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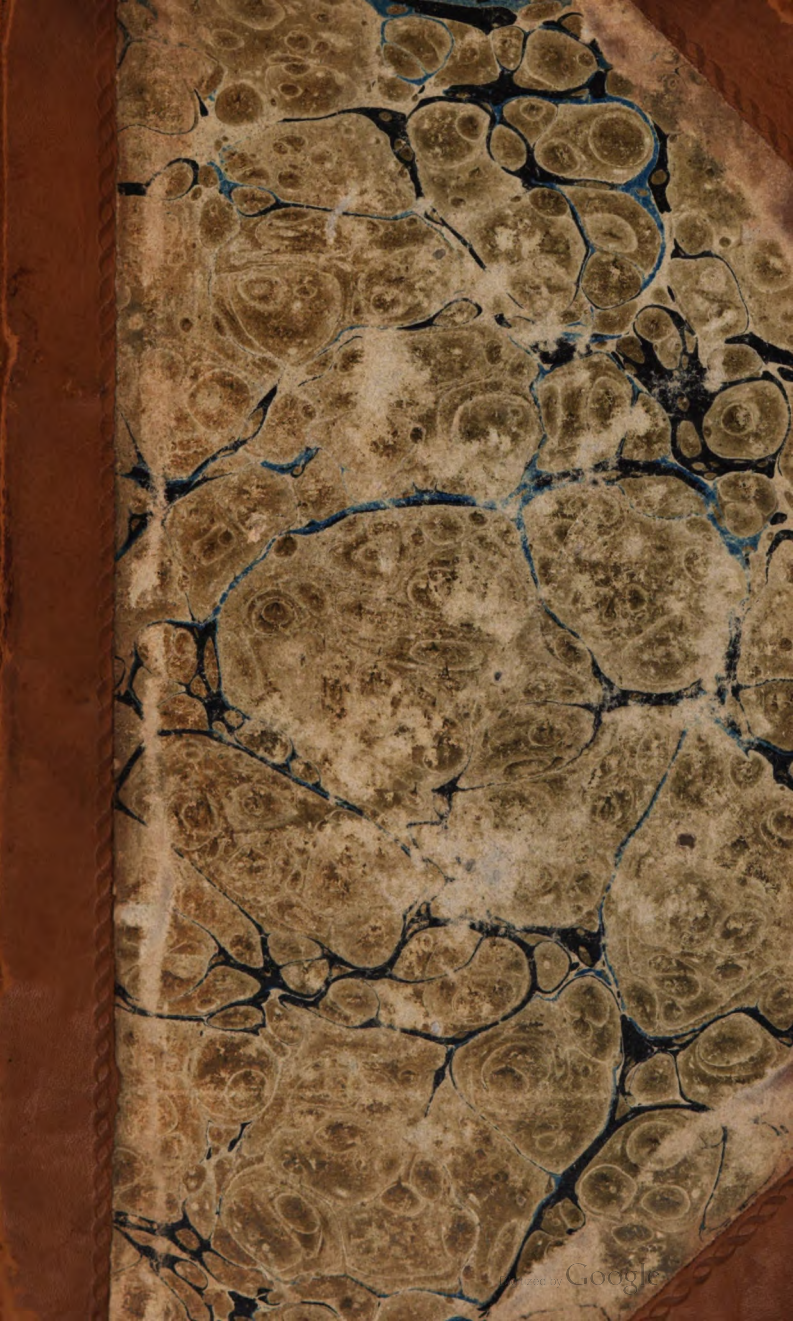
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26. III.



A
PRACTICAL TREATISE
ON
THE LAW OF JURIES
AND
JURORS.

S.H. 1827.

BY HENRY CARY, B. A.
OF WORCESTER COLLEGE, OXFORD, AND OF LINCOLN'S INN.

" Si enim pecunias æquari non placet ; si ingenia omnium paria esse non possunt ; jura certè paria debent esse eorum inter se, qui sunt cives in eâdem republicâ. Quid est enim civitas, nisi juris societas ? "

Cicero de Republicâ. Lib. 1, § 32.

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1826.

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near Lincoln's-Inn Fields.**

P R E F A C E.

THE very great improvements that have been made in the Laws relating to Juries, by the Act passed in the sixth year of His present Majesty's reign, so far interfered with the works already published on that subject, as to give room for a new publication. The simplicity of the Jury Law is such as to admit of no display of legal learning, or no entanglement of legal sophistry. The little work, therefore, now offered to the Public, pretends to no higher title than that of a compilation and digest of the law of Trial by Jury.

In forming this compilation, I have not touched upon many subordinate questions which are intimately connected with this subject, but have chiefly confined myself to

PREFACE.

Juries at Nisi Prius. Coroners Inquests, and the regulations respecting them, though embodied in the Jury Law, I considered as of little use to the Profession ; at least so simple as not to require a place in a Treatise on the Jury Law.

In the Introduction I have given a short history of Trial by Jury, which I trust will not be considered as superfluous or uninteresting.

H. C.

63, Chancery Lane,
May 1826.

INTRODUCTORY CHAPTER.

AN attempt has been made to prove that the form of trial by jury, so long made use of in this country, was derived from the Greeks and Romans. However interesting this question may be to the scholar and antiquarian, it would be to little purpose to enter into such a disquisition in a work of the present nature, which professes merely to treat of the law relating to jurors and trial by jury, as it now stands, as amended by the act passed in the sixth year of his present majesty's reign, and to point out a few of the most important alterations, which have from time to time been made in that form of trial, since first made a subject for legislative enactments.

Trial by jury seems to have been first recognized by the legislature in an act passed in the reign of Henry the second; but as the provisions of that act are no longer extant, and as no co-

temporary writer gives any satisfactory and particular account of it, it is impossible to determine, with any degree of certainty, how nearly that system approached to the one at present in use.

This form of trial, enacted in the reign of Henry the second, was called *assisa*, and was allowed to be resorted to at the option of the parties at variance, as a substitute for the trial by duel (*a*), and was only used in trying questions relating to real estate: but Mr. Reeves (*b*) informs us that criminal matters were also tried *per juratam patriæ*, or *vicinetti*, *per inquisitionem*, *per juramentum legalium hominum*, a form of trial altogether independent of the *assisa*, and which had grown out of usage and custom.

When either of the contending parties had put himself upon the assise, and sued out a writ *de pace habendâ*, the plaintiff prayed for a writ directing the sheriff to summon four knights of the county or vicinage, who were to choose twelve lawful knights. In case the four knights so sum-

(*a*) At so early a period as in the beginning of the eighth century, Luitprand, king of the Lombards, a wise prince, and, for the times in which he lived, a great legislator, condemned "the ridiculous custom of trial by duel, in which we would force God to mani-

fest his justice according to the caprice of men," but added that he was compelled to tolerate the abuse, "because the Lombards are so much attached to it." *Leg. Langob. in Codex Linderb.*

(*b*) *Hist. Eng. Law*, vol. 1, 86.

moned were not all present on the day of appearance, the court allowed one or more of the knights to complete their number from others of the county then in court, and to proceed to the election of the twelve. It was however usual to elect more than twelve, in order that if any of that number were challenged, (for jurors were considered as witnesses, and might be excepted to as such,) there might be a better chance of finding twelve unexceptionable jurors.

The jurors thus summoned were all taken from the immediate neighbourhood, and were called upon to act as witnesses as well as jurors : if all or any of them were ignorant of the matter in issue, such as professed themselves so were dismissed, and others were appointed in their stead : if they disagreed, and some were for either party, additional jurors were called in, until twelve were found of one opinion. Their conclusions must be drawn from their own knowledge, or from what they had heard ; and they were to swear that they would on no account speak what was false, or conceal any thing which they knew relating to the point at issue. When the jurors had agreed on their verdict, according to the nature of action, they were to estimate the damages on oath, subject to be taxed by the judges, in case they thought them excessive ; and even under very particular circumstances (though who were to decide what

were particular circumstances seems not very clear) the judges were at liberty to increase the damages, thereby possessing a very unlimited and exorbitant power, a power which the wisdom of future ages has very properly altogether taken away from them. In case twelve knights of the county could not be found who were acquainted with the truth, there seems to have been some doubt whether the cause could be proceeded in, and in what way it could be decided.

It would at first sight appear, that there was in such a system great room for interest and partiality ; but it was very wisely provided, that any juror convicted of perjury should be subject to the most severe punishment ; all his chattels and moveables were to be forfeited to the crown ; he was to be imprisoned for at least one whole year, and was to be deprived of the *legem terræ*, that is to say, to be branded with perpetual infamy. This punishment, however, was not always the same, but depended on the mode of conviction, which was of various kinds ; either by the oaths of twenty-four other jurors, who were to be summoned to consider of the verdict of the jury of twelve, of whom two at least were to agree in the conviction of each offender, and who were themselves to be free from any conviction of perjury, in which case the whole of the penalty was imposed ; or by the examination of the judge, who,

in case of suspicion, had power to question any of them; or by their voluntary confession; in which last two cases the punishment was varied according to the discretion of the court. Thus stood the law in the reign of Henry the second.

In cap. 29 of Magna Charta it is especially declared, that no free man shall be injured, either in his person or his property, except by the legal judgment of his peers, or the law of the land: "Nullus liber homo capiatur vel imprisonetur aut disseisietur de libero tenemento suo vel libertatibus vel liberis consuetudinibus aut utlegetur aut exsulet aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ." Lord Coke and Blackstone seem to understand these words as referring to the trial by jury; but Mr. Reeves, in his History of English Law (c), whose authority in general stands high, says, that the word *parium* merely refers to the earls and barons, and has no relation whatsoever to the trial by jury both then and now in use; but I confess there are two arguments in favour of the contrary opinion, which have not been sufficiently answered by any of Mr. Reeves's followers. In the first place, it seems very extraordinary that an institution at that time so highly valued should not be once

(c) Vol. 1, 249.

mentioned in Magna Charta; and secondly, the word *suorum* would appear more than useless, if it were merely applied to a man's superiors: and if this passage referred to the county courts or king's courts, it would certainly have been more clearly expressed.

I will however content myself with supposing one case. Let it be granted that *parium* means earls and barons: in that case *suorum* must refer to the lord or lords under whom any land was then holden, and each of whom had a court of his own; no man then is to be deprived of his freehold, or in any way injured, except by the judgment of his lord, or by the law of the land. But suppose a question is to be tried in the lord's court, and one of the parties sues out a writ *de pace habendâ*, which, as Mr. Reeves himself says, "was to prohibit the lord (if the suit was in the lord's court) from entertaining any suit, in which the duel had not been already waged between the same parties for the same land, because one of the parties had put himself upon the king's assize, and had prayed recognition to be made who had most right." What, then, becomes of the *judicium parium*? It is a dead letter, and the parties are referred to that law which was to be administered by the king, or officers appointed by him.

If all other arguments fail, it will surely be sufficient to quote a clause in 25 Ed. III. stat. 5,

cap. 4, which expressly refers to the very words in Magna Charta which have given rise to this digression, for to no other words can they by any possible construction be referred: "Estre ceo come contenu soit en la Grant Chartre des franchises d'Engleterre qe nul soit pris ne emprisoné, ne ousté de son frank tenement, ne de ses franchises costumes s'il ne soit par lei de la terre acordé et assehtu et etabli, qe nul desore soit pris par petition ou suggestion faite a nostre seigneur le roi ou a son conseil s'il ne soit par enditement ou presentement *des bones et loialx du visnée* au tiel fait se face et en due manere ou proces fait sur brief original a la commune lei; ne qe nul soit ousté de ses franchises ne de son frank-tenement s'il ne soit mesme duement en respons et forjugge dyceles par voie de lei et si rien soit fait al encontre soit redresse et tenue pur nul."

During the reign of Henry the third this form of trial became gradually more esteemed and resorted to in all judicial questions, and the natural consequence was, a considerable increase of the power of juries.

When the justices itinerant attended for the trial of causes at the different county courts, a jury was summoned for each separate hundred, who had not only to decide causes laid before them, which were at issue between parties

in their respective hundreds, but also to take cognizance of any wrongs, whether public or private, with which they were personally acquainted, and were even to apprehend any suspected persons in their hundred, if they could find them, and if not, give their names privately in a schedule to the justices, who would order the sheriffs to take them.

When the jury appointed for each hundred had appeared and taken the oath, the judges informed them of the questions which they had to consider and determine, and required them to have their answer ready on a certain day (*d*); in the meantime they were not, as now, forbidden any intercourse with parties, whether concerned or otherwise, but had leisure to inquire into the merits of the case, and to complete that information which before was probably very imperfect, and founded in many instances on mere report. They were to speak from their own knowledge, and not from the testimony of others, though, as it was impossible that twelve men could be always present, and personally acquainted with every matter that might be a subject for judicial investigation, that knowledge might of course be derived from other mediate sources; but as they came from the vicinage where the question arose, they were supposed to

(*d*) It was not so in criminal cases, as I shall take occasion to observe presently.

be sufficiently well informed of all the facts that might influence their decision.

In the reign of Edward the first, great improvements were made in this as well as every other department of the law; the materials on which we are now to work are no longer drawn from precedent and practice—are no longer enveloped in that darkness which hid from every man, who had not made it his particular study, the sources from which was derived the safety of his person and his property; but from this time we have a series of legislative enactments, each adding to and improving upon former acts; and we find this form of trial, though occasionally, and indeed too often perverted to serve the sinister purposes of a corrupt administration, in every succeeding reign becoming more favoured by the legislature.

The first provision allowing juries to give their verdict at large, and respecting the summoning of jurors, is in 13 Ed. I. st. 1, c. 30, s. 2. "It is ordained, that the justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseisin or not, so that they do show the truth of the deed, and require aid of the justices. But if they of their own head will say that it is disseisin, their verdict shall be admitted at their own peril. And from henceforth the justices shall not put in assizes or juries any

other than those that were summoned to the same at first."

It had been a serious matter of complaint against sheriffs and their officers, and those appointed to summon jurors, that they nominated persons who were aged and infirm, and who lived at a distance at the time of the summons, and also that they summoned a greater number than necessary, in order to get money for dispensing with their attendance; so that the assizes and juries "pass many times by poor men, and the rich men abide at home by reason of their bribes." An act was therefore passed in the same sessions, cap. 38, ordaining that no more than twenty-four should be summoned in one assize; that men above seventy years of age, those who were ill at the time of summons, or who did not reside in the country, should not be put on lesser juries; and to be qualified, they must have twenty shillings per annum in their own county, or forty shillings out of it, except they were witnesses in deeds or other writings, so that their presence was necessary.

With regard to great assizes, on account of the scarcity of knights, the above qualifications were not necessary; it was sufficient if they had freehold of any value in the county. Sheriffs or other officers offending against this act, were to pay

damages to the parties grieved, and be amerced to the king by the justices of assize, who were empowered to hear complaints on this statute (e).

The sheriffs had also power to imprison persons indicted before them; and as it was found that they made an ill use of this as well as other privileges, in imprisoning innocent persons who had never been indicted by twelve jurors, and obtaining money for their discharge, it was enacted by 13 Ed. I. Westm. 3, ch. 13, that inquests of offences were to be taken by twelve lawful men at the least, who were to put their seals to the inquisitions, and persons found guilty on such inquest were to be imprisoned as usual by the sheriff. Persons imprisoned unless indicted by inquests of this kind might have their writ *de imprisonment* against the sheriff or other officers, as against any other person who imprisoned them without authority. Thus we see that in criminal matters, every person indicted must, at a time when trial by jury was almost in its infancy, have been found guilty before two juries; at least the first jury, which sat on the inquest, must have thought that there was sufficient cause for indictment. The number of jurors to be summoned by

(e) Some further alterations in assizes, 21 Ed. I. st. 1; but were made respecting the qualifications of jurors by the statute *de iis qui ponendi sunt* it is unnecessary to mention the particulars.

the sheriff we have seen was twenty-four; when the prisoner, therefore, came to the second inquest, or his trial, he was allowed to challenge the jurors; the strongest cause of challenge seems to have been, that the juror challenged was one of those who indicted him (*f*); but in case he challenged more than twelve, or did not leave a full jury of twelve unchallenged, the challenges were to be tried, and if found true, another day was appointed, and more were to be summoned by the sheriff; so that it appears no peremptory challenges were at that time allowed. When the jury had all taken the oath, (for if any one of them was not sworn, he was sent to prison, and the others amerced for merely suffering it,) they were only allowed to confer with one another, and were entirely excluded from any communication with other parties; they were not even allowed the assistance of witnesses, but were to speak from their own knowledge: if they could not agree, they were to be questioned separately why they could not; and if they all declared upon oath, that they were altogether ignorant of the matter at issue, another jury was to be struck, until some were found who could determine it.

“It was many years after this reign, and when

(*f*) In *King v. Knox and* ment were allowed to be on
Cage, some of the grand jury the petit jury. 12 Mod. 305.
 who found the bill of indict-

the second (since called the *petit*) jury began to be considered rather as judges of the presumption raised by the finding of the presentors, and not as witnesses of the fact, that a kind of evidence used to be exhibited to them. The first evidence made use of in this way consisted of written papers, such as depositions, informations, and examinations taken out of court; this led by degrees to a sparing use of *vivâ voce* testimony. It was long before they thought it necessary to bring evidence into court in support of the prosecution, and it was still longer before they allowed the prisoner to disprove the indictment by any thing else than the oaths of the twelve jurati. When a prisoner was permitted to call witnesses to prove such matter as he offered in his defence, it was a high favour, and depended much on the discretion of the court, and the manner in which the charge had been made out by the prosecutors; besides this, the witnesses for the prisoner were never upon oath, which always left a pretence for discrediting their testimony.

The trial by jury at the time of which we are now writing, was, to all intents and purposes, a trial by witnesses, and no doubt deserved all the value that was set on it by our ancestors. When the condition of society so changed, that, notwithstanding all the supposition of their personal knowledge of the fact, as coming from the vicinage,

they were in reality wholly ignorant of it; and it was necessary the charge should be *proved* to them, before they could pronounce on the guilt or innocence of the party, then the old proceeding became a piece of mummery, productive of oppression and tyranny, till at length it was softened by the calling of witnesses to inform the conscience of the twelve jurors. This was the last improvement of the trial by jury in criminal cases, and was not thoroughly effected till the times of Edward the sixth and Queen Mary (g)."

The reign of Edward the second was far from enlarging on those admirable provisions made in the time of his predecessor, regarding the administration of justice. There was no law of any importance respecting trial by jury passed in this reign; but there was one of very vital importance, which not directly but indirectly affected this bulwark of our liberties. The privilege of electing their own sheriffs, where the shrievalty was not of fee, had been confirmed to the people in the reign of Edward the first, but in the reign of his successor that great privilege was taken away, and by stat. 9 Ed. II. st. 2, it was enacted, that sheriffs should be assigned by the chancellor, treasurer, barons of the Exchequer and justices; the reasons for this alteration were the

(g) Reeves' Hist. of Eng. Law, vol. 2, 291.

same that caused the penalties already mentioned, viz. the abuse of their jurisdiction by the sheriffs so chosen by the people; but there are few who would not rather trust their liberties to the discretion of officers nominated by themselves, than the summoning of jurors to officers appointed by the crown, and who had an opportunity of introducing, in spite of challenges, jurors who in criminal prosecutions would further what was deemed the interest of the crown—an opportunity which on too many occasions they have not failed to make use of (*h*).

We now come to a period of our history, in which such great improvements were made both in the theory and practice of our laws, that from this time, the reign of Edward the third, the statutes have obtained the name of *nova statuta*, as distinguished from those passed in former times, which consequently are called *vetera statuta*.

The statutes relating to jurors and trial by jury now become so many and so various, that to

(*h*) "In the reign of Henry the eighth, complaints had been made that sheriffs and other officers returned jurors for the king, who would readily perjure themselves for corrupt purposes: to remedy this, power was given to jus-

tices of gaol delivery, and of the peace, to reform the panel, by putting in and taking out of names: this was confined to juries that were to inquire for the king." Reeves' Hist. of Eng. Law. v. 4, cap. xxix. p. 298:

attempt to give any intelligible view of them would require more space than the nature of the present work will allow ; I shall therefore content myself with having given this slight and imperfect sketch of the progress of this valuable mode of trial in the reigns of Henry the second and third, and Edward the first and second.

One of the greatest inconveniences which attended the form of trial by jury on its first institution, or rather when first recognized by the legislature, was the partiality which jurors were so frequently able to shew. When jurors were summoned merely for the occasion, and few were willing or able to undertake that office, an individual might easily escape challenge, and thrust himself upon a jury, who was predetermined to carry the cause his own way ; if all other means failed he might give evidence to his fellow jurors which he knew to be false ; an evil which arose from several causes ; amongst others, because the jury were the only witnesses, and their evidence was given privately, and could not be contradicted. In such a state of things it was absolutely necessary to put some check on the perjury which many were so tempted to be guilty of. How severe a penalty was inflicted in those early times on an offence of this kind has already been mentioned ; and it is not a little remarkable that the first statute, still in existence, relating to jurors,

is one enacted for the express purpose of authorizing an attaint in pleas of land touching freehold.

The mischief, however, seems rather to have increased than diminished; for we find this subject frequently brought before the legislature in the reign of Edward the third; and an attaint was extended to all pleas whatsoever, whether personal or real; this was not sufficient, for there were some who might be bribed to run the risk of an attaint; a very severe penalty was therefore imposed on those guilty of embracery, and who took any reward for giving their verdict, *viz.* perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

Jurors attainted still contrived, if not to avert, at least to delay, the punishment which the law awarded them, by pleading severally foreign and sham pleas, which the grand jury could not try. To such an extent, indeed, was this carried, that attaints are said to have lasted ten years: it was therefore provided (*i*), that the plaintiffs in such attaints should recover their damages and costs against all such tenants, jurors, and defendants: and further, by the 15 H. VI. c. 5, that if any foreign plea were found against any party, there should be the same judgment against him as if the grand jury had passed against him.

(i) 2 Hen. VI. c. 4.

Though these penalties might have had the effect of deterring jurors from giving false evidence and false verdicts, it could not do otherwise than materially affect the administration of justice in general; for one guilty juror might involve eleven honest men in perpetual infamy and ruin: and though the honest men might prevail when put to the test, yet they must be unwilling to volunteer themselves on such a perilous undertaking, sometimes, perhaps, rather incur the penalty for non-attendance than run the risk of being subject to an attaint.

By statute 11 Hen. VII. c. 24, the severity of former enactments was mitigated, and the punishment for attainted jurors was made perpetual infamy; and, if the cause of action were above forty pounds value, a forfeiture of twenty pounds for each of the jurors; if under forty pounds, five pounds each, to be divided between the king and the party aggrieved. This act was only temporary, but was re-enacted with but little material alteration by the 23 Hen. VIII. c. 3, and made perpetual by 13 Eliz. c. 25.

But a party had the option of bringing an attaint either upon the statute or at common law; in which latter case the penalty was perpetual infamy, forfeiture of goods, chattels, lands and tenements, their wives and children to be driven out of their houses, their houses to be razed to the

ground, their trees rooted up, their meadows ploughed, and themselves imprisoned for life; this, as Lord Coke informs us, was the punishment of a perjured juror (*k*).

Attaint had grown so entirely into disuse, that no instance, where it has been resorted to, has been known since the time of Elizabeth: the legislature has left such a proceeding to remain in force as a disgrace to our statute books for the space of two centuries; and it will ever be the boast of the present times, that the uprightness of our juries, and the impartial administration of our laws, imperiously call for a repeal of all the laws respecting attaint, and that they have been repealed!

(*k*) Co. Lit. 294, b.

Qualifications.

THE introductory section of the act lately passed, gives us a general, view of the alterations which it has been deemed expedient to make relative to the subject before us: *First*, to consolidate and simplify the laws relative to the qualification and summoning of jurors, and the formation of juries in England and Wales; an object by all means desirable, when we consider that there existed on the statute books more than seventy acts of parliament relating to jurors and juries, many of which repealed some one or more of the enactments contained in preceding laws; thereby rendering a knowledge of a subject, so important to every Englishman, not only difficult of access to every one of us as citizens, but even giving unnecessary trouble and difficulty to those whose particular duty it is to administer the provisions of such laws.

Secondly, to increase the number of persons qualified to serve on juries; for as the population and wealth of the country increase, civil actions will, probably in a similar ratio, increase, and, perhaps, with the means of luxury, crime also (though this may be a question better reserved for the political œconomist): it must therefore be evident to every one how advantageous it will

be to lighten the burden of those who are called from their private professions and pursuits to hold the scales of justice between their fellow men and fellow subjects.

Thirdly, to alter the mode of striking special juries ; and *lastly*, in some other respects to amend the existing laws.

The following persons are now qualified and made liable to serve on juries for the trial of all issues joined in any of the king's courts of record at Westminster, in the superior courts, civil and criminal, of the three counties palatine, and in all courts of assize, nisi prius, oyer and terminer and gaol delivery, and to be tried in their respective counties : they are further qualified and liable to serve on grand and petit juries in courts of sessions of the peace in the county, riding or division where they shall respectively reside :

Every man between the ages of twenty-one and sixty years, residing in any county in England, who has in that county, either in his own name or in trust for him, *ten pounds* per annum above reprises, that is to say, of clear yearly income, arising out of lands or tenements, whether freehold, copyhold, or customary tenure, or of ancient demesne ; or of rents issuing out of any such lands or tenements, or in such lands, tenements and rents taken together, in fee-simple, fee-tail, or for his own, or other person's life : *or* who has in the

same county *twenty pounds* per annum above reprises, in lands or tenements held by lease or leases for the absolute term of twenty years or more; or for any term of years determinable on any life or lives: or any householder who shall be rated or assessed to the poor rate, or to the inhabited house duty in the county of Middlesex, on a value of not less than *thirty pounds*, or in any other county of not less than *twenty pounds*: or who shall occupy a house containing not less than *fifteen windows* (l).

In Wales three-fifths of any of the above qualifications will suffice (m).

By statute 4 & 5 W. & M. c. 24, s. 15, persons liable to serve on juries, as above-mentioned, were required to have in their own name, or in trust for them, in the county where the issue was to be tried, ten pounds by the year, above reprises of freehold or copyhold lands or tenements, or of lands or tenements of ancient demesne, or in rents, or in all or any of the said lands, tenements or rents, in fee-simple, fee-tail, or for the life of themselves or some other person. In Wales three-fifths of the above qualifications were to be sufficient.

By statute 3 Geo. II. c. 25, s. 18, any leaseholder for the term of five hundred years absolute,

(l) 6 Geo. 4, c. 50, s. 1.

(m) Ibid.

or for ninety-nine or any other term determinable on life or lives, of the clear yearly value of twenty pounds over and above the rent reserved, was made liable to serve on juries; and by 4 Geo. II. c. 7, § 3, leaseholders in the county of Middlesex, where the improved rents or value amount to fifty pounds or upwards per annum, over and above all ground rents, or other reservations payable by virtue of the said leases, were made liable to serve on juries in the county of Middlesex.

Thus stood the law respecting the qualifications of jurors until the passing of the present act. And as the qualification is less, so also the exceptions are more.

It must frequently have been a very severe duty for men who had nearly attained their seventieth year to attend in a close court, to which they were not at all accustomed, and in many cases they must have been wanting in that discernment, and vigour of mind, which are so generally requisite for one who has to undertake the arduous task of distinguishing truth from falsehood, and of endeavouring to digest and reconcile the various and contradictory evidence which the different parties in a suit so frequently lay before a jury.

The following persons are absolutely freed and exempted from serving on any juries or inquests whatsoever:—

Peers (*n*).

Judges of the king's courts of record at Westminster, and of the courts of great sessions in Wales.

Clergymen in holy orders.

Priests of the roman-catholic faith, who shall have duly taken and subscribed the oaths and declarations required by law.

Persons who shall teach or preach in any congregation of protestant dissenters, whose place of meeting is duly registered, and who shall follow no secular occupation, except that of a schoolmaster, producing a certificate of some justice of the peace of their having taken the oaths and subscribed the declaration required by law.

Sergeants and barristers at law actually practising.

Members of the society of doctors at law, and advocates of the civil law, actually practising.

Attornies, solicitors and proctors, duly admitted in any court of law or equity, or of ecclesiastical or admiralty jurisdiction, in which attornies, solicitors and proctors have usually been admitted, actually practising, and having duly taken out their annual certificates.

Officers of any such courts actually exercising the duties of their respective offices.

(*n*) 6 Geo. 4, c. 50, s. 2.

Coroners, gaolers, and keepers of houses of correction.

Members and licentiates of the royal college of physicians in London, actually practising.

Surgeons, being members of one of the royal colleges of surgeons in London, Edinburgh or Dublin, and actually practising.

Apothecaries, certificated by the court of examiners of the apothecaries company, and actually practising.

Officers in his majesty's navy or army on full pay.

Pilots licensed by the Trinity-house of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed by the lord warden of the Cinque Ports, or under any act of parliament or charter for the regulation of pilots in any other port.

The household servants of his majesty, his heirs and successors.

Officers of customs and excise.

Sheriff's officers, high constables, and parish clerks.

It is further provided (o), that all persons exempt from serving upon juries in any of the courts before mentioned, by virtue of any prescription,

(o) 6 Geo. 4, c. 50, s. 2.

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charter, grant, or writ, shall continue to enjoy such exemption as heretofore.

No justice of the peace shall be summoned or impanelled to serve at any sessions of the peace for the jurisdiction of which he is justice (*p*).

Inhabitants of the city and liberty of Westminster are exempted from serving on any jury at the sessions of the peace for the county of Middlesex (*q*).

No person shall be impanelled or returned to serve on any jury for the trial of any capital offence in any county, city or place, who shall not be qualified to serve as a juror in civil causes within the same county, city or place (*r*).

The following are declared to be either disqualified or exempted, or are made exceptions to the general rule:—the qualifications before mentioned are not to extend to the juries in any liberties, franchises, cities, boroughs, or towns corporate, not being counties, or in any cities, boroughs or towns, being counties of themselves, which shall respectively possess any jurisdiction, civil or criminal: but in all such places the sheriffs, bailiffs, or other ministers having the return of juries, are to prepare their panels in the usual manner (*s*).

No man shall be impanelled or returned by the

(*p*) 6 Geo. 4, c. 50, s. 48.

(*r*) Ibid. s. 50.

(*q*) Ibid. s. 49.

(*s*) Ibid.

sheriffs of the city of London as a juror to try any issue joined in his majesty's courts of record at Westminster, or to serve on any jury at the sessions of oyer and terminer, gaol delivery or sessions of the peace, to be held for the said city, who is not a householder or the occupier of a shop, warehouse, counting-house, chambers, or office for the purpose of trade or commerce, within the said city, and has lands, tenements or personal estate of the value of one hundred pounds (t).

No person is liable to be summoned or impanelled to serve as a juror in any county of England or Wales, or in London, upon any inquest or inquiry to be taken by any sheriff or coroner, by virtue of any writ of inquiry, or by any commissioners appointed under the great seal, or the seal of the court of exchequer, or the seals of the courts of the counties palatine, or the seals of the courts of the great sessions in Wales, who is not duly qualified according to this act, to serve as a juror upon trials at *nisi prius* in such county, and in England or Wales, or in London (u): but a coroner or sheriff, when acting by virtue of his office otherwise than under a writ of inquiry, may take and make all inquests and inquiries by jurors of the same description, as was usual before the passing of the present act (x).

(t) 6 Geo. 4, c. 50, s. 50.

(x) Ibid.

(u) Ibid. s. 52.

No person need serve as a juror at any session of *nisi prius* or gaol delivery in the county of Middlesex, who has the sheriff's certificate of service at either of such sessions for either of the two terms or vacations next preceding: certificate of service within one year in Wales, the counties of Hereford, Cambridge, Huntingdon or Rutland; within four years in the county of York, or two years in any other county, will exempt a man from serving on trials before any court of assize, *nisi prius*, oyer and terminer, or gaol delivery. The exemptions are the same with regard to quarter sessions, except that two years instead of four will exempt in the county of York. The above provisions are not to extend to grand juries at the assizes, or great sessions, or to special jurors (y).

The following persons are absolutely disqualified from serving on juries or inquests in any court, or on any occasion whatsoever (z).

Any man not being a natural-born subject of the king.

Any man attainted of treason or felony, or convicted of any infamous crime, unless he has obtained free pardon.

Any person under outlawry or excommunication.

To the foregoing disqualifications there is one exception: an alien indicted for any felony or misdemeanor, may obtain a rule from the court for

(y) 6 Geo. 4, c. 50, s. 42.

(z) Ibid. s. 3.

a jury *de medietate linguæ*, that is to say, one half of the jury to be aliens, if there are so many in the place, if not, as many as there are; the aliens are not to be liable to challenge for want of qualification, but may be challenged for any other cause, as if they were qualified by this act (a).

Now that I have considered the qualifications necessary to make a person liable to serve on juries, I shall proceed to explain the method of forming the jury lists, and the course to be pursued by those who claim the privilege of exemption, or who are returned in the list without being qualified according to this act.

Jury Lists.

THE clerk of the peace, each in his proper district, in the first week of July in every year, must issue and deliver his warrant in a proper form (b) to the high constables of each separate hundred or district, commanding them to issue forth their precepts to the churchwardens and overseers of the poor of the several parishes and townships within their constablewicks, which precept (c) requires them to make out a list before the first of September next ensuing, of all

(a) 6 Geo. 4, c. 50, s. 47.

(c) Vide Appendix, No. 2.

(b) Vide Appendix, No. 1.

persons within their respective parishes or townships liable to serve on juries (*d*).

(*d*) 6 Geo. 4, c. 50, s. 4. The mode of forming and returning lists of persons qualified to serve as jurors, enjoined in the present act, seems to be as unexceptionable as possible. By the 7 & 8 of Will. c. 32, s. 4, constables, tythingmen and headboroughs of towns in each county, or their deputies, were at the general quarter sessions of the peace holden for each county, riding or division, to give in a list of persons qualified to serve on juries. This system, however, was soon found inconvenient; the constables could not always know who were qualified, and had frequently to go a great distance to the place where the quarter sessions were held, and therefore sometimes neglected to return their lists: it was accordingly enacted by 3 & 4 of Anne, c. 18, s. 5, that the justices of the peace should issue their warrants to the head constables of the respective districts, who were immediately to issue precepts to the respective con-

stables in their hundred or district, requiring them to meet the head constables and make out the jury lists; a fine of ten pounds on a head constable, or five pounds on a constable, was to be imposed in cases of neglect: this had merely the effect of compelling the constables to attend to their duty, but did not in the least remedy the inconveniences above alluded to, which were however in a great measure obviated by 3 Geo. 2, c. 25, s. 7, by which constables were at liberty, on request made to any parish officer, who had in his custody any of the rates for the poor or land-tax of each parish, to inspect such rates, and take from thence the names of such freeholders, copyholders or persons qualified to serve on juries; and were also empowered to subscribe their lists before justices, on oath, who were to deliver the said lists to the head constables, and they to deliver them at the quarter sessions.

The clerk of the peace will, at the expense of the county, supply a sufficient number of printed precepts and returns to the high constables of each district (e). The high constable, within fourteen days after the receipt of the above-mentioned warrant, will issue his precept, with a sufficient number of printed forms of returns (f), which returns, when made out and filled up by the churchwardens and overseers of the poor, are by them to be delivered to the high constable, and by him to the clerk of the peace (g).

In filling up the returns, the churchwardens and overseers of the poor are to make out a true list, in alphabetical order, of all men qualified to serve as jurors, with the christian and surname at full length, and with their place of abode, the title, quality, calling or business, and the nature of the qualification of every such person (h).

The lists of qualified persons resident in each ward of the city of London, must be made out with the proper quality or addition, and the place of abode of each man, by the parties hitherto accustomed to make out such lists; the shop, warehouse, counting-house, chambers or office of each person so qualified, to be deemed the place

(e) 6 Geo. 4, c. 50, s. 5.

(h) Ibid. s. 8. For the forms

(f) Vide Appendix, No. 3.

of returns, see the Appendix,

(g) 6 Geo. 4, c. 50, s. 6.

No. 3.

of abode of such person, for the purposes of this act (*i*).

In districts where there are more than one high constable, a separate warrant must be sent to each, and both are equally liable and subject to the penalties hereafter mentioned: and where there are no overseers of the poor, the churchwardens are by the present act to be deemed such (*k*).

In cases where any parish or township extends into more than one hundred, lathe, wapentake or other district, it is supposed to be in that district in which the principal church of that parish or township is situated (*l*).

At a special petty sessions holden for that purpose before the first of July in any year, the justices of the peace of any division in England or Wales may order (*m*) any extra-parochial place to be annexed to any parish or township adjoining, for the purposes of the present act, and no other; and in consequence of such order, such extra-parochial place must ever after be deemed, as far as concerns the present act, part of the parish or township to which it shall be so annexed (*n*).

(*i*) 6 Geo. 4, c. 50, s. 50.

(*k*) Ibid. s. 6.

(*l*) Ibid.

(*m*) The order must be served upon the churchwardens

of such adjoining parish within five days after it is made.

s. 7.

(*n*) 6 Geo. 4, c. 50, s. 7.

The churchwardens and overseers must have completed the lists before the first Sunday in September; and on the first three Sundays in that month, must fix a true copy of each list on the principal door of every church or place of public worship in their respective parishes or townships: they must subjoin to such copy a notice, stating when and where all objections to the list will be heard by the justices of the peace: they are likewise to keep a copy of such list, to be read without fee, by any inhabitant of their parish or township, at any reasonable time during the first three weeks of September, in order that notice may be given of men qualified who are omitted, or of men inserted who are not qualified: such lists to be provided at the expense of each parish or township (o).

A special petty sessions is to be holden by the justices of the peace within the last seven days of September, of which notice must be given before the twentieth of August preceding, when the churchwardens and overseers of each parish and township are to produce their lists of men qualified, as above mentioned, to serve as jurors, and to answer, upon oath, any questions which the justices may think fit to put to them respecting their lists: the justices will then strike out the names of such as are found to be dis-

(o) 6 Geo. 4, c. 50, s. 9.

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qualified or disabled by lunacy, imbecility of mind, or by deafness, blindness, or other permanent infirmity, and insert the names of any qualified persons who have been omitted, and also correct any errors or omissions which may be found in the returns (*p*).

It is, however, justly provided, that no error or omission may be reformed, and no person's name may be inserted without due notice given, either before the sessions, or by two justices at least at the sessions; in which latter case, the party concerned is required to show cause at an adjournment of the said petty sessions, to be holden within four days afterwards, why his name should not be inserted in the list, or why any errors or omissions in such list should not be reformed. When the list is allowed by the justices at the petty sessions, or at any adjournment of the said sessions, it must be delivered to the high constable, and by him, upon oath, to the court of the next quarter sessions, on the first day of its sitting (*q*).

For the purpose of reforming and completing the jury lists, the churchwardens and overseers of every parish and township may, between the first of July and the first of October, by application to any collector or assessor of taxes, or any other officer having the custody of any duplicate or assessment, inspect any such duplicate or assessment, and

(*p*) 6 Geo. 4, c. 50, s. 10.

(*q*) Ibid.

from thence take the names of any persons qualified to serve on juries. The justices of the peace have a similar power, and may also, on like application to any overseer or churchwarden having custody of any poor-rate, inspect such poor-rate for the purposes above mentioned (*q*).

The clerk of the peace is to keep the lists, when returned, among the records of the sessions, arranged with every hundred in alphabetical order, and every parish and township within such hundred likewise in alphabetical order; the above to be copied in a book (*r*) to be provided by each county, riding or division for that purpose, and delivered to the sheriff or undersheriff within six weeks after the close of such sessions, which is to be called the "Juror's Book," for the year — (inserting the calendar year for which such book

(*q*) 6 Geo. 4, c. 50, s. 11,

(*r*) By 3 Geo. 2, c. 25, s. 2, the names of qualified persons were to be given in at the quarter sessions, and entered in a book kept by the clerk of the peace for that purpose, a duplicate of which was to be given to the sheriff, or undersheriff, who were to cause a copy of such duplicate

to be entered in a book kept by them for that purpose. This method was likely to be productive of mistakes, the list having to be copied by so many different parties: according to the present plan, the whole is completed by the clerk of the peace, and consequently he is solely responsible.

is to be in use), and delivered by every sheriff to the succeeding sheriff; the above book is to be brought into use on the first day of January in every year, and to continue so in use for the space of one year (s).

When the list is once completed and delivered, no alteration can be made by the sheriff, unless the churchwardens and overseers have been convicted of making any wilful omission, or of inserting the name of any person not qualified, or of any other error either as to description of the name, place of abode, title, quality, calling, business, or nature of the qualification, in any of which cases the justice, before whom any churchwarden or overseer is convicted, may certify the same to the clerk of the peace of the county, riding, or division, in which the persons so omitted or inserted shall reside; the clerk of the peace will cause the list to be corrected, and will give notice to the sheriff to correct the juror's book accordingly; but if any sheriff takes upon himself to make any alteration in the juror's book, he is liable to a penalty of fifty pounds, one moiety to the king, the other moiety, with full costs, to the person suing for the same (t).

In order to secure the more punctual formation

(s) 6 Geo. 4, c. 50, s. 14.

(t) Ibid. s. 46.

of the jury lists, as above described, the following penalties are to be imposed on any of the officers neglecting or refusing to perform any of their respective duties in the formation of such lists: on any high constable, churchwarden, or overseer, a penalty not exceeding ten pounds nor less than forty shillings, at the discretion of the justice before whom they may be convicted (*u*); on any clerk of the peace, clerk of the petty sessions, sheriff, or under sheriff, sheriff of London, or secondary, the penalty of fifty pounds; one moiety to the king, and the other moiety, with full costs, to such persons as shall sue for the same, in any of his majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, wherein no essoign, protection, or wager of law, nor more than one imparlance shall be allowed (*x*).

Of the Process against Jurors.

IN stating, as clearly and concisely as possible, the qualifications required for persons to be included in the lists of jurors, and the method of forming those lists, I have confined myself strictly

(*u*) 6 Geo. 4, c. 50, s. 44, 45.

(*x*) Ibid. s. 46.

to the act passed in the sixth year of his present majesty's reign; but as it is my purpose to consider each part of the law relating to jurors and juries in its proper order, that is to say, as it occurs in practice, this work must of necessity be more than a mere explanation of the act of parliament which has given rise to it.

In all actions at law it is necessary that the contending parties should agree in resting the merits of their case on the truth or falsehood of one particular point, and as either party fails or succeeds in establishing his side of the question, he fails or succeeds in the whole matter, of which that single point is but a part: what that point is to be, is ascertained by the pleadings, which are entirely conducted out of court; and when ascertained, it is called the issue. Issues again are either matter of law or fact; if of the former, they are argued before the judges of the court in which the action is brought, and determined by them; if of the latter, they are tried by a jury: with these only are we concerned; issues upon matters of law may therefore be dismissed.

An issue of fact is where the law of the case is not disputed, but only the fact; and where the fact was not committed, or did not exist, of course there needs no exertion of the law. The party then that denies the fact, offers the issue thus, at

the conclusion of his pleadings—" and of this he puts himself upon the country," or, " and this he prays may be inquired of by the country ;" if the opposite party has no question of law, on which he can, or prefers resting the merits of his case, he accepts the proffered issue, and subjoins, " and the said *A. B.* doth the like."

The court (for the parties, though the pleadings are carried on out of court, are supposed to be in court during the whole of the proceedings,) awards a writ of *venire facias* upon the roll or record, addressed to the sheriff, commanding him to cause to come here (*y*) on a certain day, twelve good (*z*) and lawful men, qualified according to law, of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid *A.* nor the aforesaid *B.* to recognize the truth of the issue between the said parties (*a*).

The *venire* is the same in both the courts of King's Bench and Common Pleas, except as to

(*y*) At Westminster, or, if by original, " wherever we shall then be in England."

(*z*) The form of the *venire* was twelve *free* and lawful men, but 6 Geo. 4, c. 50, s. 13, enacts, that the writ " shall direct the sheriff to return

twelve good and lawful men, qualified according to law, and that the rest of the writ shall proceed in the accustomed form."

(*a*) For form of *venire*, vide Appendix, No. 4.

the return, and the addition of the defendant's title to his name in the Common Pleas.

There ought to be fifteen days between the teste and return. But by statute 18 Eliz. 14, it shall be aided after verdict, if the return be insufficient or imperfect; and by statute 21 J. 13, if there be no return when the panel of the names of jurors is annexed to the writ, or if the name of the sheriff is not put to the return when the writ is returned to the proper officer (*b*).

This writ, though in many (*c*) cases issued, is at present of no practical use: the jury, though summoned to attend *here*, that is to say, at the King's court at Westminster, never make their appearance; but a second writ is taken out, called in the King's Bench a *distringas*, and in the Common Pleas *habeas corpora juratorum* (*d*), commanding the sheriff to distrain them by their lands and goods, *or* to have their bodies, that they may appear on the day appointed; that is to say, the jurors summoned in the *venire*, and who have made default, are excused from appearing until some later day, *nisi prius*, "unless before that day the justices assigned to hold the assizes in your

(*b*) 3 Com. Dig. 174.

(*c*) The *venire* is always made out in the Common Pleas, though not so in the King's Bench.

(*d*) For form of *distringas* and *habeas corpora juratorum*, vide Appendix, Nos. 5 & 6.

county shall have come to the place appointed for holding the assizes." Hence it derives its name of *nisi prius*: but it is well known that the justices will come to the place appointed for holding the assizes before the day mentioned in the writ, and therefore the jury have to attend at such assizes, and there try the cause.

The above writs are directed to the sheriff, who in all cases is the proper person to execute the jury process; but in case he is a party to the suit, or in any way connected with either of the parties, so as to be interested in the decision, the process must be directed to the coroners, if they are impartial, or to such of them as are so; but in case all are partial, or not indifferent, then the *venire* must be directed to two elisors appointed by the court, who for that reason cannot be objected to (e).

The method of appointing elisors is—rule why it should not be referred to the prothonotary to consider and report fit persons; rule made absolute, he nominates *A.* and *B.*; rule why they should not be appointed by the court, rule made absolute (f); or by consent of parties, process may be directed to two justices of assize (g).

If there are two sheriffs of a county, and one of them is partial, the *venire* must be directed to the

(e) Co. Lit. 158, a. More will be said on this subject under the head of challenge.

(f) 3 Com. Dig. 173. Barnes, 465.

(g) 3 Com. Dig. 173.

other, and not to the coroners ; for the coroner is not the proper person to execute the process of the court, but in such cases where the proper officer is wanting (*g*).

The coroners are not the proper officers of the court in any other case but where the sheriff is absolutely improper, not where there is no sheriff at all (*h*).

In the case of two coroners, if one be challenged the other must act, and yet both make but one officer (*i*).

If process be once awarded to the coroners, all subsequent process must be awarded to them, although there be a new sheriff afterwards (*k*).

So if process be once to elisors, all afterwards, except the *distringas*, shall be to them (*l*).

If there be cause of challenge to the sheriff, the plaintiff may make suggestion upon the roll, and if the defendant confesses it, a *venire* may be immediately awarded to the coroners (*m*).

If the defendant does not allow the cause, he cannot afterwards challenge the array (*n*).

(*g*) 3 Bac. Abr. 732. *King v. Warrington*, Shower, 329; and *King v. North*, 1 Salk. 144.

(*h*) *King v. Warrington*, 1 Salk. 152.

(*i*) *Ibid*.

(*k*) 3 Com. Dig. 173. Co. Lit. 158, a.

(*l*) 3 Com. Dig. 173.

(*m*) *Ibid*. Co. Lit. 157, b.

Dyer, 367.

(*n*) Co. Lit. 157, b.

But if the *venire* be awarded to the coroners for default in the sheriff, and they do nothing upon the writ, then, upon a default discovered in the coroner, *de puisne temps*, the party may shew this to the court, and have a *venire* awarded to the sheriff, if there be an indifferent one made in the mean time, or else to elisors, *et sic è converso* (o).

If a *venire* be awarded to the coroners, where it ought to have been to the sheriff, if it be by consent of parties, and so entered of record, it shall stand; but if without consent, it is an insufficient trial (p).

If process be once awarded for the partiality of the sheriff, though there is a new sheriff, yet process can never be awarded to him, for the entry is, *ita quod vicecomes se non intromittat* (q).

But where the sheriff who returned the panel was brother to him for whom the verdict passed, yet if the party does not challenge the array, it is no error (r).

When process for the return of jurors is directed to any coroner, elisor, or other minister, such minister has the full power of the sheriff delegated to him, at least so far as concerns the process, he has access to the jurors book (s).

(o) Trials per Pais, 54.

(p) Ibid. 55.

(q) Co. Lit. 158, a.

(r) n. 2 Saund. 101, q.

(s) 6 Geo. 4, c. 50, s. 14.

must return names contained therein, and no others, and is subject to the like penalties.

In a county palatine the record is sent by *mittimus* to the justices there, commanding them to issue the jury process, and when the cause is tried, to send the record back again to the court above (t).

But in case any plaintiff or demandant in any court of record at Westminster, or any defendant in any action of *quare impedit*, or replevin, sues out a writ of *venire facias*, upon which any writ of *habeas corpora juratorum* or *distringas* shall issue, in order for the trial of the issue at the assizes or sessions of *nisi prius*, and does not proceed to trial at the next assizes or sessions of *nisi prius*, he may, except where a view is directed, at any subsequent assizes or sessions of *nisi prius*, sue out another writ of *venire facias*, and a writ of *habeas corpora juratorum* or *distringas* with a *nisi prius*, and proceed to trial, as if no former writ of *venire* had been prosecuted, and so on, *toties quoties*, as the matter shall require (u).

“ If any defendant, or tenant, in any action depending in any of the said courts, shall be minded to bring to trial any issue joined against him, where, by the practice of the court, he may do the same by proviso, he shall or may, of the issuable

(t) Tidd, 794.

(u) 6 Geo. 4, c. 50, s. 16.

term next preceding such intended trial to be had at the next assizes or sessions of *nisi prius*, sue out a new *venire facias* to the sheriff, in the form aforesaid, by proviso, and prosecute the same by writ of *habeas corpora* or *distringas* with a *nisi prius*, as lawfully and effectually, to all intents and purposes, as if no former writ of *venire facias* had been sued out or returned in that cause, and so, *toties quoties*, as the matter shall require (x)."

The trial by *proviso* is so called from a clause in the *distringas*, which provides, that if two writs come to the sheriff, he shall only execute and return one of them (y); that is to say, if the plaintiff also should have brought him another writ to the same purpose, the sheriff should summon but one jury (z).

If both the plaintiff and defendant happen to carry down the record at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but if he do not enter it, the defendant may proceed on his record (a).

In no cases is the trial by *proviso* grantable to the defendant, unless there has been default or laches in the plaintiff; except in cases where the defendant is an actor, as in replevin, prohibition, and *quare impedit* (b).

(x) 6 Geo. 4, c. 50, s. 16.

(a) 2 Tidd, 773.

(y) 2 Tidd, 773.

(b) *Queen v. Banks*, Salk.

(z) *Trials per Pais*, 71.

652; same case in *Mod.* 247.

Before the defendant can have such trial by *proviso*, it is necessary that the issue should be entered on record; and therefore, if it be not already done, the defendant must, for that purpose, obtain a rule for the plaintiff to enter the issue, and unless he does so within a limited time after, the defendant may sign a judgment of *non pros*; but if the plaintiff does accordingly enter the issue, and is afterwards guilty of delay in not proceeding to trial, the defendant must then procure a rule for a trial by *proviso*, which rule is essentially necessary to enable him to take down the record, though it may be obtained by him after he has given notice of trial(c).

When the issue is entered, the plaintiff is held to be guilty of such a laches, or default, as entitles the defendant to carry down the cause by *proviso*, if he do not proceed to trial in a town cause in the sitting next after the term in which the issue is so entered, and in a country cause at the next assizes after the issue is so entered. And when the defendant intends to proceed by *proviso*, he must give the same notice of trial to the plaintiff as the plaintiff would have been obliged to have given him; and if the defendant, after such notice, does not proceed to trial, or does not countermand it in due time, he is liable to pay the plaintiff his costs(d).

(c) 2 Saund. 336, a. n. 4. *King v. Pippett*, 2 T. R. 695.
Dodson v. Taylor, 2 Str. 1055; (d) *Ibid.*

Where the record is carried down by the defendant, and the issue happens to be upon the plaintiff, who is therefore to begin first, but he does not appear, the defendant must not enter upon his proof and take a verdict; but the proper course is held to be to call the plaintiff and nonsuit him (e).

The trial by *proviso* was formerly the only way which the defendant had to get rid of the action, where the plaintiff neglected to proceed to trial. To remedy the delay and expense which attended this mode of proceeding to trial, it was enacted by statute 14 Geo. II. c. 17, that if after issue joined the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit (f).

There can be no trial by *proviso* in a cause of the crown, because there can be no default nor laches, nor can the crown be compelled to try any cause by *nisi prius*; and therefore, every cause of the crown in this court must be tried at bar, unless the attorney-general allows a warrant of *nisi prius*, which implies his consent to try the cause in the country (g).

(e) 2 Saund. 336, b. n. 4.
Gardener v. Davis, 1 Wils.
300. Hicks v. Young, Barnes,
458.

(f) 3 Black. Com. 357.
(g) Queen v. Banks, Salk.
652; King v. Macleod, 2
E. R. 206.

As in indictments of treason or felony, if the attorney-general will delay, the court may give the defendant leave to bring on the trial as they see fit (and so it has been done), so in indictments for misdemeanors, as in this case the defendant may in the first instance, by the consent of the prosecutor, and leave of the attorney-general, carry down the cause to trial, but it should not be allowed by surprise of the attorney-general, as here in this case, and also without consent of the prosecutor, or any default in him (*h*).

The court said that in case of an indictment and issue joined, the party could not carry it down to try it by *proviso*, for it lay not against the king (*i*).

In crown cases, if the defendant wishes to hasten the trial he must apply to the court for leave, who, upon the reasons of the attorney-general, will, as they see occasion, either give him further time, or fix a day peremptory for the trial, or give the defendant leave to bring it on himself (*k*).

In the King's Bench the *venire* must be tested of the first day of the term in or after which the cause is to be tried, and is made returnable on

(*h*) Salk. 652.

(*i*) *Anon.* 1 Ventr. 315.

(*k*) *Queen v. Banks*, 6 Mod. 247. For a fuller ex-

planation of the trial by proviso, the reader is referred to 2 Saund. 336, a. n. 4.

some day before the trial, being a general return-day or day certain, according to the previous proceedings; in a country cause, the *venire* by original is made returnable on the last general return-day, or by bill, on the last day of the term before assizes (*l*).

In the Common Pleas the *venire* must be tested, if in term, the first return of the term in which the cause is to be tried, if in London, and returnable some day before trial; if after term, it may be tested the first day of term, and returnable the last general return-day: in a country cause it must be tested the first return-day of the term preceding the assizes, and returnable the last day of that term (*m*).

The *distringas* or *habeas corpora* is tested on the *quarto die post* of the return by original, or by bill on the return of the *venire*; and made returnable on the first general return-day, or day certain, in term time, after the trial. It is not necessary, by original, that there should be fifteen days between the teste and return of the jury process. The *venire* and *distringas* or *habeas corpora* are sued out together, and after being sealed (for they do not require signing in the King's Bench), are taken to the sheriff's office to be returned. In causes which stand over from one sitting to

(*l*) Tidd, 795.

(*m*) Boots, 200, n. 1.

another, the writ of *distringas* or *habeas corpora* should be regularly altered and resealed, previous to the sitting to which they stand over; or in default thereof, the causes cannot be tried (n).

The want of a good teste cannot be amended (o).

A *distringas* is awarded by the court at the return of the *venire*, and ought to be tested the same day, otherwise it is without warrant, and makes a discontinuance (p).

But the want of a return is cured by the appearance of and trial by a proper jury (q): and the return of a *venire* may be amended (r).

The return of a *habeas corpora* may be amended after trial (s).

If there is no return to a *distringas*, but the panel is annexed to it, that is a good return, or else *semble* it shall be considered as a bad return, and is therefore amendable (t).

By statute 12 Hen. VI. judges may amend, &c. a misprision of the clerk in any return; and by 15 Hen. VI. a misprision or default in the return of any process made by sheriffs, coroners, bailiffs, or frenchises, or any other officers, in a letter or syllable too much or too little (u).

So, if four names are omitted in the return of

(n) Tidd, 795.

(o) 3 Com. Dig. 174.

(p) Ibid.

(q) Ibid. 1, 322.

(r) Ibid.

(s) Ibid. Barnes, 5.

(t) Ibid.

(u) Ibid. 321.

the *distringas*, which were in the *venire*, upon a proof that they were distrained (x).

By statute 18 Eliz. 14, after verdict, no judgment in any court of record shall be stayed or reversed by reason of any imperfect or insufficient return (y).

The sheriff, on his return of the *venire*, for the trial of all issues before any court of assize or *nisi prius* in any county in England, except the counties palatine, unless in causes intended to be tried at bar, or in cases where a special jury is struck by order or rule of court, must annex a panel (z) to the writ, containing the names of a competent (a) number of jurors, taken from the juror's book of the current year (b), arranged alphabetically, with their respective places of abode, and their additions; the number of jurors, so returned by the sheriff for the trial of issues at the same assizes or sessions of *nisi prius* in each county, must not be less than forty-eight, nor

(x) 1 Com. Dig. 322.

(y) Ibid.

(z) The panel is a narrow piece of parchment on which the names of the jurors returned are written, and which is annexed to the *venire*. A jury is said to be empannelled when the sheriff has entered their names on the panel.

(a) 6 Geo. 4, c. 50, s. 15.

(b) Ibid. s. 14. In case there should be no juror's book for the current year, the sheriff or other officer who has to execute the process, may return jurors from the juror's book of the year preceding.

more than seventy-two, unless by direction of any one of the judges, who are empowered, by order under their hands, to direct a greater or lesser number to be returned (c).

It has been already observed, that the jury do not attend in answer to this summons, except in trials at bar; but a second writ is issued, in the King's Bench a *distringas*, in the Common Pleas a writ of *habeas corpora juratorum*, to which is annexed the panel already returned by the sheriff, which writ commands the sheriff to return "the bodies of the several persons in the panel, to this writ annexed, named (d)."

By stat. 21 Ja. 13, after verdict, &c., no judgment shall be stayed or reversed, for that any juror who tried the issue is misnamed in surname or addition on the return of the *venire*, *distringas* or *habeas corpora*, so as upon examination it be proved to be the same man who was meant to be returned (e).

If the name of a juror was mistaken in the return, the sheriff might come into court and amend it (f).

A misprision in the surname when they were of the same sound, is not material; nor a misprision in the surname where it was the same person; as where in the *distringas*, Baskerfield was mistaken

(c) 6 Geo. 4, c. 50, s. 15.

(d) Ibid.

(e) 1 Com. Dig. 323.

(f) Ibid.

for Baskervill, it was amended without examination of the sheriff, by stat. 8 H. VI. as a mispri-
sion of the clerk, for the *venire* is the warrant for
the *distringas* (g).

Nor is it material where there is an abbreviation
in the Christian name, as Francis for Franciscus
in the *venire* (h).

If a man rightly named in the *venire* and *habeas
corpora* was mistaken in his surname in the panel
to the *habeas corpora*, and so sworn, it shall be
amended, if, upon examination, it appears to be
th same person returned (i).

The court will *ex-officio*, and against the will of
the defendant, amend the Christian name of a
juror who acknowledges he was the person sum-
moned (k).

So, if the sheriff annex the panel for one ac-
tion, to the *distringas* for another, it shall be
helped, for it shall be a default of the writ of
distringas (l).

But where the panel of the jury who were to
try an indictment against Willis, was by mistake
annexed to the *distringas* upon an indictment for
the same offence against Brown, and the panel of
the jury who were to try an indictment against
Brown, was by mistake annexed to the *dislringas*

(g) 1 Com. Dig. 321, 323.

(k) *King v. Roberts*, Str.

(h) Ibid.

1214.

(i) Ibid.

(l) 1 Com. Dig. 321.

upon an indictment for the same offence against Willis, the verdicts found in both cases were holden to be bad, because they were found by juries who had not authority to try the indictments (m).

The sheriff in the superior courts of the counties palatine, must at least ten days before the sitting of the said courts, summon a competent number of jurors named in the juror's book, not fewer than forty-eight, or more than seventy-two, without the direction of the judge or judges, and must return a list of the same on the first day of the said courts respectively; and a competent number of the jurors so summoned, as the judges shall direct, and no others (except in cases of a special jury) must be named in every panel to be annexed to every writ of *venire facias*, *habeas corpora juratorum*, and *distringas*, issued out and returnable for the trial of causes in such courts (n).

The foregoing enactments are by s. 18 of the present act extended to the return of jurors for the trial of causes in the court of great sessions in any county in Wales; the return is to be made at the first court of the second day of every great sessions.

The sheriff or other officer who has to return jurors for the trial of any cause, must keep a copy of the panel in the office of his under-sheriff or

(m) *King v. Willis and* Bac. Abr. title *Verdict*, Z. *Brown*, 1 Barnard. 108; 7. (n) 6 Geo. 4, c. 50, s. 17.

deputy for seven days before the sitting of the next court of assize or *nisi prius*, or the next court to be holden in any county palatine, or the next court of great sessions in any county in Wales; and the parties in all causes, and their attornies, respectively are at liberty to inspect such copy, without fee or reward (o). Any sheriff or other officer neglecting or refusing to comply with the above requisitions, is liable to a penalty of fifty pounds (p).

When the sheriff has made up the panel, he must summon the jurors whose names are contained therein, at least ten days before the day of their appearance, by showing to the man to be summoned, or in case he is absent from his usual place of abode, by leaving with some person living there, a note in writing under the hand of the sheriff or other proper officer, containing the substance of such summons (q). The period of summons before appearance was formerly eight days, except in the city of London or county of Middlesex, in which two districts, the period required was only six days. The above mentioned provisions do not extend to London (r) or Middlesex, but the period is still six days. It is further enacted, that when the period between the award of any writ of *venire facias*, *habeas corpora*, or

(o) 6 Geo. 4, c. 50, s. 19.

(q) Ibid. s. 23.

(p) Ibid. s. 46.

(r) Ibid.

distringas, and the return of such writ, is less than ten days, then every juror may be summoned, attached or distrained to appear at the day and time in such writ mentioned (s).

In case any juror having been summoned according to law, on any kind of jury, in any of the courts in England or Wales, does not attend, or being thrice called does not answer to his name, the court may set such fine on the person so making default as it may think proper, unless some reasonable excuse is proved on oath or affidavit (t).

The same power is extended to every court of *nisi prius*, *oyer* and *terminer*, gaol delivery, and sessions of the peace, held for the city of London (u), to fine any person making default when summoned to attend upon any kind of jury in any such courts.

The sheriff may empanel and return the name of any man included in his juror's book, although he may know that such person is not qualified according to law; but if he wilfully returns the name of any person whose name is not inserted in his juror's book, to serve on any jury before any of the courts in England or Wales, (except on the grand jury at any assizes or great sessions), he is liable to be fined at the discretion of the court (x).

(s) 6 Geo. 4, c. 50, s. 25.

(u) Ibid. s. 51.

(t) Ibid. s. 38.

(x) Ibid. s. 39.

Any sheriff who summons a person to attend on any jury, who is exempted by having served within any of the respective periods (*y*), as declared in the present act, is liable to be fined in a summary way at the discretion of the court (*z*).

A sheriff may on no account whatsoever excuse any person from serving on juries; but if either he or any person delegated by him takes or receives any money or reward, or promise of money or reward, to excuse persons from such service, the sheriff, or other officer so offending, may be fined by the court (*a*).

No bailiff may summon any person not named in the sheriff's warrant or mandate (*b*): and if any sheriff or other officer summons any juror less than ten days before the day of appearance, or less than the time required by law in the cases before mentioned, the court may, according to the nature of the offence, at its discretion, fine any such officer so offending (*c*).

A person not duly summoned and returned need not serve on juries.

If a stranger cause himself to be sworn in the name of one who was empannelled and returned, it is such a misdemeanor for which he may be in-

(*y*) 6 Geo. 4, s. 42, ante
p. 28.

(*z*) Ibid.

(*a*) Ibid. s. 43.

(*b*) Ibid.

(*c*) Ibid.

dicted, and for which an action on the case lies at the suit of the party injured (*d*).

Where a person not summoned on the jury was sworn on a jury at *nisi prius* in the name of a person for whom a summons on that jury was delivered, and to whose house he had succeeded, the irregularity being noticed before verdict, the court awarded a *venire de novo* (*e*).

But in this case, the son of a juryman summoned and returned having answered to his father's name, when called on the panel, and served as one of the jury on the trial of a cause, was held not of itself a sufficient ground for setting aside the verdict, as for a mistrial (*f*).

Of the Special Jury, and how struck.

THE method of striking special juries is considerably altered by the act lately passed.

It is enacted, "That it is and shall be lawful for his Majesty's courts of King's Bench, Common Pleas, and Exchequer respectively, and for the judges of the said courts, of the three counties palatine, and of the courts of great sessions in Wales, upon motion made on behalf of the king, or upon the motion of

(*d*) March, 81.

(*f*) *Hill v. Yates*, 12 E. R.

(*e*) *Dovey v. Hobson*, 229.

6 Taunt. 460.

any prosecutor, relator, plaintiff or demandant, or of any defendant or tenant, in any case whatsoever, whether civil or criminal, or on any penal statute, excepting only indictments for treason or felony, depending in any of the said courts, and the said courts and judges respectively are hereby authorized, in any of the cases before mentioned, to order and appoint a special jury to be struck before the proper officer of each respective court for the trial of any issue joined in any of the said cases, and triable by a jury, in such manner as the said courts respectively have usually ordered the same; and every jury so struck, shall be the jury returned for the trial of such issue (g)."

When either of the parties in an action wishes to have a special jury struck, he gives a brief to counsel for that purpose, which is then carried to the clerk of the rules, who draws up the rule. When the rule is drawn up, an appointment is had at the master's in the King's Bench, or the prothonotary's in the Common Pleas, and a copy of the rule and appointment served on the attorney of the opposite party, and on the deputy secondary, if in London, or sheriff, if in Middlesex, or any other county; the deputy secondary or sheriff accordingly attends the master or prothonotary with the juror's book, and the master,

(g) 6 Geo. 4, c. 50, s. 30.

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in the presence of both parties, names forty-eight out of the above book. When the list of forty-eight is made out, an appointment is had from the master, on which the attorneys on both sides attend the master, and strike out twelve of each side; the remaining twenty-four are returned to try the issue, and a special *distringas* issues for that purpose.

If the attorney for either party does not attend, the master will strike out twelve names for him that is absent (*h*).

The above is a brief account of the old method of striking special juries, which the parties are still at liberty to resort to by consent; and upon a consent to that effect, signed by each party or his attorney, being communicated to the proper officer, he is required to nominate a special jury for the trial of every such cause, according to the mode used before the passing of the present act (*i*).

In striking a special jury, the officer is not bound to take the jurors as they occur upon the sheriff's book, but may make a selection; and where he had made such selection impartially, the court refused to cancel the list of persons so selected (*k*).

If by rule of court the master is ordered to

(*h*) Tidd, 801; 1 Salk. 405. (*k*) *King v. Wooler*, 1 B.&A.
 6 Geo. 4, c. 50, s. 33. 193.

strike a jury, in case it be not expressed in such rule that the master shall strike forty-eight, and each of the parties shall strike out twelve, the master is to strike twenty-four, and the parties have no liberty to strike out any (*l*).

By the act lately passed it is enacted, " That every man who shall be described in the juror's book for any county in England or Wales, or for the county of the city of London, as an esquire or person of higher degree, or as a banker or merchant, shall be qualified and liable to serve on special juries in every such county in England and Wales, and in London respectively; and the sheriff of every county in England and Wales, or his under-sheriff, and the sheriffs of London or their secondary, shall, within ten days after the delivery of the juror's book for the current year to either of them, take from such book the names of all men who shall be described therein as esquires or persons of higher degree, or as bankers or merchants, and shall respectively cause the names of all such men to be fairly and truly copied out in alphabetical order, together with their respective places of abode and additions, in a separate list to be subjoined to the juror's book, which list shall be called ' the special juror's list,' and shall prefix to every name in such list its

(*l*) 1 Salk. 405.

proper number, beginning the numbers from the first name, and continuing them in a regular arithmetical series down to the last name, and shall cause the said several numbers to be written upon distinct pieces of parchment or card, being all as nearly as may be of equal size, and after all the said numbers shall have been so written, shall put the same together in a separate drawer or box, and shall there safely keep the same, to be used for the purpose hereinafter mentioned (*m*)."

"And be it further enacted, that whenever any of the courts or judges above mentioned shall order a special jury to be struck before the proper officer of such court, such officer shall appoint a time and place for the nomination of such special jury; and a copy of the rule of court, and of such officer's appointment, shall be served on the under-sheriff of the county in England or Wales in which the trial is to be had, or on the secondary of the city of London, if the trial is to be had there, and also on all the parties who have usually been served with the same respectively, in the accustomed manner; and the said officer, at the time and place appointed, being attended by such under-sheriff or secondary, or his agent, who are hereby respectively required to bring with them the juror's book and such special juror's list, and

(*m*) 6 Geo. 4, c. 50, s. 31.

all the numbers so written on distinct pieces of parchment or card as aforesaid, shall, in the presence of all the parties in any of the cases aforesaid, and of their attornies, (if they respectively choose to attend, or if the said parties or their attornies, all or any of them, do not attend, then in their absence), put all the said numbers into a box, to be by him provided for that purpose, and, after having shaken them together, shall draw out of the said box forty-eight of the said numbers, one after another, and shall, as each number is drawn, refer to the corresponding number in the special jurors list, and read aloud the name designated by such number; and if at the time of so reading any name, either party, or his attorney, shall object that the man whose name shall have been so referred to is in any manner incapacitated from serving on the said jury, and shall also then and there prove the same to the satisfaction of the said officer, such name shall be set aside, and the said officer shall, instead thereof, draw out of the said box another number, and shall in like manner refer to the corresponding number in the said list, and read aloud the name designated thereby, which name may be in like manner set aside, and other numbers and names shall in every such case be resorted to, according to the mode of proceeding hereinbefore described, for the purpose of supplying names in the places of those

set aside, until the whole number of forty-eight names not liable to be set aside shall be completed; and if in any case it shall so happen that the whole number of forty-eight names cannot be obtained from the special juror's list, in such case the said officer shall fairly and indifferently take, according to the mode of nomination heretofore pursued in nominating special juries, such a number of names from the general juror's book, in addition to those already taken from the special juror's list, as shall be required to make up the full number of forty-eight names, all and every of which forty-eight names shall in such case be equally deemed and taken to be those of special jurors; and the said officer shall afterwards make out for each party a list of the forty-eight names, together with their respective places of abode and additions, and after having made out such list, shall return all the numbers so drawn out, together with all the numbers remaining undrawn, to such under-sheriff or secondary, or his agent, to be by such under-sheriff or secondary safely and securely kept for future use; and all the subsequent proceedings for reducing the said list, and all other matters whatsoever relating to special juries, shall remain and continue in force as heretofore, except where the same or any part thereof is expressly altered by this act; and all the fees heretofore payable on the striking of special juries shall

continue to be paid in the accustomed manner (n)."

" Provided always, and be it further enacted, tha where any special jury shall be ordered, by any rule in any of the courts aforesaid, to be struck by the proper officer of such court, in any cause arising in any county of a city or town, except the city of London, the sheriff or sheriffs thereof, or the under-sheriff respectively, shall be commanded by such rule to bring or cause to be brought, before the proper officer of such court the books or lists of persons qualified to serve on juries within the same county of a city or town; and in every such case the jury shall be taken and struck out of such books or lists respectively, in the manner heretofore used and accustomed; any thing in this act to the contrary notwithstanding (o)."

No cause can be tried by a special jury in Middlesex or London, unless the rule for such special jury be served, and the cause marked in the marshal's book as a special jury cause, on or before the day preceding the adjournment-day, in Middlesex or London respectively (p).

No cause can be tried by a special jury in the Common Pleas in Middlesex or London, unless the rule for such special jury shall be served, and

(n) 6 Geo. 4, c. 50, s. 32.

(o) Ibid. s. 36.

(p) Reg. Gen. H. T. 44

Geo. 3. 10 E. R. 1.

the cause marked in the marshal's book as a special jury cause, two days previous to the adjournment-day, in Middlesex or London respectively (*g*).

A rule for a special jury must be served sufficiently early to enable the opposite party to strike the jury before the day of trial; and therefore where the rule was served at six o'clock the evening preceding the day fixed for the trial, it was held that the cause was properly tried by a common jury (*r*).

On a rule *nisi* for setting aside a rule which the defendant had obtained for a special jury, upon a suggestion that the special jury was moved for only for the purpose of delay, the court of Common Pleas would not discharge the rule, but directed the cause to be tried by a special jury within the term (*s*).

It is discretionary in the court of Common Pleas to grant or to continue a rule for a special jury (*t*).

The rule for a special jury need not be entered on the record (*u*).

If, after a special jury has been struck, the cause goes off for default of jurors, no new jury can be

(*g*) Reg. Gen. 52 Geo. 3.
4 Taunt. 601.

(*r*) *Gunn v. Honeyman*,
2 B. & A. 400.

(*s*) *Bloxam and Brown*,
4 Taunt. 470.

(*t*) *Ibid.*

(*u*) *King and Franklin*,
5 T. R. 454, n.

struck, but the cause must be tried by the jury first appointed (x).

The same special jury, however nominated, may, by consent of parties, be nominated to try any number of causes (y): " Provided always, that it shall be lawful for the court, if it shall so think fit, upon the application of any man who shall have served upon one or more special juries at any assizes or sessions of *nisi prius*, to discharge such man from serving upon any other special jury during the same assizes or sessions of *nisi prius* (z).

But where the same special jurymen had been struck to try several causes on the same question, the court of Common Pleas, being dissatisfied with the verdict in the first, ordered it to abide the event of another cause, and, on motion, discharged the same special jurymen from trying the second cause (a).

By Bayley, J., when a special jury is ordered, the sheriff has no authority to return a common jury panel, he being only directed to return the twelve special jurymen (b).

Where a common jury panel was returned, together with a special jury panel, and no special jurymen appearing, the cause, at the instance of

(x) *King v. Perry*, 5 T. R. 453.

(y) 6 Geo. 4, c. 50, s. 33.

(z) *Ibid.*

(a) *Mayor of Doncaster v. Coe*, 3 Taunt. 404.

(b) *Holt v. Meddowcroft*, 4 M. & S. 469.

the plaintiff, was tried by a common jury, the trial was set aside : in this case the defendant appeared by counsel, and made a defence, but protested against a trial by a common jury (c).

By Ellenborough, C. J., any objection made by plaintiff against granting a special jury, is cured by plaintiff's appearance (d).

In an action for words, a rule was for the sheriff to return a special jury, who, notwithstanding the rule had been served upon him, returned only a common jury ; after trial this was moved by defendant for a new trial, which was denied, because he had made a defence ; for since, if the verdict had gone for him, he would have had the advantage of it, it is fit he should submit to it that it is gone against him ; *secus* if he had not made a defence (e).

This case may appear to be at variance with that of *Holt v. Meddowcroft*, above quoted, for in that case also the defendant made a defence ; but in the one instance the defence was voluntary, in the other not so ; so that the conclusion of the latter case may appear rather violent.

(c) *Holt v. Meddowcroft*,
4 M. & S. 467.

(e) *Elizabeth Claxton's case*,
12 Mod. 567.

(d) *Massey v. Johnson*,
12 East, 69, n.

Of a View, and when it may be had.

IN any case whatsoever, whether civil or criminal, or on any penal statute, depending in any of the courts of record at Westminster, in the counties palatine, or great sessions, the court or any judge in vacation, if it shall "appear proper and necessary, that some of the jurors who are to try the issues in such case, should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues," may, in every such case, "order a rule to be drawn up, containing the usual terms, and also requiring, if such court or judge shall so think fit, the party applying for the view, to deposit, in the hands of the under sheriff, a sum of money, to be named in the rule, for payment of the expenses of the view, and commanding special writs of *venire facias*, *distringas*, or *habeas corpora*, to issue, by which the sheriff or other minister, to whom the said writs shall be directed, shall be commanded to have six or more of the jurors named in such writs, or in the panels thereto annexed (who shall be mutually consented to by the parties, or, if they cannot agree, shall be nominated by the sheriff, or such other minister, as aforesaid), at the place in question, some convenient time before the trial, who

then and there shall have the place in question shewn to them by two persons in the said writs named, to be appointed by the court or judge ; and the said sheriff, or other minister, who is to execute any such writ, shall, by a special return upon the same, certify that the view hath been had according to the command of the same, and shall specify the names of the viewers (f).”

“ And be it further enacted, that where a view shall be allowed in any case, those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn, and so many only shall be added to the viewers who shall appear, as shall, after all defaults and challenges, make up a full jury of twelve (g).”

Where any viewer, having been duly summoned to attend on any jury, shall make default, the court is authorized and required to set upon such viewer (unless some reasonable excuse shall be proved), a fine to the amount of ten pounds at the least, and as much more as the court, under the circumstances of the particular case, shall think proper (h).

In cases where two sets of jurors have been summoned to attend for two several periods, as permitted by the present act (i) ; in any case where an order for a view has been obtained, the judge

(f) 6 Geo. 4, c. 50, s. 23.

(h) Ibid. s. 38.

(g) Ibid. s. 24.

(i) Ibid. s. 22.

before whom such case is to be tried, is required, on the application of the party who has obtained the order for the view, to appoint such case to be tried during the attendance and service of that set of jurors in which the viewers, or the major part of them, are included (*k*).

Before the 4 & 5 of Anne, c. 16, s. 8, there could be no view till after the cause had been brought on to trial. If the court saw the question involved in obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again (*l*).

To obviate the delays which this mode of proceeding necessarily produced, the act above referred to was passed. In consequence of this act, views were always granted when applied for, as a matter of course: this was running into the other extreme: the court of King's Bench, therefore, to remove this, as well as other inconveniences arising out of the general construction of the acts relating to views, took into consideration the provisions of the above act, and those also of 3 Geo. II. c. 5, s. 14, and determined that it was discretionary in the court to grant a view, as it should be satisfied that it was proper and necessary (*m*).

(*k*) 6 Geo. 4, c. 50, s. 22.

(*l*) 1 Burr. 253.

(*m*) See this point treated

at large in 1 Burr., as above quoted.

This decision has been confirmed by the legislature in the section of the present act above quoted (n).

In actions of waste and trespass *quare clausum fregit*, the necessity for a view in general appears on the face of the pleadings; and in other cases, the motion for it is become a motion of course in the King's Bench, requiring only counsel's signature; upon which, a rule of court is drawn up in term time, or a judge's order in vacation. But in the Common Pleas, it is said that a rule for a view is never granted without an affidavit, in any case, except an action of waste (o); and therefore, in other cases, an application must be made for the rule, on an affidavit of the circumstances (p).

According to the ancient course, the *venire* must have been returned before a rule for a view could have been taken, and then a rule was made for so many of the panel to view the premises (q); but according to the new method, the court may order a special *venire* to issue in the first instance.

(n) s. 23.

(o) Barnes, 467.

(p) Tidd, 803. In the Common Pleas a judge's order for a view could not be obtained in vacation, without the consent of the opposite attorney; but by s. 23 of the

present act, this inconvenience is removed, if the judges are willing to avail themselves of its removal, and to grant a view in vacation, as has been usual for judges of the King's Bench.

(q) *Anon.* Salk. 665.

It is now necessary for the sheriff to make a special return, certifying that the view has been had.

If the officer returns that the jurors had the view, and the contrary appears by examination on the trial, the return shall not conclude any of the parties (r).

A view is grantable where the title is in question (s).

In all actions real, where the tenant does not know the certainty of the lands in the writ, he may demand a view of the land demanded (t).

There may be a view in trespass, on affidavit that it will be better direction to the jury than any evidence (u).

A view is not granted without hearing both parties, and examining into the propriety of it, unless the party applying consents that if there is no view, yet the trial shall proceed, and no objection be made on account thereof, or for want of a proper return (x).

On a view, the shewers may shew not only the place in question, but also the marks, boundaries, &c. to enlighten the viewers, and may say to

(r) *Greene v. Cole*, 2 Saund. 255.

(s) *Kempster v. Deacon*, Salk. 665.

(t) 5 Com. Dig. 591.

(u) *Ellis v. South*, T. 8 G. 2, B. R. H. 156.

(x) 1 B. M. 252; 5 Com. Dig. 592.

them, "These are the places to which we shall adapt our evidence at trial (y)."

After a verdict in an assise, default of view cannot be alleged (z).

Of a Jury de Medietate.

AN alien indicted or impeached of any felony or misdemeanor, has the right of being tried by a jury *de medietate linguæ*; and it is enacted, "that on the prayer of every alien so indicted or impeached, the sheriff or other proper minister shall, by command of the court, return for one half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any; and that no such alien juror shall be liable to be challenged for want of freehold or of any other qualification required by this act; but every such alien may be challenged for any other cause, in like manner as if he were qualified by this act (a)."

It seems agreed, that there is no need that any of those who find an indictment against an alien should be aliens (b).

(y) Barnes, n. 458.

(z) R. M. 68.

(a) 6 Geo. 4, c. 50, s. 47.

(b) 2 Hawk. P. C. c. 43, s. 36.

When an alien is plaintiff, and defendant a denizen, the plaintiff, before the awarding of the *venire*, ought to suggest on the roll that he is an alien born, and pray process according to the statute; he ought also to suggest in what parts beyond sea he was born, that men of the same country might be upon the jury, if they could be found; but if he do not suggest this before the *venire* is awarded, he cannot suggest it afterwards; neither shall he challenge the array or polls for that cause (c).

If an alien neglect to pray the benefit of the statute before the return of a common *venire*, he can neither except to such *venire*, nor pray a subsequent process *de medietate lingue* (d).

If the defendant be an alien, on notice given by his attorney to the plaintiff or his attorney, the plaintiff ought to enter it on the roll to have a trial *de medietate* at his peril; but the court refused to award it for the defendant, on his affidavit that he is an alien (e).

The return of a *venire de medietate* ought to shew which of the jurors are denizens, and which aliens; and a full number of each must appear to be sworn: if there be not sufficient to make up a full number of six denizens and six aliens, the justices of *nisi prius* may, by construction of the

(c) Trials per Pais, 243.

(e) Ibid. 245.

(d) Ibid.

statutes, which give a *tales de circumstantibus*, award such a *tales* for so many denizens and aliens as shall be respectively wanting (f).

The return of the *venire* ought to be distinct, twelve of each, and to be sworn alternately (g).

In high treason the trial cannot be *per medietatem linguæ* (h).

Nor in civil actions where one party is an alien and the other a denizen, except on the prayer of the party; in which case a special jury is returned (i): it must be prayed on the award of the *venire*, or it will not be allowed; for the sheriff hath otherwise by the *venire* no power to return aliens, or conusance that an alien is in the case (k).

An alien cannot have a jury *de medietate* where he sues as executor or administrator, *en auter droit*, if the intestate or testator was not an alien (l).

Of a Jury returned by Precept.

IN addition to the method of returning and summoning jurors, already described, judges in the court of King's Bench, and all courts of oyer and terminer, gaol delivery, the superior courts of the three counties palatine, and courts of ses-

(f) Trials per Pais, 242.

(g) Ibid. 246.

(h) Dyer, 144, b.

(i) Trials per Pais, 244.

(k) Ibid.

(l) Dyer, 28, a.

sions of the peace in England, and all courts of great sessions, and sessions of the peace in Wales, have been used to issue a writ, precept or bare award or order for the return of a jury, for the trial of criminal matters in their respective courts, independent of the writs of *venire* and *distringas* already explained. This power was given them by 3 Hen. VIII. c. 12, and is continued by the act lately passed (*m*); but with this alteration, that the jury must now be summoned generally from the county, and not from any particular hundred or hundreds, and must be qualified according to the present act.

The reason assigned for justices of gaol delivery having the power of having a jury returned without any precept or writ, is, that before their coming they always make a general precept to the sheriff, on parchment, under their seals, "to bring before them, at the day of their sessions, twenty-four out of every hundred, &c. to do those things which shall be enjoined them on the part of the king, &c." It is therefore said that their bare award that the jury shall come is sufficient, because there are enough for that purpose supposed to be present in court, whom the sheriff may return immediately, whenever the court shall demand their service (*n*).

(*m*) S. 20.

(*n*) 2 Hawk. P. C. c. 41, s. 1.

It is said that a jury may be so returned before justices of peace at their sessions, because the precept for the summons of the sessions has a clause to the same effect for the summons of twenty-four out of every hundred; but it is questioned whether this does not rather depend on practice and the constant course of precedents, than any argument from the reason of the thing; and even in the case of justices of gaol delivery, the law is otherwise, if they have a special commission (o).

The same clause is used in the precept to the sheriff from justices of oyer and terminer; and yet it seems agreed that they cannot have a jury returned for the trial of any issue joined before them, by force of a bare award, but ought to make a particular precept to the sheriff for that purpose under their seals (p).

In a mere commission of oyer and terminer, no panel is ordered till the defendant has pleaded to issue, and issue is actually joined, and then it is done by precept in the nature of a *venire*; and if in such case there should be a want of jurors, an *habeas corpora*, with a *tales*, may possibly issue: but no *tales* can be granted upon a commission of gaol delivery (q).

Process against jurors may be returnable im-

(o) 2 Hawk. P. C. c. 41,
s. 1.

(p) Ibid.

(q) Foster's C. L. 64.

mediately into the court of King's Bench for the trial of an indictment in the same county wherein it sits, whether for a crime committed in such county, or for a treason, &c. beyond the sea. But for the trial of indictments, removed thither by *certiorari* from other counties, there ought to be fifteen days between the *teste* and return of every process (r).

Justices in *eyre*, or of gaol delivery, may also order a jury to be returned immediately for the trial of a prisoner arraigned before them (s).

Justices of oyer and terminer, for the trial of any issue joined before them, may award a *venire* returnable the same day on which the party is arraigned (t).

It has been adjudged that a *venire* before justices of oyer and terminer returnable at a day certain is erroneous, unless the sessions appear to have been adjourned to the same day; because otherwise it shall not be intended that their commission continued till such day; and if it did not, their authority to try the issue was determined. But it is admitted that such *venire* may be made returnable at the next assizes, and then tried by virtue of 1 Edw. VI. c. 7 (u).

The justices of assize in England, of the

(r) 2 Hawk. P. C. c. 41,
s. 3.

(t) Ibid. See also the cases
there cited.

(s) Ibid. s. 4.

(u) Ibid. s. 6.

superior courts of the counties palatine, or of great sessions in Wales, may direct the sheriff to summon and empanel any number of jurors, not exceeding one hundred and forty-four, to serve indiscriminately on the criminal and civil side. Each juror, when summoned, must be informed at what time his attendance will be required, and whether he is included in the first or second set of jurors (v).

The sheriff, in his return of the *venire facias* or other process, must in the panel thereto annexed, include the names of each set of jurors (x).

Jury Sworn, and Challenges.

WE may now suppose that the process has been regularly carried through, and that the jurors, whose names are contained in the panel, are in court. The names of the jurors are then written on distinct pieces of parchment or card, and by the associate or prothonotary of each court, put together in a box provided for that purpose; the associate, prothonotary or other officer in open court then draws out of the box twelve of such pieces of parchment or card; the jurors whose names are so drawn are sworn to try the issue; but in case any of the jurors so drawn are absent,

(v) 6 Geo. 4. c. 50, s. 22.

(x) Ibid.

or, being present, are challenged, the associate or prothonotary continues drawing from the box until twelve men are drawn and allowed (y). When the jury so sworn have brought in their verdict, and are discharged, their names are returned to the box, to be kept with the other names at the time undrawn, and so on as long as any issue remains to be tried (z). But if any other issue is brought on to be tried, before the jury, sworn as above, have brought in their verdict, or been discharged, the court may order twelve more of those that remain undrawn, to be drawn for the trial of such other issue (a).

The court has also power, where no objections are made by either the king or any other party, to try any number of issues with the same jury, without returning their names to the box; but if both parties agree to withdraw any of the said jurors, or any of such jurors are challenged, or excused by the court, the number may be completed by other names to be drawn from the box (b).

When the jurors are called, either party is at liberty to challenge them, either the whole panel or any individual of the panel. Challenges are consequently distinguished into two kinds—challenges to the array, and challenges to the polls.

(y) 6 Geo. 4, c. 50, s. 26.

(a) Ibid.

(z) Ibid.

(b) Ibid.

Challenges to the array are at once an exception to the whole panel, in which the jury are arrayed or set in order by the sheriff in his return. Lord Coke (c) again divides the former into a principal cause of challenge, or to the favour: a principal cause is grounded on such a manifest presumption of partiality, that if it be found true, it unquestionably sets aside the array or the juror; but a challenge to the favour leaves it to the discretion of the triers (d).

The same reasons, that before the awarding the *venire*, were sufficient to have directed it to the coroners or elisors, will be also sufficient to quash the array, when made by a person or officer of whose partiality there is any tolerable grounds of suspicion (e).

But challenge to the array cannot be till issue joined (f).

It is laid down as a rule, that there can be no challenge either to the array, or polls, before a full jury appears; and therefore in a case where the plaintiff, after he had prayed a *tales*, challenged the array thereof for partiality in the sheriff; though it was objected, that this being by his own desire, he was afterwards estopped to take any exceptions to the sheriff, yet the challenge was allowed good,

(c) Co. Lit. 156, a.

(e) 3 Black. Com. 359.

(d) 3 Bac. Abr. title Juries,

(f) Booth, 283.

and the venire directed to the sheriffs; for if he had not prayed a *tales*, there could not have been a full jury, and then there could be no challenges (g).

Also it is laid down as a rule, that no juror can be challenged without consent after he has been sworn, either in a criminal or civil case, or either at the suit of the king or subject, whether on the same day, or, according to the better opinion, on a former on the same trial, unless it be for some cause which happened since he was sworn (h).

It is a principal challenge if the sheriff be of kindred or affinity to either plaintiff or defendant; if any of the jury are returned at the nomination of either party; if either party has an action against the sheriff, but not if the sheriff has an action against either party, except it be one that implies malice; if he is liable to the distress of either party; if he is servant or officer in fee, or of robes, or his counsellor or attorney, or have part of the land depending on the same title; if he has been godfather to a child of either party, or either of them to his (i).

There is no principle in the law more settled than this—that any degree, even the smallest degree of interest in the question depending, is a

(g) 3 Bac. Abr. *title Juries*, E. 11. *Vicars v. Langham*, Hob. 235. (h) 3 Bac. Abr. *title Juries*, E. 11. (i) Co. Lit. 156, a.

decisive objection to a witness, and much more to a juror, or to the officer by whom the jury is returned. The law has so watchful an eye to the pure and unbiassed administration of justice, that it will never trust the passions of mankind in the decision of any matter of right. If, therefore, a sheriff, a juror, or a witness, be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment, and therefore will not trust him. The minuteness of the interest will not relax the objection; for the degrees of influence cannot be measured; no line can be drawn, but that of total exclusion of all degrees whatsoever (*k*).

It is no cause of challenge to the array that a knight is not returned on the panel (*l*).

Challenge to the favour, not being a principal cause, must be left to the triers. If either party is tenant to the sheriff, it is no cause of challenge; but if the sheriff is tenant to either party, it is a principal challenge; for, in the former case, the lord is in no danger of his tenant, but it may be left to trial whether the challenge shall be admitted. Where the son of the sheriff, and the daughter of either party marry, or *è converso*, it is not a principal challenge, but to the favour.

(*k*) *Hesketh v. Braddock*, (1) 6 Geo. 4, c. 50, s. 28.
3, Burr. 1856.

Where the king is party, the array cannot be challenged for favour, because, in respect of his allegiance, he ought to favour the king more: the king may also challenge the array for favour (*m*).

A challenge to the array was taken, because the sheriff who made the return had continued in his office for more than three months, and not taken the oaths and subscribed the declaration required by the act of 25 Car. II. made for preventing of dangers by popish recusants; and so his office by that act was void to all intents and purposes before he made this return of the jury: but this challenge was disallowed by the court, for he must be taken here as sheriff *de facto*, and if such a challenge should be allowed, no trial could be had, but should be put off, unless the party were ready to show that the sheriff had taken the test (*n*).

The king, or any one on his behalf, may challenge the array in the same manner as a private person (*o*).

If the array is challenged in court, it is tried by two of those who are empannelled, to be appointed by the court; for the triers in that case cannot exceed the number of two, unless by consent,

(*m*) Co. Lit. 156, a.

(*o*) Co. Lit. 156, a.

(*n*) Case of the *Sheriff of Bucks*, 2 Ventr. 58.

in which case the court may name a greater number (p).

Though the challenge to the array be not allowed, the party is still at liberty to have his challenge of the polls (q); but after a challenge to the polls, there can be no challenge to the array (r).

But neither of the parties can take that challenge to the polls which he might have had to the array (s).

Challenges to the polls are exceptions to particular persons. Lord Coke reduces them to four heads—peremptory, principal, which induce favour, and for default of hundredors (t).

Peremptory challenges are allowed only in cases of treason or felony, *in favorem vitæ*. Blackstone gives the following satisfactory reasons for this apparently capricious kind of challenge:—As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a preju-

(p) Co. Lit. 158, a.

(s) Co. Lit. 157, b.

(q) Ibid. 156, b.

(t) Ibid. 156, b.

(r) 3 Bac. Abr. *title Juries*.

dice, even without being able to assign a reason for such his dislike. Secondly, because upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside (u).

A person arraigned for murder or felony not allowed more than twenty peremptory challenges (x).

In cases of high treason, the prisoner is still allowed thirty-five (y) peremptory challenges; the number formerly allowed in all cases of felony.

If a person arraigned for murder or felony were desirous of challenging more than twenty, we may suppose for the purpose of getting a *tales*, I see no reason why he should not challenge peremptorily twenty of the panel against whom he has no reasonable cause of challenge, and reserve others against whom he has a reasonable cause for other kinds of challenge; though, perhaps, a prisoner is generally most anxious to challenge those first, against whom he has the strongest prejudice.

In this case it was decided, that before any

(u) 4 Com. 353.

(y) *Swan's case*, Post. C. L.

(x) 6 Geo. 4. c. 50, s. 29.

juryman should be brought to the book, the whole panel might be called over once in the prisoner's hearing, that he might take notice who did, and who did not, appear, in order to assist him in taking his challenges (z).

Ratcliffe escaped when attainted of treason, and was retaken; he pleaded that he was not the person mentioned on the record of the court; issue was joined on this collateral point; the prisoner insisted on a peremptory challenge, but the court decided, that in collateral issues a prisoner has no peremptory challenges (a).

A person arraigned of high treason, who challenges more than thirty-five peremptorily, is liable to a sentence of *peine forte et dure*; but in cases of murder and felony, his challenges will be merely overruled (b). This point has been much canvassed, but seems to be admitted as I have here stated it.

In all inquests where the king is a party, those who sue for the king are allowed no peremptory challenges, but must assign a cause certain, and the truth of such challenge is to be inquired of according to the custom of the court (c).

If the king challenge a juror before the panel is perused, it is agreed that he need not shew any

(z) *Townly's case*, Fost.
C. L. p. 7.
(a) Fost. p. 42.

(b) 4 Black. Com. 354.
(c) 6 Geo. 4. c. 50, s. 29.

cause of his challenge till the whole panel be gone through, and it appear that there will not be a full jury without the person so challenged; and if the defendant, in order to oblige the king to shew cause, presently challenge *touts paravaille*, yet it hath been adjudged that the defendant shall be first put to shew all his causes of challenge before the king need to shew any (d).

Principal challenges are subdivided by Lord Coke into four kinds; *propter honoris respectum*, *propter defectum*, *propter affectum*, *propter delictum*. (e).

Propter honoris respectum, when a lord in parliament is empannelled on a jury, he may be challenged by either party, or challenge himself (f).

Propter defectum, when the person challenged is an alien, or not qualified according to law (g). In juries *de medietate linguæ*; neither of these objections hold good (h).

Propter affectum, for suspicion of bias or partiality; and this may be either a *principal* challenge, or *to the favour*: it is a principal challenge when there are evident grounds of suspicion, either of express favour, or express malice; as that a juror is of kin to either party within the ninth de-

(d) *Anon*, 1 Vent. 310.
Judge Wild, however, differed
in opinion from the court.

(e) Co. Lit. 156, b.

(f) *Ibid.* 157, a.

(g) 6 Geo. 4. c. 50, s. 27.

(h) *Ibid.* s. 47.

gree (i); that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and either party; that he has formerly been a juror in the same cause; but the person that takes the challenge must shew the record, if he wishes to take it as a principal challenge, otherwise he must conclude to the favour, unless it be a record of the same court, in which case he must shew the day and term (k); that he is either party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him (l).

In an action brought by a corporation, if a juror be of kin to any member, it is a principal challenge, though the corporation itself cannot have any kindred (m).

No indictor may be put on inquests upon deliverance of the indictees of felony or trespass, if he be challenged for the same cause by him who is so indicted (n).

This was adjudged a principal cause of challenge on the trial of another separate indictment or action, where the matter found in the former indictment was either directly in issue, or happened to be material (o).

(i) 3 Black. Com. 363.

(k) Co. Lit. 157, b.

(l) 3 Black. Com. 363.

(m) *Meller v. Spateman*,
1 Saund. 344:

(n) 25 Ed. 3, c. 3.

(o) Sid. 244.

Want of freehold is no longer a cause of challenge, provided a person is otherwise qualified by law (p).

If a juror, from his knowledge of the cause, declare that the party is guilty, it is no cause of challenge; but if he gives his opinion not from his own knowledge beforehand, it is a good cause of challenge (q).

Cooke being indicted for high treason, and the jury called, he offered to ask the jurors, in order to challenge them, if they had not said he was guilty, or would be hanged; *et per cur.* this is good cause of challenge, but then the prisoner must prove it by witnesses, not out of the mouth of the jurymen. A jurymen may be asked upon a *voir dire* whether he hath any interest in the cause, for this does not make him criminal; but you shall not ask a witness or juror, whether he hath been whipped for larceny, or convict of felony, or any thing that would make a man discover that of himself which tends to shame, crime, infamy or misdemeanor.—Per Powell, J. In a civil cause you may perhaps ask a man, if he has not given his opinion beforehand upon the right, for he might have done that as arbitrator between the parties (r).

(p) 6 Geo. 4, c. 50, s. 29.

(r) 1 Salk. 153.

(q) 2 Hawk. P. C. c. 43.

It is a good challenge to a juror that he has been a juror before on the same cause (s).

If a person, by mistake or otherwise, answers to a wrong name, it is a cause of challenge; but after judgment cannot be assigned as error (t).

If a juror eat and drink with either party before the trial, it is a good cause of challenge (u).

It was adjudged a good challenge, on the part of the king, when a juror had given his dogs the names of the king's witnesses (x).

Challenges to the favour are where the party has no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance, and the like. Challenges to the favour are determined by triers, who are two indifferent persons named by the court, or the two first jurors allowed; if the triers appointed by the court find one man indifferent, he is sworn, and he and the two triers try the next, and when another is found indifferent, the two triers are superseded, and the two sworn first on the jury try the rest (y).

It is scarcely possible to ascertain, with any degree of accuracy, what are challenges to the

(s) Salk. 648.

(u) Co. Lit. 157, a.

(t) *Curry's case*, cited 12 E. R. 231, from the book of Crown Cases in the possession of the C. J. for the time being.

(x) *Stapleton's trial*, 3 State Trials, 318.

(y) 3 Black. Com. 363.

favour; this is a question entirely left to the discretion of the court, and on its approval ultimately to the triers. It is that species of challenge which is resorted to when all others fail, and depends on no tangible principles of its own.

It is generally supposed that where the king is a party, the defendant cannot challenge to the favour: but in an anonymous case, reported in Ventris, where the defendant challenged one of the jury, because the prosecutor had been lately entertained at his house, it was admitted to the favour, though against the king (z).

Challenges *propter delictum* are where any juror has been attainted or convicted of some crime or misdemeanor, that affects his credit, and renders him infamous; as of treason, felony, or any offence of life and member, or for perjury as a witness, or in a conspiracy at the suit of the king (a), or if he has been adjudged to the pillory, tumbrell or the like, or if he has been branded, whipped or stigmatized (b).

In cases that do not involve the dishonour or discredit of the juror, he may be examined on oath to inform the triers; but if it concern his honour, he cannot be examined on oath (c).

The triers are sworn, "well and truly to try

(z) *Anon.* 1 Ventris. 309.

(b) 3 Black. Com. 364.

(a) Co. Lit. 158, a.

(c) Co. Lit. 158, b.

whether A. the juryman challenged, stands indifferent between the parties to this issue (d)."

It is to be observed, that the triers who try and quash the array, cannot try the *tales*; for it is as if there had been no appearance of the principal panel; but if the triers affirm the array of the principal, then they may try the array of the *tales*. If the plaintiff challenge the array of the principal, and the defendant the array of the *tales*, then one of the principal and one of the *tales* shall try both arrays (e).

If the triers cannot agree, the court may discharge them and choose others; and when there are three triers who cannot agree, the court cannot take the verdict of two, but must discharge them (f).

The triers, as far as they act therein, are officers of the court, and liable to be punished for any misdemeanor (g).

It is not necessary to make any remarks on the last cause of challenge mentioned by Lord Coke, that for default of hundredors; for it is enacted, that the *venire* shall not require the jury to be returned from any hundred or hundreds, or from any particular *venue* within the county, and that

(d) *King v. Warrington*, 1 Salk. 152.

(e) *Co. Litt.* 158., a.

(f) *Trials per Pais*, 79.

(g) 3 *Bac. Abr.* title *Juries*, E. 12.

the want of hundredors shall be no cause of challenge (*h*).

Of the Tales.

It may sometimes happen that there are not twelve unexceptionable jurors in attendance in court: it is therefore enacted, "That where a full jury shall not appear before any court of assize or *nisi prius*, or before any of the superior civil courts of the three counties palatine, or before any court of great sessions, or where, after appearance of a full jury, by challenge of any of the parties, the jury is likely to remain untaken for default of jurors, every such court, upon request made for the king by any one thereto authorized or assigned by the court, or on request made by the parties, plaintiff or demandant, defendant or tenant, or their respective attornies in any action or suit, whether popular or private, shall command the sheriff or other minister, to whom the making of the return shall belong, to name and appoint, as often as need shall require, so many of such other able men of the county then present as shall make up a full jury; and the sheriff or other minister aforesaid shall, at such command of the court, return such men, duly qualified, as shall be present or can be found to serve on such

(*h*) 6 Geo. 4, c. 50, s. 12.

jury, and shall add and annex their names to the former panel, provided that where a special jury shall have been struck for the trial of any issue, the talesmen shall be such as shall be empannelled upon the common jury panel to serve at the same court, if a sufficient number of such men can be found; and the king, by any one so authorized or assigned as aforesaid, and all and every the parties aforesaid, shall and may, in each of the cases aforesaid, have their respective challenges to the jurors so added and annexed, and the court shall proceed to the trial of every such issue with those jurors who were before empannelled, together with the talesmen so newly added and annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue (i)."

In this case, it was objected that the coroners, in violation of the statute, which directed that the *tales* should be chosen *de circumstantibus*, had by letter requested persons to attend as jurors. The *tales* were taken from the common jury panel, from which talesmen were usually summoned. The objection was overruled (k).

In capital cases a *tales* may be granted for a larger number than the first process; as for sixty, or forty, or any other even number that the court

(i) 6 Geo. 4, c. 50, s. 37.

(k) *King v. Dolby*, 2 Barn. and Cres. 105.

thinks proper, in order to prevent the delay which may be occasioned by the defendant's peremptory challenges. And in this respect, the law in respect of a *tales* in capital cases is different from what it is in any other case, it being an allowed rule, that in all other cases the *tales* must be for a less number than the first process (*l*).

But every subsequent *tales*, in capital as well as other cases, must be for a less number than the former, except the former be quashed, in which case the next may be for the same number (*m*).

The quashing the array of the principal panel does not quash that of the *tales*, but the inquest shall be taken of those returned on the *tales*, if there be enough; and if not, others shall be added to them by a new *tales* (*n*).

Yet it seems agreed, that if all the persons returned on a *habeas corpora*, be challenged and drawn, there shall not be a *tales* awarded, but a new *venire*; for the word *tales* plainly refers to some others, to whom the persons referred are to be like (*o*).

Only one juror appeared, and was challenged; but before he was set aside, the court granted a *tales*, by Montague, chief baron (*p*).

If the first *habeas corpora* be quashed, the *ha-*

(*l*) 4 Hawk. P. C. 41, s. 12.

(*m*) Ibid. s. 13.

(*n*) Ibid. s. 14.

(*o*) Ibid.

(*p*) At Wickham assizes, in Bucks, 1684. Note to Trials per Pais, 85.

habeas corpora with a *tales* cannot but be quashed with it, and the party must go on in the same manner as if the *venire* had been only returned, and nothing done upon it; for where a process is quashed, all that follows it and depends upon it, seems of course to fall with it (q).

It seems the stronger opinion, that a *tales* is not grantable upon the return of a *venire*, but only upon the return of a *habeas corpora* or *distringas*; because it appears not before such return but that a full jury may appear (r).

The *distringas* or *habeas corpora*, with a command to add so many more to those summoned on the *venire*, is the first process against the *tales*; but it is said not to be grantable with a *nisi prius*, without having been first returned into the court (s).

Upon a *pluries distringas* three only appear, the plaintiff prays another *distringas* without praying the *tales*, yet, if the defendant prays a *tales*, the court ought to grant it (t).

If the issue be to be tried by two counties, and one full inquest appear of one county, but the inquest remain for default of jurors of the other county, a *tales* must be awarded to the county where the default is, and not to the other (u).

(q) 4 Hawk. P. C. 41, s. 14.

(r) Ibid. s. 15.

(s) Ibid. s. 16.

(t) Dyer, 359; Trials per Pais, 82.

(u) Trials per Pais, 81.

It seems, that if the jury are laboured and do not appear, and talesmen are prepared for their turn, and there is a great tumult *de circumstantibus*, the justices, at their discretion, may deny a *tales*, and adjourn in bank, notwithstanding the statute (x).

The defendant cannot pray a *tales* till the plaintiff hath made default (y).

But if neither of the parties requests a *tales*, the cause must go off for want of jurors. As where the defendant's counsel, perceiving a mistake in the record whilst the jury were swearing, said they would make no defence; upon which the plaintiff's counsel, in order to avoid a nonsuit, and to save costs, refused to pray a *tales*, and though twelve had been sworn, yet there having been no actual prayer of a *tales*, the cause was suffered to remain for want of jurors (z).

The warrant for a *tales* at a trial in a county palatine, on issue joined at Westminster, is by the king's attorney-general (a).

In this case a juror on the principal panel was challenged, and afterwards sworn on the *tales* by a wrong name; and though no fault was found

(x) Trials per Pais, 83.

(y) Ibid. 85.

(z) *Jenkins v. Purcel*, 1 Str.

707; 2 Saund. 349, n.

(a) 3 Com. Dig. 174.

with the verdict, yet the court granted a new trial (b).

When the jury is thus completed, they are sworn separately, as follows:—"You shall well and truly try the issue joined between the parties, and a true verdict give according to the evidence; so help you God." In criminal prosecutions the oath is different; "You shall well and truly try, and true deliverance make, between our sovereign lord the king and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to your evidence; so help you God."

Of the Behaviour of the Jury, and the Verdict.

WHEN the jury is sworn, the case is gone into at length by the counsel for either party, and the question supported on one side and answered on the other with the best evidence which can be produced. "The one general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had, shall be allowed. For if it be found that there is any better evidence existing than is

(b) *Parker v. Thornton*, 2 Ld. Raym. 1410; 1 Str. 640.

produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed (c)."

The law of evidence is a science in itself: and what evidence the judge will admit on each particular case is a question which need not here be canvassed. It is a mere question of law, founded on reason and justice, and has very little to do with the decisions of a jury.

The jury, unless they can agree on the moment, are to withdraw from the court, to be kept together (d) without meat or drink, fire or candle, and to have no intercourse with any person, whether interested in their decision or not, until they have agreed on their verdict (e).

"In this recess of the jury," says Lord Chief Justice Hale, "they are to consider the evidence, to weigh the credibility of the witnesses, and the force and efficacy of their testimonies; wherein they are not precisely bound by the rules of the civil law, *viz.* to have two witnesses to prove every fact, unless it be in cases of treason, nor to reject one witness because he is single, or always to believe two witnesses, if the probability of the fact does, upon other circumstances, reasonably encounter them, for the trial is not here simply by

(c) 3 Black. Com. 318. to suffer any body to speak to

(d) A bailiff is sworn to them.

keep them together, and not (e) Co. Lit. 227, b.

witnesses, but *by jury*: nay, it may so fall out, that a jury upon their own knowledge may know a thing to be false that a witness swore to be true, or may know a witness to be incompetent or incredible, though nothing be objected against him, and may give their verdict accordingly."

By Vaughan, C. J. the evidence which the jury have of the fact is much other than that which is deposed in court: for they may have evidence from their own personal knowledge by which they may be assured, and sometimes are, that what is deposed in court is absolutely false; but to this the judge is a stranger (*f*).

Evidence is only given for the information of conscience; yet, if no evidence be given on either side, the jury may notwithstanding find a verdict either, for the plaintiff or defendant; and even though the evidence be given exclusive, they may find against it (*g*).

The jury may eat and drink by leave of the court before they have agreed on their verdict (*h*).

If they eat and drink at their own cost, it is only fineable, but the verdict will stand good; but if they eat and drink at the cost of the plaintiff, and find a verdict for him, it will avoid the verdict; but if they find for the defendant, it will not avoid it, *et sic et converso*; but if after they have

(*f*) *Bushell's case*, Vaughn.
148.

(*g*) *Trials per Pais*, 349.

(*h*) *Ibid.* 248.

agreed on the verdict, they eat and drink at the charge of the person for whom they have found, the verdict will stand good (i).

Jurors are liable to be fined if they take any kind of eatable with them from the bar, even though they do not use it; but in this case the verdict was held to be good (k).

In a case of necessity, as if a juror be suddenly taken ill, it is in the power of the court to suffer him to eat and drink at his own expense before he and his fellows have agreed on a verdict (l).

If the trial of a cause be very long, it is usual for the court, the consent of both parties being first obtained, to give the jurors leave to eat and drink during the trial, at their own expense, or at the equal expense of both parties (m).

In the late trials for treason, the jurors were permitted to eat, drink, and retire to rest, attended by proper officers, without requiring the formal consent of the parties. The irregularity was sufficiently justified by the necessity of the case (n).

Upon the trial of an indictment for a misdemeanor, which continued more than one day, the jury, without the knowledge or consent of the defendants, separated at night; held, that the

(i) Co. Lit. 227, b; 12 Mod. 111.

(l) 7 Bac. Abr. title Verdict, H.

(k) *Mounson v. West*, Leon. 1 pt. 133.

(m) Ibid.

(n) Ibid. n.

verdict was not therefore void, and that it formed no ground for granting a new trial, it not appearing that there was any suspicion of any improper communications having taken place (o).

If after indictment, arraignment, the jury charged, and evidence given, on a capital offence, one of the jurors becomes suddenly incapable, through illness, of proceeding to verdict, the court of oyer and terminer may discharge the jury, and charge a fresh jury with the prisoner, and convict him. In this case the prisoner was allowed at his option to challenge the eleven remaining jurors, who were sworn on the new jury (p).

When the jury have left the bar, no new evidence can be adduced, nor can they recall a witness and make him repeat his evidence; for though he give no more evidence than he had given in court, the verdict will not be allowed (q).

But they may have a witness recalled to repeat his evidence in open court (r).

The jury may not carry with them any writing which was not given in evidence in open court (s). When they carried with them papers which had been proved, but not read, although they affirmed that they had not looked at them out of court,

(o) *King v. Kinnear*, 2 B. & A. 462.

(p) *King v. Edwards*, 4 Taunt. 309.

(q) *Metcalf v. Dean*, Cro. Eliz. 189.

(r) 2 Hale's P. C. 296.

(s) *Trials per Pais*, 257.

the verdict was set aside, it being a fault to take any thing without the court's knowledge (t).

But in other books it is laid down, that if the jurors, when they go from the bar to consider of a verdict, do, without the leave of the court, or the consent of both parties, take with them any writing, not under seal, which has been given in evidence, they are guilty of a misbehaviour, but that the verdict is good (u).

In this case they took with them, an act of common council, which had been given in evidence: the verdict was holden to be good; and by Holt, C. J. it was a very improper behaviour in the jury; but as the act of common council was evidence for both parties, the verdict ought to stand. In the case of *Lady Joy*, a verdict was set aside, because the jury did, without the leave of the court, or the consent of both parties, take with them a map which had been given in evidence; but the verdict was in that case set aside, because the map was evidence for only one party, which is not the present case (x).

The plaintiff delivered an escrow to a juror empannelled before he was sworn, who afterwards being sworn, and gone with the jury from the bar

(t) *Web v. Taylor*, Roll. H.; Co. Lit. 227, b; 12 Mod. Trial, 714. 520.

(x) *King v. Burdett*, Ld.

(u) 7 Bac. Abr. title *Verdict*, Raym. 148.

to consider of the verdict, shewed the same escrow to his companions, who found for the plaintiff. The plaintiff said that the escrow proved the same evidence as that which had been given at the bar; but judgment was stayed (y).

After the jurors were gone from the bar, one of them left his fellows and returned with a copy of a court-roll in his hand, and told them that the merits, with which he was perfectly well acquainted; were with the plaintiff. Hereupon the other jurors, before of a different opinion, were prevailed upon by him to give a verdict for the plaintiff. The verdict was afterwards set aside (z).

On an issue about nonage, two church books were given in evidence, one of which was delivered to the jury in court, by the assent of parties, the plaintiff's attorney delivered the other to the jury out of court, and without assent: on a verdict for the plaintiff, it was questioned whether this should avoid the verdict. Judges Popham and Gaudy were of opinion that it should not avoid the verdict, for that the book had been given in evidence in court, and that the other party might have answered it; but Fenner and Clench held the contrary opinion, for that the book might contain new matter, which would further influence the jury, and

(y) *Trials per Pais*, 254.

(z) *Goodman v Coddington*,
1 Sid, 235.

because the verdict was given for the plaintiff, who had delivered the book. Judgment was afterwards given for the plaintiff (a).

If the defendant in the former case had given in the book, and the jury had found for the plaintiff, the verdict would have been good.

A paper not under seal, which was given in evidence, was delivered to the jury; this did not avoid the verdict, because here can be no such fear; and by Rolle, J. if any writing, though not given in evidence, be delivered to the jury by the court, it shall not avoid the verdict. And in the principal case the verdict was avoided (b).

In short, it is a general and undisputed rule, that the jury may not see or carry with them any other evidence than that which is delivered them by the court, and by the parties themselves brought into court and given in evidence (c). But a juror may give any evidence with which he is personally acquainted, either privately to the jury after they have retired, or openly in court.

However, if a jury give a verdict on their own knowledge, they ought to tell the court so, that they may be sworn as witnesses; and the fair way

(a) *Vicary v. Farthing*, Moor. 432.

(c) *Duke of Richmond v. Wise*, 1 Vent. 125; Co. Lit.

(b) *Trials per Pais*, 256. *Farthing's case*, 37 Eliz. 227, b.

way is to tell the court before they are sworn that they have evidence to give (*d*).

One Beverley, of Suffolk, a barrister, was returned on a jury for the trial of a cause which had been tried twenty years before in the Exchequer: he had been present at the former trial, and had heard great evidence to make a deed fraudulent, which was now the subject of contention: in the present case, he demanded of the court whether he should inform the rest of the jury privately of this, or conceal it, or deliver it in open court? The court ordered him to come into court, and deliver all his knowledge which he heard then proved, (which evidence was not now given, because the parties were dead); he was not sworn again, but gave evidence on his oath as a jurymen (*e*).

But where it was alleged, in arrest of judgment, that a juror delivered to his companions an escrow as evidence, which had not been given in evidence at the trial, the court adjudged it to be no cause to arrest judgment, unless it appeared to have been delivered by the party for whom the verdict was given (*f*).

If any of the parties, their attornies or solicitors, speak any thing to the jury before they are agreed

(*d*) 1 Salk. 405; *Anon.* 7 1656, B. R. ; Trials per Pais, Mod. 2. 258.

(*f*) Moor. 546; Trials per Pais, 256.

(*e*) *Duke v. Ventris*, Mich.

relating to the cause, viz. *that it is a clear cause, or I hope you will find for such a one, or the like,* and they find accordingly, it shall avoid the verdict; but if words of salutation, or the like, pass between them, it shall not (g).

It is well known that the jury must be unanimous in their verdict; but they may not draw lots, or decide by chance, in case of a difference of opinion. On affidavit that, being divided in opinion, they threw cross and pile, the court set aside the verdict, and ordered the jury to appear to an information (h).

But where the jurors, being divided six and six, agreed by lot, putting two sixpences into a hat, that which the bailiff took, that way the verdict should go, which was for the plaintiff, and two pence damages; the court would not grant a new trial, because it appeared by pumping a jurymen, who confessed all (i).

In this case the jurors threw dice for whom they should find a privy verdict, and without conferring afterwards together, confirmed their privy verdict in open court. The verdict was set aside; and *per cur.* as our estates, liberties, and lives, are in the power of jurors, they ought to be

(g) *Duke of Richmond v. 805; Hale v. Cove, 1 Stra. Wise, 1 Ventr. 125. 642.*

(i) *Prior v. Powers, 1 Keb.*

(h) *Foy v. Harden, 3 Keble, 811.*

very circumspect in their conduct. In this case the jurors have behaved very improperly, for they were determined in the finding of their privy verdict, and they had not any conference together afterwards, before they gave their verdict in open court (k).

But where the jurors, who could not agree on their verdict, determined by vote, and gave their verdict according to the greater number of votes, the verdict was held good (l).

In this case, *per cur.* if they only acquiesce in finding the verdict, that is sufficient; and they shall not now be received to say that they did not acquiesce (m).

On an affidavit of two jurors, that the jury, being divided in their opinion, tossed up, and the plaintiff won, the court refused the affidavit from any of the jurymen themselves, in all of whom such conduct was a very high misdemeanor: but in every such case the court must derive their knowledge from some other source, such as somebody having seen the transaction through a window, or by some such other means (n).

In this case eight of the jury, notwithstanding the evidence was against the defendant, agreed

(k) Lord Fitzwalter's case,
1 Freem. 415.

(l) *Anon.* Comb. 14.

(m) *Lawrence v. Boswell*,
Sayer, 100.

(n) *Vane v. Delaval*, 1 T.
R. 11.

to find him not guilty; the other four were of a contrary opinion; and on the next morning two of the four agreed with the eight to find him not guilty, the other two afterwards agreed that the foreman should offer their verdict not guilty, and that if the court disliked it, they should change their verdict, and find him guilty; the court not approving the verdict, examined them by the poll; ten of the panel affirmed their verdict, but the two last discovered the whole manner of their agreement, whereupon they were sent back and found the defendant guilty; the foreman was afterwards fined one hundred marks; the other seven, who agreed with him at first, forty pounds each; the two, who agreed in the morning, twenty pounds each; the whole ten were imprisoned; but the other two were dismissed, but blamed by the court for such a manner of consenting (o).

On a rule nisi for a new trial being granted, on an affidavit of the foreman of the jury that the verdict had been decided by lot, and on an affidavit by a person standing without the room in which the jury were, that he had heard the jury disputing, and a proposal from one of the jurors to draw lots, the court discharged the rule; and by Mansfield, C. J. we are all of opinion, that the affidavit of a jurymen cannot be received. It is

(o) *Watv. Brains*, Cro. Eliz. 779.

singular, indeed, that almost the only evidence of which the case admits should be shut out; but considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend of one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him (*p*).

When the jury are unanimously agreed, they return to the court, and their foreman delivers in their verdict.

It is said that, in cases of life and member, if the jury cannot agree before the judges depart, they are to be carried in carts after them, so they may give their verdict out of the county (*q*).

If the foreman delivers a wrong verdict, it may be set aside. In this case two issues respecting right of way were joined; the foreman gave in their verdict, as a general verdict, for the defendant, upon both issues; but eight of the jury made affidavit, "that it was the meaning and intention of the whole jury to find the former issue for the

(*p*) *Owen v. Warburton*, 1 N. R. 329. (*q*) *King v. Ledsingham*, 1 Vent. 97.

defendant, and the latter for the plaintiff, and that this mistake was discovered by them an hour afterwards, but not till the judge was gone to his lodgings:" the verdict was amended, and the latter of the two issues found for the plaintiff (r).

But the court will not at a distance of time after the trial amend the *postea*, by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased damages, and that they conceived that the verdict they had given was calculated to give him such sum: the proper time for requiring such an explanation is at the trial (s).

If the judge, before whom a cause is tried, have a doubt as to the propriety of finding a verdict, he may direct the jury to find one *de bene esse*; which verdict, if the court shall be of opinion that a verdict ought to have been found, shall stand (t).

This verdict may either be general or special: in the former case they find generally and wholly for one party or the other; in the case of a special verdict, they must be agreed on the fact, but may reserve any point of law, of which they are

(r) *Cogan v. Edden*, 1 Burr. 383.

(t) 7 Bac. Abr. title Verdict, A.

(s) *Jackson v. Williamson*, 2 T. R. 281.

doubtful, to be determined by the discretion of the court. They may, however, in all instances give a general verdict, unless the judge is doubtful as to any point of law, and wishes the case not to be finally decided, until he has satisfied himself on that point, or unless the counsel for both parties agree to take a given special verdict; in both which cases the jury had better find a special verdict, though they may, if they please, determine both on the fact and the law; "the jury, if they will take upon them the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do; for if they do mistake the law, they run into the danger of an attain; therefore, to find the special matter is the safest way where the case is doubtful (u).

A special verdict is so called because some matter of fact is thereby found specially.

The design of a special verdict is to submit some question of law, which arises upon the matter of fact found specially, to the consideration of the court (v).

The court cannot refuse a special verdict, if it be pertinent to the matter in issue (y).

The jury may give a special verdict, and find the matter at large *en chescun issue en le monde*, so

(u) Co. Lit. 228, a.

(y) Co. Lit. 228, a.

(x) 7 Bac. Abr. tit. Verdict, D.

that the matter found at large tend only to the issue joined, and contain the certainty and verity thereof (x).

A special verdict may be found in criminal cases as well as civil (a).

In criminal prosecutions the jury may find a special verdict, or may find the defendant guilty in part, and not guilty of the rest, or may find him guilty of the fact, but vary in the manner (b).

If the judge, before whom the cause is tried, take upon himself to determine the question of law, concerning which the jury doubt, and direct them to find a general verdict, they may find such general verdict (c).

It is said that if the jury are dissatisfied with the determination of the judge, as to the question of law concerning which they doubt, they are not obliged to follow his direction, but may find a special verdict (d).

But it is likewise said, that the jury will, if they are well advised, find a general verdict in every case wherein the judge determines the question of law concerning which they doubt, and directs them to find such verdict (e).

(x) Trials per Pais, 280.

(d) Lord Raym. 1494;

(a) 4 Black. Com. 361; 7 Bac. Abr. title *Verdict*, D.

Trials per Pais, 279.

(e) Ibid.; Bac. Abr.; Fost.

(b) 2 Hale's P. C. 301.

256.

(c) Co. Lit. 228, a.

When a special verdict is found, the plaintiff's attorney generally gets it drawn from the minutes taken at the trial, and settled by his counsel or serjeant, who signs the draft. It is then delivered over to the opposite attorney, who gets his counsel or serjeant, to peruse and sign it; and when the verdict is thus settled and signed, it is left with the clerk of *nisi prius* or associate in a town cause, or with the associate in the country, who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record; after which a *concilium* is moved for, a rule drawn up thereon with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, the cause entered with the clerk of the papers or secondaries, copies of the record made and delivered to the judges, and counsel instructed and heard, in like manner as in arguing upon a demurrer. In the King's Bench, a special verdict must be set down on the paper for argument within four days, and cannot be set down afterwards, without leave of the court; and in the Common Pleas, the clerk of the dockets makes six copies of the special verdict; viz. four for the judges, and two for the serjeants on each side (f).

The minutes for a special verdict are to be approved of by the judge, it being his province

(f) Tidd, 869.

to take care that the question of law be fairly stated ; and they ought to be delivered to the jury, before they find their verdict (*g*).

The minutes for a special verdict ought to be signed by one of the counsel for each party (*h*).

But if all the counsel for one of the parties refuse to sign the minutes for a special verdict, the judge may direct the jury to find one from the minutes as signed by one of the counsel for the other party (*h*).

If a special verdict be not drawn up according to the minutes, as signed and approved of at the trial of the cause, the court may order it to be amended from the minutes (*k*).

The court will never entertain a doubt concerning any thing that is not submitted to their consideration by a special verdict, but will on the contrary intend every thing, which can be fairly intended, in order to support the verdict (*l*).

Another method of finding a species of special verdict is, when the jury find a verdict generally

(*g*) 7 Bac. Abr. title *Verdict*, D.

(*h*) Ibid.

(*i*) Ibid.

(*k*) Ibid. It is not within the limits of this work to give any further account of verdicts than as relates to the

jury. I have therefore stated the mode of drawing up a special verdict ; and for all subsequent questions must refer the reader to Bac. Abr. as above quoted.

(*l*) 7 Bac. Abr. title *Verdict*, D.

for either party, but subject nevertheless to the opinion of the court, on a special case, stated by the counsel on both sides, with regard to a matter of law; which has this advantage over a special verdict, that it is attended with much less expense, and obtains a speedier decision; the *postea* being stayed in the hands of the officer of *nisi prius*, till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But as nothing appears upon the record but the general verdict, the parties are precluded thereby from the benefit of a writ of error, if dissatisfied with the judgment of the court upon the point of law. The court of King's Bench will take no cognizance of a special case reserved upon the trial of an indictment at the sessions (*m*).

Verdicts again are public and privy; the former is given in open court, and definitive; the latter is given out of court, before any of the judges, after the court is broken up: in this case, the jury obtain leave to give their verdict privily to the judge out of court (*n*); but this privy verdict must on a subsequent day be confirmed by a public verdict given in open court (*o*).

A privy verdict is so called, because what is

(*m*) Tidd, 870.

(*n*) 3 Black. Com. 377.

(*o*) Ibid.

thereby found ought to be kept secret, until a verdict is given in open court (*p*).

• A privy verdict cannot be given in a criminal case, that concerns life or member (*q*): but by Hale, C. J. a privy verdict may be taken in perjury, or wherever the king is party, unless in case of life and death (*r*).

The jury may not give a privy verdict in cases of life and death, because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time; but in criminal cases, where the prisoner is not to be personally present at the time of the verdict, a privy verdict may be given (*s*).

• In cases between party and party, the jury may give a privy verdict before any of the judges of the court, may eat and drink, and the next morning in open court may either affirm or alter their verdict (*t*).

The jury, who by a privy verdict had found for the defendant, did by a verdict given in open court, find for the plaintiff. Both verdicts being returned upon the *postea*, it was holden that the latter should stand: and by the court, the verdict

(*p*) Co. Lit. 228, a.

(*q*) Ibid. 4. 360.

(*r*) King v. Lord Fitzwalter, 3 Keble, 459.

(*s*) King v. Ledsingham, Raym. 193.

(*t*) Co. Lit. 227, b.

given in open court is the binding verdict, the other being only allowed for the ease of the jury (*u*).

If the verdict had been for the plaintiff, and defendant had afterwards treated them, and they had changed their verdict, it would be void (*x*): not so, if they had been treated by the party for whom the privy verdict had passed; for if that were the case, most verdicts given at the assizes would be void, for there it is usual for the jury to receive a collation after the privy verdict given, from him for whom they find (*y*).

One was committed for sending a note to a juryman, after a privy verdict was given, to know what verdict they gave (*z*).

But, if the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a public and not a privy verdict (*a*).

A verdict, finding matter uncertainly or ambiguously, is insufficient, and no judgment can be given thereon; and a verdict that finds part of the issue, and finds nothing for the residue, is insufficient for the whole, because they have not tried the whole issue wherewith they were charged (*b*).

(*u*) *Saunders v. Freeman*,
Dyer, 217.

(*x*) Co. Lit. 227, b.

(*y*) *Duke of Richmond v.*
Wise, 1 Ventr. 125.

(*z*) *Anon. ibid.* 49.

(*a*) 3 Blac. Com. 377, n.

(*b*) Co. Lit. 227, a.

If the jury give a verdict for the whole issue and more, that which is more is surplusage, and shall not stay judgment (c).

In an action on the case on assumpsit to pay the value of such goods as were of J. S. and his partners, the defendant pleaded that the goods were not J. S. and his partners, and issue thereon, the verdict found the value for the plaintiff. Finch, for the defendant, moved for a repleader, which by Twisden, cannot well be, but rather a *venire de novo*. On the *venire de novo*, the jury found the issue and *ulterius* an impertinent thing, which, by Twisden, is well enough; and therefore the court would make no rule for any repleader (d).

In many cases, nay, almost in all, the jury ought to find more than is put in issue, otherwise their verdict is not good; and therefore they are to assess damages and costs, because it is parcel of their charges, as a consequent upon the issue, though it be not part of the issue *in terminis* (e).

A verdict must be sufficient in matter and form, be it special or general, and therefore a jury must find damages and costs where they ought to be found (f).

It is in general true, that if the jury do not,

- | | |
|-------------------------------------|---------------------------|
| (c) Co. Lit. 227, b; Trials | 1 Keb. 289, 291. |
| per Pais, 287. | (e) Trials per Pais, 288. |
| (d) <i>Vaudevalde v. Lluellin</i> , | (f) Ibid. |

where damages or costs ought to be assessed, assess either or both, as the case may require, the verdict is bad (g).

When the verdict is once given and recorded, the jury cannot vary from it; but before it be recorded, they may vary from the first offer of their verdict, and that verdict which is recorded shall stand (h).

If a jury, who by mistake or from partiality have given an improper verdict, and of themselves give a different verdict before the improper verdict is recorded; or if, at the recommendation or by leave of the judge, they go together again before the improper verdict is recorded, and afterwards give a different verdict, the verdict which is last given shall stand (i).

In a writ of conspiracy against two, the jury gave a verdict of guilty as to one, and of not guilty as to the other. At the recommendation of the judge they went together again to reconsider their verdict, and afterwards gave a verdict of guilty as to both (k).

The title to three acres of land being in issue, the jury as to one of the acres gave a verdict for the plaintiff, and as to another for the defendant, but as to the third, said they were not agreed.

(g) 7 Bac. Abr. title, *Verdict*, Z.

(h) Co. Lit 227 b.

(i) 7 Bac. Abr. title *Verdict*, G.; Plowd. 212.

(k) Bac. Abr. *ibid*.

By leave of the court, they went together again to consider of a verdict as to the third acre. Afterwards, without taking any notice of the verdict already given, they gave a verdict as to all the three acres for the plaintiff: the latter verdict was upon great deliberation, holden to be good (l).

It is said, that after the jury have given a verdict of not guilty in an indictment of felony, the judge may, if the verdict be in his opinion contrary to clear and full evidence, send them out again to reconsider their verdict; but it is likewise said, that if the jury will stand to their verdict, the judge is bound to receive it (m).

It is a general rule that the jury must all agree in finding their verdict, but they need not agree in the reason for finding it as it is found; and if a reason be given by one or more of them, upon a question being asked by the judge for finding it as it is found, this is not to be considered or recorded as part of the verdict (n).

Of the Discharge of the Jury.

It seems anciently to have been an uncontroverted rule, and hath been allowed even by those of the contrary opinion, to have been the general

(l) 7 Bac. Abr. title *Verdict*. Dyer, 204, 205.

(n) *Bushell's case*, Vaugh.

150.

(m) Bac. Abr. *ibid*.

tradition of the law, that a jury sworn and charged in a capital case cannot be discharged without the prisoner's consent till they have given a verdict: and notwithstanding some authorities to the contrary in the reign of Charles II. this hath been holden for clear law both in the reign of James II. and since the revolution(o).

But in a case of indictment for theft, the prisoner pleaded not guilty, and a jury was sworn: the witnesses not appearing were suspected to be tampered with by the prisoner; the jury were discharged, and the trial deferred (p).

When the verdict is delivered and recorded the jury are discharged (q), unless, as if often the case, they are sworn to try another issue (r).

Jurors in all civil causes are to be paid for their trouble and attendance, and the quantum is to be proportioned according to the distance of place, badness of the weather, &c. (s).

By 24 Geo. II, c. 18, s. 2, no juryman may take more than the sum of money which the judge who tries the issue shall think just and reasonable, not exceeding the sum of one pound one shilling, except in causes wherein a view hath been or shall be directed.

(o) 2 Hawk. P. C. 47, s. 1.

(r) 6 Geo. 4, c. 50, s. 26.

(p) *King v. Jane D.* 1 Ventris, 69.

(s) 3 Bac. Abr. title *Juries*, G.

(q) 3 Bl. Com. 378.

If some of the jurors appear and the trial goes off *pro defectu juratorum*, those who appear are not to be paid; for nobody has received any benefit for their attendance, and consequently not obliged to make them any recompence. But where the parties agreed before the day for which the jurors were summoned, and the summons was not countermanded, the court on motion, ordered the attornies on both sides to pay those who appeared (*t*).

If the jury find a special verdict, the charges of the jury are borne equally by both parties (*u*).

Every juryman, having duly attended or served until discharged by the court, (upon application made to the sheriff or under-sheriff before he departs from the place of trial), may receive a certificate testifying his service, on payment of one shilling (*x*).

Of Embracery.

By the seventy-first section of 6 Geo. IV. c. 50, embracery is attended with the same punishment as hitherto; it is enacted, "that every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent

(*t*) 2 Show. 248.

(*u*) 2 Leon. 174.

(*x*) 6 Geo. 4, c. 50, s. 40. 28.

For the exemptions obtained by this certificate, see *ante* p.

thereto, shall and may be respectively proceeded against by indictment or information, and be punished by fine and imprisonment, in like manner as every such person and juror might have been before the passing of this act."

Embracery is an attempt to influence a jury corruptly to one side by threats, gifts, promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value (*y*).

Neither the party himself, nor his counsel, nor attorney, nor any person whatsoever, can justify any indirect practices of influencing a jury, either by giving or promising them money, or menacing them, or instructing them in the cause beforehand (*z*).

It is an offence of this kind for a mere stranger so much as to labour a juror to appear and act according to his conscience (*a*); but it is no offence for the party himself, or for any person who can justify an act of maintenance, to do so (*b*).

It is also an offence to give money to a juror after the verdict, unless it be openly and fairly

(*y*) 4 Bl. Com. 140.

(*b*) Ibid. s. 8. Trials per

(*z*) 1 Hawk. P. C. 85, s. 5. Pais. 267.

(*a*) Ibid. s. 2.

given to all alike, in consideration of the expenses of their journey, and trouble of their attendance (c).

The bare giving of money to another to be distributed amongst the jurors, whether distributed or not, savours of embracery; it is an offence of the like kind for a person, by indirect means, to procure himself or another to be sworn of a *tales*, in order to serve one side.

It is as criminal in a juror as in any other person to endeavour to prevail with his companions to give a verdict for one side, by any practices whatsoever, except only by exhortations from the general obligations of conscience to give a true verdict (d).

Offences of the above nature subject the offender either to an indictment or action, in the same manner as all other kinds of unlawful maintenance do by the common law. Also it seems that if an act of embracery were not known before the trial of a cause, so that the party to whose prejudice it was intended had no opportunity to prevent the ill effects of it, by challenging the juror who was practised upon, it will be a good ground to move the court to set aside the verdict (e).

In an information for a conspiracy in the nature of embracery, Hale, C. J. refused to hear any motion in arrest of judgment; two of the defen-

(c) 1 Hawk. P. C. 85. s. 3.

(e) Ibid. s. 7.

(d) Ibid. s. 4.

dants in the présent information had procured themselves to be sworn *de circumstantibus* upon the trial of an issue, and had obtained a verdict for the defendant (*f*).

Hawkins says, he never, in his own experience, knew such a motion refused to be heard; and the present practice is to hear such a motion (*g*).

(*f*) *King v. Opie*, 1 Saund. 301.

(*g*) *Ibid.* 302. *n.* For more full information on the subject

of embracery, *vide* Hawkins, Pleas of the Crown, above referred to.

APPENDIX.

N° 1.

Warrant for returning Lists of Jurors.

County of } TO the High Constable, [or, to *A B*, one
to wit. } of the High Constables] of the Hundred
of [Lathe, Wapentake, or other like district]
within the County aforesaid.

THESE are to require you, within fourteen days after the receipt hereof, to issue and deliver (in the form hereunto annexed, or as near thereto as may be) your precepts to the churchwardens and overseers of the poor of the several parishes, and to the overseers of the poor of the several townships within your constablewick, requiring them to make out and return true lists of jurors, and you are at the same time to annex to each precept a sufficient number of the forms of returns left herewith, and if you find that the number now left with you is not sufficient for all the places in your constablewick, you are to apply to me for more; and you are further required to attend at a petty sessions, in the last week of *September* next, (of which you shall have due notice), and such lists as you shall there receive you are to deliver to the next court of quarter sessions for this county [riding or division], on the first day of its sitting, and at the same time to make oath of your re-

ceipt of such lists, and that no alteration has been made therein since your receipt of them.

If there is any parish within your constablewick that has no overseers of the poor except the churchwardens, you are in such case to treat them as the churchwardens and overseers of such parish, and to direct your precept, together with a sufficient number of forms of return, to them accordingly; and if there is any parish or township which extends into any other constablewick besides your own, you are to treat every such parish or township as within your constablewick, provided the principal church of every such parish or township is situated within your constablewick, and you are to issue your precepts, with a sufficient number of forms of return, accordingly; and these several matters you are in nowise to omit, upon the peril that shall ensue. Given under my hand, at _____ in the said county, the _____ day of _____ in the year _____

C. D. clerk of the peace for the said county,
[riding or division].

N^o 2.

Precept for returning Lists of Jurors.

County of _____	}	TO the Churchwardens and Overseers of the
to wit,		
Hundred of _____		
		Poor of the Parish, [or, to the Overseers
		of the Poor of the Township] of _____.

BY virtue of a warrant from the clerk of the peace of the said county [riding or division] unto me directed, you are hereby required to make out, before the first day of *September* next, a true list in writing, in the

form hereunto annexed, containing the names of all men, being natural born subjects of the king, between the ages of twenty-one and sixty, residing within your parish [*or township*], qualified to serve upon juries; that is to say, of every such man who has in his own name, or in trust for him, a clear income of ten pounds by the year in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, situate in the said county, or in rents issuing out of any such lands or tenements, or in such lands tenements and rents taken together, in fee simple or fee tail, or for his own life, or for the life of any other person; and also of every such man who has a clear income of twenty pounds by the year in lands or tenements situate in the said county, held by lease for the absolute term of twenty-one years or some longer term, or for any term of years determinable on any life or lives; and also of every such man who is a householder in your parish [*or township*], and is rated or assessed to the poor rate or the inhabited house duty on a value of not less than twenty pounds [if in Middlesex thirty pounds], and also of every such man who occupies a house in your parish [*or township*] containing not less than fifteen windows; and you are required to make out the said list in alphabetical order, and to write the christian and surname of every man at full length, and the place of his abode, his title, quality, calling or business, and the nature of his qualification, in the proper columns of the forms hereunto annexed, according to the specimens given in such columns for your guidance.

And if you have not a sufficient number of forms, you must apply to me for more ; and in order to assist you in making out the list, you are to refer to the poor rate, and you may, if you think proper, apply to any collector or assessor of taxes, or any other officer who has the custody of any house tax, land tax, or other tax assessment for your parish [*or, township,*] and take from thence the names of men so qualified : and in making such list you are to omit the names of all peers, all judges, all clergymen, all Roman catholic priests who shall have duly taken and subscribed the oaths and declaration required by law, all ministers of any congregation of protestant dissenters whose place of meeting is duly registered, provided they follow no secular occupation, except that of a schoolmaster, and produce to you a certificate of some justice of the peace of their having taken the oaths and subscribed the declaration required by law ; all sergeants and barristers at law, all members of the society of doctors at law, and all advocates of the civil law, if actually practising, and all attornies, solicitors and proctors, if actually practising, and having taken out their annual certificates ; all officers of the courts of law and equity, and of the Admiralty and Ecclesiastical courts, if actually exercising the duties of their respective offices ; all coroners, all gaolers and keepers of houses of correction, all members and licentiates of the royal college of physicians in London, all members of the royal colleges of surgeons in London Edinburgh and Dublin, and apothecaries certificated by the court of examiners of the Apothecaries Company, if actually practising as physicians, surgeons or apothecaries.

caries respectively; all officers of the navy and army on full pay, all pilots licensed by the Trinity-house of *Deptford Strand, Kingston-upon-Hull, or Newcastle-upon-Tyne*, and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed by the lord warden of the cinque ports, or under any act of parliament or charter for the regulation of pilots in any other port; all the household servants of his majesty, all officers of customs and excise, all sheriffs officers, high constables and parish clerks, and also all persons exempt by virtue of any prescription, charter, grant or writ.

And when you have made out such list, you are authorized to order a sufficient number of copies thereof to be printed, [the expense of which printing will be allowed you by the parish or township,] and you are required on the three first *Sundays* in *September* next, to fix a copy of such list, signed by you, on the principal door of every church, chapel or other public place of religious worship within your parish, [or township,] and also to subjoin to every such copy a notice to the following effect, inserting the time and place, of which you shall be previously informed:—"Take notice, that all objections to the foregoing list will be heard by the justices in petty sessions, on the day of *September* next, at the hour of at ;" and you must allow any inhabitant of your parish [or township,] to inspect the original list or, a true copy of it, during the three first weeks of *September* next, *gratis*; and you are also further required to produce the said list at such petty sessions, and there to answer, on oath, such questions

as shall be put to you by his majesty's justices of the peace there present, touching the said list; and these several matters you are in nowise to omit, upon the peril that may ensue. Given under my hand at in the said county, the day of in the year ———.

C. D. High Constable.

The form of precept in Wales is to be altered according to the difference of qualification.

N^o 3.

Form of Returns.

County of } THE Return of the Churchwardens and Overseers [or, of the Overseers] of the
to wit. } in the Hundred of in the
said county, of Men qualified to serve on Juries.

Parish - or Township. <i>In Towns add the name of the Street.</i>	Christian and Surname. <i>At full length.</i>	Title, Quality, Calling, or Business.	Nature of Qualification.
All Saints, Derby:			
King-street - -	Adams, Johu - -	Esquire -	Freehold.
John-street - -	Alley, James -	Merchant -	Copyhold.
Duke-street - -	Bond, Henry -	Baker. - -	Leasehold.
High-street - -	Boyd, George -	Grocer -	Poor-rates.
Duke-street - -	Cole, Charles -	Butcher -	{ House assess- ment.
Church-street -	Cook, John -	Inn-keeper	Windows.

N. 4.

The Venire in the King's Bench.

GEORGE the Fourth, &c. to the sheriff of greeting: We command you that you cause to come before us at Westminster, on next after eight days of the Purification of the blessed Virgin Mary, twelve good and lawful men qualified according to law, by whom the truth of the matter may be the better known, and who are in no wise of kin either to *A. B.* the plaintiff, or *C. D.* the defendant, to make a certain jury of the county between the parties aforesaid of a plea of trespass on the case, [or, as the case may be,] because as well the aforesaid *C. D.* as the aforesaid *A. B.* between whom the difference is, have put themselves upon that jury; and have you there the names of the jurors and this writ.—Witness —— at Westminster, the day of January, in the year of our reign.

The venire in the Common Pleas is the same as in the King's Bench, except that the jury are to come "before our justices at Westminster," and the defendant's addition is put to his name (*a*).

(*a*) The difference of the teste and the return has been noticed in the text, p. 49.

N^o 5.*The Distringas in the King's Bench.*

GEORGE the Fourth, &c. To the sheriff of greeting: We command you that you distrain the bodies of the several persons in the panel (b), to this writ annexed, named, jurors summoned in our court before us, between *A. B.* plaintiff, and *C. D.* defendant, by all their lands and chattels in your bailiwick, so that neither they nor any of them, do intermeddle therewith, until you shall have other command from us in that behalf, and that you answer to us for the issues of the same, so that you have their bodies before us at Westminster, on _____ next after _____ or before our justices assigned to hold the assizes in your county, if they shall first come on (c) _____ day of _____ at (d) _____ in your said county, according to the form of the statute in such case made and provided, to make a certain jury between the said parties of a plea of trespass on the case, [or, as the plea may be,] and to hear their judgments thereupon of many defaults; and have you there the names of the jurors and this writ. Witness, &c. (e)

(b) If it be a special jury, names are set out as in the master's list.

(c) The commission day of the assizes.

(d) The place where the assizes are holden.

(e) The *distringas* in the King's Bench is only sealed; in the Common Pleas the *habeas corpora* is signed also.

If for Middlesex, you say—
 Or before our trusty and well beloved
 our chief justice assigned to hold pleas in our court
 before us, if he shall come on the
 day of at Westminster, in the said county.

If for London—

At the *Guildhall* of the City of *London*, aforesaid.

N° 6.

The Habeas Corpora in the Common Pleas.

GEORGE the Fourth, &c. To the sheriff of
 greeting: We command you that you have before our
 justices at Westminster, on or before our
 justices assigned to take the assizes in your county,
 according to the form of the statute in such case made
 and provided, if on the day of
 at in your said county, they
 shall first come, the bodies of the several persons named
 in the panel to this writ annexed, being the jurors sum-
 moned in our court, before our justices at Westminster,
 between *A. B.* plaintiff, and *C. D.* late of
 in your county, defendant, of a plea of trespass on the
 case, [*or*, as the plea may be,] to make that jury, and
 have there this writ. Witness, &c.

If for Middlesex, you say—
 Or before our faithful and well beloved
 knight, our chief justice of our court of the bench,
 appointed according to the form of the statute in such

case made and provided, if on the
day of at Westminster, in your county, he
shall first come the bodies, &c.

If for London—
If on the day of at
Guildhall of the city of *London*, aforesaid, he shall
first, &c.

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THE END.

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