two persons to take an inquest. By the court——There is no instance of the sheriff's deputing two under sheriffs extraordinary to take an inquest: for if the high sheriff may appoint two, he may appoint twenty or more, if he can exceed one. Let the inquisition be set aside. (*r*)

Where a special bailiff is nominated by the plaintiff or his agent, the sheriff is not bound to return the writ. (*s*)

Not chargeable for acts of special bailiffs appointed at request of plaintiff.

And if the sheriff appoint a special bailiff at the plaintiff's request, such plaintiff cannot rule the sheriff to return the writ. The acts of the bailiff so appointed are the acts of the plaintiff himself, and the court will not call on the sheriff to return the writ in such cases. (*t*)

But is responsible for the defendant after commitment.

But though the sheriff appoint special bailiffs to arrest the defendant at the plaintiff's request, the sheriff is responsible for the defendant after the arrest made; and the defendant is in actual custody in prison, though he gave bail on the arrest made by the special bailiff, and was committed in another

(*q*) Bac. Abr. IV. 438. Dalt. Sher. 445.
(*r*) Wils. II. 378.
(*s*) Bl. Rep. II. 952.
(*t*) Ter. Rep. IV. 119.

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suit; but while so in custody, is surrendered by his bail, in the suit on which he was arrested by the special bailiff. (*u*)

Liability for penalty of statute violated by his deputy.

Though the sheriff may, by construction of law, be liable for the penalty of a statute violated in fact by his deputy, where the words of the act are, "that no sheriff, under sheriff, or bailiff, shall carry the party arrested to prison within twenty four hours," &c. and, "that every sheriff, under sheriff, bailiff, &c. shall forfeit £50 for every such offence," yet the sheriff and his deputy cannot both be compelled to pay such penalty: but the plaintiff has his election to sue the sheriff for the act of his deputy, or the deputy for his own act. And when such plaintiff has made his election to obtain the penalty from one of them, he cannot recover against the other.(*v*) But the court will not before trial, on motion, stay the proceedings against the deputy, because the plaintiff is prosecuting the sheriff for the same penalty. (*w*)

In an action of trespass against the sheriff for the wrongful act of his bailiff, it is not enough to prove him a general bailiff, and that he had given a bond of indemnity to the sheriff as such, together with proving a copy of the warrant under which he entered and seized the plaintiff's goods; but the privity between such bailiff and the sheriff must be established, in the particular transaction, on the best evidence, by proving the original warrant of execution directed by the sheriff to such bailiff; or at least, by proving such notice, to produce it, as it will in case of non production, let in secondary evidence of its contents.(*x*)

(*u*) Ter. Rep. VIII. 506.
(*v*) Ibid. II. 712.
(*w*) Ibid. 512.
(*x*) Ter. Rep. VII. 113.

Service on an agent of a rule to return, not sufficient.

If a rule be obtained against a sheriff to return a writ, service on the under sheriff's agent in town is not sufficient; for if the rule were served even in the cases of London and Middlesex and Surrey, any where but at the office, the service would be bad. Besides, as six days are only given after the service of the rule to return the writ, it would be impossible to obey it, in distant counties, if service on the agent were sufficient.(y)

If a sheriff is not liable to be called upon to return process, unless within six lunar months after the expiration of his office, the day in which he goes out of office is to be reckoned as part of the six months.(z)

Entitled to poundage after a levy, though parties compromise.

If a sheriff levy under a *fieri facias*, he is entitled to poundage, though the parties compromise before he sells any of the defendant's goods; and if after such compromise, either party rule the sheriff to return the writ, the court will discharge that rule, with costs to be paid by the party obtaining it.(a)

May sue on bail bond in different court.

The sheriff may sue on a bail bond in a different court from that in which the original action was; for though the assignee of the sheriff must, by statute IV. Ann. c. 16. s. 20. which gives him the right of action, sue upon the bail bond in the court where the original action was brought; yet no such restriction is imposed upon the sheriff himself, who does not sue by virtue of that statute, but by the common law.(b)

No action can be maintained against the sheriff for not assigning a bail bond, if the bond be cancelled on

(y) Hen. Black. I. 631.
(z) Doug. 1. 419.
(a) Ibid. 462.
(b) Ter. Rep. V. 470.

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the defendant's returning into custody before the return of the writ.(c)

Must make return on writ executed by him, though he go out of office before return day.

If a writ directed to a sheriff, be delivered to him, and by him executed while in office, he must make his return on the same: and if his term expires before the return day of the writ, deliver it over to the new sheriff, who must at the return day, return the writ with the old sheriff's return thereon.(d)

Must complete executions commenced, tho', &c.

If upon *fi. fa.* the sheriff seize goods, and he return that goods to such a value, remain in his hands for defect of buyers, and he is removed, yet he, and not the new sheriff, is to proceed in the execution. For execution being an entire thing, he who begins, must end it: and having once seized goods under it, may proceed to make sale of them, and that without any new authority therefor, and the sale will be good: and if he neglect to proceed in executing a writ, the execution of which he had begun before his removal, he will be liable to the plaintiff for such neglect, as though he had not been removed.(e)

New sheriff must receive from old, all prisoners and writs by indenture, &c.

After the sheriff has taken the oath for the due execution of his office, and the writ of discharge is delivered to his predecessor, the new sheriff must receive from the old sheriff all his prisoners, (which are in gaol, by their names,) and all his writs, precisely by view and by indenture to be made between the old and the new sheriffs: in which indenture all the causes which the old sheriff has against every prisoner must be set forth, and delivered at the peril of the old sheriff; for the new sheriff need not take notice of any who is omitted and left out of the

(c) Ter. Rep. VII. 122.
(d) East. IV. 604.
(e) Salk. I. 323. Cro. Jack. 73.

indenture, for with such he is not chargeable, but the old sheriff only.(f) SHERIFF.

If the sheriff at the time of his death has different persons in execution, when a new sheriff is appointed, and has taken upon him the office, he must at his peril, take notice of all the executions against every person whom he finds in gaol, and that necessarily, for there is no one to make delivery or give notice. And he is not liable for detaining them until he can have proper notice of all such executions. And if in the interim, between the death of a sheriff and the appointment of his successor, one who is in execution breaks prison and goes at large, it is no escape; for in such instances the prisoners are in the custody of the law, and they are still in execution, though without the limits of the prison, and may be taken at any time after.(g) If sheriff die, new one must take notice at his peril of all executions, &c.

A sheriff or other officer in the due execution of the law need not fly to the wall though attacked, but may use all necessary force to enable him to perform his duty; and if killed in so doing, it is murder, though the process he is executing is apparently erroneous.(h) And if such officer, being resisted in attempting to make arrest, or retaking one who had escaped, though on civil process, unavoidably kills the party, it is not felony.(i) In execution of his office need not fly to the wall.

The sheriff is responsible for his officers, as well in trespass as case; and where a trespass has been committed by a sheriff's officer, by colour of his office, whether under sheriff, general or special deputy, the party injured may have his action, either against the Is responsible for acts of his officers, &c.

(f) Dalt. Sher. 15.
(g) Cok. III. 72.
(h) Co. X. 68. Hawk. P. C. I. 129.
(i) Hawk. P. C. I. 107. H. P. C. 494.

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sheriff or his deputy: as in the case of taking the goods of a stranger, or arresting one person instead of another; and so he may upon a voluntary escape by the deputy, and for his embezzling a writ. But when the injury results from a mere nonfeasance or neglect, the action lies against the sheriff only.(j)

Old sheriff may execute his office until, &c.

The old sheriff may execute his office until his writ of discharge be delivered unto him, or into the clerk's office of the city or county of which he is sheriff. And any official act commenced by him after being so discharged, is void; yet if he has executed any writ, which remains in his hands not returned when he is discharged, such writ must be returned in his name, but endorsed by the new sheriff: but if there has been no execution of the writ by the old sheriff, the return must be in the name of the new sheriff.(k)

In New-York may be arrested, &c.

In the state of New-York, an execution directed to the coroner, may issue against the body of the sheriff. He is not privileged from arrest and imprisonment. The statutes containing no provision for the case, it is left as it was at the common law. He cannot be committed to the gaol whereof he is keeper. By so doing, the coroner is liable for an escape. But he may make his own house or any other place in the county, a prison. And whenever the body of the sheriff is arrested by the coroner, he must find some other place within the county than the common gaol, to confine his prisoner.(a)

If a sheriff summon a jury, and before the return day of the *venire*, goes out of office, he is entitled to

(j) Salk. I. 18. Bl. Rep. II. 83. Wils. III. 309. Doug. 141. Cro. Eliz. 175.
(k) Dal. Sher. 18.
(a) Johns. Rep. VI. 22. Leo, III. 399.

the fees for summoning the jury, but not for the return of the *venire*.(*b*)

Record of recovery v. sheriff for escape, conclusive against sureties on prison bond, unless, &c.

If a sheriff who has taken bond with sureties for the liberties of the gaol granted to a prisoner in execution, and is sued for an escape, give notice to the sureties, of the suit, and they come in, and the suit is regularly defended by the sheriff, with their aid and assistance, and a recovery is had against him in an action on the bond against the sureties, the record of the recovery in the suit against the sheriff is conclusive against the sureties, unless they can shew fraud or collusion between the sheriff and the plaintiff in the action against him, and the sureties may not controvert the fact of the escape.(*c*)

Deputy sheriff, as plaintiff, may in certain cases serve his own writ.

It seems that a deputy sheriff who is plaintiff, may in certain cases serve his own writ. The case was, that the plaintiff was a deputy of the sheriff of the county of D. he served the writ himself, but did not require bail. The question was, whether there had been legal service.

By the court——It appears from some cases (Cro. Car. 416. 19. Viner, 443, note. Moore, 547.) to be a doubtful question, whether a sheriff can legally serve a writ when he is plaintiff. In this case the writ was served by a deputy, no bail was required, and the sheriff returned the writ, and is responsible. As the practice of deputing the plaintiff to serve his own writ, has been of long duration, it would be going too far to say that the plaintiff cannot in any case serve a writ in his own favour. A declaration in ejectment is always served by the party; and where the writ is served without exacting bail, there can be

(*b*) Johns. Rep. VI. 125.
(*c*) Ibid. 158.

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Under sheriff may depute a person to do a particular act.

An under sheriff may depute a person to serve a writ or do a particular act. The case was, an action for breaking the plaintiff's close. Plea, not guilty. On the trial the defendants in justification of their entry, offered in evidence, a writ issued in favour of the defendant P. against the plaintiff, and offered to prove that the defendant P. was deputed in writing by the under sheriff of the county in the name of the sheriff, to serve the writ; and that P. having arrested the plaintiff, who escaped, did, with the assistance of the other defendants, enter the plaintiff's house to retake him. The question was, whether the deputation was valid.

By the Court——The deputation was a sufficient authority to the defendant P. to execute the writ. The general maxim, that delegated power cannot be delegated, is correct when duly applied: for to make a deputy by a deputy, in the sense of the maxim, implies an assignment of the whole power; which a deputy cannot make. A deputy has general powers, which he cannot transfer; but he may constitute a servant to do a particular act. This distinction was taken and laid down by lord Holt, who gave the opinion of the court of k. b. in the case of Parker vs. Lett. (ld. Raym. I. 658. Mod. XII. 467. Salk. I. 95.) In that case, the steward of the manor of Riswick made his deputy steward, who appointed under his hand and seal, B. a third person to be his deputy, to take a particular surrender, who took it: and one question which arose on ejectment, was, whether the surrender taken by the deputy of a deputy steward was good. The court held it good: and said, that B.

(d) Johns. Rep. IV. 486.

was not a deputy in the proper sense of the term, since he had power to do only a particular act; whereas a deputy, from the nature of his deputation, has power to do all acts. They alluded to such a case as this, and said, it was every day's practice for under sheriffs to make bailiffs to do particular acts; and they make them by virtue of their general deputations. The moment the sheriff made an under sheriff, he of necessary consequence gave him power to make bailiffs. The case of Leak vs. Howell, (Cro. Eliz. 533.) and the cases there cited contain the same general doctrine.(e)

DEPUTY.

In the state of Massachusetts, if a defendant is misdescribed as to the place of his abode in the original writ, which is legally served upon him, and judgment is rendered thereon upon default, and execution issues in pursuance thereof, and is levied upon his goods, the officer who serves such execution is not liable in an action of trespass, on account of such misdescription. The officer is not holden to look beyond *his* execution. If with the execution in his possession, he finds within his precincts the goods of the defendant, and takes and sells them as commanded, he is not a trespasser.(f)

In Massachusetts, not liable in trespass for levying execution where defendant was wrongly described in the original writ.

Trespass with force and arms, lies against a sheriff for the act of his deputy, in taking the goods of a stranger by the colour of his office. The law views the relation of a sheriff and his deputy in the same light; in official acts they are not distinguishable from each other. The office is of the highest nature from the importance of the trusts confided to it, and the great power with which it is invested. The officer himself is supposed to possess a respectable character, correspond-

Liable in trespass for the act of his deputy, *colore officii*.

(e) Johns. Rep. V. 137.
(f) M. T. R. I. 76.

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ing to the importance of his trust and powers. Public policy dictates that such an officer should be *immediately* responsible for all injuries done in the office: and that the injured should not be shifted off and obliged to resort to his officers; men appointed by him, and who hold their offices during his pleasure, and for whom he has received such security as was satisfactory to him. The office is one. The office of sheriff: and so much is it considered so, that in the case of *Cameron and others, against Reynolds, Cowp.* 403. it was determined, "that all actions for breach of duty of the office of sheriff, must be brought against the high sheriff, though by default of the under sheriff." That such actions must be brought against the high sheriff *as for an act* done by him: and if it proceed from a default of the under sheriff or bailiff, that is a matter to be settled between them and the high sheriff.(*g*)

Some actions against sheriff, transitory.

If a sheriff be sued for not assigning a bail bond, it is not necessary that the action should be brought in the county whereof he is sheriff.(*h*)

Some local.

Some actions against the sheriff are local and not transitory; but where the action arises partly from matter of record, and partly from matter *in pacis*, in different counties, the plaintiff may bring his action in either county at his election. As where a writ issues from the court of common pleas in the county of S. directed to the sheriff, &c. of the county of M. to be served within said county of M. and to be returned before said court of common pleas, in said county of S. and the plaintiff will bring his action against the sheriff of M. for a supposed misfeasance of his deputy, in neglecting to attach the goods of the

(*g*) M. T. R. 530. Doug. 40. Term. Rep. II. 148.
(*h*) Ibid. II. 596.

defendant in such writ of attachment named, he may bring such action against the sheriff in which of the counties he pleases.(i)

Action for not returning execution and not paying over monies received.

In an action on the case against the sheriff of K. for not returning an execution, and for not paying over to the plaintiff monies received by the sheriff, in satisfaction of the execution after the return day, the material facts were, That the plaintiff recovered a judgment against W. H. and that an execution issued on that judgment, May 5th, 1803, returnable in three months; and was in the same month delivered to the defendant to be served: and that on the 7th of September, in the same year, the return day of the execution being passed, the plaintiff's attorney, J. B. esq. wrote the defendant a letter, in which was the following direction: "as the execution is run out, and H. I understand is a man of property, I presume the money is ready, and wish you therefore, on the receipt of this, to send me the balance, being 260 dollars, and 38 cents, as near as you can make it in paper, by mail, and direct the post master at D. to deliver me the letter immediately on receiving it." But no letter from the sheriff to the attorney was ever received by him, or ever came to the post office at D. That on the 21st of December, 1803, the sheriff inclosed in a letter directed to J. B. esq. the plaintiff's attorney at D. 254 dollars, in bank notes, sealed the letter, and caused it the same day to be put in the post office at A. but no letter from the sheriff to J. B. esq. was ever received by him, or ever came to the post office at D. And that the plaintiff, not hearing from the sheriff, and the execution not being returned in the same month of December, 1803, sued him for not returning it, and the writ was sent to Mr. W. of A. with a request to procure the service

(i) M. T. R. III. 23.

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of it: That in February following Mr. W's clerk wrote J. B. esq. that on enquiry of the sheriff, he said he had received the money, and had sent it to J. B. esq. by the mail: that in March, 1804, the sheriff returned the execution fully satisfied. Question?—Were the bank notes then enclosed to J. B. esq. by the sheriff, at his risk, or were they at the risk of the plaintiff?

By the court——When a sheriff has received money to satisfy an execution, it is his duty to return the execution according to its precept: but by our statutes he is not obliged to bring the money into court, but may retain it until it be demanded of him by the creditor. And if it be demanded of him at any time after he has received it, either before or after the return day, and he refuse to pay it to the creditor, the creditor may recover it of him with interest, at the rate of thirty per cent. The creditor is therefore to demand his money, and if he direct the sheriff to send it to him by mail, the money is very properly at the risk of the creditor. On this principle, presuming that the sheriff had levied the money, the plaintiff's attorney wrote his letter to the sheriff, directing it to be remitted by mail. But through the neglect of the sheriff, the money had not been levied, and he had made himself liable to the plaintiff for the amount of his execution. The money which the sheriff received after the return day, he had no legal authority to receive by virtue of the execution: he might hold it against the debtor as an indemnity for satisfying the damages the plaintiff had sustained by the sheriff's own breach of duty; as the debtor, having paid it for the plaintiff's use, would be discharged by the payment to the plaintiff of these damages. The money, therefore, which the sheriff remitted, was on his own account, to satisfy a demand which the plaintiff had against him: and it must be considered as sent at the risk of the sheriff, and not as the money which the plaintiff

May retain money collected on execution till demanded.

had authorized him to send by the post. The case might have been different, if the sheriff on the receipt of the money, after the return day, had given notice of it to the plaintiff; and he, after notice, had authorized the sheriff to remit it by mail, as the subsequent authority might have been considered as recognising the conduct of the sheriff in thus receiving the money, as the act of his agent.(*j*) SHERIFF.

The sheriff is answerable *civiliter*, for the defaults of his deputies, by nonfeasance, or malfeasance, in the duties of their office enjoined on them by law; but not for a breach of contract made with the plaintiff, obliging themselves to do what by law they are not bound to do.(*k*) Answerable for nonfeasance, or malfeasance of deputies.

And a party injured by a malfeasance of the sheriff or his deputy, is entitled to relief on the sheriff's bond to the treasurer of the commonwealth, for his faithful performance of the duties of his office.(*l*) And may be sued on his bond to the state therefor.

If a *sheriff arrest* a debtor in execution, and commit him to prison, and such debtor afterwards take the benefit of the act providing relief for poor prisoners, the sheriff may recover his lawful fees for poundage and travel (but no more) of the judgment creditor, in an action of assumpsit.(*m*) But though it seems the thirty cents taken by officers, for levying executions in addition to the poundage, is not authorized by the statute, yet when it has been customary to take it, the demand and receipt of it by the officer is not of itself evidence of a corrupt intention.(*n*) Debtor, after committed, taking poor prisoners' oath, sheriff may recover poundage and travel of creditor.

If goods are attached upon an original writ, and If goods attached be re-

(*j*) M. T. R. III. 249.
(*k*) Ibid. IV. 634.
(*l*) Ibid. 68.
(*m*) Ibid. 411.
(*n*) Ibid. I. 314.

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plevied, creditor after judgment must look to sheriff for their value.

are replevied out of the hands of the sheriff by a coroner, the creditor, if he recover on such original writ after the judgment for a return, must look to the sheriff for the value of the goods attached; and cannot maintain an action against the coroner for taking insufficient pledges, nor for any other misfeasance in the service: such action lies for the sheriff only, who has a special property in the goods, and who is liable to the plaintiff in the original writ to the amount of the value of the goods attached, and who may have his indemnity against the pledges in replevin, or, if they be insufficient, against the coroner. Any negligence or misfeasance of the coroner, in the service of the writ of replevin, is a tort to the sheriff, who is the defendant in the writ, and who alone can demand damages.(*o*)

Trespass lies against an officer who executes the process of a court not having jurisdiction.(*p*)

In Connecticut sheriff not liable to arrest on civil process.

In the state of Connecticut, the body of a sheriff is not liable to arrest or imprisonment on civil process. And if a writ of attachment in the usual form, commanding the officer to whom it is directed, for want of goods or estate of the defendant, to take his body, be issued against a sheriff, though served as a summons, the court will, on plea of abatement, abate it *in toto*.(*q*) *But quere? See escape post.*

Action for not returning execution from superior court may be bro't in any county where either party dwells.

An action on the statute against a sheriff for not returning an execution issued on a judgment of the superior court, may be brought in any county where either party dwells, whether the original judgment was rendered in that county or not. For the superior court is the same court within the meaning of the statute,

(*o*) M. T. R. II. 514.
(*p*) Cranch, III 335, 336, 337. S. C. U. S.
(*q*) Kirby, 48.

sitting in any county in the State.(r) And such action may be brought at common law against an officer for not returning an execution, before any court having jurisdiction in other cases between the parties, though such court did not render the judgment on which the execution issued. As where an execution issued on a judgment of the county court of the county of W. and was committed to a deputy of the sheriff of the county of W. to levy, collect, and return; and on his neglect so to do, an action for such neglect was brought against the sheriff of the county of W. before the county court in the county of N. L. and by the superior court, on writ of error, held to be well brought.(s)

Goods taken on attachment, and not taken on execution within 60 days after judgment, to be returned to owner on demand.

If an officer by virtue of a writ of attachment, take the goods of the defendant, and hold them, until the expiration of sixty days after final judgment is rendered on such writ of attachment, and no execution has been taken out on such judgment, and delivered to such officer to levy upon such goods, and no demand has been made for such goods by any other officer to whom *such execution* has been delivered, to execute *within* said sixty days, the officer who took such goods on the attachment, must deliver them up to the defendant, the owner of such goods, on demand by him made for them. And the attaching officer will not be liable to the creditor in any action for so delivering the goods to the defendant from whom they were taken by such writ of attachment. And if the attaching officer has delivered such goods to a third person for safe keeping, he may in like manner deliver such goods to such defendant after the expiration of such sixty days, no demand having been made for them, neither by the attaching officer, nor by any other officer having such execution to serve, and will be liable to no action therefor, though he in his receipt for such goods pro-

(r) Kirby, 114.
(s) Root, I. 90.

SHERIFF. mised to deliver them to the attaching officer on demand. (t)

Liable to fine for not returning execution as well as original writ.

The statute which subjects an officer to a fine for not executing, or not returning any writ delivered to him to execute, extends as well to writs of execution, as to original writs or *mesne* process. But if a party bring an action in his own name only against an officer for such neglect, the court are not, on such action, bound to inflict such fine. (u)

May return writ to clerk's house, he being absent.

If a sheriff who has served a writ of attachment, return it to the house of the clerk of the court to which such writ is returnable, and there, the clerk being absent, deliver it to his wife inclosed in a wrapper, and inform her what the wrapper contains, but such writ is not entered in the docket of such court, by which the plaintiff loses his hold on the property attached, yet no action lies against such sheriff for not returning such writ, he having, under the circumstances, done what the law requires. (v)

Deputy promising to pay a yearly sum for his appointment, promise good.

If a deputy sheriff, in consideration of his appointment to such office, promise the sheriff making such appointment, to pay him at the rate of a certain sum per year for said appointment, such promise is good, and the consideration sufficient to support an action for the recovery of the sum promised. (w)

If a writ be directed to the sheriff without mentioning his deputy, yet it may be served by a deputy.

What he does by deputy he does by himself.

By the common law of England, all writs directed to the sheriff, may be executed by his general or

(t) Root, II. 481.
(u) Ibid. 251.
(v) Day, II. 480.
(w) Ibid. 528.

special deputy: and there is no diversity between the English and our law in that respect, or the mode of return. What the sheriff does by his deputy is done by himself. If the writ be directed to the sheriff it may be served by his general, or special deputy, though they be not particularly described in the direction; and that whether it be a writ of execution, or mesne process, the power of his office cannot be restrained, unless by positive statute.(x) And if the treasurer of the state direct an execution to the sheriff against a collector of state taxes, the sheriff may depute a member of the town where the collector belongs to serve such execution.(y) SHERIFF.

Sheriffs of the cities in this State, have within the limits of their respective cities the same powers and authority, and are liable to the same suits and penalties for neglect of duty, in any case whatsoever, to all intents and purposes, as sheriffs of counties are; and must obey all lawful writs directed to them by courts and magistrates not of the city, when such writs are to be executed within the limits of the city to which such sheriff belongs. And service of writs within such cities, returnable before the county or superior court, when made by the sheriff of the city where service is done, is as valid as though performed by the sheriff of the county.(z) Of cities, have like powers within their jurisdiction.

In the state of Vermont, a sheriff, as the known first executive officer of the county, is not obliged to show his warrant to any one, neither to the person arrested, nor to the bystanders. His deputies are by the statute clothed with the same power; and their names and In Vermont, not obliged to show his warrant.

(x) Kirb. 240. Vide Bac. Abr. Title sheriff. Cowp. 403. Black. Com. I. 116, 339.
(y) Ibid. Salk, I. 12, 95, 96. Holt, Rep. 221. Hobart, 12. Black. Rep. II. 332.
(z) Root, I. 552.

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deputations are put upon the public records of the county, that their appointment to office may be known to all; and all are obliged to obey these officers in carrying into effect the legal orders of the government: and when they attempt to apprehend any one, the fair and legal conclusion to be drawn by all, is, that they are lawfully authorized.(*a*)

Deputy may serve writ in favour of selectmen of town where he lives.

A deputy sheriff may serve a writ in favour of the selectmen and overseers of the poor of the town of which such deputy sheriff is an inhabitant. The interest of the sheriff is so remote, that it does not disqualify him from serving the writ.(*b*)

In action on the case, sheriff may take advantage of the illegality of *sci. fa.* in case, &c.

In an action on the case against the sheriff, for taking insufficient bail upon mesne process, by the plaintiff's producing the records and proceedings on the judgment in the *scire facias* against him in evidence to the jury, the sheriff is by the act of the plaintiff so far made privy to the record, that he may take advantage of the illegality of the issuing of the *scire facias*. And if a *scire facias* be issued against bail taken on mesne process returnable to a county court, it must be signed by one of the judges, or the clerk of the county court to which it is returnable: and if signed by a justice of the peace only, is void as to the sheriff, and may by him be taken advantage of, whenever an attempt is made to use it against him.(*c*)

(*a*) Tyl. Rep. II. 214.
(*b*) Ibid. I. 241.
(*c*) Ibid. II. 319.

II. CORONERS.

CORONER. His office and appointment.

THE coroner is a very ancient officer at the common law. He is so called, because his office principally concerns pleas of the crown. In former days, coroners were the principal conservators of the peace within their counties. The lord chief justice of the king's bench is the principal coroner in the kingdom, and may exercise the office in any part of the realm. There are also a number of particular coroners for every county, in some more, in others less. They are chosen by all the freeholders in the county court. For this purpose there is a writ at common law, *de coronatore eligendo*, in which it is expressly commanded the sheriff, *quod talem eligi faciat, qui melius sciat et velit et possit officio illi in tendere.* The coroner is chosen for life, but may nevertheless be removed for various causes occurring, deemed inconsistent with his executing the office in a manner most beneficial. His office and power are either judicial or ministerial; and consist, first, *in inquiring*, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death: and this must be done, *super visum corporis*, upon the view of the body; for if the body be not found, the coroner cannot sit. He must also sit at the very place where the death happened, and his inquiry is made by a jury from four or five towns over whom he is to preside. If any be found guilty in this inquest, of murder or other homicide, he is to commit them to prison for further trial, and must certify the whole of this inquisition, (under his seal and the seals of the jurors,) together with the evidence thereon, to the court of king's bench or the next assizes.(*a*)

(*a*) Bl. Com. I. 346, 347, 348.

CORONER.

Inquisition of death.

In taking an inquisition of death, though there be many coroners in the county, an inquisition *super visum corporis*, may be taken by one of them.(*d*) Regularly, the coroner hath no power to take inquisitions, but touching the death of a man and persons *subito mortuis*, and some special incidents attending it,(*e*) When it happens that any person comes to a sudden and unnatural death, and notice is given thereof to a coroner, he must issue a precept to the constables of four, five, or six of the next towns to return a competent number of good and lawful men of their towns to appear before him in such a place, to make inquisition concerning it.(*f*)

If the constable make no return, or the jurors do not appear, they are respectively liable to be amerced.(*g*) The jury must be sworn and charged by the coroner, to inquire, upon the view of the body, how the party came by his death; whether by murder by any person, or by misfortune, or *felo de se*.(*h*) For he can take indictments of death only upon view of the body and not otherwise: therefore if the body be buried, he must dig it up, and he may lawfully do it in any convenient time; but if the body cannot be viewed, he can do nothing.(*i*)

The sudden and violent deaths which are all within the coroner's office to inquire, are, from the visitation of God by misfortune, where no other had a hand in it, as if a man fall from a horse, or cart; by his own hand, as *felo de se*; by the hand of another where the offender is not known; by the hand of another

(*d*) H. P. C. II. 56.
(*e*) Ibid. 57.
(*f*) H. P. C. II. 57, 59. Burn. Jus. I. 387.
(*g*) Ibid. 59.
(*h*) H. P. C. 60.
(*i*) Ibid. 176. Hawk. II. 48.

where he is known; whether by murder, manslaughter, in self defence, or by misfortune.(j) The jury, when sworn, and in view of the body, must be charged by the coroner, to inquire how the person came by his death; where slain; by whom, and by what means or instrument; where he was slain; whether in any house, field, bed, tavern, or company; who are culpable, either of the act or of the force, and who were present, either men or women, and of what age soever they be, if they can speak or have any discretion; whether he were slain in the place where he is, or has been brought thither since his death, and by what way and by what means, whether upon a horse or in a carriage; whether he be known, or is a stranger, and where he lay the night before; of what length, depth, and breadth are his wounds; with what weapons made, and in what part of the body the wound or thrust is; and how many are culpable, and how many wounds there are, and who gave the wound.(k)

Inquest, to hear all evidence.

The coroner's inquest must hear evidence of all hands if it be offered to them, and that upon oath; because it is not so much an accusation or indictment, as an inquisition or inquest of office.(l)

And inquire of all circumstances.

The coroner may and ought to inquire of all the circumstances of the party's death, and all things which occasioned it: whether by drowning, strangling, or by a cord round any of the members of the deceased, or by any other hurt.(m) If it be found by inquest, that the person deceased was killed by a fall from a bridge into a river, and that the bridge was out of repair by the default of the inhabitants of such

(j) Ibid. 62.
(k) Burn. Jus. I. 388—9.
(l) H. P. C. II. 157. Burn. Jus. I. 389.
(m) Burn. Jus. I. 389.

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a town, and that those inhabitants are bound to repair it, the town shall be amerced.(n)

His jurisdiction confined to his county, &c.

The jurisdiction of the coroner is confined to his county; but on arms of the sea, across which he can see what is doing, and on the sea shore, when the tide is out, between low and high water mark, he may take cognizance of matters belonging to his office; but when the tide is in, he loses his jurisdiction as to the space between high and low water mark.(o)

But it is said that it is not necessary to take the inquisition where the body is viewed. And that an inquisition taken at D. on the view of a body lying at L. may in certain circumstances be good.(p)

If more than one in a county, he who commences may complete a judicial act.

Where there are more coroners in the county than one, he who first proceeds in any matter judicial belonging to his office, may complete the same alone as effectually as though it were done by all. And after such proceeding by one, the act of any other will be void.(q)

Inquiry concerning shipwreck.

Another branch of his office, is, to inquire concerning shipwrecks, and certify whether wreck or not. Concerning treasure trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure.(r)

Is sheriff's substitute in certain cases.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception is taken

(n) Bac. Abr. I. 495.
(o) Hawk. P. C. II. 73.
(p) Ibid. 78.
(q) Hawk. P. C. II. 85.
(r) Bl. Com. I. 349.

to the sheriff for suspicion of partiality, (as that he is interested in the suit, or of kindred to either party, plaintiff or defendant;) the process must be awarded to the coroner instead of the sheriff, for execution.(s) CORONER.

And where process is directed to him for service, it is alike his duty as that of the sheriff to obey the writ; which both must do when it is not on the face of it void, or within their knowledge such. But for particular cases, in which process is regularly directed to coroners, see direction and service of process.

(s) Bl. Com. I. 349.

III. CONSTABLES.

CONSTABLE.

The name.

CONSTABLES appear to have been officers of great antiquity. By the laws of king Alfred, the freemen were to digest themselves into decenaries and hundreds, and every ten freeholders chose an annual officer whom they called constable, borsholder, tithing man, or headborough, as head of the decenary. In each hundred there was also appointed an officer called a high constable, all which constables were sworn into office.(*a*) The word constable has afforded matter of much disquisition among the learned. Dr. Burn traces it from the Hebrew word *cone* or *cune*, (the root from which he derives the word count,) and from the Greek word *stao*, down to most of the modern languages of the nations of Europe. The Germans have it connestafle, the French connestable, the Italians conestabile, the Spaniards condestable, and the English constable. Sir William Blackstone says the word is often supposed to be derived from the Saxon, and signifies the support of the king. But he believes the name as well as office borrowed from the French, and derived from the Latin *comes stabuli*, an officer well known in the empire.(*b*) Whatever may have been the origin of the name, it seems the office was well known to the common law, anterior to any statute in being wherein it is mentioned. And the statute of Winchester, the first that mentions the office, does not use language proper for constituting a new office, but clearly seems to suppose such an office then well known.(*c*)

(*a*) Lamb. Con. 8. H. P. C. II. 61. Inst. IV. 267.
(*b*) Bl. Com. I. 355.
(*c*) H. P. C. 61. Burn's Jus. I. 362.

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Appointment and general duty.

Constables were originally appointed for the better preservation of the peace, and may, by the common law, arrest felons, and all suspicious persons who go abroad by night and sleep by day, or resort to bawdy houses, or keep suspicious company.(*d*) Also by the ancient common law it was their duty to act as informing officers, and present at the turn* or leet* all those within their precincts who were not admitted into some tithing, and who had not sworn to the king's allegiance.(*e*) And at this day, they ought to present all offences inquirable of, in those courts.(*f*) A constable is not only empowered as all private persons are, to part an affray in his presence, but is bound at his peril to endeavour it, not only by doing his utmost himself, but also by demanding the assistance of others, which they are bound to give him under pain of fine and imprisonment.(*g*) And if he sees persons actually engaged in an affray, whether the violence be done or offered to another, or even to himself; or if any man shall threaten to kill, beat, or hurt another, or shall be in a fury ready to break the peace, he may either carry the offender before a justice of the peace, in order to his finding sureties for the peace, or he may imprison him himself a reasonable time, till the heat be over, and afterwards detain him till he give such surety by bond.(*h*) But he seems to have no power to commit the offender in any other manner, or for any other purpose: for he cannot commit him to gaol till he shall be punished; nor ought he to lay hands upon those who barely contend with words only, without any threats or personal hurt; but all he can do in such case, is to command them,

* Two courts held by the sheriff, in which small offences were tried, &c.

(*d*) H. P. C. 61, 62.
(*e*) Lamb. Con. 5, 6.
(*f*) Dalt. Sher. 388.
(*g*) Inst. III. 158. H. P. C. 135. Lamb. Con. 132. Dalt. Jus, c. 1. 8.
(*h*) Dalt. Jus. c. 1. 8. Lamb. Con. 132. Cro. Eliz. 375.

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under pain of imprisonment, not to fight.(*i*) Notwithstanding it is said to be law, that a constable may take surety of the peace by bond, it is most advisable for him to carry the offender before a justice of the peace, where he can do it. But in no case can he require security of the peace, unless the offence be committed in his own presence and view; for he cannot take any man's oath that he is afraid of death, because he is not a judge of record; which is the reason that an obligation taken by him must be in his own name, and must be certified at the sessions of the peace.(*j*)

In an affray may break doors to preserve the peace.

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 freshly follow, he may break open the doors to apprehend them.(*k*) But he cannot of his own authority compel a man to find sureties who is delivered into his hands as having broken the peace in his absence, but must carry him before a justice of the peace; neither can he arrest a man for an affray out of his view, without a warrant from a justice of the peace, unless a felony were done, or likely to be done.(*l*)

If a constable see a person expose an infant in the street, who refuses to take it away, he may lawfully apprehend and detain such person till he or she consent to take care of it.(*m*)

May not take a person into custody for a

A constable may not take a person into custody for a mere assault, unless he is present at the time, and

(*i*) Bac. Abr. I. 441. Hawk. P. C. I. 268.
(*j*) Cro. Eliz. 375, 376.
(*k*) Dalt. Jus. c. i. 8, 67.
(*l*) Ibid. Lamb. 133. Cro. Eliz. 375. Owen. 105.
(*m*) H. P. C. 77. Moor. 284.

inter poses with a view to prevent a breach of the peace. But if an affray has happened and a blow or wound has been received, likely to end in a felony, that will authorize the constable to take the party into custody without warrant; but in such case it should appear that *there was good ground and foundation for such a supposition*, that a felony was likely to ensue: for as on the one hand, by forbidding a constable to take a person into custody without a warrant, where death was likely to ensue in consequence of a blow given, a murderer might escape; so, by allowing the ill-grounded or malicious suggestions of the constable or any other person who might give him information, to justify a constable to take a person into custody, great injury might be done to individuals. The ground ought therefore to appear sufficient and satisfactory; such as may afford reasonable ground to the constable to believe a felony would probably ensue; for if the grounds are frivolous, or such as it appears he himself hardly credited, (as if he consent to enlarge the prisoner on a person's becoming bound for his appearance, which he would not do, where he really apprehends a felony will ensue,) he will be liable to an action of false imprisonment, if he proceed in the arrest.(*n*)

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mere assault, unless made in his presence.

Otherwise, if felony be likely to ensue, or actually committed.

If a regular charge of theft be made before a constable against a third person, the constable is by law warranted in committing the party charged. He may if he pleases use his own discretion, and exercise his own judgment in a charge made before him; and if in so doing he is guilty of no collusion with design to oppress and imprison a person wrongfully, he will not be liable in an action of false imprisonment.(*o*)

May commit a person regularly charged with theft.

(*n*) Esp. N. P. cases, II. 540, 541.
(*o*) Ibid. IV. 80, 81.

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Must be sworn.

No person can act as a peace officer or constable with all the immunities and rights belonging to that office, unless he has been regularly sworn into the office.(p)

Is the proper officer of a justice of the peace.

The constable is the proper officer to a justice of the peace, and is bound to execute his warrants. Hence, when a statute authorizes a justice of the peace to convict a man of a crime and to levy the penalty by distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and is indictable for disobeying it.(q) And as the office is altogether ministerial upon principle, it follows of course he may make a deputy to execute a warrant directed to him; but in practice this is not admitted, unless in special cases, such as the sickness or absence of the constable and the like, when he cannot perform the office in his own person. But without some such special cause, a constable cannot act by deputy.(r)

May in certain cases make a special deputy.

When he may make arrest, &c.

If a warrant be directed generally 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.(s) A sworn constable in the execution of a warrant, need not show it to the party, although he demand a sight of it; but in making an arrest he ought to acquaint him with the substance of it.(t) An unlawful arrest without a warrant, cannot be made good by a warrant taken

(p) Esp. N. P. cases, V. 41.
(q) Mod. 130. Salk. I. 175, 381. Rol. Rep. II. 78.
(r) Bac. Abr. I. 444.
(s) Salk. I. 176, 378. Carth. 508. Ld. Raym. 545.
(t) Co. VI. 54. IX. 69.

afterwards.(*u*) If a constable after having arrested the party suffers him to go at large on his promise to return, the constable cannot, by virtue of the same warrant arrest him again: but if the party voluntarily return into custody, the constable may detain him and bring him before the justice, in pursuance of the same warrant.(*v*) CONSTABLE.

A constable cannot justify an arrest by virtue of a warrant from a justice of the peace, which expressly appears in the face of it to be for an offence, whereof a justice of the peace hath no jurisdiction, or to bring the party before him at a place out of the county for which he is a justice.(*w*) It is not material whether the party arrested by virtue of a warrant from a justice of the peace be guilty or innocent, or whether the felony, &c. were actually committed or not, if the warrant be good on the face of it, the constable may justify under it.(*x*) And hard, indeed, would be his case, if he could not, and yet be liable to indictment for disobedience, as above. If a constable be assaulted in the execution of his office, he need not go back to the wall as a private person ought to do: and if in striving together, the constable kills the assailant, it is no felony; but if the constable be killed it shall be construed premeditated murder.(*y*) A constable coming to appease a sudden affray in the day-time, in the village whereof he is constable, it seems every man, ex officio, is bound to take notice that he is the constable, because he is chosen and sworn in the leet, where all the residents are to attend; but not so in the night-time, unless there be some notification that he

If assaulted in execution of his duty, need not go back to the wall.

(*u*) Dyer, 254.
(*v*) Dalt. Jus. c. 117. H. P. C. 81. Crompt. 148. Bac. Abr. 442.
(*w*) Crompt. 147, 148, 149. Bac. Abr. I. 442.
(*x*) H. P. C. I. 81, 82.
(*y*) Ibid. 37. H. H. I. 458.

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is constable: but whether it be day or night, it is sufficient if he declare himself to be constable, or command the peace in the king's name, and the like, for any who come to his assistance.(z) And if upon an affray made, the constable and others in his assistance come to suppress it, and to preserve the peace, and in doing their office, the constable, or other of his officers, be killed, it is murder, although the murderer knew not the party killed.(a)

If felony be committed, may arrest & commit felon until, &c.

If felony is in fact committed, the constable may, *ex officio*, arrest and imprison the felon till he can conveniently be conveyed to a justice of the peace, or the common gaol; and it is immaterial whether the felony were committed in the same town, or in any other town or county, if the felon be in the town whereof he is constable. And to make such arrest, he may break open doors to take the felon, if such felon be in the house, and the constable is denied entry after demand and notice that he is constable. And if in attempting so to make an arrest, the constable or any who come in his assistance, be killed after competent notice that he is constable, it is murder. And if the felon resist and cannot be taken, whether it be after the arrest or before, the killing such felon, who cannot otherwise be taken, is no felony. Nor is it material whether he saw such felony committed, or hath it only by complaint and information: for as well in the one case as the other, he is bound to apprehend the felon, and to make search after him within the limits of his jurisdiction, and to raise hue and cry upon him. And the law gives him protection in the execution of his office, and will never punish him in the necessary

(z) H. P. C. II. 461.
(a) Cok. IV. 40.

pursuit of what it enjoins him. For felony and suspicion of felony, sheriffs and constables may break the house to apprehend the felon;(b) but if the suspicion arises in the mind of a third person, and is by him communicated to the constable, he must accompany the constable, and be present at the breaking; for the justification of the constable must be, that he did aid the person suspecting, in taking the person suspected.(c)

In cases of felony, or suspicion of felony, may break doors to make arrest.

If a man and woman be in incontinency together, a constable may take the neighbours and arrest them and commit them to prison to find sureties for their good behaviour.(d)

May arrest upon view of incontinency.

If a constable, head of the nightly watch, wilfully suffer a person brought to him by one of the nightly watch, during the watch hours, and taken up as a street walker, to escape, it is a misdemeanour in the constable, though no positive charge were alleged against the person so taken up, and suffered to escape.(e)

Duty on watch.

In the state of New-York, any constable of the county where process is issued under the act for the more speedy recovery of debts to the value of twenty-five dollars, may serve such process in any part of such county; and having received such process for service, is liable for neglect or false return.(a)

In New-York, may serve process in certain cases throughout the county.

In the state of Connecticut, if a person be duly appointed to the office of constable at a lawful town

In Connecticut, need not be sworn on

(b) Cok. V. 90.
(c) H. P. C. II. 91.
(d) Ibid. 89.
(e) Bur. Rep. II. 864.
(a) Johns. Rep. I. 502.

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reappointment the next year.

meeting, for the choice of town officers, and regularly sworn to the execution of such office within the time by law limited for his taking such oath, and be the next year reappointed to the same office, but not sworn, and continues to act as constable in the service of process under his reappointment after the expiration of the year, is, and for which he was particularly sworn, yet such service done by him is good and valid, and if resisted in making such service, he may as constable maintain an action against those who make such resistance.(*b*) *But quere? See st. C. Vol. II.*

Town meetings for choice of, must be held in November or December.

Town meetings for the choice of constables, must be held in the month either of November or December in each year. And constables chosen at such annual meeting, must be sworn as the law directs before the first day of January next following such election. And if a town meeting first held in one of those months, is continued by adjournment into the month of January next after, and at such adjourned town meeting a constable is appointed, all acts done by him as constable are void. And every appointment of constable made in any month other than November or December is void, unless where a town has become wholly destitute of such officer, in which case, constables may be chosen at a special town meeting for that purpose, in any other month.(*c*)

In action for assault and battery, permitted to prove his office.

A constable having by virtue of an execution arrested the body of the defendant, who was rescued, brought his action against the rescuers for an assault and battery, but did not allege that he was an officer in the execution of his office. While the action was

(*b*) Root I. 83.
(*c*) Ibid 135.

pending, the judgment on which the execution issued was reversed. And on the plea of not guilty as to the assault and battery, the plaintiff was permitted to prove that he was a constable, and held the person rescued by virtue of said execution.(*d*)

In Massachusetts, constables, though authorized to serve civil process in personal actions, to the amount of $ 70, can in no case serve a writ in a real action. *See direction and service of process post.*

(*d*) Root, I. 527.

IV. GAOLER.

GAOLER.

His appointment.

THE sheriff has the custody of all the common gaols in his county.(a) It is incident to his office.(b) But he must appoint an under keeper, who is called the gaoler, and for whose conduct in office the sheriff must answer.(c) But whom he may discharge at his pleasure, and if he refuse to surrender up, or quit possession, the sheriff may take him out by force, as he may a private person.(d) His business is to keep safely all such prisoners as are committed to him by lawful warrant,(e) or order of court.(f)

And office.

A gaoler is considered as an officer relating to the administration of justice; and is so far under the protection of the law, that if threatened for keeping a prisoner in safe custody, the person threatening may be indicted, fined, and imprisoned for it. And if a criminal, endeavouring to break the gaol, assault the gaoler, he may lawfully kill such prisoner.(g) But if a prisoner get out of gaol, and the gaoler in pursuit of him kills him, the gaoler is guilty of an escape, though he never lost sight of him, and could not otherwise retake him.(h) But if the prisoner make no assault on the gaoler, but only fly from him, and he for fear of an escape or rescue, strikes the prisoner, whereof he dies, this is murder; for there being no assault first made by the prisoner, the stroke

(a) Dalt. Sher. 5.
(b) Burn's Jus. II. 315.
(c) Ibid. 316.
(d) Bac. Abr. IV. 444.
(e) Bl. Com. I. 346.
(f) H. P. C. I. 584.
(g) Hawk. I. 107.
(h) Bac. Abr. II. 630.

was not given in self-defence. But if the prisoner fleeing, be a felon, and he cannot otherwise be retaken, and he be killed, it is no felony.(i) GAOLER.

The gaoler is liable for voluntary escapes, according to the nature of the cause of commitment, of the person escaping. If the escape be of a person committed on civil process, the gaoler is liable in an action of the case, if committed on mesne process; and to an action of debt, or an action of the case, at the election of the plaintiff if committed in execution,(j) and may be further punished by attachment.(k) Liable for voluntary escape.

If the prisoner was committed for any criminal offence, and the gaoler voluntarily suffer him to escape, the escape amounts to the same kind of crime, and is at common law punishable in the same degree as the offence of which the prisoner was guilty, and for which he was in custody, whether treason, felony, or trespass. And if the warrant of commitment do plainly and expressly charge the party with treason or felony, but in some other respects be not strictly formal, yet it seems that the gaoler in suffering an escape, is equally punishable as if the warrant were perfectly right. If the warrant be good in substance, the gaoler is bound to observe it as strictly as if ever so correctly made. But no escape can amount to a capital offence, unless the crime for which the party was committed were actually such at the time of the escape: and if a gaoler suffer one to escape who is committed for having given a dangerous wound to another, who dies of such wound, yet he is not guilty of felony; for that the offence of the prisoner was but a Voluntary escape in criminal cases, amounts to crime where with prisoner was charged.

(i) H. P. C. I. 481.
(j) Dalt. Sher. 466.
(k) H. P. C. II. 227.

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trespass at the time of the escape, though by a fiction of the law, it be afterwards for some purposes esteemed a felony from the time of giving the wound, yet since it is in truth no felony till the death of the party, it shall be afterwards construed to be such, with respect to those only, who were privy to the giving of the wound.(*l*)

Cannot be arraigned for felony on escape until principal be attainted.

A gaoler, who suffers a prisoner to escape, who was in his custody for felony, cannot be arraigned for such escape as for a felony, until the principal be attainted; but such gaoler may be indicted and tried for a misprison before the attainder of the principal. If the commitment were for high treason, and the prisoner committed actually guilty, it seems the escape is immediately punishable as high treason also. But no one is punishable as for high treason, for a voluntary escape, but the person who was actually and voluntarily guilty of it. The sheriff is only fineable for a voluntary escape suffered by his deputy the gaoler; for no one shall answer capitally for the crime of another.(*m*)

For negligent escape, sheriff equally liable with gaoler.

For a negligent escape, the sheriff is equally with his deputy gaoler, liable to answer, and the court may charge either the sheriff or the deputy gaoler for such an escape; and if the deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. Though for suffering a single voluntary escape, the gaoler forfeits his office, yet the court will not deprive him of it for one negligent escape; but if he suffers many negligent escapes, it puts it in the power of the court to oust him out of his office at their discretion.(*n*)

(*l*) Hawk. P. C. II. 204, 205. Salk. I. 272. H. P. C. I. 591.
(*m*) Hawk. P. C. II. 205. Salk. I. 272. H. P. C. I. 237.
(*n*) Ibid. 205, 206.

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If upon an indictment or presentment, the gaoler be found guilty of a negligent escape, he ought to be condemned in a sum certain, as a fine.(o)

Penalty by common law.

By the common law, the penalty for suffering a negligent escape of a person attainted, was £100; and for suffering the negligent escape of one indicted, but not attainted, was 100 shillings: but if the person escaped, were neither attainted nor indicted, it seems to have been left with the court to assess such reasonable forfeiture as should seem to them proper. And if the party should have twice escaped, the forfeitures were doubled. Yet the forfeiture was no greater for suffering a prisoner, committed on two several accusations, to escape, than if he had been committed on but one.(p)

If A. arrest B. for felony, and deliver him to the constable, A. is discharged of the custody, and the escape after, if any happen, is chargeable upon the constable; and if the constable deliver him to the sheriff or gaoler, and he receive him, the constable is discharged of the custody, and the sheriff or gaoler is chargeable with the escape.(q)

If A. the sheriff of B. hath a felon in gaol, and then C. is made sheriff, till the prisoner be turned over by indenture to the new sheriff, the custody of him remains in A. and he or his gaoler is chargeable for a negligent escape, and his gaoler for a voluntary escape.(r)

(o) Hawk. P. C. II. 206.
(p) Ibid. H. P. C. I. 604.
(q) H. P. C. I. 594.
(r) Ibid. 594, 595.

CHAPTER.

If prisoner be rescued, &c. this no voluntary escape.

If a prisoner committed for felony, be rescued, or rescue himself against the will of him who has him in custody, this is no voluntary escape; nor is the gaoler punishable for the same. Or if the prison be set on fire, and the gaoler let out the prisoners, there being no other means of preserving their lives, and exert his best endeavours by his officers and irons, to keep them safe, and this without fraud; or if enemies force him to open the prison doors, and he do it to save his life, it excuses the felony. And if it be done by rebels, (though this does not excuse the gaoler nor sheriff in civil actions,) it excuses the gaoler from felony; and also from a fine, if it be a greater force than he can withstand.(*s*)

If a justice of the peace bail a person not bailable by law, it excuses the gaoler; and it is not felony in the justice, but negligent escape, for which he is at common law fineable.(*t*)

Voluntary escape of felon by gaoler.

If a gaoler voluntarily licence a felon to wander out of the limits of the prison under a promise to return again, and the prisoner return to the gaol, so as to be in custody before the gaoler is indicted, it is held by some not to excuse a voluntary escape as to felony; but it certainly is punishable as a misdemeanor; and if he do not return, the escape amounts to felony.(*u*)

Sheriff fineable for.

If a gaoler deputed by the sheriff, voluntarily suffer a felon in his custody to escape, it is felony only in the gaoler, not the sheriff. But whether the escape were voluntary or negligent, the sheriff may be

(*s*) H. P. C. I. 596.
(*t*) Ibid.
(*u*) Ibid. 597.

indicted, fined, and imprisoned for the offence of the gaoler. And though not felony in the sheriff, yet it is a negligent escape as to him, for trusting a person thus false and unfaithful with the custody of his prisoner.(v)

Gaoler may retake prisoner negligently escaped, on fresh pursuit.

A gaoler making fresh pursuit after a prisoner, who had escaped through his negligence, may retake him at any time, even at the distance of seven years, and where he can find him, either in the same or a different county: but if the prisoner has gone beyond the view of the gaoler, it will be a negligent escape, which the recaption will not purge, but it may mitigate his fine; but if the retaking happen before the prisoner has fled out of the sight of the gaoler, he is not punishable, it being in law no escape.(w)

May not retake prisoner on voluntary escape.

If a gaoler voluntarily suffer a prisoner to escape, it is said he can no more retake him, than if he had never been in his custody.(x) But the cases cited in support of the last dictum, are on civil process.

Liable to action for abuse of prisoner.

If a man be committed to prison on civil process, and the gaoler maliciously puts him in irons, or puts him in the stocks, or withholds from him his victuals, whereby he becomes decrepit, lame, or otherwise diseased, &c. such prisoner may have an action on the case against the gaoler.(y)

And though it is the duty of the gaoler to keep in safe and close custody all persons committed to his charge by lawful warrant, or order of court: yet if the gaoler, having A. a prisoner in his custody,

(v) H. P. C. I. 597.
(w) Ibid. 602. Hawk. P. C. II. 200.
(x) Hawk. P. C. II. 200. Co. III. 52. Cro. Jac. 659.
(y) Dalt. Sher. 465.

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whom he knows to be infected with an epidemic distemper, confines B. another prisoner, against his will in the same room with A. whereby B. takes the infection, and dies, this is a felonious killing by the gaoler.(z)

Guilty of felony for maltreating a prisoner, so that he die.

It is also felonious homicide in the gaoler, to confine a prisoner in a low, damp, unwholesome room; not allowing him the common conveniencies which the decencies of nature require, by which the habits of his constitution are so affected, as to produce a distemper of which he dies.(a)

For, although the law invests gaolers with all necessary powers for the interest of the state, they are not to behave with the least degree of wanton cruelty to their prisoners. The cases above described, are deliberate acts of cruelty, and erroneous violations of the trust the law reposes in its ministers.(b)

If a gaoler keep a prisoner more strictly than the law requires, whereof the prisoner dies, this is felony in the gaoler by the common law; and this is the reason why, if a prisoner die in gaol, the coroner ought to inquire of his death. And when the death is owing to cruel and oppressive usage on the part of the gaoler or his officer, it is wilful murder in the person guilty of the duress.(c)

Refusing to receive prisoner, is liable of an escape.

If the gaoler refuse to receive a prisoner, arrested on mesne process, though tendered after the return day of the writ on which he was arrested, or refuse to receive a person taken in execution, and delivered

(z) Stra. 856. Hawk. P. C. I. 119.
(a) Stra. 884. Ld. Raym. 1587.
(b) Hawk. P. C. I. 119. Foster, 322.
(c) H. P. C. I. 432. Foster, 321, 322.

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or brought to such gaoler at the prison, and the prisoner escape, the gaoler must answer the damage or debt. And if the prisoner do not escape, the gaoler shall be fined for such refusal only. And in like manner shall be fined for refusal to receive a prisoner sent to him on criminal process, by lawful authority.(d)

Fineable, if prisoner do not escape.

A gaoler is punishable by attachment for gross misbehaviour in his office; such as barbarously using a prisoner; for disobeying writs of *habeas corpus* lawfully issued; and not bringing up the prisoner at the day prefixed by the court or judge issuing such writ. And it is no excuse for not obeying a writ of *habeas corpus ad subjiciendum*, that the prisoner did not tender the fees due to the gaoler.(e)

Punishable by attachment for misbehaviour in office.

The want of a tender of the gaoler's fees, is said to be no excuse for not obeying a writ of *habeas corpus ad faciendum & recipiendum*; however, it is certain, that if the gaoler bring up the prisoner by virtue of such *habeas corpus*, the court will not turn him over until the gaoler be paid his fees.(f)

Must obey habeas corpus.

If a prisoner is unruly, and makes any attempt to escape, so that the gaoler has just reason to fear that he will effectuate it, the gaoler may hamper such prisoner with irons to secure him; but without such reasonable fear, to put a prisoner in irons, is altogether unwarrantable, and at common law may not be done.(g)

May not put prisoner in irons, unless, &c.

An action of debt will lie against a gaoler for the escape of a person in execution, though such escape

Liable in debt, for an escape

(d) Dalt. Sher. 466. Term. Rep. I. 60.
(e) Hawk. P. C. II. 227.
(f) Ibid.
(g) H. P. C. I. 601. Inst. II. 381.

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were *without* the knowledge of, and without any fault on the part of the gaoler, who in such case can avail himself of nothing but the act of God, or public enemies, as an excuse.(*h*)

May not discharge prisoner on authority from creditor, if such authority be countermanded before discharge.

If the creditor in an execution give a written authority for the discharge of the debtor out of prison, and afterwards, before the prisoner is discharged, countermands the authority for his discharge, and the gaoler notwithstanding discharge the prisoner, the creditor may recover against the gaoler for an escape, and the gaoler has no remedy against the person discharged, for the money recovered in the action for the escape.(*i*)

Liable for escape of prisoner, surrendered in discharge of bail.

If a defendant be arrested, and let to bail, and afterwards the plaintiff cause him to be again arrested in another suit, on which he is committed, and the bail in the first action, (the defendant being so in custody on the second arrest,) before the return day of the writ, notify the sheriff in writing, that they surrender the defendant so in custody, in discharge of their bail bond, given on the first arrest, and the sheriff do not manifest an acceptance of such surrender, and the prisoner afterwards escape, and the sheriff pays the amount of the demand for which the prisoner was first arrested, and let to bail, the sheriff cannot recover the same against the gaoler, on his bond of indemnity; for at the time of the departure of the prisoner, he was not in custody on the first, the sheriff not having assented to such a surrender, and of course it was no escape in the gaoler, and no breach of the condition of his bond, to save the sheriff harmless from escapes.(*j*)

(*h*) Hen. Black. II. 108.
(*i*) Peak, N. P. cases, 144. Note (a.)
(*j*) East, I. 383.

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His liability on escape of two indicted for the same, &c.

As the gaoler, who suffers an escape of a prisoner, indicted for two or more distinct felonies, is liable as for but one escape, so if two or more persons be indicted for one felony, and escape, the gaoler is liable to be indicted severally for the escape of each.(*k*)

Not liable for escape on execution from court not having jurisdiction.

If an action be brought on a bond, before a court of limited jurisdiction, and the plaintiff sets forth that the bond was made within the jurisdiction of the court, (when in truth it was not made within their jurisdiction,) and the action proceed to judgment, the defendant not having excepted to their jurisdiction, and execution issue, and the defendant be arrested, and committed to prison, and afterwards escape, neither the gaoler nor sheriff is liable in an action for such escape; for all that was done, was *coram non judice*, and therefore no legal commitment. And though the defendant in the court below, pleaded *non est factum*, that cannot give the court jurisdiction which it had not before.(*l*)

(*k*) H. P. C. I. 599.
(*l*) Mod. II. 29.

CHAP. II.

Of different Processes, and their Incidents.

I. DIRECTION AND SERVICE OF PROCESS.

DIRECTION, &c.

THE office of sheriff consists chiefly in the execution and service of writs and processes of law; and to do this, he is the immediate officer of the king and all his courts. For this purpose, he is sworn to a faithful performance of his duty, without favour, dread, or corruption.(*a*)

Process directed to sheriff, unless, &c.

By the ancient law, all original writs (purchased at the suit of a party to maintain actions,) are to be directed to the sheriff of the county where the cause of the suit arises, and may not be directed to any other person, unless in special cases, where there is good cause of exception to the sheriff, when the writ must be awarded to the coroner.(*b*)

Where the sheriff is a party, or cousin, or otherwise of kindred, or tenant to the other party, and which is not denied by such other party, the process must be directed to the coroner of that county, and must by him be executed. Yet it seems that when a sheriff is plaintiff, the original process, summons,

(*a*) Dalt. sher. 96.
(*b*) Ibid.

DIRECTION, &c. or capias, and the like, may be served by him on the defendant; and he, or his under sheriff for him, may afterwards put in pledges of prosecution when the writ is pending. And when they come to issue, he or the defendant may shew that he is sheriff, and the venire must be directed to the coroner. But if the plaintiff be named sheriff in the writ, a coroner must execute it; and so he must if the sheriff be defendant.* In some cases, where the sheriff makes default in the service of process, it must be directed to the coroner. And a coroner must serve an attachment awarded against a sheriff. And if the sheriff be guilty of partiality in returning the array, and thereupon the jury be quashed, process goes to the coroner; and in the writ to the coroners, the sheriff is commanded not to intermeddle.(c)

May *not* be directed to coroner, if there be no sheriff.

But if the sheriff be dead or removed, or otherwise there be no sheriff, the process may not be directed to the coroners, but must be stayed until a new sheriff be appointed. For the sheriff being the immediate officer of the courts, process may not go to the coroners but in special cases only; as where it is alleged that the sheriff is of kindred, or tenant, to either party; or is himself party to the suit, as above; or that the sheriff, made default, or is found partial as aforesaid: in such cases, process must be directed to coroners; otherwise, to the sheriff. And if the *venire facias* be awarded to the coroners, where it ought to have been directed to the sheriff, or *e converso*, (and so the jury be returned by such as have no authority,) it is error, and is not remedied by the statute of jeofails.(d)

* Where a sheriff is plaintiff, a *lalitat* directed to himself is irregular. Vide 1. Bl. Rep. 506.

(c) Dalt. sher. 97, 98. Co. X. 103, 104. Co. Lit. 138.
(d) Dalt. sher. 98. Co. V. 36.

DIRECTION, &c.

When the original process is once directed to the coroners, all the residue of the process in that suit must follow the original, and be likewise directed to the coroners; and that, though the sheriff be dead, or removed, or acquitted, and another indifferent sheriff be appointed, pending the suit.(e) If process go to the coroners, and there be four in the county, it is said that any two of them may execute or return it; for the plural number, to *coroners*, is observed; but one of them alone cannot execute or return such process.(f) But if three of the coroners die, the fourth may execute and return the process, until more be appointed.(g)

Original process directed to coroner, residue of the same suit must be also.

If favour in the under sheriff, (or that he is of kindred to either party,) or that he is a party, be alleged, the process must be directed to the high sheriff, with this clause, (it seems,) that the under sheriff shall not intermeddle.(h)

If both the sheriff and coroners be found partial, or faulty, the process must be directed to elisors appointed by the court, which elisors, upon a *venire facias* to them directed, must make and return the pannel, and after the return thereof, must serve and execute all other process which may issue in the suit, as the sheriff should have done, if the process were directed to him.(i)

If sheriff and coroner be partial, process directed to elisors.

Sir John Fortescue (some time lord chief justice, and afterwards chancellor to king Henry the sixth,) writing on the subject, says, If the sheriff return a

(e) Dalt. sher. 99.
(f) Ibid. Co. IV. 46.
(g) Ibid. Co. Lit. 181.
(h) Ibid.
(i) Ibid. Co. Lit. 158.

favourable panneh, exception may be taken to it by either party; and if the exception be found true, by the oath of two of the same pannel, (chosen thereto by the justices,) the pannel must be quashed: and then the justices shall write to the coroners of the same county, that they make a new pannel; and if that be found faulty, that must also be quashed: and then the justices shall choose two clerks of the same court, or two other persons of the same county, who in the presence of the court, must, upon their oaths, make an indifferent pannel, which may not be challenged by either party. But exception may be taken by either party to the poll or person of any such pannel, as to say he is cousin, &c. to the other party, which being found, such person shall not be sworn.(j)

Sheriffs, &c. must receive all writs at all times.

Sheriffs and under sheriffs must receive all manner of writs in any place, and at all times, within the county, when, and wheresoever they shall be delivered them, without further compensation than the the fees by law allowed; and must by themselves, or some lawful substitute, execute and return such writs according to the directions in them respectively given, and for neglect are liable to be fined. And the sheriff, &c. on the delivery of any such writ, must execute a receipt for the same, giving such a description thereof, as to enable the person delivering it, to prove such delivery if ever questioned. By this means remedy may be had against the sheriff for not executing such writ, or making a false return as to the time the writ came to his hands.(k) Though all writs are directed to the sheriff, yet he has choice to execute them himself, or he may command his under sheriff, bailiff, or other sworn officer, to serve

Sheriff may execute writs himself, or command other sworn officer to do it.

(j) Dalt. sher. 100. Co. Lit. 158.
(k) Ibid. 101, 102.

or execute them; and such command of the sheriff by word only, is good, without any precept in writing; but if such command be given to one not a sworn officer, it must be in writing, and accompanied by the writ.(*l*) If a writ or other process is delivered to the under sheriff, he must either execute it himself, or make his warrant in the name of the sheriff, to some other person, who may execute such writ or other process, but can command no other person to do it; and each respectively, having such writ or process to execute, may take the *posse comitatus*.(*m*) Neither the sheriff nor his officers may dispute the authority of the court from which they may receive any writ, process, or other warrant, but must execute all writs, precepts, and warrants, of the court, judges, or justices, to them directed, if within the jurisdiction of such court, judge, or justice, as may have issued the same; but if the court, judge, or justice, has not jurisdiction, the officer must take notice of it at his peril; for want of jurisdiction in the authority issuing any writ, process, or precept, will subject to an action the officer serving the same: not so, if the issuing such writ, precept, or process, is merely erroneous.(*n*)

Summons, &c.

Officer's duty therein.

The sheriff or other officer, to whom any writ or warrant shall be directed and delivered, ought to execute it with all speed and secrecy, and pursue the directions therein contained; else he cannot justify under it. When directed to attach the goods estate, or person, of a debtor, if by the delay of the officer having such warrant, such debtor absconds, or his goods are removed out of the jurisdiction of such officer, or are sold, or such goods or estate are

(*l*) Dalt. sher. 103.
(*m*) Ibid. 103, 104, 106.
(*n*) Ibid. 109.

DIRECTION, &c. by some other officer seized by virtue of lawful process, the officer thus delaying, becomes liable to an action for such his delay.(o)

A known officer need not show his writ or warrant before he makes service of it, although demanded; but one specially appointed, not known as a public officer must, otherwise the defendant may make resistance: and every officer who will justify an arrest or attachment by virtue of any writ or warrant, must produce it in court. It is also the duty of every officer, having made an arrest or attachment by virtue of any writ or process, to show it, if required by the defendant, that he may either pay the money demanded, or procure bail, or in some other way be enabled to liberate his person or goods. But though such officer need not show his precept when making such arrest or attachment, yet he ought to declare the contents of it, unless when the defendant makes resistance, in which case the officer need not even declare such contents, until the person arrested submit himself thereto. And if the officer is not known to the person whom he arrests, yet, when such officer says, I arrest you in the king's name, it is such notice to the person arrested, that he is bound to obey; and if arrested without lawful authority to make such arrest, he may have his action of false imprisonment against the person arresting.(p)

Sheriff, &c. may pursue defendant, flying from arrest, or escaping.

If a sheriff or other officer come to arrest a person, and before the officer can make the arrest, the defendant flies; the officer may pursue him, and take him, even in another county, but must use no violence to him, he not having been actually arrested

(o) Dalt. sher. 110, 111.
(p) Ibid. Co. IX. 68, 69.

before he fled; but if, after being arrested, he flies, and when overtaken, draws any weapon, the officer may justify an assault and battery to take him.(q) DIRECTION, &c.

If an officer arrest a person without warrant, though one be delivered to him immediately after, to arrest the party for the same cause, yet the action is tortious, and the officer liable in an action of false imprisonment by the party, and may be amerced.(r)

If the person or goods of a stranger are seized or attached, though his name is the same, and he affirmed himself to be the defendant yet the officer is liable in trespass: so if such person or goods are pointed out to the officer by the plaintiff, as the person or goods of the defendant. But if there are divers of the same name and sirname in the described limits, and the officer cannot by any means ascertain which is in fact the defendant named in the writ, it is safest for such officer to return such fact, and that he knows not on whom to execute such writ.(s) Liable for seizing the person or goods of a stranger, tho' &c.

If an officer arrest a defendant by virtue of a writ or warrant, and permits him to go at large to procure bail, on an agreement by the person arrested, that he will return to such officer on a day agreed, but does not return, the officer cannot retake such defendant by virtue of the same writ or warrant; but if the person arrested escape of his own wrong, without such consent of the officer, he may, on fresh pursuit, retake his prisoner, and repeat it as often as he escapes, though he gets out of the view of such officer, and even flies into another county.(t) May not retake prisoner, if he permit him to go at large.

(q) Dalt. sher. 111.
(r) Ibid.
(s) Ibid. 112, 113. Com. sher. 90.
(t) Ibid. 115.

DIRECTION, &c.

If an officer arrest a person on a capias, or writ of attachment or other lawful process, and returns, *non est inventus*, the person arrested, may maintain false imprisonment against such officer.(*u*)

A person in custody on one process, (civil,) will be also on a second, if tendered to the sheriff.

If a person is in custody of the sheriff by lawful authority, (except for criminal matters,) and another writ is delivered to the sheriff, commanding him to take the body of such person then in custody, by virtue of such other writ, and if such sheriff shall refuse to receive such other writ, or shall not hold the prisoner upon it, it will be an escape in the sheriff, though he made no formal arrest by the second writ.(*v*)

Every person who has any suit pending in any of the king's courts at Westminster, is privileged from any arrest either of his body or goods which are necessary for the maintenance of such suit.(*w*)

Sheriff, &c. may not arrest person performing divine service, &c.

If any officer or other person, arrest any clergyman or other person while performing divine service in the church or church yard, or other place dedicated to God, he is liable to be imprisoned, and punished at the king's pleasure, and to recompence the party arrested; but none may be kept within the church by fraud or collusion; and the sheriff may, if necessary, serve process and execute writs within a church, so that it be not done to the disturbance of divine service; nor may it be done on the Lord's day.(*x*)

No foreign minister, &c.

No sheriff or other officer may at any time serve any civil process or writ on any foreign minister or

(*u*) Dalt. sher. 113.
(*v*) Ibid. 114.
(*w*) Ibid.
(*x*) Ibid. 115.

his domestics, while he is resident in the country, and in office; to do which is prohibited by the law of nations, as well as by statute of the realm.(y) DIRECTION, &c.

Service of a declaration in ejectment, by nailing it on the barn door of the premises, in which the tenant had occasionally slept, there being no dwelling-house on the premises, and the tenant not being found at his last place of abode, was allowed to be good service.(z) Declaration in ejectment nailed to door, held good service.

In the state of Massachusetts, a constable cannot serve an original writ in a real action; and if such writ is served by a constable only, it is matter of error after judgment.(a) In Massachusetts, constable cannot serve original writ in real action.

By the statutes of Massachusetts of 1785. c. 75, s. 8. process against a town or other body corporate, must be served by leaving a copy of such writ with the clerk or principal inhabitant of the town, or some principal member of the corporation, thirty days before the return day of the writ. And the words, other body corporate, include all aggregate corporations; and of course banking companies, on which writs must be served thirty days before the return day.(b) Writ v. town, served by copy left with clerk.

In scire facias, to hear errors in judgment upon a probate bond, all the names of the persons indorsed on the original writ, and for whose use executions were awarded, ought to be inserted in the writ, and service thereof to be made upon all.(c)

(y) Com. sher. 98.
(z) Bos. Pul. IV. 293.
(a) M. T. R. V. 260.
(b) Ibid. 100.
(c) Ibid. III. 252.

DIRECTION, &c.

In Connecticut, officer bound by precept, unless, &c.

In the state of Connecticut, an officer is bound by his precept, unless it be void on the face of it. He cannot look into the circumstances which induced the direction of it to him.(d)

Justice may grant warrant to search for stolen goods.

A justice of the peace may grant a warrant to search for stolen goods, but the places to be searched must be particularly described and specified in such warrant, (as well as the goods for which search is to be made,) and if a justice grant a warrant to search all places, and arrest all persons the complainant may suspect; such warrant is illegal and void.(e)

A writ directed to an indifferent person by name, without describing his place of residence, is good.(f)

Recognizance by plaintiff only, before authority signing, attachment good.

A recognizance by the plaintiff in a writ of attachment before the authority signing the same, is sufficient security given on such writ, to authorize service thereof as an attachment.(g)

Writ of replevin, a mandatory process.

A writ to replevy goods taken by attachment, is not an adversary suit, but a mandatory precept, which ought to be directed to the officer who served the attachment, requiring him to redeliver the goods to the defendant in the original action, to give notice to the plaintiff at whose suit they were attached, and to return the writ of replevin to the court to which the attachment was made returnable. And the bonds which are given on the issuing of the writ of replevin, are the only pledge which the plaintiff has for the security of his debt, &c.(h)

(d) Kirb. 182.
(e) Ibid. 215.
(f) Root, I. 504.
(g) Day, II. 227.
(h) Kirb. 274.

DIRECTION, &c.

If a writ of attachment be served by a proper officer's reading the same in the hearing of the defendant, or by leaving a true and attested copy thereof, at his usual place of abode in the state, the service will be good to hold the defendant to answer to the action, though no property of the defendant's be attached.(*f*)

Attachment may be served as summons.

In process of foreign attachment, if the defendant ever dwelt in this state, a copy of the writ must, by a proper officer, be left in service at his lodging, or last usual place of abode in the state.(*j*)

Foreign attachment.

When the inhabitants of a town are sued in their corporate capacity, and the writ is returnable before a justice of the peace, it must be served at least twelve days before the time of trial.(*k*)

Process against a town.

In an action where a town is plaintiff, a member of that town may serve the writ.(*l*) If the officer or indifferent person who serves a writ gave bonds of prosecution thereon when it issued, and is the only security thereon at the time of service, the service of such writ by him is nevertheless good.(*m*)

Process in favour of a town, officer may give bond of prosecution.

If a husband and wife are both defendants in an action, and the process be served by copy only, one true and attested copy of such process, left by a proper officer at their usual place of abode, (they then living together) is sufficient service on both.(*n*)

Husband and wife both defendants.

In the service of an attachment, the officer may not take the goods nor estate of the defendant, and

On attachment may not take both

(*i*) Root, I. 54. II. 130.
(*j*) Ibid. 387.
(*k*) Ibid. 109.
(*l*) Ibid. 175.
(*m*) Ibid. 328, 356.
(*n*) Ibid. 475.

DIRECTION, &c. goods and body.

also take his body: and if after having taken the defendant's goods or estate, he also take his body, such officer is liable to an action of false imprisonment, in favor of the person whose goods, or estate and body are so attached.(o)

In Vermont, warrant to apprehend criminal, not issued but upon oath.

In the state of Vermont, a warrant to apprehend a person charged with a crime, upon the complaint of a private informer, cannot legally issue without oath made by the complainant. And though the complainant write in his complaint, that it is under oath, and the mittimus set forth that the complaint was so made, it is bad, and nothing short of the certificate of the magistrate, that the oath was administered, is sufficient evidence thereof.(p)

Sci. fa. v. bail.

A writ of scire facias, issued against bail taken on mesne process returnable to a county court, must be signed by one of the judges, or by the clerk of the court to which such writ of scire facias is made returnable. And if signed by a justice of the peace only, all proceedings thereon are, as to the parties, erroneous, and in relation to third persons, void.

(o) Root, II. 346.
(p) Tyl. Rep. I. 444.

II. SUMMONS.

SUMMONS. What, and how served.

SUMMONS is a writ, directed to the sheriff or other proper officer, to cite or warn one to appear at a certain day, and answer, &c. The summons must be made *by* or in the presence of two or three summoners, who ought to be free and lawful men of the neighbourhood. And in real actions, the sheriff's order to serve or execute this process, is to go himself, or send his deputy to the land with the summons, and there to cite or warn the tenant, or party, by sticking up a white stick in his land; which done, the sheriff must return the common pledges for the plaintiff, and the names of the summoners, thus:

Pledges of prosecution { *John Doe,* / *Richard Roe.*

Summoners of the within named J. S. (the deft.) { *Richard Doe,* / *Henry Few.*

This summons, or warning of the defendant to appear and answer, &c. is so necessary by the common law, that without it, all the proceedings and judgments after, are often erroneous, and rendered fruitless, and the officer liable to punishment and damage. For if a man recover in a writ of dower, or waste, &c. by default of the defendant, when in fact he had not been summoned, (nor attached, nor distrained) he may have a writ of deceit against both the officer and plaintiff. (*a*)

(*a*) Dalt. sher. 149, 150.

SUMMONS.

In trespass. In a writ of trespass, the sheriff returned a *non est inventus*, whereupon a *capias* issued out to take the defendant, who afterwards came into court, and alleged that he was sufficient, and that he might have been summoned; and prayed a writ against the sheriff for his false return, and had it.(*b*)

Real actions. In real actions, the sheriff or his officer must summon the tenant upon the land, but in an action of debt, for damages recovered in a writ of entry, &c. the summons must be to the person.

Petit cape. In a *petit cape*, the sheriff must summon the tenant to answer to his default, and to hear his judgment upon it, after plea, issue, or demurrer. But in a *grand cape*, the tenant must be summoned to answer to the default, and further to the demandant.(*c*)

Real actions. In summons in real actions, the summoners, in presence of the pernors, (receivers) and viewers, &c. ought, 1st, to summon the tenant to keep his day of return, and name it certain, to answer, &c. 2d, they must name the name of the defendant; 3d, the land demanded.(*d*)

And the sheriff, by force of the *præcipe*, may come upon the land with the summoners, and there summon the person against whom the *præcipe* is brought; but if the sheriff, by information of the demandant, shall summon the tenant in another man's land, the sheriff shall be excused. And the summons in a *præcipe* must always be done in the day time, between sunrising and sunsetting, and not in the night, and fifteen days at least, before the return of the writ.(*e*)

(*b*) Dalt. sher. 150.
(*c*) Ibid. 151.
(*d*) Co. VI. 52.
(*e*) Dalt. sher. 151.

The sheriff cannot summon the tenant by rent common or reversion, nor the like; for that the soil is another man's freehold. And yet where tenant for life, prays in aid of him in reversion, and a *scire facias* issues to summon him in reversion, and the sheriff returns that the reversioner hath nothing in the county but the reversion of the land in which he hath summoned him, it is a good return; for he must be summoned in the land demanded, and which is another's freehold.(*f*) SUMMONS.

But where the action is to recover the freehold of land, the summons must be made in the same land. And where the summons is brought against one as heir, the summons must be in the land descended.(*g*)

Upon a *præcipe*, if the defendant be not tenant of the land, &c. yet the sheriff must summon him on the land demanded; inasmuch as the plaintiff has sworn that he is tenant. And, indeed, the writ does not command the sheriff to summon the tenant upon his own land, but generally, that he must summon him, not naming in what land. And then, by a maxim in law, it is taken, that he must summon him upon the land in demand.(*h*)

If the sheriff summon him who has no land, by his person, and return him summoned, it is good. As in actions of annuity or covenant, summons is the proper process; and where the defendant has no land, he may be summoned by his person, and in all actions merely personal, the sheriff must summon the defendant by his person.(*i*) One who has no land may be summoned by his person.

(*f*) Dalt. sher. 151, 152.
(*g*) Ibid.
(*h*) Ibid. 152.
(*i*) Ibid.

summons.

In a præcipe there ought to be two summoners, for if there be but one, and the tenant make default, and lose by his default, he shall have a writ of deceit against the sheriff.(j)

Sheriff cannot summon himself.

The sheriff cannot summon himself; and if he do, and suffer a recovery, it is erroneous: and if he return one summoned, who has not been summoned, he it is punishable.(k)

(j) Dalt. sher. 153.
(k) Ibid. 152, 153.

III. ATTACHMENT AND CAPIAS.

ATTACH comes from the French word *attacher*, and signifies to take or apprehend, by commandment of a writ or precept.(*a*)

ATTACHMENT, &c.

Attachment, what, and its difference from arrest.

It differs from arrest, in that he who arrests a man, carries him forthwith before a person of higher authority, to be disposed of as the law directs; while the person attached may be kept by the officer executing the writ, and presented in court at the day assigned. An arrest is executed on the body only, but an attachment often upon goods and chattels,(*b*) and is most properly issued in personal actions.

Capias, what, and its difference from attachment.

A capias takes hold of lands and tenements, and appropriately belongs to real actions.(*c*)

Difference of attachment from distress.

The difference between a common attachment and distress, is, that an attachment runs not against the lands, while a distress does; and the distress runs not against the body, but it may be taken by an attachment.(*d*) The attachment, in the most common use of the word, is an apprehending the body of a man, to bring him to answer the action of the plaintiff. Attachments are also issued against persons guilty of a contempt of court.(*e*) Attornies, for injustice and base dealings with their clients, are liable to attachment, as well as for contempt of court.(*f*) Where a man is attached by his goods, they ought to be move-

(*a*) Jac. Law Dic. title, Attachment.
(*b*) Kitch. 279. Dalt. Sher. 154.
(*c*) Bract. lib. 4. Fleta, lib. 5. cap. 24.
(*d*) Glan . lib. 10.
(*e*) Lill. Abr. 121.
(*f*) Hawk. H. 217, 219.

ATTACHMENT, &c.

ables, mere chattels personal; nor is every chattel personal at all times subject to attachment. The defendant's horse on which he rides, ought not to be attached, if other goods sufficient may be found. Neither are goods pawned or borrowed subject to attachment. If the goods of A. are attached as the goods of B. and in his possession, yet A. may maintain his action against the officer serving the attachment, for he must at his peril take knowledge to whom is the property of the goods. An attachment may be made by pledges, as well as by goods, viz. by the defendant's procuring pledges or sureties for his appearance in court. (g)

Sworn bailiff having warrant, may command his servant to make attachment.

A bailiff sworn and known, having a warrant to make an attachment, may command his servant to do it, and it will be good, though the command be by parol only. (h) If an officer attach live cattle, he may put them in the common pound, but chattels without life, in any other place of safety. (i) If the officer attaching goods leave them in the hands of the owner, taking an obligation of him for the delivery of the goods, if he make default of appearance, such obligation is good and valid. (j)

A married woman must be attached by the goods of her husband. (k)

Attachment v. sheriff, &c. for corrupt practice.

The court will grant an attachment against sheriffs, their officers, coroners and constables, authorized to serve process, whenever it shall appear that any such officers have been guilty of any corrupt practice, in not serving any writ; as where they refuse to do it,

(g) Dalt. Sher. 155.
(h) Ibid. 156.
(i) Ibid.
(j) Ibid.
(k) Ibid. 157.

unless paid an unreasonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his personal effects in order to prevent the service of any writ, the court which awarded it may punish such offences in such manner as shall seem proper, by attachment, &c. But if there neither appears to have been any palpable corruption in the case, nor particular obstinacy, as by disobeying a special rule of the court in relation to the service of such writ, nor other extraordinary circumstance of wilful negligence, it seems not to be usual to grant an attachment in such cases, but to leave the party to his ordinary remedy against the officer, which he may have, either by serving him with rules to return the writ, &c. or by suing him for the damage sustained by his negligence, in an action of escape, or on the case, or by taking out an *alias*, or *pluries*, which if the sheriff do not execute, an attachment goes against him of course, unless he give a good excuse for his not having done it.(*l*) ATTACHMENT, &c.

So for oppressive practice in the execution of a writ, as for using needless force, violence and terror, in making an arrest, or breaking open doors where, by law, it is not justifiable, and there is no plausible excuse for doing it, or treating persons arrested basely and inhumanly, or keeping them in custody till they consent to pay money for their deliverance, or making an arrest without due authority, as by force of a blank warrant, filled up with the name of a special bailiff by the party himself, or by a bailiff without the privity or subsequent agreement of the sheriff, attachments are every day granted. But attachments of this kind are sometimes denied, in respect of the common use of the practice, which experience has For oppressive practice.

(*l*) Hawk. P. C. 215.

ATTACHMENT, &c. proved almost necessary in some cases, to prevent the defendant's having notice of the intended arrest. And if it appear to the court that there be any such reasonable cause, they will in a great measure excuse, if not wholly dispense with it.(*m*)

Where an officer is guilty of any corrupt practice, in depriving the plaintiff of that benefit which he ought to have from the execution of his writ, such officer is liable to be punished by attachment. As if he levy the debt by virtue of an execution, and keep the money in his own hands and embezzle it. But unless there appear some gross and palpable corruption in an officer by neglecting to return a writ executed by him, or to bring in the body or money, &c. according to his return, the court will hardly grant an attachment immediately, but rather proceed against him by rules to return the writ, &c.(*n*)

For contempt. But where an officer attempts to impose upon the court, by knowingly making a false return, he is liable to be punished by attachment for his contempt. Yet in such case, the court will choose to leave the party injured to his remedy, by an action on the case, unless where there is some extraordinary hardship or oppression: as where an officer who had arrested one on a *capias*, returned that he had taken him, but that the defendant was so sick, that he could not bring in his body at the day for fear of endangering his life; when, in truth, the defendant had been all the while in good health, and was only detained under such pretence to extort money from him, &c.(*o*)

(*m*) Hawk. P. C. 216.
(*n*) Ibid.
(*o*) Ibid. II. 217.

ATTACHMENT, &c.

A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of the court within six months after the expiration of his office; notwithstanding he was requested by the party to return it before the six months had expired.(p)

Sheriff not liable to attachment for not returning writ, unless, &c.

The sheriff returned *cepi corpus* to a bailable writ, in Hilary term, upon which the plaintiff proceeded no further till next Michaelmas term, when the court decided it unreasonable that the sheriff should be called upon to bring in the body after such delay, and set aside an attachment issued against him for not doing it.(q)

A sheriff who is ruled on the last day of a term, to bring in the body, but goes out of office before the next term, is liable to an attachment for not bringing in the body. (r)

But a sheriff ought not to be ruled to bring in the body, *until* the day after the day on which the rule to return the writ expires. And if he be ruled to bring in the body before such expiration, and be attached for not obeying it, the court will set aside the attachment for irregularity.(s)

An attachment against the sheriff is irregular, if the rule to bring in the body issues before the time of putting in bail expires.(t)

Contempt not purged by defendant surrendering.

If the sheriff be once in contempt for not bringing in the body, that contempt is not purged by the de-

(p) Term. Rep. II. 1.
(q) Ibid. VII. 452.
(r) Hen. Black. I. 629.
(s) Ter. Rep. V. 479.
(t) Hen. Black. II. 276.

ATTACHMENT, &c.

fendant's surrendering on a subsequent day, though before an attachment is moved for against the sheriff.(*u*)

When bail is put in after attaching the sheriff, and a trial has not been lost, the court will set aside the attachment; for the plaintiff is not entitled to it as a security, in case he should recover: otherwise, if a trial has been lost.(*v*)

Application to set aside attachment.

Upon application to set aside an attachment against the sheriff for not bringing in the body, bail having been put in and no trial lost, the court require an affidavit of the merits of such application, to come from the defendant in the cause, but not if it come *bona fide* from the sheriff himself, of which fact he must make oath. But when such attachment has regularly issued, the court will not relieve the sheriff, if it appear that he let the defendant out of custody without taking from him such bail bond as is required by statute.(*w*)

A rule, calling on the sheriff to return a writ issued in the vacation, though tested in the succeeding term, is irregular, and an attachment grounded upon it will be set aside by the court, on motion.(*x*)

Although an exception to bail has been regularly entered, and the defendant's attorney, having had verbal notice of it, proceeds to give notice of justification, and attempts to justify, yet notice of such exception must have been given to make the sheriff liable to an attachment for not bringing in the body.(*y*)

(*u*) Ter. Rep. VIII. 29.
(*v*) Ibid. IV. 382.
(*w*) Ibid. VII. 239.
(*x*) Ibid. I. 559.
(*y*) Hen. Black. I. 80.

ATTACHMENT, &c.

Notice of justification of bail is not such a waiver of the default of not giving notice of exception, as to support a rule on the sheriff, to bring in the body, though it is a waiver between the plaintiff and defendant.(z)

Sheriff for not bringing in the body, will not be discharged but upon payment of the whole debt and costs.

The court will not discharge an attachment against the sheriff for not bringing in the body, except upon the payment of the whole debt, due, and costs. The sheriff will not be allowed to put himself in a better situation than the bail. He may, if he pleases, bring in the body. He ought to put the plaintiff in the same situation as if good bail were put in and justified. If he do not return the writ, and is attached for contempt, he must not put the plaintiff in a worse situation. The whole debt and costs, together with the costs of the application, must be paid before the attachment may be discharged.(a)

After an attachment against the sheriff for not bringing in the body, he must not merely pay the sum sworn to and costs, before the court will relieve him, but he must pay the whole debt and costs.

A *fi. fa.* issued to the sheriff, at the suit of A. against B. On the next day another *fi. fa.* issued on the suit of C. against B. A levy was made under the first writ, but notice was given to the sheriff by C. not to pay over the money to A. on the ground, that the judgment obtained by him was fraudulent. The sheriff, notwithstanding, paid the money over to A. and the officer returned the second writ with a *nulla bona*. On this, an attachment issued against the sheriff for not returning that writ, to which at-

(z) Hen. Black. 1. 106.
(a) Ibid. 233.

ATTACHMENT, &c.

tachment the sheriff put in bail, and was afterwards examined on interrogatories. The prothonotary to whom the examination was referred, having reported that neither the contempt of the court, nor the imputation of fraud appeared to him to be done away, the court thereupon ordered the sheriff immediately to pay the whole debt and costs due to C. together with the costs of all the applications.(*b*)

For refusing to make affidavit, &c.

An attachment was granted against a bailiff for refusing to make affidavit of the service of a subpœna upon one H. L. to appear and testify before a grand jury, in order to found a motion for an attachment, for his not appearing.(c)

But the court would not grant an attachment against a sheriff for neglecting to take a replevin bond, because the party injured may maintain an action; for it could not by any means be construed to be an abuse of the process of the court, nor a contempt, which are the sole grounds for an attachment against the sheriff.(*d*)

v. Coroner.

An attachment was granted in the first instance against the coroners for not attaching the sheriff, against whom an attachment directed to the coroners, had issued, for bringing in the body of the defendant, pursuant to a rule of the court of common pleas; and the attachment was ordered to be directed to *elisors* named by the plaintiff, and approved by the prothonotary.(*e*)

A rule for an attachment against the sheriff for not bringing in the body of the defendant, having been obtained on the 19th of November, but the attach-

(*b*) Hen. Black. I. 543.
(*c*) Black. Rep. I. 432.
(*d*) Term. Rep. II. 617.
(*e*) Black. Rep. II. 911, 1218.

ment not sued out and served upon the sheriff until 9th of March, the court held the sheriff discharged. The case was—the defendant in the original writ, was arrested in a long vacation, on a writ returnable on the first return day of the next (Michaelmas) term, and paid into the hands of the sheriff's officer the sum of £205 and the costs. On the 6th of November, the plaintiff ruled the sheriff to return the writ, which was complied with; on the 13th of November he ruled the sheriff to bring in the body, which rule expired on the 17th; and this not being complied with, a rule was obtained for an attachment upon the 19th, but was not sued out and served until the 9th of March following. ATTACHMENT, &c.

The court was of opinion, That the plaintiff had discharged the sheriff, and that therefore the attachment must be set aside. (f)

The court will set aside an attachment, if the affidavit on which it was founded, merely state, that the officer of the sheriff was served with the copy of the rule to bring in the body, but does not add, that the original was shewn to him. (g)

If an attachment for non payment of money to A. issue against B. and the process be committed to the hands of an officer who is not able to serve it upon B. and A. meet B. in the street, and by violence carry him to the chamber of C. A's attorney, and B. is there detained until the officer having the process of attachment is sent for, (though not by A.) and on B's leaving C's chamber, arrests him at the bottom of the stairs, the arrest is illegal, and B. must be dis-

(f) Bos. & Pul. III. 151.
(g) Ibid. IV. 121.

ATTACHMENT, &c.

charged by the court. For arrests by violence lead to serious consequences, and must not be encouraged.(*h*)

The court will not open the rule for an attachment on the mere affidavit of the party only, that he has not been served with it, unless he can also show some mistake that has been made in the service; as that one person has been served in the place of another.(*i*)

On an application for an attachment against the defendant for non payment of an attorney's bill, pursuant to the master's *allocatur*, under the usual references, by the judge's order, the rule was objected to, because the service of it was made on sunday. Lord Kenyon, ch. j. after adverting to the statute, and expressing an anxious wish to preserve as much as possible a strict attention to the sabbath, said, that the statute of Car. II. was equally applicable to the case of a service of process, as to an actual arrest, and the rule in this case was a proceeding within the act. The rest of the judges concerning the rule was discharged.(*j*)*

To answer, may issue v. tenant after summons.

After a summons, if the tenant or defendant do not come into court, an attachment issues; by virtue of which, the officer must go to the house or land of such tenant or defendant, take surety by pledges, or attach him by his goods, to compel him to appear and answer to the suit. But the defendant cannot be attached by his land, nor by any part of his freehold,

* By the statute 29. Car. 2. C. 7. s. 6. it is enacted, that "No person "upon 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," &c.

(*h*) Bos. & Pul. IV. 135.
(*i*) Ibid. 256.
(*j*) Ter. Rep. VIII. 86.

nor by any chattel real, nor by any table dormant, nor by any thing fastened to the freehold; as a furnace, wainscot, doors, windows, pales, or the like; but attachment ought to be made by the defendant's own proper goods, mere chattels personal, which may be forfeited by outlawry, and which, if the defendant do not appear, will be forfeited. But the apparel of the defendant then on his body, may not be attached at all; nor the horse on which he is riding, if he hath other goods; but if not, such horse may be attached.(k) ATTACHMENT, &c.

The goods attached must be the proper goods of the defendant: and the officer making the attachment must take knowledge whose are the goods, at his peril, for if they prove to be the goods of a stranger, the officer is a trespasser. He may not take my horse in the possession of my servant, for his debt. If the sheriff find the party, he may attach him by pledges; but if the sheriff do not find the defendant, he must attach him by his goods.(l) Goods attached must be proper goods of defendant.

A sworn and known bailiff may not make an attachment without warrant, but a warrant by word only, is sufficient. And the attachment may be served by the plaintiff's servant, if he have the sheriff's warrant therefor.(m) The sheriff commanded his bailiff to make an attachment, and the bailiff commanded his servant to do it, who did it; and all this was by parol, without any warrant in writing, and held good.(n) Parol warrant to bailiff, sufficient to make service

If live cattle are attached, the officer may put them into the common pound; but if goods without Live cattle attached may

(k) Dalt. Sher. 154, 155.
(l) Ibid. 155.
(m) Ibid. 156.
(n) Ibid.

ATTACHMENT, &c.

life are attached, as pots, pans, or the like, the officer may take and carry them home to his own house. And it seems, that if the officer leave the goods with the defendant, and take his obligation for the delivery of them, if he make default of appearance, the obligation will be good.(o)

be put in common pound.

If an officer attaches a defendant by a chattel, and he does not appear at the day of his return, the chattel is forfeited, and the sheriff must answer for the value of it: he ought, therefore, to keep the goods attached, or take security to be saved harmless therein.(p)

The defendant ought always to be attached fifteen days at the least, before the return day of the writ.(q)

In assize of novel desseisin and nuisance, where the original process is by attachment, the defendant may be attached by his goods.(r)

For trespass against peace.

For trespass done against the peace, (as for assault and battery, for breaking a close, for carrying away goods, for cutting down trees, and the like,) the defendant shall be attached by pledges, or by his goods and chattels. But for trespass against the king's crown, which touches life, the defendant or delinquent must be attached by his body.(s)

Upon rule to return.

The sheriff being ruled to return the writ, either does, or does not return it. If there be no return, it is a contempt of the court; for which the constant course of proceeding is by attachment, whether against the

(o) Dalt. Sher. 156.
(p) Ibid.
(q) Ibid. 157.
(r) Ibid. 153.
(s) Ibid. 157.

present or late sheriff. For as to the late sheriff, he ought, in strictness, to have returned the writ before he was out of office, and therefore, the contempt was actually committed while he was a servant of the court. But the sheriff is not liable to an attachment before the expiration of the time allowed for putting in and perfecting the bail. And therefore if the rule to return the writ expire (as it generally does,) during that time, the plaintiff, instead of moving for an attachment, must proceed as though the sheriff had duly returned the writ.(a) ATTACHMENT, &c.

The mode of proceeding against the present sheriff upon a return of *cepi corpus et paratum habeo*, in order to compel him to bring in the body, or put in and perfect bail above, is by rule of court: but against the late sheriff, it is by *destringas*, which is a judicial writ, directed to the present sheriff. In point of form, it is general or special, and should be made returnable on a certain day or general return, according to former proceedings.(b)

When bail above is put in, and notice thereof given to the plaintiff's attorney, the bail should be excepted to, and notice of the exception given to the defendant's attorney before the sheriff is called upon to bring in the body. But where bail above is not put in at the time of calling upon the sheriff, he must put in and perfect it at his peril, without an exception.(c)

When the sheriff is called upon to bring in the body, he must either bring it into court, or put in and perfect bail above, within the time allowed him by

(a) Tyd's Prac. 87.
(b) Ibid. 87, 88.
(c) Ibid. 88.

ATTACHMENT, &c.

the rule or *destringas*. Otherwise it is a contempt for which he is liable to pay the debt and costs; and, in order to enforce the payment, the plaintiff on a proper affidavit, may move the court for an attachment, or sue out an *alias destringas*. The attachment is a criminal process, and lies against the present or late sheriff for not returning the writ; but for not bringing in the body, it lies against the present sheriff only, and against the present sheriff it must be directed to coroners; against the old sheriff, to his successor; and must be made returnable at a general return, though the original process was at a day certain.(*d*)

In New-York upon rule to return.

In the state of New-York, instead of the mode by *destringas*, where the sheriff is out of office, the proceeding is by attachment; to obtain which, a rule is entered in the book of common rules, thus:

"*Thomas Stevens*, } *SUPREME COURT.*
v.
"*John Williams*, }

5th May, 1807.

"The sheriff of the city and county of New-York, "not having returned the writ of capias in this "cause, ordered on motion of Mr. Sacket, on behalf "of the plaintiff, that the said sheriff peremptorily "return the writ issued in this case, within twenty "day's after notice of this rule, or that an attachment "issue against him."

Of this rule it is not necessary to serve a copy, the following notice of its being entered, is all that is required:

(*d*) Tyd's Prac. 88.

ATTACHMENT, &c.

" *Thomas Stevens,*
v.
" *John Williams,* } *SUPREME COURT.*

" Take notice, that a rule has this day been " entered in this cause, with the clerk, in the book " of common rules in his office, that within twenty " days you return the writ issued in this cause, or " that an attachment issue against you. New-York, " the 5th day of May, 1807.

" Samuel Sacket, *Attorney for Plaintiff.*

" To William Cutting, esquire,

" *Sheriff of the city and county of New-York.*"

If the sheriff do not return the writ within the time, the following affidavit is made and filed with the clerk:

" *John Williams,*
ads.
" *Thomas Stevens,* } *SUPREME COURT.*

" Samuel Sacket, the attorney for the plaintiff in " this cause, being duly sworn, makes oath, and saith, " That he, the deponent, did, on the last, " (or instant,) personally serve William Cutting, esq. " sheriff of the city and county of New-York, with a " true copy of the annexed notice, by delivering the " same to him. And this deponent further saith, " *That he hath this day searched at the office of the* " *clerk of this honourable court, for the return of* " *the writ of capias issued in this cause, but that no* " *such writ was then filed there.*

" Samuel Sacket.

" Sworn this 26th day of May, 1807,

" before me,

" John Keese, *Com.*"

ATTACHMENT, &c. To this affidavit, a copy of the notice of the rule is annexed when they are filed, and the sheriff's default entered in the book of common rules, as follows, viz.

"*Thomas Stevens,*
v.
"*John Williams,* } *SUPREME COURT.*

"*May 26th*, 1807.

"On reading and filing the affidavit of Mr. Samuel "Sacket, attorney for the plaintiff, stating, that the "said Samuel Sacket did, on the fifth day of May, "instant, personally serve William Cutting, esq. "sheriff of the city and county of New-York, with "a notice of the rule entered in this cause, on "the said fifth day of May, ordering the said "William Cutting, to return the writ of capias issued "in this suit, and that on due search, the same has "not been returned: ordered, on the motion of Mr. "Sacket, for the plaintiff, that the default of the "said sheriff be, and it hereby is accordingly en-"tered; and further, that an attachment issue."

On this, an attachment issues of course, as well in vacation, as in term, in form following, viz.

"The people of the state of New-York, to the coroner of the city and county of New-York, greeting:—We command you, that you attach William Cutting, esq. sheriff of our said city and county, so that you have him before our justices of our supreme court of judicature, at the city-hall of the city of Albany, on the first monday of August next; to answer before our said justices, for certain trespasses and contempts, done and committed in our said court, before our said justices; and have you then there this writ. Witness, James Kent, esq.

our chief justice, at our city of New-York, the sixteenth day of May,* in the year of our Lord, 1807." ATTACHMENT, &c.

* Last day of term.

The rule under which these proceedings are had, extends to late as well as present sheriffs, *mutatis mutandis.*(a)

On the return of the writ if there be no appearance endorsed, the clerk enters of course in his book the following rule:

"*Thomas Stevens,* v. "*John Williams,* } *SUPREME COURT.*

4th May, 1807.

"The sheriff of the city and county of New-York, "having returned the writ of *capias*, issued in this "cause, *capi corpus*, ordered on motion of Mr. Sacket "for the plaintiff, that the sheriff of the city and "county aforesaid, bring in the body, sitting the "court, or be amerced forty shillings."

If the plaintiff wish to compel the bringing in the body, his attorney enters in the book of common rules, the following:

"The sheriff of the city and county of New-York, "having returned the writ of *capias* issued in this "cause, ordered, on motion of Mr. Sacket, for the "plaintiff, that the said sheriff bring in the body of "the defendant, within twenty days after service of "notice of this rule, or show cause, on the first day "of next term, why an attachment should not issue "against him."

(a) Caines' Prac. 70, 71, 72, 73.

ATTACHMENT, &c.

On this rule notice is served, and affidavit thereof made, as upon the rule for returning the writ: varied only in form, so as to comport with the rule. This being a rule to show cause, no default can be entered in vacation. But on motion for an attachment on the first day of the next term, the rule will be made absolute, unless by having put in, and perfected bail, or in some other way, the sheriff show good cause against it. And though the sheriff have put in one real bail, who has justified, and has filled up the bail piece, with the name of a fictitious person, as the other bail, the attachment will be granted.(*d*)

v. Defendant.

If a prisoner be admitted to defend on payment of costs, and after entering into the consent rule, keep out of the way, to avoid being served with a copy of the *ca. sa.* against the casual ejector, a rule will be granted to show cause, why an attachment should not go against him; and *service of that rule at the defendant's house, is sufficient.*(*a*)

v. Sheriff.

Where a sheriff is brought up on an attachment, the plaintiff must file his interrogatories in four days, and the sheriff must enter into a recognizance, to appear from day to day, and after having answered, may, on motion, amend, to explain an ambiguity, but not to introduce any new matter.(*b*)

The court would not grant an attachment against the sheriff for not bringing in the body of the defendant, the rule having expired, where the defendant tendered the money to the full amount, as security;

(*d*) Caines' Prac. 77, 78.
(*a*) N. Y. T. R. II. 368.
(*b*) Johns. Cas. I. 31, 32.

and having put in bail which was excepted to, and the plaintiff did not ask for a trial.(c) ATTACHMENT, &c.

A sheriff is not to be considered as in contempt for not acting on an execution which never came to his personal knowledge, nor was lodged in his office. But where a *fi. fa.* was delivered to a deputy, and the sheriff affirmed the receipt of it, by acting upon it, and did not return it within 40 days, nor respond any satisfactory excuse, the court fined him 20 dollars for the contempt, with costs of the rule and attachment, and committed him, until payment of fine and costs.(*d*)

Where, on the non-payment of costs on a judgment by default against the casual ejector in ejectment, by A. the tenant, who had entered into the consent rule, an attachment was issued to bring A. before the court to answer; and the sheriff to whom the attachment was issued, arrested A. but while he was in custody, was served with an order for his discharge, made by the court of common pleas, to whom A. had petitioned for a discharge, pursuant to the "Act for "the relief of debtors, with respect to the imprison- "ment of their persons," and the sheriff accordingly discharged A. from his custody: it was held that the order of the court of common pleas was void, as A. was not in custody on a conviction for a contempt, but only to answer. And that the sheriff was liable for the amount of the costs recovered against A.(*e*) v. Tenant.

In the state of Massachusetts, attachments were at first issued only to cause an appearance of the defend- In Massachusetts, person or property

(c) Johns. Cas. I. 412.
(*d*) Ibid. 137.
(*e*) Ibid. 115.

ATTACHMENT, &c.

ant in court, and were dissolved on such appearance, being duly entered in the cause. Afterwards, if person or property were attached, they were holden until final judgment rendered in the cause, when the attachment was dissolved. At length the creditor was allowed thirty days to charge the defendant, or take the property attached, in execution: and if it was not done in that space, all hold by virtue of the attachment was lost. Such is the law at present. (f)

attached, holden until 30 days after judgment.

Proceedings, or where body is exempt.

If the body of the defendant is by any legal means exempted from arrest and imprisonment generally, on civil process, or is so exempted in any particular case, or for a limited time, while his goods and estate are liable to be taken for the purpose of securing, or in satisfaction of the plaintiff's demand, a writ may lawfully issue, commanding the officer, if on mesne process, to attach the goods and estate of the defendant, and to summon him to appear before the court and answer to the plaintiff, and if on execution to take the goods or estate of the defendant to satisfy such execution, omitting to give any authority to take the body of such debtor. (g)

Body & goods may not be taken.

An officer cannot attach the estate of the defendant on mesne process, after having arrested his body on the same writ, and taken bail for his appearance at court. And if after making such arrest, and taking bail, the officer without giving up the bail bond, attach estate, and make return thereof, but in his return make no mention of such previous arrest, he is liable to an action for a false return. And such

(f) M. T. R. V. 273.
(g) Ibid. III. 193.

action lies for a third person, who had caused the same estate to be afterwards attached at his suit. ATTACHMENT, &c.

The case was, an action against the sheriff for a false return. The facts were: N. B. was the owner of a share in the Hay-market theatre, and was indebted to S. S. in a considerable sum. S. S. purchased a writ, which was put into the hands of a deputy sheriff, who arrested N. B. and took bail. In a few hours after, the deputy sheriff, on the same writ, without giving up the bail bond, attached the share in the theatre. Afterwards J. B. another creditor, attached the same share, subsequent to the attachment of S. S. who went on with his suit, and levied his execution on the same share in the theatre. The deputy sheriff made return of S. S's writ, that he had attached the share, but took no notice of the previous arrest. J. B. having lost the benefit of his attachment, brought his action against the sheriff for a false return. The court in their directions to the jury, said it was clear, that by law, an officer could not take both body and estate: and that when he had taken the body, the writ was *functum officio*, completely executed; and no further proceedings could be had thereon by the officer, except to make his return: That the return was clearly false, as the officer, though he had returned nothing but the truth, had not returned the whole truth: and that J. B. might maintain his action for the damage by him sustained.(*h*)

To constitute an attachment of goods, the officer must take them into his actual possession and custody, as on seizure by execution.(*i*) Of goods, how made.

(*h*) M. T. R. III. 561.
(*i*) Ibid. V. 163, 164.

ATTACHMENT, &c.

At common law, goods seized on a *fieri facias* cannot be seized by the same officer, under another writ, while held by virtue of the first; but in this state, the officer who takes goods by virtue of one writ, may afterwards take them by virtue of another, while held under the first; but while so in the custody of the officer who first took them, they cannot be taken by a different officer. For the officer who attaches goods, must hold them in his actual custody; so that he alone can control the possession. They cannot, therefore, be attached at the suit of a second creditor, but by the officer who thus has them in actual possession. For he who attaches goods lawfully, must take them into his actual possession, which another officer cannot do, the first having a special property in them, by his prior attachment: and if the goods are finally sold on execution, in consequence of such first attachment, the officer who sold the same having no other attachment or execution in his hands, by which he had taken the goods before sold, must pay over the surplus, if any there be, to the person from whom such goods were taken. By different officers, is not meant different deputies of the same sheriff, for they are all his servants; and the possession of a deputy by virtue of an attachment, is the possession of the sheriff. But if the sheriff first attach the goods, the marshal of the United States, in consequence of the priority given to the United States in the collection of debts, may, by virtue of an attachment or execution in favour of the United States, seize the goods in the possession of the sheriff, and take them from him, and entirely defeat the attachment by the sheriff. (*j*)

(*j*) M. T. R. V. 273, 274, 275.

Implements of husbandry used in tilling, are not within the statute exempting the tools of a debtor from attachment and execution.(k) ATTACHMENT, &c.

If goods be consigned by A. to B. an insolvent debtor, who on notice of the consignment, immediately, while the goods are *in transitu*, and not received by him, disagrees to the consignment, they are not liable to be attached as his goods. For the assent of A. the consignor, must be presumed, unless in a reasonable time he declare his dissent, or neglect to give notice of his dissent. If the goods arrive before the consignor can have notice, that the consignee has disagreed to the shipment, any person at the request of the consignee may receive and take care of them, until the consignor can have notice; and an intermediate attachment will not defeat his right.(l) Goods consigned, when liable to.

If an officer on an original writ attaches property not belonging to the defendant, and judgment is recovered, and execution issued, and put into the hands of the attaching officer, with directions to levy such execution upon the property so attached, the officer may, notwithstanding, where the property attached was not the property of the debtor, or if it be rescued, return *nulla bona*, or rescue, of the property, and take the body of the defendant, and commit the same to prison, and thereby exonerate himself from the creditor.(m)

Where an original writ is delivered to the sheriff with a special direction indorsed, "to attach sufficient estate, or hold to bail," perhaps he is not holden

(k) M. T. R. V. 113.
(l) Ibid. 162.
(m) Ibid. IV. 504.

ATTACHMENT, &c.

to look up estate: but if at the time of the delivery of the writ, he be verbally directed to go immediately and attach certain chattels, describing their nature and situation, he is bound to obey such verbal direction, if he lawfully can. And the creditor, if required, must designate the chattels to be attached, and if they are not in the possession of the debtor, or there be a dispute concerning the property of them, the creditor must also give the officer an indemnity for making the attachment, but need not go with him to make it.(*n*)

When goods or chattels are attached, by virtue of an original writ, to secure the judgment which the plaintiff may recover, if on the appeal, judgment be rendered for the defendant, the attachment is *ipso facto* dissolved, and the sheriff can no longer retain the property attached, against the demand of the defendant.(*o*)

When goods attached by the officer on four writs, in favour of four different plaintiffs, are replevied from the possession of such officer, by as many different writs of replevin, sued by the same party, on each of which a bond is given to the officer, and he puts them all in suit, he is entitled to his costs in each action.(*p*)

In Connecticut, may in certain cases be served by indifferent person.

In the state of Connecticut, the statute which empowers the authority signing original writs, in certain cases, to direct such writs to indifferent persons to serve and return, includes writs of attachment, as well as writs of summons.(*q*)

(*n*) M. T. R. IV. 60, 63.
(*o*) Ibid. 100.
(*p*) Ibid. 316.
(*q*) Root, II. 72.

If a writ of attachment be no otherwise served, than by its being read by a proper officer in the defendant's hearing, or by a true and attested copy of such writ being left by such officer at the defendant's usual place of abode, within the state, the service is good to hold the defendant to answer to the suit.(r)

ATTACHMENT, &c. May be served as summons.

If on a writ of attachment, the officer attach goods and estate of the defendant, he cannot on the same writ attach the defendant's body. The body being only liable to attachment for want of goods or estate. And though in the opinion of the officer, the goods or estate by him taken are insufficient to satisfy the plaintiff's demand, and on that account he takes the body, he is a trespasser; for unless by the special direction of the plaintiff, the officer need not attach goods or estate, unless evidently sufficient, but may take the body, and return *nulla bona* as to goods and estate: but if the creditor direct the officer to attach the goods or estate of the defendant, of ever so little value, he is justified in not taking the body. If the officer take the goods, or estate, and body of the defendant, without any direction from the plaintiff so to do, the officer alone is liable. But if the creditor direct the officer to take both goods, or estate, and the body of the defendant, and the officer proceed accordingly, they are jointly liable.(s)

Goods and body may not be seized.

If goods are taken by attachment, and delivered to B. who promises to redeliver them on demand, and they are not demanded within sixty days after final judgment in the action in which they were attached, B. may restore them to the original owner, and will not be liable on his promise to the officer. And if the officer hold the goods himself, and exe-

Goods seized, not held more than 60 days after final judgment.

(r) Root, II. 130. I. 54, 128.
(s) Ibid. 346.

ATTACHMENT, &c.

cution be not issued, and the goods taken thereon within sixty days after such judgment, he ought to deliver back the goods attached to the right owner.

M. brought his action against B. on a receipt, executed by the defendant to the plaintiff, as constable, for goods taken by attachment, containing a promise to redeliver said goods on demand, for the purpose of responding the judgment on the writ of attachment. The defendant pleaded that he held said goods, and was ready to redeliver them to the plaintiff at all times, until the expiration of more than sixty days after judgment on said writ of attachment: that no demand was made for said goods, and in consequence of the premises he restored them to the original owner. On demurrer it was adjudged——

That goods attached cannot be holden more than sixty days after the rendering final judgment in the action; and if not taken in execution within that time, must be restored to the owner. And that no demand having been made on the defendant to redeliver said goods, before the expiration of sixty days after rendering final judgment on said writ of attachment, it became his duty to restore the goods to the owner from whom they had been taken by said writ of attachment: and that he would have been liable in trover if he had refused.(*t*)

If A. receive money on an execution in favour of B. and endorse the execution, satisfied, the money lying on the table, an officer, who has a writ of attachment in his hands for service against B. cannot attach the money so received by A. on execution in favour of B. and lying on the table, for the property

(*t*) Kirb. 40.

in money accompanies possession; and A. not having paid the money over to B. it is not liable to attachment as his property, but remains the property of A. until actually delivered into the possession of B.(u) Attachment, &c.

And though goods be taken by attachment, and receipted by a third person, who promises to redeliver the same to the officer on demand, the officer can maintain no action on such promise, if the goods be not demanded within sixty days after final judgment; but if a writ of error be prayed out by the defendant in the original action, and served on the plaintiff therein, before the expiration of sixty days after such judgment, and such judgment be affirmed, the officer may make such demand at any time within the first sixty days after the rendering such original judgment, that execution can be lawfully levied upon the goods, including in such sixty days the number of days between the rendering the judgment on which execution may issue, and the service of the writ of error, and a sufficient number first after the determination of the writ of error to complete sixty days, in which execution may be taken out and served. Final judgment in an action, is a judgment on which execution may, in a course of regular proceedings, be issued; and a writ of error is no supercedeas until served.(v) Final judgment, what.

The officer who serves an attachment on real estate, must leave a true and attested copy of the writ, and a description of the estate taken, at the town clerk's office, in the town where the estate lies; and though there may be several variations between the description of the estate taken, on the copy left with Attachment on real estate.

(u) Root, I. 544. Cranch. I. 135.
(v) Ibid. 481.

ATTACHMENT, &c.

the town clerk, and the description on the copy left with the defendant, and between that and the return on the original writ, it will not so vitiate the service that the creditor will lose his hold on the estate, provided the description on the copy left at the town clerk's office, so far describe the land, that no mistake can happen as to what land is intended.(w)

Plaintiff's recognizance sufficient.

If the plaintiff in an attachment enter into a recognizance before the authority signing the writ to prosecute his action, to effect and answer all damages in case he make not his plea good, it is a giving sufficient security within the statute requiring bonds for prosecution, to warrant the service of such writ, and for further proceedings thereon, until additional security is ordered by the court.(x)

In Vermont, action of trespass v. constable.

In the state of Vermont:—Trespass for breaking and entering the plaintiff's barn, and taking his horse. The case was this: The defendant as a constable, on the 7th day of October, 1797, attached the horse as the property of W. M. upon a writ to him directed, to serve and return in favour of J. and H. and soon after entrusted W. M. with the keeping of the horse. On the 10th of January 1798, W. M. sold and delivered the horse to the plaintiff. On the 20th of March, 1798, the defendant retook the horse out of the possession of the plaintiff, to satisfy the execution which followed the attachment on which the defendant attached the horse on said 7th of October, 1797. On the facts in the case being disclosed, the court observed, that the case was

(w) Kirb. 103.
(x) Day, 11. 227.

clearly with the plaintiff And in their charge to the jury, laid it down as a principle, that when an officer attaches a chattel, and leaves it in the custody of the defendant, he so far loses his lien upon the property attached, that a second attachment or *bona fide* purchase, shall always enure against him.(y) ATTACHMENT, &c.

(y) Tyler's Rep. 249.

IV. DISTRINGAS.

DISTRINGAS. What, and how directed.

THE writ of *distringas* is directed to the sheriff, &c. commanding him to distrain the party, for his, or the jury, for their appearance. A *distringas* for the appearance of the party to answer, as also for the jury, goes out *infinite*, until the party or the jurors come in and appear. And the *distringas* is a process to distrain the parties or jury by their goods, and the issues of their lands. And the goods and issues taken, are forfeited on failure of their appearance. This distress is of two kinds: personal, by taking the moveable goods of the party, and detaining them for the surety of his appearance to the suit; and real, made also of the moveable goods, as the *grand cape* and *petit cape*. The grand distress, is when the defendant has been attached but does not appear; or, having appeared, makes default.

How served.

The wife must be distrained by the goods of her husband, which must be returned by the sheriff in issues; and are forfeited if she does not appear.(*a*)

Upon a *distringas*, the sheriff must distrain the defendant by his goods in such manner, as he attached him, except that the goods attached may be replevied by two pledges, but the distress may not be delivered by fewer than four sureties; otherwise he must keep the distress as he should do goods attached but not replevied. And if the defendant thereupon make default, the distress not delivered

(*a*) Dalt. Sher. 160, 161.

upon sureties as aforesaid, the court may award the distress forfeited, and detain it as such. DISTRINGAS.

But if the distress be delivered upon sureties, and the defendant make default of appearance, the court shall then award the defendant and his sureties to be amerced; and in both cases the defendant shall be distrained again to appear at the next court, to answer the plaintiff.(*b*)

The sheriff upon a *distringas*, takes all the goods of the party and the profits of the land from the test of the writ; which issues are forfeited and escheated into the exchequer, if the party do not appear.(*c*) Issues forfeited, if party do not appear.

If a *distringas* go instead of a *grand* or *petit cape*, and the sheriff return issues on nihil, and at the return, the tenant or defendant make default, final judgment must be given. The issues upon a *distringas* ought to be reasonable, though the writ says, by all his chattels and lands. And it is sufficient that the sheriff return the profits which may arise after the *teste*, and before the return of the writ; or in a personal action, so much as may be the charge of the process. But the court may order issues to be increased on *alias* or *pluries* at their discretion, generally five times.(*d*)

If three partners (two of whom reside abroad, and one in England,) be sued for a partnership debt, and the party resident in England appears to the action, but refuses to appear for the partners resident abroad, the sheriff under a *distringas* against the two absent partners, may take partnership effects; v. Absent partners.

(*b*) Dalt. Sher. 417, 418.
(*c*) Com. Dig. IV. 484.
(*d*) Ibid.

DISTRINGAS.

though paid for by the partner resident in England alone, and to whom the partnership is largely indebted; and the court will not relieve him against such distress, though if an account were taken between him and the other partners, it would be found that they were indebted to him. Whatever may be taken in execution may be taken under a distress. If the defendant had no interest in the property taken under the distress, the sheriff ought to have returned *nulla bona*.(e)

(e) Bos. et Pul. III. 254.

V. VENIRE FACIAS.

THE writ of *venire facias* is of two sorts. The first is a mere summons to cause the defendant to come in and answer, &c. The other is a writ issued by the court after the parties have come to an issue, directing the sheriff to impannel and return a jury; and this is but a summons to the jurors. If upon this *venire facias* the sheriff shall return the names of the jury, and they do not appear at the day, there issues an *habeas corpora juratorum*, and after that a *distringas jurator.* to distrain them until they come.(a)

VENIRE FACIAS. What and how served.

(a) Dalt. Sher. 160.

VI. ISSUES.

Issues. What.

ISSUES are the chattels and profits of the lands of the defendant, which may be taken by virtue of a writ of *distringas*; which, if the defendant do not appear, are by the common law forfeited.(a)

Rents not due, &c. need not be returned.

Though the writ requires the sheriff to distrain all the chattels and profits of the lands of the defendant, he must not distrain rent not due, nor corn growing; for such corn may be destroyed by tempest: nor are arms, implements of trade, or the household goods of the defendant, to be returned as issues; but all other moveables, as well as the profits of his lands, are to be returned.

Reasonable distress sufficient.

Though upon a *distringas* against the defendant, the sheriff must return issues, (if any there be,) and a reasonable distress is sufficient. Yet, if the issues returned be ever so great, it seems the party has no remedy: but they must be forfeited, or the sheriff must be answerable for them. By the common law the sheriff need not return issues on a *venire facias*, for jurors, nor any great issues upon any writ of *habeas corpora*, or *distringas juratos*. And if the sheriff upon such *distringas*, return no issues, and a full jury appear, it is not error, the intention of the writ being answered.(b)

Insufficient juror being returned, sheriff must pay issues.

If the sheriff return a juror in issues, who is not sufficient, or hath no land, the sheriff must pay the issues himself. And if he return issues upon a juror

(a) Bl. Com. III. 280.
(b) Dalt. Sher. 323, 456. St. N. Y. I. 209.

not lawfully summoned, he shall be punished. If twelve jurors appear, and are sworn, and the rest make default, they shall not lose their issue; but if twelve do not appear, those who appear shall have their appearance noted, and shall save their issues; and those who make default shall lose their issues. Yet if eight appear, and the rest make default, and the plaintiff is demanded at the same time, and is nonsuit, the issues of the defaulting jurors will be saved. And if a jury appear, and after make default, they shall lose their issues.(c) ISSUES.

When a *tales* is awarded, the sheriff or other officer must add to their former pannel, the names of those impannelled upon the *tales*.(d)

The sheriff is not chargeable for issues, other than those which he has a lawful warrant to collect.(e)

Issues returned and lost for the nonappearance of the defendant or persons impannelled, are forfeited, and must be levied by the sheriff, for which he must account. And the land of the person making default, into whose soever hands it may come, stands chargeable with the issues returned and lost, as in any other case of distress infinite.(f) Issues lost, are forfeited.

If the sheriff return none, or too small issues, he is liable to amercement.(g)

(c) Dalt. Sher. 327.
(d) Ibid.
(e) Ibid.
(f) Ibid 329. Salk. I. 395.
(g) Ibid. 490.

VII. OUTLAWRY.

OUTLAWRY. What, and its consequences.

A MAN is outlawed, when, by judgment of law, he is by his own default ousted of his law; or is placed *extra legem*, and put without the protection of law, and prohibited from enjoying its privileges. He is then called *utlegatus*, or an outlaw. But as the name is derived from the practice in ancient times of administering the oath of allegiance to every man of the age of twelve years, one not so sworn, was denominated an outlaw. So women not being admitted to take the oath of allegiance are not said to be outlawed, but in the language of lord Coke, are said to be *waviatæ*, waived; *id est, derelictæ*, left out, and not regarded.(*a*) And on this subject, so careful have courts been in regard of etymology, that if in process, a woman is said to be *utlegata*, it is error.(*b*) An infant under the age of twelve years cannot be outlawed.(*c*)

In the reign of Alfred, and until long after the conquest, no man could have been outlawed but for felony; the punishment whereof was death. And hence it was said, that according to the common law, an outlaw had a wolf's head; because he might be put to death by any man. But in the beginning of the reign of Ed. III. it was resolved by the judges, that an outlaw might be put to death by the sheriff only; and that under the authority of a lawful warrant; and that it was murder for any other to kill an outlaw: and such has remained the law.(*d*)

(*a*) Co. Lit. 128.
(*b*) Com. Dig. V. 650. Rol. II. 804.
(*c*) Co. Lit. 128.
(*d*) Ibid.

OUTLAWRY. In what cases it lies.

Afterwards in the time of Bracton, and somewhat earlier, process of outlawry was ordained to lie in all actions of trespass, *vi et armis*. And now by different statutes of New-York, it is extended not only to treason,(*e*) but to actions of account, debt, detinue, annuity, covenant, conspiracy, and of the case; and in all actions of replevin, after a capias in withernam is returned, that the person against whom it is issued has no goods: and in all other cases where process is issued for taking the body, if it be returned, that the person against whom such process is issued, is not to be found, as well as in actions of trespass done with force and arms. And process in the several cases may be pursued to the *exigent* and outlawry thereupon.(*f*) In New-York.

In Massachusetts.

By statutes of Massachusetts, process of outlawry issues against any person charged of any offence before the supreme court of the state, by indictment or presentment of a grand jury; whether the same were made before said court, or made before a court of inferior jurisdiction, and removed to the supreme court by appeal on writ of *certiorari*.(*g*) And against any constable or collector of any town, district, plantation, parish, or precinct, who shall abscond or secrete himself for the space of one month, having assessments in his hands unsettled.(*h*)

At common law, a person outlawed, forfeits his goods and chattels, and the profits of his lands, his personal chattels, immediately upon the outlawry; and his chattels real, and the profits of his lands, when found by inquisition.(*i*)

(*e*) St. N. Y. 215.
(*f*) Ibid. 246.
(*g*) St. M. 76.
(*h*) Ibid. 272.
(*i*) Salk. I. 395.

OUTLAWRY. Proceedings to, and in.

Outlawry is either upon *mesne* process before, or upon final process after judgment.(*j*) When the plaintiff will proceed to outlawry on *mesne* process in a civil action, after different intermediate processes for causing an appearance of the defendant have proved unsuccessful, the writ of *exigent* issues, directed to the sheriff of the county where the action is laid, or the defendant is supposed to dwell; commanding such sheriff to require such defendant from county court to county court, until he be outlawed: that is, to require such defendant at five successive county courts; if he do not appear at the last of which, the sheriff must, by himself, or his sufficient deputy, on the non appearance of such defendant, pronounce judgment of outlawry, and return his writ of *exigent* to the court to which it is made returnable. After judgment in the original action, and a *non est inventus* returned upon the *ca. sa.* an *exigent* immediately issues, and the proceedings thereupon had by the sheriff, are the same as upon an exigent on *mesne* process.

Upon the defendant's being put in exigent, he is either taken by the sheriff, appears voluntarily, or makes default. If he be taken, he either remains in custody of the sheriff, or gives bail, &c. as upon a common arrest, as the case may be, either upon *mesne* or final process.(*k*) If the defendant be neither arrested nor appear, but makes default at five successive county courts, he is, if a man, outlawed; if a woman, waived.(*l*) And the judgment of outlawry being returned by the sheriff upon the *exigent*, a writ of *capias ut legatum* issues,

(*j*) Tyd's Prac. 91.
(*k*) Ibid. 31, 32.
(*l*) Co. Lit. 288.

which may run into any county without a *testatum.*(*m*) The defendant being taken by the sheriff, on this writ, either gives bail to appear, and reverse the outlawry, or remains in custody until he actually reverse it, or be otherwise in due course of law discharged.(*n*) At common law, the defendant could not have been bailed when taken by the sheriff upon a *capias utlagatum;* but by statute, the sheriff is authorized to take bail as in other cases of arrest.(*o*)

OUTLAWRY.

For further directions under this head, see vol. II. *statutes of New-York upon outlawry;* and *upon process and service.* And *statutes Massachusetts, upon outlawry;* and *upon service.*

(*m*) Tidd's Prac. 33.
(*n*) Ibid.
(*o*) Ibid. 33, 34. Bur. III. 1484. IV. 2540.

CHAP. III.

OF ARREST AND ITS CONTINGENCIES.

I. ARREST.

ARREST is derived from the French word *arrester*, to stop or stay. It is a restraint of a man's person, obliging him to be obedient to law, and is the execution of the command of some court or officer of justice. None may be arrested in any civil action, but by some writ, precept or command, issued by some court, judge, or justice, having authority therefor. But for treason, felony, or breach of the peace, any person may arrest, without warrant or precept.(*a*)

Arrest. What.

After presentment, or indictment found, in criminal cases, the first process is a *capias* to arrest and imprison the accused; and if he cannot be taken, an *exigent* is awarded in order to outlawry.(*b*) When a man is apprehended for debt, he is said to be arrested. And writs express arrest by *capias*, or *attachias*, to take and catch hold of a man. For there must be a corporal seizing, or touching the defendant's person; or, what is tantamount, a power of taking immediate possession of the body, and

Upon presentment or indictment, capias issues.

(*a*) Terms de ley, 54.
(*b*) H. P. C. 208.

ARREST.

and the party's submission thereto, and a declaration of the officer that he makes an arrest.(c) If the officer put his hands upon the party, saying that he arrests him, it is sufficient; without shewing his warrant, and without saying at whose suit the arrest is made, unless required. And that, though the warrant is in his pocket, or he has two or more warrants there, and does not say on which he arrests for, the arrest will be good on all.(d)

By whom made.

An arrest must be by authority of the bailiff, or officer to whom the warrant or precept is directed. And he must be in company, but he need not be the hand that arrests; nor present, nor in the sight of the party arrested: but it may be done by a servant of the officer, sent forward at some distance, and out of sight.(e)

And how.

Words only do not make an arrest. And if after the officer says, "*I arrest you*," not having touched the person, he is beaten off by a sword or other weapon, it is no arrest. If an officer be kept off from making an arrest, he may maintain an action of assault; and if the person arrested make resistance, or assault the officer, he may justify beating him. And if he touches him for the purpose of an arrest, and he escapes, it is a rescous; and the officer may pursue him, and justify breaking open a house to retake and carry him away. And an attachment may also be had against him.(f) If an officer, having a precept to arrest a man, take hold of his hand held out of a window, it is an arrest; and he

(c) Lill. Abr. I. 96. Bul. N. P. 62. Salk. I. 79.
(d) Cro. Jac. 485, 486.
(e) Cowp. 63, 64.
(f) Salk. I. 79. Mod. VI. 173.

may pursue and take him, &c. in the same manner as though arrested at large.(g) ARREST.

Arrests may be made in the night as well as by day.(h) But arrests on civil process, made on sunday are void, and the party arrested may maintain false imprisonment against the officer.(i) But a prisoner who has escaped may be retaken on sunday.(j) And bail may, on sunday, take the principal and confine him till monday, and then render him.(k) When.

The defendant, whose cause was put off early in the day, staid in court till five in the afternoon, to speak to his attorney, who was engaged in other causes, and at the rising of the court went with his attorney and witnesses to dine at a tavern, and during dinner was arrested: the court, on motion, discharged him; for by the court, such a necessary refreshment is not such a deviation as to cancel the defendant's privilege in returning: but this is not the privilege of the person attending the court,(l) but the privilege of the court which he attends. And therefore, the allowing or not allowing the privilege is discretionary, and has been disallowed in collusive actions,(m) and in vexatious ones,(n) and when the party attended as a volunteer, and not upon process.(o)

When a felony has actually been committed, a constable, and even a private person acting bona May be without warrant if

(g) Ventris, I. 306.
(h) Co. IX. 66.
(i) Salk. I. 78.
(j) Mod. VI. 231.
(k) Nels. I. 258.
(l) Black. Rep. II. 1193.
(m) Rastal, 76. } Bl. Rep. II. 1193.
(n) Mod. XI. 79. }
(o) Salk. 544.

ARREST.

cases of felony, &c.

fide, and in pursuit of the offender, upon such information as amounts to a reasonable and probable ground of suspicion, may justify an arrest. And though in fact no felony has been committed, if a constable receive such information, given him by design, and for charging with a felony, he may justify arresting the accused.(p)

A person convicted on a penal statute, may not be arrested on sunday for non payment of the penalty.(q)

Exempt from.

Ambassadors and other public ministers, their secretaries and families and servants, are privileged from arrest. And even a domestic servant of a foreign minister, though a native of the country where he resides, is by the law of nations privileged from arrest;(r) and so is a messenger sent by his sovereign to such minister.(s)

All persons who have relation to a suit which calls for their attendance, whether compelled or not by process to attend, (in which number bail are included,) are entitled to privilege, in going to and coming from court, provided they came *bona fide*;(t) but not in attending on commissioners of a bankrupt, to prove a debt.(u)

A minister of religion, while performing divine service in a church, churchyard, or other place of public worship, may not be arrested on civil process, unless his stay or continuance is with a fraudulent

(p) Wms. Abr. I. 667, 668.
(q) Term. Rep. I. 265.
(r) Burr, III. 1478-9.
(s) Ter. Rep. III. 79. Tidd's Prac. 25.
(t) Hen. Black. I. 636.
(u) Term. Rep. IV. 377.

design. And it seems that no person ought to be arrested in any place where courts of justice are actually in session. ARREST.

If a person be arrested after the writ is returnable, the officer may not legally detain him, though for the shortest time, till the writ be renewed. As where the writ was returnable on sunday, and on monday, the next day, at eight o'clock in the morning, the defendant was arrested and detained by the officer till ten o'clock the same morning, when the writ was renewed; it was held an unlawful arrest, and the defendant, on motion, discharged.(v) A defendant in a case, attending an arbitration as a witness, under a rule of court, is privileged from arrest while necessarily there, and in returning home.(w) May not be made after the writ is returnable.

A constable may justify an arrest, on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed; but the person making the charge, if unfounded, is liable to the accused.(x)

A person in custody, under an attachment for non payment of costs, is in custody on civil process, and may be charged with an execution in a different action.(y)

The defendant having been arrested by the sheriff at the suit of another plaintiff on saturday, was discharged on the same day, the sheriff not knowing that at that time there was a detainer lodged with his Nor on sunday.

(v) Hen. Black. II. 29.
(w) East, III. 89.
(x) Ter. Rep. I. 358.
(y) Ibid. IV. 316.

ARREST.

officer against him. This being afterwards discovered, the defendant was arrested on sunday; but on motion was discharged out of custody, as being arrested contrary to the statute for the preservation of the sabbath.(z)

If a defendant be taken on execution, and give the plaintiff a draft, saying it will be paid immediately, and is thereupon discharged out of custody, and the bill is dishonoured, he may be again arrested on the same execution.(a)

If the plaintiff strike out of the warrant the name of the bailiff, inserted by the sheriff, and insert the name of another person, who makes the arrest, such arrest is illegal; and the prisoner will be discharged out of custody, and the plaintiff compelled to pay costs.(b)

Until a written discharge comes from the plaintiff at whose suit the defendant is in custody, the sheriff is not called upon to search the office, to see if there are any other writs against such defendant; and then a reasonable time must be allowed for the purpose, and twenty four hours does not seem an unreasonable time.(c)

If an arrest be made after the return day of the writ, the arrest is void, and the officer liable in false imprisonment.(d)

Writ of protection, its effect.

A writ of protection will not protect one who is not lawfully entitled to it, and is of no other use

(z) Ter. Rep. V. 25.
(a) Ibid. VI. 32.
(b) Ibid. 199.
(c) Esp. N. P. Cases. I. 45.
(d) Ibid. II. 585.

to one who is entitled, but as *prima facie* evidence to the officer who is to arrest him. If a juror or any other person whose duty brings him to court, whether as a party or witness, is arrested while attending upon, or in going to, or returning from the court, the court will upon motion take order for his discharge.(*c*) ARREST.

In the state of New-York; a defendant had obtained his certificate under a commission of bankruptcy issued against him in Connecticut, under the bankrupt law of the United States: he was afterwards arrested in the state of New-York at the suit of the plaintiff; but on production of his certificate, the court ordered him to be discharged.(*a*) In New-York

In the state of Massachusetts, no member of the house of representatives may be arrested or held to bail on original process during his going unto, attending upon, or returning from the general assembly. No militia officer, non commissioned officer, nor private, may be arrested on any civil process, during his going unto, performance of, or returning from, military duty; nor during his going unto, remaining at, or returning from, any place at which he is ordered to meet for the election of any officer or officers. Nor may any militia officer be arrested on any civil process, while going unto, serving upon, or returning from any court martial, court of inquiry, or board of officers, upon which it may be his duty to attend.(*b*) In Massachusetts.

In the state of Connecticut, a sheriff is not liable to be arrested on civil process. And if so arrested, In Connecticut.

(*c*) M. T. R. III. 288.
(*a*) N. Y. T. R. I. 487. Jones, vs. Emerson.
(*b*) St. M. I. 30. VI. 164, 165.

ARREST.

will be discharged by the court, and the process abated.(c) *

Nor may the body of an administrator be arrested for a claim upon the estate of the intestate; and if such arrest be made under the direction of the plaintiff, with a design thereby to compel the administrator to satisfy such claim, he may maintain an action of false imprisonment against the plaintiff.(d) And it seems, that if it appeared on the face of the process, that the officer was directed to arrest the body of an administrator for a claim against the estate of his intestate, and the officer arrest the defendant, such officer is also liable to the same action, such process being void.(e)

If a justice of the peace, and a constable, being informed of an affray, come to a shop where the affrayers are, and find the door locked in such a manner as to prevent their admission without breaking the door; and the justice make demand of admittance, and is refused, and, while attempting to get in, is struck by one of the affrayers; and the justice thereupon by parol, order the constable to break open the door and arrest the affrayers, and the constable in obedience to such parol command, break open the shop, and arrest the affrayers, the arrest is lawful. And in an action of trespass against the justice and constable, they may plead the general issue, and give the facts in evidence in complete justification.(f)

* *Quære*—A marshal of the United States, may be arrested in Connecticut, and committed: and why not a sheriff, in a county of which he is not sheriff? *See escape.*

(c) Kirb. 48.
(d) Ibid. 68.
(e) Ibid. 179.
(f) Root, 1. 66.

When a theft has been committed, any person may, without warrant, pursue and take the thief, and convey and deliver him to some proper authority, to be dealt with as the law directs. And if such prisoner be convicted of such theft, the person so taking him without warrant, is not liable on an action of assault, battery, and false imprisonment.(g) ARREST.

No senator nor representative in the congress of the United States, during his attendance at the respective houses, nor going to, nor returning from the same, may be arrested; except in cases of treason, felony, or breach of the peace.(h)* Persons exempted from.

No member of the general assembly of Connecticut, during the sessions thereof, or in going to, or returning from the same, may be arrested, sued, or imprisoned; or in any way molested, or troubled, or compelled to answer to any suit, bill, plaint, or declaration, or otherwise; before any court, judge, or justice, except in cases of high treason or felony only.(j)

Nor may any member of the senate or house of representatives in the general court of New-Hampshire, be arrested or held to bail on mesne process, during his going to, coming from, or attendance at said court.(k) New-Hampshire.

In Vermont, the governor, lieutenant governor, treasurer, and every member of the council, and Vermont.

* If such senator, &c. loiters on his return, on his own business, a time longer than at the rate of 20 miles to the day, he loses his privilege. Sup. Ct. N. Y.

(g) Root, II. 171.
(h) St. U. S. I. 8.
(j) St. C. 203.
(k) St. N. H. 9.

ARREST.

house of representatives, and all officers whose duty it is to attend the legislature, are in all cases, except for treason, felony, or breach of the peace, privileged from arrest during their attendance at the session of the legislature, and in going to, and returning from the same.(*l*)

Rhode-Island.

Every person or persons chosen to serve as members of the general assembly of Rhode-Island, and their estates, are privileged from summons, arrest, attachment, and execution, at the suit of any private person, for any debt or damages, during the session of the assembly; and for three days before, and three days after such session.(*m*)

New-York.

In the state of New-York, electors are privileged from being served with any civil process, between the day preceding an election of governor, lieutenant governor, or senators, and representatives, &c. and the day subsequent to the closing of the poll at such election.(*n*)

No member of the legislature, or his servant, or servants, are liable to arrest on any civil process, while coming to, or returning from the place where the legislature shall sit, to the place of such member's residence: but such time of coming or returning, may not exceed fourteen days.(*o*)

Counsellors and attornies of the supreme court are neither liable to arrest:(*p*) nor are militia men from sunrise to sunset, of the day for which they are under arms for improvement or inspection.(*q*)

(*l*) St. V. 552. Stay's edition, in 1798.
(*m*) St. R. I. 207, 208.
(*n*) St. N. Y. I. 275.
(*o*) Ibid. 133.
(*p*) N. Y. T. R. II. 387.

ARREST.

All non commissioned officers, musicians, seamen, and marines, enlisted into the sea-service of the United States, are exempted, during the term of their service, from personal arrest, for any debt or contract.(r)

And all non commissioned officers, musicians, and privates, enlisted into the army of the United States, are privileged from arrest, or being taken in execution for any debt contracted after such enlistment: and are, in like manner, privileged from arrest, or being taken in execution, for any debt under the sum of twenty dollars, contracted before such enlistment.(s)

(q) St. N. Y. I. 510.
(r) St. U. S. IV. 201.
(s) Ibid. VI. 28.

II. BREAKING DOORS.

BREAKING DOORS.

When legal.

AN officer may not break open a window or outward door, to make an arrest on civil process;(a) but if once in the house, he may break inner doors, if his entrance through the outer door was peaceable, such outward door standing open; and may break such inner door, having first demanded entrance, though the defendant be not within at the time.(b)

But, if on rapping at the door, it be opened to see who is there, and the officer rush forcibly in, with a drawn sword, or other similar weapon, and make an arrest, such entry and arrest are both unlawful.(c)

When the outer door was a hatch door, the upper part of which was open, but the lower part bolted at top and bottom, the officer unbolted the top, and not being able to reach the bottom, leapt over, and unbolted it, and let in the others; it was ruled at *nisi prius*, that the entry was lawful. In a later case, in an action for breaking and entering the plaintiff's house, it appeared, that the plaintiff's house stood in a stable yard, which was surrounded by a wall: there was a hatch gate at the foot of the stairs, which led to an open gallery, from which there were doors to the several apartments; at the top of the stairs was a door across that part of the gallery which led to the chamber where the plaintiff was: the under part of the house was in stables. The

(a) Co. V. 92. Foster, 319, 320. Cro. Eliz. 908. Dalt. Sher. 359.
(b) Cowp. I. Bos. & Pul. 111. 223.
(c) Hob. 62.

defendant having gained admission into the yard, went up stairs, and broke open the door at the top of the stairs, and arrested the plaintiff. Lord Kenyon held, that this was the outer door of the plaintiff's house, and that the arrest was illegal.(*d*)

BREAKING DOORS.

Though a person has been illegally arrested, as just mentioned, yet if, while in such illegal custody, he is fairly charged with another arrest, the last is good, if there be no fraud nor collusion, first to arrest the party unlawfully, and then to charge him with another action.(*e*) This privilege of a man's house extends only to the owner or occupier, and his family: but does not protect any person who flies thither, nor the goods of any person conveyed thither, to prevent a lawful execution.(*f*) But a person who lodges in the house, or makes it his home, is considered as the occupier, or one of the family.(*g*)

In all cases where the king is a party, or of a criminal nature, the officer may break the door of the party, either to take him or to execute the process, if he cannot otherwise enter; but before he enters, he ought to signify the cause of his coming, and make request to have the door opened. On a *capias* to compel a man to find sureties for the peace, or good behaviour, or upon a warrant from a justice of the peace for such purpose, the officer may break open the door of a dwelling house. And also upon a *capias ut lagatum*, or *capias*, for a fine in any action whatever. And upon a warrant of a justice of the peace for levying a forfeiture in execution of a judg-

(*d*) Esp. N. P. cases, 99. Esp. Dig. 685.
(*e*) Black. Rep. II. 823.
(*f*) Co. V. 93.
(*g*) Hob. 62.

BREAKING DOORS.

ment or conviction for it, grounded on any statute which gives the whole or part of such forfeiture to the king, and authorizes the justice of the peace to give such judgment or conviction for it. And where a forcible entry or detainer is found by inquisition, before justices of the peace; or appears upon their view, and upon a commission of rebellion out of chancery, the sheriff or his officers may break open the doors, or house, to apprehend the party, whether it be his own or that of a stranger; if upon request such house is refused to be opened.(*h*)

In a writ of seizin, or *habere facias possessionem*, in ejectment, the officer may break open the door, if denied entrance.(*i*) If a person be arrested, and after, escapes into his house, the sheriff may break the door to take him: as where one opened his window, and the sheriff took him by the hand,(*j*)

If an affray be made in a house in the view or hearing of a constable, or those who have made an affray in his presence, fly to a house, and are immediately pursued by him, and he be not suffered to enter to suppress the affray, or to apprehend the affrayers, he may break open the doors.(*k*) If the sheriff's officers enter a house, the door being open, and the owner lock them in, the sheriff may break open the doors to set them at liberty.(*l*)

If an execution be directed to the sheriff, to levy the goods of A. and A's goods are in B's house, if the sheriff request a delivery of the goods, and they

(*h*) Co. V. 91. Bac. Abr. IV. 454, 455. Dalt. Sher. 350—353.
(*i*) Ibid.
(*j*) Mod. VI. 173, 174.
(*k*) Bac. Abr. IV. 456.
(*l*) Cro. Jac. 555, 556.

are refused, he may justify breaking and entering the house, and taking the goods.(m) BREAKING DOORS.

And though the sheriff may not break a man's dwelling house, or out-house thereto adjoining, to execute civil process against him or his goods; yet the sheriff may break open the door of a barn, standing at a distance from the dwelling house, without even requesting the owner to open it, in the same manner as he may enter a close.(n)

When once in a house, the sheriff may break open, not only inner doors, but also trunks and chests, to complete the execution of his writ.(o) But it seems, that before breaking trunks or chests, the officer ought to demand that they be opened.(p)

Though if an officer break a house by force of a *fieri facias*, he will be a trespasser by the breaking, yet the execution which he shall do in the house will be good.(q) [It seems to follow of course, that the taking of the goods will be no ground of damage, but the injury to the house only.]

The mere raising a window, or lifting the latch of a door, to obtain entrance into a dwelling house to make an arrest, or seize goods on civil process, is a breaking the house which cannot be justified.(r)

(m) Co. V. 93. Sid. 186.
(n) Sid. 189. Keb. 698.
(o) Show. II. 87.
(p) Cro. Eliz. 99.
(q) Co. V. 93.
(r) Com. Dig. III. 229.

III. BAIL.

BAIL. What.

BAIL, is a French word signifying a guardian or gaoler, and is used in the common law for the freeing, or setting at liberty a person arrested or imprisoned upon any civil matter or criminal prosecution, on surety taken for his appearance, at a day and place certain.(a) It is called bail, because thereby the party is delivered into the keeping of those who bind themselves for his forthcoming: and the end of bail is to satisfy the judgment and costs, or render the defendant to prison.

Why so called.

A man bailed, is when one arrested, or in prison, is delivered to others, as his bail, who ought to keep him to be ready to appear at the time assigned, or otherwise, to answer for him: the bail may, therefore, keep the person committed to them, in their own custody, for their own safety.(b) Or, if they permit him to go at large, they may resieze and bring him before a justice of the peace, to find new bail, or be committed to prison.(c)

Must be taken in personal actions.

In personal actions, the sheriff or other officer making an arrest must take bail of sufficient surety or sureties, if offered, by obligation, in a reasonable sum, to himself by his name of office, and not to his under sheriff or deputy, for the appearance of the defendant at the return of the process.(d) *

* By the statute of 23. H. VI. c. 10. sheriffs, under sheriffs, and other officers, must let to bail all persons by them arrested, or in their custody, by force of any writ, bill, or warrant, in any personal action;

(a) Bract. lib. 3. tract 2. chap. 8.
(b) Inst. IV. 178, 179.
(c) Hale, P. C. II. 127.
(d) Com. Dig. I. 477, 480.

Bail taken without the joining of the defendant in the bond is good.(e) If the bail bond be made to the officer by his name and office, for the party's appearance at a day and place certain, it is sufficient; though variant from ordinary form in other respects; and if the sureties are in fact insufficient to respond the demand, it is immaterial to the sheriff, provided the defendant appear according to the condition.(f)

BAIL.

Bond good, though defendant do not join.

If the sheriff, having arrested the defendant, return that he is sick, and after, admits him to bail, no action lies against the sheriff.(g) But if he return that he has taken the body, and has him ready in court; or that he is sick, when he is in fact at large without bail, an action lies for the false return.(h)

If the condition of the obligation be, to save harmless the officer, it is void; and so also is a promise. On attachment for contempt, the sheriff may not take bail; but on an attachment out of chancery, for want of an answer, he may.(i) If a person arrested in one county, be carried by the officer into

Condition to save harmless the officer, void.

or because of any indictment of trespass, upon reasonable sureties offered, (having sufficient within the county, where such persons are let to bail,) to appear at the day and place required by such writ, bill, or warrant, or where the same is returnable, such persons as are in their custody, 1st. by condemnation; 2d. execution; 3d. utlagatum; 4th. excommunication; 5th. for surety of the peace; (and yet by the common law the sheriff must have bailed such before:) 6th. committed by the command of the justices; 7th. and vagabonds, refusing to serve according to the statute of labourers, only excepted. Persons of either of which descriptions are not bailable by the sheriff.(1)

(1) Dalt. Sher. 357.

(e) Salk. I. 3. Cro. Jac. 286.
(f) Cro. Eliz. 862. Cro. Jac. 286.
(g) Cro. Eliz. 852.
(h) Bac. Abr. IV. 462.
(i) Ibid. 463. Co. X. 101.

BAIL. another, and there give bond to the sheriff for the county, where the arrest was made, it is void for duress.(j) A bond to an officer, that a debtor in in execution shall pay the money at the return of the writ, is good.(k) And so is a bond to the plaintiff in a *capias*, that the defendant shall pay the money or render himself at the return of the writ.(l)

If the defendant who has given a bail bond surrender himself to the sheriff before the return of the writ, the bail bond may be given up; and it will be considered as if no such bond had been given, and the sheriff not liable for not assigning the same.(m)

In the case of Brooks, v. Warren; Gould, Blackstone and Nares, (De Gray absent,) it was clearly held, that the bail to the sheriff had no right to take the defendant on sunday, in order to surrender him: even on an escape, if voluntary, it cannot be done.(n)

May not be taken upon indictment at quarter sessions.

A sheriff may not take a *bond* for the appearance of persons, arrested by him under process issued upon an indictment at the quarter sessions, for a misdemeanor; but may take a recognizance.(o) Under an original writ, in a plea of *trespass on the case, on promises*; the sheriff took a bail bond conditioned for the defendant's appearance, &c. in a plea of *trespass*; and on an action of debt, on the bail bond, brought by the plaintiff as assignee of the sheriff, the defendant pleaded that *no such plea of trespass* was pending; by reason whereof the defend-

(j) Cro. Eliz. 745, 746.
(k) Co. X. 99.
(l) Mod. II. 304, 305.
(m) Term. Rep. 75, 3, & VII. 122.
(n) Black. II. 1273.
(o) Ter. Rep. IV. 505. Hen. Black. II. 418.

and could not, nor can appear. The plaintiff demurred, and the question was, whether the bail bond was void? By the court.—The bail bond need not disclose the nature of the action; this is neither required by the statute, nor by any of the authorities: it is sufficient that it set forth the parties, and the time and place of appearance. Besides, a plea of trespass does not necessarily mean a plea of trespass *vi et armis*, it may as well mean a plea of trespass on the case, for the words, "*plea of trespass*," apply as well to one as the other, and the mode of proceeding is the same in both.(*p*) BAIL.

In an action of the case against the sheriff, on the statute, 23. Hen. VI. ch. 9. for refusing to take bail: On demurrer, the question was, whether, by said statute, the sheriff is bound to take bail on an attachment issuing out of chancery? The words of the statute are, "that the said sheriff, and all officers "and ministers aforesaid, shall let out of prison all "manner of persons, by them, or any of them, "arrested; or being in custody by force of any writ, "bill, or warrant, in any action personal, or by cause "of indictment of trespass upon reasonable sure-"ties," &c. It was held that the action, as laid, could not be maintained; it being the case, that process issuing out of chancery, does not come within the statute, which directs that sheriffs shall let out of prison all persons by them arrested, or being in their custody, "*by force of any writ, bill, "or warrant, in any action personal,*" which words are confined to actions at law.(*q*) Insufficient, if bail have not sufficient within jurisdiction of the court.

An officer who shall take bail from a person who has not sufficient property within the jurisdiction of

(*p*) Term. Rep. VI. 702.
(*q*) Hen. Black. I. 468.

BAIL. the court, although he has without such jurisdiction, takes insufficient bail, and is of course liable.(r) An action on a bail bond by the assignee, must be brought in the same court where the bail was given.(s) Bail to the sheriff cannot be held to bail on an assignment of the bail bond, and an action brought thereon.(t)

By virtue of a writ issued on the 5th of July, 1786, and returnable the 6th of November; the sheriff on the 4th of the same November, arrested the defendant, and took bail for his appearance; and the defendant, and one B. on the 4th of November, became bound to the sheriff in £20, conditioned for the appearance of the defendant on the 3d day of the same November. The defendant did not appear at the time mentioned, and the sheriff assigned the bond; on which an action was brought, and on the plea of *non est factum*, a verdict was obtained for plaintiff. On a rule to show cause why judgment should not be arrested, it was determined, that the statute 23. Hen. VI. c. 9. relating to bail bonds, is a public act, and that the court will take notice of it, though not pleaded. And if it appears on the declaration by the assignee of such bond, that the bond is void, by the provisions of that statute, the court, on motion, will arrest the judgment, after verdict against the defendant, upon a plea of *non est factum*. And the rule was made absolute.(u)

May not surrender principal without consent of sheriff.

After a defendant has, by the sheriff, been discharged out of custody upon a bail bond, it is neither in the power of the bail, nor of the party to surrender himself again into the custody of the sheriff,

(r) Bur. IV 2596.
(s) Bur. III. 1923. Ibid. I. 642. Wils. III. 348. Black. II. 868.
(t) Term. Rep. V. 336.
(u) Ter. Rep. II. 569.

before the return of the writ, without his consent. And the sheriff may, at his own option, accept the surrender of the party, and discharge his bail; or he may refuse so to do, and rest his security upon the bail bond, and insist upon the bail performing the conditions of it.(v) BAIL.

Though the assignee of a bail bond, must, by the provisions of the statute authorizing the assignment, bring his action upon it, in the same court where the bail was given, yet the sheriff may sue on such bond in a different court from that in which the original action was brought. He, being under no restriction by virtue of the statute, may have the benefit of the common law. Bond, when actions may be brought upon it.

If the sheriff, having arrested a party, permit him to go at large without taking a bail bond, and return that he has taken his body, and before the expiration of the time for bringing in the body, bail is entered, the sheriff is not liable for an escape, nor for a false return.(w)

If the defendant be a lunatic, he may, by *habeas corpus*, be brought into court, and rendered in discharge of his bail; and may be delivered over to the keeper of the prison.(x)

If the sheriff bring debt on a bail bond, the defendant cannot plead that the action is brought for the benefit of the sheriff's officer, who served the original writ; and that the defendant, in that writ, after the return day, and before the sheriff was ruled to return the writ, paid the debt and costs in that action, and

(v) East, I. 390.
(w) Bos. & Pul. II. 35.
(x) Ibid. III. 550.

BAIL. the fees and expenses, charges of arrest, bail bond, and damages, &c. to the officer who made the arrest, and who accepted the money so paid, in full satisfaction, and discharge of the bail bond, and fees, &c. For the officer cannot release the bond nor receive any thing in discharge of it. But if he can, it must be pleaded as a satisfaction to the sheriff, and not to the deputy.(*y*)

In New-York. In the state of New-York: Bail to the sheriff are responsible, only for the principal and interest, due on the bond, in the original suit; and not for any matter *dehors* the condition, for which the penalty is claimed as security.(*a*)

Bail to the sheriff will be relieved in all cases on the return of the writ against them. The case was, that a bail bond was executed in 1804, and the capias against the principal, was returnable in November term, 1804. In 1805, the principal died, and the bail to the sheriff was afterwards sued; and the writ was returnable in August term, 1806. The court ordered the proceedings to be stayed on the payment of costs.(*b*)

In Massachusetts, sheriff liable for taking insufficient bail. In the state of Massachusetts: If the sheriff take insufficient bail on an attachment of the body of the defendant, an action lies. And it is not necessary to aver in the declaration, that the officer knew the bail to be insufficient at the time of taking the same, it being the duty of the sheriff, at his peril, to take only bail that are sufficient. Nor is the plaintiff's proceeding against the bail on scire facias, to final

(*y*) East, VII. 148.
(*a*) Johnson's cases in error, II. 341.
(*b*) Johnson's reports, I. 515.

judgment and execution, without obtaining satisfaction, any exoneration of the liability of the sheriff. BAIL.

The case was this:—The plaintiff on the 16th of September, 1799, delivered to J. H. the defendant's deputy, a writ of attachment against one N. commanding the sheriff, or his deputy, to attach the estate of N. to the value of and for want thereof to take his body, to answer to the plaintiff, &c. The deputy returned, *that he had taken the body of N. and that he had taken bail for his appearance, &c.* In November 1800, the plaintiff recovered judgment against N. and in February, 1801, delivered the execution issued upon that judgment, to the same deputy, to serve; who, in April, 1801, returned, that he could find neither the body nor estate of N. The plaintiff thereupon sued out a *scire facias* against J. W. S. the bail; and in April, 1802, recovered judgment on the *scire facias*, and took out execution, and put it into the hands of the same deputy; who, thereupon, took the body of J. W. S. and committed him to goal, from whence he was discharged as a poor prisoner. The plaintiff then brought his action against the sheriff for the insufficiency of the bail; averring such insufficiency of the said J. W. S. for bail in the action, at the time he was accepted as such; but without alleging such insufficiency to have been within the knowledge of the defendant. The case was tried on a plea of *not guilty*, and a verdict for the plaintiff. On a motion for a new trial the court said, That in this state, the right of a party arrested in a civil action to be delivered on bail, depends principally upon the statute of 23. of H. VI. c. 10. But the statute of this government regulating bail in civil actions, sec. 1. has altered the law in several particulars respecting the mode of taking bail, and the effect of bail to

BAIL.

the sheriff; it seems to be the effect of this statute, that bail to the sheriff, is bail to the action, and avails immediately to the party at whose suit the bail is taken; and for their sufficiency he is compelled to rely upon the discretion of the sheriff: and if the sureties prove insufficient, the party has his remedy by an action against the sheriff for his negligence or misbehaviour in accepting and returning insufficient sureties. And that an officer is responsible for a mistake respecting the sufficiency of the sureties accepted as bail, arising from negligence only, without design; which renders an averment of his knowledge of such insufficiency unnecessary: and that the plaintiff's accepting the bail bond, and prosecuting the action against the bail, and recovering judgment, committing him to gaol, and his being discharged from confinement, does not release the sheriff from his liability for taking insufficient bail; and that the law gives the plaintiff a remedy by this action.(*e*).

In Connecticut.

In the state of Connecticut: If a sheriff's deputy arrest a defendant, and suffer him to escape, and return that he has taken sufficient bail for his appearance, when in fact he has not taken any bail; in an action for an escape, brought by the plaintiff, more than a year after final judgment, the sheriff cannot defend on the ground, that having made such return, he himself was bail, and answerable in that capacity only; and that the plaintiff, not having brought his action within one year after judgment against the principal, is barred by the statute limiting actions against bail. For a sheriff is liable for an escape, and not as bail; nor is he to be sued as bail, but as sheriff; and may, according to the statute of limitations of actions against sheriffs, be sued at any

(*e*) M. T. R. II. 188.

time within two years after the right of action accrues. The statute of limitations in case of bail, does not, in the letter of it, extend to sheriffs, and is not to be extended by implication, to cases not mentioned. Nor does the case of a sheriff come fully within the reason of the statute. Bail, if subjected and relied upon, is to be notified and sued early, that he may take his remedy against the principal; but a sheriff suffering a voluntary escape, for which he has to pay the debt or damage, has no such remedy.(d) BAIL.

If a prisoner be brought before a magistrate charged with a criminal offence, and for refusal, or neglect to procure bail for his appearance before a county or superior court, is by such magistrate committed to prison; the sheriff, according to a decision of the superior court, affirmed by the supreme court of errors, may take bail of such prisoner by a bond, with sufficient surety to the treasurer of the state, conditioned for the appearance of such prisoner before such county or superior court, as has cognizance of the offence.(e) But since the said decision of the superior court and supreme court of errors, the legislature have enacted, "That all "prisoners detained in gaol for trial, for an offence "not capital, shall be entitled to bail, to be taken "by one or more of the judges of the court having "cognizance of the offence."(f) Since which, it would seem safest for the sheriff to have the prisoner bailed by a judge, rather than hazard the question of his right to take bail being made, and also the sufficiency of the bail.

(d) Kirb. 209.
(e) Day, II. 1.
(f) St. C. 69.

BAIL.
In Vermont.

In the state of Vermont the sheriff must, at his own risk, take such bail for prisoners admitted to the liberties of the goal yard, as in case of an escape shall be sufficient to satisfy a judgment in favour of the creditor, in money. He must take such bail as is not only sufficient at the time of executing the bond; but, to exonerate the sheriff, such as will be sufficient to respond the judgment. Even if they possess ample freehold subject to the creditor's execution, real estate may not satisfy him. His execution is for money, and he has a right to it, and if not obtainable from either principal or bail, the sheriff must pay it. (g) But it would seem that if the bail be sufficient at the date and issuing of the *scire facias* against them, the sheriff must be exonerated. For in an action on the case against the sheriff, for taking insufficient bail on *mesne* process, it was determined that the *non est* returned upon the writ of execution, issued upon the judgment rendered upon the *scire facias*, might be so far impeached, that the defendant might show in evidence, that the bail was of sufficient property to respond the judgment at the date of the writ of execution, issued on the *scire facias*. (h)

A promise made by a sheriff to a debtor within the liberties of the prison, that if he escaped, no action should be brought against him, until the bail had been first prosecuted, will not operate to defeat a recovery in an action on the bail bond, though both principal and bail are joint defendants. (i)

In a case where the bail on *mesne* process, surrenders his principal in a justice's court, it is the duty of

(g) Tyl. Rep. I. 213, 225.
(h) Ibid. 314, 317.
(i) Ibid. 230.

the justice to order the person surrendered, into the custody of a proper officer, if there be one present; if not, the justice must appoint some suitable person to fill the place of such officer, and order the principal surrendered into his custody. BAIL.

If judgment final, be rendered for the plaintiff, the justice must make out his writ of execution before the rising of his court, that the defendant may be charged with it. But if the cause is continued to an adjourned session of the justice's court, or where an appeal is taken, to the county court; it is his duty before such adjournment takes place, to make out and deliver to a proper officer a *mittimus* in due form, stating therein the grounds of issuing it, and commanding, in the name, and by the authority of the state, such officer to commit the prisoner to the common gaol of the county: and likewise commanding the keeper of the prison to receive and safely keep such defendant within said prison, until liberated by due course of law. And a record of the proceedings aforesaid must be made by such justice. And without such *mittimus*, the officer may not hold such defendant a moment after the rising of such justice's court; and of course he cannot be chargeable with an escape for not holding him.*(j)*

(j) Tyl. Rep. I. 277, 290.

IV. RESCOUS.

Rescous. What.

RESCOUS, from the French *rescousse*, that is, liberation; is the taking away and setting at liberty, against law, a distress for rent, or services, or damage, feasant, or forcibly freeing another from arrest, or legal commitment: and is an high offence, subjecting the offender, not only to an action at the suit of the party injured, but likewise to fine and imprisonment on public prosecution.(*a*)

When it can be committed.

Rescous cannot be committed, unless the chattels, or person supposed to be rescued, were in actual custody of the party from whom the rescue is made; for if a man come to make an arrest, or destrain, and is disturbed, before having made the arrest, or seized the distress, it is no rescous; and the remedy is by action on the case, for the disturbance: but if, having taken cattle by distress, and while driving them to pound, they go into the owner's house, and he refuse to deliver them, it is a rescue in law.(*b*) Where the obstruction is of a process to arrest a person, it is a contempt of court, and punishable accordingly.(*c*)

May be returned on mesne process.

The sheriff may return a rescue upon *mesne* process, and is subject to no action; for he is not obliged to raise the power of the county, though he is obliged to make the arrest if he see the defendant, and can do it. But if the person arrested on *mesne* process, be committed within the prison, or the sheriff had

(*a*) Co. Lit. 160. F. N. B. 226.
(*b*) Co. Lit. 161. F. N. B. 102.
(*c*) Mod. VI. 210.

previous notice, so that he could have raised the *posse comitatus*, the sheriff may not return a rescue, except by public enemies.(*d*) RESCOUS.

If the sheriff return a rescue on *mesne* process, it is conclusive, and may not be traversed; and the rescuer is immediately liable to attachment.(*e*) But an attachment will not be awarded against rescuers on a mere affidavit of the officer, to a rescue on *mesne* process, but he must return it; and then an attachment may issue. But a rule to show cause why an attachment should not be granted, may be allowed on affidavit; and it is said, that if an officer return a rescue, and the rescuer be brought into court upon the attachment, he may give a recognizance to try false return against the sheriff; and and if there be a verdict for the plaintiff, the recognizance shall be discharged.(*f*)

The return of rescous ought to be certain, and must show that the person rescued was in custody,(*g*) and where he was arrested; that it may appear to have been within the county or limits of the officer's jurisdiction.(*h*) And the time when the arrest was made must also be set forth, and from whose immediate custody; whether that of the sheriff or one of his deputies; and if from a deputy, that he was duly authorized to make the arrest.(*i*)

If the sheriff make an arrest, and there is an attempt to rescue the person, the sheriff may use all

(*d*) Cro. Eliz. 868, 873. Cro. Jac. 419. Co. IV. 84. Ter. Rep. IV. 789. Strange, II. 488. Bur. V. 2812.
(*e*) Cas. Temp's. L. Hard. II. 112. IV. Bur. 2129.
(*f*) Bac. Abr. IV. 399, 400.
(*g*) Com. Dig. 439. Bac. Abr. IV. 402.
(*h*) Tyd. 51. Bac. Abr. IV. 402.
(*i*) Com. Dig. 439. Bac. Abr. IV. 402.

Rescous.

necessary force to prevent it; and in an action against him for a battery, the attempt to rescue will be a sufficient justification.(j)

May not be returned on capias utlagatum.

Though on *mesne* process, rescue is a good return, in ordinary cases; yet upon an execution, or *capias utlagatum*, the sheriff may not return a rescous; and if he make such return, it will be no justification, except in the solitary cases of rescue by public enemies. And if a prisoner in execution, escape from the custody of the sheriff, he is liable to the plaintiff for the amount for which such prisoner was committed; and is also subject to a public prosecution.(k)

Nor on execution.

So if an officer seize goods upon execution, and and they are afterwards taken away by a stranger, the officer may not return a rescue; for, by virtue of the seizure on execution, such officer has a property in the goods, and may maintain trover or trespass for them; and the party injured may have his action against the trespasser. By a return of rescue of goods, seized on execution, the officer subjects himself to an amercement by the court; and the party at whose suit the execution issued, may in an action, recover of him the value of the goods.(l)

Plaintiff's remedy.

In rescue on *mesne* process, the plaintiff has his remedy against the rescuers only;(m) but in case of rescue on execution, the party may take such remedy, either against the rescuer or against the sheriff; and

(j) Esp. Dig. 314, and the cases cited.
(k) Cro. Jac. 419.
(l) Bac. Abr. IV. 396, 397. Cro. Eliz. 639. Show. 180.
(m) Cro. Eliz. 868. Cro. Jac. 419, 486. But. 111. 200.

If he recover his damages from the rescuers, the sheriff may plead such recovery in bar of an action against him for the escape; and if the party take his remedy against the sheriff, he has his remedy over against the rescuers.(*n*)

Rescous on criminal process, is the forcibly freeing another from arrest.(*o*)

The sheriff's return, that the prisoner is rescued, is not a sufficient ground to arraign the rescuer.(*p*)

A sheriff's return of a rescous, without shewing the year and day on which the rescous was made, is insufficient.(*q*)

If the sheriff on a *capias* awarded, arrest a man for felony, he cannot make rescue, though innocent otherwise, if the sheriff arrest without warrant, on his general authority.(*r*)

If a felon be attaint, and be carried to execution, and be rescued from the sheriff, the sheriff is punishable, notwithstanding the rescue; for there being judgment given, the sheriff ought to have taken with him sufficient power to have prevented the rescue.(*s*)

(*n*) Cro. Car. 109. Bac. Abr. IV. 399.
(*o*) Hawk. P. C. II. 209. H. P. C. I. 606.
(*p*) Ibid.
(*q*) Ibid. 38.
(*r*) Co. Lit. 161.
(*s*) H. P. C. II. 602.

V. COMMITMENT.

COMMITMENT. What. **COMMITMENT** is the sending a person to prison by warrant, writ, or order, issued by some court, judge, justice, magistrate, or other officer, who, by the law of the state, had authority to do it: which Authority for. warrant must be under the hand and seal * of the person by whom it is made, and expressing his office or authority, and the time and place at which it is made; and be directed to the gaoler or keeper of the prison: and must set forth the crime or cause of commitment with convenient certainty; otherwise the officer, if he suffer the party to escape, is not punishable. And every *mittimus* must also conclude, that the party be safely kept until he be delivered, by order of law, or by due course of law, or to the like effect. And if the party be committed for want of bail, the conclusion may be, that he be kept until he find bail; but a commitment, until the person who makes it shall take further order, is not good; and the party committed by such, or any other irregular *mittimus* may be bailed.(*a*) If the commitment be by execution in a civil action, the conclusion must be, that he be kept until payment of the sum or sums for which he is thus in execution.(*b*) A commitment founded on a particular statute, ought to be conformable to the method prescribed by such statute: as when the church wardens of Northampton were committed on the 43d. Eliz. cap. 2. and the warrant concluded

* The seal is not necessary in Connecticut.

(*a*) Hawk. II. 185, 186. Bac. Abr. I. 180, 181. H. P. C. II. 122. Burn. I. 348, 349.
(*b*) Inst. II. 46. Burn. Just. III. 209.

in the common form, viz. until they be duly discharged according to law: but the statute appointing, *that the party should there remain until he should account;* for want of such conclusion, they were discharged.(c) COMMITMENT.

The defendant was brought up by *habeas corpus*, having been committed by two justices upon the 17th. G. II. c. 5 & 7, for running away, and leaving his wife and children to be maintained by the parish. It was objected to the commitment—1st. That the prisoner was not convicted; 2d. That it was not alleged that his wife and children were chargeable to the parish; and 3d. That he was not committed for any limited time, but *till he shall be discharged according to the laws and customs of this realm*, instead of the direction of the statute, which is, "there to remain until the next general "quarter sessions, or for any less time, as such "justice or justices shall think proper." Lord Mansfield observed, that the 2d. and 3d. objections were sufficient to invalidate the commitment.(d)

A warrant of commitment must be certain, and not in the disjunctive; as where in a warrant for commitment, the person to be committed was described as "an apprentice *or* servant;" and the cause of his commitment, "for disobeying his indentures "*or* articles;" the warrant was considered insufficient.(e) A warrant expressing the cause of commitment "*for treasonable practices*," where, by the statute on which it was founded, it was enacted, that "every person or persons that are, or shall be im- Warrant of must be certain.

(c) Carth. 152, 153. Bac. Abr. 181. Burn. I. 349.
(d) Bur. III. 1636.
(e) Wm. Abr. II. 564. Cald. 26.

commitment. "prisoned, &c. by warrant, &c. for high treason, "suspicion of treason, *or treasonable practices*," was held good.(*f*) But a warrant of commitment in execution after conviction, must show before whom the conviction was, and the authority to convict. For where the return did not add any name subscribed at the bottom of the commitment, though the name of J. F. was set in the margin over the place of the seal, and it was only said in said warrant, "brought before me, by, &c. and convicted "upon the oath, &c. for being loose, idle and disorderly persons, of evil name, and common night "walkers, against the statute, &c." Lord Mansfield, (after the case had been argued,) observed that this was a conviction, and it ought to be shown, that the person convicting, had authority to convict. It is a commitment in execution, and the authority of the person committing, ought to be shown, but here it does not even appear by whom they were convicted; it is only said in the warrant, "brought "before me and convicted;" the not showing before whom they were convicted is a gross defect. Let them be discharged.(*g*) When a statute authorizes a commitment after conviction only, the words, "charged before me, the said justice, upon the oath "of, &c. for being a rogue and vagabond, within the "intent and meaning of an act, entitled, &c." without otherwise stating a conviction, are insufficient, and the warrant bad.(*h*) When the words of a statute on which a warrant of commitment is founded are, "apprehended having upon them any picklock, "&c. with an intent to break and enter any dwelling "house, &c." in the warrant of commitment it must

(*f*) Term. Rep. VII. 736.
(*g*) Bur. V. 2684.
(*h*) Term. Rep. IV. 220. VI. 509.

boldly stated, that the defendant was *apprehended* with implements of house breaking *upon him at the time of such apprehension.*(*i*)

If a statute inflict a penalty for the performance of any prohibited act, and then declare the penalty, when incurred, by any delinquent, to be payable forthwith on conviction: and in case the person convicted, shall refuse or neglect to pay the same, or to give security for the payment thereof, the justice before whom the conviction is had, shall, by warrant under his hand and seal, cause the same to be levied by distress and sale of the defendant's goods, &c. and then proceeds, "*and it shall and may be lawful* "*for such justice, to order such offender to be de-* "*tained in safe custody until return may conveni-* "*ently be had, and made to such warrant; unless the* "*party so convicted, shall give security for his ap-* "*pearance,*" &c. But if upon such return, no sufficient distress can be had, then, and in such case, the said justice shall, and may commit such offender, the justice may legally authorise by *parol*, a constable or other officer, to detain the delinquent, in custody, until the return of the warrant of distress. And the officer so detaining such delinquent, will not be liable to false imprisonment for want of a written warrant.(*j*)

Commitments on warrant or order of court, ought to be to the common gaol.(*k*) And if for felony, must express what kind of felony, and against whom committed; as for the death of J. S. or breaking the house of J. N. or stealing the goods of J. B.(*l*)

(*i*) Term. Rep. VIII. 26.
(*j*) East. VII. 533.
(*k*) H. P. C. II. 121. I. 585.
(*l*) Ibid. 122.

COMMITMENT.

Though a commitment by a magistrate, ought to be under his hand and seal, yet a commitment by order of a court of record, without such warrant, is sufficient, for the record itself, or the memorial thereof, which may at any time be entered of record, will protect the gaoler from false imprisonment, to which he is liable for an unlawful detention.(*m*)

And if the conclusion to a warrant of commitment for felony be irregular, the warrant is not thereby rendered void, for the law will reject that as surplusage, and let the rest stand; and if the gaoler suffer an escape of a person committed under such warrant, such gaoler will, notwithstanding the irregular conclusion, be liable for the escape; and in false imprisonment, for detaining a prisoner by virtue of such warrant, it will be sufficient to justify the gaoler.(*n*)

An omission to specify the kind of felony in the warrant, seems not to render it absolutely void, so as to subject the gaoler in an action of false imprisonment; but he need not receive a prisoner on such warrant. Yet if he do receive him, and is acquainted what the crime is, and suffer the prisoner to escape, it is felony.(*o*)

When a man is committed for any crime, either at common law, or created by statute, for which he is punishable, by indictment; then he must be committed *till discharged by due course of law;* but when the commitment is in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue that authority. As

(*m*) H. P. C. I. 583, 584.
(*n*) Ibid. 584.
(*o*) Ibid. 584, 585.

where the statute directs that he be committed *till he gives a satisfactory account of himself to the justice who commits him; or, till he makes proof of his innocence before the said justice; or, till he gives or finds security not to be guilty of any of the offences aforesaid;* then the statute must be pursued in the warrant of commitment, and a *commitment till discharged by due course of law,* will be bad.(p) COMMITMENT.

Where by a statute, a prisoner committed to gaol is entitled to a copy of the warrant, or order of commitment within a limited time after demand thereof, in writing, such demand ought to be made upon and delivered to the officer, who, for the time being, has the custody of the gaol; and delivery of such demand to, or service thereof, made upon the turnkey, is not sufficient to support an action against the gaoler, for non delivery of such copy.(q)

(p) Bl. Rep. II. 805.
(q) Bos. & Pul. II. 530.

VI. ESCAPE.

ESCAPE. What.

ESCAPE, from the French *eschapper*, to fly from, signifies a violent or private evasion out of some lawful restraint; as where a person arrested or imprisoned, gets away before delivered by due course of law.(*a*)

Either voluntary or negligent.

Escapes are either voluntary or negligent: voluntary escapes are such as are by express consent of the keeper, after which he can never retake his prisoner:(*b*) (though the plaintiff may take him at any time,) but the sheriff must answer for the debt. Negligent escapes, are where the prisoner escapes without his keeper's knowledge or consent; and then, upon fresh pursuit the defendant may be retaken, and the sheriff will be excused if he has him again before any action brought against him for the escape.(*c*) The sheriff is answerable for the gaoler in civil cases only: the gaoler alone is punishable criminally for escapes; and he for such only, as are voluntary, except by fine.(*d*)

Sheriff not chargeable for, until party is in actual custody.

The sheriff cannot be charged with an escape before he has the party in actual custody by a legal authority. But if A. be arrested, and in the actual custody of the sheriff, and afterwards another writ be delivered to him at the suit of B. upon the delivery of the writ A. by construction of law, is immediately in custody on B's writ, without an actual arrest: and if he escape, B. may maintain his action for such

(*a*) Stand. P. C. cap. 26, 27.
(*b*) Co. III. 52.
(*c*) Bl. Com. III. 415.
(*d*) Hawk. II. 227. Salk. 272.

escape against the sheriff, in the same manner as if he were in custody on B's writ only.(e) If the sheriff marry a woman in his custody, on execution, it is an escape of the woman: and if a sheriff be committed in execution to the gaol whereof he is keeper, before the prisoners are secured, it is an escape of all the prisoners.(f) ESCAPE.

If the sheriff suffer a person arrested on *mesne* process, to escape, he is liable to an action at common law for damages thereby sustained, by the plaintiff. But if the sheriff arrest a person on *mesne* process, and he be rescued by A. B. he may return the rescue, which will be good; and no action of escape lies against him after such return; for, though the sheriff may, he is not obliged to raise the power of the county. But after an arrest on execution, a sheriff may not return a rescue; for in that case he is obliged to raise the power of the county, and may not return that he cannot do execution.(g) On mesne process how far sheriff is liable.

No action will lie against the sheriff for an escape of a prisoner committed on *mesne* process, if the plaintiff cannot prove any debt against such prisoner, not even for nominal damages.(h) If after judgment, and before any charge in execution, the prisoner be rescued, when brought out on habeas corpus, it is not a sufficient excuse for the sheriff in an action of escape.(i)

If A. permit a voluntary escape, and quit his office to B. or it descends to him, to whom the prisoner returns; B. ought to detain him, otherwise it will be an escape in him; and an action will lie

(e) Co. V. 89.
(f) Bac. Abr. II. 239.
(g) Ibid. 241. Cro. Car. 240, 255.
(h) Term. Rep. IV. 611.
(i) Str. I. 429.

escape. against either A. or B. at the election of the plaintiff.(j) An action will lie against the prison keeper for an escape upon *mesne* process, though the prisoner return the same day, and the plaintiff proceed to final judgment against him, knowing him to have escaped.(k)

An officer who has arrested a person on *mesne* process, may retake him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest. The only difference between an arrest on *mesne* process, and in execution, is, that on the former, the officer may permit the prisoner to go at large, or keep him in his own custody, provided he has him at the return of the writ, and the jury find that the plaintiff has not been delayed or prejudiced in his suit: but in the latter, if the officer voluntarily permit the prisoner to go at large, though only for a minute, he cannot retake him. And the reason of a difference between a retaking on *mesne* process, and in execution, is, that in the latter, if the prisoner escape by the voluntary permission of the gaoler, the plaintiff's debt is paid; and if the gaoler retake him, he is liable to an action of false imprisonment.(l)

If a prisoner escape without the knowledge or consent of the sheriff, he may maintain an action for the escape against such prisoner, whether he retake him or not.(m)

On execution, what. If a prisoner, committed on execution, be permitted to go at large beyond the limits of the prison,

(j) Com. Dig. III. 183. Johns. Rep. IV. 473.
(k) Wils. II. 294.
(l) Term. Rep. II. 172. & V. 37.
(m) Dalt. Sher. 139.

though with a keeper, the servant of the sheriff or gaoler, it is an escape, and the sheriff is liable for the whole amount of the execution.(n) But if the sheriff has a prisoner in execution for debt, and receives a writ of *habeas corpus*, to have the body before a court having authority to issue such writ, though the prisoner of his own accord leave the sheriff on the way, and return to him again, so that his body be delivered on the return day of the writ, it is no escape. And in such case, the sheriff may proceed with his prisoner on the way he judges most safe :(o) but may not, however, conduct such prisoner into another county, in order that he may negotiate with his creditor, nor permit him to go at large, by colour of a void authority.(p) ESCAPE.

If an officer, having a person in custody by virtue of an authority from a court having jurisdiction of the matter, suffer him to go at large, it is an escape; otherwise, where the court has not jurisdiction.(q) But the sheriff may not take advantage of the errors or irregularity of the proceedings of a court having jurisdiction of the matter; otherwise, if the proceedings are void.(r)

If, when a new sheriff is appointed, his predecessor omit to deliver over by indenture all the prisoners in his custody, charged with their respective executions, to such new sheriff, every omission is an escape in the old sheriff.(s) But if the old sheriff give notice to the new sheriff of the executions,

(n) Dalt. Sher. 140, 144.
(o) Ibid. 140. Co. III. 40.
(p) Ibid. 481. Bac. Abr II. 238, 239,
(q) Bac. Abr. II. 234. Com. Sher. 148.
(r) Bulst. II. 65. VIII. Co. 142.
(s) Bac. Abr. II. 241. H. P. C. 113.

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which are against any prisoner, by word only, or by some note in writing, under the old sheriff's hand, or under the hand of his under sheriff, and not by indenture, and the new sheriff agree to accept such notice, it seems sufficient: otherwise it must be by indenture.(t) If the sheriff die during his term of office, the new sheriff, as soon as appointed, must take notice of all the prisoners in custody, and of the several executions with which they are charged, at his peril.(t) If a gaoler who is the sheriff's servant, suffer a prisoner to escape, the action must be brought against the sheriff, and not against the gaoler.(u) So if the sheriff's deputy make an arrest, and suffer the party to escape, the remedy is against the sheriff.(v) But no action lies against the executor or administrator of a person who suffers an escape, it being a personal tort, and within the rule that a personal action dies with the person.(w)

If a gaoler bail a person not bailable, it is an escape.(x) An action for escape lies, if the prisoner be permitted to go at large, be the distance ever so small, or the time ever so short.(y) If the gaoler make a prisoner in execution turnkey, and he go out on an errand, and return, it is an escape.(z)

There can be no escape where the party never was in custody: as, if the old sheriff do not deliver over the prisoner upon such execution. If a prisoner be arrested but not actually committed to gaol, the gaoler is not chargeable for an escape.(a)

(t) Dalt. Sher. 16. Cro. Jac. 588.
(u) Bac. Abr. 242. Co. III. 72.
(v) Mod. II. 124.
(w) Co. V. 89.
(x) Bac. Abr. II. 244. and cases there cited.
(y) Dalt. Sher.
(z) Com. Dig. III. 183. Hen. Black. II. 108.
(a) Ibid.

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If a prisoner go out of prison by reason of a sudden fire in the goal, occasioned by lightning, it is not an escape; nor if the gaol be broken by public enemies; nor if the prisoner be rescued upon *mesne* process before he was in gaol, though the rescous be not returned; or if it be, if the defendant be retaken on fresh suit, before action commenced for the escape. And though the fresh suit was not commenced till a day and a night after the escape; and though not retaken till the prisoner has fled out of sight, and into another county: and though, not in fact, retaken till seven years after; if it be done, on fresh pursuit. Nor if the prisoner go out with the consent of the creditor, and that by parol.(*b*) But fresh suit is no plea where the escape is voluntary in the sheriff, nor after action brought; though before plea or declaration filed.(*c*) If a prisoner escape by negligence of the sheriff, he may retake him, or may have an action on the case against him, as well before an action or recovery against the sheriff, as after. And that, though the party acknowledge satisfaction upon record, if he do not show specially how satisfied.(*d*) If a prisoner escape, and afterwards return to prison, the plaintiff may admit him in execution, though he has remedy against the sheriff; or he may take him by a new execution, if the first be not returned and filed: he may retake him in all cases of negligent escape, for the sheriff may be insufficient. Also if the escape were voluntary by the gaoler, but without the plaintiff's consent. If a prisoner be dismissed on a wrongful writ *a quærela*, he may be retaken, and shall be in execution.(*e*) But if the sheriff suffer a voluntary es-

(*b*) Com. Dig. III. 184. Hen. Black. II. 108.
(*c*) Ibid.
(*d*) Ibid. 185.
(*e*) Ibid. Johnson's cases, II. 3.

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If a defendant, taken in execution, be afterwards seen at large, for any, the shortest time, even before the return of the writ, an action of debt lies against the sheriff, to recover the whole debt and damages.(*g*) If a sheriff's officer, having taken a prisoner in execution, on the 27th of September, carries him to a lock-up house; and on the second of October, permits him to go in company with one of his followers to his own house, for the purpose of settling his affairs; and on the 3d the prisoner is seen riding out at large in a chaise-cart, attended by the same person, all before he takes him to prison, it is an escape.(*h*) And an action of debt will lie against a gaoler for the escape of a prisoner in execution; though without the knowledge of, and without any fault whatever, on the part of the gaoler; who can, in such case, avail himself of nothing but the act of God, or of public enemies, as an excuse.(*i*)

Action for a voluntary escape.

In an action for a voluntary escape, the case was, that a *habeas corpus* was issued from the court of common pleas, to bring up the prisoner from the marshalsea to that court; and the prisoner being put under two guards, attempted to make his escape, was prevented by one of them: and that then he was rescued by a mob of an hundred butchers or more, a force too strong for resistance; but

(*f*) Com. Dig. III. 185, 186.
(*g*) Black. Rep. II. 1048.
(*h*) Bos. & Pitt. I. 24.
(*i*) Hen. Black. II. 108.

it was held no excuse. By lord Mansfield—"The "cases are hard, but they are too strong to be got "over. There may be policy in the cases, but they "are very hard, there is no going into the reason "of them." The three other judges admitted it was a hard case: but they said it might be inconvenient, if it should be otherwise. It would introduce excuses from sheriffs for voluntary escapes, and as it was established by former cases, they concurred.(*m*) If a mob riotously, and by force, demolish a gaol, by which the debtors escape, the sheriff or gaoler is answerable to the creditors for their escape.(*n*) ESCAPE.

An action of debt will lie against a sheriff for the escape of a prisoner in custody in execution, although the prisoner be discharged under the insolvent act, at the general quarter sessions; if it appear that the court had no jurisdiction at the time of making the order, the sessions not being holden in conformity to said act.(*o*)

If in an action for an escape of a prisoner in execution, the plaintiff declare, that the prisoner was, by *habeas corpus*, brought before a judge of k. b. and by him committed to the custody of the marshal, "*as by the said writ of habeas corpus, and the said "commitment thereon, now remaining in the said "court, more fully appears*;" the evidence of a commitment by a judge, but not filed, of record, will not support the action. And that such allegation (even if unnecessary,) must be proved, as laid. For having stated commitment of a particular kind, the prisoner is not at liberty to prove a commitment of any other species, though such particular description

(*m*) Bur. V. 2312. Vid. H. P. C. I. 601.
(*n*) Term. Rep. IV. 787.
(*o*) Ibid. VIII. 426.

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may have been unnecessary. But the allegation would be imperfect, if not of a commitment, now of record.(p)

An escape from the rules (limits) of the king's bench prison is not voluntary, unless it be by the consent or default of the marshal: but his allowing the rules of the prison, is no default in him, because the law has given a sanction to it; and it cannot be inferred from thence, that he consented to the prisoner's escape, because he takes security that the prisoner shall not go beyond the rules: and a voluntary return of the prisoner after escape, and before action brought, is equal to a retaking on fresh pursuit. And an administratrix may maintain an action of debt in her own name, against the sheriff or gaoler, for the escape of a prisoner, who is in execution on a judgment obtained by her as administratrix. And the jury cannot give a less sum than the creditor would have recovered against the prisoner; namely, the sum endorsed on the writ, and the legal fees of execution. At common law, an action on the case only, lay against sheriff or gaoler for an escape, in which the creditor might recover damages for the officer's misconduct; but still, he had a right to recover the debt against the original debtor. But the statutes give an action of debt against the sheriff or gaoler, to recover at once the sum for which the prisoner was charged in execution. Those being affirmative statutes, do not take away the common law remedy, so that the creditor has his election; but if he adopt the latter, he must recover the whole sum.(q)

(p) Bos. & Pul. III. 456.
(q) Term. Rep. II. 126.

ESCAPE. In criminal process.

To constitute an escape in criminal process, there must be an actual arrest; therefore, if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape.(r)

The arrest must also be justifiable: for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed; or for such slight suspicion of an actual crime, and by such an irregular *mittimus*, as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large.(s)

It must be also for a criminal matter. The escape of a person committed for any crime whatever, is criminal; for public justice requires, that a person committed for a crime, be safely kept, under such commitment, and may reasonably demand satisfaction from the officer to whose custody he is committed, if he neglect to keep him as he ought.(t)

The continuance of the imprisonment must be justifiable at the time, to make his escape criminal in the officer. For if such prisoner has been acquitted of the crime on which he was committed, and be held only for his fees, it is no crime in the officer to suffer him to escape, though the prisoner had been ordered to pay such fees. But if convicted, and sentenced to commitment, until the fees are paid, as part of his punishment; an escape may be cri-

(r) Hawk. P. C. II. 197.
(s) Ibid. 197. H. P. C. I. 583, 599. Mod. V. 414. 415, 416.
(t) Hawk. P. C. II. 197, 198.

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minal in the officer suffering it, if the fees are due to any but the officer.(*u*)

It is an escape in some instances, to suffer a prisoner to have greater liberty than by law he ought to have: as, to admit to bail a person not bailable, or permit him to go out of the limits.(*v*)

If a prisoner escape, and the gaoler pursue and retake him, without having lost sight of him, it is no criminal escape; but if the gaoler once lose sight of his prisoner, it seems in strictness of law to be a criminal escape in the gaoler, for which he is liable to a fine at the discretion of the court; and much more so, if he kill the prisoner in the pursuit, endeavouring to retake him.(*w*)

If a prisoner be rescued by enemies, the gaoler is not guilty of an escape: otherwise, if by subjects in a mob, or riot; for the officer has his legal remedy against the latter.(*x*)

If an officer, voluntarily, and with intent to save from trial or execution, a prisoner charged with, and guilty of a capital offence, give him his liberty; such officer is thereby involved in the guilt of the same crime of which the prisoner was guilty, and stood charged.(*y*)

If negligent, officer may pursue, &c.

If a prisoner escape through the negligence of the officer, he may pursue and retake him at any time after, where he can find him; either in the same, or

(*u*) Hawk P. C. II. 198. H. P. C. I. 234, 594.
(*v*) Ibid. 198.
(*w*) Ibid. 198, 201.
(*x*) Ibid. 199.
(*y*) Ibid. 199.

a different county; but if the officer be fined for such escape before the retaking, such retaking will not exonerate him from the fine. But if it were a voluntary escape, the officer has no more right to retake his prisoner, than if he had never had him in custody.(z) ESCAPE.

As to other prisoners who are not so committed, but are in custody of a goaler, sheriff, or constable, or other person, by any other means whatsoever; it seems agreed, that he who has them in custody, is not punishable for the escape, (except in some special cases,) until it be presented.(a)

It seems to be generally agreed, that a voluntary escape amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody; whether it be for treason, felony, or trespass; and whether the person escaping, were actually committed to some gaol, or under an arrest only, and not committed; and whether he be found guilty, or only accused of such crime, and not indicted.(b) Voluntary escape, how punished.

If the warrant of commitment do plainly and expressly charge the party with treason or felony, but in some respects be not strictly formal, yet good in substance, the gaoler is bound to observe it; and if he suffer the prisoner to escape, he is as much punishable as if the warrant were perfectly right.(c) But no escape can amount to a capital offence, unless the cause for which the party was committed were

(z) Hawk. P. C. II. 200, 201. Co. III. 52.
(a) Ibid. 203. H. P. C. I. 595.
(b) Ibid. 203. Salk. I. 272.
(c) Ibid. 204. H. P. C. I. 234, 390.

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actually such, at the time of the escape. As, if a gaoler suffer a prisoner to escape, who is committed for having given a dangerous wound to another, who afterwards dies of his wounds; yet he is not guilty of felony: for that the offence of the prisoner was at the time of the escape but a trespass; for it is no felony till the death of the party.(*d*)

He who suffers another to escape that was in his custody for felony, cannot be arraigned for such escape, as for a felony, until the principal be convicted: but one accused of such escape may be indicted, and tried for a misprision, before the conviction of the principal offender; for that whether such offender be guilty or innocent, it was a high contempt to suffer him to escape. Yet for suffering one to escape committed for, and guilty of treason, the gaoler will be subject to trial and punishment, immediately as for treason; without waiting for the conviction of the principal offender. But no one is punishable in this degree for a voluntary escape, but the person only, who is actually guilty of it; so that the principal gaoler is only liable for a voluntary escape suffered by his deputy: for no one shall suffer capitally for the crime of another.(*e*)

Negligent escape, who liable for.

The sheriff is equally liable for a negligent escape suffered by his deputy, as for one suffered by himself. And the court may charge either the sheriff, or his deputy gaoler, for such an escape. And if the deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him.(*f*)

(*d*) Hawk. P. C. II. 204, 205. H. P. C. I. 291.
(*e*) Ibid. 205. H. P. C. I. 287, 597, 598. H. P. C. II. 254. Salk. I. 272
(*f*) Hawk. P. C. II. 205. H. P. C. I. 597, 604. Salk. 272.

Whenever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he ought to be fined in a sum certain. But where the sheriff, having returned *capi corpus*, on a *capias*, against a man on an indictment for a felony, does not bring him in at the day, he is usually amerced, not fined.(g) Amerce.

By the common law, the penalty for suffering the negligent escape of a person convicted, was of course, as it seems, £100; and for suffering such escape of a person indicted, and not convicted, was £5. But if the person escaping were not convicted, nor indicted, it seems that it was left to the discretion of the court, to assess such reasonable forfeiture, as to them seemed proper, and if the party had twice escaped, the penalties were to be doubled; but the forfeiture was no greater for suffering a prisoner committed on two several accusations to escape, than if he had been committed on but one.(h) Penalty by common law.

In the state of New-York: in an action for an escape and false return on mesne process, the plaintiff can recover no more than he might have done in the original action; nor ought he to recover more than he has actually lost in consequence of the escape, though the sheriff's return was, at the time of making it, known by him to be false. The true question is—What has the plaintiff lost in consequence of the escape? And the solvency of the prisoner, or his capacity to pay, must determine the amount of damages sustained.(a) In New-York.

(g) Hawk. P. C. II. 206.
(h) Ibid. 206. H. P. C. I. 604.
(a) Johns. Rep. I. 215.

If the sheriff have the body of the defendant after an arrest on *mesne* process, at the return day of the writ, it is sufficient. But if the defendant escape at any time thereafter, the sheriff is liable to an action: nor is it material whether, the escape be voluntary or negligent, for the sheriff is equally liable in the one case as in the other; but it being for an escape on *mesne* process, the damages are uncertain, and may amount to the whole or but a part of the plaintiff's demand, according to the evidence in the particular case.(*b*)

If a constable arrest a defendant, on a warrant issued by a justice of the peace, and after the arrest, the constable permit him, upon his promise to return, to go home and come on again; and on his way home, meet he a deputy sheriff, and goes back with him, and the deputy sheriff arrest the defendant, and take him to prison on a criminal process, so that the constable cannot have him before the justice on the warrant upon which the defendant was first arrested; it is a voluntary escape in the constable, for which he is liable.(*c*)

In an action for the escape of one A. A. after judgment against him, and after he had been surrendered by his bail, but before he had been charged in execution, the declaration was, in debt for the amount of the judgment. Previous to the surrender, a *ca. sa.* had been issued on the judgment, and returned *non est inventus*. By the court—The action is misconceived. Under the statute debt for an escape, lies only where the prisoner is in execution; and under our law, a person is not in execution,

(*d*) Johns. Rep. V. 182.
(*c*) Ibid. VI. 62.

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until a writ of execution against the body has been issued and delivered to the sheriff. The provision of the statute requiring a prisoner to be charged in execution, within three months next after a surrender of his bail, subsequent to judgment, is conclusive, to show that a defendant is not in execution by virtue of his surrender. The action for the escape in this case, ought to have been an action upon the case in which the measure of damages is open to the investigation of the jury; and not an action of debt in which the whole judgment is to be recovered or nothing.(*d*)

An action of debt will not lie against the administrators of a sheriff, for an escape in the life time of their intestate.(*e*)

In an action of debt for an escape, the plaintiff cannot recover interest: In an action on the case it may be inquired what was lost by the escape, and the jury may give such damages as they suppose the party has sustained; but in an action of debt, every inquiry of that kind is improper, for the statute has fixed the extent of the sheriff's liability; that is, for the original damages recovered.(*f*)

If a new sheriff regularly receive a prisoner from his predecessor, he is bound to detain him, and is answerable for his escape; although a voluntary escape may have existed in the time of his predecessor. But the plaintiff has his election, and may proceed against the old sheriff for the escape in his time, or consider the the prisoner after his recaption as in execution, and charge the new sheriff for

(*d*) Johns. Rep. VI.
(*e*) N. Y. T. R I. 460. Mod. VI. 225. Co. X. 100.
(*f*) Johns. Rep. II. 454.

NOTES. the last escape: but having made an election to take his remedy against one, he is barred of any action against the other.(g)

Where a defendant is taken in execution, and the sheriff voluntarily suffers him to escape, he may not afterwards retake or detain him, without a new authority from the plaintiff: and until the plaintiff has notice of the escape, it cannot be presumed that he will elect to detain him if returned into custody, and the sheriff is liable for an escape notwithstanding such return.(h)

A former sheriff will not be ordered after a lapse of five years, to amend his return according to the truth of the case, by stating that the defendant had escaped from prison, if it was at a time when others forcibly out; broke and the only object of the amendment, is to enable the plaintiff to recover from the sheriff the whole amount of his debt, when, if the person had not escaped, the plaintiff never would have recovered one cent. And when the plaintiff, by an action for a false return, may obtain ample justice.(i)

An information will not lie against the sheriff for the penalty of 1250 dollars, given by the 22d section of the act concerning sheriffs, for false swearing on a plea of retaking and fresh pursuit; if it appear that the prisoner had before broken his bonds, and an action brought by the party grieved, be pending against him for the escape.(j)

(g) Johns. Rep. VI. 469. Lev. II. 109, 162. Ventris, I. 269. Mod. VI. 185.
(h) Johns. Cas. II. 3. Com. Dig. III. 185.
(i) N. Y. T. R. I. 57.
(j) Ibid. 181

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If a prisoner, in execution, having given security to the sheriff for the liberties of the prison, and is in custody within the limits, go beyond, and without such limits, on sundays; but returns in the evening, it is an escape in the sheriff, although he has no power to restrain the prisoner after he has given the security required by the statute. Nor does the prisoner's voluntary return, before action brought, purge the escape: but the sheriff is liable to the plaintiff, and must resort to his bond for indemnity.(*k*) Nor does the statute, making prison bonds assignable, compel the plaintiff to take his remedy on the bond. But on his neglect or refusal so to do, the court may after judgment against the sheriff, stay all proceedings thereon, until the sheriff has had a reasonable time to indemnify himself from the bond.(*l*)

If a defendant in execution, admitted to the liberties of the gaol, walk beyond the limits knowingly and voluntarily; on pretence of avoiding a snow bank, which obstructs his usual walk, it is an escape. And it would be most inconvenient and liable to every imposition, and go in a great measure to defeat the law of imprisonment for debt, if a question of convenience merely, might determine whether a voluntary and wilful departure from the limits is, or is not, an escape. And if the limits are vaguely defined, without posts or other visible marks prescribed by the statute, that will not justify an escape. The sheriff is not bound to take a bond until the limits are defined according to law; and if he does, and suffers the prisoner to go at large, it is at his peril. The creditor has nothing to do with

(*k*) Johns. Rep. IV. 45.
(*l*) St. N. Y. V. 509. Johns. Rep. V. 857.

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the liberties in making out his action. It is enough for him to show the judgment and execution, and the prisoner taken and at large without the walls of the prison. It lies with the sheriff to justify the prisoner's being at large, by showing liberties established, and defined according to law: and if he does not, he fails in making out his defence: and if the prisoner go but sixteen feet beyond the limits and return within an hour it is an escape, and if the passing over the limits was a mere inadvertence, and without any intention to escape, the place where, being within the reputed limits: yet, if an action be brought before a return within the true limits the sheriff is liable. And in an action for the escape, the sheriff cannot take advantage of a variance between the amount of judgment and the sum expressed in the execution on which the prisoner was committed; such erroneous process is sufficient for him, and stands good until the party avoids it by error.(*m*)

When an action is brought against a sheriff for an escape of a prisoner, upon the limits, having given security for the liberties of the prison, the court will stay execution upon the judgment, to give the sheriff a reasonable time to sue on the bond taken for the gaol liberties. And the sheriff is not liable to pay interest to the plaintiff during the time the proceedings are so stayed.(*n*)

A sheriff may permit a prisoner in execution, the privilege of the gaol liberties, without having security, and if the prisoner without his knowledge go beyond the limits, but returns again before suit brought, the

(*m*) Johns. Rep. V. 89—101.
(*n*) Ibid. 347.

sheriff is not liable for an escape. The liberties of the gaol are considered as an extension of the walls of the prison; and a return within them, a return within the gaol. And if the sheriff take no bond or security from the prisoner, for his enjoyment of the liberties, and he escape, the sheriff may retake him in the same manner as though he had escaped from within the walls of the prison. And a voluntary return of the prisoner is equivalent to a retaking; which purges a negligent escape. The prisoners in execution, are in prison while on the limits:† and if guilty of an escape, and no bonds have been given, the sheriff's right of recaption is in full force.(o) ESCAPE.

In the state of Massachusetts: If a debtor committed upon original process, escape through the negligence of the gaoler, or insufficiency of the prison; the jury in an action on the case for such escape, are not obliged to find for the plaintiff his whole debt. But the sheriff is answerable to the creditor, who shall recover according to the damages he has sustained. And if the escape happen through the insufficiency of the gaol, though the sheriff is immediately answerable to the creditor for actual damages sustained, he has his remedy over against the county; which must look to the prisoner for their indemnity.(p)

If the sheriff permit a debtor who has been surrendered by his bail in a civil action, and by the court committed to the custody of the sheriff, to go

† See post Massachusetts, the same point adjudged, and held no escape.

(o) Johns. Rep. VI. 121.
(p) M. T. R. 11. 326. 21. St. Febry. 21. 1785.

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The direction of the statute, that the sureties in a bond for the liberty of the gaol yard, shall be approved by two justices, is given to prevent oppression in the creditor, by his refusing the bond, when the sureties are sufficient. If therefore, he does not allege the insufficiency of the sureties, but is satisfied with them, and agrees to take the bond, the intent of the statute is complied with; and there is no necessity for the approbation of the sureties by the justices, to entitle the prisoner to the privileges and liberty granted by the statute, or to indemnify the sheriff for allowing them. And if a prisoner for debt, having given such bond to obtain an easement from close imprisonment, be found in the night time, voluntarily without any apartment,

(q) M. T. R. II. 549.

in, or belonging to the prison, and in the yard appurtenant to the gaol: both upon the principles of the common law,† and upon the construction of our own statutes, it is an escape within the true intent of the condition of the bond. And in an action on such bond, the court will enter judgment for the penalty of the bond, without interest.(r) ESCAPE.

To constitute an escape within the intent of a bond, for the liberties of the prison, there must be some agency of the debtor employed; and a conveying him out of the limits of the prison, he not consenting, is no escape, if he return as soon as he has ability. If any force, other than that of an enemy, break open the gaol, and a prisoner, avail himself of the breach to leave the prison, or suffer himself to be rescued, it is an escape; but if carried away by violence, he returns as soon as the force ceases, it is not clear that at law it is an escape. And if a debtor, who has entitled himself to the liberty of the gaol yard, by giving bond, be forcibly carried without the limits, and returns as soon as the force ceases, perhaps it is not a breach within the true intent of the bond. If he be visited by sudden sickness, so extreme that he is carried to an adjoining house, without any agency or direction of his own, but by the humanity of others, that is no escape, if he returns as soon as he has reason and strength. And if he die of such sickness, while thus removed, the bond is saved. It happened by the providence of God, which hurts no man.(s)

† See note in New York, where the limits are at common law considered but an extension of the walls of the prison.

(r) M. T. R. III. 86.
(s) Ibid. IV. 369, 370.

ESCAPE. If a coroner, by virtue of an execution, arrest the body of the debtor, who is a deputy sheriff, and keeper of the gaol, and carry the prisoner to the gaol house, (the sheriff being absent on his own private business,) and leave a copy of the precept in the house with such prisoner, the coroner has performed his duty, and is not liable to the creditor for an escape, nor in any other way. But the facts constitute an escape committed by the sheriff, for which he must answer; because he has no person at the gaol authorized to receive and confine the prisoner.(*t*)

In Connecticut. In the state of Connecticut: If an officer who has arrested a defendant on civil process, take bail apparently good and sufficient, at the time of taking the same; and the defendant fails to appear and plead to such action, and judgment is rendered on default therein, and execution issues, and is committed to the hands of the same officer, who returns *non est inventus* thereon; such officer is not liable for an escape, nor for taking insufficient bail; though the surety, after executing the bail bond and before the return of the execution against the principal, become wholly insufficient.(*u*)

If a prisoner in execution escape from the officer through his negligence, he may retake him: but if the escape were voluntary in the officer, he cannot retake his prisoner: but in either case, the creditor may retake his debtor on an *alias* execution on the same judgment; for the creditor is not obliged in such case to accept the officer for his debtor. But if the officer collect the money, or take the goods and

(*t*) M. T. R. V. 310—312.
(*u*) Root, 1, 54.

chattels of the debtor, it is otherwise; for the debtor having been compelled to pay the money, or to turn out his goods to the creditor's officer, such debtor is discharged, if the goods taken are sufficient to satisfy the execution: and the creditor must look to the officer only.(v) ESCAPE.

If a person prosecuted for the maintenance of a bastard child, be arrested, and afterwards escape, and the officer return his warrant, he may afterwards retake his prisoner; and if he can, must do it, and deliver him up in court upon such prosecution. And if the officer, after retaking his prisoner, hold him twenty-four hours without his warrant, the same having been returned to court, and the prisoner then compromise the prosecution he cannot maintain false imprisonment against the officer.(w)

If a defendant committed to prison on an execution issued upon a judgment rendered by a city court, upon an action of which such city court had not jurisdiction, escape, and an action be brought against the sheriff for such escape, he may defend on the ground that such city court had not jurisdiction of the original action, and such defence will be good.(x)

A prisoner upon execution, who escapes, may be retaken in any place. As, where a constable having taken a debtor in execution, who escaped and fled into the state of Rhode-Island, obtained an escape warrant, and pursued his prisoner; and obtained a renewal of the warrant in said state of Rhode-Island, and at Providence retook his prisoner, and brought him back and committed him according to the direc-

(v) Root, II. 324.
(w) Ibid. I. 388.
(x) Ibid. 288.

ESCAPE.

tion of the execution. It was held that the proceedings of the constable, and the retaking and commitment were lawful, and not a trespass.(y)

A prisoner, committed on execution, procured bonds for the liberties of the prison, and brought his petition to the general assembly, praying for an act of insolvency, and, in the mean time, that he might be liberated from his imprisonment on said execution. The petition was continued to the next session of the assembly for trial, and the petitioner in the mean time liberated from his imprisonment on such execution, and departed from the limits. On trial of the petition on the merits, it was negatived, but the prisoner never returned. In an action on the prison bond, the departure of the prisoner from the limits, and his neglect to return, were held to be no escape; and that the condition of the bond was not broken so as to subject the sureties.(z)

If a defendant be committed to prison in execution, and having obtained upon bond the liberties of the prison, in the night time privately go beyond the limits, and return within them before morning, his departure and return being unknown to the sheriff, and afterward is permitted to take the oath provided for poor persons, the plaintiff cannot maintain an action against the sheriff for the escape so committed in the night season, without his knowledge; for by the prisoner's return before action brought, the escape, as to the sheriff's liability therefor, was purged. It was no more than a negligent escape in

(y) Root I. 106.
(z) Ibid. 72.

the sheriff, and the prisoner's return was equivalent to a retaking on fresh pursuit.(a) ESCAPE.

If a prisoner in execution on the liberties under bonds, inadvertently pass beyond the limits about thirty feet, and immediately return and request the sheriff to hold him as a prisoner on such execution, the sheriff may refuse and take his remedy on the bond for the escape. But if in an action brought on such bond, final judgment be not rendered therein, and no action be brought by the creditor in such execution against the sheriff for the escape, within two years from the time such escape happened, the sheriff will recover no more than nominal damages in his action on the bond, he not being any longer liable to the creditor for the escape of the prisoner.(b)

A gaoler may allow to a prisoner committed on civil process, the enjoyment of the liberties of the prison, either on bond, or his bare promise to abide a true and faithful prisoner. And if such prisoner, so on the liberties, go beyond the limits, he may, on fresh pursuit be retaken and committed. So to permit prisoners to enjoy the limits, is no escape; for while they are within the limits, they are to every legal intent and purpose within the prison. A prisoner being allowed the liberties of the prison, on his promise only to remain a true and lawful prisoner, having escaped, and being retaken and committed, procured bonds for the liberties, and again escaped. In an action on the bond, it was alleged to be void, on account that the retaking was unlawful. But it was determined that the retaking was lawful and the bond good, the first being only a negligent escape.(c)

(a) Root I. 106.
(b) Ibid. 127.
(c) Ibid. II. 174.

ESCAPE.

If the creditor in an execution, whose debtor is imprisoned thereon, and on the limits, fraudulently procure a third person, without the sheriff's knowledge, to entice the prisoner to escape, and such prisoner, in consequence of such enticement, go out of prison, and beyond the limits thereof, it is not an escape in the sheriff; and in an action on the prison bond, the sureties will be exonerated.(*d*)

If a prisoner in execution on the liberties under bonds, take the oath by law provided for the relief of poor prisoners, and immediately depart after having taken such oath, it is an escape in the sheriff, and a breach of the condition of the prison bond. As where such prisoner took the oath on the 4th of February, 52 minutes after 2 o'clock in the afternoon, and money was left for his support until the 30th of March following, including his dinner on that day. And on the same 30th day of March, at 3 o'clock in the afternoon, departed from the limits, and but 5 minutes after such departure, more money was left by the creditor for the prisoner's support, it was held an escape.(*e*)

So where money was left sufficient to pay for the prisoner's support, until the 8th day of February, including his breakfast on that day, and the prisoner departed between the hours of 9 and 10 in the forenoon, it was held to be an escape.(*f*)

But in an action against the sheriff of the county of N. L. for the escape of one J. F. committed on

(*d*) Root, I. 336.
(*e*) Ibid. 285.
(*f*) Ibid. 494.

ESCAPE.

execution in favour of the plaintiff, the sheriff pleaded, that J. F. being a poor debtor, unable to support himself in prison, prayed out a proper citation and notification, to notify the plaintiff to appear before E. H. esquire, a justice of the peace for N. L. county, or some other proper authority, at the dwelling-house of S. M. in N. L. under keeper of said gaol, on the 12th day of August, 1805, at 2 o'clock in the afternoon, to shew cause, &c. That the plaintiff being an inhabitant of the state of New-Hampshire, service of such citation was made by leaving a copy with J. L. esquire, his attorney of record. That the same being so served, was returned to A. S. esquire, who was then a justice of the peace for said county. That justice A. S. attended at the time and place mentioned, examined into J. F's circumstances, and being of opinion that he was a proper subject of the poor prisoner's oath, administered the same to him about thirty minutes after 3 o'clock; and that J. F. remained in gaol until about 4 o'clock of the same afternoon, and then, no money having been left for *his* support, went at large, which was averred to be the escape complained of in the declaration.

The plaintiff replied, that within two hours after the oath was administered, and before the usual time of supper, he left three dollars with the gaoler for the support of J. F. and that when J. F. went at large, he had not become chargeable for necessary food either to himself or the gaoler.

To this replication the sheriff demurred, and the superior court adjudged the same to be insufficient, which was affirmed by the supreme court of errors.(g) By which it seems that a poor debtor can-

(g) Day II. 562.

ESCAPE. not be detained in prison after taking the oath, unless money be left for his support immediately on the oath's being administered. And that a citation by the debtor to his creditor to appear before E. H. esq. justice of the peace, or some proper authority, is good, though not returned to E. H. but to some other justice of the same county.

On a petition against a county for an escape of a prisoner in execution, through the insufficiency of the gaol, the defence was, that the prisoner escaped by the aid and assistance of certain persons from without the prison, who furnished implements and means by which the prisoner broke the gaol, and not through its insufficiency; and that the prisoner was retaken on fresh pursuit, and was still in prison. To which the petitioner replied, that he had no knowledge of the persons who aided in the escape of the prisoner, and that the recaption took place after his action was commenced against the county; to which there was a demurrer, and rejoinder in demurrer.

The court in delivering their opinion, say: That public justice and the peace of society are concerned that prisoners should be securely kept; and that for every escape not happening by fire, public enemies, or the providence of God, the builder or keeper of the gaol be responsible. In England, the responsibility is on the same person, who provides and keeps the gaol. Here by statute it is divided, but not lessened. The county which builds and repairs is responsible for the sufficiency of the gaol, and the sheriff for the custody of it; and the one or the other must answer for every escape except in the cases abovementioned. It is no excuse

for the county, if a prisoner break out by the help of implements handed in at a window. It is their duty to provide a sufficient gaol, which they do not do if prisoners can break out of it with or without implements. If the gaol is left accessible to persons without, and is of a construction and materials, that by the secret use of implements it can be broken, it is not that place of security which the law intends. It is the sheriff's duty to defend the gaol against open and riotous attempts, but it devolves on the county so to build and secure it, that it shall not be liable to be broken secretly, and without the knowledge of a vigilant and faithful keeper. And though when an escape takes place through the means of parties from without, of ability to respond, it is the duty of the creditor in the execution to seek his remedy against them; yet if they are unknown to the creditor, or are not of sufficient ability to respond the damages and cost, he has his remedy immediately against the county. Nor does the recaption, after process instituted, discharge the liability of the county, though on fresh pursuit; for if there has been an escape the county is holden. And though the debtor has taken the poor prisoner's oath, his detention in gaol is a statute provision which entitles the creditor to detain the prisoner at his own expense, upon the ground that the detention still may, as in fact it sometimes does, notwithstanding the oath, produce a disclosure of estate and satisfaction of the debt. Sheriffs, neglecting to commit on execution, are never excused or abated in damages, because the debtor is poor. In England the common action for escape of one in execution is debt, in which, of course, the whole debt for which he was in execution is recovered. Execution is the end of

recapt.

ESCAPE. the law, laxness and inexcusity hene, render futile law proceedings, and the law itself.(k)

N. S. brought his petition against the county of M. to recover damages for the escape of one J. K. by reason of the insufficiency of the gaol.

The material facts were, that on the 29th of April, 1802, N. S. commenced an action against J. K. by writ of attachment, returnable to the county court in November, 1802; and that on the same day the body of J. K. was by virtue of said writ arrested, and for want of bail committed to prison. And that in May, 1802, J. K. escaped from his imprisonment by reason of the insufficiency of the gaol, and immediately absconded to parts unknown. And that said writ was duly returned and entered on the docket of said court, and came by legal remove to the adjourned county court held in December, 1802, when the parties appeared, and a legal judgment was rendered in the action, and an appeal taken to the superior court, where N. S. recovered a judgment against J. K. took out execution and caused demand to be made at the gaol within five days, and a non est inventus was returned. By which N. S. lost the whole amount of his judgment against J. K. with the interest upon it.

The superior court decreed that N. S. recover the same amount of the county.

On a writ of error to the supreme court of errors, the errors relied upon were,

1. That the damages were excessive, unless

(k) Kirby, 327.

2. That J. K. was legally discharged by appearing in court, and pleading to the action. ESCAPE.

By the Court.——As to the 1st question, the remedy against coroner by our statutes, is equivalent to an action on the case at common law against the sheriff for a negligent escape, as to all the damages alleged, inquiry was competent; inquiry was made, and the court gave the principal, interest and costs, which they had an unquestionable right to do.

Respecting the 2nd point, by our law, if the body of the defendant be attached, he may be let to bail, and the sheriff must take bail if it be sufficient. The officer must then return his writ with an indorsement mentioning that *he has taken bail for the defendant's appearance.* This return imposes an obligation on the plaintiff, if he would preserve his hold to demand special bail. The return is the only object at which he is to look. The condition of the bail bond is performed if the defendant appear. And this appearance consists in the acceptance of a plea. The plea, if accepted, waves all right to special bail, or to an imprisonment of the defendant's body. The plaintiff must see that special bail be given before he accepts a plea, or that the defendant, (if delivered up) be committed to prison. When he is committed, he may plead by attorney, or personally, and the words "*that he pleads in custody,*" cannot be essential. They are always superfluous. The record gives a history of the proceedings of his delivery up in court, and of his commitment to gaol. After he is imprisoned, whatever may be the length of the litigation, the defendant must remain in prison until five days after final judgment; and then if execution be not levied on him, he may be discharged.

ESCAPE.

If the defendant will not or cannot procure bail, it becomes the duty of the officer to apply to a justice for a *mittimus*, which, declaring the cause of the commitment, directs the gaoler to receive and keep the prisoner until discharged according to law. What this law is, appears from the next statute. The prisoner is *not to be holden longer than five days after the rising of the court in which final judgment shall be rendered.* Though expressed negatively, the construction has ever been, that the defendant is to be holden until five days after the judgment. In the mean time, the plaintiff, on inspecting the record, knows that the defendant is secure, and that he has no act to do to keep him in prison. He is not to object to this pleading, because the defendant has a right to plead, and that without bail. He opposes not his pleading *by attorney*, for the prisoner has a right to his attorney. On the whole, the plaintiff is only to take care that within five days after final judgment his execution be in the hands of the sheriff to be levied on the debtor. This is the construction of our statutes, and this is the *invariable practice.*

There is no analogy between bail to the sheriff and imprisonment. Their *systems* are *entirely distinct*, both resting on statutes; but if there be any analogy, the most simple mode of ascertaining the law relative to both, is by an investigation of each without embarrassment from the other.

There is, however, a point at which an analogy commences. It is where the person bailed has been delivered up in court, and committed to gaol. And when the person who could not procure bail, is committed by the justice. The commitments are in the

same language, for the same cause, with the same object. The law then must be similar in both instances. Imprisonment by the court, it is agreed, must be permanent until after the rising of the court. The same must be the imprisonment for want of bail to the action.(*i*) ESCAPE.

Decree of the superior court unanimously affirmed.

Money for the support of a prisoner in execution, after having taken the insolvent debtor's oath, must be left by the creditor with the gaoler.

In an action on a prison bond, alleging an escape of the prisoner, the defendant pleaded, that, having been admitted to take the poor prisoner's oath, the creditor left no money with the prisoner for his support. The plaintiff replied, that money sufficient was by the creditor left with the gaoler. On demurrer the replication was adjudged sufficient.(*j*)

If the marshal of the district of Connecticut be arrested upon process under the authority of this state, and be committed to prison, the sheriff of the county where the marshal is so committed, must detain him until legally discharged. And if the sheriff permit such marshal to depart from such gaol, it is an escape in the sheriff, for which he is liable to the creditor in the process on which the marshal was committed.(*k*)

In the state of Vermont, a former sheriff is not liable for the escape of a prisoner during the shriev-

(*i*) Day, II. 195.
(*j*) Ibid. I. 117.
(*k*) Ibid. II. 300. 304.

ESCAPE. ality of his successor, though such prisoner was committed on mesne process during his own continuance in office. He is not answerable for the safe keeping of a prisoner within the county gaol after his commission has expired, if he regularly delivered over such prisoner under the keys to his successor in office.(*l*)

A sheriff, as keeper of the prison to which is committed a debtor from another county, is not liable for the negligent escape of such debtor. Nor can the nominal plaintiff in ejectment, maintain an action against a sheriff for an escape of a defendant committed *in his name*, for the damages recovered in the action of ejectment.(*m*)

If a defendant, arrested on mesne process, be committed, and procure bond for the liberties of the prison, and afterwards escape, and be not at the prison to be charged in execution, when within the fifteen days demand is there made for him by a proper officer, having a lawful execution on a judgment rendered on the original writ of attachment on which the arrest was made, the bond is forfeited by the escape; though such defendant was, during the life of the execution, continually within the jurisdiction of the officer holding the same for service, and though the defendant requested the plaintiff to cause him to be charged in execution. But though the bond is forfeited, on the chancery thereof, the bail may on motion surrender the principal into court, and on payment of costs the court may chancer the penalty down to mere nominal damages, and order the prisoner into the custody of the sheriff, to be kept fifteen days,

(*l*) Tyl. Rep. II. 286.
(*m*) Ibid. 61.

that the plaintiff may charge him in execution on his original judgment.(*n*) ESCAPE.

Whenever a prisoner for debt is admitted to the liberties of the prison, and a bond with surety taken to indemnify the sheriff, the *least inducement* given by the creditor to the departure of the prisoner from the liberties, is a good bar to an action on the bail-bond, when the escape is assigned in breach.(*o*)

(*n*) Tyl. Rep. 121, 127, 282.
(*o*) Ibid. 409.

CHAP. IV.

OF EXECUTION.

I. EXECUTION.

EXECUTION. **EXECUTION,** according to lord Coke, is the obtaining actual possession of any thing acquired by judgment of law, and is the fruit, effect, and end of the law;(*a*) and is the putting the sentence of the law in force.(*b*)

Hab. fac. seizinam. Hab. fac. possessionem. If the plaintiff recover in an action real, whereby seizin of land is awarded to him, the writ of execution is an *habere facias seizinam.* This is where the freehold is recovered; but if the recovery be in ejectment, in which the party is restored to his term of which he was ousted, the writ of execution is an *habere facias possessionem.* These writs are directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the lands or tenements recovered; in the execution of which, he may take with him the power of the county, and may break open doors if the possession be not quietly delivered. But if it be peaceably yielded up, the deli-

(*a*) Cok. Lit. 154. 289.
(*b*) Bl. Com. III. 412.

EXECUTION.

very of a twig, a turf, or the ring of the door in the name of seizin, is sufficient execution of the writ.(c) The sheriff may not only break open the house to deliver seizin and possession to the demandant or plaintiff, but he must remove all persons from the house.(d) And until possession be completely given, and the officers withdrawn, the writ is not executed.(e)

If the writ direct the sheriff to deliver seizin of several messuages in the possession of the same person, it is sufficient that he do execution in one in the name of all, without going to each particularly. But where the houses, &c. recovered, are in possession of several, it is not sufficient that he deliver seizin of one in the name of all, but he must go to each particularly. And if a recovery be of rent common, &c. it is sufficient that the sheriff upon the land delivers seizin of the rent common, &c. by parol, for thereby the demandant is in actual possession. And if the sheriff offers to deliver seizin, and shows the parcels *in which*, it is sufficient, though the demandant refuse it, for his entry afterwards is lawful.(f)

To a writ of *habere facias seizinam*, the sheriff may not return that another is tenant of the land by right, for the sheriff has nothing to do but to execute the writ.(g)

If a man recover several houses in an assize, and after the tenant reverses the judgment in a writ of error, and a writ thereupon issues to the sheriff, to

(c) Bl. Com. III. 412. V. 91.
(d) Lev. I. 145.
(e) Mod. VI. 27. Salk. I. 321. Lev. I. 145.
(f) Com. Dig. III. 294. Rol. I. 886. Dy. 278.
(g) Co. VI. 52.

put him in possession of those houses, though the te- EXECUTION.
nants are strangers to the recovery, and ought not to be ousted without a *scire facias*, yet if the sheriff execute the writ, and put them out of possession by virtue of it, he is no disseisor, for he acts under the authority of the court, which he is sworn to obey.(*h*)

If the plaintiff in ejectment declare for forty acres, and recover only thirty, the sheriff may deliver to him possession of two or three acres in the name of all, without setting them out by metes and bounds, though the plaintiff recovered but part of what he supposed in possession of the tenant.(*i*)

Low water mark is a description of the boundary of land in a judgment in a real action sufficient to enable the sheriff to execute such judgment by an *habere facias seizinam*.(*j*)

If damages and costs are given in an action for the recovery of seizin, or possession of lands or tenements, the writ of execution is so framed, that the officer may levy and collect such damages of the defendant, as well as deliver the seizin or possession of the premises recovered.(*k*)

In other actions, where the judgment is, that something in special be done or rendered by the defendant in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff, according to the nature of the case. As upon an assize of nuisance, where one part of the judgment, is that the nuisance be removed, a writ

(*h*) Bac. Abr. II. 353.
(*i*) Com. Dig. III. 294, 295.
(*j*) M. T. R. III. 252.
(*k*) St. M. 201. N. H. 81, 82. St. V. 513, impression of 1798.

EXECUTION. goes to the sheriff, to abate it at the charge of the party, which like writ issues even in case of an indictment. Upon a replevin, the writ of execution is

Retorno habendo. the writ *de retorno habendo*, and if the distress be eloigned, the defendant has a *capias in withernam*. But on the plaintiff's tendering the damages, and

Withernam. submitting to a fine, the process *in withernam* is stayed. In detinue after judgment, the plaintiff has a *distringas* to compel the defendant to deliver the goods by repeated distresses of his chattels, or else a *scire facias* against a third person, in whose hands they happen to be, to show cause why they should not be delivered. And if the defendant still continue obstinate (if the judgment hath been by default, or on demurrer, the sheriff must summon an inquest to ascertain the value of the goods, and the plaintiff's damages, which, being so assessed, or by the verdict in case of an issue) shall be levied on the person or goods of the defendant.(*l*)

Executions in actions, where money only is recovered, as a debt or damages, (and not any special chattel,) are of five sorts: either against the body of the defendant, or against his goods and chattels, or against his goods and body, or against his goods and chattels and lands, or against all three, his goods, body, and lands.(*m*)

(*l*) Bl. Com. III. 412, 413.
(*m*) Ibid. 413.

II. AGAINST THE BODY, OR CA. SA.

CA. SA.

The first species of execution for the collection of money only, is a *capias ad satisfaciendam*, commonly called a *ca. sa.* and commands the sheriff to take the body of the debtor, and him to have before the court from which the writ issued, on a day therein named, to satisfy the planitiff's demand.(*n*) This form of execution is in use in the state of New-York, but may not be issued against heirs nor devisees, nor against executors, administrators, nor any other persons whose bodies are by any legal means exempted from imprisonment on execution.

Vide St. New-York, I. 395.

If an action be brought against a *feme sole*, and pending the suit she marries, the *capias* shall issue against her only, and not against her husband.(*o*) When a man is once taken in execution on this writ, no other process can be sued out against his lands or goods; unless he die in execution, when the plaintiff may, after his death, sue out an execution against his lands, goods, or chattels.(*p*) If the body of a debtor be taken in execution, and he escape, the officer from whom he made his escape, is liable for the whole amount of the execution.(*q*) But courts will always make a construction as favorable to the officer as the law will permit.(*r*) On a *ca. sa.* the officer may not take bail, nor can he return that the party was rescued; for he may take the power of

(*n*) Cok. Lit. 289. Bl. Com. III. 414, 415.
(*o*) Cro. Jac. 323. East. IV. 521.
(*p*) Bl. Com. III. 414, 415.
(*q*) Dalt. Sher. 149.
(*r*) Ibid. 143.

CA. SA.

the county to his aid; and if he return a rescue, he is liable for the escape, though the plaintiff may have a new execution.(s) As soon as the defendant is arrested on this writ, he is in execution before the return of it.(t) And if the defendant be already in custody on mesne process or execution, and another capias or execution be delivered to the sheriff, so holding him in custody, he is in custody immediately upon the second writ, without actual arrest.(u) If the defendant be in prison for a crime, he may, by leave of the court, be charged in execution.(v)

If the officer put his hand, &c. upon the party, or only touch him, saying he arrests him, it is sufficient; without showing the warrant, and without saying at whose suit he is arrested, if he does not ask it. And though the officer have the writ in his pocket, or have two there, and do not say on which the arrest is made for, he shall be arrested on both.(w) But if the party request it, the officer ought to shew his writ, tell at whose suit it issued, and for what cause, by what process, and in what court returnable; otherwise it will be wrong.(x) Words only do not constitute an arrest.(y)

See title *arrest.*

See title *breaking doors.*

After an arrest made, the officer may justify breaking open the defendant's house to retake him if escaped.(z) And to make an arrest in the first instance, he may break the house of a stranger, where

(s) Bac. Abr. II. 351. Cro. Car. 240.
(t) Com. Dig. III. 302. Rol. I. 901.
(u) Co. V. 89. Com. Dig. III. 302.
(v) Com. Dig. III. 302.
(w) Cro. Jac. 485, 486. Salk. I. 79.
(x) Co. VI. 54.
(y) Salk. I. 79.
(z) Com. Dig. III. 303. Salk. I. 79.

the defendant is secreted: but he must be certain the defendant is there, and ought first to make demand of entrance, for if he break the house of a stranger, and the defendant be not within, he may lawfully be resisted, and will be liable in an action in favour of the owner or tenant.(*a*) CA. SA.

If a man, taken upon execution for money only, satisfy the debt, the officer must discharge him. And if before an arrest made the defendant pays the debt to the officer holding the execution, he may not afterwards make an arrest.(*b*) Nor if served with a writ of *supercedeas*, or such process has been delivered to him; but if a *supercedeas* be delivered to an officer, he may detain the party a reasonable time to be informed of the import of it.(*c*)

If A. arrested on an execution in favour of B. pays the money to the officer, he cannot apply that money to an execution against B. in favour of A. but must pay it over to B.(*d*) If a defendant has been once taken in execution, and afterwards discharged by consent of the plaintiff, he can never be taken again by virtue of an execution issued on the same judgment, nor can debt on judgment be maintained; but if the defendant were discharged on a special agreement between the parties, an action on the case may be maintained on such agreement.(*e*)

If the plaintiff consent to discharge one of several defendants taken on a joint execution, he cannot

(*a*) Com. Dig. III. 303.
(*b*) Cro. Eliz. 404.
(*c*) Com. Dig. III. 303, 304.
(*d*) Barns. 214. Cranch. I. 134.
(*e*) Burr, IV. 2482.

CA. SA.

afterwards retake him nor take any one of the others. And a separate execution against one defendant, on a judgment against two, cannot be supported.(*f*) Nor can an execution be taken out against the goods and chattels of a defendant, whose body has been once taken in execution on the same judgment and discharged.(*g*) Nor may a defendant be taken twice on the same judgment, though discharged the first time on an express agreement that he should be liable to be taken in execution again, if he should not fulfil the terms which were agreed upon between the parties, as the ground of his discharge.(*h*)

If it appear that a *ca. sa.* has been sued out by the plaintiff against the original defendant, and left at the sheriff's office with direction to return *non est inventus*, though the defendant was then actually in the custody of the sheriff, in the prison of L. and such return were made by the sheriff, and an action brought against the bail, judgment entered up, execution issued out, and the money levied, the court will set the return aside, together with all subsequent proceedings against the bail, and order the money levied under the execution to be returned to him.(*i*)

New-York.

In the state of New-York: If the defendant has been surrendered in exoneration of his bail, final judgment obtained against him, and after three months elapsed, on regular notice to the plaintiff is superceded for want of being charged in execution in due time; the plaintiff has elected to relinquish the person of his debtor, who having once been actually superceded, must continue so, and can never

(*f*) Term. Rep. VI. 525.
(*g*) Ibid VII. 420.
(*h*) East, II. 248.
(*i*) Bos. et Pul. IV. 251.

be taken on an execution against his body, issued on the judgment, in the suit on which he was in custody.(a) CA. SA.

In the state of Connecticut: A justice of the peace may issue his execution throughout the state, if he finds it necessary to give it effect. Should it appear that an execution was directed to a distant officer, merely to vex and oppress the debtor, it might subject the authority who issued it to damages: but the officer is bound by his precept. Unless it be void on the face of it, he cannot look into the circumstances which induced the direction.(b) Connecticut.

An execution returnable according to law, runs to the next court which is to commence at the distance of sixty days or more from the date of the execution. The case was thus:—An execution issued on a judgment of the county court, dated the 4th day of October, 1782, and returnable *according to law*. The next county court held in the same county, after the date of the execution, commenced its session on the fourth Tuesday of November, 1782. On the 11th day of December, 1782, the officer levied said execution on a quantity of salt, the property of the debtor: and delivered the same to one H. at his store, to keep and redeliver to the officer at the end of twenty days, which said H. promised to do, but never did. The officer thereupon brought his action of assumpsit against said H. who defended on the ground, that the officer acquired no right to the said salt by virtue of his said seizure: because the return day of the execution, as the defendant contended,

(a) N. Y. T. R. I. 515.
(b) Kirb. 180.

was past, when the seizure took place, and the execution of no force.

By the court——After the return day of an execution is expired, an officer has no authority to levy under it; but the statute requires that executions be made returnable within sixty days, or to the next court, in case sixty days are remaining between the date of the execution and the next court. And when an execution is made returnable *according to law*, and there are not so many as sixty days to the court next to be holden, such execution is, by construction of law, returnable to the court holden next after the expiration of sixty days from the date of such execution, which in this case was in June, 1783; and the levy good.(*c*)

If an officer arrest the body of a debtor on execution, and at his request, and on his promise to return upon a particular day, within the life of the execution, permit such debtor to go home to his family; and afterwards such officer retake his prisoner, and commit him to gaol on the same execution, such prisoner cannot maintain an action of false imprisonment against the officer.(*d*) Such has been the decision, but it is safer for the officer, notwithstanding, to omit taking the body until he has determined to commit him without delay, than to hazard a renewal of the question.

But if an officer, for want of money, goods, or chattels of the debtor, take his body in execution, and immediately after the arrest, such debtor tender

(*c*) Root, I. 101.
(*d*) Ibid. II. 135.

to the officer sufficient personal estate belonging to the debtor, to satisfy the execution and the officer's fees thereon, he must release the body and take such estate; and if he refuse to do it, and commit the debtor to gaol, such officer is a trespasser, and liable to an action of false imprisonment. If the estate taken on the release of the body prove to be insufficient to satisfy the execution, (though when taken, apparently enough) the officer may, for the residue, take further estate if to be found; and if not, may again take the body in execution: for his release of the body was lawful, and no voluntary escape, which precludes a retaking.(e) ca. sa.

If an officer who holds an execution for service, has an opportunity to take the goods of the debtor, upon the execution, and neglects to do it, he is liable to the creditor for the neglect; and if, having had such opportunity for executing his writ, he is afterwards prevented by any act of the defendant, or any lawful impediment not existing when he had such opportunity of levying such execution, and he returns a *non est inventus*, or that he could find no goods whereon to levy, &c. he is liable for a false return.(f)

In the state of Vermont: In all civil cases where there has been a commitment upon mesne process, the creditor must be prepared to charge the debtor in execution within fifteen days after the rendering final judgment against him, or he will lose his lien upon the sheriff as keeper of the gaol, whether the debtor be *de facto* a prisoner at the term at which

(e) Root, I. 120. Kirb. 180.
(f) Day, I. 128.

CA. SA. final judgment be rendered or not. If the debtor has been legally committed, and not legally discharged, he is in contemplation of law in the sheriff's custody within the prison.(g)

(g) Tyl. Rep. II. 283.

III. AGAINST GOODS AND CHATTELS, OR FIERI FACIAS.

EXECUTION against the goods and chattels of the defendant, is called a *fieri facias*, and by abbreviation, a *fi. fa.* from words in it formerly, when judicial proceedings were in Latin, wherein the sheriff is commanded, that of the goods and chattels of the defendant, he cause to be made the sum or debt recovered. This execution is issued in cases where, by the general principles of law or some special circumstances, the body of the defendant is not liable to imprisonment on execution, nor are the lands of the defendant liable to extent.(*a*) In executing this writ, the officer may not break open the outer door of the defendant's house; but if his goods and chattels are secreted in another's house, the officer, after a demand of admission, stating the cause, and a refusal, may break the house where the goods, &c. are deposited, by night or day.(*b*) And if he enter peaceably the defendant's house, the outer door being open, he may break inner doors, chests, and trunks, to come at the goods.(*c*) But the officer may not even raise the latch of the defendant's outer door; nor, if a little opened, thrust in with violence.(*d*) Fi. Fa.

To execute this writ, the officer may take and sell the goods and chattels, including terms for years, and annuities, till he has raised enough to satisfy the

(*a*) Bl. Com. III. 417. St. M. N. H. R. I. *post.*
(*b*) Co. V. 93.
(*c*) Ibid. 92. Cro. Eliz. 909.
(*d*) Com. Dig. 299.

FI. FA. judgment and costs,(e) first paying to the landlord of the premises, whereon the goods are found, the arrears of rent then due, not exceeding one year.(f) He may cut down and sell corn growing on the land, and may remove and sell utensils of trade erected by the defendant, though fixed to the land; such as coppers, fats, tables, partitions, and the like: but hearths, chimney-pieces, put up by the defendant for the use of the house, and not for trade, may not be taken in execution. Nor may doors, nor windows, nor fruit or other trees, nor the fruit on them, nor common grass.(g)

The officer may not take goods deposited in pledge, or pawned; nor articles demised, or let to another; nor goods taken and in custody on a former execution,(h) unless in the custody of the same officer;(i) or unless the officer who first took the goods returned that he found none.(j)

If there are joint partners, and execution issue against one, the partnership goods may all be taken, but the officer must sell only the defendant's share, and the purchaser will be tenant in common with the other partner.(k) But where the officer, having seized, and sold the whole of the partnership effects on execution against one, it was held to be the officer's duty to pay over to the other partner a part of the avails proportioned to his share in the partnership effects.(l)

(e) Co. III. 12. VIII. 171. IV. 74. Cro. Jac. 79.
(f) Bl. Com. III. 417. St. N. Y. I.
(g) Co. III. 10. Salk. I. 368. Com. Dig. III. 299. Bos. & Pul. III. 181. East. VI. 604.
(h) Com. Dig. III. 299. Show. 175. Mod. III. 236.
(i) M. T. R. V. 273, 274.
(j) Com. Dig. III. 299. Ver. II. 238.
(k) Salk. I. 392.
(l) Doug. 650.

If an execution issue upon a judgment against a corporation, the officer cannot take the goods of a member, of which he has in his natural capacity, but the goods of the corporation only.(m) Nor can an officer take any thing in execution which he cannot sell, such as deeds, bonds, writings, notes of hand, bank notes, nor any chose in action; they are of no intrinsic value, nor can he give any title to them by the forms of a sale.(n) But specie, gold and silver coin, may be taken in execution, and endorsed at its statute value.(o) FI. FA.

The officer may not take several chattels where one is sufficient for the debt and costs. Nor may he detain the chattels taken, till the money be levied, and the charges of keeping them be paid for; though he may make sale, and the keeping is a favour to the defendant, yet this must be by agreement, and not by detainer till satisfaction.(p)

When an officer has taken goods in execution, he may sell them, though his office be determined before the sale.(q) In the sale of a term for years on execution, if the officer mistake the date of the term, and the bill of sale contain general words, such as, "all the defendant's interest," &c. it is sufficient; but if there be no such general words, the sale will be void.(r) A sale by the sheriff continues good, though the judgment be afterwards reversed: for the money only shall be restored if the sale was to a stranger; otherwise of a term, to the plaintiff.(s)

(m) Com. Dig. III. 299.
(n) Cases Temp. lord Hardwicke, II. 53. S. C. C.
(o) Cranch, I. 134.
(p) Com. Dig. III. 300.
(q) Mod. VI. 295, 299.
(r) Co. IV. 74.
(s) Ibid. V. 90. Cro. Jac. 246. Yel. 180.

Pr. Pa.

Though a *fi. fa.* bind the goods as against the defendant, yet the property remains in him until execution executed; and for that reason, execution and sale under a subsequent writ delivered to the sheriff will vest a title in the purchaser; and the plaintiff in the first execution is left to his remedy against the sheriff, unless it were the fault or laches of such plaintiff, which occasioned the non execution of his writ.(*t*)

If a *fi. fa.* issue against one of several partners, the court will not, at the request of the partnership creditors, give the sheriff time to return the writ, until an account can be taken of the several claims upon the partnership property. And the safest line of conduct for the sheriff to pursue, is to put some person in possession of the defendant's share as vendee, leaving him and the parties interested to contest the matter in equity, where a bill may be filed, stating that he has taken possession of the property; and praying, that it may not be disposed of until all the claims are arranged.(*u*)

Wheat growing, is liable to be taken on a *fi. fa.*

In the state of New-York: Wheat or corn growing, is a chattel, and may be taken on execution. The case was; W. H. on the 9th of December, 1805, recovered a judgment against R. H. and execution on the judgment was taken out, returnable in February, 1806; and delivered the 19th of December 1805, to the defendant, sheriff of Chenango county, (which at that time comprehended the place where, &c. and which, before August, 1806, was included in Madison county;) and in the same month of December, the defendant, by virtue of said execution, seized the wheat in question, then growing on the ground,

(*t*) East, IV. 523.
(*u*) Bos. et Pul. III. 288.

And in the month of August, 1806, the proper time for harvesting the wheat, by virtue of his seizure so made, cut, carried away, and sold the wheat on said execution. On the 16th of August, 1806, an execution issued, at the suit of B. W. and S. G. W. against the said R. H. tested on the 11th August, 1806, returnable the second monday of November thereafter, directed to the sheriff of Madison county, the plaintiff in this suit; who on the 16th, of said August, went into the same field of wheat, and made a personal levy, and took account of it, while W. H. and others, under the direction of the sheriff of Chenango county, the defendant were gathering the wheat. After the defendant had sold the wheat as aforesaid, the plaintiff brought his action of trover, for the same. R. H. vs.

The question was—Was the seizure and sale by the sheriff of Chenango, the defendant, good?

By the court——The wheat growing on the ground was a chattel, and as such, subject to be taken in execution. The defendant, when he levied, took all the possession which the subject matter would permit; and it was sold as soon as it was fit to be reaped. The nature of the property accounts for the delay, and destroys the presumption of fraud, which might otherwise exist. The sheriff might perhaps have sold the wheat while growing, and the purchaser would then have been entitled to enter for the purpose of cutting and carrying it away. But such a sale would probably have been very unfavourable, as the certainty and value of the crop could not be ascertained: the defendant has made out his justification, and a non suit must be entered.(a)

(a) Johns. Rep. II. 418. Salk. I. 368. Co. III. 11. Com. Dig. III. 298.

PL. PA.

If the levy and sale be made by a sheriff, after the execution in his hands is returnable, he acts without authority, and is liable to an action of trespass to respond damages to the defendant. For after the return day of a *fieri facias*, the power of the sheriff under it, is gone. The latest period which the law allows for the service of an execution, is the return day.(*b*)

A resulting trust, or residuary interest, remaining to the assignor after the purposes of the assignment for the payment of debts, are satisfied, is not such an interest as can be taken and sold upon an execution. Such residuary interest, necessarily arises in every case where property is assigned in trust to pay debts, or to satisfy other specified objects; but it is not subject to execution issued against the assignor.(*c*)

A sale under an execution issued on a judgment rendered by a justice's court, may be adjourned at the discretion of the officer; and the completion of the sale at a different time and place will be valid, if there be no fraud or abuse. The case was an action of trespass against a constable, who by virtue of an execution against the defendants therein named, took certain blacksmith's tools, which were advertised for sale at auction; and after two bids were made, one of the bidders, who had bid twelve dollars, refused to bid more until he should see the tools. The debtors objected to adjourning to a different place, but the constable adjourned to the blacksmith's shop, where the tools were, at the distance of more than a mile from the place where the auc-

(*b*) Johns. Rep. IV. 446. N. Y. T. R. 243. Salk. I. 321. Cro. Jac. 505, 506. Day III. 1.
(*c*) Johns. Rep. V. 335.

tion commenced, and there sold the tools to the highest bidder for twenty four dollars.

By the court——The adjournment of the sale to a different place, was a matter of discretion with the constable; and the question must always be, whether this discretion has been abused. There is no charge of fraud in the present case, and the constable could not therefore be liable as a trespasser.(*f*)

In the state of Massachusetts: If a sheriff sell goods upon an execution without legally advertising the sale, and return that he advertised and sold them according to law, he is liable to an action on the case for a false return; but the debtor in the execution cannot maintain trover for the goods.(*g*)

If an officer seize goods on an execution, he must sell them at the expiration of four days from the seizure; and must duly advertise such sale forty eight hours before it takes place. And if he neglect to make such sale, or to advertise as the law directs within the time limited, another creditor may seize the same goods in execution, and cause them to be sold for his benefit.(*h*)

When goods sufficient to satisfy the judgment are seized on an execution, the debtor is discharged. Even if the sheriff waste the goods, or misapply the money arising from the sale, or do not return the execution. For by a lawful seizure, the debtor has lost his property in the goods.(*i*)

(*f*) Johns. Rep. 345.
(*g*) M. T. R. III. 487.
(*h*) Ibid. V. 399.
(*i*) Ibid. IV. 403.

Pl. Fas.

Money may be taken in execution, if in the possession of the defendant. But if an officer collect money on an execution in his hands in favour of A. against B. and has another execution in his hands, in favour of C. against A. the officer may not levy C's execution on the money so collected of B. until it is paid over to A. and in his actual possession.(j)

If a deputy sheriff have in his hands an execution in favour of C. and D. against M. and J. and while holding such execution, and before serving it, he is summoned in an action of foreign attachment, as trustee to C. and D.; and after being so summoned, he levies the debt of M. and J. he may pay the money over to C. and D. or their attorney, the service of such summons upon him as trustee to C. and D. notwithstanding. For the officer is not, under such circumstances, within the statute authorizing the action of foreign attachment, trustee to C. and D. Nor has he, by holding such execution, any of their goods, effects, or credits, in his hands at the time of serving the summons. Nor is he any debtor of theirs, having no property in the execution. While in force, it cannot be liable to satisfy the judgment upon the foreign attachment, for it cannot be taken and sold on execution. Neither can C. and D's execution stand bound in the officer's hands for that purpose. For C. and D. may at any time before it is served, release the execution; which, after notice to the officer, will defeat all his authority to serve it, and thereby wholly discharge M. and J.(k)

Nor is a deputy sheriff, who has collected money on an execution in his hands not yet returnable,

(j) Cranch. I. 117—136.
(k) M. T. R. II. 91.

liable in an action of foreign attachment, as a trustee to the creditor in such execution. When an officer receives money upon an execution, the law prescribes his duty in relation to it. He is not bound to pay it over to the creditor until the return day of the execution. From his receipt of it, until that day, it is not the creditor's money, but is in the custody of the law, and is not liable to be arrested in the hands of the officer. The money collected on execution by an officer, is not, while in his hands, the property of the creditor, and of course cannot be either his goods, effects, or credits. And if the officer has not in his hands any goods, effects, or credits of the creditor in execution, he certainly cannot be his trustee.(*l*) PL. PA.

Nor is such deputy sheriff liable, as a trustee, to a judgment creditor, on account of money collected on an execution in his favour, until after demand shall have been made upon such officer, by such judgment creditor, for the money so collected on his execution. The money not belonging to the creditor in the execution until actually paid over to him, and no indebtedness arising from its detention until such demand made.(*m*)

In the state of Connecticut: If an execution be played out after the death of the plaintiff, and committed to an officer to collect, he may receive the money thereon, and indorse the execution satisfied; and the administrator is thereby barred of his scire facias.(*n*)

(*l*) M. T. R. III. 289.
(*m*) Ibid. V. 319. Cranch. I. 117. S. C. U. S.
(*n*) Root. I. 192.

FI. FA.

Money of a debtor may be levied upon, and taken by an officer, to satisfy an execution.(o) But it must be money in possession of the debtor; for money received by an officer, of B. and indorsed on an execution against him, in favour of A, cannot, by such officer, be levied upon, and taken to satisfy an execution in his hands against A; for it is not the money of A. until paid over to him.(p)

A writ of error allowed and signed, is not before service a *supersedeas* of execution. Nor will the service of a writ of error, after seizure of goods, prevent the officer from compleating execution thus begun. And if the goods thus seized, have been delivered to a third person at his request, and on his promise to redeliver them to the officer at the sign post, on the day on which, by law, they must be sold; and a writ of error to reverse the judgment on which the execution issued, is after such seizure and delivery to a third person, and before the day appointed for the sale of such goods, served on the creditor on such execution, and a copy of such writ of error left with the officer holding such execution, it will not suspend his right to compleat the sale of such goods, and the levy of such execution. And if the third person shall not, on the day appointed for the sale of such goods, redeliver them according to his promise: and afterwards, on the hearing of the writ of error, the original judgment be reversed, such reversal will be no bar to an action to be brought by the officer against the third person, on his promise to redeliver the goods. But if he has restored them to the original owner before such action brought, the rule of damages will be

(o) Root. I. 116
(p) Ibid. I. 47. Cranch. III. 317.

the amount of the officer's fees on the execution only.(q) FI. FA.

If judgment be entered in favour of the plaintiff, in an action by foreign attachment, he must take out execution; and demand thereon must be made of the garnishee, by a proper officer within sixty days after the rendering final judgment in the action, or the attachment will be dissolved.(r)

In the state of Vermont: If an officer holds at the same time, an execution in favour of A. against B. and another execution in favour of B. against A. he may offset one execution against the other, and indorse the amount of the less on the greater, and return the less satisfied by such offset.(s)

(q) Day, II. 370.
(r) Root, II. 238, 224.
(s) Tyler's Rep. I. 29.

IV. AGAINST THE BODY, GOODS AND CHATTELS.

BODY, GOODS & CHATTELS.

A THIRD species of execution runs against the body, goods, and chattels, of the defendant, and may not be executed on real estate. If goods and chattels sufficient can be found by the officer within the limits of his jurisdiction, he may not take the body of the defendant: but for want of such goods and chattels, and in case the execution be not otherwise satisfied, his body may be arrested and committed to prison until satisfaction be made. (a) This form of execution issues in the states of New-York, Massachusetts, and New-Hampshire, on judgments rendered by justices of the peace only: and in the state of Rhode-Island, also on judgments of superior courts.

(a) St. N. Y.
Ibid. M.
Ibid. N. H.
Ibid. R. I.
} Vide Vol. II.

V. AGAINST GOODS, CHATTELS, AND LANDS.

V. GOODS, CHATTELS, & LANDS.

A FOURTH species of execution issues against the goods, chattels, and lands of the defendant, and the body of the defendant can in no case be taken upon it. If there be goods or chattels sufficient to satisfy the execution within the officer's jurisdiction, he may not, in New-York, Connecticut, Vermont, or Rhode-Island, take the lands of the defendant; but for want of such goods and chattels, the defendant's lands may, by virtue of such execution, be taken; and in Massachusetts and New-Hampshire, the creditor may, at his election, take either goods and chattels, or lands. In the states of New-York and Rhode-Island, lands and tenements taken on execution, may be sold at vendue to raise the money due on such execution. But in the states of Massachusetts, Connecticut, New-Hampshire, and Vermont, must be extended according to their true and just value, in satisfaction of such execution, and be set off by metes and bounds, or otherwise designated with as much precision as the nature of the estate will admit of. But if it cannot be divided nor described in such manner, in Massachusetts, New-Hampshire, and Vermont, the execution may be extended on the rents, issues, and profits thereof, to be received by the plaintiff till his execution be satisfied, or the estate be redeemed by the defendant; excepting that an equity of redemption in Massachusetts must be sold at vendue. This form of execution issues in the states of New-Hampshire, Massachusetts, Rhode-Island, Connecticut, and Vermont, in cases only where the bodies of the defendants are

v. GOODS, CHATTELS, & LANDS.

not liable to imprisonment on execution; but in the state of New-York, the plaintiff may, at his election in all cases of judgments obtained in personal actions in any court of record, have this form of execution, or one against the body of the defendant only.(a)

Sheriff's sale must be by deed, which may be delivered as an escrow.

In the state of New-York: If a sheriff sell land on execution, it is within the statute of frauds, and requires a deed or note in writing, to pass the estate.(b) A deed executed by the sheriff, of land so sold at auction, and delivered to the attorney of the plaintiff, to be delivered to the grantee, on the payment of the purchase money is an escrow; and until such payment, the estate continues in the debtor whose lands have been thus sold by the sheriff.(c)

An equity of redemption in mortgaged premises, (the mortgagor being in possession,) is liable to be sold by the sheriff under an execution against lands and tenements.(d)

Sheriff's deed of sale, when it must be executed and delivered.

A sheriff's deed of lands, sold under an execution, and described by metes and bounds, together with all *ways, passages, paths, easements, &c.* does not include land held by a distinct title, though adjoining the premises, and formerly purchased for, and used as a *road* for the same; if not included in a particular description of the premises. And a subsequent deed from the sheriff for the road, founded

(a) St. N. H.
Ibid. M.
Ibid. R. I.
Ibid. C.
Ibid. V.
Ibid. N. Y. 390.
} Vide Vol. II.
(b) N. Y. T. R. II. 61.
(c) Johns. Rep. II. 248.
(d) N. Y. C. E. 47.

on the antecedent execution and sale, will not pass the land. The sheriff cannot, after a sale duly made, and after a deed executed with the requisite formalities, and an acceptance of it by the grantee and the execution returned satisfied, be permitted to aver against his own deed; and substantially to vary and enlarge it by a subsequent conveyance. His whole authority is at an end after the sale, and consequent satisfaction of the party. The purchaser buys at his peril, and no property passes at the sheriff's sale but what is, at the time, ascertained and declared.(e)

v. GOODS, CHATTELS, & LANDS.

Cannot be amended by an after deed.

If A. by agreement with B. and with his money, purchase land, and take a deed thereof to himself, he is a trustee for B. And such an implied resulting trust, is not within the statute of frauds, and may be proved by parol, and the land so purchased by A. may be seized and sold on an execution issued on a judgment against B. *the cestui que trust* There may be an interest in growing crops in one man, whilst the title to the land is in another. The one does not necessarily follow the other; but when the right to any portion of the crop exists in the owner of the soil, then, unless in certain excepted cases, the ownership of the land, draws after it that of the crop, and a sale of the land simply by the owner both of the land and crop, conveys the property of the crop to the purchaser. If a voluntary sale would do this, a sale under an execution will produce the same consequences.(f)

The interest the mortgagee has in lands mortgaged, cannot be taken and sold on execution until foreclosure; or at least until possession taken by the mort-

(e) Johns. Cas. I. 284.
(f) Johns. Rep. III. 216.

n. GOODS, CHATTELS, & LANDS.

gagee; for the mortgaged premises continue to be real estate in the hands of the mortgagor, and liable to be sold on execution against him. The mortgage remains in the light of a *chose* in action; and is merely an incident attached to the debt, and cannot in reason and propriety be detached from its principal. There is no way to render a mortgage vendible but by allowing the debt to go with it; and and this would be repugnant to all rule, for a *chose* in action is not the subject of sale on execution.(g) *Vide ante.*

Poundage.

If an execution be levied on lands, and before the time of sale, the parties compromise, the sheriff is entitled to his full poundage in the sum realized by the plaintiff, or what might have been collected from the property levied on; and may recover the same by action against the creditor in the xecution.(h)

The sheriff is entitled to poundage on an execution levied on the body of the debtor, who, after his arrest and detention in custody obtains his discharge under a law granting relief to debtors with respect to the imprisonment of their persons; and may compel the attorney for the plaintiff to pay such poundage, without resorting to the creditor in the execution.

The case was an action brought by the sheriff against the attorney in the cause, for poundage on an execution levied on the body of the debtor. The sheriff, by virtue of an execution issued in favour of D. and R. non residents, against W. arrested and

(g) Johns. Rep. IV. 41.
(h) N. Y. T. R. I. 192.

detained him in custody until discharged under the act for the relief of debtors, with respect to the imprisonment of their persons. The questions raised, were: Is the sheriff entitled to poundage? and if so, can he compel the attorney to pay it?

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By the court.——The sheriff is to have his fees for serving an execution. This service when applied to an execution against the body, means the taking the body in execution. The sheriff has then performed the service of arresting and imprisoning the debtor pursuant to the command of the writ, and has subjected himself to the peril of an escape, and of being answerable for the whole debt; and it is just and reasonable he should be paid, what the law deems an adequate compensation for this service and for this risk, and is entitled to his poundage; which, he may compel the attorney, his immediate employer, to pay, and need not resort to the principal.(i)

(i) Johns. Rep. V. 252.

VI. AGAINST GOODS, CHATTELS, BODY, AND LANDS.

V. GOODS, CHATTELS, BODY, AND LANDS.

THE fifth and last species of execution I shall describe, issues against the goods, chattels, body, and lands of the defendant. In the states of Connecticut and Vermont, this form of execution issues on all judgments rendered in personal actions, wherein the body of the defendant is liable to be taken in execution; and also the same in Massachusetts and New-Hampshire, except on judgments rendered by justices of the peace. And in Rhode-Island, on judgments rendered by their supreme court or courts of common pleas, in cases where real estate was attached in the original actions on which such judgments are founded; and where no such attachment was made in the original action, if neither personal nor moveable estate of the defendant, nor his body can be found, his land may be taken on this execution. It is the duty of the officer, if the sums specified in the execution are not paid, (of which he must make demand at the debtor's usual place of abode in Connecticut and Vermont, if such abode is within the jurisdiction of such officer,) to take goods and chattels of the defendant, if to be found within the limits of his jurisdiction, sufficient to satisfy such execution, and for want of such goods and chattels of the defendant, to take his body, and commit the same to prison, unless the plaintiff elects to take the defendant's real estate. If the officer seizes goods and chattels, he must sell them at public vendue, and apply the avails thereof in satisfaction of the execution: but if he take real estate, it must be extended at its true and just value, and be set off by metes and bounds, or

otherwise designated with as much precision as the nature of the estate will permit: (but if the estate cannot be divided, nor sufficiently described, in Massachusetts, New-Hampshire, and Vermont, the execution may be extended on the rents, issues, and profits thereof, to be received by the plaintiff, till his execution be satisfied, or the estate be redeemed by the defendant;) excepting that in the states of Massachusetts, an equity of redemption, and in Rhode-Island, all real estate so taken, must be sold at vendue for the purpose of satisfying such execution.(*a*)

If in Massachusetts, the officer who levies an execution upon land, return that he appointed two appraisers, but does not certify that the debtor refused to choose one, the return is bad, and the extent void; and the plaintiff acquires no title to the premises.(*b*)

The case was a petition for partition. The petitioner claimed three-fourth parts of the premises described. The respondent pleads that he is seized of one half, and traverses the petitioner's seizin of three-fourth parts. The petitioner replies, that he is seized of three-fourth parts in manner and form, &c. On trial, the petitioner offered in evidence, a judgment of the court of common pleas, in favour of P. E. against A. E. and an execution thereon, levied on one-fourth part of the premises. The respondent objected to this evidence, because it appeared that the sheriff had appointed two of the appraisers, although he had not certified that the debtor had refused to choose one. The judge overruled the objection. To this opinion

(*a*) St. M.
Ibid. C.
Ibid. N. H.
Ibid. R. I.
Ibid. V. 144, 145, 146. Fay's impression.
(*b*) M. T. R. II. 154.

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of the judge, the respondent filed his exceptions, and moved for a new trial.

Parsons, C. J. At common law, land is not liable to execution; this being wholly a provision of a statute, the proceedings ought substantially to pursue the statute. The act of 6. Geo. 2. c. 2. by force of which this execution was levied, directs the officer to cause three indifferent and discreet freeholders, to appraise the land on oath. Of these appraisers the creditor is to choose one, the debtor one, if he see cause, and the officer the third. If the debtor do not see cause to appoint an appraiser, the duty necessarily devolves on the officer, or he cannot cause the land to be appraised by three appraisers. But here is nothing shown to authorize the officer to appoint two of the appraisers. It does not appear that the debtor had the option given him by law, as the officer does not return that the debtor did not see cause to choose an appraiser. The objection is fatal. The execution ought not to have been given in evidence, because the judgment creditor derived no title to the land by the levy.

Parker and Sewall, judges concurred. New trial granted.(c)

The lands of a debtor cannot be taken on execution unless by the acceptance of the creditor, to whom seizin must be delivered by the sheriff; and until such delivery of seizin, the title of the debtor is not effected. The creditor's title is by matter of record, and unless he can show such title by record, the debtor will hold the land. The sheriff must therefore return the extent and the delivery of seizin.(d)

(c) M. T. R. II. 154.
(d) Ibid. IV. 403.

An execution against the goods and estate of a deceased person in the hands of his executors, may be levied on lands of which the testator died seized, in possession of the alienee of the devisee; and this may be done, though the executor, being also residuary legatee, has given bond with sureties to the judge of probate for the payment of the debts and legacies of the deceased.

Though the plaintiff has a right to have his execution levied on the lands of the debtor, whether living or deceased; on those lands only is the sheriff authorized to lay his execution. If he take other lands, he is a trespasser; and neither he nor the creditor can be protected by the execution. If the right owner, not the debtor, be dispossessed, the act is tortious, and he may maintain trespass against the creditor and the sheriff; who are equally liable, as for taking goods not the debtor's, or for arresting the wrong person.(*e*) Nor does a specific devise of the land levied upon, make any difference, or extinguish its liability to be taken by virtue of an execution against the goods and estate of the testator.(*f*)

In the state of Connecticut: If a *feme* while *sole*, obtain an execution in her favour, such execution may be levied on land, after her marriage; and her coverture notwithstanding, she must as the creditor, appoint one of the appraisers. And though the estate of the debtor in the land levied upon, be but a chattel interest, he, holding under a lease for 999 years only, it must be appraised, and set off in the same manner as when he is tenant in fee simple.(*g*)

(*e*) M. T. R. III. 523.
(*f*) Ibid. IV. 153, 512.
(*g*) Root III. 5.

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For the purpose of appointing an appraiser of land taken on execution, on the refusal or neglect of either party, any justice of the peace within the town where the land lies, may be considered as the next justice. And where the parties agree upon a tenant of the debtor, (recognizing him as such,) to be an appraiser, neither of them will be permitted to allege that the appraiser so agreed upon, was not indifferent; and especially will the debtor, whose tenant was the appraiser, be precluded from objecting to the appraisal on that account.(*h*)

An officer, by the direction of the creditor in an execution, levied the same on land with a house and shop thereon standing, the property of the debtor; and in his absence procured the legal appointment of appraisers, who appraised the land, house, and shop, each by a distinct and separate appraisal, amounting in the whole to a sum sufficient to satisfy the execution. And having proceeded thus far with the real estate of the debtor, by the further direction of the creditor, who was displeased with the appraisal of the real estate, levied the same execution upon personal estate of the debtor, and having sold the same to the amount of the sum at which the shop was appraised, obtained from the appraisers a certificate of their appraisal of the land and house, omitting in the description to mention the shop, and made return of the execution as satisfied by the taking and sale of the personal estate; and by the appraisal and setting off of the land, with the house and shop standing thereon, without making any exception of the shop in such return, such officer was held liable to the debtor in the execution, in an action of trespass for taking his goods, sold on such execution. For after a levy upon

(*h*) Ibid. I. 141.

land, and an appraisal, the officer cannot desist and resort to personal property. If a creditor may be allowed to abandon one levy and appraisal, he may a second and a third, and so on, till he gets an appraisal to suit him. The real estate was first levied upon, and the title afterwards compleated. That he can hold. That title accrued under the original levy: no subsequent levy or appraisal was made; the act of the officer in turning aside and taking personal property, was as much a trespass as if the execution had been satisfied years before it.(*i*)

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An equity of redemption of mortgaged premises, is liable to be taken in satisfaction of an execution, and must be appraised as land, but cannot be set out by metes and bounds; but the whole of the mortgager's right must be appraised, and if it do not exceed the amount of the execution, and officer's fees, and other charges of levying, may be set off as all the right of the debtor in such land: and the amount of the appraisal must be indorsed on the execution, in which the creditor becomes as a mortgager. But if the debtor' sright in the premises be appraised at more than the amount of the execution, and officer's fees thereon, and charges of levying, the officer must set off to the creditor such a proportion of the equity of redemption, being an undivided right as the amount of the execution, officer's fees, and other charges of levying, bear to the whole appraised value of such equity of redemption. And in such case, the creditor becomes as a second mortgagee.(*j*)

In an action of surrendry, the plaintiff, to make out a title to land, by virtue of the levy of an execution, must show (by the officer's return) that the ap-

(*i*) Day II. 317.
(*j*) Ibid. I. 93. II. 142.

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praisers who made the appraisal were *indifferent* freeholders, and that they were sworn according to law. But the defendant may, by parol evidence, falsify the return of the officer, and show that the appraisers, or some of them, were not indifferent. And where one of the appraisers was uncle to the wife of one of the creditors in the execution, it was considered that he was not indifferent within the statute, and the levy void.(*k*)

If an execution be levied on lands or tenements in which the defendant has an estate for life, the estate taken must be appraised in the same manner as when the estate taken is held by the defendant in fee, the appraisers estimating the true and just value of the defendant's life estate in the premises. And the officer must by metes and bounds, set off by admeasurement so much of the land as will satisfy the execution according to such appraisal, if there be sufficient of the lands and tenements whereon the levy is made.(*l*)

Appraisers of land taken in execution must be freeholders of the town where the land lies, and if one of the appraisers belong to another town, though agreed upon by the parties, the levy is void, and no title acquired by the creditor in such execution.(*m*)

In the state of Vermont: If the sheriff has in his hands two writs of execution, both in favour of A. against B. he may extend them both jointly upon the same parcel of land, without specifying in his return distinct boundaries to the land appraised and

(*k*) Day, I. 109. M. T. R. II. 154.
(*l*) Root, II. 398.
(*m*) Ibid. I. 196.

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set off on each execution. And may return on each, "that to satisfy this and one other writ of execution between the same parties, I have extended on, and caused to be appraised, according to law, certain lands, butted and bounded," &c. and it will be good.(*n*)

The fee bill does not empower the officer to charge fees to the plaintiff, for the return of an execution stayed by *supersedeas* or a writ of error: and if the plaintiff is not liable to pay the officer's fees, he cannot claim them of the defendant, nor ought they to be included in damages recovered on such writ of error.(*o*)

(*n*) Tyl. Rep. I. 14.
(*o*) *Ibid.* 28.

CHAP. V.

OF REPLEVIN.

REPLEVIN. What.

REPLEVIN is a redelivering by the sheriff to the owner, his cattle or goods, distrained upon any cause, or otherwise illegally taken; though not as distress, upon surety that such owner will pursue his action against him who distrained, and if such owner shall not pursue his action, a judgment shall be rendered against him, that he who took the distress, shall have it again.(*a*)

The surety for prosecution, is said to be by common law; and the surety for return, by statute.(*b*)

Writ or plaint.

The process of replevin is at common law, by writ out of chancery; and by statute, either by writ, or complaint to the sheriff.(*c*)

Grant of writ.

A writ of replevin in cases of distress, is granted as a matter of right; so that if a man grants a rent

(*a*) Co. Lit. 146. Vir. Abr. Repl. B. pl. 2.
(*b*) Ibid.
(*c*) Ibid. St. N. Y. 1. 96. St. M. 1. St. V.

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with clause of distress, and that such distress shall be irrepleviasble, yet it may be replevied.(*d*)

Where the sheriff makes deliverance by virtue of an original writ or plaint in replevin, he must take sufficient sureties to prosecute the suit, and to return the beasts or goods, if return thereof shall be adjudged. If he omit to take any sureties, or if he take such as are insufficient, he is liable to the defendant, to the amount of such beasts, goods, and chattels; and the person who distrains, shall have recovery, by writ, that so many beasts, goods, or chattels, be restored.(*e*)

It is a general rule that the plaintiff must have the property of the goods in him at the time of taking, to maintain replevin. But that may be either a general property which every owner has, or a special property, such as a person has in goods pledged to him; or who has the cattle of another to manure his lands, &c. on either of which the party may bring replevin.(*f*) But if the plaintiff has not the immediate right of possession, replevin cannot be supported.(*g*)

In a special case, one may have replevin of goods, though they were not distrained; as if the *mesne* put in his cattle in lieu of the tenant, *per avail*, whom he is bound to acquit, he shall have a replevin of them.(*h*)

(*d*) Co. Lit. 145. St. N. Y. I. 96. St. M. I. St. V.
(*e*) Dal. Sher. 433. St. N. Y. I. 97, &c. VI. 399.
(*f*) Co. Lit. 145.
(*g*) Ter. Rep. VII. 9.
(*h*) F. N. B. 69.

In the declaration, the place where the cattle or goods were taken, and a particular description of them must be set forth, or it will be bad on demurrer.(*i*)

An executor may have a replevin of the taking of beasts in the life of his testator. And a husband may maintain a replevin for the goods of his wife taken from her while sole. But of the taking of goods which a feme has, as executrix to her former husband, she may join.(*j*) And so must joint tenants and tenants in common.(*k*) But several persons having separate interests in the property taken, cannot join in replevin.(*l*) And if one tenant in common bring the action, or two join when but one owns the goods, it is bad.(*m*)

Replevin lies against him who takes the goods, and also against him who commands the taking, or against both together.(*n*)

And so it does against him who takes damage feasant, if he detain after amends tendered.(*o*)

Replevin does not lie against him who takes goods beyond the sea, though he afterwards import the goods hither. As in the case where the goods were taken by the order of the East-India Company, from persons styled interlopers, in the Indies.(*p*)

(*i*) Wils. II. 554. Saund. II. 74.
(*j*) Bac. Abr. 385. Sid. 81.
(*k*) Bul. N. P. 53.
(*l*) Co. Lit. 45.
(*m*) Ibid.
(*n*) Com. Dig. V. 496.
(*o*) Ibid.
(*p*) F. N. B. 69.

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Nor does it lie for goods seized on execution, nor goods taken by a warrant from a justice of peace, or a conviction under a penal statute.(q)

But it does lie for an illegal distress taken damage feasant; or for rent, and where the party in possession of the land has no title thereto.(r)

Replevin lies for a swarm of bees, and for a ship; and so of the sails of a ship. And if a mare with foal, a cow with calf, &c. be distrained, and they happen to bring forth their young while in custody of the distrainer, a replevin lies for the foal and calf, &c. as well as for the mare, cow, &c. But it does not lie for trees or timber growing, nor of any thing annexed to the freehold, because they cannot be distrained; nor of deeds, nor charters concerning land, for they are of no value but as in relation to the land; nor of money; nor of leather made into shoes; nor of beasts wild by nature, unless reclaimed, and then only while tame.(s)

If the defendant claim property, the sheriff cannot proceed, for property must be tried by writ; and in this case the plaintiff may have the writ *de proprietate probanda* to the sheriff, and if it be found for the plaintiff, then the sheriff is to make deliverance; if for the defendant, the sheriff may proceed no farther.(t)

The writ *de proprietate probanda* is an inquest of office, and the sheriff is to give notice to the parties of the time and place of executing it.(u)

(q) Com. Dig. V. 436.
(r) Chit. Plead. V. 158.
(s) Bac. Abr. IV. 384, 385.
(t) Co. Lit. 145.
(u) Dal. Sher. 274.

None but a party to the replevin shall have the writ *de proprietate probanda*: and the sheriff must return the claim of property on the *pluries*, before which time the writ *de proprietate probanda* does not issue. But if the defendant claims property in replevin, the plaintiff may have the writ *de proprietate probanda*, without continuance of the replevin; because, by the claim of property the first suit is determined.(*v*)

Upon a replevin directed to the sheriff, it seems that he need not return the writ until the *pluries* replevin: but if at the *pluries* he do nothing, an attachment shall go against him to the coroners. It also seems that the writ *de returno habendo*, is not returnable.(*w*)

If on the *pluries* replevin, the sheriff return that the cattle are eloigned to places unknown, &c. so that he cannot deliver them to the plaintiff, there shall issue a *withernam* directed to the sheriff commanding him to take the cattle or goods of the defendant and detain them till the cattle or goods distrained be restored to the plaintiff; and if upon a *withernam* a *nihil* be returned, then an *alias* and *pluries* replevin shall issue, and so to a *capias* and *exigent*.(*x*)

Cattle taken in withernam may be worked; or if cows, may be milked, for the party has them in lieu of his own; and on that account is not entitled to payment of the expenses of their keeping.(*y*)

(*v*) Bac. Abr. IV. 381.
(*w*) Dalt. Sher. 273, 274.
(*x*) F. N. B. 75.
(*y*) Bac. Abr. IV. 379.

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If a *retorno habendo* be awarded to the sheriff, and after, a writ of deliverance be prayed out by the plaintiff, this is a *supersedeas* to the *retorno habendo*, and closes the sheriff's hands from making any return thereto. If the sheriff will not execute the writ of second deliverance, the party has his remedy against him.(*z*)

If the party who distrains, convey the distress into any house or other place of strength, and refuse to suffer them to be replevied, the sheriff may take with him the *posse comitatus*, and on request and refusal may break open such house or other place of strength, and make deliverance. And if the sheriff return that the beasts or goods are inclosed in a house or other place of strength, so that he cannot make deliverance, he shall be amerced, and another writ of replevin awarded.(*a*)

If the sheriff come to make replevin of beasts in another's soil, and the place be enclosed, and has a gate open to the enclosure, he cannot lawfully break the enclosure and enter thereby, when he may enter by the open gate; but if the owner of the soil hinder him, so that he cannot enter by the open gate for fear of death, he may break the enclosure and enter there.(*b*)

If the sheriff be shown the goods of a stranger and he take them, an action of trespass lies against him: otherwise the stranger can have no remedy, because he cannot have the writ *de proprietate pro-*

(*z*) Bac. Abr. IV. 379.
(*a*) Ibid. 381.
(*b*) Ibid. 384.

landa.(c) Nor does the writ *de proprietate probanda* lie upon replevin by plaint.(d)

If the sheriff return that the distress is eloigned to a place unknown, the return is good, and the party must pursue his writ of *withernam;* but if the sheriff return that the beasts are eloigned to places unknown within his county, he shall be amerced; for the law intends that he has notice in his county.(e)

Nor may he return that the beasts are enclosed in a house or other place of strength; for he ought to take the power of the county and make deliverance.(f)

Nor may he return that there are no such cattle or goods found within his bailiwick; but if such be the fact, he must return that the beasts are eloigned.(g) Nor must he return that the defendant did not take the cattle.(h)

But he may return that no one came on the part of the plaintiff to show him the cattle: yet it seems that the sheriff need not require this.(i)

So he may return that he came to the place, but could not have sight of the cattle.(j)

The sheriff may return that the cattle are dead, or that he from whom they were detained, had re-

(c) Bac. Abr. IV. 384. Dal. Sher. 277. Com. Rep. 596.
(d) Com. Rep. 596.
(e) Bac. Abr. IV. 383, 384.
(f) Ibid. 383.
(g) Dalt. Sher. 276.
(h) Bac. Abr. IV. 384.
(i) Dalt. Sher. 277. Bac. Abr. IV. 384.
(j) Ibid. 276.

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taken them, and yet sues a replevin; but in the latter case the sheriff must return the special matter.(*k*)

So he may return that the defendant claims property in the cattle.(*l*)

The officer who serves a replevin, need serve it on such cattle only as the plaintiff designates and shows to him; and not upon such, unless they are the plaintiff's, of which the officer ought to be well ascertained; as a deliverance of other cattle is at the peril of the officer.(*m*)

If there be a dispute about the seizure of cattle in a high way, upon which application is made to A. a stranger, who permits B. (upon security given to him to return the cattle to him who has right,) to depasture the cattle in the mean time, till the contest is determined; and thereupon the servants of A. seize the cattle for the use of their master, replevin does not lie against A. and he may plead *non cepit*.(*n*)

In the case of Richards against Acton, it was held by the court, that the high sheriff, under sheriff, and replevin clerk, who is their deputy, are all answerable to the defendant in replevin, for the sufficiency of the sureties.(*o*) But in an action against the sheriff for taking insufficient pledges, the plaintiff cannot recover damages beyond the value of the distress.(*p*) If the sheriff neglect to take a re-

(*k*) Dalt. Sher. 277.
(*l*) Ibid. 276.
(*m*) Ibid. 277.
(*n*) Com. Dig. IV. 435.
(*o*) Bl. Rep. II. 1220.
(*p*) Term Rep. IV. 453.

plevin bond, the court will not grant an attachment, but leave the party to his action.(q)

In a case in the court of common pleas, it has been determined, that in an action on the case against a sheriff for taking insufficient sureties in a replevin bond, knowing them to be insufficient at the time of taking, the sheriff is liable to the full amount of the damage sustained, though it exceed the penalty of the bond; that is, for more than double the value of the goods distrained.(r)

Yet in a still later case it was determined by the same court, that for taking insufficient sureties in replevin, the sheriff was liable in damages to the extent of double the value of the goods, but no further.(s)

The action on the case against the sheriff for taking insufficient sureties in replevin, ought to be brought by the person making cognizance, where there is no avowant upon record.(t)

In the proceedings against the sheriff some evidence must be given by the plaintiff of the insufficiency of the sureties; but very slight evidence is sufficient to throw the proof on the sheriff; for the sureties are known to him, and he is to take care that they are sufficient.(u)

If sufficient sureties are taken in replevin, and the defendant recover costs thereon, the court will not

(q) Ter. Rep. II. 617.
(r) Hen. Black. II. 36.
(s) Ibid. 547.
(t) Bos. and Pul. I. 378.
(u) Bul. N. P. 68. Esp. Dig. 348.

REPLEVIN. order the sheriff who took such sureties to pay such costs, but leave the party to his action.(v)

In the state of Massachusetts: Replevin lies at common law, for him who has the general or special property in chattels, against him who has wrongfully taken them; but chattels in the custody of the law cannot, at common law, be replevied. As a general principle, the owner of a chattel may take it from any person whose possession is unlawful, unless it be in the custody of the law, or has been taken by replevin from him by the party in possesion. The statute of 1789. c. 26. s. 4. authorises the suing out a writ of replevin against the sheriff for chattels which he has attached or seized on execution, provided the plaintiff in replevin be not the debtor.(a)

If the plaintiff in replevin become *non suit*, the defendant recovers judgment for the return of the goods, and damages, to the amount of six per cent. on the penal sum of the bond, as well when taken on *mesne process* as on execution. If the plaintiff attaching, fail to support his action, the officer is then accountable to the defendant whose goods he had attached, and is to pay over to him the six per cent. damages recovered, and deliver the goods. In case of seizure upon execution, the officer is liable to both the creditor and the debtor. To the creditor to the amount of his judgment, and to the debtor for what may remain after satisfying such judgment. The officer being merely a trustee, after indemnifying himself is accountable over.(b)

(v) Bos. and Pull. 292.
(a) M. T. R. V. 283, 284.
(b) Ibid. I. 421.

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If A. and B. are tenants in common of a chattel which is wrongfully taken by C. A. cannot alone maintain replevin for his right to, or his part of the chattel. For in replevin, which is founded in property, the chattel is to be delivered as well as damages recovered. The sheriff cannot sever the chattel and deliver a part, but must deliver the whole of it, or none. And if he deliver the whole to the plaintiff, he being but a part owner, must receive an undivided part in which he claims no property, and of which the sheriff cannot lawfully make deliverance.(c)

In replevin, the authority of the officer to replevy and deliver the goods to the plaintiff is conditional. The plaintiff must first give him a bond with sureties, in the penalty and with the conditions required by the writ. If the plaintiff give him this bond, yet the goods are irrepleviable if they are distrained as the plaintiff's on *mesne process*, warrant of distress, or on execution; and if the officer deliver goods so detained, he is a trespasser, the writ being no justification to him. He must also, in his return, give a description of the bond taken, so that it may appear that it is a bond, in conformity to the statute, and the directions in the writ.(d)

In the state of Connecticut every man may replevy his cattle, or other goods and chattels impounded, distrained, attached, seized, or extended; (unless it be upon execution after judgment, or in payment of fines and rates, or for some case or matter cognisable and triable before the admiralty courts;) pro-

(c) M. T. R. II. 509.
(d) Ibid. III. 310.

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vided he give sufficient security to prosecute his replevin to effect; and to satisfy and answer all such damages, demands and dues as the adverse party shall by law recover against him.(e).

In this state, beasts taken damage feasant, and goods attached on *mesne process*, are the only cases in which writs of replevin are issued. The writ for replevying beasts taken damage feasant, contains a declaration in trespass against the distrainor for taking the beasts, and is returnable to some court for trial. The authority signing the writ must take bonds to the defendant, sufficient to respond all damages he may sustain by losing his hold upon the distress; which is not to be returned, though lawfully distrained.

The defendant in *mesne process*, whose goods are attached, may alone sue out a writ of replevin for them; a stranger, whose goods are wrongfully attached as the goods of the defendant, has his remedy only in an action for damages. A writ to replevy goods attached, is merely a mandatory precept directed to the officer who served the attachment, and holds the goods; him commanding to redeliver the goods to the defendant, from whom they were taken; and to give notice thereof to the plaintiff. Bond with surety, must be taken to the plaintiff in the original action by the authority issuing this writ, sufficient to answer the value of the goods replevied: but no declaration accompanies the writ, nor is any person to answer to it in court, though returnable with the original writ on which the goods were attached.(f)

(e) St. C. 575.
(f) Swift. Sys. II. 88, 93. Kirb. 276. Root. I. 56.

In neither case is the sheriff or constable to judge of the sufficiency of the bonds: that is the province of the authority signing the writ, who must, at his peril, take sureties, apparently sufficient at the time of taking, or be liable in damages to the party injured. The bond of the defendant in a writ on which his goods are attached, is clearly insufficient; and the authority taking such bond only, is liable for such insufficiency.(g)

(g) Root. I. 165.

CHAP. VI.

DE HOMINE REPLEGIANDO.

HOMINE REPLEGIANDO.

THE writ *de homine replegiando*, lies to replevy a man out of prison, or out of the custody of any private person, in the same manner that chattels taken by distress, are replevied, upon giving security to the sheriff that the person to be replevied shall be forth coming to answer any charge against him. If the person be conveyed out of the sheriff's jurisdiction, he may return *elongatus;* upon which a *capias in withernam* issues, to imprison the defendant without bail or mainprize, till he produce the party.(*a*) If the sheriff return *non est inventus*, upon the *capias in withernam* for the body, the plaintiff shall have a *capias in withernam* of the goods of the defendant.(*b*)

According to Dalton, formerly in England, the sheriff might return on a writ *de homine replegiando*, that the defendant claims the plaintiff as his villain. If that be good, it seems that in those states where slavery is yet recognized, a return that the defendant claims the plaintiff as his slave, would also be good.

(*a*) Bl. Com. III. 129. F. N. B. 65.
(*b*) Dalt. Sher. 259.

CHAP. VII.

OF HABEAS CORPUS.

HABEAS CORPUS.

THERE are various kinds of writs of *habeas corpus* made use of by superior courts of law, 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 has a cause of action against one who is confined, by process of some inferior court, in order to remove the prisoner, and charge him with a new action at the court above. Such is that *ad satisfaciendum* where a prisoner has had judgment against him in an inferior court, and the plaintiff is desirous to bring him up to some superior court, to charge him with process of execution. Such, also, are those *ad prosequendum, testificandum, deliberandum,* &c. which issue when it is necessary to remove a prisoner in order to prosecute, or to testify in any court, or to be tried in the proper jurisdiction wherein the fact was committed. Such, also, is the common writ *ad faciendum et recipiendum,* which issues from a superior court when a person is sued in an inferior court, and is desirous to remove the action into a superior

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court.(a) All of which must be obeyed by the officers or persons to whom directed, if issued from courts of competent jurisdiction, unless a sufficient excuse can be returned.

But the great and efficacious writ in all manner of illegal confinements, is that of *habeas corpus ad subjiciendum*, often called *habeas corpus cum causa*, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption, to do, submit to, and receive, whatsoever the judge or court, awarding such writ, shall consider in that behalf. This writ issues as well in vacation, as in term time. If it issue in vacation, it is usually returnable before the judge who awarded it, and he proceeds by himself thereon, unless the term should intervene; and then it may be returned into court.(b)

This writ at common law was awarded in England by either the court of chancery, or court of king's bench; and when issued in term time, it is necessary to apply for it by motion* to the court; and before a judge reasonable cause must be shewn, and this seems the more proper, 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.(c) Where a probable ground is shown, that the party is imprisoned without just cause, an *habeas corpus* is then a writ of right, and may not be deni-

* If the prisoner be committed for a crime, a motion is necessary; but if otherwise imprisoned on a civil affair only, he may have the writ without, of course, and as matter of right. 11 Mod. 306.

(a) Bl. Com. III. 129, 130.
(b) Ibid. 131.
(c) Ibid. 132. Bac. Abr. III. 3. Cro. Jac. 543.

ed.(*d*) Such seems to have been the outlines of the common law on the subject; but a variety of pitiful evasions having been adopted by the courts, to avoid allowing to the subject the full benefit of this writ, gave rise to successive statutes which were also evaded or abused, until the oppression of an obscure individual gave birth to the famous *habeas corpus* act of the 31. Car. II. c. 2. in which it was, among other things, in substance enacted, "That on complaint or request, in writing, by or on behalf of any person committed and charged with any crime, (unless committed for treason or felony plainly epxressed in the warrant, or as accessary before the fact to any petit treason or felony; or upon such suspicion of such petit treason or felony plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process,) the lord chancellor, or any of the twelve judges in vacation, upon viewing a copy of the warrant, or affidavit, that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award an *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. That such writs shall be endorsed as granted in pursuance of this act, and signed by the person awarding them. That the writs shall be returned, and the prisoner brought up within a time limited according to the distance, not exceeding in any case twenty days. That officers and keepers neglecting to make due return, or not delivering to the prisoner or his agent, within six hours after demand, a copy of the commitment, or shifting the custody of a prisoner from one to another,

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(*d*) Bl. Com. III. 132.

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without sufficient reason or authority specified in the act, shall, for the first offence forfeit 100*l.* and for the second 200*l.* to the party grieved; and be disabled to hold his office. And that any such prisoner may move for, and obtain his *habeas corpus* as well out of the chancery or exchequer, as out the king's bench or common pleas; and that 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 500*l.*(*e*) It is further provided in the same act after the assizes proclaimed for the county where the prisoner is detained, no person shall be removed from common gaol upon any *habeas corpus* granted in pursuance of said act: but upon such *habeas corpus* shall be brought before the judge of assize in open court, who shall thereupon do what to justice shall appertain.(*f*)

Whenever a person is imprisoned, whether it be by one concerned in the administration of justice, as a sheriff, gaoler, &c. or by a private person, such as a doctor of physic, who confines a person under pretence of curing him of madness, &c. the *habeas corpus* must be directed to him.(*g*)

If an *habeas corpus* be directed in the disjunctive, to the sheriff *or* gaoler, it is bad. 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, where one is committed to the gaoler immediately, as in cases criminal.(*h*)

(*e*) Bl. Com. III. 135, 136, 137.
(*f*) Bac. Abr. III. 9.
(*g*) Ibid.
(*h*) Ibid. 10. Salk. 350.

The writ must be returned by the person to whom it is directed. When a writ of *habeas corpus* was directed to the sheriff of ——, who before the return left the office, and the new sheriff returned that the prisoner was so sick, &c. it was held not to be good; for the return ought to have been by the old sheriff, that he had had the body, and delivered it to the new sheriff, who ought to have returned *languidus*.(*i*) HABEAS CORPUS.

If an *habeas corpus* be served upon an officer who has the custody of, or left at the gaol, with the under keeper, &c. he must return it according to the statute prescribing and limiting the time of such return, where any is in force, and where, not according to the directions in the writ.

On a *habeas corpus* granted by a judge in the vacation, returnable immediately before himself at his chambers, the party may be brought into court.(*j*)

At common law, if an *habeas corpus* be not returned, an *alias* and *pluries* issue; if they disobeyed, an attachment is awarded of course. The court may also make a rule on the officer to return his writ; and if such rule prove ineffectual, the court may proceed as in other cases of disobedience to any other rule.(*k*)

As a gaoler, &c. is obliged to bring up the prisoner at the day prescribed by the writ, it is no excuse for not obeying a writ of *habeas corpus ad subjiciendam*, that the prisoner did not tender, or refused to pay

(*i*) Bac. Abr., III. 10 Salk. 350.
(*j*) Com. Dig. III. 456.
(*k*) Bac. Abr. III. 10. Lov. II. 129.

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the fees due to the gaoler. Nor is the want of such tender an excuse for not obeying a writ of *habeas corpus ad faciendum et 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 his fees.(*l*)

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.(*m*)

If a gaoler return one *languidus*, where the party himself brings his *habeas corpus*, and is in good health, an attachment shall issue against him: otherwise, if the *habeas corpus* be brought by another.(*n*)

The return to an *habeas corpus* ought to shew the day of caption, and cause of commitment and detainer, specifically and certainly. If the return be, that the prisoner was committed for a contempt, in not performing an order between A. and B. made upon the third day of May, it will be good. So it will, if committed for not performing an order of the exchequer for payment of a fine, without saying for what cause imposed, for it is a court of justice. Or for suspicion of treason, without saying what species of treason.(*o*)

When a commitment is in court to a proper officer there present, there is no warrant of commitment, and therefore he cannot, upon a *habeas corpus*, return a warrant *in hæc verba*; but he must return this

(*l*) Bac. Abr. III. 10. Show. II. 172. Jon. II. 178.
(*m*) Ibid. II. Salk. 352.
(*n*) Ibid. III. 11.
(*o*) Com. Dig. III. 456. Cor. Car. 507, 579.

truth of the whole matter at his peril : but if the commitment be to one who is not an officer, there must be a warrant in writing ; and where there is, 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 on the warrant.(p) HABEAS CORPUS.

A return, that before the delivery of the writ he had delivered the woman to her husband, and knows not where she is, is a good return.(q)

It seems that before the return is filed, any defect in form, or the want of an averment of 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: but after a return is filed, it becomes a matter of record of the court, and cannot be amended.(r)

Though on an *habeas corpus* to produce the body, with the cause of taking and detaining, it was held, that the party must return an answer to the taking, as well as detaining ; and that a return, as to the detaining, was no answer, as to the taking ; yet it was permitted to amend the return in court by denying the taking also.(s)

A return, that "I had not at the time of receiving this writ, nor have I since had the body of the within named M. Grey Goose, detained in my custody, so that I could not have her before the within named W. H. Ashurst, as I am within commanded," is an equiv-

(p) Salk. 349.
(q) Stra. II. 15
(r) Bac. Abr. III. 19.
(s) Bl. Rep. II. 1204.

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ocal return, and does not deny the having the party, but only the detaining her.(*t*)

It seems a sufficient return to an *habeas corpus*, that the defendant is in custody under the sentence of a court of competent jurisdiction, to inquire of the offence, and to pass such a sentence, without setting forth the particular circumstances necessary to warrant such sentence.(*u*)

In the state of New-York: On a writ of habeas corpus the sheriff must return all the the facts as they truly are. And set forth the true cause of caption and grounds of commitment, and detention, the original attachment and subsequent orders, if any have been given, together with all other proceedings relative to such detention; that the whole may be examined by the court. A prisoner committed by an order of the court of chancery, and discharged by a judge of the supreme court in vacation, may be again committed for the same cause. And a commitment until further order of the court, is good.(*a*)

In the state of Connecticut, one or more of the judges of the supreme court may issue the writ of *habeas corpus*, and proceed thereon according to law(*b*)

All persons detained in gaol for trial of an offence not capital, are entitled to bail, to be taken by one or more of the judges of the court having jurisdiction of the offence.(*c*)

(*t*) Ter. Rep. V. 89.
(*u*) East. 1. 306.
(*a*) Johns. Rep. IV. 317.
(*b*) St. C. 19.
(*c*) Ibid.

If a debtor, imprisoned on execution admitted to take the oath provided by law for the relief of poor prisoners, be detained in gaol after the creditor has omitted to furnish the support by law allowed, though for ever so short a space, in which the debtor is entitled to his regular meals, and which, if he obtains, is at the expense of some person other than such creditor, such prisoner is entitled to his discharge by the gaoler. And though the creditor, after such omission, while his debtor is yet in gaol, deliver to the gaoler money to reimburse the expence of such support during such omission, and sufficient for the future support of such prisoner, yet such prisoner may be discharged on a writ of habeas corpus.(*d*) HABEAS CORPUS.

But in a case where a deputy sheriff committed a debtor in execution, and omitted to leave with the gaoler a copy of the execution, and such debtor after several weeks, demands of the gaoler to be discharged from his imprisonment, and the officer who levied such execution, thereupon furnished such gaoler with a defective copy of such execution, and the gaoler continued to hold such debtor in prison, without any other cause or authority therefor, the court would not relieve such prisoner on habeas corpus.(*e*)—— *Quære?—Can this be law?*

In the state of Vermont: The writ of protection *ad testificandum* suspends all civil process against the subject of it while coming tō, and attending upon court, with a reasonable time for the witness to return home after the *rising of the court.* Testimony *viva voce* is so much to be preferred to depositions,

(*d*) S. C. C. July term 1808. Hubbel vs. Dimon.
(*e*) Ibid. September term 1810. Towsey vs. Dimon.

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that the court will favour the personal attendance of witnesses. The writ of protection will therefore always receive a liberal construction in favour of the witness covered by it; and if arrested contrary to the letter of such writ, or such liberal construction of it, the witness will be discharged on a writ of *habeas corpus*; and the officer making the arrest be in mercy for his contempt of the court.(*f*)

If a sheriff to whom a writ of *habeas corpus ad prosequendam* is directed, commanding him to bring his prisoner into court, return, "that the prisoner is sick and languishing, so that he cannot be removed without endangering his life," the return is good; but it ought to be accompanied by affidavits of physicians, that the court may judge whether the bodily indisposition of the prisoner be so great as to justify the sheriff in his disobedience to the writ.(*g*)

(*f*) Tyl. Rep. I. 274.
(*g*) Ibid. II. 260.

CHAP. VIII.

OF SUPERSEDEAS.

SUPERSEDEAS.

SUPERSEDEAS is a writ that lies in a great many cases, and signifies, in general, a command to stay some ordinary proceeding at law on good cause shown, which ought otherwise to proceed.(a) A *supersedeas* is used for the staying of an execution after a writ of error is allowed and bail put in. But no *supersedeas* can be made out on bringing the writ of error until bail is given, where there are judgments by verdict or by default in debt, &c.(b) What, and its use.

Upon exigent.

If an *exigent* has been awarded against a person, he may have a writ directed to the sheriff, commanding him, upon the person's finding sureties, to appear at the return of the *exigent*; that if he have not arrested him, he do not arrest him, but suffer him to go in peace; and if he have arrested him, he discharge him. Or the person against whom an *exigent* has been awarded may, upon finding sureties in a court which has power to award a writ of *supersedeas*, have such writ directed to the sheriff to the same effect.(c)

(a) F. N. B. 236.
(b) Litt. Abr. 543.
(c) F. N. B. 236.

SUPERSEDEAS.

Without writ.

An express *supersedeas* without writ, is where a person who has pursuant to an authority in him vested, made an order for the doing of an act, does, by a second order, forbid the doing of the act.(*d*) As if a justice of the peace have made an improper order, he may upon reconsideration, by a second order, supercede the former.(*e*)

Upon *certiorari*.

When a *certiorari* is granted, the party may have a *supersedeas* out of chancery to the sheriff.(*f*) And it would seem that a *certiorari* is itself a *supersedeas*, if bail to try cause be given. For it is said that "if one bring a *certiorari*" to remove an indictment, and do not give bail to try it according to the statute, it is no *supersedeas*.(*g*)

Writ of error, a supersedeas by implication.

A writ of error is a *supersedeas* by implication, until the errors are examined; that is, it is a *supersedeas* to the execution, but not to an action of debt on the judgment. From the time of the allowance, a writ of error is a *supersedeas*; but this must be where execution is not executed, nor began to be executed.(*h*) If the sheriff, notwithstanding such writ of error, proceed to execute a *fieri facias*, the court will award a *supersedeas*; because execution has erroneously issued, and command a return of the money.(*i*)

May be granted upon habeas corpus.

A *supersedeas* is grantable to the sheriff to stay the return of an *habeas corpus*; and if he return it afterwards, and the parties proceed to trial, it is

(*d*) F. N. B. 236.
(*e*) Strange. I. 6.
(*f*) F. N. B. 237.
(*g*) Mod. VI. 35, 43.
(*h*) Cro. Jac. 534. Mod. VI. 130. Salk. I. 321. Ter. Rep. V. 273. East. II. 439. Bos. & Pul. I. 478. Bos. & Pul. II. 370.
(*i*) Stile. 414.

error; as well as all the proceedings in an inferior court after a *habeas corpus* delivered, unless a *procedendo* be awarded; in which case a *supersedeas* will not be granted.(*j*) SUPERSEDEAS.

If a *fieri facias* come to the sheriff who seizes the goods of the defendant, and, while they remain in the officer's hands, before a writ of error is allowed, or a *supersedeas* issues on such writ of error, and is delivered to such sheriff; he must, notwithstanding, proceed in his sale of the goods: having begun to execute his writ he must complete it.(*k*) Does not stay execution upon goods seized.

If a *capias* come to take the body, and before it is executed, a *supersedeas* comes, the sheriff must omit to make the arrest; but if he has already taken the body, when the *supersedeas* comes, he must, at the return of his writ, return the body together with the *supersedeas*.(*l*) On capias, if received before arrest made, officer must not proceed, &c.

A *supersedeas* was delivered to a sheriff to stay the return of *distringas* at the assizes, which the sheriff did not obey, but returned it notwithstanding; and it was adjudged error and the judgment reversed. Where the sheriff was going to execute an *hab. fac. poss.* there came a *supersedeas* to him, which he refused to obey, and delivered possession. The court granted an attachment against the sheriff, and a writ of restitution to the party.(*m*)

In the state of New-York: If a prisoner in execution, who has given security for the gaol liberties, and resides with his family within the limits, obtain In New-York.

(*j*) Jacob's Law Dictionary, Title Supersedeas.
(*k*) Dalt. Sher. 538.
(*l*) Ibid.
(*m*) Ibid.

a writ of supersedeas, the delivery thereof to the sheriff destroys the operation of the execution; and with it the necessity for, and further effect of, the security; so that the prisoner is thereby virtually and legally discharged from imprisonment, and may immediately thereafter leave the gaol *liberties*. Nor can the sheriff legally prevent his departure. And although the sheriff, on application therefor, refuse to discharge the prisoner, unless his poundage fees on the execution be first paid, yet the prisoner cannot maintain an action of false imprisonment against him, if the sheriff do not use any force to detain him in custody.(a)

(a) Johns. Rep. IV. 32.

CHAP. IX.

OF RETURN OF PROCESS.

RETURN OF PROCESS.

What, and how made

A RETURN is the certificate of the officer to whom any process is directed, stating what he has done in obedience to the commands therein, or the reason of his neglect, and is often the most difficult part of the sheriff's duty, as the return ought to be both in form and substance according to law: otherwise the officer may be subjected to punishment, and the party employing him to damage.(*a*) All that the officer is commanded by writ to do, he must perform, and no more;(*b*) or show a sufficient reason for his neglect;(*c*) and make return of his precept to the proper court, on or before the day mentioned therein for its return.(*d*) The return must always be attested by the officer who made the service,(*e*) and must be certain to every intent.(*f*) If the officer, upon a *capias*, return that he arrested the defendant at D. and would have carried him to the gaol, and that W.

(*a*) Dalt. Sher. 162.
(*b*) Ibid. 166.
(*c*) Com. Dig. V. 444.
(*d*) Mod. VI. 148, 159, 196, 250.
(*e*) Cro. Eliz. 310.
(*f*) Dalt. Sher. 166.

RETURN OF PROCESS.

N. rescued him, it is not good; because it is not shown where the rescue took place:(g) he must also specify the time when the facts took place. The officer may return that the writ came to him so late, that on account of the shortness of the time, he could not make service thereof.(h) But if he make such return falsely, he is liable in damages.(i)

Upon replevin.

If the sheriff, in a replevin, return the cattle were in a fort, castle, or park, so that he could not make deliverance, it is bad; for he might have taken the power of the county with him. Nor may he, in such case, return resistance, for the same reason.(j) In *mesne* process the officer may return a rescous of the person arrested, or goods seized; but not so on execution. And the reason of the difference is, that in *mesne* process, he is not obliged to call in aid the power of the county; but in doing execution he must if necessary.(k) If one taken on *mesne* process be committed to prison, the sheriff may not return a rescue; for the law presumes the sheriff able to keep him there.(l) If the return of a rescous does not show that the defendant was in custody, and where arrested, it is insufficient.(m) If the sheriff return that the defendant was rescued in the county aforesaid, without saying, in my bailiwick, it is good.(n) If on a return of rescous of two persons, it is only said, that they could not afterwards be found, without saying, nor either of them, it is bad.(o) If a rescue be made in fact from a sheriff's officer, the

Rescous upon mesne process.

(g) Dalt. Sher. 168. and Yelv. 51.
(h) Ibid. 168.
(i) Ibid. 164.
(j) Ibid. 165.
(k) Bac. Abr IV. 401.
(l) Cro. Jac. 419.
(m) Yelv. 51. Com. Dig. V. 439.
(n) Ibid 51.
(o) Com. Dig. V. 440. Str. 1. 225.

return may be made either according to the fact, or as made from the sheriff, by construction of law.(p) RETURN OF PROCESS.

Upon a writ of *habeas corpus* against a person in his custody, the sheriff must return the facts according to truth, and the cause of commitment, and bring the prisoner into court, or before the judge who has authority to examine and determine the same.(q) Of habeas corpus.

In waste, or redeseizin, in different towns, the sheriff must go to each, but may make his inquisition at one, and a return that he went to D. and there took inquisition, is good; for by intendment he might have been to each town, &c.(r) If a sheriff in a writ of account or debt, return *non est inventus*, and that he hath no lands by which he can be distrained, and a *capias* issue against the defendant, who is taken thereupon; when in fact he had goods, chattels, or lands, sufficient, he may have his action against the sheriff for his false return, by writ directed to the coroners.(s)

An officer may not return any thing contrary to the verdict of a jury. As where, in an action against executors, who plead that they have fully administered, and it was found against them, viz. that they have assets remaining, the sheriff, on execution, may not return, that they have not any goods, &c. of their testator. But such verdict, notwithstanding, the sheriff may return that they have not goods, &c. within his county.(t) He may not return in replevin, that there were no such goods nor cattle taken; nor in detinue, that there are no such goods detained; nor

(p) Bac. Abr. IV. 403.
(q) Dal. Sher. 166.
(r) Ibid. 172.
(s) Ibid. 173.
(t) Ibid. 173.

Return of process.

in a *habere facias seisinam*, that there is no such land, &c. nor in a writ of seizin, *non tenantcy* in him whom the law supposes to be tenant.(*u*)

If officer make no return upon an original writ, he is liable to action by both parties.

If after service of an original writ, the officer make no return, he is liable to an action by both parties respectively. He may also be liable to both parties for a false return.(*v*) The creditor in an execution, may maintain his action if the officer return that he cannot do execution on account of resistance. And, the plaintiff in replevin, if the return be, that the cattle are in a fort or castle.(*w*) If an officer take the body or goods of a defendant on *mesne* process, and do not return the writ, the taking is tortious; and the defendant may maintain an action of trespass.(*x*) But the officer need not return a writ of execution whereon the money is collected, and paid over to the plaintiff; nor where no inquest is to be taken; but only land to be delivered, seizin had, or goods sold, &c.(*y*) An officer may not return that he neglected to execute the writ because the party would not pay his fees. But if in replevin, he return that the defendant claims property in the goods or cattle, it is good.(*z*)

Erroneous or bad return may be amended by order of court.

If the sheriff make an erroneous or bad return, the court may cause the same to be amended, either by the sheriff himself, his deputy, or clerk.(*a*) If the sheriff upon an execution, return that he took the goods and chattels, &c. of the debtor, &c. and that they remain in his hands for want of buyers, and he go out of office, and the execution comes into the

(*u*) Dal. Sher. 174.
(*v*) Ibid. 176, 173.
(*w*) Ibid. 176. Com. Dig. V. 446, 447. Salk. 581.
(*x*) Ibid. 178, 179. Co. V. 90
(*y*) Ibid. 179, 180.
(*z*) Ibid. 181.
(*a*) Ibid. 193.

hands of the new sheriff, he is not concluded by the old sheriff's return; but may return that his predecessor did not take the goods, &c. But if the old sheriff return a juror in issues, the new sheriff may not on the *distringas*, return the same juror *nihil*; but must return such facts relative thereto, as have intervened between the time of the return made by the old sheriff, and that made by the new.(*b*)

RETURN OF PROCESS.

The sheriff may return that he had taken the body of the defendant, and that he is detained, (in such prison or gaol or elsewhere, as the case may be,) so sick that he cannot be had in court without danger of his death.(*c*) So he may return that during the whole time he held the writ the defendant was under the protection of the court (specifying the particular court) as a party, juror, or witness therein, as the case may be.(*d*) If the sheriff before the return day of the writ, make return that the defendant has no goods, &c. it is void; for though he may have none at that time, yet he may have before the return day.(*e*) If the officer return that he has attached cattle to the value of £10, and does not set out what the cattle are, it is bad.(*f*)

Sheriff may return that he has taken the body, and the prisoner sick, &c.

If the return day of the writ be sunday, and the return appears to be made on that day it will be bad; nor can it be made on any day subsequent.(*g*) The sheriff may return that he was always ready to deliver seizin, &c. and gave notice such a day, but the plaintiff did not come to receive it. And in replevin, that no one came to show him the cattle.

On a writ of seizin and replevin.

(*b*) Dalt. Sher. 193.
(*c*) Ibid. 211.
(*d*) Com. Dig. V. 448.
(*e*) Cro. Eliz. 512. Com. Dig. V. 446.
(*f*) Ibid. 513.
(*g*) Mod. V. 148, 159.

RETURN OF PROCESS.

And on a writ which says, "if the plaintiff make you secure," &c. that the plaintiff did not find pledges. But the sheriff may not return that he could not have view of the premises: nor that he could not have sight of the cattle: nor that the plaintiff did not prosecute his writ: nor that he had levied the goods on an execution, and afterwards lost them: nor that they were rescued: nor *non est inventus*, on a writ delivered to him against his bailiff.(*h*)

A return is sufficient, if it can be ascertained by the writ.(*i*)

Sheriff may return attachment made by his orders.

If the writ command the sheriff to attach J. L. and the sheriff return that he has caused J. L. to be attached, or that J. L. is attached, it is good; for the sheriff is not bound to execute the writ in person, but may do it by deputy. And a return upon a *capias*, that the defendant is taken, is sufficient. And upon a *scire facias*, if the sheriff return, that by virtue of this writ, as to me commanded, I have caused A. B. to know, &c. it is good, without describing A. B. as within named.(*j*)

Upon a grand cape.

A return upon a *grand cape*, *cepi in manus*, &c. if it say nothing as to the summons of the tenant, is bad. And so is a return upon a *scire facias* against an heir and tenants, if it say nothing as to the heir; and if the sheriff upon a *petit cape*, where the count was for a house and stable, return that he has taken the house, and say nothing as to the stable, it is not good.(*k*)

(*h*) Com. Dig. V. 444, 445.
(*i*) Ibid.
(*j*) Salk. II. 589.
(*k*) Com. Dig V. 446.

RETURN OF PROCESS.

Cannot be made contrary to a former return.

The sheriff cannot make a return contrary to his former return upon record. As, if he return upon a *venire facias* twelve jurors, he cannot say upon a *distringas* that one has nothing. If he has returned a distress, he cannot upon the grand distress, *alias*, or *pluries*, say that the tenant or defendant hath nothing by which he may be distrained. If upon a *capias* for a fine, the sheriff return *cepi*, he cannot on the *ca. sa.* return *non est inventus*. But he may make a return variant from a former, but not repugnant to it. As he may say, evicted by an elder title *mesne* between this and the former writ, and so has nothing; or that he held land for the life of another in the right of his wife, &c. who is now dead.(*l*)

Or to matter of record.

Though a return cannot be made contrary to a matter of record, as in the case of a verdict against executors on *plene administravit*, he cannot return a *nulla bona testatoris* but may return *nulla bona* in his *bailiwick* on a *devastavit*.(*m*)

If there be judgment against A. G. widow, and a *ca. sa.* thereon, and before the execution of the writ, she marries B. the sheriff cannot return that she is now the wife of B. for that falsifies the writ and record.(*n*)

In New-York.

In the state of New-York it is not requisite to the proceedings on execution, that the writ should ever be returned; nor is it requisite, even if a return be made, that the sheriff should specify with certainty the particular lands sold, or the name of the pur-

(*l*) Com. Dig. V. 446.
(*m*) Ibid.
(*n*) Ibid. 447.

RETURN OF PROCESS.

chaser. It is sufficient to state, that of the lands and tenements of the defendant, he caused to be made the debt and damages specified in the writ, as he was thereby commanded.(a)

By under sheriff, in his own name, is not a return, in name of the sheriff.

A return by an under sheriff in his own name, is not a return in the name of the sheriff. When a man acts in contemplation of law, by the authority, and in the name of another, if he do an act in his own name, although alleged to be done by him as attorney, it is void.(b)

Upon execution levied upon lands.

If the return of the sheriff on an execution levied upon lands, in effect, show that there were no goods or chattels belonging to the defendant, it is good. But the sheriff's return is not essential to the title of the purchaser. Such title is not created by, nor dependant on, the return, but is derived from the previous sale made by the sheriff, by virtue of his writ. It is sufficient for the purchaser that the sheriff has competent authority, and sells and executes a deed to him. The proceedings in the case of an *extent* upon an *elegit*, do not apply to the writ of *fieri facias*. On the writ of *elegit* no sale can be had; but the sheriff takes an inquisition by a jury, who set off moieties by metes and bounds. The inquisition is then necessary to be returned; and together with the return constitutes the title. The sale and the sheriff's deed are sufficient evidence of the title. If the purchaser can show that the sheriff had authority to sell, it is enough; he need not look further.(c)

(a) N. Y. T. R. 63.
(b) Ibid. 66.
(c) Johns. Rep. I. 453.

RETURN OF PROCESS.

In Massachusetts:* The officer who levies an execution upon land, must, in his return, specifically set forth a substantial compliance with each particular aequirement of the statute authorizing such levy, and prescribing the mode of proceedings therein: otherwise the levy will be void, and no title to the land be thereby acquired by the creditor.(*d*)

In Massachusetts.

In the state of Connecticut an officer's return must show, not only that he has pursued the directions in the writ, but that he has executed it according to law. It must be good in substance and form, or he cannot, in an action brought against him, be justified by it; and though such return may be falsified, yet it is *prima facie* evidence of what it purports, but no more.(*e*)

In Connecticut, must show the writ to have been executed according to law.

If an officer who has served a writ of attachment and taken the property of the defendant, return the writ to the house of the clerk, and in his absence deliver such writ to the wife of the clerk, informing her what it is thus delivered to her, it is sufficient to exonerate the officer in an action for not returning the writ according to the statute, making it his duty to return all writs by him served, to the clerk of the court to which such writ is returnable.(*f*)

May be made to the house of the clerk, &c.

If process issue against two defendants, and one of them is described as living without the official precincts of the officer who makes the arrest, and

* The principles of this case apply as well in Connecticut, New-Hampshire, and Vermont, as in Massachusetts.

(*d*) M. T. R. II. 154.
(*e*) Root. I. 526.
(*f*) Day. II. 480.

RETURN OF PROCESS.

he dates his return within his official precincts, and proceeds, "Then for want of goods or estate, &c. I attached the bodies of the said A. and B. within named, &c." the return is *prima facie* evidence that both the defendants were at the time of the arrest, within the precincts of the officer who served the writ; and good until it be proved that the arrest was made without his precincts.(*g*)

(*g*) Root. I. 526.

CHAP. X.

GAOLS AND GAOL LIBERTIES.

GAOLS, &c. What, and how provided.

A GAOL is a place authorized by law for the confinement of prisoners by virtue of legal process. By the common law, every county ought to have two gaols.(*a*) One for prisoners committed for debt, which might be in any house the sheriff should please to appoint, and which he might remove from one place to another within his county at his pleasure, to which no liberties were attached; but within the walls of which he must keep the prisoners in strict and safe custody,(*b*) and might not suffer them to go at large, or at their liberty, neither within the prison nor without the prison.(*c*) The other was a gaol for the confinement of persons committed for some criminal offence, which was the county gaol.(*d*)

The Marshalsea and Fleet prison are under different regulations, according to the discretion of the courts to which they respectively belong; and to which, rules somewhat extensive have been annexed;

(*a*) Bac. Abr. III. 443.
(*b*) Ibid. M. T. R. III. 86—106.
(*c*) Dal. Sher. 485.
(*d*) Bac. Abr. III. 443.

GAOLS, &C.

and within which, prisoners are not necessarily so closely confined, as in the sheriff's prison; it being no escape for the prisoner in the Marshalsea or the Fleet to be any where within the rules, though without the walls of those prisons.(e)

In New-York, how built and repaired.

Gaols or prisons, in the state of New-York, are erected under the authority of the legislature by special acts empowering the supervisors of the county where a gaol or prison is to be built, to levy and raise upon the inhabitants of such county a specific sum, authorized by such act for the purpose.(f) But gaols or prisons when built, are kept in repair by the supervisors of each county, whose duty it is from time to time as occasion requires, to direct to be raised and levied on the freeholders and inhabitants of the county, a sufficient sum of money for making necessary repairs to the gaols therein.(g)

When destroyed, &c. how prisoners may be disposed of.

When the gaol or prison of any county in this state is destroyed, or rendered unfit for the confinement of prisoners, the judges of the court of common pleas of such county, or any two of them, on application of the sheriff, may, by warrant under their hands and seals, fix upon the gaol of some other county as the prison of their said county, for the confinement of criminals and debtors, or either of them, or any one or more of them, as shall be expressed in such warrant; and from the granting such warrant, the gaol so named, together with the limits thereof, is to all intents and purposes, so far forth as such warrant extends, the proper gaol of such county.(h)

(e) M. T. R. III. 102. Ter. Rep. II. 126.
(f) St. N. Y. III. 177, 178, 179, 180.
(g) Ibid. I. 563, 564.
(h) Ibid. V. 102, 103.

GAOLS, &c.

The court of common pleas of such county, may, at any time after the granting of such warrant, on application of the sheriff, modify or annul the same, as occasion may require; until their prison shall be rebuilt, or rendered fit for the confinement of prisoners: when the powers of such court and judges, shall cease in relation to granting or modifying such warrant, and the sheriff must forthwith remove the prisoners in his custody, and so confined without his county, to his proper gaol.(i)

When any such warrant or order is issued, a copy thereof must be served on the sheriff, under sheriff, or gaoler of the county, whose gaol is so fixed upon; and from thenceforth it is the duty of such sheriff, under sheriff, or gaoler, to receive into the prison of the county, and safely keep all such persons as may come within the terms or intent of such warrant or order. And such sheriff, under sheriff, or gaoler, as far as respects the persons so to be delivered to them, is to all intents and purposes, the sheriff, under sheriff, or gaoler, of the county for which such warrant or order is made.(j)

Liberties of what, and how ascertained.

The mayor's court in the city of New-York, and the several courts of common pleas, of the respective counties, are authorized at their discretion to appoint a reasonable space of ground, adjacent to the gaol of the city and county of New-York, and of the several counties wherein each gaol is situated, not exceeding a space of ten acres, and not extending in any direction to a greater distance than sixty rods, to be denominated the liberties of such gaol; and to cause such liberties or limits to be designated by enclosures or posts, or other visible marks placed on

(i) St. N. Y. V. 103.
(j) Ibid. 103.

GAOLS, &c.

the outer lines of such liberties, as to them may seem proper.(k)

Within such limits a prisoner committed on any civil process or execution is considered to be in gaol, to all intents and purposes, as though within the actual walls of the prison; the liberties being in contemplation of law an extension of the four walls of such prison; nor is it an escape for any such prisoner to be at large within such liberties, though he has given no bonds for the liberties of the prison; and if such prisoner, not having given such bond, escape, and return within the limits again before any action be brought, he is in as though taken on fresh pursuit, and the escape is purged.(l) But if, having given such bonds, a prisoner escape, he cannot be retaken by the gaoler, nor detained by him, though he voluntarily return; but is, to all intents, out of gaol, and his bond forfeited, and the sheriff liable for the debt or damages for which he was committed.(m)

In Massachusetts how erected and greulated.

In Massachusetts: The justices of the court of general sessions of the peace, are authorized to assess the polls and estates within their several counties, in such sums as are necessary to erect and keep in repair a good and sufficient gaol in each town, where, by law, a court is to be holden; and to direct and order the building and repairing of such gaols, according to their discretion; which gaols must be provided with sufficient and convenient apartments for receiving and lodging prisoners for debt, separate and distinct from felons and other criminals.(a) And such justices must, at the beginning of every quarter

(k) St. N. Y. V. 509. I. 359, 360.
(l) See Escape, ante 169, 171.
(m) Ibid.
(o) St. M. I. 219.

sessions, inquire into the state of the prisons in their respective counties, with respect to the security of such prisons from escape; the condition and accommodation of the prisoners; and from time to time, take such means as may best tend to secure them from escape, sickness, or infection.(b) And when any escape happens through the insufficiency of the gaol, though the sheriff of the county stands chargeable to the plaintiff, creditor or other person, at whose suit, or for whose debt the prisoner was committed: such sheriff has his remedy over against the county, which must indemnify him therefor.(c) GAOLS, &c.

The court of general sessions of the peace, must also fix and determine the boundaries of the gaol-yards, appertaining to the several gaols in their respective counties.(d) But such gaol-yard is not an extension of the prison, so that the gaoler may permit a prisoner to be at large within such yard, without incurring the guilt of an escape, excepting where the prisoner has given bond with sufficient surety or sureties within the county to the creditor or creditors in double the amount for which he is committed; conditioned, that from the time of executing such bond, he will continue a true prisoner in the custody of the gaoler, and within the limits of such prison, until he shall be lawfully discharged, without committing any manner of escape. And though, by force of such bond, the gaoler may permit such prisoner to have the liberty of the gaol yard in the day time, yet in the night he must be confined in some house or apartment belonging to such prison, and if found in the night Liberties of, how determined.

(b) St. M. 221.
(c) Ibid, 219, 226.
(d) Ibid. 222.

coons, &c.

time voluntarily without any apartment in or belonging to such prison, but in the yard appointed to the gaol, it is an escape within the true intent of the conditions of the bond.(e)

In Connecticut how erected and regulated.

In Connecticut: There must be kept and maintained in good and sufficient condition and repair, a common gaol in every county town in the several counties in the state; and there must be two of such common gaols in each of the counties of New-London, Fairfield, and Middlesex: viz. one in each of the towns of New-London, Norwich, Fairfield, Danbury, Middletown, and Haddam. The whole charge of building, and of keeping such gaols in repair, must be paid by the counties to which they respectively belong. And the assistants and justices of the peace in the several counties are empowered and required to tax the inhabitants of their respective counties, for building, repairing, and furnishing such gaols, as need shall require; and from time to time to order, direct, and take care of the building, and keeping in repair such gaols.(f)

When any county is destitute of a gaol, any person in such county, liable to be imprisoned, may, by lawful authority, be sent to the common gaol of the next adjoining county; and the keeper of such gaol must receive and keep such prisoner accordingly.(g)

County liable for escape through insufficiency of gaol.

If any person lawfully committed to any gaol in the state, either in any civil or criminal case, escape, by reason of the insufficiency of such

(e) St. M. J. 221. M. T. R. III. 86—106.
(f) St. C. 363, 364.
(g) Ibid. 367.

gaol; all costs, charges, and damages, thereby incurred and sustained by any person, must be answered out of the treasury of the county, wherein such insufficient gaol is; unless satisfaction can be obtained out of the estate of the person escaping, or from some person or persons for aiding and assisting such prisoner to escape; which being the case, the county will not be liable.(*h*) goods, &c.

Though there is no statute of this state authorizing the setting out any portion of ground as the liberties of the prison, yet a practice has long since obtained for the county court, to ascertain a certain space adjacent to each gaol in their county, which has been considered the liberties of the prison. And sheriffs and gaolers continually admit prisoners committed on civil process or execution, either on bonds or without, to go at large within such limits. And the superior court has sustained actions on such bonds.

In the 16th section of the statute for regulating gaols and gaolers, the gaoler is made liable for an escape for permitting a prisoner committed on execution to go at large without the *precincts* of the prison.(*j*) By the 20th section of the same statute, if the sheriff do not confine *within the walls* a person committed on execution for debt, damage, fine, or cost, when so ordered by the superior or county court, as the case may be, such sheriff is guilty of an escape.(*k*) These sections plainly recognize a right in the sheriffs to permit prisoners, under certain circum- Liberties of, how ascertained.

(*h*) St. C. 367, 368. see escape.
(*j*) Ibid. 366.
(*k*) Ibid. 367.

goods, &c.

stances, to go at large beyond the walls of the prisons; and perhaps sufficiently sanction the proceedings of the county courts, in ascertaining and determining liberties to the prisons of their respective counties. The principle that in legal construction, the liberties of the prison are an extension of the prison itself, or *quasi*—an enlargement of the space within its walls, has been so often recognized by the superior court, as far as laid down in the cases of Bonafous and Walker,(*l*) and by the supreme court of New-York,(*m*) that such may be considered the law in Connecticut.

In New-Hampshire, how erected and regulated.

In New-Hampshire: The court of general sessions of the peace, have the care of building, inspecting, and repairing all prisons; and must, at the beginning of every term enquire into the state of the prisons in their respective counties; as to the security of such prisons from escape, the condition and accommodation of the prisoners, and from time to time take care to secure them from escape, sickness, and infection. And in case of the escape of any prisoner committed for debt through the insufficiency of the gaol or prison, in any county, though the sheriff stands chargeable to the creditor or person to whose use any forfeiture was adjudged, or any damages or costs awarded against such prisoner, for the amount of such damages and costs, yet such sheriff has his remedy against the county, which must eventually indemnify him.(*n*)

Liberties, how ascertained.

In this state it is the duty of the justices of the inferior court of common pleas, to fix and determine the boundaries of the gaol yards appertaining to

(*l*) Ter. Rep. 126.
(*m*) Johns. Rep. see escape, ante 171.
(*n*) St. N. H. 124.

the several gaols in their respective counties; and to extend the bounds and limits of such gaol-yards as far as the local situation of the gaols, and the convenience and accommodation of the prisoners require: provided said yards may not in any case extend more than two hundred rods each way from said gaols; and the determination of such inferior court, be at all times subject to the controul of the justices of the supreme court of judicature.(o) yards, &c.

In the state of Vermont; There must be kept and maintained, in good and sufficient repair, a common gaol or prison in each shire or county town, at the expense of the county in which such gaol is, or shall be erected; to be defrayed by a tax upon the polls and ratable estate of the inhabitants of the several towns in such county, to be assessed by the representatives chosen to represent the several towns in such county, in the general assembly. And at the stated session of the supreme court of judicature in each county, the grand jurors impannelled at such court must examine into the situation of the gaols in the several counties; and if they find any such gaol insufficient, present the same to the court, who must order a record thereof to be made by the clerk, and a copy thereof transmitted to the clerk of the county court in the same county; and thereupon the sheriff of such county, must, under the direction of one or more of the judges of the county court, proceed to repair such gaol, and his expenses therein, accurately keep and exhibit to the judges of the county court, who must audit the same, and direct the clerk to draw an order on the treasurer of such county, for the sum found due to In Vermont, how erected and regulated.

(o) St. N. H. 126.

GOODS, &c.

such sheriff; which treasurer must immediately pay the same. When any escape is made through the insufficiency of the gaol, the county must be answerable to the sheriff for all legal cost and damage, by him sustained in consequence of such escape, the sheriff being liable immediately to the party injured by such escape.(p)

Liberties, how ascertained.

The county courts in their respective counties must set out yards to their respective gaols for the liberty of such prisoners as may be confined in them respectively.(q)

See obligations, covenants, and promises.

(p) St. V. 317, 318. Fay's impression, 1798.
(q) Ibid. 329, 331.

CHAP. XI.

OF OBLIGATIONS, COVENANTS, AND PROMISES.

OBLIGATIONS, &c.

Bail bonds, what, and how taken.

BY the statute of 23d H. VI. chap. 10. it is enacted, That all sheriffs and other officers and ministers, shall let out of prison all persons in their custody, by force of any writ, bill, or warrant, in an action personal or by cause of indictment for trespass, upon reasonable surety of persons having sufficient within the counties to keep their days—(persons in ward by redemption, execution, *capias ut lagatum*, or excommunication, surety of the peace; and all persons committed by special order of the justices, excepted.) And no sheriff, nor his officers, shall take any obligation for any cause aforesaid, or by colour of their office, but only to themselves; nor by any person who shall be in their ward by course of law; but by the name of their office, and upon condition written, that the said person shall appear at the day contained in their writ, bill, or warrant. And if any sheriff, or officers aforesaid, take any obligation in other form, by colour of their office, it shall be void.(*a*)

(*a*) Dalt. Sher. 517, 518. Bac. Abr. IV. 461.

OBLIGATIONS, &c.

This statute has been substantially re-enacted in the state of New-York ;(b) and in practice is adopted in Massachusetts ;(c) and, it is believed, in the other states, so far as relates to taking bail on *mesne* process, and the invalidity of obligations taken by colour of office materially variant from the form prescribed.

On the first branch of the statute, the sheriff is obliged, in cases not within the exceptions, to admit the party to bail; and if he refuses, is liable to an action by the party injured. This is but an affirmance of the common law.(d)

But the clause which renders void any obligation taken by colour of office in a form not authorized by the statute, is in prevention of the oppression suffered by debtors, and of the delay creditors experienced previous to the enactment of the statute.(e)

The defendant must be lawfully in custody of the officer, or the bond will be void. But the bond may be executed by but one surety, and yet be good; for the words *upon reasonable securities*, are for the benefit of the sheriff, who must, at his peril, make himself secure.(f) And though the surety be a stranger inhabiting without the county, and having nothing within, in an action on the bond, it cannot be avoided on that account.(g)

If the bond be made to the sheriff himself, (or other officer as the case may be,) by the name of his office, and for the appearance of the defendant at

(b) St. N. Y. I. 210.
(c) M. T. Rep. II. 194.
(d) Dalt. Sher. 318, 356, 357. Bac. Abr. IV. 461
(e) Dalt. Sher. 518, 519.
(f) Ibid. 520. Co. X. 101.
(g) Cro. Eliz. 808, 862.

the day only, though in other circumstances somewhat variant, it may be good.(h)

OBLIGATIONS, &c.

An obligation made to the deputy of a bailiff, or to an under sheriff's deputy is void, for it ought to be in the name of the sheriff or bailiff himself.(i)

If the sheriff arrest a man in his own county, and carry him into another, and there detain him until he has given bond for appearance, the bond is not within the statute; but is void for duress.(j)

If the sheriff take bond for the appearance of the defendant arrested by virtue of a void process, the authority issuing it not having jurisdiction so to do, the bond is void.(k)

If the officer, taking a bail bond, omit to describe himself as an officer, as if the bond be made to A. B. without adding sheriff of, &c. (or constable, as the case may be,) the bond is void.(l)

If the condition of a bail bond be, that the defendant appear before the justices, &c. at W. on the day, *&c. to answer to J. H. as shall appertain, and further to do and receive as the court therein, of him, shall consider in that behalf, that then, &c.* the bond is void.(m).

These words, *by colour of his office,* are general, and extend to bonds taken by colour of office, other than those taken from persons in their custody: as

(h) Cro. Eliz. 862. Cro. Jac. 286.
(i) Noy. 69.
(j) Cro. Eliz. 745.
(k) Ibid. 646.
(l) Ibid. 862. Cro. Jac. 286.
(m) Ibid. 672.

OBLIGATIONS, &c.

a bond taken for the payment of fees upon an execution, being taken by colour of office, and by which, if allowed, the officer may take double fees.(*n*)

So a bond taken from a prisoner for meat and drink, is a bond taken *colore officii*, and void.(*o*)

But where a sheriff had taken goods in execution, and afterwards took a bond of the defendant to pay the money in court at the return of the writ, it was held not void by the statute, nor was it void by the common law.(*p*)

A single bond without condition, is void. If the condition be in substance variant from the statute, as, if there be added to the lawful condition, that the prisoner *pay so much more for a horse*, the addition makes the whole void. So is a condition to save the sheriff harmless, on his admitting to bail persons not bailable, void at common law.(*q*)

Though the statute speaks only of obligations, yet promises are adjudged to be within the intention of it.(*r*) As where a special bailiff had taken the body of one H. in execution, the defendant, as well in consideration that the bailiff would permit him to go at large, as of two shillings paid in hand, promised to pay the bailiff all the money in which he, H. was condemned; and upon an action brought by the bailiff on this promise, it was held to be contrary to the statute, the consideration not good, and promise void: and though joined with another

(*n*) Dalt. Sher. 523, 524.
(*o*) Ibid. 524.
(*p*) Co. X. 99.
(*q*) Ibid. 100.
(*r*) Dalt. Sher. 524.

consideration of two shillings, yet, being void and against the statute for part, it was void in the whole.(s)

OBLIGATIONS, &c.

So, where J. S. promised a gaoler, if he would permit a prisoner, then in his custody, to go at large, that he, J. S. would pay the gaoler so much money: for a breach of which promise an action was afterwards brought, and by the whole court the promise adjudged void.(t)

A promise to save the sheriff harmless for the ease and enlargement of a prisoner, is not only within the statute, but void at common law.(u)

An obligation taken by the sheriff for the payment of money due to the state on an extent out of the exchequer, is not within the statute.(v)

If the sheriff arrest a defendant, and B. a stranger, enter into an obligation, conditioned, that the defendant shall give security, such as the plaintiff shall approve, for the payment of ninety pounds to him, or shall render his body to prison at the return of the writ, the bond is not void by the statute.(w)

So if a *capias* be taken out against the defendant, and a third person gives the plaintiff a bond that the defendant shall pay the money, or render himself at the return of the writ, it is a good bond, and not within the statute; because it is not by the direction of the officer, but by the agreement of

(s) Cro. Eliz. 199, 200. Dalt. Sher. 524.
(t) Dalt. Sher. 524.
(u) Co. X. 101, 102.
(v) Ibid. 100.
(w) Mod. II. 304, 305.

OBLIGATIONS, &c.

the plaintiff; and there is no law which makes the agreement of the parties void.(x)

A bond taken by the serjeant at arms, attending the house of commons, is not within the statute; but being for ease and favour, is void by the common law.(y)

A bond taken by the marshal of the king's bench, for the easement or delivery of a prisoner in execution, is void by the statute, though he be not named in it.(z)

If A. be taken on a *ca. sa.* and escapes, and be afterwards retaken, and for his enlargement, gives a bond to the gaoler, it is void.(a)

If a *capias* be awarded against B. and before the arrest, or after the return, the sheriff takes an obligation for his enlargement, it is void,(b)

If the condition of a bond be, to be a true prisoner, and to pay so much per week for chamber room, it is void. Though a bond for true imprisonment is good, *prima facie*, yet the defendant may aver that it was given for ease and favour; and may also make the like averment, if the obligation be given for the payment of money generally.(c)

If the under sheriff covenant with the high sheriff to discharge and save him harmless from all escapes of prisoners arrested by the under sheriff, or any by

(x) Mod. II. 305.
(y) Keble, 391.
(z) Cro. Eliz. 66.
(a) Leon, II. 119.
(b) Bac. Abr. IV. 464. Sid. 151.
(c) Ibid. Raym. 222.

him appointed, this is a good covenant. But if the high sheriff make J. S. his under sheriff, and take a bond or covenant from him, that he will not serve executions above twenty pounds without his special warrant, this is a void covenant; because the under sheriff is by law obliged to execute all precepts, as well as the high sheriff: though this covenant is void in law, yet the bond or indenture, as it is not founded on the statute, is governed by the common law, and may be good for other covenants therein contained. For though if the sheriff take a bond upon the statute of 23. H. VI. cap. 10. for a point against that law, and also for a due debt, the whole bond is void, the letter of the statute being so: yet by the common law, the bond is only void as to what is against law, and remains good for the rest.(*d*) OBLIGATIONS, &c.

In debt upon an obligation entered into by the under sheriff, for the payment of money into the exchequer within fourteen days after he received it, he pleaded the statute of 23. H. VI. cap. 10. and averred, that it was taken *colore officii*; but upon demurrer, it was adjudged that the statute extended only to bonds taken from those who were to appear, or who were in ward, and not to this case.(*e*)

In the state of New-York: A bond taken by the sheriff to induce a less rigorous imprisonment, is good, if the indulgence be such as he would otherwise consistently with his duty be authorized to grant: if it confer a privilege inconsistent with his duty, by which the object of the imprisonment, as a mean to compel a satisfaction of the plaintiff's de- In New-York, What bonds may be taken of prisoners.

(*d*) Bac. Abr. IV. 438, 439.
(*e*) Ibid. 439.

OBLIGATIONS, &c.

mand may be impaired or defeated, the bond is illegal and void. It is then a bond for ease and favour of the prisoner, and contrary to the statute. So a bond taken by the sheriff under colour of his office, to acquire profit or emolument, is void. The statute is directed against oppression on the one hand, and improper indulgence on the other. A bond conditioned, "That the defendant shall remain a true and faithful prisoner in the gaol or prison until from thence discharged by due course of law," and designed to indulge him to go at large within the walls of the prison, is good at common law, and not within the statute prohibiting the taking bonds for ease and favour; nor affected by the statutes relative to gaol liberties.(a)

A bond given to indemnify the sheriff against an escape already happened, is good. The bonds which are void under the act as being given for ease and favour, are those given by a person in custody.(b)

A promise made by a constable to a defendant against whom he has an execution issued from a justice court, that if the defendant will deliver property as security for the payment of the execution, he, the constable, will wait thirty days before he will sell the property, is a promise without consideration and void.(c)

Bond from deputy sheriff to his principal.

Where a sheriff takes a bond from his deputy for the due execution of his office, the same bond continues in force as long as the sheriff continues in office, and the other party is his deputy. Though the sheriff is continued in office by reappointment,

(a) Johnson's Cases, II. 239—245.
(b) N. Y. T. R. I. 460. Mod. V. 225. Co. X. 100.
(c) Johns. Rep. II. 193.

yet the bond of the deputy need not be renewed, but continues in force, and extends to all acts of such deputy, as well after such appointment as before; and covers the acts of such deputy so long as he holds the office under such sheriff.(d) OBLIGATIONS, &c.

If a prisoner in execution, in order to obtain the liberties of the gaol, together with a security enter into a bond to the sheriff, conditioned, that he shall remain a faithful prisoner, &c. pursuant to the statute regulating the liberties of gaols, and the sheriff at the same time take a warrant from the obligors, directed to an attorney, to confess judgment on the bond; by virtue of which, a judgment is entered and execution issued thereon; such warrant, judgment, and execution, are all void: for the statute does not authorize the sheriff to take such warrant, and if permitted, might be employed to oppressive purposes.(e)

In the state of Massachusetts: If the plaintiff in replevin execute an informal bond, voluntarily, to obtain goods attached; and the officer thereupon deliver him the goods, the defendant in replevin, may, if he please, accept the bond, and pursue a remedy at law upon it against the obligors; unless the bond be void at common law. Bonds for ease and favour are void here by our common law, founded on an English statute in force before the settlement of this country; and so are bonds given to an officer to indemnify him for a breach of his duty likewise void. But a bond merely informal, given for an object lawful in itself, is not within either of those descriptions of void bonds: and it would be altogether un- In Massachusetts, what bonds are legal, and what not.

(d) Johns. Rep. V. 166.
(e) Johns. Cases, I. 129. Vide Salk. II. 674. Cases contra.

OBLIGATIONS, &c

reasonable to allow defendants to dispute their bonds voluntarily executed by them, after their principal has had their full benefit of it, as a legal deed.(f)

The condition of a bond was—That whereas the plaintiff as constable of the town of B. had taken one S. B. as a prisoner, by virtue of a warrant granted by N. C. esq. and therefore, if the defendants or either of them shall deliver up the said S. B. on the day of, &c. or sooner, if the defendants or either of them shall see cause, the bond shall be void. It was determined that the plaintiff had no right to take such bond in exercising the office by which it was obtained. And that in fact, the permission by the officer to his prisoner to go at large after the arrest, amounted to a voluntary escape; and that the bond intended to protect him against the consequences of his own misconduct, is void at law.(g)

A discharge from prison by a competent tribunal, though obtained by fraud, is a discharge in due course of law. And no action can be maintained on the bond for the liberties of the prison, on account of the departure of the prisoner.(h)

In Connecticut.

In the state of Connecticut: Action on bond to the sheriff, conditioned that one S. should abide a faithful prisoner, and not depart the gaol until he should have paid the execution, on which he was committed; together with the sheriff's and gaoler's fees, and the gaoler for his support. The execution, sheriff's, and gaoler's fees, had been paid before bringing the action, which was brought to recover

(f) M. T. R. V. 517.
(g) Ibid. 541.
(h) Cranch, III. 300.

the expenses of victualling only. The court directed the jury, that a bond to the sheriff from a prisoner in execution, conditioned that he will abide a faithful prisoner, and not depart the gaol until his support should be paid, is illegal and void——Verdict for defendant.(e) OBLIGATIONS, &c.

In an action on a prison bond, for the escape of a prisoner committed on execution, if the creditor in such execution, be by the statute of limitations barred of all right of action against the sheriff for such escape, the sheriff will recover nominal damages only.(j)

If the sheriff appoint a deputy *for the space of six months*, and A. and B. thereupon enter into a bond to the sheriff, conditioned, "That such deputy shall faithfully perform his said office, and execute all lawful writs according to law, and ever save harmless and indemnify the sheriff, his heirs, &c. from all costs and damages whatever, that shall or may arise by means of his being deputed as aforesaid," and such deputy sheriff continues to act as such, under said deputation; and after the expiration of said six months, by his negligence, subjects the sheriff to damage, A. and B. are not liable on their bond to the sheriff, to indemnify him for any damage he may sustain by any default of such deputy, committed after the expiration of said six months.(k)

(i) Root, I. 158.
(j) Ibid. II. 334.
(k) Kirby. 189. See ante, 282.

CHAP. XII.

OF ACTIONS.

I. ASSUMPSIT.

ASSUMPSIT. ASSUMPSIT lies in favour of an officer for his fees.(a) But it will not lie in his favour to recover a sum agreed to be paid for accepting bail of one arrested, because it is the officer's duty to take bail, and the consideration illegal.(b) So, where an executor having sued out an execution, put it into the hands of the sheriff, a friend of the executor, in consideration that the sheriff would execute the writ; and of sixpence, given him by the plaintiff, promised to give the plaintiff £60. On an action on the promise for the £60, it was held that the consideration was illegal, and the action would not lie.(c) If an officer discharge a defendant, on his payment of the sum endorsed on the writ, and afterwards the officer is compelled to pay the whole debt, he may maintain assumpsit for the rest against the person discharged.(d)

(a) Chitty, Plead. II. 31.
(b) Bur. II. 924. Bl. Rep. II. 804.
(c) Cro. Jac. 103.
(d) Peak, N. P. C. 145.

ASSUMPSIT. If an officer collect money on an execution, and do not pay it over to the plaintiff, he may, after demand, recover it on assumpsit.(e) If a sheriff's officer take money unlawfully, *colore officii;* assumpsit for money had and received, lies against the sheriff.(f)

(e) M. T. R. Esp. Cas. I. 154, 263.
(f) Esp. Cas. II. 507. III. 231.

II. COVENANT BROKEN.

COVENANT. THE sheriff may maintain an action of covenant broken, against an under sheriff, on covenant to save harmless his principal from all escapes of persons arrested by the under sheriff, or any by him appointed.(a)

(a) Bac. Abr. IV. 438. and cases there cited.

III. DEBT.

DEBT.

DEBT lies in favour of an officer for his fees, for levying an execution on land ;(a) and so for executing an erroneous writ ;(b) and for levying an execution on goods, when the parties compromise before the goods are sold.(c) The sheriff may maintain debt against the sureties on a bail bond taken to himself; and that, though the sureties had nothing within the county.(d) So he may on a replevin bond, where the goods have been replevied from his possession.(e) So he may have debt on bonds for the prison liberties ;(f) and on a bond for his indemnity given by his deputy ;(g) and against the surety on such bond.(h)

Debt doess not lie against the sheriff because an officer of his, who keeps a lock-up house, (but not the officer to whom the warrant was directed,) takes more money for a bail bond than the law allows.(i) But it does against an officer who returns, that he has levied the money under an execution; but not if he return, that he has seized goods to such a value, which remain in his hands for want of buyers.(j) But if his return be that the goods were rescued, the sheriff is liable in debt.(k) Debt also lies against the executors of the sheriff, who, having levied mo-

(a) Salk. 209.
(b) Ibid. 332.
(c) Term. Rep. V. 470.
(e) M. T. R.
(f) Ter. Rep. II. 126.
(g) Ibid. I. 60. Bac. Abr. IV. 439.
(h) Esp. Cas. I. 394.
(i) Ibid. IV. 63.
(j) Hob. 206.
(k) Mod. VI. 296, 299. Saund. II. 343. Com. Dig. III. 300.

DEBT.

ney by virtue of an execution, and dies without having paid the same over to the plaintiff's, for the execution, is discharged.(l) So debt lies against the sheriff for the escape of one in execution (m) to recover the whole debt and damage;(n) and equally, whether the escape be negligent or voluntary,(o) or whether the sheriff return the writ or not.(p) So debt also lies against a gaoler for the escape of a prisoner in execution, though the escape were without the knowledge of, or without any fault on the part of the gaoler; who can avail himself of no excuse but the act of God, or public enemies.(q)

(l) Cro. Car. 539. Cro. Eliz. 209.
(m) Ins. II. 382.
(n) Bl. Rep. II. 1048. Ter. Rep. II. 126.
(o) Stra. I. 153.
(p) Cro. Eliz. 17.
(q) Hen. Black. II. 108. Stra. I. 153.

IV. CASE.

CASE.
For escape.

CASE lies against sheriff's, &c. for escapes on *mesne*, or final process;(*a*) and for not arresting the debtor when he could have done it;(*b*) and for a false return of *non est inventus*, or *languidus*, on *mesne* or final process;(*c*) and for a return of *nulla bona* upon a *fieri facias*;(*d*) and for not levying under it where he might have levied;(*e*) and for not taking a replevin bond;(*f*) and for taking insufficient sureties in replevin;(*g*) and for not assigning bail bond;(*h*) and for refusing to accept bail when offered;(*i*) and for removing goods taken in execution off the premises before the landlord is paid a year's rent, having notice that it is due;(*j*) and for a return of too small issues.(*k*)

If a gaoler permit a voluntary escape, an action on the case lies against him, and no subsequent recaption will purge a voluntary escape.(*l*)

If a prisoner in lawful custody of the sheriff, escape, an action on the case lies by the sheriff against the prisoner, and that, before any action brought, against the sheriff.(*m*) But the bailiff from whom

(*a*) Esp. Dig. 609. Cro. Eliz. 652, 868. Bac. Abr. II. 240. Ter. Rep. II. 126. Cro. Eliz. 289.
(*b*) Chit. Plead. 140. Cro. Eliz. 729.
(*c*) Mod. I. 228. II. 178. Bac. Abr. I. 58. Str. I. 605.
(*d*) Cro. Eliz. 512. Chit. Plead. I. 140.
(*e*) Chit. Plead. I. 140.
(*f*) Ibid.
(*g*) Ibid.
(*h*) Ibid.
(*i*) Ibid.
(*j*) Com. Dig. I. 202. Stra. I. 92.
(*k*) Ibid.
(*l*) Salk. I. 18, 271.
(*m*) Cro. Eliz. 53, 237. Co. III. 52.

CASE.

the escape actually was, cannot have any action, if the escape were voluntary; though a recovery have been had against him by the sheriff.(n)

For neglect of duty.

An action lies against an officer for neglect of his duty; as, if a sheriff do not return a writ;(o) and if he do not summon a tenant in a real action, whereby he loses by default;(p) and if he will not execute a writ of seizin;(q) and if he do not deliver the new sheriff a *supersedeas*, &c. by reason whereof the plaintiff is taken in execution anew.(r) So, if he permit a rescous upon judicial process.(s) But no action lies against the sheriff for rescous on *mesne* process.(t) This action lies against the sheriff, if one taken on a *capias utlagatum* be rescued.(u)

If the sheriff return that he has taken the body, and have him ready in court, where he had taken him and let him go at large without bail, the sheriff is liable in this action.(v) But no action lies for the escape of a prisoner arrested on void process,(w) though it is otherwise of proces erroneous only.(x)

If two executions against the goods and chattels of a defendant, tested the same day,* be delivered

* Where the goods of a debtor are not holden till actual seizure, the test is immaterial: the officer must be governed by the delivery.

(n) Cro. Eliz. 549.
(o) Com. Dig. I. 206. Cro. Eliz. 873.
(p) Ibid.
(q) Ibid.
(r) Ibid.
(s) Ibid.
(t) Ibid.
(u) Ibid.
(v) Mod. I. 228. II. 178.
(w) Carth. 148.
(x) Salk. 273. Cro. Eliz. 188.

to the sheriff on the same day, and he execute first that which was last delivered, an action on the case lies against the sheriff in favour of the creditor in the execution first delivered.(y) But if the first execution be fraudulent, it is otherwise;(z) or if the plaintiff in the first execution, direct a levy thereof to be deferred to a day certain, and the second execution comes on in the interim.(a) CASE.

An executor may maintain this action against a sheriff for a false return, in the life of his testator.(b)

If a prisoner escape, and be retaken on fresh pursuit, or return before action brought against the the sheriff, he is not liable on this action.(c) But the sheriff cannot lawfully retake or detain a prisoner, after a voluntary escape; and is of course liable in this action, though such prisoner be again in actual custody before action brought.(d)

If an officer holding an execution, send notice thereof to the debtor, who thereupon avoids the officer when he ostensibly seeks to arrest him, and the officer return a *non est inventus*, it is a false return, for which this action lies.(e)

Though the sheriff under an execution seize goods apparently the property of the debtor, where, by a failure in the consideration for which they were by the debtor obtained, his right to them has ceased,

(y) Salk. 320.
(z) Peak, c. 48, 65.
(a) Wils. I. 42. Hen. Black. I. 543. Ter. Rep. V. 436.
(b) Salk. 12.
(c) Co. V. 52. Vide escape. Com. Rep. 554.
(d) Ter. Rep. II. 126. Johns. Rep.
(e) Esp. Cas. II. 475.

case. the sheriff may return *nulla bona*, and will not be liable for a false return.(*f*)

If a party against whom an officer has a writ, do not abscond, but continues in the daily exercise of his occupation, appears publicly as usual, is visible to any person who comes to him about business, and the officer neglect to arrest him, and return *non est inventus* to the writ, it is a false return, for which an action on the case lies.(*g*)

If the plaintiff request the appointment of a special deputy to serve a particular writ, and nominate such deputy to the sheriff, and the sheriff thereupon depute the person nominated; it is at the risk of such plaintiff; and the sheriff is not liable to such plaintiff for such deputy's not returning the writ; but if the sheriff, when called upon, undertake to return the writ, he binds himself by the return, and is liable for an escape which has already happened.(*h*)

For default of deputy. Case lies against the sheriff, for the default of his deputy in not levying an execution; and for his false return on execution; and for his releasing goods attached; and for his not paying over to the creditor money collected on execution; and for not executing *mesne process*; and for a false return thereon. For deputy's not returning *mesne process*, action on the case lies against the sheriff, as well by the defendant as by the plaintiff. This action lies against the sheriff for an escape of the prisoner from gaol, after judgment, and before he is charged in execution;

(*f*) Ter. Rep. II. 603.
(*g*) Esp. Cas. II. 475.
(*h*) Ibid. 591.

and also for an escape by deputy after arrest and before commitment.(i) CASE.

See escape, direction and service of process, bail, execution.

(i) Esp. Dig. 609.

V. TROVER.

TROVER.

THE sheriff may maintain trover for the taking and conversion of goods, by him seized under an execution.(a)

If the sheriff take the goods of A. instead of B. trover lies.(b) So it lies against an officer for goods attached, but not returned after judgment in favour of the defendant:(c) and so it does, if the judgment be in favour of the plaintiff, and the goods are not taken in execution within sixty days after, and demand has been made by the owner:(d) so it does if the officer convert the goods to his own use pending the suit.(e) Every unlawful meddling with the goods is a conversion.(f) As if he ride a horse by him taken on lawful process; the riding being an unlawful intermeddling. But the officer may milk a cow so taken, for it is for the benefit of the owner.(g) Trover does not lie against a sheriff or other officer for goods taken on execution issued on an irregular judgment.(h) Nor, though there be no judgment on which the execution is founded, if the execution be be good on the face of it.(i)

(a) Lev. I. 282. Esp. Dig. 557.
(b) Bac. Abr. 265.
(c) Root, I. 481. Yelv. 194.
(d) Ibid.
(e) Mod. IV. 212.
(f) Yelv. 194.
(g) Mod, IV. 212.
(h) Stra. 509.
(i) Mod. XII. 178.

VI. TRESPASS.

TRESPASS.

A SHERIFF may maintain trespass for goods seized under an execution, and forcibly taken from him.(*a*)

If a sheriff take the goods of a stranger in execution, though by order of the plaintiff, trespass lies against the sheriff:(*b*) and so it does if he attach the body of one person, for the appearance or debt of another; though by the showing of the party to the suit:(*c*) so it does if the sheriff's deputy take the goods of a stranger either by attachment or execution.(*d*) But if a deputy detain them in custody after a *supersedeas*, trespass lies against the deputy, but not against the sheriff.(*e*)

If the sheriff take a furnace, &c. fixed to the freehold, being part thereof, trespass lies.(*f*) So, if the sheriff do not return his writ after having taken the goods or body of the defendant, the defendant may maintain trespass against the sheriff.(*g*) So trespass lies in favour of A. if arrested instead of B.(*h*)

If a constable under a warrant to search the house of A. B. for stolen goods, pull down the clothes of a bed in which there is a woman, and attempt to search under her shift, it is such an indecent abuse, that he

(*a*) Cro. Eliz. 639.
(*b*) Com. Dig. V. 579. Rol. II. 553.
(*c*) Ibid. 579, 580. Ibid. 552.
(*d*) Ibid. 579. Ibid. 552.
(*e*) Ibid. 579. Ibid. 552. Bl. Rep. II. 382. Wils. III. 309. Doug. 141.
(*f*) Ibid. 579. Ibid. 556.
(*g*) Ibid. 579. Ibid. 563. Co. V. 90. Salk. 409. Cro. Car. 446.
(*h*) Ibid. 579. Ibid. 552.

TRESPASS. is a trespasser from the beginning.(*i*) Trespass lies against an officer, for holding possession of the debtor's goods an unreasonable length of time, without proceeding to complete his levy as the law directs, though seized by virtue of an execution against the owner:(*j*) so it does for breaking outer doors to serve civil process:(*k*) so it does for using goods seized by lawful process; such as riding a horse or drawing him in a team; for he thereby becomes a trespasser from the beginning.(*l*)

Trespass lies against an officer for breaking inner doors to search for a defendant, without previous demand of admittance, and without reasonable ground of suspicion of his being there secreted, and when in fact he was not there: but if the officer know the defendant to be secreted in the house, he may break an inner door to get at him, without any previous demand of admittance.(*m*)

See arrest, attachment, breaking doors, execution, direction and service of process, executions.

(*i*) Bac. Abr. V. 161.
(*j*) Bl. Rep. II. 1208.
(*k*) Cowp. I.
(*l*) Cro. Jac. 148.
(*m*) Bos. et Pul. III. 223.

VII. FALSE IMPRISONMENT.

FALSE IMPRISONMENT.

AN action for false imprisonment lies for every unlawful restraint of liberty, whether abroad or within doors; and every arrest for a civil cause not warranted by legal process, is an unlawful restraint of liberty.(a)

If an officer make an arrest by virtue of process issued from an inferior court, and it appears on the face of the process, that such court hath not jurisdiction, such officer is liable in false imprisonment.(b)

If the sheriff arrest A. instead of B. false imprisonment lies.(c) And that, even if A. tell the officer who makes the arrest that his name is B. To arrest a clergyman under a civil process, either in going to church to perform divine service, or in returning from thence on any day, subjects the officer to false imprisonment.(d) So it does to arrest any person on civil process on Sunday, whether going to church or not.(e) But a prisoner escaped may be retaken on Sunday, either on fresh pursuit, or on an escape warrant;(f) and bail, may on Sunday, retake the principal.(g)

False imprisonment lies for detaining a person under a *capias* or *exigent*, after a writ of *supersedeas* has been delivered to the sheriff.(h) And so it does,

(a) Bac. Abr. V. 169. Co. Lit. 253. Bul. N. P. 22.
(b) Ibid. 169, 170. Co. X. 76. Mod. II. 195.
(c) Ibid. 170. Com. Dig. 493.
(d) Ibid.
(e) Salk. 78.
(f) Ibid. II. 626. Mod. IV. 95.
(g) Mod. IV. 231.
(h) Cro. Jac. 37. Com. Dig. III. 493.

FALSE IMPRISONMENT.

if the plaintiff in the suit whereon such prisoner is held, command the sheriff to discharge him, and the sheriff disobeys such command.(*i*) And likewise, if the sheriff detain such prisoner after a written discharge by the plaintiff in the suit has been delivered to the sheriff.(*j*)

False imprisonment also lies against the sheriff for detaining the prisoner in gaol, after having been admitted to take the oath for poor prisoners, and after the creditor for twenty-four hours had ceased to advance money for the prisoner's support, and after the prisoner had demanded his enlargement.(*k*)

If the order of a court be to confine a prisoner in a certain gaol, the confining him in any other gaol is false imprisonment.(*l*) False imprisonment lies against the sheriff for his deputy's arresting a person on a writ, after the return day is past, the writ being then void, and no authority for the arrest.(*m*)

If an officer, having arrested a man under a warrant of a justice of the peace, suffer the prisoner to go at large, and afterwards retake him under the same warrant, such officer is liable in false imprisonment.(*n*) But if such prisoner voluntarily surrender himself to such officer, he may hold him under such warrant, and will not be liable in false imprisonment.(*o*)

(*i*) Cro. Jac. 379. Com. Dig. III. 493.
(*j*) Ibid.
(*k*) S. C. C. July, 1810. Hubbell, vs. Dimon.
(*l*) Salk. I. 408.
(*m*) Esp. Cas. II. 585. Day. III. 11.
(*n*) Hawk. P. C. II. 81.
(*o*) Ibid.

False imprisonment does not lie against an officer for refusing bail.(p) FALSE IMPRISONMENT.

If a warrant come into Connecticut, from an adjoining state, to arrest the body of the reputed father of a bastard child, and such warrant be backed by a justice of the peace in Connecticut, and a constable of Connecticut thereupon arrest the defendant, and at the line of the state from which the warrant came, deliver the defendant to an officer of that state, false imprisonment lies both against the justice who backed the warrant, and the constable, who in pursuance thereof, took the defendant and delivered him at the line of the state.(q)

False imprisonment does not lie against an officer, for detaining a prisoner a reasonable length of time, after a discharge comes from the plaintiff, in order to be satisfied of the authenticity aud validity of the discharge. And twenty four hours, as the case may be, is not an unreasonable length of time.(r)

False imprisonment lies against a constable for detaining a person taken up and brought by a watchman to the watch-house, for using loud words in the street.(s) But if the constable, on the delivery of such prisoner, do not take him into custody, nor so much as tap him on the shoulder, saying "you are my prisoner," false imprisonment will not lie.(t)

False imprisonment does not lie against a constable for taking into custody a stranger, who encourages

(p) Com. Dig. III. 493.
(q) Root, II. 152.
(r) Esp. Cas. I. 45.
(s) Ibid. 294.
(t) Ibid. 431.

FALSE IMPRISONMENT.

a prisoner then in custody of such constable, to retist. For when a man is in the custody of an officer of justice, no other person has a right to interfere; and if he do it, so far makes himself an accomplice, as to justify taking him into custody also.(u)

False imprisonment lies against an officer for an arrest, under colour of an execution, after the return day of the same.(v)

See attachment, arrest, bail, execution, breaking doors, direction and service of process, and trespass.

(u) Peak, Cas. 89.
(v) Day, III. 1.

BOOK II.

OF FORMS.

CHAP. I.

FORMS OF RETURNS.

I. SUMMONS.

Sureties of prosecution, { *John Doe,* / *Richard Roe.*

Summoners of the within named J. S. defendant, { *Wm. Brown,* / *Robt. Woodward.*

A. C. Sheriff.

Sureties of prosecution, { *John Doe,* / *Richard Roe.*

The within named J. S. has nothing in my bailiwick by which he may be summoned.

A. B. Sheriff.

The within named J. B. (the plaintiff,) hath not found (or procured) sureties of prosecution to me.

A. B. Sheriff.

This writ came so late to me, that on account of the shortness of the time, I could not make service thereof.

A. B. Sheriff.

Hampshire, ss. July 11th, 1810.

By virtue of this writ, to me directed, I have summoned the within named J. S. for his appear-

SUMMONS.

ance at court, by reading this writ to him in his presence and hearing.

O. P. Sheriff.

Fees.

Another in Massachusetts, Connecticut and Rhode-Island.

Massachusetts, Connecticut, and Rhode-island.

By virtue of this writ, to me directed, I have summoned the within named J. S. for his appearanceat court, by giving him a true and attested copy of this writ.

R. T. Deputy Sheriff.

Another.

By virtue of this writ, to me directed, I have summoned the within named J. S. for his appearance at court, by leaving a true and attested copy of this writ at his last and usual place of abode.

S. W. Sheriff.

Another in New-Hampshire.

New-Hampshire.

By virtue of this writ, to me directed, I have summoned the within named J. S. to appear at court, as by this writ is required, by leaving an attested copy therof, with a copy of the service endorsed, at the last and usual place of abode of the said J. S.

E. F. Deputy Sheriff.

Another, in Vermont.

Vermont.

By virtue of this writ, to me directed, I have summoned the within named J. S. to appear at court, as by this writ is required, by delivering to him a true and attested copy of said writ, with a copy of

the service thereof thereon endorsed, *(or as the case may require,)* by leaving a true and attested copy of said writ, with a copy of the service thereof thereon endorsed, at the house of his usual abode, in said county, with one C. D. a person resident therein, and of sufficient discretion: *(or, if the case so require,)* by leaving a true and attested copy of said writ at the house of his then usual abode in said county, on a table in the common keeping room, in fair view, with a book laid on one end thereof, in such situation as that the said J. S. will most probably receive it. SUMMONS.

G. H. Sheriff.

II. ON A CAPIAS, ALIAS, PLURIES, AND ATTACHMENT.

Non est inventus.

CAP. ALI. PLUR. & ATTACH. Non est.

The within named A. B. is not found in my bailiwick.

C. D. Sheriff.

Another.

The within named A. B. and E. F. are not, nor is either of them found in my bailiwick.

C. D. Sheriff.

Cepi corpus.

Cepi corpus.

By virtue of this writ, to me directed, I have taken the body of the within named J. S. whose body I have ready before the justices, (or before the court,) at the day and place mentioned, as within to me is commanded.

C. D. Sheriff.

Supersedeas.

Supersedeas.

By virtue of this writ, &c. I arrested, &c. and afterwards, on the —— day of ——, under pretext, and by virtue of a certain other writ to me directed, and annexed to this writ, I caused the said C. D. to be liberated from the prison. And therefore I cannot have the body of the said C. D. before the justices of said court (or before said court,) at the day and place mentioned, as by this writ to me is commanded.

C. D. Sheriff.

Rescue.

Rescue.

By virtue of this writ to me directed, I arrested the body of the within named C. D. and he, having neglected to procure (or find) sufficient bail, I was proceeding with him the said C. D. to commit him to the keeper of the gaol in ——, in said county, within the prison; when at ——, in said county, J. S. H. I. F. R. and N. W. all of ——, in said county, on the —— day of ——, at said ——, with force and arms: viz. with guns, swords, staves, and stones, upon me came, and assault made; and me with like force and arms did beat, bruise, wound, and evilly entreat; and then, and there, the said J. S. H. I. F. R. and N. W. with like force and arms, the same C. D. did rescue, and take out of my custody, against my will. And the said C. D. has not been since found, though diligent search to find him the said C. D. has been constantly made by me, throughout my bailiwick.

X. Y. Sheriff.

Languidus.

By virtue of this writ to me directed, I arrested the body of the within named C. D. who then was, at the time of his arrest, and still on this —— day of ——, the last return day of this writ, is so sick, that, for fear of his death, I cannot have him before the justices of said court, (or before said court,) according as is by this writ required.

Another.

Languidus.

By virtue of this writ to me directed, I arrested the body of the within named C. D. who is vexed with so many and so great infirmities of body, that I

CAP. ALI. PLUR. & ATTACH. cannot have him before the justices of said court, (or before said court) according as is by this writ required, without great danger of his death, on account of the weakness of his body.

S. T. Coroner.

Cepi, and Mortuus est.

Cepi, and mortuus est. By virtue of this writ to me directed, I arrested the body of the within named C. D. and held him in custody; until, on the —— day of ——, he, the said C. D. died, by reason of sickness, of a disease called the ——; *(or)* died by his own felony: *(or)* was murdered by one J. S. *(or)* was murdered by some person unknown; *(or)* died by misfortune of choaking in attempting to swallow his food; wherefore I cannot have the body of the said C. D. before, &c.

E. D. Sheriff.

Nulla Bona, and Non Est Inventus.

Nulla bona and non est. By virtue of this writ to me directed, I have made diligent search throughout my bailiwick, but have not found either any goods or chattels or estate of the within named C. D. nor his body, whereon to make service of this writ, as therein required.

A. B. Sheriff.

Nulla Bona, Cepi Corpus, and Bail.

Nulla bona, cepi corpus, and bail. By virtue of this writ to me directed, having made diligent search throughout my bailiwick, for goods and chattels of the within named C. D. to be attached on this writ; and finding none, I attached the body of the said C. D. [and read this writ in his hearing] and have taken sufficient bail for his appearance at court.

C. D. Constable.

Nulla Bona, Cepi Corpus, and Committitur.

Nulla bona, cepi corpus, and committitur.

By virtue of this writ to me directed, for the want of goods or estate of the within named defendant, to be found within any precincts, I attached his body, and [read this writ in his hearing, and] he having neglected, (*or* refused) to find sufficient bail for his appearance at court, according as is by this writ required, I [by virtue of a lawful *mittimus* issued by J. R. justice of the peace for the county of ——] committed the said defendant to the keeper of the gaol in ——, in said county, within the prison.

E. F. Deputy Sheriff.

Cepi Corpus, and Committitur.

Arrest and commitment.

By virtue of this writ to me directed, I arrested the body of the within named J. S. and he having neglected to procure sufficient bail for his appearance at court, and answer the suit, and to abide the order and judgment thereon, I committed the said J. S. to the common gaol in ——, in said county, and left an attested copy of this writ, and of my proceedings thereon, with the keeper of said prison.

F. F. Deputy Sheriff.

Cepi Corpus, and Bail.

Arrest and Bail.

By virtue of this writ to me directed, I arrested the body of the within named J. S. and read the writ in his hearing, and took bail for his appearance at court, to answer to the suit.

E. M. Sheriff.

CAP. ALI. PLUR. & ATTACH.

Another in Massachusetts, New-Hampshire, Vermont, and Rhode-Island.

Arrest and bail.

By virtue of this writ to me directed, I arrested the body of the within named defendant, and at his request delivered him an attested copy of this writ, and have taken bail for his appearance to answer the suit, and to abide the order and judgment of the court thereon.

S. B. Sheriff.

Arrest, Release and Attachment of Goods.

The release of body, and attachment of goods tendered.

By virtue of this writ to me directed, and for want of sufficient goods or estate of the defendant, then to be found in my bailiwick, I arrested the body of the within named J. S. and he having neglected to procure sufficient bail, I was proceeding on my way to the common gaol in ——, in said county, by virtue of a lawful *mittimus* issued by J. B. justice of the peace for said county, him the said J. S. to commit, to the keeper of said gaol, within the prison, when the said J. S. offered and tendered to me, to be taken on said writ, in discharge of his body, one pair of oxen, five cows and ten sheep, all of sufficient value to answer the demand in said writ, and the proper goods and chattels of the said J. S.; whereupon I released* the body of the said J. S. from his said arrest, and by virtue of said writ, attached the said one pair of oxen, five cows, and ten sheep, and delivered to him the said J. S. a true and attested copy of this writ, and of my doings above stated thereon endorsed.

H. B. Sheriff.

* *Quære*—If a constable carrying a prisoner to gaol, can, after passing the limits of his town, release the body, and take goods in a town of which he is not a constable.

On Attachment of Goods and Chattels, in Massachusetts and New-Hampshire. CAP. ALI. PLUR. & ATTACH.

Hampshire, ss. June 18th, 1809.

By virtue of this writ to me directed, I attached one hogshead of rum, three barrels of molasses, and three horses, all the proper goods and chattels of the within named J. S. and at the same time gave him a summons for his appearance at court, as in said writ is required. Goods and chattels attached and held in Massachusetts & New-Hampshire.

O. P. Sheriff.

In Connecticut.

County of ——, ss. Windsor, May 8th, 1810.

By virtue of this writ to me directed, and by direction of the plaintiff, therein named, I attached one coach and harness, two chaises, and eight horses, all the proper goods and chattels of the within named defendant, and on the same day delivered to him, (or left at his usual place of abode *as the case may be*) a true and attested copy of this writ, and of my doings above stated thereon endorsed. The same in Connecticut.

J. F. Deputy Sheriff.

In Vermont.

By virtue of this writ to me directed, I have attached five tons of cheese, and three hundred bushels of wheat, all the proper goods and chattels of the within named defendant, and have delivered to him a true and attested copy of this writ, and of the list of the articles attached thereon, as above stated, (or have left a true and attested copy of this writ, and of the list of the articles attached thereon as above stated, at his then usual place of abode, *&c. as in the* The same in Vermont.

CAP. ALL. PLUR. & ATTACH.

service of summons) (or if the defendant, whose goods are attached is not an inhabitant of this state) have left a true and attested copy, &c. with C. D. the agent (or attorney *as the case may be*) of said defendant *(or if no agent or attorney to such defendant be known, then)* have left a true and attested copy of this writ, &c. at ——, the place where such goods and chattels were by me so attached.

X. Y. High Bailiff.

In Rhode-Island.

The same in Rhode-Island

I certify, that having by virtue of this writ to me directed, used my best endeavours to arrest the body of the within named defendant, and not being able to find the same within my precincts, I have attached one schooner called the Janeiro of Providence, with her furniture, tackle, apparel and boat, the proper goods and chattels of the defendant, and at the same time left an attested copy of this writ and my doings thereon, at the defendant's usual place of abode in ——, in the county of ——, with one C. D. then and there being.

S. W. Sheriff.

Another in Massachusetts.

Bank shares in Massachusetts.

By virtue of this writ to me directed, I attached twenty-five shares in the [*here describe the bank*] the property of, and belonging to, the within named J. S. and left an attested copy of this writ with C. D. cashier of said bank, and delivered to the said J. S. (*or* left at the last and usual place of abode of the said J. S.) a summons for his appearance at court.

K. L. Coroner.

Another in Massachusetts.

Turnpike, &c. shares. in Massachusetts.

By virtue of this writ to me directed, I attached ten shares in the stock of the [*here describe the Turnpike, Bridge, Canal, or other Company*] the property of the within named J. S. and left an attested copy of this writ with A. B. clerk of said company, and also left a like copy with C. D. treasurer of said company, and delivered to the said J. S. (*or*) left at the last and usual place of abode of the said J. S. (*as the case may be*) a summons for his appearance at court.

M. N. Sheriff.

Another in Massachusetts.

Foreign attachment in Massachusetts.

By virtue of this writ to me directed, I attached one horse and one sleigh, the property of the within named J. S. the principal, and at the same time, summoned him to appear at court, by reading this writ in his presence. And on the same day I summoned the within named S. C. and R. W. the trustees, to appear at court, by delivering an attested copy of this writ to the said S. C. and by leaving an attested copy thereof, at the last and usual place of abode of the said R. W.

H. L. Deputy Sheriff.

Another, and Rescue.

Goods and chattels attached and rescued.

By virtue of this writ to me directed, on the —— day of ——, at ——, in the county aforesaid, I attached one horse, two oxen, and three cows, all the proper goods and chattels of the within named C. D. [and delivered to him a true and attested copy of this writ, and of my proceedings above stated, thereon endorsed;] and the same horse, oxen, and cows, in

CAP. ALI. PLUR. & ATTACH.

my possession, then and there had and held, until afterwards on the —— day of ——, at —— in said county, one certain R. W. of ——, in said county, and S. T. of ——, in said county, jointly with force and arms, to wit: guns, swords, staves, sticks, and stones, an assault upon me made, and me did then and there beat, bruise, wound, and evilly entreat. And then and there the said R. W. and S. T. with like force and arms, the same horse, oxen, and cows, in my custody as aforesaid, then and there being, did take away and rescue against my will. And I have not, nor can have, the said horse, oxen, or cows, nor any of them, to answer the demand in the writ contained. And the said C. D. has no other or more goods or chattels within my bailiwick to be found to be attached to answer said demand in said writ mentioned.

W. M. Sheriff.

On Attachment, and Proclamation.

By virtue of this writ to me directed, I have caused public proclamation to be made in my bailiwick, that the within named J. T. be and appear on the day and at the place within written as I am within commanded; and I further certify, that the within named J. T. is not found in my bailiwick.

Protected by an Ambassador.

The within A. B. at the time of the delivery of this writ to me, to wit, on the —— day of ——, A. D. ——; and from that time until the return of said writ, was in the service of ——, plenipotentiary from ——, to the government of the United State of America, as the secretary of the said plenipotentiary; therefore, I cannot have the body of the said A. B.

before the court (or justices of the court) of, &c. at the day and place in the within writ mentioned, as within I am commanded. CAP. ALL. PLUR. & ATTACH.

Of a Grand Cape.

By virtue of this writ to me directed, I have, by A. B. and T. W. good and lawful men of my bailiwick, given notice to the within named T. F. to be and appear before the justices of the court of ——, at ——, at the time and place within mentioned, and as I am within commanded, I have taken by the view of G. T. and J. O. honest and lawful men of my county, the land and premises within mentioned, as also I am within commanded. Grand cape.

The execution of this writ appears in a certain schedule hereto annexed.

Live Stock attached, and dead.

By virtue of this writ to me directed, and by the direction of A. B. the within named plaintiff, I attached twenty-five merino sheep, the proper goods and chattels of J. Y. the within named defendant, and left with him the said J. Y. a true and attested copy of this writ, and of my doings above stated thereon endorsed, and held the same twenty-five sheep in my custody until the —— day of ——, when at said ——; the said sheep, each and every of them, died by reason of sickness. And the said J. Y. had no other or more goods or chattels within my bailiwick to be found, before the time by law limited for the service of this writ had expired. Live stock attached.

R. W. Sheriff.

CAP. ALI. PLUR. & ATTACH.

Another in Connecticut.

Bank shares in Connecticut.

By virtue of this writ to me directed, and by direction of the within named plaintiff, I attached seven shares, the property of the within named defendant, in the [*here describe the bank*] by leaving a true and attested copy of this writ, with my doings thereon endorsed, with N. F. cashier of said bank: and on the —— day of ——, at ——, in ——, I left with the within named defendant (*or* left at the usual place of abode of the within named defendant *as the case may be*) a like copy of this writ, with my doings thereon endorsed.

N. O. Sheriff.

Another.

Turnpike, &c shares in Connecticut.

By virtue of this writ to me directed, I attached nine shares, the property of the within named defendant, in the [*here describe the turnpike or other company or corporation*] by leaving a true and attested copy of this writ, with my doings thereon endorsed with G. H. secretary (or clerk *as the case may be*) of said company: and on the —— day of ——, at ——, in ——, I left a like copy at the place of the usual abode of the within named defendant.

F. T. Sheriff.

On Foreign Attachment.

Foreign attachment in Connecticut.

By virtue of this writ, to me directed, I summoned the within named defendant, by leaving a true and attested copy thereof at his last usual place of abode in this state; and attached the goods and effects of the defendant in the hands of C. D. within named, as agent, trustee, factor, and debtor, to said defendant, by leaving a true and attested copy of this writ,

at the usual place of abode of the said C. D. —— fourteen days before the time of trial. CAP. ALL. PLUR. & ATTACH.

F. G. Constable.

Another in Connecticut, where the defendant was never an inhabitant nor resident in this state.

Another in Connecticut.

By virtue of this writ to me directed, I attached the goods and effects of the within named defendant, in the hands of F. G. within named, as agent, trustee, factor, and debtor, to said defendant, by leaving a true and attested copy of this writ, at the usual place of abode of the said F. G. fourteen days before the time of trial.

P. Q. Constable.

On attachment of lands in Massachusetts and New-Hampshire.

Attachment of lands in Massachusetts.

By virtue of this writ to me directed, I attached all the right, title, and interest, of the within named F. G. the defendant, to one certain piece or parcel of land, lying and being situate in ——, in the county of ——, containing by estimation —— acres, bounded *(here give a general description of the bounds of the land attached,)* with a dwelling house and barn, thereon standing. And left at the last and usual place of abode of the said F. G. a summons for his appearance at court.

G. Y. Sheriff.

In Connecticut.

The same in Connecticut.

By virtue of this writ to me directed, and by direction of P. B. the within named plaintiff, I attached all the right, title, and interest of the within named F. G. the defendant, to one certain piece or parcel of land, containing by estimation, —— rods of ground,

CAP. ALI. FI. SU. & ATTACH.

bounded as follows, viz. *(here give a general description of the bounds)* with a large store thereon standing, all situate lying and being in ——, in said county. And on the —— day of ——, I left with the said F. G. (or I left at the usual place of abode of the said F. G. at ——, in —— this state, *as the case may be,)* a true and attested copy of this writ, and of my doings above stated thereon. And on the —— day of ——, I also left a true and attested copy of this writ, and a description of the said estate taken thereon, at the town clerk's office, in said ——, where the estate attached lies.

T. J. Sheriff's Deputy.

Another, in Vermont.

Vermont. By virtue of this writ, to me directed, and by direction of B. Q. the within named plaintiff, I attached five acres of land, the estate of the within named defendant, situate in ——, in said county, and bounded as follows, *(here set out the bounds as nearly as conveniently may be,)* and delivered to the said defendant, (or left at the dwelling house of said defendant, or at the last and usual place of abode of said defendant,) in said —— a true and attested copy of this writ, with the above description of the estate attached endorsed thereon. And I also on the —— day of ——, left a like copy of this writ, and of the description of the estate attached endorsed thereon, with one P. F. town clerk of the said town of ——, *(or if there be no town clerk in said town, then)* at the office of W. D. county clerk, of said county of ——.

J. L. Sheriff.

Another, in Rhode-Island.

Rhode-island. I certify, that neither the body of R. B. the within named defendant, nor his personal estate can

be found within this state; and that by virtue of this writ to me directed, and at the request of W. C. the the plaintiff within named, I have attached all the right, title, and interest, of the within named B. B. in and to one piece of land in ——, in said county, containing by estimation —— acres, bounded—*(here set out the bounds so that the land may be found and known,)* with a large building erected for a distillery standing thereon: And that I have left with J. S. of said ——, the person in possession of the above attached estate, an attested copy of this writ, and of my doings thereon: And that I also have left with P. F. the town clerk in said ——, the town in which said attached estate lies, a like copy of this writ, and of my doings thereon. CAP. ALL. PLUR. & ATTACH.

T. M. Sheriff.

N. B. If there be no person in possession of the attached premises, the officer attaching the same, must, in his return, instead of saying, "*I have left with J. S. of ——, the person in possession of the attached estate, an attested copy of this writ, and my doings thereon,*" say, "*I have set up a notification of such attachment of said premises at ——, and a like notification at ——, and a like notification at ——, three public places in said ——, where such estate lies;*" and have left an attested copy of this writ and of my doings thereon, with P. F. the town clerk, &c.

III. ON SCIRE FACIAS.

SCIRE FACIAS. BY virtue of this writ to me directed, by P. Q. and T. Y. honest and lawful men of my bailiwick, I made the within named F. G. senior, and F. G. junior, to know, that they be before the justices of the court within described, at the day and place within mentioned, to show, &c. as I am within required.

Another.

By virtue of this writ to be directed, by J. Y. and J. U. honest and lawful men of my bailiwick, I made M. R. the holder of the goods and chattels of the within named P. Q. at the time of his death, to know, that he before the court of exchequer, at the day and place within mentioned to be holden, to show, &c. as I am within required. And I further certify, that there are no executors to *the last will and testament* of the aforesaid P. Q.; nor are there any administrators; nor were there any other holders of goods or chattels of the same P. Q. at the time of his death; nor are there any heirs or tenants; nor is there any heir or tenant of the lands or tenements, which belonged to the same P. Q. on the day and year in which, &c.

Another.

I certify, that the within named P. Q. hath nothing in my bailiwick, by which I can make him to know, nor is he found in the same.

L. M. Sheriff.

IV. ON DISTRINGAS AGAINST DEFENDANT.

THE within named L. M. has nothing in my bailiwick, by which he can be distrained. DISTRINGAS.

B. Y. Sheriff.

Another.

The within named C. D. has nothing in the lands, tenements, and hereditaments, within mentioned, by which I can distrain him.

B. Y. Sheriff.

Another.

§ 3. § 3.

F. G. and L. M. are distrained, and each of them is distrained by their lands and chattels, according to the form of this writ, whence their issues, as appear above. And they are mainperned, and each of them is mainperned, by himself, viz. J. D. J. F. P. H. that they, and every of them, may be at the day and place within written, according to the tenor of this writ.

L. M. Sheriff.

Another.

A. who was wife of B. R. within named, executrix of the last will and testament of C. D.

§ §

B. R. J. S. another executor of the last will and testament of C. D. and J. S. the third executor of

DISTRINGAS. the last will and testament of C. D. aforesaid, are distrained, and every of them is distrained, by himself separately, according to the form of this writ, from whence their issues appear as above. And every of them is mainperned by himself, viz. by four mainpernors, by name A, B, C, and D. And there are not any more executors of the same last will and testament of said C. D. nor were his heirs in the county of ——, as by any means can at present be discovered. Distraint is by chattels to the value of —— in the whole.

L. M. Sheriff.

Sureties of prosecution, { J. B. / R. R.

Another.

I certify, that there are not any executors of the last will and testament of the said C. D.; nor any administrators of his goods and chattels, nor any heirs, nor tenants of his lands within my bailiwick, whom I can distrain, as is by this writ required and commanded.

T. M. Sheriff.

V. ON VENIRE FACIAS AGAINST A DEFENDANT.

THE within named J. G. has nothing in my bailiwick, by which he can be attached, or whereby I can summon him. VENIR.FAC.DEF.

A. B. Sheriff.

By virtue of this writ to me directed, I have made the within named J. L. to come before the justices within named, at the day and place within mentioned, as I am by this writ required.

The within named J. B. is attached by sureties:

viz. { *Richard Hobson,* / *Nathaniel Dobson.*

A. B. Sheriff.

VI. OF VENIRE FACIAS OF JURORS.

THE execution of this writ, appears in a certain pannel hereunto annexed. VENIR.FAC.JUR.

L. M. Sheriff.

Names of the jurors between A. B. plaintiff, and L. M. defendant, in a plea of trespass.

P. F. of A. Gent. } *and thus to the whole num-*
R. B. of B. Yeoman. } *number required.*

Each of the jurors aforesaid, by himself, separately is attached by sureties. } *J. D.* / *R. R.*

Issues of each 20*s*.

T. M. Sheriff.

VII. HABEAS CORPUS JURATORUM.

HAB.CORP.JUR. THE execution of this writ appears in a certain pannel hereunto annexed.

Names of the jurors between A. B. plaintiff, and C. D. defendant, in a plea of debt.

A. B. of L. Gent. } *and thus to the whole number*
C. D. of M. Yeoman, } *the writ requires.*

Each of them is by himself separately attached by sureties. } *J. D.* *R. R.*

Issues of each of them 20*s.* (*or more, as the writ requires.*)

VIII. OF DISTRINGAS OF JURORS.

THE execution of this writ appears in a certain pannel hereto annexed.

P. F. of A. Gent. } *And thus of all the writ*
J. L. of H. Yeoman, } *requires.*

Manucapators of the aforesaid jurors of each of them, { *J. D.* *R. R.*

Issues of each of them 20*s.* (*or more, as the law requires.*)

Another.

As to J. L. and the other jurors to be distrained, to be before the justices, &c. at the day and place within mentioned, I certify that this writ was so late delivered to me, that I could not execute it by reason of the shortness of the time.

T. M. Sheriff.

IX. OF EXIGENT.

EXIGENT.

BY virtue of this writ to me directed, at my county court held at the court house in —— in my said county, on the —— Monday in —— A. D. —— J. S. and the other defendants *(if there be more than two)* within named, were first exacted and did not appear, nor did either of them appear. And at any county court there held on the —— Monday of —— A. D. ——, the said J. S. and the rest of the defendants within named, were a second time exacted, and did not appear, nor did either of them appear; and at my county court there held on the —— Monday of —— A. D. —— the said J. S. and the rest of the defendants within named, were a third time exacted but did not appear, nor did either of them appear; and at my county court there held on the —— Monday of —— A. D. —— the said J. S. and the rest of the defendants within named, were a fourth time exacted and did not appear, nor did any one of them appear; and at my county court there held on the —— Monday of —— A. D. ——, the said J. S. and the rest of the defendants within named were a fifth time exacted and did not appear, nor did any one of them appear. Therefore the said J. S. and *(name them all)* the rest of the defendants within named, according to the statute law of this state are outlawed, and every one of them is outlawed. *(Or)*—Therefore the said J. S. and *(name them all)* the rest of the defendants within named by the judgment of B. M. and O. P. coroners of said county are according to the statute, *&c. (as before.)*

A. B. Sheriff.

Another, with supersedeas.

By virtue, &c. at any county court held at &c. on &c. the aforesaid J. S. was a fourth time exacted and appeared and produced and delivered to me a writ of *supersedeas*, and which writ of *supersedeas* is to this writ annexed, by which the execution of this writ further to be done, is altogether superseded, as is to me commanded in the same writ of supersedeas.

A. B. Sheriff.

Another.

By virtue, &c. at my county court there held on the —— Monday of —— A. D. ——, the aforesaid, J. S. and the rest of the defendants within named were a fourth time exacted, at which day the aforesaid J. S. appeared and rendered himself to the prison, &c. and whose body I have ready before the justices of the court within written, at the day and place within named, as is to me within commanded; but the rest of the defendants within named, did not appear. Therefore, &c. *(as before.)*

A. B. Sheriff.

Another.

At my county court, &c. the aforesaid J. S. appeared, and rendered himself to the prison, within the county aforesaid and in the same prison now remains sick, detained by various infirmities, so that on account of the weakness of his body and the danger of his death, he cannot be removed, and for that cause I cannot at present have the body of the said J. S. before the justices within named, (or described,) at the day and place within contained, (or specified,) according to the form of this writ, &c.

A. B. Sheriff.

EXIGENT.

Another.

By virtue, &c. at my county court there held on the —— Monday of —— A. D. ——, the aforesaid J. S. R. A. D. B. and O. L. were a fifth time exacted, and the said J. S. rendered himself to the prison in the county aforesaid, whose body I have, &c. to do that which the aforesaid writ exacts, and requires of him. And the aforesaid R. A. appeared and produced to me a writ of supersedeas to this writ annexed, therefore I could not proceed further against him. And the aforesaid D. B. is dead and the aforesaid O. L. is outlawed, &c.

A. B. Sheriff.

X. OF A WRIT OF PROCLAMATION UPON AN EXIGENT.

PROCLAMATION UPON EXIGENT.

BY virtue of this writ to me directed, at my county court, held at the court house in the county of —— on the —— day of ——, I, in open court first made proclamation, and at the court of general sessions of the peace held at —— in the county of —— where the said J. S. resided at the time of awarding said writ of exigent, on the —— day of —— A. D. —— I, a second time made proclamation. And at (or near) the most usual door of the church in said —— where the said J. S. resided, at the time of awarding the exigent *(or if there be more than one church in said town, then)* the most usual door of the church, nearest the dwelling of the said J. S. in said —— *(and if there be no church in said town, then)* the most usual door of the church, in the next town, nearest the dwelling of the said J. S. (there being no church in the town wherein there was the dwelling of the said J. S.) upon a Sunday immediately after divine service *(if any there be)* one month at the least before the within named J. S. was a fifth time exacted, I, a third time made proclamation that the within named J. S. render himself to me, so that I may have his body before the justices within named *(or described)* at the day and place within contained, *(or mentioned)* as the writ enjoins and requires.

A. B. Sheriff.

XI. OF REPLEVIN.

REPLEVIN. Sureties for prosecution and return, if return shall be adjudged. { *John Doe,* *Richard Roe.*

By virtue of this writ, &c. on the —— day of ——, A. D. ——, I made replevin to the within named T. R. of the cattle within specified, which the within named T. R. and J. N. had taken, and unjustly detained, according to the form of this writ, as within to me is commanded.

L. M. Sheriff.

Another.

Eloigned. I certify that before the coming of this writ to me, the beasts in this writ specified, were eloigned to places to me unkown, by the within named J. T. so that I could by no means make replevin of said beasts within described, as within to me is commanded.

L. M. Sheriff.

Another.

I certify that no one on the part of the said J. K. came to show to me how many, and what cattle of the said J. K. the said T. N. and others had taken and unjustly detained. Therefore the cattle of the aforesaid J. K. I could not replevy to him.

L. M. Sheriff.

Another.

I certify that on the —— day of —— A. D. ——, at ——, in said county, this writ, and two other

writs, at one and the same time, were delivered to me. And by virtue of this writ, I went to ——, in my county, where the cattle within described were, to replevy the same cattle to the within named A. B. And the within named J. T. and the within named T. N. as the bailiff of the said J. T. claimed the property of the cattle aforesaid, to be the proper cattle of the aforesaid J. T. and therefore I could not replevy those cattle to the aforesaid A. B. according as this writ requires.

REPLENIN. Replevin of property by third person.

L. M. Sheriff.

Another in Massachusetts, New-Hampshire, Vermont, and Rhode-Island.

By virtue of this writ to me directed, I have replevied the within described goods and chattels (or cattle) to him the said A. B. and have taken bond of the said A. B. with sufficient sureties for prosecution of this writ, and return of said goods and chattels (or cattle) if return shall be adjudged. And have summoned the said J. T. for his appearance at court, by reading this writ in his presence (or hearing, or to him) *or* by leaving a true and attested copy of this writ, at his dwelling-house, or usual place of abode in said ——, (*or* at his last and usual place of abode, &c.)

Another in Connecticut.

By virtue of this writ to me directed, I have replevied to him the said A. B. his cattle within described, and have read this writ in the hearing of A. M. the within named defendant (or have left a true and attested copy of this writ at his usual place of abode in ——.)

T. N. Sheriff (or Constable.)

XII. RETORNO HABENDO, AND SECOND DELIVERANCE.

SECOND DELIVERANCE.

Retorno habendo.

I certify that before the coming of this writ to me, the cattle within specified were eloigned by the within named J. T. to places to me unknown, so that I could by no means cause the said beasts to be returned, as within to me is commanded.

L. M. Sheriff.

Second deliverance.

By virtue of this writ to me directed, I have caused to be delivered to the within named L. his cattle within mentioned.

XIII. OF WITHERNAM.

WITHERNAM.

By virtue of this writ to me directed, I have taken one silver tankard, and one gilt tea-urn, and one horse, the proper goods and chattels of J. T. in this writ named, in withernam; and the same tankard, tea-urn, and horse, have caused to be delivered to the within named A. B. to be held by him the said A. B. until the aforesaid J. T. will deliver the chattels within described, to him the said A. B.; and I further certify, that the aforesaid J. T. in this writ named, has no other goods nor chattels, which can be taken in withernam, and by which he can be attached according to the tenor of this writ.

L. M. Sheriff.

Another.

By virtue of this writ, &c. I have taken in withernam, at ——, in the county aforesaid, two cows, the proper beasts of the within named J. T. and two cows the proper beasts of the within named F. G. to the value of ——, which several beasts I have caused to be driven and conducted into a certain place at ——, in the county aforesaid, there to be kept in sure and safe custody, according to the requirement of this writ, where the cattle aforesaid lie. And the said J. T. and F. G. have no more, nor other cattle at present in my bailiwick, which I can by any means take in withernam, as within to me is commanded.

L. M. Sheriff.

Another.

By virtue, &c. I took two cows and two calves, the cattle of the within named J. T. which I have caused

WITHERNAM. to be delivered to the within named A. B. to be safely and surely kept, until I can deliver to the said A. B. his cattle within specified, before taken and eloigned to places unknown to me, as in this writ I am commanded.

L. M. Sheriff.

Another.

The within C. D. has no cattle in my bailiwick, which I can take in withernam according to the requirement of this writ, (nor has he any thing else in my bailiwick, by which he can be attached,) nor is he found in the same.

L. M. Sheriff.

Another.

There are no goods nor chattels of the within named C. D. which I can take in withernam, therefore the aforesaid C. D. is mainperned by J. D. and R. R.

L. M. Sheriff

IV. OF EXECUTION AGAINST THE BODY.

Cepi corpus.

By virtue of this writ to me directed, I have taken the body of the within named C. D. and have him ready at the day and place within specified. CA. SA. Cepi corpus.

A. B. Sheriff.

Another.

By virtue of this writ to me directed, I have taken the body of the within named C. D. and have his body ready at the day and place within named, as by this writ I am commanded.

A. B. Sheriff.

Non est inventus.

The said C. D. is not found within my bailiwick. Non est.

A. B. Sheriff.

Another.

The said C. D. is not found within my bailiwick, so that I cannot have him before the justices of the court at the day and place within named as by this writ is required.

A. B. Sheriff.

Cepi corpus, and mortuus est.

By virtue of this writ to me directed, I arrested the body of the within named C. D. who, on the —— day of died of his own felony; (*or*) who Mortuus est.

CA. SA. died of sickness, while in my custody; (*or*) who died by murder by one J. N; (*or*) who died of misfortune by drinking cold water, while in my custody.

A. B. Sheriff.

Cepi corpus, and payment.

Payment. I have taken the body of the within named W. D. and him detained in custody, until he paid the debt and damages within mentioned; which debt and damages I paid to the plaintiff within named, and immediately afterwards discharged the said W. D. out of custody.

Cepi corpus, and rescue.

Rescue. By virtue of this writ to me directed, I arrested the body of the within named C. D, and had him in my custody till on the day of he was rescued by a body of public enemies, (*here describe the manner of the rescue, and the enemies which made the rescue, and how,*) so that I cannot have him at the day and place, before the said justices of the court, (*or*) before the court, at the day and place within named as by this writ is required.

A. B. Sheriff.

Cepi corpus, and escape.

Escape. By virtue of this writ to me directed, I arrested the body of the within named C. D, and had and held him in my custody, in the common gaol at —— in the county of ——, when said gaol was struck by lightning, which set the gaol on fire, and an opening made in the side thereof, from which said C. D. escaped, against my will so that I cannot, &c.

A. B. Sheriff.

Another, in Massachusetts and New-Hampshire. Nulla bona, cepi corpus, and committitur. CA. SA.

By virtue of this execution to me directed, and for want of goods, chattels or estate of the within C. D. shewn to me, or to be found within my precincts, to the acceptance of the said A. B. to satisfy the same, I have taken the body of the said C. D. and him committed to the gaol of this commonwealth, (or state) in ——, in said county, and at the same time I left an attested copy of this execution, with the gaoler thereof. Committitur.

E. M. Deputy Sheriff.

Another, in Connecticut and Vermont.

By virtue of this execution to me directed, I repaired to the usual place of abode of C. D. the within named debtor, and there made demand of the debt or sum due on this execution, with all necessary charges of executing the same, and the said C. D. neglecting to pay and satisfy this execution, and for want of personal or moveable estate of the said C. D. shown to me, or to be found within my precincts, to satisfy said execution, I took the body of the said C. D. and on the day of him committed to the keeper of the gaol in —— in the county of —— within the prison, and then and there left with the said keeper a true and attested copy of this execution, and of my doings thereon. The same in Connecticut and Vermont.

A. H. Constable.

Another, in Rhode-Island.

By virtue of this execution to me directed, for want of money, goods or chattels of C. D. the within named debtor, to be found within my precincts, for The same in Rhode-island.

CA. SA.

the satisfying this execution, I arrested the body of the said C. D. and committed him to the keeper of the common gaol, in ——, in said county, within the prison, and left with the said keeper, a true and attested copy of this execution, and of my return above thereon.

A. B. Sheriff.

XV. OF FIERI FACIAS, OR EXECUTION AGAINST GOODS AND CHATTELS.

Nulla bona.

The within named M. B. has no proper goods or chattels, in my bailiwick, whence I can cause to be made, or levy, the sixty pounds within mentioned, or any part thereof. FI. FA.

A. B. Sheriff.

Another, against executors.

The within named W. P. has no goods or chattels, which belonged to the within named J. G. at the time of his death, in his hands to be administered, in my bailiwick, whence I can cause to be made the within mentioned five pounds, or any part thereof; but there were divers goods and chattels, belonging to the said J. G. at the time of his death, to the value of fifty pounds, which came to the hands of the aforesaid W. P. after the death of the aforesaid J. G. to be administered; which certain goods and chattels, the said W. P. afterwards, and before the return of this writ, wasted, eloigned, and converted to his own use. Devastavit.

Another.

By virtue of this writ to me directed, I have caused to be made the sum of ($80,) from the goods and chattels of the within named A. B. and am ready to have the same sum of money before the justices of the court, *(or, before the court,)* at the day and place mentioned, to be paid to the within named

FI. FA. F. G. for his debt and damages within specified, as by this writ to me is commanded.

J. L. Sheriff.

Another.

By virtue of this writ to me directed, *&c. (as before, as far as,)* to be paid to the within named P. F. in part of his debt and damages within specified: and further, I certify to the justices of the court, *(or to the court,)* that the aforesaid P. F. has no more goods or chattels in my bailiwick, whence at present I can cause to be made the residue of the debt and damages aforesaid, according to the requirement of this writ.

J. L. Sheriff.

Another.

By virtue of this writ to me directed, I have caused to be made the sum of $ 40, of the goods and chattels of the within named R. B.; which $ 40, I am prepared to have before the justices within named, at the day and place within prescribed, as this writ requires and commands.

J. L. Sheriff.

Another.

By virtue of this writ to me directed, I have caused to be seized, *(or have taken)* one mare, two steers, and twenty-five sheep, the goods and chattels of the within named A. B. of the value of the debt and damages within stated, which same goods and chattels remain in my hands unsold, on account of defect of buyers. Therefore I cannot have the

money in court, at the day and place required, as is within to me commanded. FI. FA.

J. L. Sheriff.

Another.

I certify to the justices (*or court*) within named, that there are divers persons in my county, (*or the town of* ——, *within named,*) known and called by the name of J. L. to wit, J. L. of B. J. L. of C. and J. L. of D; and because it is not specified in this writ, of the goods and chattels of which of the said J. L's I should make the sum of money within mentioned; therefore I could not, nor can proceed to the execution of this writ. Divers of the name of defendant, and officer knows not on which to levy.

Another.

By virtue of, *&c.* I seized the goods and chattels, lands and tenements, of the within named J. L. to the value of $2000, and the same from day to day exposed for sale, and then sold to the value of $100, which same $100 I am ready to have at the day and place within directed, to be paid to the within named P. F. as soon as I am further commanded. And the residue of the goods and chattels remain with me for defect of buyers. Goods, &c. seized, and part sold.

Another.

By virtue &c. I took the goods and chattels of the within named A. W. to the value of $4 part of the within written $8, which goods and chattels, remain in my hands, unsold for defect of buyers, and that the aforesaid A. W. has at present no other or more goods or chattels, nor any lands or tenements in my bailiwick, whence I can cause to be made, the residue of said $8, or any part or parcel thereof. No goods, or chattels, except, &c.

Fi. Fa.

Another.

By virtue, &c. I have sold the goods and chattels above described, by me before taken, and also have caused to be made of the goods and chattels of R. S. within named, the residue of the debt within stated, so that I am prepared to have all the money in court at the day and place within directed, to be paid to the within named H. W. as I am within commanded.

Special return in New-York.

New-York. County of Dutchess, ss. September 12th, 1811.

By virtue of this writ to me directed, I, John Finch, sheriff of said county of Dutchess, seized one horse, one pair of oxen, and three cows, the proper goods and chattels of the within named C. D. and on the same 12th day of September, advertised the same horse, oxen, and cows for sale at public vendue, at the dwelling house of —— in —— in said county of Dutchess, on the 20th day of September aforesaid, at two o'clock in the afternoon, by putting up written notifications of the time and place, where the goods so seized were to be sold, at ——, and ——, and ——, three of the most public places in said town of ——, and on the said 20th day of September, at said —— according to notice as aforesaid given, I sold at public vendue the said horse so seized, at the sum of —— and the said pair of oxen at the sum of ——, and the said cows, one at the sum of ——, and one at the sum of ——, and one at the sum of ——, and in manner aforesaid, I have caused to be made of the goods and chattels of the said C. D. the sum of —— and have the sum of money last mentioned before the court, at the day and place within named, in

in satisfaction of the debt and damages within stated, as within to me is commanded. Fi. Fa.

John Finch, Sheriff.

Another, in Massachusetts and New-Hampshire.

By virtue of this writ of execution to me directed, I seized (*or* took) one chaise, the property of the within named C. D. and afterwards, on the day of forty eight hours before the expiration of four days from the time said chaise was so as aforesaid seized advertized by posting up notifications at — and also at ——, two public places, in said town of——, that said chaise at —— in said county, on the day of at o'clock in the after (*or* fore) noon, being the expiration of four days, from the time when said chaise was so seized, would be sold at public vendue, unless said C. D. should previously redeem such chaise, by otherwise satisfying said execution; and having safely kept said chaise, for said space of four days, from the time of seizing the same as aforesaid; and the said C. D. having failed to redeem the same by otherwise satisfying said execution; at the time and place aforesaid appointed, I at public vendue sold the same chaise to E. F. of —— in said county, he being the highest bidder therefor, for the sum of ——, and thereupon satisfied said execution, the charges of sale, and my fees all amounting to —— and the overplus arising from such sale, being the sum of ——, I returned to the said C. D. Massachusetts.

E. M. Sheriff.

Another, in Connecticut.

F. County, ss. July.

By virtue of this execution, I repaired to the place of usual abode of C. D. the within named debtor, at Connecticut.

Fi. Fa. ——in said county, and there made demand of the debt, or sum then due on this execution, with all necessary charges of executing the same; and the said C. D. neglecting to make payment thereof, by direction of A. B. the creditor within named, I seized and took by virtue of this execution, one horse, and one horse-cart, the property of the said C. D. and he the said C. D. having no other, or more goods or chattels, liable to be taken in execution, to be found within my precincts, on the same day I set up, on the sign post in —— society where said horse and horse-cart were so seized and taken, an account of them particularly, with a declaration that said horse and horse-cart would be sold at said sign post, at public vendue, at the end of twenty days. And at the end of twenty days thereafter, the said debtor having failed to pay the debt in said execution contained, together with the costs and charges thereon, I caused a drum to be beaten at said sign post, and sold said horse there at an outcry to O. L. the highest bidder therefor, for the sum of —— and in like manner then and there sold said horse-cart to P. T. the highest bidder therefor, for the sum of —— both which sums amount to the sum of —— from which deducting the costs, charges, and my fees thus far on this execution, amounting to the sum of ——, leaves the sum of —— arising from the sale of said horse and horse-cart, which I applied towards satisfying the execution, and paid the same sum of —— over to the said A. B: and there remaining due on this execution the sum of ——, and there being no goods or chattels of the within named debtor, to be found within my precincts, to satisfy the same execution, I, by virtue thereof, and by the direction of said creditor, seized one acre of land with the dwelling house thereon; *(then pro-*

ceed according to the form herein after given, for the levy of an execution on real estate in Connecticut,) which said sum of , at which said land and house were appraised as aforesaid, I applied towards completing the satisfaction of this execution, cost and charges; but the sum being insufficient therefor, leaving still due on this execution the sum of , by the direction of the said A. B. and by virtue of this execution, on the day of at —— I took the body of the within named debtor, and him committed to the keeper of the common gaol, in —— in said county, within the prison, and delivered to the said keeper of the prison, an attested copy of this execution, with my proceedings aforesaid endorsed thereon. FI. FA.

A. M. Sheriff.

Another, where the debtor lives out of the officer's precincts.

F. County ss. borough of B. &c.

The within named debtor having neglected to make payment of this execution, to me directed and delivered, together with the lawful charges thereon; by virtue of this same execution, and by direction of A. B. attorney to the within named creditor, I then seized and took one puncheon of Antigua rum, and one butt of Muscovado sugar, and on the same day posted the same puncheon of Antigua rum, and butt of Muscovado sugar, on the sign post in the borough of B. there to be sold, at the end of twenty days thereafter, and the said debtor having failed to pay the said debt, costs and charges arisen on this execution, on the day of the day so as above appointed, for the sale of said rum and sugar,

FI. FA. I caused a drum to be beaten, &c. (*as in the form preceeding.*)

G. H. Bailiff.

Another.

By virtue of this execution to me directed, I repaired to the place of the usual abode of C. D. the within named debtor, in said ——, and there made demand of the debt (or sum) due on this execution, with the necessary charges of executing the same. And the said debtor, having refused to make payment of the same, and there being no moveable or personal estate of said debtor sufficient to satisfy said debt and charges, to be found within my precincts, I arrested the body of said C. D. and then and there commenced proceeding to commit him the said C. D. to the common goal in —— in said county, when he, the said C. D. to procure a release of his body from arrest as aforesaid, and for the satisfying of this execution, presented to me, to be taken on the same execution, one hat, one bed, one sheet, one blanket, and one iron pot, whereupon, the articles aforesaid being apparently sufficient to satisfy the said execution, &c. I released the body of the said C. D. from arrest on said execution, and by virtue thereof, then and there, on the day of , seized the said hat, bed, sheet, blanket, and iron pot. And on the same day posted the same articles on the sign post in said —— (*then proceed as in the forms preceding*).

All which sums arising from the sale of the said several articles, amounting to the sum of , and the debt due on this execution being the sum of , and the cost, charges, and my fees, on the same execution, amounting to the sum of , both which

last mentioned sums amounting to the sum of , leaves a surplus arising from the sale of said articles, after satisfying said debt, cost, charges, and fees, of the sum of , which I returned to the said C. D. and paid over to the said A. B. the creditor within named, the said sum of , in full satisfaction of this execution. FI. FA.

J. N. Constable.

Another, in Vermont.

By virtue of this execution to me directed, I repaired to the usual place of abode of C. D. the within named debtor, in said ,—— and there demanded the debt (or damages, or cost, *as the case may be)* contained in this execution, with all legal charges for serving the same; and the said C. D. having neglected to pay said debt, (*or*, &c.) with the legal costs of serving the same, I seized two oxen, and two cows, the proper goods and chattles of the said C. D. (*or* shown to me by A. B. the creditor within named, as the proper goods and chattles of the said C. D.) and on the same day, I advertised upon the sign post in ——, the town where said two oxen and two cows were by me so taken, that said two oxen and two cows would be sold, at public vendue, at said sign post, on the day of , fourteen days from the time of advertising as aforesaid (*or* more than fourteen days, &c. *as the case may be*). And having safely kept said two oxen and two cows, and the said C. D. having failed to redeem the same, by otherwise satisfying this execution, and the charges of the officer thereon, I at the said sign post, on the day of , then so appointed for the sale of said two oxen and two cows, sold at public vendue the said two oxen to E. F. of ——, the highest bidder for them, for the sum of , and one of said cows

FI. FA.

to G. H. of ——, the highest bidder for her, for the sum of , and the other of said cows to I. J. of ——, the highest bidder for her, for the sum of , and the debt (*or, &c.*) in this execution being the sum of , and the officer's cost and charges being the sum of , both amounting to the sum of . And the money arising from the sale of said two oxen and two cows, amounting to the sum of , left a surplus of the sum of , which I returned to the said C. D. and paid and satisfied to the said A. B. the said sum of , being his debt in this execution.

J. M. High Bailiff.

Another, where the debtor lives out of the precincts of the officer, and the place of advertisement and sale is at a place other than the sign post, by agreement of the officer and debtor.

The said C. D. having neglected to pay the debt contained in this execution, with the legal charges thereon, by virtue of this same execution, I, at ——, on the day of , seized one hundred bushels of wheat, the proper goods and chattels of the said C. D. and by agreement with the said C. D. advertized upon the front of the dwelling-house of P. F. of said ——, that said one hundred bushels of wheat, would, at said dwelling-house, be sold at public vendue, on the day of , more than fourteen days from the time of setting up such advertisement as aforesaid. And having kept said one hundred bushels of wheat safely, *&c.* (*as in the preceding, till the sale is completed at said dwelling-house, and the money arising to be applied.*) The cost and charges of the officer in proceeding thus far on this execution, being ——, which deducted from said sum of , at which said wheat was sold, leaves

the sum of , which I have paid over to the said A. B. in part satisfaction of this execution. Fi. Fa.

J. N. Constable.

Another, on articles exempt from execution, unless turned out by the debtor.

By virtue of, &c. (*as in the preceding forms*) I seized one cow, one coat, one pair of woollen blankets, one table, and one gun, all turned out to me by the said C. D. to be taken on this execution, &c. (*as in said forms preceding.*)

N. O. Sheriff.

Another, in Rhode-Island.

By virtue of this execution to me directed, and by direction of A. B. the creditor within named, I seized one hogshead of molasses and one anchor, the proper goods and chattels of C. D. the within named debtor, and the same goods and chattels, on the same day advertized to be sold at public auction, on the day of at —— in said ——; and having kept said goods and chattels, for the space of ten days, until the day appointed as aforesaid for the sale of said hogshead of molasses and anchor, and the said C. D. having failed to pay the money due on this execution, together with the costs accrued thereon, and thereby to redeem his said goods and chattels on the said day of at ——, I at public auction sold the said hogshead of molasses to P. F. of —— the highest bidder therefor, for the sum of ; and I also in like manner, then and there, sold said anchor to G. H. of —— the highest bidder therefor, for the sum of , both which sums of money arising from said sales of said goods and chattels, amounting to the sum of , and the Rhode-island.

FI. FA. money then due on this execution being the sum of , and the costs accrued thereon being the sum of , both which last mentioned sums, amounting to the sum of , which deducted from the amount arising from said sales, leaves an overplus of the sum of , which I returned to the said C. D, and paid over to the said A. B. the said sum of , being the money due to him on this execution, in full satisfaction.

P. F. Town Serjeant.

Another on set-off of one execution on another, in New-Hampshire and Rhode-Island.

Set-off of one execution upon another, in New-Hampshire and Rhode-island. I certify, that after I had received this writ of execution, C. D. the within named debtor, delivered to me an execution in his own name and right against A. B. the within named creditor, for the proper debt of the said A. B. issued on a judgment rendered by (*here insert the court or justice issuing such execution*) on the day of at —— in the county of —— in favour of said C. D. against said A. B, bearing date the day of signed by (*here insert the name of the clerk of the court, or the name of the justice who signed such execution*) and directed to (*here insert the description of officers, sheriff, deputy-sheriff, coroner, high bailiff, constable or town serjeant, and the county or town of which they are officers as aforesaid*) for the sum of —— debt (*or*) damages, and for the sum of —— costs of suit, and made returnable (*here insert when such execution was made returnable*) and that at the request of said C. D. I received and set off on this execution, in favour of said A. B. his, the said C. D's, said described execution, against him, the said A. B. amounting to the sum of , leaving a balance due on

this execution of , besides officers's fees and charges, and have returned the execution of the said C. D. against the said A. B. satisfied. FI. FA.

And by virtue of this execution, on the day of , at said —— I took one horse, &c. (*here proceed as in ordinary cases on goods and chattels.*)

M. N. Sheriff.

Another.

I certify, that at the request of A. B. the within named creditor, I set off this execution, amounting to the sum of including debt (*or*) damages and costs, in full satisfaction thereof, upon an execution directed to me, and then in my hands for collection against him the said A. B. in favour of C. D. the within named debtor, which said execution in favour of said C. D. on which this execution was so set off, issued on a judgment rendered, (*here proceed in the description as in the preceding form,*) leaving the sum of , a balance still due from the said A. B. on said execution in favour of the said C. D. besides officers' fees and charges.

W. C. Deputy Sheriff.

For cases in which set-offs of one execution on another may be made, see statute of New-Hampshire and of Rhode-Island, Vol. II.

Another, on bank shares in Massachusetts.

By virtue of this execution to me directed, and by the direction of A. B. the creditor within named, on the day of at said —— I seized seven shares in the (*here describe the bank*) the property of C. D. the within named debtor, with all the rights On Bank shares in Massachusetts.

N. Pa.

and privileges of said seven shares, by leaving with E. F. cashier of said bank, at —— aforesaid, a true and attested copy of this execution, and on the same day I gave public notice, that said seven shares, with all their rights and previleges, would be sold at public vendue at —— on the day of , thirty days from the time of giving such notice, by posting up notifications thereof at —— a public place in said —— and at —— a public place in ——, and at —— a public place in ——; the two towns adjoining to said —— where such sale was so appointed to be made, and caused an advertisement, expressing said time and place of such sale, and against whom the execution had issued, to be published three weeks successively before said day of sale, in a public newspaper called the ——, printed at —— in said county: (*but if no newspaper be printed in said county, say,*) printed at —— in the county of ——, the county nearest to the place of such sale. And on the same day of I gave notice in writing to the said C. D. of the time and place of sale as aforesaid, of said of seven shares, by leaving such notice at his last and usual place of abode. (*But if the judgment debtor has at no time resided, or does not at that time dwell in the county where such shares are seized, notice in writing left at his place of abode as aforesaid, may be omitted.*) And on the day of aforesaid, appointed for such sale, I sold six of said seven shares to G. L. of —— highest bidder for them, for the sum of ; and from the money arising from such sale, paid to the said A. B. the sum of in full satisfaction of his debt due upon said execution, and retained the sum of , being the amount of charges of sale, and officers fees; and the sum of remaining, beyond satisfying this execution, charges, and officer's fees, I deposited

with the cashier of said bank, for the benefit of the said C. D. FI. FA.

A. B. Sheriff.

When levied on Turnpike Shares, &c.

(*As in the preceding, except in the manner of seizing, which must be*) by leaving an attested copy of this execution with P. F. of ——, clerk of said company, and a like copy of said execution with G. H. treasurer to said company: (*and in either case, if, for want of purchasers on the day appointed for the vendue, the officer adjourn the same, then he must return*) that, for want of purchasers, on said day of , I adjourned said vendue, to be held again on the day of , (*not exceeding three days from the first,*) when I sold, &c. (*and instead of saying,* I deposited the same with the cashier, &c. say,) I deposited the same with the treasurer of said company (*or*) corporation, (*as the case may be,*) *or* I paid the same to the said C. D. the debtor in this execution.

J. M. Sheriff.

Another, on Bank Shares in Connecticut.

By virtue of this execution to me directed, I seized thirteen shares in the—(*here describe the bank,*) the property of C. D. the within named debtor, by leaving a true and attested copy of this execution, with a certificate thereon, that I had taken said shares, to satisfy this execution, and on the same day of posted the same, &c. (*proceeding as in levying executions on goods and chattels,*) and on the day of the day appointed for the sale of said shares, I sold at the sign post, &c. (*as in other* On bank shares in Connecticut.

FI. FA. *cases,*) and gave to the said L. O. the purchaser of said shares, an instrument in writing, conveying to him said shares, so by him purchased; and also left with said cashier a true and attested copy of this execution, and of my return above stated thereon; and the money arising from said sale being —— and the amount of debt and cost in this execution, and my fees and expenses amounting to the sum of left a surplus of the sum of which I returned to the said C. D.

J. Q. Constable.

When rights or shares in a turnpike company, or other company or corporation, are taken on execution, it must be done by leaving a true and attested copy of such execution with the secretary or clerk thereof.

Another, on foreign attachment, in Massachusetts.

Foreign attachment in Massachusetts. By virtue of this writ to me directed, I repaired to the usual place of abode of C. D. one of the trustees within named, and there demanded payment of this execution, and the said C. D. then and there, in part satisfaction thereof, paid to me the sum of being all the effects, credits, or estate of J. L. the principal, in his, the said C. D's possession or hands, as he said. And on the same day I repaired to the usual place of abode of the said F. G. another of said trustees within named, and of him demanded payment of the residue of this execution, or of effects or estate of the said J. L. in the hands or possession of him the said F. G. whereon to levy and satisfy the same. And the said F. G. then and there exposed to view, one horse, as the only property, or credit of the said J. L. in his, the said F. G's hands or possession, I thereupon, by virtue of said execution, seized said horse, (*here describe a*

proceeding with the horse seized, to sale, as in case of goods and chattels taken on execution in ordinary cases, in the state where the same is taken.) I also, on the day of , repaired to the usual place of abode of G. H. within named, in said ——, as another trustee to said J. L. and of him demanded payment of the sum remaining due on this execution, which the said G. H. then and there wholly refused to make: and I then demanded of him the said G. H. goods, chattels, effects, or estate of the said J. L. in his hands, whereon to levy and satisfy this execution and all fees, but none were exposed or shown to me, nor have I found any other, or more goods, chattels, effects, or estate of the said J. L. nor his body within my bailiwick, wherewith to satisfy this execution.

PI. FA.

W. D. Sheriff.

N. B. *The above form may serve in any of the New-England states. In Connecticut, instead of the word* trustee *only, saying* agent, trustee, factor, and debtor. *And in Rhode-Island,* attorney, agent, trustee, factor, and debtor.

XVI. OF LEVARI FACIAS.

LEV. FA.

By virtue of this writ to me directed, I have levied of the rents, issues, and profits, of the lands and tenements in this writ mentioned, the sum of seventeen pounds; which sum I am prepared to have in court at the day and place within mentioned, as I am within required.

A. B. Sheriff.

Another.

By virtue of this writ to me directed, I have caused to be made, collected, and levied, of the rents, issues, and profits of the messuage or tenement in the tenure *(or possession)* of the within named M. R. at the day of due and unpaid, seventeen pounds and ten shillings lawful money. And I have also caused to be made, levied, and collected, from the rents, issues, and profits, of a messuage or tenement in the tenure *(or possession)* of F. W. at the day of , due and unpaid, twelve pounds and ten shillings, like money: which certain sums amounting in the whole to thirty pounds I am prepared to pay to the use of —— at the day and place within required, in satisfaction of the debt within mentioned, according to the command of the within writ.

A. B. Sheriff.

XVII. OF EXECUTION LEVIED ON LANDS, (IN NEW-YORK.)

EX. ON LANDS.

By virtue of this writ to me directed, I, John Finch, sheriff of the county of Dutchess, certify, that sufficient goods and chattels of the within named C. D. to satisfy the debt, damages, and costs, (or sum of money) specified in this execution, could not be found within my county. And that therefore, and in pursuance of the command in said writ, on the 12th day of September, A. D. 1811, I took one lot of land, called —— containing —— acres; bounded, (*here set out the bounds,*) with a dwelling house and barn on said lot standing, all the lands and tenements of the said C. D. and situate in —— in said county of ——, and on the same 12th day of September, 1811, I advertised publicly, the same lands and tenements so seized, for sale at public vendue, on the 12th day of November, 1811, at the dwelling house of —— in —— in said county, by nailing up a printed (*or* written, *as the case may be*) notice thereof, and in ——, and in ——, and in ——, three of the most public places in said town, where said lands and tenements so seized, were to be sold, (*and if any public newspaper is printed in said county, then*) and also, by causing a similar notice of the time and place of such sale, to be printed in the public newspaper called the —— printed at —— in said county of Dutchess, for the space of six weeks preceding such sale: (*or, in case such lands and tenements are not occupied by the defendant or defendants in such execution named, or some one of them, or by some person or persons holding the same as tenant, or purchaser, under such defendant, or defendants, and are situate in any county in the eastern or western district, in the state, in which no newspaper is printed,*

EX. ON LANDS. *then*) and also, by causing a similar notice of the time and place of such sale, to be inserted in the public newspaper printed in the city of Albany, called the —— in which the laws of the state are required to be printed, for six weeks preceding such sale. And on the same 12th day of November, 1811, between the hours of nine in the morning, and the setting of the sun on the same day, I sold said lands and tenements so seized, and advertised as aforesaid, at public vendue, to E. F. of ——, the highest bidder for them, for the sum of ; and then and there, made, executed, and delivered to him the said E. F. a good and sufficient deed of the premises so by me to him sold. And in manner aforesaid, I have caused to be made of the lands and tenements of the said C. D. the said sum of and have the same sum of money before the court at the day and place within named, in satisfaction of the debt, damages, and costs within stated, as within to me is commanded.

John Finch, Sheriff.

Of the sale of an equity of redemption, in Massachusetts.

Equity of redemption sale in Massachusetts.

By virtue of this execution to me directed, I took all the right in equity, which the within named B. C. the debtor, then had of redeeming the following described real estate, lying in ——, in said county, mortgaged by the said B. C. to E. F. of ——, in said county, (addition) to wit: a certain tract of land lying in —— aforesaid, containing about —— acres, and bounded as follows, to wit: (*here set out the boundaries with all convenient certainty*) the said right in equity having been previously attached by me on the original writ, on which this execution is founded; and afterwards on the same day, being the day of , I gave notice in writing of the time and place

of sale, to the within named B. C. in person, (*or*, I left a notice in writing of the time and place of sale, at the last and usual place of abode of the within named B. C.) and I gave public notice of the time and place of sale, by posting up notifications thereof at —— and at ——, two public places in said town of and also by posting up notifications thereof at —— and at —— two public places in —— a town adjoining said —— and at —— and at —— two public places in —— and also a town adjoining said thirty days before the time of sale: and I also caused an advertisement of the time and place of sale to be published, three weeks successively before the day of sale in the ——, a public newspaper printed in ——, in said county, (*if any such newspaper be therein printed;*) and afterwards on the day of , at a public vendue, held at the house of L. B. of —— aforesaid (addition) I sold to P. S. of —— aforesaid, (addition) for the sum of he being the highest bidder therefor, all the right in equity which the within named B. C. had, of redeeming the real estate aforesaid; and on the same day of for the consideration aforesaid, I made, executed, acknowledged, and delivered to the said P. S. a good and sufficient deed of said right in equity, sold as aforesaid, therein reserving to the said B. C. the liberty to redeem the said right in equity, by paying within three years, after the date of the deed aforesaid, all such sums of money as by the statute or law of the Commonwealth, in such case made and provided, he ought to pay, in order to redeem the said right in equity. All which is in full satisfaction of this execution, and all fees, the costs of levying the same execution, together with my fees amounting to——.

EX. ON LANDS.

W. C. Deputy-Sheriff.

EX. ON LANDS.

A Conveyance of a right of Redemption.

Know all men by these presents, that I, L. N. of ——, in the county of ——, and commonwealth of Massachusetts, a deputy sheriff under J. T. esquire, sheriff of the same county, at a public vendue, held at the dwelling-house of N. O. of ——, in said county (addition) on this day of , in the year of our Lord, , having given notice in writing, of the time and place of sale to the debtor in the execution herein after mentioned, in person, (*or* having left a notice in writing at the last and usual place of abode of the debtor in the execution herein after mentioned,) and having given public notice of the time and place of sale, by posting up notifications thereof, in two public places in said town of ——, and also by posting up notifications thereof, in two public places in each of the adjoining towns of —— and ——, thirty days before the time of sale; and having caused an advertisement of the time and place of sale to be published three weeks successively before the day of sale, in the ——, a public newspaper, printed in ——, in said county, have, by virtue of an execution, to me directed and in my hands, in favour of C. D. of ——, in said county (addition) against T. F. of ——, in said county (addition) in consideration of the sum of , lawful money of the said commonwealth, paid to me this day, by W. R. of , in said county (addition) sold to the said W. R. he being the highest bidder therefor, all the right in equity which the said T. F. has of redeeming the following described real estate, lying in —— aforesaid, mortgaged by said T. F. to J. L. of ——, in said county (addition) to wit: a certain tract of land lying in —— aforesaid, containing about —— acres, with the buildings standing thereon, and bounded as follows, to wit: [*here set out the boundaries the same as in the*

advertisement] reserving liberty to the said T. F. to redeem the said right in equity, by paying within three years after the date of these presents, all such sums of money as by the statute law of this commonwealth in such case made and provided, he ought to pay, in order to redeem the said right in equity. In witness whereof, I have hereunto set my hand and seal, this day of in the year of our Lord,

EX. ON LANDS.

L. N. (L. S.)

Signed, sealed, and delivered, in presence of }

Return of an extent on Land, in Massachusetts.

Justice's Certificate.

Suffolk, ss. May 28th, 1810.

Then personally appeared, B. C. D. E. and F. G. all freeholders in said county, who made oath, that in appraising such real estate of the within named G. H. as should be shown to them to satisfy this execution and all fees, they would act faithfully and impartially according to their best skill and judgment.

Before me, J. K. Justice of the Peace.

Appraisers' return.

Suffolk, ss. May 28th, 1812.

We, the subscribers, being all freeholders within the said county of Suffolk, and having all this day, been duly chosen, appointed, and sworn to the faithful and impartial appraisement of such real estate of the within named G. H. as should be shown to us to be appraised, in order to satisfy this execution, and all fees, have this day viewed a piece or parcel of land, lying in ——, in said county, shown to us by N. M. and P. T. the creditors, (*or* by S. R.

EX. ON LANDS. the attorney of said creditors,) as the estate of the said G. H. which said piece or parcel of land is bounded as follows, to wit: (*here set out the bounds with all convenient certainty,*) and containing acres, which said piece or parcel of land, we have on our oaths appraised at the sum of and no more: and we have set out said piece or parcel of land by metes and bounds, to the creditors within mentioned, to satisfy this execution and all fees. In witness whereof we have hereunto set our hands,

B. C.
D. E.
F. G.

Officer's return.

Suffolk, ss. May 28th, 1810.

The debtor within named failing to satisfy this execution by money or other specie, and the creditors within named, finding no personal estate to their acceptance, wherewith to satisfy the said execution, and thinking proper to levy the same on the real estate of the within named G. H. to satisfy the said execution, and the judgment on which it was rendered; I have this day caused B. C. (addition) D. E. (addition) and F. G. (addition) all of ——, in said county, and freeholders; being three disinterested and discreet men, to be sworn, truly, faithfully and impartially to appraise according to their best skill and judgment, such real estate of the within named G. H. as should be shown to them, to satisfy this execution and all fees, as appears from the foregoing certificate of J. K. justice of the peace, the said B. C. being chosen by the creditors within named, the said D. E. by the debtor within named, and the said F. G. by myself: (*or* the said B. C being chosen by the creditors within named, and the said D. E. and F. G. appointed

by me for the purpose before mentioned, the said G. H. neglecting (or refusing) to choose any person; and the aforesaid piece of land containing acres, which is particularly bounded and described, as in the foregoing return of the appraisers, will more fully appear, being shown to the appraisers by the said N. M. and P. T. the creditors, (or by the said S. R. the attorney of the said creditors,) as the real estate of the said G. H.; and the said appraisers having this day viewed the premises, appraised the same, upon their oaths aforesaid, at the sum of , and no more, in full satisfaction of this execution and all fees. The costs of levying the same execution, together with my fees amounting to , and the said appraisers set out the same tract of land by metes and bounds; and on the same day of by direction of the creditors aforesaid, (or by the direction of the attorney aforesaid,) I levied this execution on the same tract of land, and delivered to the said N. M. and P. T. the creditors, seizin and possession of the same; (or delivered to the said S. R. the attorney, for the said creditors, for the use of the said N. M. and P. T. seizin and possession thereof,) who accepted the same in full satisfaction of this execution and all fees.

EX. ON LANDS.

W. D. Deputy Sheriff.

Creditors' receipt.

Received of W. N. deputy sheriff, seizin and possession of the before described real estate, in full satisfaction of this execution and all fees.

N. M.
P. T. } Creditors.

EX. ON LANDS.

On land held in common, &c. in Massachusetts.

H——, ss. July 15th, 1811.

The within named debtor having failed to satisfy the within execution, by money or other specie, and the creditor having been unable to find personal estate to his acceptance, wherewith to satisfy the same execution, and thinking proper to levy the same upon the debtor's real estate: I, E. M. sheriff of the county of H——, by virtue of this writ to me directed, on this same 15th day of July, at ——, in said county of H—— by the direction of A. B. the creditor within named, levied this execution upon all the estate, right, title, and interest, of the said C. D. the within named debtor, to one certain piece or parcel of land, lying and being situate in ——, in said county of H——, bounded (*here describe the bounds of the land seized,*) the same estate, right, title, and interest of the said C. D. in and to said land so seized, being one undivided fourth (*or any other proportion, as the case may be,*) part thereof; held by him the said C. D. as tenant in common, (*joint tenant, or coparcener, as the case may be,*) together with E. F. G. H. and I. J. all of ——, &c. and the said A. B. the within named creditor, chose K. L. of ——, in said county, (addition) and the said C. D. the within named debtor, chose M. N. of ——, in said county, (addition) and I, the said sheriff, chose O. P. of said ——, (addition) all which said K. L. M. N. and O. P. are disinterested, discreet men, and freeholders in said county of H——; who were all sworn before Q. R. one of the justices of the peace of said county of H——, faithfully and impartially to appraise such real estate, as should be shown to them to satisfy said execution, with all fees thereon. And the said appraisers having been shown said des-

cribed piece of land, all the estate, right, title, and interest of the said C. D. in and to which land, had been so seized by virtue of said execution; which estate, right, title, and interest of the said C. D. in and to the same piece of land, being as aforesaid, one undivided fourth part thereof, held by him as a tenant in common as aforesaid, did upon their oaths, appraise all the said estate, right, title, and interest of the said C. D. in and to said described piece of land at the sum of (in —— satisfaction of this execution and all fees;) and all the estate, right, title, and interest of the said C. D. in, and to said described piece of land, being one fourth part thereof, having been extended at the sum of aforesaid, in manner aforesaid, as the law directs; I, the said sheriff, did thereupon, by virtue of said execution, and the proceedings aforesaid thereon, give to the said A. B. (*or to S. T. the attorney of the said A. B. as the case may be,*) the creditor named in said execution, the full seizin and possession of all the said estate, right, title, and interest of the said C. D. in, and to said piece of land, the same being one undivided fourth part of said described piece of land, to hold the same as tenant in common with the said other persons, named as co-tenants with him, the said C. D. of said piece of land, before the levy of this execution, in full, (*or in part satisfaction, as the case may be,*) of said execution, together with my fees thereon. EX. ON LANDS.

E. M. Sheriff.

The above form, omitting the introductory paragraph in italics, and beginning the return with, *I, E. M. sheriff of the county, &c. by virtue of this writ to me directed, &c.* And substituting for the words, [*disinterested and discreet men and freeholders;*] the words following, to wit: [*respectable free-*

EX. ON LANDS. *holders and residents,*] will be in conformity with the requirements of the statutes of New-Hampshire.

On issues, rents, and profits of real estate.

This form is the same as the preceding, until it comes to describe the quantity of estate the debtor has in the lands or tenements seized: All which estate, right, title, and interest of the said C. D. in and to said described lands, is an annual rent issuing therefrom, payable to him the said C. D. *(then insert the appointment of appraisers, and their being sworn as in the preceding, and then proceed)*—and the said appraisers did upon their oaths, find and appraise (in —— satisfaction of this execution and all fees) the said rent then to be of the annual value of , payable by one V. W. the tenant on the described premises, to him the said C. D.; and all which estate, right, title, and interest of the said C. D. in, and to said premises described, being such rent so as aforesaid, extended at the yearly sum of , payable to him, the said C. D. as aforesaid, for, and during the term of years, I, the said sheriff, did thereupon, by virtue of said execution, and the proceedings thereon aforestated, give seizin of said rent, unto him, the said A. B. the aforesaid creditor, in said execution, *(or to his attorney, as the case may be,)* and did cause the said V. W. the tenant in possession of said described premises, to attorn and become tenant to him, the said A. B. and to pay said rent to him, until the day of A. D. when the sums due on this execution, with interest thereon, and all lawful fees, amounting in the whole to the sum of by such payment will be fully satisfied, unless sooner redeemed, as the law directs. *(But if the tenant refuse to attorn and become tenant to such creditor, then instead of the clause immediately preceding, say,)* And the said V. W. hav-

ing refused to attorn, and become tenant to the said A. B. I, the said sheriff, did then and there turn him, the said V. W. out of the said described premises, and did give livery, seizin, and possession of the same premises, to him the said A. B. to hold and enjoy the same, until the day of A. D. when the sums due on this execution, with interest thereon, and all lawful fees, amounting in the whole to the sum of will be satisfied out of said rent, the issues and profits of said premises; unless sooner redeemed according to law. EX. ON LANDS.

E. M. Sheriff.

The preceding form may be alike used in the states of Massachusetts, New-Hampshire, and Vermont; the officer taking care to observe in the introductory part of his return, the requisites peculiar to each state, previous to a levy on real estate, and also the manner of appointing appraisers, and their qualifications.

On land in fee, in Rhode-Island.

By virtue of this writ of execution to me directed, I certify that no personal estate of C. D. the within named debtor, nor his body, can be found within my precincts, whereon to levy this execution, and for want of such personal estate, and of the body of the said C. D. to be found as aforesaid, on the day of at said , I levied this execution on two acres of land, with a dwelling house thereon, situate in , in said county, and bounded, (*here describe the bounds*) and set up notifications at , and at , and at , three public places in said , where said land lies, to notify all persons concerned, that the same land and house, on the day of , being at the expiration of the space of three months after I levied this execution on said land and house, would be exposed to sale, to satisfy

EX. ON LANDS.

this execution. And on the same day of no person having appeared to redeem said land and house, I sold at public auction, said two acres of land and house, to ——, of ——, the highest bidder therefor, for the sum of and then and there gave to him a deed of the land and house, so by me sold as aforesaid. And of the money arising from said sale, I paid and satisfied to him, the said A. B. the creditor in this execution, within named, the sum of in full satisfaction thereof, and retained the sum of to satisfy the costs and charges of executing this writ, and the residue of the money arising from said sale being the sum of I deposited in the general treasury for the said C. D.

A. L. Sheriff.

Form of a deed to be given according to the above return.

To all people to whom these presents shall come, I —— send greeting: whereas an execution against —— at the suit of ——, was by me the said ——, levied on (*here describe the premises,*) and whereas on the day of all the estate, right, title, interest, and property of the said ——, in the premises aforesaid, were by me, the said sold at public auction for the satisfaction of the said execution, to who was the highest bidder therefor, for the sum of ; which the said hath since well and truly paid me, the said . Now, know ye, that by force and virtue of the law in such case made and provided, I, the said , in consideration of the sum of money paid unto me as aforesaid, do by these presents, bargain, sell, assign, and set over unto the said heirs and assigns forever, all the lands, tenements, and hereditaments, with all their

appurtenances, as the same are above described; with all the estate, right, title, interest, property, freehold and inheritance of the said ——, of, in, and to the said premises and appurtenances to the said —— heirs and assigns for ever. EX. ON LANDS.

In witness, &c

Another, in Connecticut.

By virtue of this execution on the day of I repaired to the usual place of abode of C. D. the debtor within named, in said ; and there made demand of the debt or sum of money due on this execution, with all necessary charges of executing the same, and the said C. D. having neglected to make payment thereof, and for want of personal or moveable estate of the said C. D. shown unto me, or found within my precincts, to satisfy this execution and necessary charges of executing the same; by direction of A. B. the creditor within named, I levied this execution on one piece of land lying and being situate in said , containing acres, bounded, (*here describe the boundaries,*) the proper estate of the said C. D. in fee. And the said A. B. the creditor, chose E. F; and the said C. D. the debtor, chose G. H. and the said creditor, and the said debtor, agreed in choosing I. J; all to be appraisers of said described piece of land; all indifferent freeholders of the same , wherein the said land lies. And J. B. a justice of the peace, within, and for said county of , then and there administered to the said E. F. G. H. and I. J. the oath by law required for appraisers of land taken on execution. And the said appraisers then and there, on a view of said described premises, on which this execution had been so levied, did, upon their oaths, appraise the Estate in fee.

EX. ON LANDS. same premises, at the sum of per acre; as the then present true and just value thereof, to the creditor in this execution; and the sum mentioned in this execution being and the lawful charges of executing the same execution being both which last mentioned sums amount to the sum of I on the day of set off to the said A. B. the creditor, in this execution acres and rods, of said appraised premises, in manner following, viz. (*here describe the limits of the land set off,*) and erected proper bounds to the same in full satisfaction of this execution, and my fees and all charges thereon.

H. B. Sheriff.

And on the day of I caused this execution and my endorsement above thereon to be entered on the records of land in said town of where said land lies.

H. B. Sheriff.

N. B. A term for years in land, or buildings, or parts of buildings, may, in the manner above, be set off on execution, though but chattels. And do not come within the description of personal or movable estate, which must be sold at vendue.

Another.

Estate for life. By virtue, &c. (*as in the preceding,*) I levied this execution on all the estate, right, title, and interest of the said C. D. in, and to one certain piece of land containing by estimation acres; bounded, &c. and the said A. B. the within named creditor, by his attorney, O. L. chose E. F. an indifferent freeholder of the same ——, and C. D. the aforesaid debtor, neglecting to choose an appraiser, I ap-

plied to J. B. esq. the next assistant (*or* justice of the peace, *as the case may be*) who by law may judge between said parties in civil causes, which said assistant, (*or* justice) appointed G. H. and I. J. both indifferent freeholders of the same——, appraisers of the estate aforesaid, levied upon by virtue of this execution. And J. B. esq. justice of the peace for said county, then and there administered to the said E. F. G. H. and I. J. the oath by law prescribed for appraisers of land taken on execution. And the said appraisers did then and there, upon their oaths, appraise all the estate, right, title, and interest of the said C. D. in, and to said described premises, (which said estate, right, title, and interest was an estate for, and during his, the said C. D's natural life, in, and to one undivided moiety of said land and dwelling house; and an estate in fee in the other undivided moiety of said land and dwelling house,) at the sum of as the then present true and just value thereof, to the creditor A. B. within named. And on the day of I set off to him the said A. B. the within named creditor, the whole of said land and dwelling house, to have and to hold the one undivided moiety thereof to him, the said A. B. for, and during the natural life of the said C. D. and the other undivided moiety to him, the said A. B. and his heirs and assigns for ever, in satisfaction of the said sum of upon this execution, &c. (*as in the form preceding.*)

J. M. Sheriff.

Another.

By virtue, &c. (*as in the first,*) I levied this execution on all the estate, right, title, and interest of the said C. D. in, and to one certain water lot wharf and store thereon standing, and situate in, &c.

EX. ON LANDS.

bounded, &c. and the said A. B. the creditor within named, chose E. F. an indifferent freeholder of the same——an appraiser, and the said C. D. chose G. H. also an indifferent freeholder of the same——; and the said A. B. and C. D. not agreeing in choosing a third appraiser, I applied to J. B. the next justice of the peace, who could by law judge between the said parties in civil cases, which said justice appointed J. S. also an indifferent freeholder of the same——an appraiser, and said J. B. esq. justice of the peace for said county of——, then and there administered to the said E. F. G. H. and J. S. the oath by law prescribed "for appraisers of land taken on execution." And the said appraisers did then and there, upon their oaths appraise all the estate, right, title, and interest, of the said C. D. in, and to said water lot wharf and store, the same estate, right, title, and interest, being an equity of redemption in and to said water lot wharf and store, which were then and there subject to a mortgage to one M. N. of —— for the security of the payment of the sum of ——, from him the said C. D. to him the said M. N. at the sum of $ 500, as the then present true and just value thereof, to the said A. B. the creditor in this execution. And the sum due on this execution being $ 300, and the legal costs, charges, and fees for executing the same being $ 25, which two last mentioned sums, amounting to the sum of $ 325, I then and there set off to the said A. B. an estate, right, title, and interest in, and to said equity of redemption in proportion to the whole of said equity of redemption as the sum of $ 325 bears to the sum of $ 500, in full satisfaction of this execution, and all legal costs, charges and fees for executing the same, &c. (*as in the preceding form.*)

P. Q. Constable.

Another.

By virtue, &c. (*as in the preceding forms,*)—on all the estate, right, title, and interest of C. D. the debtor within named, in, and to one certain piece of land lying and being situate in said ——, containing 1000 acres, and bounded as follows, &c. all which said estate, right, title, and interest of the said C. D. in and to said 1000 acres of land is an equity of redemption in and to one undivided fourth part of said 1000 acres, which said undivided fourth part of said 1000 acres, is subject to a mortgage to one M. W. to secure the payment of the sum of $ 500; and is also subject to an execution in favour of N. O. against the said C. D. levied on said equity of redemption; for the sum of $ 350, both which last mentioned sums making an incumbrance on said undivided fourth part of said 1000 acres, of the sum of $ 850: and a remainder to the said C. D. in fee of one other undivided fourth part of said 1000 acres, after the demise of J. S. without heirs male, of his body lawfully begotten, the said J. S. being now living, and of the age of 50 years; having three sons, John aged 27 years, James, aged 25 years, and Mark, aged 23 years; which three, John, James, and Mark, are sons of him, the said J. S. of his body lawfully begotten. And a remainder to him, the said C. D. for his life, of one other undivided fourth part of said 1000 acres of land, after the determination of a term of forty years, to commence on the death of R. W. now tenant for life of the last mentioned undivided fourth part of said 1000 acres. And also a reversion in fee, of the undivided fourth part of said 1000 acres, after W. H. a trustee in possession thereof, shall, out of the issues, rents, and profits thereof, have raised the sum of $ 500, for the benefit of G. R. the *cestui que trust.* And A. B. one of the inhabitants of the

EX. ON LANDS. town of ——, and agent for the inhabitants of said town, the creditors in this execution chose E. F. an indifferent freeholder of——a town next adjoining said town of ——, an appraiser; and the said C. D. chose G. H. also an indifferent freeholder of said —— next adjoining to said ——; and the said A. B. as agent aforesaid, and the said C. D. agreed in choosing I. J. another indifferent freeholder of said ——, adjoining said ——, where said land lies. And P. F. a justice of the peace, in, and for the said county of ——, administered to the said E. F. G. H. and I. J. the oath by law prescribed "for appraisers of land taken on execution." And said appraisers then and there appraised said equity of redemption of said first undivided fourth part of said 1000 acres, at the sum of $ 3000, as the then present true and just value thereof to the said creditors. And the said remainder, after the demise of the said J. S. without heirs male of his body, &c. at the sum of $ 500, in manner aforesaid. And the said remainder after the determination of the said term of forty years, &c. at the sum of $ 75 as aforesaid; and the said reversion after the said trustee shall have so raised the said of $ 500, at the sum of $ 3350: and the sum due on this execution being $ 4273; and the costs, charges, and my fees, for executing the same, being $ 72, both which last mentioned sums amounting to $ 4345, I set off to the within named creditors the whole of the estate right, title, and interest, of the said C. D. in, and to the said reversion in fee, after the raising of the said $ 500 by the said trustee; and also the whole of the estate, &c. of the said C. D. in, and to the remainder in fee, after the demise of the said J. S. without heirs male, of his body lawfully begotten; and also the whole of the estate, &c. of the said C. D. in, and to the said remainder, for his, the

said C. D's life, after the determination of said term, at the sums at which said remainder and reversion were as above appraised. And also so much of the equity of redemption of, in, and to said first mentioned undivided fourth part of said 1000 acres, as the sum of $ 348 dollars, bears to the sum of $ 3000; at which the said equity of redemption was so appraised, all in full satisfaction of this execution, &c.

M. G. Sheriff.

The four forms preceding will serve equally in Vermont, by inserting in lieu of the words, "indifferent freeholders," *the words,* "judicious, disinterested freeholders of the vicinity." *And also, in lieu of the words,* "to the creditor in this execution," *the words,* "in money, to satisfy this execution with all fees."

N. B. In Vermont, if both parties neglect to choose appraisers, the officer may obtain the appointment of all of them by the next justice of the peace of the same county. And a choice made by an authorized agent to either party, is as valid as if made by an attorney, technically so called. When an execution issues in this state against the inhabitants of a county, demand for the payment thereof, must, by the officer, be made upon the treasurer of the county; and such demand must be stated in his return. *Vide st. Vermont, Vol. II.*

XVIII. OF HABERE FACIAS SEIZINAM.

HAB. FAC. SEIZIN.

By virtue of this writ to me directed, I certify to the justices of the court of ——, (or to the —— court,) that on the day of , at said ——, I caused A. B. within named to have full seizin of the messuage, with the appurtenances thereof, in said —— within specified and described, in all things, as this writ requires and exacts of me to be done.

S. D. Sheriff.

XVIV. OF HAB. FAC. POSSESSIONEM, WITH FIERI FACIAS.

HAB. FAC. POS.

By virtue of this writ to me directed, on the day of A. D. I caused the within named A. B. to have full possession of his term within described, in the tenements within mentioned, with their appurtenances. And also, I caused to be made of the lands and chattels of the within named C. D. the sum of $ 5, parcel of the damages within named, at the day and place within mentioned, to be delivered to the said A. B. as I am within commanded.

M. R. Sheriff.

Another.

By virtue, &c. I certify, that no one on the part of the within named A. B. came to show to me the messuage and premises within described; wherefore I could not make the said A. B. to have seizin of the said messuage, &c.

G. K. Sheriff.

Another.

By virtue, &c. no one on the part of the said A. B. came to show me the tenements within specified; therefore I could not make the said A. B. to have possession of his said term in said tenements with their appurtenances, as by this writ is required.

G. K. Sheriff.

Another.

By virtue of this writ, &c. I have caused the said J. B. to have seizin, (*or* possession) of the within described premises. And at the same time received of the within named C. D. the sum of being the full amount of the damages and costs contained in this execution.

G. K. Sheriff.

N. B. Where the damages and costs are not paid by the defendant, the proceeding to obtain the money is the same as on other executions for the collection of money only.

XX. OF SEIZIN IN DOWER.

SEIZIN IN DOWER.

By virtue of this writ to me directed, and to this schedule annexed, I certify to the justices, &c. that on the day of A. D. at said ——, I made A. B. the widow aforesaid in this writ named, to have full seizin of a third part of the manor of ——, with the appurtenances thereof in the same manor specified: viz. of one hall and kitchen, and of two shops in the tenure of the said J. S. with free egress and regress from and to the same. And also in the upper part of the mansion-house in the tenure of F. G. from the entry opposite the south ——; And of one separate close, called H. containing by estimation five acres; and of five acres of pasture, lying on the northern line of a close, called B; and of one acre of pasture, called C; in this writ specified, to be held in severalty by the aforesaid A. B. by metes and bounds, by the name of all the dower of the aforesaid A. B. happening to the said A. B. of the whole manor, in said writ specified; as by the said writ aforesaid is commanded to me.

L. M. Sheriff.

Another.

By virtue of this writ, &c. on the day of &c. I made the said A. B. widow, in the aforesaid writ named, to have full seizin of a third part of the manor of B. with the appurtenances in the same writ specified; viz. &c. (*here recite the particulars as in the writ*) to be held by the aforesaid A. B. in severalty, by metes and bounds, by the

name of the whole dower fallen to her, the said A. B. from the whole manor in the writ aforesaid, specified as by the writ aforesaid, to me is commanded. SEIZIN IN DOWER.

A. B. Sheriff.

Another, in Massachusetts.

By virtue of this writ to me directed, by J. S. of ——, J. N. of ——, and J. M. of ——, all of said county, disinterested freeholders, under oath administered by P. F. esq. a justice of the peace for said county of ——, to them the said J. S. J. N. and J. M. to set forth the same dower equally and impartially, without favour or affection, as conveniently as might be; I caused one third part of the messuage, (*or tenement,*) with the appurtenances situate at —— aforesaid, within described; viz. one kitchen and one front room, and the chamber over said front room; all on the north side of the hall in the in the dwelling house of said deceased, at ——, with free ingress and regress to and from said rooms, through said hall, the chamber stairs therein, and the front and back yards of said house. And five acres of land in the meadow, called A. situate at ——; which five acres of land are bounded as follows, viz. (*here describe the metes and bounds particularly, and so of each piece of land set forth, as well as of each building, or part of building, and privilege,*) to be set forth to the said A. B. as her dower in the estate of C. D. her husband within named. And then and there I caused the said A. B. to have full seizin of said one third part of the aforesaid messuage, (or tenement,) &c. with the appurtenances so set forth by the said J. S. J. N. and

SEIZIN IN DOWER.

J. M. to hold to her, the said A. B. by metes and bounds.

N. B. *Where the estate upon which the dower is set forth, is entire, and no division can be made by metes and bounds, the estate must be specifically described, and the metes and bounds omitted in the return, as in the case of one third of rents, issues, or profits.*

And for levying the damages and costs in such writ, the officer must proceed as in other executions for the obtaining of money only.

The above form of return may be used in New-Hampshire, varying the description of the freeholders thus, "three freeholders of the neighbourhood, *&c.*" *instead of* "three disinterested freeholders of the same county," *as in the above form.*

Of a writ of inquiry of damages in dower, where tenant died seized.

An inquisition indented, taken at —— in the county of ——, on the day of by me, E. D. sheriff of the county aforesaid, by virtue of a writ to me directed, and to this inqusition annexed, by the oath of L. O. G. R. P. Q. *&c.* (*to the number of twelve,*) who say upon their oaths, that the within named C. D. on the day of *&c.* at —— in the county aforesaid, died, seized in his demesne, as of fee, of, and in the tenements within specified. And that the tenements aforesaid, are of the yearly value in all issues beyond reprises of and that six years and three quarters of a year are elapsed from the death of the aforesaid C. D. and that the within named A. B. sustained damage by reason of the detention of her dower within specified, to the value

of ——. In testimony whereof, as well I, the aforesaid sheriff, as the jurors aforesaid, to this inquisition have alternately set our hands and seals, on the day and year and at the place abovesaid.

SEIZIN IN DOWER.

F. D. Sheriff.
P. F.
W. D. &c. } *Jurors.*

XXI. OF A WRIT OF SEIZIN IN WASTE.

SEIZIN IN WASTE.

By virtue of this writ to me directed, on the day of A. D. I delivered to, and made the within named C. D. to have full seizin of the within mentioned, wasted mansion house, with the appurtenances, as is within to me commanded. And also by virtue of this same writ, on the same day and year, in my proper person, I went to the within described wasted mansion house, and there made diligent inquisition concerning the damages, which the aforesaid C. D. had sustained by occasion of the vendition, and destruction within mentioned, the tenor of which inquisition is set forth in the schedule to this writ annexed.

L. M. Sheriff.

XXII. OF A WRIT OF INQUIRY OF WASTE.

INQUIRY IN WASTE.

By virtue of this writ to me directed, I, P. F. esq. sheriff of the county aforesaid, on the day of in my proper person, went to the tenements wasted, in said writ named and described, and then and there made inquisition, &c. as this writ requires of me.

The residue of the execution of this writ appears in a certain inquisition to this writ annexed.

Inquisition indented, taken at ——, in the county of ——, on the day of before me A. B. sheriff of the county aforesaid, by virtue of a certain writ to said sheriff directed, and to this inquisition annexed, by the oaths of A. D. &c. *(to the number of twelve, or such number as the statute requires,)* who say upon their oaths aforesiad, that A. H. and J. his wife, in said writ named, have made waste, sale, and destruction in all, in said writ named, viz. by permitting one hall of the price of 40s.; and two chambers of the price of 60s.; and one stable of the price of 20s.; to be uncovered for defect of repairs of those same houses, and by tempests and storms descending upon them, to become putrid and corrupt, &c. against the form of the provision in the same writ contained. And further, the jurors aforesaid, upon their oaths aforesaid, say, that the aforesaid A. H. and J. have made no other, nor more waste, sale, nor destruction in the houses aforesaid. In testimony whereof, &c.

P. F. Sheriff.

M. R.
S. D. &c. } *Jurors.*

XXIII. INQUISITION OF DAMAGES DONE BY LAYING OUT A HIGHWAY.

In Connecticut.

INQUIRY OF WASTE.

BY virtue of this writ to me directed, on the day of I, in my proper person, repaired to the lands of the within named C. D. J. described in this process, situated in —— and across which said highway within described had been laid. And then and there made an inquisition of the damage done to him the said C. D. J. by reason of the laying out of said highway across his said land, by the oath of S. D. and M. R. both of H. in said county; and P. F. and A. M. both of B. in the county aforesaid; and M. D. and C. C. both of M. in the county aforesaid, six disinterested freeholders, by virtue of this writ drawn from the jury boxes in their respective towns as the law directs, and duly sworn by I. D. esq. justice of the peace for said county, to inquire of the amount of damages done to him the said C. D. J. in manner aforesaid, a certificate whereof is hereto annexed. Which said jurors upon their oaths say, that the damage done to the said C. D. J. by the laying out of said highway across his lands aforesaid, amounts to sum of and no more.

R. R. Sheriff.

XXIII. OF A WRIT OF PARTITION.

PARTITION.

BY virtue of this writ to me directed, and to this indenture in partition annexed, I, P. F. esq. sheriff of the county aforesaid, on the day of having taken with me I. D. &c. twelve good and lawful men of my county, and of the neighbourhood (or town) within written, in presence of H. F. in the writ aforesaid named, in my proper person, went to the tenements in said writ described, and there by their oath, (respect being had to the true value of those tenements, with their appurtenances,) the same tenements in partition, I caused to be parted in three equal parts, viz. twelve feet in breadth from north to south, and eighteen feet in length from east to west, of the messuage in the aforesaid writ, specified on the northeast corner thereof, &c. (*describing the parts particularly, both of lands and buildings, by length of line and boundaries,*) I, the the aforesaid sheriff, on the same day of A. D. caused —— to be delivered and assigned to H. F. in said writ named to be held to him in severalty, according to the form and effect of the writ aforesaid, and as this same writ requires and commands.

Which whole third part of the tenements aforesaid in the writ aforesaid, I assigned and delivered to the said H. F. And as to the two remaining parts of the aforesaid tenements in the writ aforesaid specified, belonging to I. F. in the same writ named and in the partition aforesaid to be delivered to him, I certify, that no one on the part of the said I. F. came to receive of me, the aforesaid sheriff, the said

PARTITION.

two parts, so that those two parts aforesaid to the said I. F. I could not deliver nor assign, as this writ commands and requires. In testimony whereof, as well I, the aforesaid sheriff, as the said twelve jurors, to this indenture of partition, have put our seals, and signed the same with our hands, on the day and year aforesaid.

P. F. Sheriff.
&c. &c.

XXV. OF SUPERSEDEAS.

SUPERSEDEAS.

I CERTIFY to the court, (*or* to the justices of the court) that before the coming of this writ to me directed a writ of *supersedeas* came to my hands, the tenor of which same writ of *supersedeas* follows in these words, viz. (*here set out the supersedeas,*) by reason of which I could not proceed to the execution of the said writ first above mentioned, as I am commanded therein.

A. R. Sheriff.

Another.

I certify, &c. that after the coming of this writ to me directed, to wit, on the day of before the return day thereof, and before I had commenced the execution of the same, a writ of *supersedeas* came to my hands; the tenor of which, &c. (*the same as in the preceding form.*)

A. R. Sheriff.

Another.

I certify, &c. that on the day of after the coming of this writ, to me directed, I was duly notified, that a lawful writ of error with bonds thereon given, had been issued for the reversal of the judgment on which the writ first above mentioned was issued, by a copy of the same writ of error having been then and there left with me, certified by F. G. deputy sheriff for said county of ——, the tenor of which copy of said writ of error and certificate thereon, follows in these words, to wit: (*here set out the copy of the writ of error.*) By reason of which I could not proceed to the execution of the said writ first above mentioned, as therein is required of me.

A. L. Sheriff.

XXV. OF HOMINE REPLEGIANDO.

HOMINE REPLEGIANDO.

BY virtue of this writ, &c. I certify, that no other writ of replevin of the said W. S. than this pluries writ of replevin of the said W. S. has come to my hands or was delivered to me. Nevertheless, I certify, that immediately after the reception of the same writ, I went to make replevin of the said W. S. from him the said J. B. but the said J. B. would *not* show to me the said W. S. And that the said J. B. had, in fact, before the coming of this writ to me, eloigned the said W. S. to places unknown to me; and that, after the acception of this writ, the said W. S. has not been found in my bailiwick, so that I could not make replevin of her the said W. S. in any manner according to the command of this writ, as of me within is required.

A. B. Sheriff.

Another.

I certify that the aforesaid W. S. before the coming of this writ to me, was eloigned to places unknown to me by the within named S. B. S. T. and R. F. by reason of which, I could not nor can make replevin of the aforesaid W. S. as I am within commanded.

A. B. Sheriff.

XXVI. OF HABEAS CORPUS CUM CAUSA.

HAB. CORP.

BY virtue of this writ I certify to you, that before the coming of this writ by virtue of another writ before directed to me, A. B. within named, was in the prison at ——, and there lay sick and infirm, and in the same prison as yet lies sick and infirm, so that I cannot, for fear of his death, remove him. Therefore, I cannot have the body of the said A. B. at the day and place within contained.

M. N. Sheriff.

Another.

I certify to the justices of the court within named, that the said J. S. in the prison in the country of ——, is detained by various infirmities and is so sick that I cannot, on account of the weakness of his body, and the danger of his death, safely remove him. Therefore, I cannot at present have his body before the justices (*or* the court, *or* the judge) at the day and place within mentioned, according to the form of this writ.

N. F. Sheriff.

Another.

By virtue of this writ I certify, &c. that before the coming of this writ to me J. T. within named, was taken in another place and committed to the prison in —— aforesaid, by virtue of a certain other writ before to me directed, a copy of which annexed to this writ I transmit to you. Nevertheless, I have the body of the said J. T. before you at the day and place within mentioned, as is to me within commanded.

R. H. Gaoler.

HAB. CORP.

Another.

By virtue of this writ I certify to you, that before the coming of this same writ to me, J. L. in this writ named, was taken in ——, and committed to prison at ——, in said county, for suspicion of being a common robber. And further, the said J. L. was detained in the same prison, for that he was indicted and informed against for divers felonies, done and perpetrated by him, at ——, in the county of ——. And another time was apprehended at ——, in the county aforesaid, and conducted to the prison at ——, in the county of ——. And the said J. L. the same prison last mentioned feloniously broke, and therefrom escaped, as it is said. Nevertheless, the body of the said J. L. &c. *(as above.)*

W. C. Sheriff.

Another.

I, A. B. esquire, sheriff of the country of C. certify, that before the coming of this writ to me directed, J. M. in this writ named, was committed into my custody by a certain *mittimus* from J. H. and G. R. two justices of the peace in and for the county of C. aforesaid, the tenor of which said *mittimus* follows, in these words: *(here set out the mittimus verbatim at full length.)* And this is the cause of the taking and detention of the aforesaid J. M. under my custody. Yet the body of him the said J. M. I have ready as this writ requires.

W. C. Sheriff.

Another.

By virtue of this writ to me directed, and to this schedule annexed, I certify, that at the day and place

in the same writ specified before the coming of said writ to me, F. G. in the same writ mentioned, was committed and detained under my custody by a certain order made at the court of general gaol delivery, held at M. in the county of N. on the day of A. D. before S. C. and J. L. esquires, justices, who held said court of gaol delivery, in the county aforesaid, which orders follows in these words: (*here set out the order verbatim at full length*) and also that the aforesaid F. G. was, and is detained in the prison aforesaid under my custody, and by virtue of a certain writ of ——, against the same F. G. at the suit of J. A. of a plea of trespass. And also on a writ of him J. A. against him F. G. £20, returnable to the court of ——, to be held on the day of A. D. at ——, in the county of ——. And that these are the reasons of the taking and detention of the said F. G. under my custody. Yet the body of him F. G. I have ready at the day and place in the writ aforesaid mentioned, as the same writ commands and requires. HAB. CORP.

A. B. Sheriff.

Another.

I certify, &c. that before the coming of this writ to me directed, the within named J. S. was committed to the common gaol under my custody, by virtue of a certain warrant signed by L. M. justice of the peace, for certain acts of treason (*or* felony) plainly and specially expressed in said warrant, by him the said J. S. to have been committed, which warrant of commitment in these words and figures, to wit: (*here set out the warrant verbatim,*) therefore I cannot have the body, &c.

A. B. Sheriff.

HAB. CORP.

Another.

I, L. K. sheriff of the county of ——, do certify, that at the day and place in the schedule to this writ annexed, before the coming of this same writ to me, A. O. in said writ named, was taken within the county aforesaid, by W. V. esquire, late sheriff of the county aforesaid, and in the prison in ——, in said county, in the custody of the same late sheriff was safely kept by virtue of a certain writ of *capias ad satisfaciendum* (*or* execution) against the said A. O. tested at ——, on the day of to satisfy ——, the sum of debt, and the sum of costs (*or* damages) in which sums the said A. O. was before —— condemned (*or* for which said sums judgment had been rendered by the justices of the —— court —— aforesaid, against him the said A. O.) For the cause, and in the manner aforestated, the body of the said A. O. was so taken and detained in prison by the said late sheriff. And I, the aforesaid L. K. now sheriff of the county aforesaid received the said A. O. within the prison aforesaid, from the said late sheriff, at the time of his going out of office, and within the same prison, held the body of the said A. O. in safe custody until afterwards, to wit, on the day of A. D. I received a certain writ, of *supersedeas*, to me directed, the tenor of which follows in these words: (*here set out the writ of supersedeas.*) And for that the said A. O. was not committed for any other cause, I permitted him, the said A. O. to go at large, the said writ of *capias ad satisfaciendum* (*or* execution) notwithstanding, as in and by said writ of *supersedeas* to me is commanded. Therefore, I cannot have the body of the said A. O. before the justices of the supreme court (*or* supreme judicial court, *or* before the supreme court, *or* before the superior court, *or* before the said E. G. one of the justices,

or judges of the supreme *or* superior court) in ——, HAB. CORP. as by this writ is required of me.

L. K. Sheriff.

Another.

I certify, &c. ——, committed for suspicion of treason (*or* felony, *or* as accessary to a felony committed before the fact) plainly and specially expressed in said warrant by him the said J. S. to have been committed, which said warrant of commitment is in these words following, to wit: (here set out the warrant *verbatim*) therefore I cannot have the body of him the said J. S. &c.

A. B. Gaoler.

Another, in Massachusetts.

I certify, &c. that the said J. T. was, on the day of by ——, deputy sheriff, committed to the gaol under my custody, on *mesne* process, for want of reasonable bail; and that at the time of the commitment of the said J. T. the said deputy sheriff left with me the said keeper, a copy of the original writ, on which the said J. T. was by him taken, with his the said deputy sheriff's return on said writ, on said copy endorsed, all which are in these words, to wit: (*here set out said copy of said original writ, and of said return of said deputy sheriff*) therefore I cannot have the body of the said J. T. &c.

A. B. Gaoler.

Another, in Connecticut.

I certify that, &c. (*as in the preceding*) was taken at ——, in said county, by ——, deputy sheriff, by

HAB. CORP.

virtue of an execution issued on a judgment rendered by —— court, held at ——, in the county of ——, on the day of (*or* by A. B. justice of the peace, in, &c.) for the sum of —— damages, and for the sum of —— cost, in favour of ——, against him the said C. D. dated the day of returnable within days next ensuing, (*or* to the next —— court, to be holden at ——) and signed by ——, clerk of said court, (or by ——, justice of the peace) and by said deputy sheriff, committed to my keeping within the prison whereof I am keeper as aforesaid. And that the said deputy sheriff, at the time of committing him the said C. D. in execution as aforesaid, left with me the said keeper, a copy of said execution, and of his endorsement thereon, in these words: (*here set out said copy of the execution, and of the officer's endorsement.*) And that on the day of at said prison, J. T. justice of the peace for said county, administered to him the said C. D. so then in prison on execution, the oath by law provided for the relief of poor prisoners imprisoned for debt, and certified the same on the back of said copy of said execution so left with me the said keeper, by said deputy sheriff. And that on the same day of immediately after said oath was so administered to said C. D. A. B. and the creditor named in said execution left with me the said keeper, the sum of ——, for the support of the said C. D. the said debtor, as the law directs. And I further certify, that the sum by the county court (*or* by, &c.) allowed for the support of the said C. D. at the time of the said C. D.'s taking the oath as aforesaid, was per week, and so continued until the day of when the sum allowed per week was the sum of —— and no more. And which said sum of money so left by the said A. B. for the support of the said C. D. is not as yet expended, but there still remains in my

hands the sum of —— parcel thereof, for the future support of the said C. D. And that the said C. D. is not committed nor held by me for any other cause, or in any other manner than as is above stated. Wherefore I cannot have the body of the said C. D. before the said supreme court (*or* before the said L. M. judge of the superior court) at the day and place within required.

HAL. CORP.

A. B. Gaoler.

XXVII. OF SUMMONS OF ASSIZE.

SUM. OF ASSIZE.

By virtue of this precept to me directed, I have made to come before the justices of oyer and terminer and gaol delivery within written, at the day and place within named, twenty-four good and lawful men of said county (*or* city and county) of , to inquire for the people of the state of (*or* for the state of) and the body of the same county (*or* city and county) of , and to do and receive all those things which on behalf of the people of the state of (*or* in behalf of the state of) shall be then and there enjoined them. And also the prisoners being in the gaols thereof, together with their attachments, indictments, and all other minuments any way concerning those prisoners. And likewise so many good and lawful men of the same county (*or* city and county) duly qualified to serve as jurors therein, as the said court of oyer and terminer and gaol delivery (*or* justices of said court of oyer and terminer) hath directed, by whom the truth of the matter may be better known and inquired into, and who have no affinity to the prisoners.

And I have caused to be publicly proclaimed throughout said county (*or* city and county) that all those who will prosecute against those prisoners, be then and there to prosecute against them as shall be just, and have given notice to all justices of the peace, coroners, bailiffs, and constables within said county (*or* city and county) that they be then and there in their own proper persons, with their rolls, records, indictments, and other remembrances, to do

those things which to their offices in that behalf appertain to be done, and am present attending, in my proper person, to do those things which to my said office of sheriff appertain to be done. SUM. OF ASSIZE.

The residue of the execution of this precept, is contained in the schedule hereunto annexed.

A. B. Sheriff.

XXVIII. OF WARRANTS OF DISTRESS.

Against a deficient Collector of Taxes, in the State of New-York.

WARR. OF DISTRESS.

I certify, that the within named C. D. has not any goods or chattels found within my bailiwick: and that, by virtue of this warrant to me directed, I have caused to be made of the lands and tenements of the within named C. D. the sum of $100, part of the said sum of $800 dollars within contained; which said sum of $100 I have ready to be delivered to the within named E. F. according as this warrant requires. And I further certify, that the within named C. D. has no other or more lands or tenements whereof I can cause the residue of the money within mentioned to be made or levied, as I am within commanded.

J. S. Sheriff.

Another, in Massachusetts, for a Judgment Debt due to the Commonwealth.

By virtue of this warrant to me directed at C. in said county, on the day of A. D. I distrained one horse, the property of the within named J. D. and, on the day of A. D. at the dwelling-house of E. F. in C. aforesaid, having given notice by posting up notifications at ——, and at ——, two public places in said C. four days before the said day of that said horse would then be sold at public vendue at said dwelling-house, I accordingly then and there sold said horse to G. H. the highest bidder therefor, for the sum of and, on the day of by virtue of this same war-

rant, I took three acres of land, the estate of said C. D. situate in said C. bounded, &c. (*here describe the bounds*) and posted up notifications at —— and at —— two public places in said C. and also at —— and at —— two public places in D. a town adjoining to said C. and also at —— and at —— two public places in E. another town adjoining to said C. that the said three acres of land would be sold at public vendue to the highest bidder, on the day of thirty days after the day of posting up such notification as aforesaid, at the dwelling house of , in said C. [and also caused an advertisement of the time and place of such sale to be published in the public newspaper called the —— printed at —— in said county * three weeks successively before the day so appointed for the sale of said three acres of land;] and on the said day of at said dwelling house, I sold said three acres of land at public vendue, to L. N. the highest bidder therefor, for the sum of and then and there made, executed, acknowledged, and delivered to him the said L. N. a good and sufficient deed of conveyance thereof And on the day of there still remaining due on this warrant, the sum of and the said C. D. having no other, or more goods or estate, found within my bailiwick, for want thereof, I, by virtue of this same warrant, took the body of the said C. D. at —— aforesaid, and him committed to the gaol of this commonwealth, at —— in said county, and left with the gaoler of said gaol an attested copy of this warrant, and of my proceedings above stated, endorsed thereon.

WARR. OF DISTRESS

* *If there be no newspaper printed in the same county, then say,* "printed at ——, in ——, the county nearest to where such land lies, there being no such paper printed in the county of ——." (If the real estate taken be of less value than £100, the advertisement in the newspaper may be omitted.)

WARR. OF DISTRESS.

Another, levied on real estate of a sheriff, deputy-sheriff, or constable, for default in not executing warrants issued for the collection of taxes.

By virtue, &c. I took one acre of land situate in D. in said county, and bounded, &c. with a dwelling house thereon, the property of the within named C. D. and gave notice that the same land and dwelling house, would, on the day of *A. D.* at A. in said D. be sold at public vendue to the highest bidder, by posting up advertisements fourteen days previous to such sale, at ——, and at ——, two public places in D. aforesaid, where said land and house are situate; and also at —— and at —— two public places in E. a town adjacent to said D. and at ——, and at —— two public places in F. another town adjacent to said D. And on the same day of so appointed for the sale of said land and house, at said A. I sold the same land and house at public vendue to L. M. the highest bidder therefor, for the sum of and then and there made, executed, acknowledged, and delivered to the said L. M. a good and sufficient deed of conveyance thereof, as the law directs; and on the day of I paid to the within named treasurer of —— the sum of being the amount then due on said warrant from him the said C. D. and on the same day, I returned to him the said C. D. the sum of being the overplus of the money arising from said sale, after deducting therefrom the said sum so paid to said treasurer, and the charges and fees for executing this warrant.

G. H. Sheriff.

Another, in New-Hampshire.

By virtue, &c. *(as in the preceding form in Massachusetts, till the giving notice of time and place of sale,)* I gave notice, &c. by posting up advertisements thereof, on —— at —— a public place in said C. where the estate so taken, lies, and at ——, a public place in D. a town adjoining to said C. and also at —— a public place in E. another town adjoining to said C. thirty days before said day of so appointed for the sale of said land &c. And in said advertisements stated the amount to be satisfied by such sale and that payment must be made in money *(or other things as the case may be)* for the purchase of said land. And on the day of at said —— sold &c. *(as in the preceding form.)*

X. Y. Sheriff.

Another, in Vermont.

By virtue, &c. I destrained forty five sheep, the property of the said C. D; and fourteen days before the day herein after mentioned, for the sale of the said distress, gave public notice by posting such distress at ——, a public place in said C. where such distress was made, that such distress would be sold at ——, in said C. at public vendue on the day of and then and there on said day of at said C. I sold said forty five sheep to F. G. the the highest bidder for them, for the sum of per head; amounting to the sum of in the whole. And that at said C. on the day of by virtue of said warrant, I took fifty acres of wood land, situate in said C. and bounded, &c. *(here describe*

WARR. OF DISTRESS.

the bounds,) and published three weeks successively in the newspaper printed at ——; in which, by law, land taxes are to be published, that the said fifty acres of land so taken would, at said ——, in said C. on the day of ten days after the day of publishing the same in said newspaper, be sold at public vendue to the highest bidder. And on the day of aforementioned, at —— in said C. I sold the said fifty acres of land to F. G. the highest bidder for them, &c. (*as in the form preceding in Massachusetts.*)

M. R. Sheriff.

N. B. Constables in Vermont, may use this form of return on warrants for the collection of taxes varied thus: "And kept the said distress the space of four days, and on the day of six days, (*instead of fourteen,*) gave public notice, &c.

Another in Connecticut, by collector of taxes.

In Connecticut, the proceeding on a warrant of distress, when levied on the body, goods, or chattels, is the same as the levy of executions; but when such warrant is levied upon real estate, the estate taken must be sold at auction.

By virtue, &c. for want of goods or chattels of C. D. named in the schedule hereunto annexed, found in my precincts, I took six acres of land, the property of the said C. D. (*or* for want of goods or chattels or any other estate of the said C. D. on the day of within one year after the tax in the annexed schedule became due, I took six acres of land belonging to him the said C. D. at the time of

making up the list, whereon the tax in the schedule annexed arose.) And on the same day of I advertised on the sign post, in —— society, where said land lies, in said C. that on the day of said six acres would, at said sign post, be sold at public auction for the purpose of paying said tax, or so much of said six acres, as should be sufficient for that purpose. And *also*, three weeks successively, six weeks before said day of I published the same advertisement in the public newspaper, called the ——, printed at ——, in this state. And afterwards, to wit, on the same day of at said sign post, I, at public auction, sold to J. S. of —— two acres and three quarters, part of said six acres of land for the sum of the amount of said tax, and the lawful costs and charges arising thereon, which said two acres and three quarters, I then and there set off to him the said J. S. by metes and bounds, as follows, to wit; (*here describe the length of lines and bounds*) and then and there executed, acknowledged, and delivered to him, the said J. S. a deed with warranty of said two acres and three quarters of an acre, meted and bounded as aforesaid.

S. D. Sheriff.

WARR. OF DISTRESS

XXX. INQUISITION OF DEATH BY THE VISITATION OF GOD.

INQ. OF DEATH. AN inquisition taken at A. in the county of B. on the day of A. D. before J. A. esq. one of the coroners, (*or* justices of the peace,) in, and for said county of B. upon the view of the body of T. C. (*or* of a person unknown,) there lying dead, by the oaths of G. M. P. R. *&c.* (*to the number of twelve,*) good and lawful men, (freeholders,) of ——, in the same county; who, being charged and sworn, to inquire, when, how, and by what means, the said T. C. late of ——, in the county of ——; (*or* the said person unknown,) came to his death, upon their oath, say, that the said T. C. (*or* the said person unknown,) on the day of at —— aforesaid, in the county aforesaid, died by the visitation of God, in a fit, (*or otherwise, as the case may be, &c.*) And the jurors aforesaid, upon their oath aforesaid, say, that the said T. C. (*or* the said person unknown,) in manner and form aforesaid; and not otherwise, nor by any other means came to his death. In testimony whereof, as well the said jurors as the said coroner, (*or* justice of the peace,) have subscribed this inquisition with their hands, and affixed thereto their seals, on the day and year abovesaid.

G. M.
P. R. *&c.* } *Jurors.*

J. A. Coroner, (*or* justice of the peace.)

Another, by murder.

An inqusition taken at H. in the county of N. on the day of before W. D. gentleman, one of the coroners of the said county of N. upon the view of the body of G. D. gentleman, then and

there lying dead, upon the oath of J. W. &c. to INQ. OF DEATH.
inquire how, and in what manner, the aforesaid G. D. came to his death; who say, that I. H. of the county aforesaid, yeoman, D. E. D. B. and divers others, not having the fear of God before their eyes, but moved and seduced by the instigation of the devil, on the 23d day of May, A. D. 1812, at H. aforesaid, in the county aforesaid, about ten o'clock of the forenoon of said day, from their malice aforethought, feloniously as felons, upon the said G. D. then and there an assault and affray made, and that the aforesaid I. H. with a certain sword of the value of five dollars, which sword the same I. H. held in his right hand, then and there feloniously struck the said G. D. and gave him the said G. D. then and there one mortal wound upon the left knee, of the said G. D. wholly cutting asunder a certain bone called the pan of the knee, of the aforesaid knee of the said G. D. of which certain mortal wound, the same G. D. languished from the said 23d day of May, and languishing did live until the 4th day of the month of June, A. D. 1812, on which same fourth day of June, the same G. D. of the mortal wound aforesaid, at H. aforesaid, in the county aforesaid, died. And the jurors aforesaid, upon their oath aforesaid, say, that the aforesaid I. H. in manner and form aforesaid, the aforesaid G. D. feloniously and of his malice aforethought, killed and murdered, against the peace and dignity of this State, (*or* Commonwealth.) And further, the aforesaid jurors, upon their oath aforesaid, say, that the aforesaid D. E. D. B. &c. at the time of the felony and murder aforesaid, done and committed, to wit: on the twenty-third day May, aforesaid, in the year 1812, aforesaid, about ten o'clock in the forenoon of the same day, feloniously were present with swords, &c. then and there helping, assisting, abetting, com-

INQ. OF DEATH.

forting, and maintaining the aforesaid I. H. to the felony and murder aforefaid, in form aforesaid, done and perpetrated against the peace and dignity of this State, (*or* Commonwealth,) and the laws of the same. In testimony whereof, &c.

Another.

Upon their oaths, say, that W. C. of ——, in the county of —— aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigations of the devil, on the day of at said ——, with force and arms, feloniously, wilfully, and of his malice aforethought, in, and upon the said J. L. did make an assault. And that he, the said W. C. with a certain knife called a cutteau, of the value of twenty five cents, which he the said W. C. in his right hand then and there had and held, the said J. L. in, and upon the left side of the said J. L. between his ribs, about four inches from the breast bone of him, the said J. L. the said W. C. did then and there give a mortal wound, of the width of one inch, and the depth of five inches, of which mortal wound, so given by the said W. C. in manner aforesaid, the said J. L. languished from the said 4th day of August, A. D. 1809, until the 9th day of December, A. D. 1809; on which 9th day of December, A. D. 1809, the same J. L. of the mortal wound aforesaid, died. And so the jurors aforesaid, upon their oaths aforesaid, say, that the said W. C. in manner and form aforesaid, of his malice aforethought, did kill and murder him, the said J. L. against the peace and dignity of this State, (*or* Commonwealth,) and the laws of the same. In testimony, &c.

Another, of manslaughter.

Upon their oaths, say, that T. M. of, &c. on, &c. at, &c. on a sudden quarrel between him the said T. M. and him the said J. S. he, the said T. M. not having the fear of GOD before his eyes, but moved and seduced by the instigation of the devil, in, and upon him the said J. S. did, then and there, with force and arms, wilfully, and feloniously make an assault; and with his, the said T. M's right fist clenched, did then and there give to him, the said J. S. one mortal wound on the left side of the head of him the said J. S. under the left ear of the said J. S. of which mortal wound, so in manner aforesaid given, by him the said T. M. the same J. S. then and there immediately died. And so the jurors aforesaid, upon their oath aforesaid, say that the said T. M. did then and there in manner and form aforesaid, wilfully and feloniously kill and slay him, the said J. S. against the peace, &c.

Another, of self murder.

Upon their oath, say, that the said R. B. on the day of at &c. not having the fear of GOD before his eyes, but being moved and seduced by the instigation of the devil, in and upon himself, the same R. B. then and there, wilfully, feloniously, and of his malice aforethought, did make an assault. And that the said R. B. with a certain razor of the value of six cents, which the said R. B. then and there had, and held in his right hand, himself, in, and upon the throat of him, the said R. B. did then and there wilfully, feloniously, and of his malice aforethought, strike and cut, and then and there gave to himself with the said razor one mortal wound of the length of five inches, and of the depth of one

INQ. OF DEATH.

inch, of which said mortal wound, the said R. B. from the said day of did languish, until on the day of next after, at, &c. he the said R. B. of the said mortal wound died. And so the jurors aforesaid, upon their oaths aforesaid, say, that the said R. B. in manner and form aforesaid, then and there voluntarily, and feloniously, and as a felon of himself, did murder himself, against the peace, &c.

Another, chance medley.

Upon their oath, say, that the said T. G. on the day of at, &c. was hunting in pursuit of wild fowls, in company with one S. M. of ——, in the county aforesaid; each of whom had then and there a gun called a fowling piece, for the purpose of killing such fowls. And that the said S. M. then and there, a certain fowling piece, of the value of six dollars, then and there loaded with gunpowder, and fifty leaden shot, in his hands then and there had and held, aimed at a partridge, then and there perched on the twig of a tree, then and there standing. And the said S. M. not seeing the said T. G. nor knowing that the said T. G. was then and there in a direction and line between him the said S. M. and the said partridge, did then and there shoot and discharge the load of his said fowling piece at said partridge, and with his leaden shot aforesaid out of the fowling piece aforesaid, then and there by force of the gunpowder aforesaid, shot and sent forth as aforesaid, the aforesaid T. G. in and upon the back of him the said T. G. on the left side thereof, a little below the shoulder blade of him the said T. G. did strike, penetrate, and wound, then and there giving to the said T. G. with the leaden shot aforesaid, sent forth

out of the fowling piece aforesaid, by him the said S. M. in manner aforesaid, in and upon the back of him the said T. G. on the left side thereof, a little below the shoulder blade of him, the said T. G. twenty mortal wounds, each of which wounds were of the depth of three inches, and of the breadth of one eighth of an inch; of which mortal wounds aforesaid, the said T. G. then and there instantly died. And so the jurors aforesaid, do say, that the aforesaid S. M. the aforesaid T. G. by misfortune, and against, and contrary to the will of him, the said S. M. in manner and form aforesaid, did kill and slay. In testimony, &c. INQ. OF DEATH.

Lunacy.

That the said A. R. *not being of sound mind, memory, and understanding, but lunatic and distracted,* on the day of in the year aforesaid, one end of a small cord, over a joist fastened, in a chamber of him, the said A. B. in the dwelling-house of C. D. situate in said —— and the other end of said cord about his own neck, the said A. B. did fix, tie, and fasten, and therewith did then and there hang, suffocate, and strangle himself; of which said hanging, suffocation, and strangling, the said A. B. then and there died. And so the jurors aforesaid, upon their oath aforesaid, say, that the said A. B. *not being of sound mind, memory, and understanding, but lunatic and distracted, in manner and by the means aforesaid, did kill himself.* In witness, &c.

Misfortune.

That the said A. B. on the day of at in —— aforesaid, going to the river —— there to bathe himself, (*or* fell in the river —— from a boat,

MODE OF DEATH

or from a chaise, *or otherwise,*) *it so happened, that accidentally, casually, and by misfortune,* he, the said A. B. was in the waters of said river, then and there suffocated and drowned, of which said suffocation and drowning, he, the said A. B. then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, say, that the said A. B. in manner and by the means aforesaid, *accidentally, casually, and by misfortune, came to his death, and not otherwise.* In witness, &c.

Another.

That the said man unknown, on the day of at —— aforesaid, was found drowned in the river ——, at ——, and that the said man unknown, had no marks of violence appearing on his body; but how and by what means he became drowned and suffocated, no evidence doth appear to the jurors. In witness, &c.

CHAP. II.

FORMS OF DECLARATIONS.

Indebitatus assumpsit, for officer's fees.

ASSUMP. FOR OFF. FEES.

THAT at —— aforesaid, on the day of the said C. D. was indebted to the said A. B. in the sum of for certain fees, perquisites, and sums of money, before that time due, and owing, and of right payable, from the said C. D. to the said A. B. as a sheriff, (*or* under sheriff, *or* deputy sheriff, of the county of ——,) (*or* constable of the town of ——,) (*or* coroner, *or* high bailiff of the county of ——,) (*or* town sergeant of the town of ——,) upon, and for the execution of divers writs, precepts, and processes, for the said C. D. at his special interest and request. And also, upon and for the work and labour, trouble, care, diligence, journies, of said A. B. as such sheriff as aforesaid, (*or* such deputy, *&c.*) by him before that time done, performed, and bestowed, in and about the executing and serving of the said writs, precepts, and processes; and in and about the conducting, guarding, and keeping divers persons arrested by him, the said A. B. for him the said C. D. under and by virtue of the said writs, precepts, and processes, at the like

ASSUMP. FOR OFF. FEES.

special instance and request of him, the said C. D.; and being so indebted, he, the said C. D. in consideration thereof afterwards, to wit, on the day and year last aforesaid, at —— aforesaid, undertook, and then and there faithfully promised the said A. B. to pay to him the said sum of money, when he, the said C. D. should be thereunto afterwards requested. Yet the said A. B. saith, that the said C. D. his promise and undertaking aforesaid not regarding, hath never paid to him, said A. B. the said sum of money, nor any part thereof, but still unjustly neglects and refuses to do it, though he, the said C. D. hath often been requested to pay the same; to the damage of the said A. B. as he saith, the sum of and therefore he brings this suit.

Debt, for escape on execution.

Debt for escape.

That the said A. B. by the consideration and judgment of the justices of the court of ——, held in and for the (*or* our) county of ——, on the day of recovered against one E. F. a certain debt of $ and also $ costs, which in and by the same court were adjudged the said A. B. (*or* the sum of $ as damages, and $ costs, adjudged, *&c.*) as by the record and proceedings thereof, now remaining in the same court, at —— aforesaid, will more fully appear.* And the said A. B. further saith, that on the day of he sued and prosecuted out of said court a certain writ of execution, (*called a capias ad satisfaciendum,*) upon the judgment aforesaid, against him the said E. F. directed to the sheriff of the county of M. by which said writ the said sheriff was commanded to take the

* In Connecticut, the plaintiff makes a profert of the record, as of a deed.

body of the said E. F. if he should be found within his bailiwick, and him safely keep, so that the said sheriff might have his body before the justices of the —— court, at ——, on the day of , to satisfy the said A. B. the debt and costs aforesaid (or the damages and costs aforesaid) in form aforesaid recovered. And that the said sheriff of M. should have there that writ, which said writ afterwards, and before the delivery thereof to the said sheriff of M. to be executed, as is herein after mentioned, was duly endorsed with a direction to the said sheriff, requiring him to levy $ besides sheriff's poundage, officer's fees, and other incidental expenees. And which said writ, so endorsed as aforesaid, afterwards, and before said return thereof, to wit, on &c. was delivered to the said C. D. who then, and from thenceforth, until, and at, and after the return of the said writ, was sheriff of M. to be executed in due form of law; and by virtue of which said writ, and said endorsement so made thereon as aforesaid, the said C. D. so being sheriff of M. as aforesaid, afterwards, and before the return of said writ, to wit, on, &c. last aforesaid, and within the bailiwick of the said sheriff of M. to wit, at, &c. aforesaid, took and arrested the said E. F. by his body, and then and there, by virtue of the said writ, and of the said endorsement so made thereon as aforesaid, had and detained him in his custody, in execution, for the said sum of $ so endorsed on the said writ as aforesaid, besides sheriff's poundage, officer's fees, and all other incidental expenses; and kept and detained him in his custody, from thence until the said C. D. so being sheriff of M. as aforesaid, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, without the leave or licence, and against the will of the said A. B. suffered and permitted the said E. F. to es-

DEBT FOR ESCAPE.

DEBT FOR ESCAPE.

escape, and to go at large wheresoever he would, out of the custody of him the said C. D. (he the said C. D. then being sheriff of M. as aforesaid, and the said sum of £ so endorsed on said writ as aforesaid, being then and still wholly unpaid and unsatisfied to the said A. B. to wit, at &c. aforesaid, whereby an action hath accrued to the said A. B. to demand and have of and from the said C. D. the sum of , above demanded;) Yet the said C. D. though often requested so to do, *hath not* as yet paid the said sum of above demanded, nor any part thereof, to the said A. B. but he to do this hath wholly refused, and still doth refuse, to the damage of the said A. B. of £ and therefor he brings this suit, &c.

Debt on bail bond by sheriff.

Debt on bail bond.

That one A. B. of ——, on the day of sued out of —— court, held at ——, in the county of ——, on the day of against one C. D. a certain writ, called ——, directed to the sheriff of M. him commanding to take the said C. D. if he should be found in his bailiwick, and him safely keep, so that he might have his body before the justices of the —— court, ——, to be held at —— in the —— county of ——, on the day of to answer to the said A. B. in a plea, (*here describe the nature of the action as mentioned in the writ on which he defendant was arrested*) to the damage of the said A. B. £ as it was said, and that the said sheriff could have there that writ: which said writ, afterwards, (*here state particularly the endorsement for bail, if such be necessary, in the state where this form may be used*) on the day of at ——, in said county of —— delivered to the said E. F. who then, and from thence, until, at, and after the re-

DEBT ON BAIL BOND.

turn of the said writ, was sheriff of the said county of M. in due form of law to be executed. By virtue of which said writ, the said E. F. so being sheriff as aforesaid, and within his bailiwick as such sheriff, to wit, at, &c. as aforesaid, took and arrested the said C. D. by his body, and then and there had and detained him in his custody, as such sheriff, at the suit of the said A. B. for the cause aforesaid. And the said C. D. so being arrested and in custody of the said E. F. so being sheriff as aforesaid, by virtue of the said writ, at the suit of the said A. B. the said C. D. afterwards, and before the said return of the said writ, to wit, on the day of last aforesaid, and within his bailiwick, as such sheriff, to wit, at, &c. aforesaid, took bail for the appearance of the said C. D. at the return of the said writ, according to the form of the statute in such case made and provided. And on that occasion, the said C. D. (*or if the action be against one of the bail, the said G. H. as bail and surety for the said C. D.*) then and there, to wit, on, &c. last aforesaid, at, &c. aforesaid, by his certain writing obligatory, commonly called a bail bond, sealed with the seal of the said G. H. and now shown to the court, the date whereof is on the same day and year last abovesaid, acknowledged himself to be held and firmly bound to the said E. F. so then being sheriff of the county of M. as aforesaid, as such sheriff by the name, description and addition of E. F. sheriff of the county of M. in the penal sum of £ to be paid to the said sheriff, or his said attorney, executors, administrators or assigns, when he the said G. H. should be thereunto afterwards requested, with and under a certain condition thereunder written, that if the said C. D. should appear before the justices of the said —— court, so to be holden at on the day of next, to answer to said A. B. in a plea of ——. (*Here follow the description of*

DEBT ON BAIL BOND.

*the action, as mentioned in the bail-bond.**) That then the said obligation to be void, otherwise should be and remain in full force and virtue. As by the said writing obligatory, and the condition thereunto annexed ready in court to be shown, more fully appears. And the said E. in fact saith, that the said C. D. did not appear before the said justices of the said —— court ——, held at —— aforesaid, on the day of aforesaid, next after the execution and delivery of, and in the condition of the said writing obligatory mentioned, according to the exigency of the said writ, but therein wholly failed, and made default, whereby the said writing obligatory, became, was, and is forfeited. Yet the said C. D. (*or if against bail, the said G. H.*) (though often requested so to do,) hath not as yet paid the said sum of $ above demanded, nor any part thereof, to the said E. F. so being sheriff of said county of M. as aforesaid, but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse to pay the same, or any part thereof, to him the said E. F. so being sheriff of the county of M. as aforesaid, to the damage of the said E. F. $ and therefore he brings suit, &c.

Case for an escape on mesne process.

Case for escape.

That one F. G. heretofore, to wit, on, &c. was indebted to the said A. B. in a large sum of money, to wit, the sum of $ for so much money by said F. G. before that time had and received to and for the use of the said A. B.; and being so indebted, he, the

* In Massachusetts, New-Hampshire, Vermont and Rhode-Island, the condition of a bail bond is not only for the appearance of the party to answer the suit, but also, that he abide the order and judgment of the court thereon, which ought to be stated in the declaration, and the breach, &c. assigned according to the fact.

said F. G. in consideration thereof afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook and faithfully promised the said A. B. to pay to him the said sum of $ when he, the said F. G. should be thereunto requested, but the said sum of $ being wholly unpaid to the said A. B. and the said promise and undertaking of the said F. G. being wholly unperformed, he, the said A. B. for the recovery of his damages by him sustained, on occasion of the not performing of the said promise and undertaking of the said F. G. afterwards, to wit, on the day and year aforesaid, sued and prosecuted out of the court, &c. (*here state the writ* [*and the endorsement for bail, if any,*] *the delivery to the sheriff, and the arrest as in the preceding form on bail bond, and then proceed as follows,*) yet the said C. D. so being sheriff of the county of M. as aforesaid, not regarding the duty of his office as such sheriff, but contriving and intending wrongfully and unjustly to injure the said A. B. and to delay and hinder him in, and from the recovery of his said debt afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid: without the leave or licence, and against the will of the said A. B. suffered and permitted the said F. G. to escape, and go at large wheresoever he would, out of the custody of the said C. D. so being such sheriff as aforesaid, the said debt for which the said F. G. was so arrested as aforesaid, and every part thereof, then and still being wholly unpaid to the said A. B. And the said A. B. in fact, saith, that the said F. G. did not appear in the said —— court ——, at the return of the said writ, according to the exigency thereof, but therein wholly failed and made default; whereby the said A. B. has been, and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same; and thereby also, he, the said A. B. hath lost and been

CASE FOR ESCAPE.

CASE FOR ESCAPE.

deprived of the means of recovering his costs and charges by him paid, laid out, and expended in and about his said suit so commenced and prosecuted against the said F. G. as aforesaid, amounting together to a large sum, to wit, the sum of $ to wit, at, &c. aforesaid.

Second count. [*The same as in the first count to the end of the statement of the delivery of the writ to the sheriff, and then proceed as follows.*] And the said A. B. in fact, saith, that the said F. G. at the time of the delivery of said last mentioned writ to the said C. D. so being sheriff of the county of M. as aforesaid, and thence until the return of the said last mentioned writ, was within the said sheriff's bailiwick; and the said sheriff at any time during that period, might have taken and arrested the said F. G. by virtue of the said last mentioned writ, at the suit of the said A. B. if he would so have done; whereof the said C. D. so being sheriff as aforesaid, during all that time had knowledge: yet the said C. D. so being sheriff of the county of M. as aforesaid, not regarding the duty of his said office, but contriving and intending, wrongfully and unjustly to injure the said A. B. and to delay and hinder him in and from the recovery of his debt last aforesaid, did not, nor would [at any time before the return of the said last mentioned writ, although often requested so to do,] take, or cause to be taken, the said F. G. as by the said last mentioned writ, he was commanded; but thereof wholly failed and made default: and the said F. G. did not appear, &c. [*the same as the first count to the end, and conclude,*] to the damage of the said A. B. as he saith, the sum of $ and therefore he brings this suit.

CASE FOR ESCAPE.

[*Same as in the first count to the end of the statement of the escape, as far as to the obelisk, and then proceed as follows:*] And the said C. D. so being sheriff of M. as aforesaid afterwards, to wit, on, &c. (*the return day*) being the day of the return of said writ, to wit, at &c. aforesaid, falsely and deceitfully returned upon the said writ, to the said —— court ——, that the said F. G. was not found in the bailiwick of the said C. D. so being such sheriff as aforesaid, to wit, at, &c. aforesaid, and the said F. G. did not appear, &c. [*as in the first count to the end.*] Third count.

For a false return of nulla bona to an execution, against goods and chattels.

[*Same as in debt against the sheriff for the escape of a prisoner in his custody on execution, to the reference to the record, and then proceed as follows:*] And the said A. B. further saith, that that the said judgment being in full force, and the damages (*or debt and damages*) and costs so recoverd as aforesaid, remaining unpaid and unsatisfied, he the said A. B. on the day of A. D. for the obtaining satisfaction thereof, sued and prosecuted out of the said —— court ——, at ——, aforesaid, a certain writ of execution, (*called a fieri facias,*) directed to the sheriff of the county of M; by which said writ, the said sheriff was commanded of the goods and chattels of the said F. G. in his bailiwick, he should cause to be levied the damages (*or debt and damages*) and costs; and that he should have the money before the justices of the —— court ——, next after, to render to the said A. B. for his damages (*or debt and damages*) and costs aforesaid, (*or that he caused to be paid and satisfied to the said A. B. his damages &c.*) and that the said sheriff have then False return.

FALSE RETURN.

and there that writ, (*or, and that he make due return of said writ, &c.*) which said writ afterwards, and before the delivery thereof to the said C. D. as herein after mentioned, was duly endorsed with a direction for the said sheriff to levy £ besides sheriff's poundage, officer's fees, and all other incidental expenses, and which said writ, so endorsed afterwards, and before the return thereof, to wit, on, &c. at, &c. was delivered to the said C. D. who then, and from thence, until, and at, and after the return of said writ was sheriff of the said county of M. to be executed in due form of law. By virtue of which said writ, the said C. D. so being sheriff of said county of M. as aforesaid, afterwards, and before the said return day of said writ, to wit, on, &c. last aforesaid, at, &c. aforesaid, and within his bailiwick, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said F. G. of great value, to wit, of the value of the monies so [endorsed on the said writ,] (or due on the said execution,) and directed to be levied as aforesaid, and then and there levied the same thereout. Yet the same C. D. so being such sheriff of said county of M. as aforesaid, not regarding his duty as such sheriff, but contriving, and wrongfully, and unjustly intending to injure, prejudice and aggrieve the said A. B. in that behalf, and to deprive him of the said monies [so endorsed on the said writ, *or*] so due on said execution, and directed to be levied as aforesaid, and of the means of obtaining the same, [had not the said monies so levied as aforesaid, nor any part thereof before the justices of the court ——, at ——, aforesaid at the return of said writ, according to the exigency thereof, and of the said endorsement so made as aforesaid, [*or*] did not cause to be paid and satisfied to the said A. B. the monies so due on said execution, but therein wholly failed

and made default; and at the return of said writ, to wit, on, &c. aforesaid falsely and deceitfully returned to the said justices of the said court ——, (or the said court ——,) upon the said writ of execution, that the said F. G. had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages, (or debt and damages) and costs aforesaid, or any part thereof, as by the said writ and the return thereof, remaining of record in the said —— court ——, at —— aforesaid fully appears. By means of which said premises, the said A. B. hath been greatly injured, and deprived of the means of obtaining said monies [endorsed on the said writ] due on said execution, and directed to be levied as aforesaid, and which are still wholly unpaid as aforesaid and is likely to lose the same, to wit, &c. aforesaid. FALSE RETURN.

[*The same as the first count to the obelisk, then proceed as follows:*] And although there were then, and afterwards, and before the said last mentioned writ, divers goods and chattles of the said F. G. within the bailiwick of the said C. D. as such sheriff as aforesaid, whereof the said C. D. could, and might, and ought to have levied the monies so [endorsed or said last mentioned writ] due on said last mentioned execution, and directed to be levied as aforesaid, to wit, at, &c. aforesaid, whereof the said C. D. so being sheriff as aforesaid, then had notice, Yet the said C. D. so being sheriff of the said county of M. as aforesaid, not regarding the duty of his office as such sheriff, but contriving and wrongfully intending to injure, prejudice, and aggrieve the said A. B. in this behalf, and to deprive him of the monies so [endorsed] due on said last mentioned writ, *(or execution,)* and directed to be levied as last aforesaid, and of the means of obtain- Second count.

FALSE RETURN.

ing the same, did not, nor would at any time before the return of said last mentioned writ, *(or execution,)* levy the monies last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein failed and made default, and at the return of the last mentioned writ, *(or execution,)* to wit, on, &c. aforesaid falsely and deceitfully returned to the said justices of the said —— court ——, that the said E. F. had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages *(or debt and damages,)* and costs last aforesaid, or any part thereof; as by the last mentioned writ *(or execution,)* and the return thereof, remaining in, &c. (or here brought into court,) more fully appears, *(then proceed as in the first count.)*

For not taking replevin bond according to the statute.

Not taking replevin bond.

For that, whereas the said A. B. heretofore, to wit, on, &c. in a certain close, situate, &c. took and distrained certain large quantities of potatoes then planted and growing in the said close of great value, to wit, of the value of $ as a distress for certain arrears of rent, to wit, for the sum of $ then due and owing from one L. K. to the said A. B. for the rent of the said premises with the appurtenances by virtue of a certain demise thereof, theretofore made to the said L. K. rendering rent for the same. And the said A. B. then and there detained the said potatoes, so taken and distrained for the cause aforesaid, according to the laws and customs of the state of ——, until the said C. D. then being sheriff of the said county of M. afterwards, to wit, on, &c. aforesaid, and within his bailiwick as such sheriff; that is to say, at, &c. on the complaint of the said L. K. made to him, the said C. D. so

then being such sheriff, as against the said A. B. in that behalf, and under colour of his office of such sheriff as aforesaid, caused the said goods and chattels to be replevied and delivered to the said L. K. and then and there made deliverance of the said distress to the said L. K. to wit, at, &c. aforesaid, and returned the said plaint before the justices of the court of common pleas, held next after, in said county of M. on the day of when and where the said L. K. appeared, and then and there, in the same court, without writ levied his plaint against the said A. B. for taking, and unjustly detaining of the said goods and chattels; and afterwards, to wit, on, &c. last aforesaid, the said A. B. did duly appear, in and before the said court, to answer the said L. K. in the plea of his said plaint, and such proceedings were thereupon had in the said plea, that afterwards, to wit, at the next court of common pleas, held at —— aforesaid; in and for said county of M. on, &c. the said L. K. did not duly prosecute his suit, and it was then and there duly considered, in and by the said last mentioned court, that the said F. K. should take nothing by his said plaint; but that he and his said sureties to prosecute, should be in mercy, &c. and that the said A. B. should have a return of the said goods and chattels, as by the records and proceedings thereof, still remaining in said court, more fully and at large appears. And although it was the duty of the said C. D. before his making deliverance of the said distress, to the said L. K. as aforesaid, in pursuance of the statute in such case made and provided, to take from the said L. K. and two responsible persons as sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid conditioned, for the prosecuting the suit of replevin of the said L. K. for the taking the said goods and chattels

NOT TAKING REPLEVIN BOND.

NOT TAKING REPLEVIN BOND.

with effect and without delay, and for duly returning the goods and chattels so distrained, in case a return should be awarded. Nevertheless the said C. D. so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending to injure the said A. B. and to depive him of the benefit of his said distress, and of the means of obtaining satisfaction for the said arrears of rent so due and owing as aforesaid, did not, nor would, before his making *deliverance* of the said distress to the said L. K. take from the said L. K. and two (responsible persons as) sureties, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously, wholly omitted and neglected so to do, to wit, at, &c. aforesaid and the said A. B. in fact saith, that he hath not as yet obtained a return of the said goods and chattels so distrained as aforesaid, nor any nor either of them nor any part thereof, and the said arrears of rent have not, nor hath any part thereof as yet been paid to him the said A. B; nor hath he, the said L. K. hitherto answered to the said A. B. for the value of the said goods and chattels so distrained as aforesaid, nor any, nor either of them, nor any part thereof, and by reason of the premises, the said A. B. hath been, and is wholly deprived of the said goods and chattels so distrained as aforesaid; and of the benefit of the said distress and of the means of satisfying the said arrears of rent, and his costs and charges by him expended in and about the endeavouring to obtain satisfaction thereof, and a return of the said goods and chattels, to wit, at, &c. aforesaid.

Second count.

And whereas also heretofore, to wit, on, &c. aforesaid, the said A. B. took and distrained certain other goods and chattels, to wit, &c. of great value, to wit, &c. for a certain sum of money, to wit,

&c. then due and owing to the said A. B. for rent; And the said last mentioned goods and chattels being so distrained as aforesaid, the said C. D. then being sheriff of the county of M. aforesaid, afterwards, to wit, on, &c. aforesaid, last aforesaid, at, &c. aforesaid, at the prayer of the said L. K. replevied and made deliverance of the last mentioned goods and chattels to the said L. K.; and afterwards, to wit, at the court of common pleas, held in and for said county of M. at, &c. on, &c. aforesaid, the said L. K. did not duly appear at the same court, and then and there prosecute with effect, his suit, by him before then commenced, in the same court of common pleas, against the said A. B. for the taking of the said goods and chattels as last aforesaid; and it was thereupon then and there duly considered, in and by the same court, that the said A. B. should have a return of the said last mentioned goods and chattels, as by the records and proceedings thereof, still remaining in the said court, more fully appears. And the said A. B. further saith, that the said C. D. so being sheriff of, &c. at the time of causing the said last mentioned goods and chattels to be replevied and delivered to the said E. F. as aforesaid, not regarding his duty as such sheriff, nor the statute in such case made and provided, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said A. B. in that behalf, and to deprive him of the benefit of his said last mentioned distress, did not, nor would, before the replevying and delivery of the last mentioned goods and chattels so distrained as last aforesaid, to the said E. F. take in the name of the said C. D. so being sheriff as aforesaid, of the said E. F. and two responsible persons as sureties, a bond in double the value of the said last mentioned goods and chattels, so distrained

NOT TAKING REPLEVIN BOND.

NOT TAKING REPLEVIN BOND.

as last aforesaid, such value being ascertained by the oath of one or more credible witness or witnesses, not interested in the said last mentioned goods and chattels, or distress; and conditioned for the prosecuting said writ of replevin of the said E. F. with effect and without delay, and for duly returning the said last mentioned goods and chattels, in case a return thereof should be awarded before the deliverance of the said last mentioned distress, was so caused to be made to the said E. F. as last aforesaid, as he, the said C. D. according to the form of the statute ought to have done: but the said C. D. so being sheriff of, &c. aforesaid, then and there wholly neglected so to do, nor have the said last mentioned arrears of rent, or any part thereof been paid or satisfied to the said A. B. nor hath the said E. F. hitherto answered to the said A. B. for the value of the said last mentioned goods and chattels so distrained as last aforesaid, or any, or either of them, or any part thereof—[conclusion as in the first count.]

[*Proceed as in the first count of the preceding to the obelisk, after these words,* "neglected so to do," *and then as follows:*] And on the contrary thereof, he, the said C. D. wrongfully and unjustly, before the replevying and delivery of the said cattle, goods and chattels as aforesaid, to wit, on, &c. at, &c. aforesaid, did take, in the name of him, the said C. D. as such sheriff as aforesaid, of the said F. G. and two other persons, to wit, G. H. and I. K. a certain bond, conditioned for the prosecuting the said suit of the said F. G. with effect and without delay; and for duly returning the said cattle, goods and chattels, so distrained as aforesaid, in case return thereof should be awarded, as a bond taken in

pursuance of the said statute, nevertheless the said A. B. in fact saith, that the said G. H. and I. K. so taken as sureties as aforesaid, at the time of their becoming sureties in that behalf as aforesaid, were not good, able, sufficient, or responsible sureties for prosecuting the said suit with effect and without delay, or for duly returning the said cattle, goods, and chattels, so distrained as aforesaid, in case a return thereof should be adjudged; but the said G. H. and I. K. at the time of their becoming sureties as aforesaid, were, and each of them was, and ever since hath been, and still are, wholly insufficient for that purpose; nor have the said cattle, goods and chattels, or any, or either of them, or any part thereof, been as yet paid or satisfied to the said A. B. nor hath the said judgment been in any way satisfied, nor hath the the said F. G. hitherto answered to the said A. B. for the value of the said cattle, goods and chattels so distrained as aforesaid, or any or either of them or any part thereof, by means of which said premises, he, the said A. B. hath been, and is wholly deprived of the said cattle, goods and chattels, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and the said costs and charges by him in that behalf expended, in and about his said suit in that behalf, and in and about the endeavouring to obtain a return of the said cattle, goods and chattels, to wit, at, &c. aforesaid. [*A count may be added for not taking sureties generally.*]

NOT TAKING REPLEVIN BOND.

For not assigning bail bond.

[*As in the count for an escape on mesne process, to the end of the statement of arrest, and then proceed as follows*:] And the said A. B. in fact, further saith, that the said M. G. being so arrested and in custody of the said C. D. so being such sheriff as

Not assigning bail bond.

NOT ASSIGNING BAIL BOND.

aforesaid, under, and by virtue of the said writ, for the cause aforesaid, he, the said C. D. as such sheriff, afterwards and before the return of the said last mentioned writ, to wit, on, &c. last aforesaid, at, &c. aforesaid, took bail for the appearance of the said M. G. in said —— court ——, at the return of the said writ, according to the form of the statute in such case made and provided, and on that occasion, he, the said C. D. so being such sheriff as aforesaid, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, took off the said M. G. and two other persons as his sureties or bail, according to the form of the statute in such case made and provided, a certain writing obligatory, commonly called a bail bond, in the penal sum of £ conditioned for the appearance of the said M. G. at the time and place aforesaid, to answer to the said A. B. in the plea aforesaid. And the said A. B. in fact further saith, &c. [*state the non appearance of the party arrested and the consequent forfeiture of the bail bond, as in the precedent of a declaration on such bond, ante; and then proceed as follows*:] And although the said A. B. by J. S. his lawful attorney, in that behalf, did afterwards, and whilst the the said C. D. was such sheriff as aforesaid, to wit, on, &c. at, &c. aforesaid, request the said C. D. to assign the said writing obligatory to him, the said A. B. the plaintiff in the said action, according to the form of the statute in such case made and provided. And although the said A. B. was then and there ready and willing, and then and there offered to pay to the said C. D. the costs payable to him, the said C. D. in that behalf, [according to the form of the said last mentioned statute;] yet the said C. D. so being such sheriff as aforesaid, not regarding the duty of his said office as such sheriff, nor the statute in such case made and provided, but contriving, and wrong-

fully, and unjustly intending to injure the said A. B. in this behalf, and to hinder and prevent him from bringing any action or actions on the said writing obligatory, and to deprive him of the means of recovering the damages (*or* debt) aforesaid, did not, nor would, at the said time, when he was so requested as aforesaid, assign the said writing obligatory to him the said A. B. but on the contrary thereof, then and there wholly refused, and hath from thence hitherto wholly neglected and refused so to do; and by the means of the premises last aforesaid, he, the said A. B. hath been, and is hindered and prevented from bringing any action or actions on the said writing obligatory, and hath been and is deprived of the means of recovering the said damages, and is likely to lose the same, to wit, at, &c. [*If it be doubtful whether a bail bond was taken, add a count for an escape, as ante.*] NOT ASSIGNING BAIL BOND.

Against bail to the sheriff, on bail bond taken by a deputy.

In a plea that to the plaintiff the defendant render the sum of which he owes to the plaintiff and unjustly detains from him, whereof the plaintiff complains, and says that on the day of he, the plaintiff, was and ever since continued to be sheriff of the said county, and on said day of G. H. was, and ever since hath continued to be a deputy of the plaintiff, as sheriff aforesaid, in and for said county, duly authorized and empowered to serve all manner of writs, within said county, and that at said —— on the day of said G. H. as deputy sheriff aforesaid, received of I. K. of ——, a certain writ of attachment, in favour of said I. K. as surviving partner of the partnership of —— signed by lawful authority, dated the day of On bail bond.

on said bond. and directed to the sheriff of said county of ——, his deputy, &c. them requiring to attach the goods or estate of L. M. of said ——, to the value of —— dollars, and cause him to appear before the —— court, held at ——, on the day of the said G. H. as deputy sheriff as aforesaid, having said writ of attachment at said —— on the day of by virtue thereof, duly and legally took and arrested the body of him, the said L. M. and then and there had, and held the body of *him the* said L. M. in his, the said deputy sheriff's custody, and the said L. M. being so arrested, and in custody as aforesaid, the defendant, together with the said L. M. in and by a certain writing or bond obligatory, under the hand and seal of him the defendant, and also under the hand and seal of the said L. M. then and there well executed, dated the day of acknowledged himself, together with the said L. M. jointly and severally bound to the plaintiff as sheriff as aforesaid, in the penal sum of dollars, to be paid to the plaintiff, his heirs, executors or administrators; to which payment well and truly to be made and done, the defendant in and by said bond, jointly and severally bound himself, his heirs, executors, and administrators, with the condition to said bond annexed, that whereas the said L. M. was attached at the suit of I. K. as surviving partner to —— in the sum of to appear before the —— court on, &c. (as by the said original writ may more fully appear,) if the said L. M. did appear at said time and place, before said —— court, and answer the said I. K. in his said suit; then said bond to be void, otherwise in full force and virtue, as by the said bond ready in court to be shown, fully appears. Now the plaintiff further says, that the said L. M. was upon the execution of said bond as aforesaid, immediately released

from the custody of said sheriff's deputy: and said writ and process, was by said deputy sheriff duly returned to the clerk of said court, and was by the clerk of said court duly entered in the docket of said court, on the, &c. and the parties to said suit and process being duly called to appear in said court, said I. K. appeared, and made answer in said suit, but said L. M. when duly called, neglected to appear, and made default of appearance in said court, and did not answer to said suit: and said court then and there rendered judgment in said suit in favour of said I. K. against said L. M. that the said I. K. should recover of the said L. M. the sum of debt, and the sum of cost, taxed at —— and execution was issued by said court for the sum of debt, and for said sum of costs, beside cents for said execution; dated the day of signed N. O. clerk, directed, &c. returnable in —— days from its date, as by the files and records of said court, ready in court to be produced, fully appears. And the plaintiff further says, that at said —— on or about the day of while such execution and judgment were in full force and virtue, said I. K. delivered said execution to said G. H. as deputy sheriff aforesaid, and said G. H. then and there received said execution of said I. K. to levy and collect; and during the time said execution was in full force and virtue, and according to the directions therein contained, made diligent search at said —— throughout his precincts, for goods, chattels, and estate, of said L. M. and for the body of said L. M. whereon to levy said execution, and could find neither the body nor the goods or estate of the said L. M. and on the day of the deputy sheriff aforesaid, endorsed his certain return in writing under his hand on said execution, that he had repaired to the said L. M's usual

ON BAIL BOND.

ON BAIL BOND. place of abode, in said —— and then and there made demand of goods and chattels or estate of said L. M. to satisfy said execution, and could not find any goods, chattels or estate of said L. M. nor said L. M's body, whereon to levy said execution, and duly returned the said execution with his endorsement aforesaid thereon, into the files of the clerk of said court, as by the files of said court ready in court to be produced, fully appears; and the plaintiff saith that said judgment of said court, *is in* full force and virtue, and hath never been reversed nor in any way annulled; and that the said execution hath never been paid nor satisfied, which files and records the plaintiff here brings into court to be shown. And the plaintiff saith, that said bond hath never been paid or satisfied, nor any part thereof, neither by the defendant nor by said L. M. though often requested and demanded, to the plaintiff's damage in his said capacity, the sum of &c.

Debt on a prison bond.

On prison bond. In a plea, that to the plaintiff, the defendants, under the sum of which to the plaintiff the defendants owe and unjustly detain: whereupon the plaintiff declares and says, that at said —— on the day of the defendants by that writing obligatory, under their hands and seals well executed and delivered within said city, since its incorporation, acknowledge themselves jointly and severally bound to the plaintiff, in the sum of to the payment whereof they bound themselves, their heirs, executors, administrators, and each of them, by said bond; to which said bond was annexed the following condition, viz. (*write the condition verbatim,*) as by said bond, ready in court to be produced, fully appears: and said gaol and the whole limits thereof,

ON PRISON BOND.

are, and have been, since the execution of said bond, and at the time of executing said bond, were within the limits of said city: and the plaintiff on the said day of was and ever since hath been sheriff of said county: and on the day of after the execution of said bond, the said A. in said city, did escape and depart from the limits of said gaol, and went at large in said city: and the said execution has never been paid, and the plaintiff has become liable to pay the same, and hath not been saved harmless as aforesaid —— to the damage of the plaintiff, the sum of ——.

For not assigning bail bond.

Neglect to assign bail bond.

In a plea of the case, whereupon the plaintiff declares and says, that on the day of in the year he prayed out a writ of attachment against J. H. of said ——, directed to the sheriff of the county of ——, his deputy, or either constable of said ——, commanding them to attach the goods or estate of the said J. H. to the value of and for want thereof, to attach his body, and him cause to appear before the —— court, to be held at said ——, on the day of A. D. to answer to the plaintiff in an action on a certain note of hand, executed by the said J. H. to the plaintiff, and dated A. D. and given for the sum of dollars and payable on demand; in which said action the plaintiff demanded of said J. H. the sum of in damages and cost. Said writ was dated, &c. and signed by D. F. justice of the peace: which said writ, he the plaintiff, at —— aforesaid, on the day of A. D. delivered to the defendant to serve and return; and the defendant then was

NEGLECT TO ASSIGN BAIL BOND.

constable of said ——, and then and there received said writ to serve and return as aforesaid. And on said day of by virtue of said writ, he, the defendant, took the body of said H. and took bail for his appearance at the said court, to which said writ was returnable: and afterwards the defendant duly returned said writ to said court, to which it was made returnable: and which by legal removes, came to the adjourned —— court, holden at said ——, on the day of A. D. when and where the plaintiff recovered judgment against said J. H. for the sum of damages, and for the sum of costs, (including execution,) by default of appearance of the said H. to said action: and the plaintiff says, that the said H. never did appear in court to answer to said action, but did entirely neglect to do the same, all which, by the files and records of said adjourned —— court, ready in court to be shown, fully appears. Now the plaintiff in fact saith, that on the day of A. D. he took out execution on said judgment, against said H. dated the day of A. D. signed by T. W. clerk of said court, returnable in sixty days, and directed to —— county sheriff, or his deputy, commanding him to execute the same, according to the direction thereof, and the same at —— aforesaid, on or about the said day of he, the plaintiff, delivered to A. A. of said ——, who then was and ever since has been a deputy sheriff for said —— county, under J. F. esq. of said ——, sheriff of said county of ——, to execute, according to the directions therein given: and said A. A. then and there received the same to execute as aforesaid: and said A. A. on the day of last past, made the following endorsement thereon, to wit:

June 4th, A. D. 1812. NEGLECT TO ASSIGN BAIL BOND.

By virtue of this execution, I repaired to the usual place of abode of the within named debtor, and made demand of money, goods, or chattels to satisfy the same, with my fees; and made diligent search, but none were shown unto me, nor could find either body or estate whereon to levy this execution.

Test. A. A. Sheriff's Deputy.

And afterwards said A. returned said execution with said endorsement thereon, to the said clerk's office in said N. H. as by said execution ready in court to be shown fully appears: Now the plaintiff further says, that on the day of last past, at —— aforesaid, he demanded of the defendant the bail bond for the appearance of the said H. at said court to which said writ was made returnable; but the defendant did then and there utterly neglect and refuse to deliver him the same: and the plaintiff further says, that said judgment and execution never have in any wise been paid nor satisfied, but the same remain in full force, whereby the plaintiff is damnified the sum of &c.

Upon a receipt given to an officer levying a state warrant or execution, mutatis mutandis.

Then and there to answer unto P. W. in a plea of the case, whereupon the plaintiff declares and says, that on the day of J. H. esquire, treasurer of the state of ——, in pursuance of the law in such case provided of said state, issued his execution or warrant, against the inhabitants of the town of in said state, for the amount of the arrears of a tax of three pence on the pound, upon the polls and rateable estate of the said inhabitants, granted and laid by the general assembly of said On receipt to Officer.

ON RECEIPT TO OFFICER.

state, and payable on A. D. being the sum of then remaining due and unpaid to said treasurer; together with —— officer's fees on a former execution against the collector of said tax, on said inhabitants, and as officer's fees on an execution against the select men of said —— and for said last mentioned execution, and for said execution against said inhabitants, which execution against the said inhabitants was dated said day of A. D. was signed by said J. H. as treasurer, returnable in sixty days from said date, and was directed to the sheriff of said county of ——, or his deputy; them requiring to levy and collect said sums, amounting in the whole to —— of the goods, chattels, and estates of the inhabitants of said ——. And on the day of A. D. said execution being in full force and virtue, and altogether unsatisfied, was delivered to the plaintiff as deputy sheriff of said county to levy and collect, and return A. D. and the plaintiff, as deputy sheriff aforesaid, on the day of at aforesaid, levied said execution on ten horses and twenty oxen, the property of said inhabitants, and of the value of and having levied said execution , as aforesaid, the plaintiff then and there by virtue thereof, took said horses and oxen into his custody: and afterwards at said ——, on the said day of at the special instance and request of the defendants, he, the plaintiff, delivered said horses and oxen to the defendants, who then and there received the same of the plaintiff to keep safely, and redeliver to the plaintiff at the sign post in the society of ——, in said ——, at the end of twenty days from the time of said levy as aforesaid, and in consideration thereof, at said ——, on said day of the defendants did assume upon themselves, and to the plaintiff faithfully

promise, to deliver to him said horses and oxen at said sign post ——, at the expiration of twenty days from said day of A. D. to wit, on the day of or to pay to the plaintiff all damages that might accrue to him in consequence of said horses and oxen not being delivered at said time and place, as by a certain written receipt, under the hands of the defendants, dated the day of A. D. ready in court to be shown fully appears. And the plaintiff further says, that on the day of A. D. he was, and hath ever since been deputy sheriff, in and for said county; and was fully authorized to levy said execution as aforesaid, but the defendants, their said promise not regarding, never delivered said horses nor oxen to the plaintiff at said sign post, though the plaintiff, at said sign post, at the expiration of twenty days from said day of was ready to receive, and did then and there demand said horses and oxen of the defendants, and they did then and there refuse to deliver, and have ever since neglected to deliver said horses and oxen to the plaintiff, though he hath ever been ready to receive the same. And said execution so levied on said horses and oxen hath never been paid nor satisfied; and the plaintiff hath become liable therefor, and hath been compelled to pay the same: all which is to the plaintiff's damage, the sum of and therefor, and for costs, the plaintiff brings this suit, &c.

ON RECEIPT TO OFFICER.

Against sheriff for default of his deputy, in not levying nor returning an execution.

Declares and says, that he recovered judgment against A. B. of —— before —— for the sum of damages and costs of suit, and had execution grant-

v. Sheriff for default of deputy.

v. SHERIFF FOR DEFAULT OF DEPUTY.

ed thereon, in due form of law; for the aforesaid sums, and cents for said exception, dated the day of and signed by —— clerk, and returnable in sixty days after the date of said execution, directed to the sheriff of ——, &c. and the plaintiff at ——, caused said execution to be put into the hands of ——, who then and for more than sixty days after, was one of the defendant's deputies, duly qualified to act as a deputy sheriff (and the defendant then was and ever since hath been sheriff of the county of ——,) and the said deputy received the said execution to serve, levy and return according to the direction therein given, as by said deputy's receipt, &c. Now the plaintiff in fact says, that neither the plaintiff nor his deputy, nor either of them, have ever levied said execution, nor made any return thereof, but said judgment and execution remain altogether unpaid, unsatisfied, and unreversed, to the damage of the plaintiff, the sum of &c.

Against a constable, for not levying nor returning two executions.

v. Constable for not levying execution.

Then and there to answer unto A. N. of , within said county of ——, in an action or plea brought upon a certain statute law of the state, entitled, "*An act for appointing sheriffs, and for empowering and regulating them in the execution of their office.**" Whereupon the plaintiff complains and says, that at —— aforesaid, on or about the day of the defendant then being one of the constables of said town of ——, received of the plaintiff to serve, (levy) and return, two certain executions in due form of law, directed to either constable of said ——, both being in favour of the plaintiff, each on

* This statute is alike applicable to constables as to sheriffs.

a judgment of —— court, held on the day of A. D. signed by J. W. clerk of said —— court, and made returnable according to law; the one being against D. P. of said ——, for, &c. and costs: the other of said executions being against S. S. of said —— for, &c. which executions the defendant, &c. as constable aforesaid, received of the plaintiff to levy and return according to law. Yet nevertheless the plaintiff saith, that the defendant never levied nor returned said executions, nor either of them, but has wholly neglected to do it, against the form and effect of the statute law of this state, in such case made and provided, and to the plaintiff's damage the sum of &c.

v. CONS. FOR NOT LEVYING EX.

Against sheriff for an escape by his deputy, before commitment, of one taken on execution.

For that whereas the plaintiff, by the consideration of our justices of, &c. holden at ——, on within, and for our county of ——, recovered judgment against one C. of ——, for the sum of $ damages, and $ costs by the same suit, as by the record thereof in the same court remaining, appears: and afterwards, on the plaintiff, sued out a writ of execution thereupon in due form of law directed to the sheriff of our said county of —— or his deputy, commanding them among other things, that of the goods, chattels or lands of the said C. within their precincts, to cause to be paid and satisfied unto the plaintiff, (at the value thereof in money,) the aforesaid sums, with more for our said writ of execution, and for want of goods, chattels, or lands of said C. to be by him shewn unto them, the said sheriff or deputy, or found within their precincts, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said C.

v. Sheriff for escape before commitment.

D. SHER. FOR NEG. DISCH. EX.

and him commit to our gaol, in ——, in our said county of ——, and to detain him in our said gaol until he should pay the full sums above mentioned, with the said sheriff's or deputy's fees, or that he should be discharged by the plaintiff, the creditor, or otherwise by order of law.* And afterwards, on at ——, the plaintiff delivered the said writ of execution to one D. then and ever since one of the deputies of said A. in our county of ——, to be duly executed by him the said D. And thereafterwards, on by virtue of our said writ of execution, and for want of goods, chattels or land of the said C. by him shewn, or to be found as aforesaid, the said D. took the body of the said C. and him had and detained in his custody for the space of one hour: and then the said D. in no wise regarding the duty of his said office, freely and voluntarily suffered him, the said C. to escape out of his custody, and to go at large whither he the said C. would, without the license, and against the will of the plaintiff, the damages, costs, and charges aforesaid, being then unpaid and unsatisfied to the plaintiff; whereby an action hath accrued to the plaintiff, to demand and have the aforesaid sums, amounting in the whole to of the said A. (defendant.) Yet the said A. &c.

Against sheriff, for an escape after commitment on execution.

For escape on execution.

(*As before to* *.) And thereafterwards on by virtue of said execution, and for want of goods, chattels or lands of the said C. by him shewn or to be found as aforesaid, the said D. took the body of the said C. and committed him to our said gaol, in —— aforesaid, to the custody of the said A. (dft.) then and ever since keeper of said gaol; to be by him there detained, till the said C. should pay the

full sums above mentioned, or be otherwise discharged as aforesaid. Yet the said A. the duty of his office, as keeper of the said gaol, as aforesaid, not regarding, did not detain the said C. in our said goal, but by his negligence, suffered the said C. to escape from our said goal, and go at large where he would, without the consent and against the will of the plaintiff; he being then and still unsatisfied of his damage and costs aforesaid: whereby an action hath arisen to the plaintiff, to demand and have the aforesaid sums, amounting in the whole to of the said A. yet though often requested, he hath not paid the same, but refuses and neglects so to do.

FOR ESCAPE ON EX.

Against sheriff, for escape on execution.

For that the plaintiff by the consideration of our justices of our (s. j. court, or court of c. p. *as the case may be,*) held at ——, on ——, in and for the county of ——, recovered judgment against one F. G. of ——, for the sum of dollars debt or damage, and costs of suit, as by the record thereof remaining in the same court appears; and on sued out our writ of execution thereon, in due form of law, directed to the sheriff of our said county of ——, or his deputy, and returnable into the same court, *(or)* into the clerk's office of our said court,) on —— and on , at delivered the same writ to one G. H. then and ever since, a deputy sheriff under the said D. (dft.) who was then and ever since hath been sheriff as aforesaid, and keeper of our gaol in the county aforesaid in due form of law to be executed: by force whereof the said G. afterwards, and before the return thereof, to wit, on at ——, for want of goods, &c. of the said F. G. &c. took his body and committed him

For escape on execution.

FOR ESCAPE ON EX.

to our gaol, in —— and to the custody of the said D. then and yet keeper, &c. as aforesaid: and by force thereof, the said F. G. was in the custody of the said D. sheriff, as keeper as aforesaid, until when the said D. suffered the said F. G. to escape out of his custody, and go at large where he would, without the consent of the said plaintiff, who then was, and still is unsatisfied for his debt and costs aforesaid, and every part thereof; whereby an action hath arisen to the said plaintiff, to demand and have of the said D. the aforesaid debt and costs, amounting in the whole to dollars: yet, &c.

For neglect of deputy, in not serving an execution.

Neglect of deputy, not serving ex.

For that whereas the plaintiff, by the consideration of the justices, &c. recovered judgment against one D. of ——, for $ debt and $ cost, as by record thereof in the same court remaining appears; and on took out of the clerk's office of the same court, our writ of execution on that judgment, directed to the sheriff, &c. commanding, &c. (in common form,) and on at ——, the plaintiff delivered the same writ of execution to one C. then being a deputy sheriff of the said D. (dft.) who then was, and ever since has continued sheriff of our county aforesaid, in due form of law to be executed. Yet neither the said D. nor said C. nor any of the deputies of the said D. ever executed the writ aforesaid, or caused the aforesaid sum or sums, or any part of them to be paid to the plaintiff, who still remains unsatisfied for the same; or made any return of our writ aforesaid with their doings thereon according to the command thereof, but neglected so to do, to the damage, &c.

For false return on execution, by his deputy.

DEP. FALSE RETURN.

For that whereas the plaintiff, by the consideration of our justices, &c. recovered judgment against one J. S. of —— for the sum of dollars damages, and dollars costs of suit, as by the record, &c. and on sued out a writ of execution thereon, in due form of law, directed to the sheriff, &c. and returnable, &c. and on the said plaintiff delivered our said writ of execution to one E. F. who then was, and until after the day when our said writ was returnable, continued to be one of the said D's (dft.) deputy sheriff's of our said county of ——. to be by the said E. F. duly executed and returned, according to our command therein given. Yet neither did the said E. F. nor the said D. nor any of the deputies of the said D. execute our said writ, nor make any lawful return thereof to our said court, where the same was returnable according to our command therein given, but the same E. F. kept the same writ until —— and then returned it into the clerk's office of our said court with this false return endorsed thereon: "E. ss. [*date*] I return this execution in no part satisfied by virtue of the creditor's order. E. F. Deputy Sheriff." Now the plaintiff in fact saith, that he never gave any such order, and that he has not been satisfied for his debt aforesaid, but the same still remains due and unpaid: and by means of the said E. F's doings aforesaid, the said plaintiff has lost his debt and costs aforesaid, to the damage, &c.

For neglect of deputy, in not arresting on execution a debtor in his presence.

Dep. not arresting debtor on execution.

For that whereas the plaintiff by the consideration of our justices, &c. recovered judgment against one

DEP. NOT ARRESTING DEBTOR ON EX.

C. of ——, for the sum of $ damages, and $ costs, of the same suit, as by record thereof, in the same court remaining appears; and afterwards, to wit, on the plaintiff sued out our writ of execution, thereupon in due form of law directed to the sheriff of our said county of ——, or his deputy, commanding them among other things, that of the goods, chattels, or lands of the said C. within their precinct, to cause to be paid and satisfied unto the plaintiff at the value thereof in money, the aforesaid sums, with for our said writ of execution, and for want of goods, chattels or lands of the said C. to be by him shown to the said sheriff or his deputy, or found within their precinct, to the acceptance of the plaintiff to satisy the sums aforesaid to take the body of the said C. and him commit unto our gaol in ——, until he should pay the full sums above mentioned, with the said sheriff's or his deputy's fees, and that he should be discharged by the plaintiff, the creditor, or otherwise by order of law; and to make return of our said writ of execution, with their doings thereon, into the clerk's office of our said court of ——, on ——. And afterwards, to wit, on the same day at ——, the plaintiff delivered our said writ of execution, to one D. of ——, then and ever since, one of said sheriff's deputies for our said county of ——, to be duly executed; and requested the said D. to serve, execute, and return the same according to the precept thereof: and the said D. then and there received the same of the plaintiff, to be served, executed, and returned according to the precept thereof. And afterwards, before the return of said writ, to wit, on at —— the said C. was in the presence of the said D: yet the said D. in no wise regarding the duty of his said office, but contriving, and fraudulently intending to deprive the plaintiff of his proper remedy

to obtain satisfaction and payment of the aforesaid sums, amounting to dollars, did then and there, wilfully refuse and neglect to take the body of the said C. according to the command of our said writ of execution, though the said D. might then and there easily have taken and arrested the said C: nor hath the said D. at any time since taken or arrested the said C. upon our writ of execution, or in any wise satisfied the plaintiff for the sums aforesaid: and the said C. hath ever since the day of return of the said writ absconded and escaped into places altogether unknown, so that the plaintiff hath by means of the said D's wilful neglect of his duty aforesaid, totally lost all benefit of the payment and execution aforesaid, &c.

NEG. NOT ARRESTING DEBT ON EX.

Same, for not paying money recieved on execution, and not returning an alias execution.

For that whereas the plaintiff, by the consideration of our justices, &c. recovered judgment against one C. of ——, for the sum of dollars damages, and dollars costs, of the same suit, as by the record there of in the same court remaining appears: and afterwards, to wit, on the plaintiff sued out our writ of execution thereupon, in due form of law directed to the sheriff of our said county of or his deputy, commanding them among other things, that of the goods, chattels or lands of the said C. within their precincts, to cause to be paid and satisfied unto the plaintiff, at the value thereof in money, the aforesaid sums with for our said writ of execution: and for want of goods, chattels or lands of the said C. to be by him shewn unto the said sheriff or his deputy, or found within their precinct, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said C. and him com-

Not paying money received, &c.

NOT PAYING MONEY RECEIVED.

mit unto our gaol in ——, until he should pay the full sums above mentioned, with the said sheriff's or his deputy's fees, and that he should be discharged by the plaintiff, (the creditor,) or otherwise by order of law; and to make return of our said writ of execution with their doings thereon, unto the clerk's office, of our said court of ——, on ——. And afterwards, to wit, on the same day, at ——, the plaintiff delivered our said writ of execution, to one D. of ——, then and ever since one of said sheriff's deputies for our said county of ——, to be duly executed: and requested the said D. to serve, execute, and return the same, according to the precept thereof: and the said D. then and there received the same of the said plaintiff, to be served, executed, and returned, according to the precept thereof. And afterwards, before the return of the said writ, to wit, on at ——, the said D. received of the said C. dollars in part satisfaction of said execution; and afterwards, to wit, on returned the same execution into our said court, to which the same was returnable as aforesaid, satisfied in part, to wit, for the sum of dollars. And afterwards, to wit, on at ——, the plaintiff took out and delivered to the said D. an alias execution, upon said judgment, for the remainder then due thereon, in the same form with the first, and directed to the same officers, and containing the like commands with the first, as to levying the same, and returnable into said court on —— at ——, by virtue of which, the said D. afterwards, to wit, on at , received of the said C. the further sum of in part of said alias execution, and well might and ought to have served the said execution, on the said C. for the remainder according to the precept of said writ: yet the said D. then and there neglected so to do, nor did he return the last mentioned exe-

cution according to the precept thereof, nor has he ever paid said sums by him received on said executions to said plaintiff, though requested at ——, on as by law and the duty of his office, he might, and ought to have done, but hath neglected and refused, and still negleets and refuses to pay them. And so the said plaintiff hath wholly lost the benefit of said judgment and executions, for recovering the sums aforesaid: to the damage, &c. NOT PAYING MONEY RECEIVED.

Same, for not executing mesne process, and for false return.

For that whereas at ——, on one R. W. by his note under his hand for value received, promised the plaintiff to pay him or his order dollars on demand, with lawful interest, till paid: and afterwards, on the contents of the said note being unpaid, though the said R. W. was before duly requested, the plaintiff, for the recovery of his due damages for the breach of that promise, purchased out of the office of the clerk of (our court of c. p.) for said county, our writ of attachment in due form, as by law is required, directed to the sheriff, &c. commanding them, among other things to attach the goods and estate of the said R. to the value, &c. (in common form) to answer to the said S. upon his declaration therein at large set forth; and to have the same writ with their doings thereon, at the same court as by the record of the same suit, in the same court remaining more fully appears. And afterwards, to wit, on at ——, the said S. delivered the same writ to one J. K. then and ever since a deputy sheriff for the same county, duly authorized and qualified under the said D. (dft.) who then was, and ever since hath been sheriff of our said county, and then was, and still is by law answerable for the neglect of the Not executing mesne process.

not executing mesne process.

said J. K. his deputy aforesaid, to be by him the said J. K. duly executed, served and returned, according to the directions therein given: and afterwards, to wit, on the same day, at ——, the said J. K. being possessed of the same writ, was present and in company with the said R. and could have attached his body if he would; yet the said J. K. regardless and negligent of his duty in this particular, did then and there utterly refuse and neglect to attach the body of the said R. as he might have done; neither did the said J. K. at any time, by force of the same writ, attach the goods of the same R. to the value of dollars, as he was therein commanded, but thereafterwards, on the same day, attached a chair of no value, as the estate of the said R. and at the same court (of c. p.) returned the same writ, and thereon, among other things, falsely returned that he could not take the body of the defendant, (meaning the said R.) and that he had attached a chair as the only estate of the said R. which he could find within his precincts, by reason of which neglect and misdoing of the said J. K. the the said C. hath altogether lost the aforesaid sum of dollars, together with the lawful interest thereon, and such other due damages as he might have recovered for the payment, and his lawful costs of that suit, &c.

Against sheriff, for not returning a writ of mesne process.

Not returning mesne process.

For that the plaintiff, on purchased our writ of attachment out of the office of the clerk of our (court of c. p.) for our county of ——, in form by law prescribed for the recovery of with interest due to the plaintiff from one J. B. then an inhabitant of ——, by his the said B's note of hand,

dated as also, for the recovery of a further sum of due to the plaintiff from the said B. according to the said B's negotiable note, endorsed to the plaintiff; and the plaintiff declared accordingly, in his said writ of attachment, against the said B. in a plea of the case, setting forth the sums due from the said B. on the notes aforesaid, and the plaintiff's damage by the said B's neglecting to pay the said sums to the plaintiff. And the said writ was directed to the sheriff of our said county of ——, or his deputy, commanding them, &c. (in common form) and afterwards, viz. on at ——, the plaintiff delivered the said writ to the said D. (dft.) then and to this day, sheriff of our said county of ——, to be executed and returned into the then next court of c. p. which was held at ——, in and for the said county of —— on and the said D. then and there promised to serve and return the same writ accordingly. Yet the said D. neglecting in the premises, never made any return of the said writ, nor of his doings thereon, to the said court, when and where it was returnable as aforesaid, nor did any of his deputies make any return thereof, but secreted the same, whereby the plaintiff hath lost the benefit thereof, and of the said notes which remain yet unpaid.

NOT RETURNING MESNE PROCESS.

Against sheriff, for an escape from gaol before execution levied.

For that whereas one A. was indebted to the plaintiff in the sum of for goods, &c. and the plaintiff, in order more speedily to recover his just debt aforesaid, on at purchased a writ of attachment in due form of law out of the clerk's office of our court of c. p. for returnable a

Escape from goal before ex. levied.

ESCAPE FROM GAOL BEFORE EX. LEVIED.

our court of c. p. then next to be holden and to the sheriff of said county directed: and then and there delivered the same to the said D. (dft.) who then was, and still is sheriff of said county, for him to serve and return the same; by virtue of which, the said D. was commanded to attach, &c. (as in the writ.) And afterwards, on at ——, in pursuance of the same writ, the said D. sheriff as aforesaid, for want of goods or estate of the said A. took the body of the said A. and committed *him to* our gaol, in ——, of which gaol the said D. then was, and ever since hath been keeper, and made true return of his said doings according to his said precept unto our court of c. p. holden, &c. at which same court to which the same was returnable as aforesaid, the plaintiff entered his action as aforesaid: and thereupon, by the consideration of our justices of the same court, recovered against the said A. the sum of dollars damages, with costs of suit taxed, at ——: and afterwards, on took out of the same office, at —— our writ of execution on the same judgment, in form by law prescribed, and directed to the sheriff, &c. and then at ——, being within thirty days * after the judgment aforesaid was recovered, delivered the same to the said D. sheriff as aforesaid, to be by him levied and returned; by which said precept, the said D. was commanded, (as in execution) yet the said D. at ——, suffered the said A. to escape out of the gaol aforesaid, and go at large, and returned the said execution entirely unsatisfied, without doing any thing in pursuance thereof: by means whereof, neither the said

* *In Massachusetts and New-Hampshire,* or within five days after final judgment, *if in Connecticut;* or within fifteen days after the rendering final judgment, *if in Vermont;* or within three months after judgment obtained; *or* the defendant was surrendered in discharge of his bail, *if in New-York.*

A. nor his goods or estate were ever since to be come at: and the plaintiff by the said A's misconduct and and laches as aforesaid, has utterly lost his debt and costs aforesaid.

ESCAPE FROM GAOL BEFORE EX. DELIVERED.

Against a deputy sheriff, being a party to a writ for serving the same, though directed to a coroner.

For that, on —— at ——, one J. M. for value received of the plaintiff, endorsed over to him a promissory note, under the hand of S. B. and the said D. (defendant,) bearing date by them given to the said J. M. for the payment of to the same J. M. or his order, in months from the date thereof, with lawful interest thereon, afterwards, if not then paid, and by the same endorsement appointed the contents of said note then unpaid, to be paid to the plaintiff, who afterwards, viz. on at ——, the said months, being expired, gave the said S. B. and the said D. due notice thereof, and then and there requested of them to pay to him the amount contained in said note, which they neglected to do; wherefore the plaintiff afterwards, to wit, on took out of the clerk's office of our (court of C. P.) for said county, a writ of capias or attachment in form by law prescribed against the said S. B. and the said D. who then was, and ever since hath been a deputy sheriff of our said county of returnable into our said court, held at ——, within and for our said county of ——, on directed to any coroner of our said county of ——, or his deputy, and no otherwise directed, commanding such coroner or his deputy to attach the goods or estate of the said S. B. and the said D. to the value of and for want thereof, to take their bodies, if to be found within their precinct, and safely keep them so as to have them before the justices of our

Dep. serving writ directed to coroner.

DEP. SERVING WRIT DIRECTED TO CORONER.

said court, then next to be held within, and for our said county of ——, on —— to answer to the now plaintiff in a plea of the case, for not paying him the said sum of with the interest aforesaid. And the said D. afterwards, viz. on perceiving that our said writ was taken out as aforesaid, and subtilly contriving to defeat the plaintiff's suit aforesaid, and to defraud the plaintiff of the aforesaid dollars, and of the aforesaid interest for it, and to expose him not only to the costs of his suit aforesaid, but also to the payment of costs to the said S. B. and D. at ——, craftily got into his hands our writ aforesaid, and afterwards, viz. on in our said country, served the same writ on the said S. B. and D. by attaching a dwelling house, and acres of land, of the said S. B. and by attaching a cow of the said D. and giving each of them a summons, and wrote his said service and doings thereon, and subscribed the same by the name of "I. D. Deputy Sheriff;" and afterwards returned the said writ so served into our said court, when and where it was returnable as aforesaid. And the plaintiff, supposing the same writ to have been duly served by a coroner of our said county, or his deputy, entered his said action in our said court, held as aforesaid. And the said S. B. appeared in our said court, to answer to the plaintiff in his said action, and finding said writ was not served by such coroner as aforesaid, or his deputy, but was served by the said D. without being directed to a deputy sheriff of our said county of ——, alleged and showed the same to our said court, and prayed that the same writ might be dismissed for want of a good and legal service, and for their costs to be allowed them; whereupon our said court then and there adjudged accordingly, and allowed to the said S. B. for his costs: and the said S. B. hath since sued out a

a writ of execution upon the said judgment, and the plaintiff hath thereupon been compelled to pay that sum with more, for the same writ; and hath also, by reason of the aforesaid fraudulent management and intermeddling of the said D. lost his own costs and expenses in that suit, besides much time in commencing and so far prosecuting his said action for ever; and hath also been since delayed in recovering his debt aforesaid, to his damage, &c.

DEP. SERVING WRIT DIRECTED TO CORONER.

Against a sheriff, for an escape on an alias execution.

For that the plaintiff, by the consideration of the justices of our court, &c. holden at , within and for the county of ——, on recovered judgment against one R. of ——, for the sum of dollars; and also dollars, costs of suit, as by the record thereof, in the same court remaining appears. And the plaintiff, in order to have said judgment executed afterwards, on sued out a writ of *alias* execution upon the said judgment, against the said R. directed to the sheriff of our said county of ——, or his deputy, in form of law in such cases prescribed; and afterwards, on the same day, at —— aforesaid, delivered the same writ to the said D. (deft.) then and ever since sheriff of the same county, and keeper of our goal aforesaid, in —— aforesaid, to be by him executed according to the precept thereof: and afterwards, pursuant to the precept thereof, the said D. duly took the body of the said R. and committed him to our goal aforesaid, and afterwards made due return of said writ as he was therein directed; and thereupon the said D. by law became obliged, and by the said writ was commanded, the said R. to detain in his custody until he paid the aforesaid sum of and also the further sum of for the

Escape on alias.

ESCAPE ON ALIAS.

same writ, and a former writ of execution, or that until the said R. should be discharged by order of the plaintiff. Now the plaintiff in fact saith, that neither of the sums aforesaid were ever paid; nor did he ever discharge the said R. yet the said D. did not there safely keep or detain the said R. but did there so negligently and carelessly keep and detain him, that by means of the carelessness and negligence of the said D. the said R. was suffered to escape, and by means thereof, did escape out of the goal aforesaid, and custody aforesaid, and cannot now be found: by means whereof, the said D. thereupon became liable according to law to pay the plaintiff the two last mentioned sums on demand; yet he hath not paid the same, though requested, but detains the same, &c.

For confining plaintiff in close gaol, after he had liberty of the yard.

For confining plaintiff, who had liberty of the yard.

For that, on at ——, the plaintiff being a prisoner in the goal of ——, for debt; and by giving the security by the law required, being allowed a chamber and lodging in the prison house, and liberty of the goal within the limits of the prison for his comfort and refreshment, the said A. with force and arms assaulted the plaintiff, took him by the collar, and dragged him from his chamber and lodging through the prison yard, into close confinement in another room in said goal, and deprived him of all his comforts and privileges aforesaid, by him purchased and confirmed to him by law, and there confined him to a dark and loathsome close room of said gaol for the space of against the peace, &c.

For assault and false imprisonment, against justice, constable and complainant.

FALSE IMPRISONMENT.

For that the said A. B. and C. (defendants,) on with force and arms at D. aforesaid, assaulted the plaintiff, took him and carried him away several miles from his dwelling-house, in D. aforesaid; and caused him to be tried and condemned as a criminal, without being charged with any crime, and caused him to pay a fine of five shillings; and twelve shillings under colour of costs. And they, the said A. B. and C. then and there under unlawful imprisonment, judged and condemned and held the plaintiff in prison for the space of twenty-four hours; until, to gain his liberty, they compelled him to become bound with two sureties, to appear before the justices of the next court of general sessions of the peace, which was then to be held at —— in and for the said county of ——, on, &c. and abide the order of said justices on certain matters whereof the said justices had not power or authority to take any cognizance, or give any sentence or judgment thereon, whereby the plaintiff was compelled to travel many days and miles, and expend large sums of money to discharge himself from his bonds aforesaid: and other injuries the said A. B. and C. then and there did to the plaintiff, against the peace, &c.

Note. This action was brought against the defendants for illegal proceedings against the plaintiff, and granting and executing a warrant and binding over the plaintiff, pursuant to a complaint for *words* not cognizable by a justice criminally on the face of complaint.

Against coroner, for taking a note and returning execution.

C. CORONER FOR TAKING NOTE, &c.

For that whereas the plaintiff, by the consideration of our justices of our court of C. P. held at ——, on within and for the county of Essex, recovered judgment against E. F. &c. sheriff, &c. for dollars debt, and dollars costs of suit, and on took out a second writ of execution thereon, in form by law prescribed, directed to the coroner of our said county or his deputy, and returnable, &c. and on delivered it to the said C. D. then and still coroner of the same county, to be executed and returned according to law: yet the said C. D. hath not executed the said writ, nor made any lawful return thereupon, but on returned thereupon into our said court that he had taken of E. F. his note for the satisfaction of the said execution, and returned it fully satisfied; whereby the plaintiff hath lost the benefit of said execution to the damage, &c.

CHAP. III.

OF INDENTURES, BONDS, &c.

Indenture between old and new sheriff.

IND. BETWEEN OLD & NEW SHERIFF.

THIS indenture made, *&c.* between R. S. esq. late sheriff of the county of ——, of the one part and A. B. esq. now sheriff of the said county on the other part, Witnesseth, that the said R. S. by virtue of a writ of discharge of his late office, to him directed, hath delivered and set over to the said A. B. these writs following: that is to say, a *capias* against W. F. returnable on the day of before the justices of the —— court, at the suit of S. B. together with the bodies of J. N. at the suit of G. H. for a debt of dollars, and J. H. at the suit of J. D. for a debt of dollars, as also at the suit of N. W. for a debt of dollars, *&c.* In witness whereof, *&c.*

N. B. All the writs which are set over in the indenture between the sheriffs, if they have been executed by the old sheriff, must be returned by him, or in his name, and endorsed or subscribed by the new sheriff, thus:

IND. BETWEEN OLD & NEW SHERIFF.

This writ as endorsed was delivered to me by R. S. esq. late sheriff, my immediate predecessor, on his going out of office.

A. B. Sheriff.

Indenture between the sheriff, and his under sheriff.

Between sheriff and under sheriff.

This indenture made, &c. between R. O. esq. sheriff of the county of ——, of the one part, and R. H. of —— in said county, of the other part, Witnesseth, that whereas the said R. O. hath, upon special confidence and trust which he bears in and towards the said R. H. promised and granted to the same R. H. the use of the exercising of the office of his under sheriff, of the county aforesaid, with all fees, profits, commodities, advantages, casualties, allowances, and other emoluments, certain and uncertain whatsoever, to the office of under sheriffwick belonging, or in any wise appertaining, that any under sheriff of the said county hath heretofore lawfully and justly claimed or had, to have and enjoy, during and for all such time as the said R. O. shall remain and continue sheriff of said county, this appointment or election not discharged. In consideration whereof, the said R. O. covenants, grants, agrees, and faithfully promises, for him, his heirs, executors and administrators, that he the said R. H. his heirs, executors and administrators, shall and will discharge, or otherwise sufficiently save and keep harmless, as well the said R. O. his heirs, executors, and administrators, as also his and their, and every of their goods, chattels, lands, tenements and hereditaments, of and from all, and all manner of troubles, vexations, suits, actions, informations, complaints, contempts, fines, forfeitures, amercements, penalties, pains, sum and sums of money, payable or collectable, to or for the use of the state

(*or* commonwealth) of ——, or any person or persons whatsoever, for any matter or thing to be done in or about the said office. And of and from all, and all manner of losses, hindrances and damages, that shall or may be lawfully moved, stirred, procured, commenced, prosecuted, happen or fall, or lawfully asked, demanded, or levied upon the said R. O. his heirs, executors or administrators, or of or upon his or their goods, chattels, lands, tenements or hereditaments, for or by reason of the said office of sheriff, either by not returning, or unlawfully returning, slow returning, or misreturning of any precepts, writs, warrants or process, to the sheriff directed, or to be directed, or for or by cause or means of any excessive, or unlawful extortion, or taking of any money, or other gain, or commodity, for the serving or not serving any such writs, precepts, warrants or process; or for or by reason of any misdemeanor, misusing, or misgovernment, negligence, lack of skill, or ignorance that shall be in the said R. H. in or about the doing or exercising, or executing of the said office of under sheriff. And the said R. H. for himself, his heirs, executors and administrators, by these presents further covenants and grants, to and with the said R. O. his heirs, executors and administrators, in like manner to discharge, or to save harmless and indemnified, as well the said R. O. his executors and administrators, as also all their goods, chattels, lands, tenements and hereditaments, of and from all manner of escapes, both wilful and negligent, of traitors, felons, and all other prisoners committed, or to be committed, to his or their safe keeping or charge, from breach of prison, and of and from all fines, forfeitures, amercements, sums of money and penalties, that he or they, or any of them, shall or may incur, bear, pay or sustain for any escape or breach of prison, during

IND. BETWEEN SHF. & UND. S. P.

IND. BETWEEN SHF. & UND. SHF.

all the time of his continuance in the said office of sheriff of his appointment. And moreover, the said R. H. shall give attendance convenient and requisite, upon all courts, judges and justices, and other officers within said county, upon whom the said R. O. or the said R. H. in respect to the said office of sheriffwick ought, by the laws of the state, (or commonwealth) of —— to attend. And furthermore shall, within the space of after the discharge of the said R. O. from his said office, *justly* and truly make a perfect account of all the sums of money, receipts and other things wherewith the said R. O. shall or may be charged as sheriff of said county: and the same account deliver into the (*here describe the court, &c. to which the account is to be rendered*) and shall within the space of —— deliver unto the said R. O. his heirs, *&c.* a sufficient acquittance, or *quietus est;* and it is further agreed upon by the said parties to these presents, that all bailiffs, deputies and other officers under the sheriff, shall enter into sufficient bonds by obligation that they, and every of them, shall diligently and faithfully execute their respective offices during the time aforesaid. And if any shall refuse to enter into such bond, or shall misdemean himself in his or their said office, the said R. H. may in his discretion place another, mete for such office, in the room of him who shall refuse to enter into bond, or shall misdemean himself as aforesaid. In witness whereof, *&c.*

Condition of a bond that the under sheriff shall keep his covenants in the foregoing indenture.

Condition of undersheriff's bond.

The condition, &c. That if the above bounden R. H. do well and truly hold, perform, observe, fulfil and keep all and singular the covenants, grants, pro-

mises, articles, payments, provisos and agreements which, on the part and belief of the said R. H. his heirs, executors, &c. or any of them are to be holden, performed, observed, fulfilled or kept, contained, written, declared or specified in one pair of indentures, bearing date, &c. made between the said R. H. of the one part, and the above named R. O. of the other part, according to the tenor, purport, true intent and meaning of said indentures. That then the above obligation to be null and void, otherwise, to be in full force and virtue in the law, &c.

CONDITION OF UNDER SHERIFF'S BOND.

Appointment of a general deputy.

To all to whom these presents may come,
[L.S.] *Greeting:*

Know ye, that I, A. B. of M. in the county of C. esquire, sheriff of the county of C. aforesaid, reposing special confidence and trust in E. D. of F. in said county, gentleman, at his special instance and request, have constituted and appointed, and by these presents do constitute and appoint him, the said E. D. a deputy, under me the said sheriff. And I do hereby grant unto him, the said E. D. full power and authority, as my deputy, throughout the said county of C. to use and exercise the office of deputy sheriff, according to the laws of this state, (commonwealth,) relative to, and regulating the office of deputy sheriff aforesaid, until he shall be legally discharged thereupon.

Appointment of deputies.

In witness whereof, I have hereunto affixed my seal, and subscribed my name and office, this day of in the year of our Lord one thousand, &c.

A. B. Sheriff.

APPOINTMENT OF DEPUTY.

Appointment of a special Deputy.

I, A. B. sheriff of county of C. to whom the within writ is directed, at the special instance, request and risk of D. E. the within named plaintiff, (or creditor,) do constitute and appoint F. G. of H. in said county a special deputy under me, and in my name, to execute the within writ, according to the requirements thereof. And do hereby grant unto him, the said F. G. full power and authority for the execution of said writ as aforesaid, according to law.

Witness my hand this day of A. D.

A. B. Sheriff.

Deputation to take an inquisition.

Dutchess, } A. B. esquire, sheriff of said county
to wit, } to C. D. gentleman, *Greeting:*

By virtue of a writ of inquiry, issued out of the —— court, at ——, to me directed and hereunto annexed, I do hereby authorize and empower you to summon a jury and take an inquisition, in my name, in a cause wherein E. F. is plaintiff, and G. H. is defendant; and render me an account of what you shall do therein, so that I may certify the same to the justices of said court, at ——, on the day of next. Hereof fail not. Given from under the seal of my office, the day of

This deputation to be endorsed and returned with the inquisition. } By the same Sheriff.

Bond of indemnity from deputy sheriff to his principal.

BOND FROM DEPUTY.

Know all men by these presents, that we J. S. of —— in the county of —— *(addition)* and J. B. of —— in said county, *(addition)* and J. N. of —— in said county *(addition)* are holden, and firmly bound and obliged unto J. W. esquire, of —— in said county, sheriff of the county of —— aforesaid, in the sum of dollars, to be paid to him the said J. W. or his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, and each of us, by himself, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, this day of in the year of our Lord ——.

The condition of this obligation is such, that whereas the above named J. S. is, at his special instance and request, appointed by him the said J. W. a deputy sheriff, under him the said J. W. within and for the said county of ——. Now if the said J. S. do and shall faithfully serve and execute, within said county of —— all writs, warrants, precepts and processes to him directed and committed, issued from good and lawful authority, and shall perform and execute all the duties pertaining to the office of a deputy sheriff, required by the laws of of the state (or commonwealth) of ——, and shall save and keep harmless and indemnified the said J. W. his executors and administrators, of and from all actions, suits, troubles, costs, charges, damages and expenses whatsoever, on account or by reason of any malfeasance, misfeasance or nonfeasance of him, the said J. S. in his said office of deputy sheriff, then

PRISON BOND. fully appear, by virtue of which execution (*or* writ) and commitment as aforesaid, the said J. B. is still imprisoned in the prison aforesaid: Now if the said J. B. shall continue a true prisoner, in the custody of the goaler of the said prison, and within the limits of the said prison until he shall be lawfully discharged from the same, without committing any manner of escape, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

Another, in Connecticut.

The condition, &c. If the said J. S. shall be and remain a true and faithful prisoner until discharged by due course of law, then this obligation to be void, &c.

For condition to bond for the liberty of the gaol-yard, in New-Hampshire, Vermont, and Rhode-Island, see Vol. II.

END OF VOL. I.

over, which shall or may grow or happen to be taxed, imposed, estreated or levied upon, of or against the said sheriff, as sheriff of said county aforesaid, for and by reason of any such escapes as aforesaid. And if said J. S. shall indemnify and save harmless the said sheriff, his heirs, executors and administrators, from all malfeasances, misfeasances, and nonfeasances of him the said J. S. in his said office of goaler and keeper of said prison, and his deputies and servants in the keeping of said prison, then the above obligation to be void and of no effect, otherwise to be and remain in full force, virtue, and strength. BOND FROM GOALER.

Condition of a replevin bond.

The condition, &c. That whereas the above named sheriff, by virtue of his office, and upon the complaint of the above bounden J. S. hath delivered to the same J. S. two horses and five cows, which one W. T. late took, and wrongfully withheld, as the said J. S. says; if the said J. S. do pursue his said action with effect against the said W. T. for the taking and withholding the said horses and cows, and do make return of the same, if return thereof shall be adjudged by law; and the said sheriff, his heirs, executors, and administrators, shall acquit, discharge, and save harmless of and from all and every thing concerning the premises. That then, &c. Replevin bond.

Another.

The condition, &c. That whereas the above named sheriff, by virtue of a certain writ of replevin, *(here describe the writ, in whose favour and against whom, when issued, when tested, to what court, and at what time and place returnable,)* direc-

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ERRATA.

Page 8, line, 3, ~~for issue read issues~~, and for *land*, *lands*; 8, 14, dele *to* at the end of the line; 8, 16, dele *to*; 8, 22, for *of* read *on*; 8, 23, for *serving*, *saving*; 8, 30, for *vent*, *sent*; 10, 24, dele *of*; 13, 17, for *or* read *on*; 15, 8, for *time*, *place*; 17, 23, after *first* insert *jurors*; 19, 7, for *on* read *an*; 21, 22, for *succeeding*, *preceding*; 25, 9, for court *of* justices, court *or* justices; 26, 16, for *held*, *had*; 34, 21, dele *even*; 35, 16, For *justices* read *justice of the peace*; 39, 12, for *on petition*, *or petition*; 40, 24, for *for*, *forth*; 42, 15, for *prisoner*, *prison*; 46, 24, for *up*, *into*; 49, 30, for *tenants*, *tertenants*; 51, 33, for *officers*, *offences*; 52, 11, after *&c.* read *wherein* it is provided; 55, 17, for *mortgage*, *mortgagee*; 67, 7, after *remains*, read *taken*; 68, 23, for *muniments*, *miniments*; 69, 1, after *give*, read *notice*; 70, 3, after *capias in*, read *withernam*; 77, 23, after *any* read *persons*; 78, 21, for *then*, *there*; 80, 5, for *requests*, *neglects*; 80, 26, after *subscribed*, read *such oath*; 82, 18, for *return*, *virtue*; 92, 7, for *having*, *have*; 99, 15, for *of any*, *or*; and for *on*, *of*; 101, 18, for *small*, *all*; 106, 26, after *cause* read *be shown*; 106, 31, for *and*, *but*; 107, 8, dele *made*; 110, 15, for *to*, *by*; 115, 15, for *suit*, *writ*; 117, 2, for *executed*, *excited*; 140, 27, for *and*, *one*; 163, 18, for *no*, *a*; 164, 26, for *to* appoint, *must* appoint; 181, for a . at the end of the 11th, 19th, 23d lines, read as if a ; only had been inserted; 185, 13, for *unknown*, *knowu*; 208, 30, for *preserve*, *pursue*; 209, 14, after *find* read *opposition*; 220, 25, for *as*, *or*; 221, 20, add *time of trial*; 251, 14, for *lieu*, *lien*; 268, 19, after *must* read *each*; 276, 28, for *process*, *processes*; 291, 17, after *days* dele *to*; 298, 32, for *forfeit* read *forfeiture*; 354, 18, for *arrest*, *assist*; 374, 31, for *damage*, *discharge*; 385, 12, after *gaol yard*, read *of*; 395, 1, for *power*, *forever*; 426, 27, for *desire*, *design*.