

THE
DUTIES AND LIABILITIES
OF
SHERIFFS,
IN THEIR
VARIOUS RELATIONS TO THE PUBLIC
AND
TO INDIVIDUALS,
AS
GOVERNED BY THE PRINCIPLES OF COMMON LAW,
AND
REGULATED BY THE STATUTES OF NEW YORK.

REVISED, CORRECTED, AND ENLARGED,

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ERRATA.

- Page 57—last line, after "execution" add "2 *Wend.* 262."
- " 80 last line, for "*civilis*" read "*civiliter*."
- " 145 10 line, after "execution" add "and afterwards levy the execution."
- " 159 15 line, strike out the reference to laws of N. Y., and add to the sec. "2 R. S., 290, § 22."
- " 174 15 line, "(2 *Wend.* 260,)" a misrecital.
- " 174 26 line, instead of "3" insert "13" add "3 *Wils.* 345."
- " 174 30 line, after "execution" add "3 *Caine's*, 174."
- " 174 30 line, strike out "1" and insert "13."
- " 179 note, strike out the 32d sec., repealed.
- " 180 8 line from bottom, for "creditor," insert "debtor"
- " 183 last line, for "203" read "474."
- " 193 15 line, for "20 *Wend.*, 416," read "22d *Wend.*, 116."
- " 203 26 line, for "555," read "356."
- " 223 9 line, for "cause," read "case."
- " 270 18 line, for "applies," read "appeals."
- " 290 29 and 30 lines, strike out "defendant he" and insert "plaintiff, the defendant."
- " 319 last line, for "county" read "court."
- " 324 12 line, insert "not," for "no."

INTRODUCTION.

The former office and dignity of Sheriff, may be considered as objects rather of antiquarian research, than of any practical utility. But in a work professedly treating of his duties and liabilities, it would, perhaps, be improper not to recur to the state of society from whence they sprung, and the necessity which enforced them. Nor is such investigation entirely useless; as the present services of the sheriff may in some instances be inferred from his former duties.

The Sheriff boasts no less an honorable, than an ancient descent. His rank, during the continuance of his office, was considered superior to that of any nobleman of his county, and he dates his origin beyond the remotest page of Anglo-Saxon history. The *gerefa* of the Saxons, or *reeve* as he is called in English, was an officer known at the commencement of their civil polity, and only inferior in rank to the earl himself. Of this nobleman he was the companion in his judicial capacity, and frequently his substitute. The earl, as respected his office, corresponded altogether with the *comes* of the Latin, and the *comte* of the French. He had both a civil and military administration of the county, and acted, like the *comes* equally as a judge and a commander of the forces. (*Al-*

cuin in Epist. 35.) In his judicial capacity he was, probably, styled *alderman*, and in his military capacity he had the title of *heretock*, from *here*, an army, and *token*, to lead. (*Crabb Eng. Law* 17.) At first the earls or dukes had their appointment from the king, and held their office at his pleasure; but from the increasing power of these dignitaries, and the tacit consent of the sovereign, this office became, in process of time, hereditary, and, if we may believe the laws ascribed to Edward the Confessor, sometimes elective. (*Spelm. in Concl.* 190; *Annal. San.* 49.) The digression to this office became necessary in order more fully to understand the powers and capacities of the Sheriff. He was both a judicial and ministerial servant of the king; in the former the equal, and not the mere deputy, of the earl, and in the latter he was appointed to execute process, to keep the king's peace, and to put all the laws in execution. He witnessed all contracts and bargains; brought offenders to justice, and delivered them to punishment; took bail or security of such as were to appear at the county court; and presided at the hundred. (*Crabb Eng. Law*, 25.) If he failed in the execution of his duty, he lost his office, and the king's favor. The most exalted personages of the kingdom, especially after the Conquest, filled the station and performed the duties of Sheriff; and not unfrequently Sheriff and Earl were united in the same person. Among the number, *William*, earl of Salisbury, the most powerful subject in the realm, was the king's Sheriff of Wiltshire in the eighth year of Richard the First; and Edward, the king's eldest son, (a few years afterwards king, himself, of England) was Sheriff of the counties of Buckingham and Bedford, the fifty-second and fifty-third years of Henry the Third.

(*Lingard*, 242.) In the last instance it would do violence to probability by supposing that the heir apparent of the crown was the deputy of, or derived his authority from any earl. There was, however, a distinction with the Saxons, both in the rank and jurisdiction of their *gerefa*. The shire-gerefa, shire-reeve, or sheriff, was probably distinguished by the name of the king's gerefa, because he more immediately executed the king's precepts, and sometimes officiated in the county court, in place of the earl, or alderman. He appears also to have been known by the title of the *heh gerefa*, or High Sheriff. Those who acted in the tithings, boroughs, and towns, were named tithing, borough, or town gerefa. (*Crabb's Eng. Law*, 25.)

All the other nations, of Gothic, or German origin, who, on the ruins of the Roman empire, founded kingdoms in the different parts of Europe, constituted officers of the same kind with the Sheriffs of the Anglo-Saxons. A strong confirmation of their high antiquity and general importance. He was called in the Danish, *grave*; Swedish, *grefve*; Teutonic, *grefe*; German, *graf*; and in the Latin of the middle ages, *graphio*, or *graffio*. (*Du Cange Gloss. in voe.*) Both the officer and the name have, with some variations, been retained in Germany. The *graf* of the Germans signifies a title of dignity, answering to the count of the French, and the earl of the English; and in some cases also, the title of a prince, as the landgrave, or marsgrave. It is likewise still used there to denote a judicial officer. The gerefa of the Saxons was changed, as to the name, into the English greve, or reve, but the duties remained nearly the same.

The courts of justice established by the Saxons, were modeled

according to the divisions of the kingdom, into counties, hundreds, and tithings. The Saxons, in imitation of their German ancestors, did, as Tacitus informs us, "*jura per vagos, et vicos reddere*," (*Tacit. Germ. c. 12*,) distribute justice in every town and village, so as to afford to every man an opportunity of having redress for injuries within his own district, in an easy and expeditious manner. And in most of these courts the Sheriff was the distributor of justice.

The court of the hundred was, as its name denotes, a court held every month, for the benefit of the inhabitants of the hundred; at which the alderman, but most generally the Sheriff presided; and all who were summoned were obliged to attend on pain of being heavily mulcted. (*Crabb's Eng. Law*, 27.) In this court causes of great moment and high importance were heard and determined (*Dugdale, Orig. Jur.* 27); besides which it took cognizance of thefts, trials by ordeal, view of the frank pledge, and the like. Whence, after the Conquest, this court was called the Sheriff's tourn, and as regarded the examination of the pledges, the view of the court of frank pledge.

The Sheriff acquired additional power after the Norman conquest. He was then called *vice-comes*, because he performed all the ministerial duties of the earl, and, in his judicial character, he took the place of the alderman. The latter officers were now entirely confined to cities and boroughs, where they acted as judges. (*Matt. Paris*, 1196.) Religious intolerance, also increased his authority. The secular and ecclesiastical judicatures were declared to be distinct and separate; whilst the bishop and alderman were prohibited from interfering with the former,

and their jurisdiction confined exclusively to the latter. No cause relating to the discipline of the church was, on the other hand, to be carried before a secular magistrate, and every person who was answerable to the ordinary for a breach of the canon law, was to make his appearance at a place appointed by the bishop, where the cause was to be determined according to the form and manner prescribed by the ecclesiastical constitution. (*Co. 4 Just.*, 259; *Glanville, Chap. 1.*)

On the removal of the bishop and alderman from the county courts, the office of Sheriff rose in consequence. To him, exclusively, now belonged both a civil and criminal jurisdiction. To the civil jurisdiction of the Sheriff appertained the plea concerning the right of freehold, when the lord's court failed in doing justice; also the plea of villainage, when it concerned the claim of any one to a villain; and the plea of dower, when part only of the dower was withheld; with other matters whenever he had the king's writ authorizing him to hold jurisdiction. (*Dug. Orig. Jury*, 28.) To the criminal jurisdiction of the Sheriff belonged at this time, the plea of theft, and other minor offences, which were decided according to the customs of different counties. Besides, in case of neglect on the part of the lords of franchises, it appertained to the Sheriff to take cognizance of scuffles, blows, and wounds, unless the accused added to his charge that the offence was committed against the king's peace; such minor offences being said to be committed against the Sheriff's peace. (*Reeve's Hist.* 113.) The court in which the Sheriff exercised his civil jurisdiction retained the name of the *comitatus* or county court; that in which he exercised his criminal jurisdiction

was afterwards distinguished by the name of Sheriff's tourn. But in order to further the due administration of justice, particularly as it concerned the life and person of the subject, it was ordained by Magna Charta (9 Hen.3, c. 17,) that no Sheriff, coroner, or constable, or other bailiff of the king should hold pleas of the crown. By this statute the authority of the Sheriff to hear and determine theft and other felonies, as in the time of Glanville, was done away. This restriction probably reduced the jurisdiction of the Sheriff to its original state, as it was in the time of the Saxons.

The authority, lawful, and unlawful, which was exercised by Sheriffs in these days, will be best understood from a statute (*Stat. Westm.*, c. 15,) passed in the reign of Edward I., for the purpose of checking such malpractices, and irregularities as these: the levying of distresses by persons who were not regular bailiffs, which was made punishable as an offence against the king; the making false, or negligent returns of writs; the appointing of persons to be jurors who were not duly qualified; the returning a greater number of jurors than were wanted, in order to obtain money by dispensing with their attendance; the unjustly seizing into the king's hands, *colore officii*, the freeholds of individuals, for which, on conviction, the Sheriff was to pay double damages; the imprisoning persons on false indictments, in order to extort money, for which the party injured might have a writ of false imprisonment; the bailing of improper persons, which was punishable with the loss of office; &c., &c. The parliament was thus obliged to interpose their authority, and give relief to the people against the Sheriffs, who, in a particular manner harassed jurors unnecessarily, by summoning them from a great

distance, and who returned such as would not give an impartial verdict. This last abuse, says a writer (*Barrington on Stat.* 185,) on the English law, was never perfectly removed until the act was made for balloting juries. In an account of Cornwall, written by Mr. Carew, we are informed that in the reign of Henry the Seventh, a charge for the "friendship of the Sheriff," was a standing article in the bill of every attorney.

By the statute of Sheriffs, passed in the ninth year of Edward the Second, an alteration was made in the manner of choosing Sheriffs, which was taken from the people at large of the respective counties, and committed to the chancellor, treasurer, barons of the exchequer, and justices. None were to be appointed who had not sufficient land to answer to the king, and his people. This alteration was called for by the former malpractices of these officers, and naturally tended to elevate the character of those who afterwards filled this important situation. By a subsequent statute (*Stat.* 18, 20; *Ed.* 3.) they were not permitted to hold their bailiwicks longer than one year. And in confirmation of previous statutes, it was subsequently enjoined on them to abide in their bailiwicks, and not let it to any one, which was henceforth to form part of their oath. (*Stat.* 4, *Hen.* 4, *cap.* 5.) In the time of Fortescue, who was chief justice, and chancellor to Henry the Sixth, the manner of the appointment of Sheriffs was as follows: every year there met, in the court of exchequer, all the king's councillors, as well lords spiritual as temporal, as all other the king's justices, all the barons of the exchequer, the master of the rolls, and certain other officers. All these, by common consent, nominated, of every county, three persons of

distinction, such as they deemed best qualified for the office of Sheriff, and presented them to the king. Of the persons so nominated and returned, the king made choice of one, who, by virtue of the king's letters patent was constituted High Sheriff of that county for which he was chosen. (1 *Bl. Com.* 340; *Wood* 70.) This mode of nomination and appointment, with a slight variation, still continues in England. (*Petersd. Ab.* 591.) It has ever been usual to appoint them annually; but in the reign of Henry the Fifth, we find, from this custom, a parliamentary exception, rendered very remarkable by the reason assigned for it: the king is permitted to appoint Sheriffs for four years, because, by wars and pestilence, there are not a sufficient number remaining in the different counties to discharge this office from year to year.

This is a slight sketch of the tenure and powers of Sheriffs, without particularly noticing the various statutes, which extend, limit, or modify those powers. Their duties, at the present day, as conservators of the peace, and as ministers of the courts, more especially as applicable to our own state, will be considered in the following chapters.

The Sheriff, though in some measure shorn of his dignity, and curtailed in his honors, may yet be considered as an officer of great trust and authority; still having the custody, keeping, command, and government, in some sort, of the whole county committed to his charge and care. And there is one branch of his authority, by virtue of which we frequently see him, in history, at the head of a mighty armament—I mean his right of summoning and raising the *posse-comitatus*, or power of the county; which he may still exercise, as well to overcome any resistance to his own lawful discharge of duty, as to quell any other riot or insurrection.

DUTIES AND LIABILITIES OF SHERIFFS.

CHAPTER I.

The Sheriff.

We purpose in this chapter on the Sheriff to consider the nature of his office, the qualifications necessary for it, the mode of his election, and the general duties required of him.

In most, if not in all of the United States, the Sheriff is merely an executive officer, having, individually, no judicial authority. He presides over a jury in assessing damages upon judgments by default, but, as will be seen hereafter, he has no voice in the inquest.

Any free white male citizen of the state of New-York, who has never been convicted of any infamous crime, is eligible to the office of Sheriff. By the constitution and statutes (*Const. Art. 4, § 8; 1 Rev. Stat., 2d edit., 103, § 53, 54,*) of the state, the Sheriffs of the several counties are chosen by the electors in the respective counties, once in every three years, and as often as vacancies occur; and can hold no other office, and are ineligible to the same office, for the next three years after the termination of their office.

In the mode of election here pointed out, we find an instance of the old Saxon and German customs revived and renewed in the constitution of this state. And as the officer is elected for three years, instead of annually, and can serve only once in the period of six years, he is in a considerable degree independent, and may, therefore, be presumed impartial, in the exercise of his very im-

portant duties and powers. By a still existing act of the English Parliament (1 *Rich.*, 2, c. 11; 1 *Bl. Com.*, 343,) no man who has served the office of Sheriff for one year can be *compelled* to serve it again within three years afterwards. The reason of this regulation may be collected from another act emanating from the same authority. The expense which custom had introduced in serving the office of High Sheriff became so burdensome that it was enacted (13 and 14 *Car.* 2, c. 21,) that no Sheriff should keep any table at the assizes, except for his own family, or give any presents to the judges, or their servants, or have more than forty men in livery, yet, for the sake of safety and decency, he may not have less than twenty men in England, and twelve in Wales.

Under the fourth article of the constitution, the supreme court has decided (11 *Wend. Rep.* 132, 511,) that a Sheriff when elected, takes the office for three years, whether the vacancy which he is elected to fill, be occasioned by death, removal, or expiration of the term of office of his predecessor; and a re-election of the incumbent to the same office, during the running of the three years, does not justify him in holding the office longer than three years in the whole; such re-election during the term for which he was entitled to hold under his first election being void.

Sheriffs in new counties are to be elected at the general election next succeeding the erection of the county, or at such other time as the legislature shall direct. (1 *Rev. Stat.*, 2d edit., 103, § 56.)

The Sheriff must be a resident of the county for which he is elected, and in which the duties of his office are required to be performed. (1 *Rev. Stat.*, 2d edit., 93, § 17.)

This last provision of the Revised Statutes is, in substance, the same as that of 4 *Hen.*, 4, chap. 5, by which it is enacted: that every Sheriff shall be dwelling in proper person within his bailiwick, for the time he shall be such officer, and that the Sheriff shall be sworn to do the same; and in the construction of which it has been held clear that a Sheriff has no jurisdiction in any other county, nor can he do a judicial act in which his personal

presence is required, out of his county. But he may do a ministerial act, as make a panel, or return a writ out of his county. He may also assign a bail bond out of his county. And if, on a *habeas corpus*, &c., the Sheriff is commanded to carry a prisoner to a certain place out of his county, and, in doing this, he is obliged to go through several counties for this special purpose, he has authority in those other counties. So if a person, of his own wrong, shall escape, and fly into another county, the Sheriff, or his officers, upon fresh suit, may take him again in another county. (2 *Ld Raym.*, 1455 ; 2 *Stra.*, 757 ; *Dalton*, 23 ; *Plowd.*, 37.)

The Sheriff can continue to discharge the duties of his office until his successor shall be qualified. (1 *Rev. Stat.*, 2d edit., 108, § 13.)

The duties, and the sufficiency of their performance, required from the old Sheriff to the new, when he surrenders up his trust, and the custody of the county, may with propriety be noted here.

After the Sheriff has taken the oath and given the bond for the due performance of his office, and his predecessor has been legally notified, the new Sheriff must receive from the old Sheriff all his prisoners which are in jail by their names, and all his writs precisely by view, and by indenture to be made between the old and new Sheriff ; in which indenture, all the causes which the old Sheriff has against every prisoner must be set forth and delivered at the peril of the old Sheriff ; for the new Sheriff need not take notice of any who are omitted and left out of the indenture, for with such he is not chargeable, but the old Sheriff. (6 *Bac. Abr.*, 159 ; *Dalton*, 15.)

By referring to the Revised Statutes, we shall find that their provisions are nearly a confirmation of this previously prescribed practice :

When any new Sheriff shall be elected or appointed in the place of any other, or upon the expiration of the term of any Sheriff's office, and shall have qualified and given the security required by law, the clerk of the county shall grant a certificate

under his official seal that the person so appointed or elected has qualified and given such security. Upon the service of such certificate on the former Sheriff, his powers, except when otherwise expressly provided by law shall cease. Within ten days after the service of such certificate upon such former Sheriff he shall deliver to his successor :

1 The jail, or jails if there be more than one, of the county, with all their appurtenances, and the property of the county therein.

2. All the prisoners then confined in such jail.

3. All process, orders, rules, commitments, and all other papers or documents, authorizing, or relating to the confinement of such prisoners ; and if any such process shall have been returned, a statement, in writing, of the contents thereof, and when returned.

4. All writs of *capias ad respondendum* and other *mesne* process, and all precepts and other documents for the summoning of a grand or petit jury then in his hands, or which shall not have been fully executed by him.

5. All executions, attachments, and final process, then in his hands, except such as the said former Sheriff shall have executed, or shall have begun to execute by the collection of money thereon, or by a levy on property, in pursuance thereof. At the time of such delivery the said former Sheriff shall execute an instrument reciting the property, process, documents, and prisoners delivered, specifying particularly the process or other authority by which each prisoner was committed, and is detained, and whether the same be returned or delivered to such new Sheriff ; which instrument shall be delivered to such new Sheriff, who shall acknowledge in writing, upon a duplicate thereof, the receipt of the property, process, documents, and prisoners therein specified, and shall deliver such duplicate and acknowledgement to the said former Sheriff. Notwithstanding the election or appointment of a new Sheriff, the former Sheriff shall return in his own name all writs of *capias ad respondendum*, all other *mesne* process, all attachments, and all executions which he shall have fully executed,

and shall proceed and complete the execution of all final process and attachments which he shall have began to execute, by a collection of money thereon, or by a levy on property in pursuance thereof. And when a Sheriff shall have arrested any person upon a *capias ad respondendum*, by virtue of which such person shall be confined either in jail, or on the liberties thereof, at the time of assigning and delivering such jail to the new Sheriff, if such *capias* be not then returned, the same shall be delivered to the new Sheriff, and shall be returned by him, at the return day thereof, with the proceedings of the former, and of the new Sheriff thereon. And if any former Sheriff shall neglect or refuse to deliver to his successor, the jail, process, documents and prisoners in his charge, as herein required, such successor may, notwithstanding, take possession of such jail, and take the custody of the prisoners therein confined, and may compel the delivery of such process and documents in the manner prescribed (in 1 R. S., 2d ed., 114, 233,) for compelling delivery of papers by officers to their successors. (2 R. S., 2d ed., 356, §70—76.)

It was formerly adjudged by the Supreme Court (20 *John Rep.* 64,) that when a new Sheriff is appointed, the right of the old Sheriff to assign prisoners, on civil execution, to his successor, being for his own security and benefit may be waived by him; and the prisoners not delivered over, are to be deemed, to all intents and purposes as in his custody, and in case of actual escape, he will be liable. But in a late case, in the same court, it has been decided, (21 *Wend. Rep.*, 223,) that on the election or appointment of a new Sheriff, and the service of a certificate of the county clerk that the new Sheriff has qualified, and given the security required by law, the powers of the old Sheriff cease within ten days after the service of such certificate, and all prisoners who are not assigned within that time, are at liberty to go at large; the new Sheriff has no control over them, and the powers of the old Sheriff are at an end: that the latter cannot in such case, even maintain an action on a bond for the liberties given by a prisoner not assigned. Under the former law, (1 R. L., 418, § 1, 4, 5,) the court remark, a writ of discharge was delivered to

the old Sheriff, commanding him that by indenture he deliver to his successor, "the county, with the appurtenances, together with the rolls, writs, memorandums, and all other things touching that office which are in his custody;" and thereupon the office of the old Sheriff was at an end. Notwithstanding the imperative language of the writ, it was said in *Hempstead v. Weed*, 20 *John Rep.* 64, that the right of the old Sheriff to turn over his prisoners on civil executions to his successor, was for his own safety and security; that the rule was introduced for his benefit, and he might, if he pleased, receive the advantage of it. It was accordingly held that the old Sheriff was not chargeable with an escape, when, on going out of office, he had by mistake neglected to assign to his successor one of the prisoners on the jail limits; but that the prisoner still remained in his custody on the principle that when the Sheriff has commenced the execution of final process, he may complete it after his office is at an end. In *Partridge v. Westervelt*, 13 *Wendell*, 500, it was decided that a prisoner on the jail limits who had not been assigned to the new Sheriff was not in the custody of the new Sheriff, and consequently that he was not chargeable for an escape of the prisoner, although it happened in his time; but that the remedy of the creditor was against the old Sheriff, who could not plead his failure to perform his duty as an excuse. In this case, the late chief justice expressed the opinion that the turning over of prisoners was no longer a privilege which the old Sheriff could waive, but that it was now his duty to assign them.

The language of the present statute is certainly imperative in its form—the former Sheriff *shall* deliver to his successor the jail, and the prisoners. Although this language may not be stronger than that in the former writ of discharge—I think it not only confers a benefit, but imposes a *duty* on the old Sheriff; and I am not prepared to say that he can sue for an escape, when he is driven to the necessity of alledging his own breach of duty by way of making title to the action. But if there can be a good excuse for not assigning, as that a particular prisoner was omitted by mistake, the Sheriff should show the excuse.

But the difficulty, continues Justice Bronson, who delivered the opinion of the court, presents itself in another form. Although under the old law, the Sheriff when he had commenced the execution of final process might complete it after his office was at an end, and although he may do so still in relation to executions against *property*, yet he cannot, I think, do so when the final process is against the *body* of the debtor. A certificate from the county clerk that the new Sheriff has qualified and given security, has taken the place of the old writ of discharge. Upon service of the certificate on the former Sheriff, the statute declares that "his powers as such Sheriff, except when otherwise expressly provided by law, shall cease;" and I find no provision which will authorize him to continue the execution of process on which any person is in his custody as a prisoner. The exception in the last clause of the 69th section, (the 72d of the 2d edition,) and the power to proceed given by the 71st section, (the 74th of the 2d ed.) are both evidently confined to final process against the *property*, not the *person* of the debtor. And besides, it is made the duty of the Sheriff to deliver to his successor, the *jail* of the county, with its appurtenances, *all the prisoners* then confined in such jail, and *all process*, orders, &c., in his custody, *authorizing or relating to the confinement of such prisoners*. On reading the 68th 69th and 71st sections (the 71st, 72d, and 74th of 2d ed.) together, I am unable to resist the conclusion, that the legislature intended the powers of the old Sheriff in relation to all prisoners in his custody, should cease within ten days after the service of a certificate that the new Sheriff had entered upon the duties of his office. If the common law power of the old Sheriff to continue the execution of final process against the body is taken away by this statute, as I think it is, prisoners who are not assigned within the ten days will be at liberty to go at large. The new Sheriff has nothing to do with them, and the power of the old Sheriff is at an end. If he cannot enforce the imprisonment by direct means, he cannot do it indirectly, by suing the bond which was given while the restraint was legal.

If a new Sheriff receives a prisoner, (provided we suppose in

conformity with the above decision, and within the ten days) from his predecessor, he is answerable for his escape, though a voluntary escape may have existed in the time of his predecessor. But the plaintiff has his election, either to consider the prisoner in execution, and so charge the new Sheriff for the last escape, or as out of execution, and charge the old Sheriff. (4 *John. Rep.* 469.) But if the plaintiff has once made his election, and sued the old Sheriff, and recovered judgment against him, it is conclusive, and a bar to any action against the new Sheriff.

The same Sheriff by whom any writ directed to him is executed, ought to make his return to the same; and in case of a new Sheriff, who comes into office before the return day, he should hand over such writ to him, with the return, and it is the duty of such new Sheriff to return the same. And if the old Sheriff, after arresting a defendant suffer him to escape, and go out of office before the return day, he alone is answerable for the escape. Yet where the new Sheriff, by mistake, returned *cepi corpus* to a writ directed to the old Sheriff, after the latter who arrested the defendant upon it had permitted an escape, and an attachment afterwards issued against the old Sheriff, who was ruled to bring in the body, the irregularity was waived by not moving in time to set aside the attachment. (1 *East's Rep.* 604.)

Where an indenture of assignment of prisoners from the old to the new Sheriff specified a suit of *Talmadge, Smith & Co. v. Brockway*, it was held sufficiently certain without giving the names of all the plaintiffs at large, and was sufficient notice to the new Sheriff of the execution against the prisoner. All that is required is, that the old Sheriff, when he delivers over the prisoner, give notice of all the executions against him. The rule does not require that this notice shall contain the accuracy and precision necessary in special pleading. (9 *John. Rep.* 85.)

If a Sheriff, at the time of his death, had different persons in execution when a new Sheriff was appointed, and the new Sheriff had taken upon him the office, it was his duty at his peril to take notice of all the executions against every person whom he found in jail, and that necessarily, for there was no one to make delivery,

or give notice. And he was not liable for detaining them until he could obtain proper notice of all such executions.—3 *Co. Re.* 72; 19 *Vin. Abr.*, 544, pl. 8.

It had, however, previous to any statutory provision, been adjudged, (*Barnes*, 259) that an assignment of the prisoner, &c. by the Under Sheriff was sufficient; but to obviate all doubts, and at the same time to direct the powers of the Under Sheriff in certain circumstances, the statute (2 *R. S.*, 2d ed., 357, § 77) provides: if at any time when any new Sheriff shall have qualified, and given the security required by law, the office of the former Sheriff shall be executed by his Under Sheriff, or by a coroner of the county, or by any other person specially authorized for that purpose, such Under Sheriff, coroner, or other person, shall in all things comply with the preceding provisions, (the statutory provisions we have just enumerated) and shall perform the duties required of such former Sheriff.

Before entering on the duties of his office, it is obligatory upon the Sheriff to take the following oath, and which oath is required to be filed in the office of the clerk of the county.—*Const. art.* 6 § 1; 1 *R. S.*, 2d ed., 109, § 23.; *ibid.*, 110, § 27.

“I do swear that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of Sheriff of the County of ———, according to the best of my ability.”

This oath, though not so explicit in its details, is yet as full and comprehensive in its subject, as the one enjoined by the ancient common law, (*Dyer*, 168) and confirmed by act of parliament, (3 *Geo. I. c.* 15, § 18.) If a person refused to take upon himself the office of Sheriff, it was, formerly, usual to punish him in the Star Chamber, (*Dalton*, 15) and he may now be proceeded against by information in the court of king's bench. (*Dyer*, 167.) Also, if he refused to take the several oaths enjoined him, or officiates in the office before he has qualified himself, that court, which has a general superintendence over all officers and ministers of jus-

tice, will grant an information against him. And it has been held that a refusal of the oaths enjoined to be taken, amounts to a refusal of the office. (2 *Lee*, 116; *Carth.*, 507.) The breach, or violation of this oath, although a high offence, is not, however, perjury, or punishable as such.—11 *Co. Rep.*, 98.

Within twenty days after his receiving notice of his election, and before he shall enter upon the duties of his office, the Sheriff must execute with sureties, who shall be freeholders, a joint and several bond to the people of the State of New York, the condition of which is to be as follows :

Whereas the above bounden A B hath been elected to the office of the Sheriff of the County of ———, at the general election held therein on the ——— day of ——— [or at a special election, as the case may be.] Now, therefore, the condition of the above obligation is such, that if the said A B shall well and faithfully, in all things, perform and execute the office of the Sheriff of the said County of ———, during his continuance in the said office, by virtue of the said election, without fraud, deceit, or oppression, then the above obligation to be void, or else to remain in full force.

A B, *Sheriff*. [L. s.]

C D, [L. s.]

E F, [L. s.]

In the city of New York the Sheriff's bond is to be in the penalty of twenty thousand dollars, with two sureties; and the bond to be executed in every other county in the state, shall be in the penal sum of ten thousand dollars, with two or more sureties. The bond given by the Sheriff must be filed in the clerk's office of the county for which the Sheriff executing it shall be elected; and at the time of filing the same, the clerk must administer an oath to each of the sureties therein named, that he is a freeholder within the state of New York, and is worth such sum as shall be proportionate to the number of sureties bound in such bond, and to the amount of the bond required in such county, over and above all debts whatsoever owing by him. The oath must be endorsed on the bond, and signed by each of the sureties, in the presence of

the county clerk, who shall, notwithstanding, judge of and determine the competency of the sureties offered. In the city and county of New York the like proceedings must be had, but the sureties must there make oath that they are freeholders within the state, and that each of them are worth twenty thousand dollars over and above all debts due by or from either of them.

The Sheriff must once in each year, within twenty days after the first Monday in January, subsequent to the year in which he shall have entered upon the duties of his office, renew the security required to be given by him upon entering upon the duties of his office. This renewed security must be in the same amount, and given in the same manner, and be subject, in all respects, to the same regulations, as the original security required from such Sheriff.—1 *R. S.*, 2d ed., 371, § 78—81.

The bond thus given and filed, is intended for the benefit of individuals who may suffer by the malfeasance of the Sheriff, or his deputy, as well as for the benefit of the people; and the clerk is the mere depositary of the bond, for the use of those who may suffer by a breach of its condition, whether it be the public or private individuals. And, accordingly, whenever a Sheriff shall have become liable for the escape of any prisoner, or whenever he shall have been guilty of any default, or misconduct in his office, the condition is broken, and the party injured may apply to the supreme court for permission to prosecute the official bond of such Sheriff.—2 *R. S.*, 2d ed., 390, § 1.

Such application is to be accompanied by proof of the default or delinquency complained of, and that no satisfaction for the same has been received; and by a certified copy of such official bond.—*Ibid*, 390 § 2.; 6 *Wend. Rep.*, 454; 4 *Hill's Rep.*, 572.

Upon such application and proof, the court order the bond to be prosecuted, but the applicant is authorized to prosecute the same in the supreme court only, and in the name of the people of the state, stating in the process, pleadings, proceedings, and record in such action, that the same is brought on the relation of such applicant. During the pendency of any suit upon such official bond, or after judgment rendered in such suit, any other party

aggrieved by the default or delinquency of such sheriff, may, in like manner apply to the supreme court for leave to prosecute such official bond, and upon such leave being granted, the applicant may prosecute such bond in the manner already mentioned; and the pendency of any other suit, at the relation of any other person, on the same bond, or a judgment recovered by or against any other person on such bond, shall not abate, or in any manner affect such suit, or the proceedings therein. And any person who may have recovered any judgment upon such official bond, may, in like manner apply for leave again to prosecute such bond whenever he is aggrieved by any other default or delinquency than such as shall have been the subject of the former action, and shall proceed therein in like manner as before mentioned. The relator in case of his discontinuance or failure in the action, is liable to costs, as in other cases. The surety is never to be liable beyond the penalty of the bond. And if it appears that the amount of any damages recovered against the Sheriff, which the surety has been obliged to pay, or will be obliged to pay, is equal to the amount for which such surety shall be liable by virtue of the bond, he shall be acquitted and discharged of all further liability, and judgment shall be rendered in his favor. And whenever a judgment shall be obtained against a Sheriff and his sureties, a direction shall be endorsed on the execution issued thereon by the attorney issuing the same, to levy the amount of such execution in the first place of the property of such Sheriff, and if sufficient property of such Sheriff cannot be found to satisfy such execution, then to levy the deficiency of the property of the sureties.—2 *R. S.*, 2d ed., 390, § 3, 6, 7, 8, 11, 13, 15; 4 *Hill's R.*, 570.

Under this and similar provisions, the question has repeatedly arisen, as to what shall be regarded as a breach of the official bond of the Sheriff, entitling the party aggrieved to prosecute his sureties. A late, excellent work, "On the Organization and Jurisdiction of the Courts of Law and Equity in the State of New York," has given a lucid exposition of the nature and tendency of the several provisions of this statute, and whose commentary we are happy to follow. (*Graham on Jurisd.*, 212.) The bond of the

Sheriff being conditioned that he *shall* well and faithfully, in all things perform and execute the office of Sheriff, during his continuance therein, without fraud, deceit, or oppression, it follows, of course, that it is prospective, and that his sureties are not liable for any act done before its execution. And where the bond of a Deputy Sheriff was confined in its terms to *business that should come to the hands of the principal*, it was held that the obligation of the sureties did not extend to process committed to him previous to its execution, nor to any subsequent acts of his, such as the collection of money under such process. (20 *John. Rep.*, 166.) But it is no answer to an action on a Sheriff's bond, that he is sought to be charged for the non-performance of duties created subsequently to the act under which the bond is executed, provided that such duties existed at the date of the bond. If new duties were imposed subsequently to the giving of the bond, it might be otherwise. (6 *Wend. Rep.*, 454.) And the bond prescribed by the statute, extends in express terms, to the whole subsequent official conduct of the Sheriff, and under it, therefore, the sureties are liable for money had and received by him on an execution, at any time after the execution of their bond, although the process may have been received by him previous to the giving of the bond. (15 *Wend. Rep.*, 623.) And notwithstanding the bond provides that the Sheriff shall perform his duty, *without fraud, deceit or oppression*, it is regarded as broken, so as to entitle the party aggrieved to an action, if the Sheriff be guilty of any default or misconduct, his neglect of duty being, in legal consideration, a breach of the bond, although it do not involve any positive act of fraud, deceit, or oppression. (6 *Wend. Rep.*, 454.)

It is further provided, that such application shall be accompanied by proof of the default or delinquency complained of, and that no satisfaction for the same has been received, and by a certified copy of such official bond.—2 *R. S.*, 390, § 1.

Under the law, as it stood in the revision of 1813, (1 *R. L.* 418 § 6) the party aggrieved by the official default of the Sheriff, in order to entitle him to leave to prosecute the bond, must have previously recovered a judgment against the Sheriff in an action

against him, grounded directly on such default. Nor was it enough, that the plaintiff had proceeded by *attachment* against the Sheriff, for his default, and that a judgment had been recovered in the name of the people, against the Sheriff, on his recognizance to appear on the return of the attachment, those proceedings only involving, in contemplation of law, the forfeiture of his recognizance, but not establishing, as a recovery in an action founded directly on the default would, that he had rendered himself legally liable for its consequences. (18 *John. Rep.*, 390.) It was also formerly, as a general rule, required that a *fi. fa.* against the Sheriff, should have been returned unsatisfied, as the evidence of his inability to pay, although it was subsequently held to be unnecessary, when it appeared satisfactorily, upon the application for leave, to prosecute the official bond, that the Sheriff was wholly unable to pay.—2 *Cowen*, 590.

This rule, however, was altered by the legislature in 1827, by an act authorizing the supreme court to order the bond of the Sheriff to be put in suit, on the application of any party aggrieved, without requiring that a previous recovery should have been had against the Sheriff, and making it discretionary with the court whether they would direct a prosecution or not. (*Laws of 1827*, p. 219, § 5.) Under this provision the practice was established by the court, that before directing a prosecution of the bond, it should be shown, (which might be done by affidavit,) that the Sheriff was individually unable to respond in damages, for the default or mis-conduct alledged against him.—2 *Wend. Rep.*, 209.

The provision of the Revised Statutes, already quoted, regulating the present power of the court in this respect, and providing that the application shall be accompanied by proof of the default or delinquency complained of, and that no satisfaction for the same has been received, and by a certified copy of the official bond, was introduced by the revisers, in conformity to the practice of 1827, and, as they express it, “as a substitute for the former practice of showing a judgment received. (*Revisers’ notes*, 3 *Rev. Stat.*, 2d ed., 758.) Such seems to have been recognized as its effect, in a case, in which it was held, that on an applica-

tion to the court, to prosecute the official bond of a Sheriff, for a default in not paying over money collected by him under execution, it must appear that the money has been demanded of the Sheriff, (5 *Wend. Rep.*, 102.) And although in a subsequent case, (15 *Wend. Rep.*, 623,) the objection was taken, in an action on a Sheriff's bond, that the plaintiff should have shown a judgment and execution against the Sheriff unsatisfied, the court, in putting their decision upon other grounds, seem to regard the objection as destitute of weight. But in an action against a Sheriff for neglecting to return a *fi. fa.* it is not necessary that he be first ruled or notified to return.—3 *Hill's Rep.*, 552.

It is further provided as we have seen, that, upon such application and proof, the court shall order that such bond be prosecuted; and the applicant shall thereupon be authorized to prosecute the same in the supreme court only, in the name of the people of this state, stating in the process, pleadings, proceedings, and record in such action, that the same is brought on the relation of such applicant. (2 *Rev. Stat.*, 2d. ed., 390, § 3.) And in such actions, the same pleadings and proceedings are required to be had, as are provided by law in the case of suits upon bonds, with other conditions than for the payment of money, except as therein otherwise provided (and to which we shall presently advert,) and judgment shall be rendered for the defendants in the like cases. (2 *Rev. Stat.*, 2d ed., 390, § 4.) But such judgment shall not be a bar to any other suit that may be brought on the same official bond, by the same plaintiff, or any other plaintiff, for any other delinquency or default of such Sheriff, than such as was assigned as a breach of the condition of such bond in the action in which such judgment was rendered.—2 *Rev. Stat.*, 2d ed., 390, § 5.

Previous to the Revised Statutes, but one judgment could be entered, in form, on the same bond. The action was in the name of the people, and the judgment stood as security for future breaches, so as to entitle any other party who had a similar right to that of the original relator, to issue a *scire facias*, and enforce a satisfaction of his claim, and so on with other claimants until

the penalty of the bond was reached. In introducing some of the provisions above cited, regarding the suit as an individual one for the benefit of the relator, and in some measure in his name, and treating all the proceedings as of that character, and also as introductory to some further enactments, which will be presently considered, the revisers remarked that the former practice was "altogether anomalous." It involves, say they, this difficulty, that after a judgment is satisfied, it must either remain a lien on the estate of the defendants, so as to be a security for further breaches, or it must be cancelled and discharged. If discharged, it is not perceived how it can be the subject of a *scire facias*. It ought not to remain a lien, after its purpose is answered. These, and various other difficulties, will be obviated, and the proceedings will be much simplified by treating them throughout as separate actions; which can easily be done by requiring the name of the relator to appear in each suit.—*Revisers' notes*, 3 R. S., 2d ed., 758.

It is accordingly provided that during the pendency of any suit upon such official bond or after judgment rendered in such suit, any other party aggrieved by the default or delinquency of such Sheriff, may in like manner apply to the supreme court, for leave to prosecute such official bond. (2 R. S., 2d ed., 390, § 6.) And upon such leave being granted the applicant may prosecute such bond, in the manner above provided: and the pendency of any other suit, at the relation of any other person, on the same bond, or a judgment recovered by or against any other person on such bond, shall not abate, or in any manner affect such suit, or the proceedings therein except as afterwards provided. (2 R. S., 2d ed., 399, § 7.) And any person who may have recovered any judgment upon such official bond, may, in like manner, apply for leave again to prosecute such bond, whenever he is aggrieved by any other default or delinquency than such as shall have been the subject of the former action, and shall proceed therein, in like manner as above provided. (2 R. S., 2d ed., 390, § 8.) In addition, also, to the implied abrogation of the former practice by *scire facias*, it is expressly provided that no *scire facias* shall

be brought upon any judgment rendered upon such official bond, by the party at whose relation such judgment was obtained, or by any other person, for any breach of the condition of such bond. (2 R. S., 2d ed., 390, § 9.) And every suit brought upon such official bond, and every judgment rendered therein shall be deemed the private suit and judgment of the party on whose relation the same shall be brought or obtained; such suit may be discontinued, and the relator may be non-suited, as in private suits; and the judgment therein may be cancelled and discharged by the relator in the same manner as if he were the nominal plaintiff, and shall be deemed satisfied, in the same cases as judgments by individuals.—2 R. S., 2d ed., 390, § 10.

As a substitute for the former mode of collecting costs against an unsuccessful relator by attachment, (*Laws of 1827*, p. 219, § 6,) frequently an imperfect remedy, it is provided, that if the suit be discontinued, or the relator be non-suited, or judgment be rendered for the defendant, upon verdict, demurrer, or otherwise, costs shall be awarded against the relator, as if he was the nominal plaintiff, and judgment shall be rendered for such costs, and execution thereon awarded against him, in the same manner.—2 R. S., ed., 390, § 11.

In order to prevent a Sheriff and his sureties from collusively suffering judgments, to the amount of the penalty of the bond, and that, too, for the supposable purpose of satisfying them with the very money retained by the Sheriff for that purpose, thus, effectually defeating the security arising from the bond, (*Revisers' notes*, 3 R. S., 2d ed., 758,) it is further provided that no such suit shall be barred, nor shall the amount which the plaintiff may be entitled to recover therein, be affected by any plea or notice made by any surety in such bond, of a judgment recovered thereon, unless it be accompanied by an allegation that the sureties in such bond, some or one of them, have been obliged to pay the damages assessed in such judgment, or some part thereof, for the want of sufficient property of such Sheriff whereon to levy the same, or that they will be obliged to pay the same, or some part thereof, for the same reason; nor unless such plea or notice be verified

by the oath of the defendant making the same. (2 R. S., 2d ed., 391, § 12.) If it appear, that the amount of any damages so recovered, which such surety has been obliged to pay, or will be obliged to pay, as specified in the last section, is equal to the amount for which such defendant shall be liable, by virtue of the bond, he shall be acquitted and discharged of all further liability, and judgment shall be rendered in his favor. (2 R. S., 2d ed., 391, § 13.) But if it shall appear, that the amount of any damages so recovered, and which such surety has been obliged to pay, is not equal to the amount of such surety's liability, the amount thereof shall be allowed to such defendant in estimating the extent of his liability in any such action.—2 R. S., 2d ed., 391, § 14.

Whenever a judgment shall be obtained against a Sheriff and his sureties no execution against the bodies of the defendants shall be issued, until an execution against the property shall have been returned unsatisfied in whole or in part. (2 R. S., 2d ed., 391, § 16.) And in analogy to the case of a creditor's bill, filed on the return of an execution at law unsatisfied, (2 R. S., 2d ed., 173, § 38,) it would seem that a *bona fide* attempt must be made to collect the judgment by *fi. fa.* before a *ca. sa.* can be issued, and that when the judgment is in the supreme court (as it must be in the case under consideration,) so that the execution may issue to any part of the state, if the defendants have a fixed and known place of residence at the time the execution shall issue, and have visible property in the county wherein they reside, sufficient to satisfy the debt, it would be a good ground for setting aside the *ca. sa.* that the plaintiff had neglected to issue a *fi. fa.* to that county. (1 Paige, 309.)

In order also, that a distribution may be made among all the creditors similarly situated, as far as possible, and to prevent any undue and inequitable preference, from priority in levying an execution, (*Revisers' notes*, 3 R. S., 2d ed., 758, 759,) it is further provided that whenever several judgments shall be obtained at the same term upon any official bond of a Sheriff, for damages amounting, in the whole, to more than the sums for which the

sureties therein shall be liable, the supreme court shall order the moneys levied upon such judgments, from the property of the sureties, to be distributed to the relators respectively in such judgments, in proportion to the amount of their respective recoveries. (2 R. S., 2d ed., 391, § 17.) And if executions be issued upon several judgments, obtained at the same term, upon any such official bond, and sufficient moneys shall not be raised to satisfy all of the said executions, the supreme court shall distribute the moneys collected on such executions to the relators respectively in such judgments, in proportion to the amount of their respective recoveries.—2 R. S., 2d ed., 391, § 18.

A motion to issue further execution upon a judgment obtained against a Sheriff and his sureties on a bond given for the faithful execution of his office, under the statute, must be made on notice to the Sheriff and his sureties. The reason of this is, the sureties are not liable, as we have already seen, beyond the penalty of the bond, and it may be that there has been already levied by execution against them the full amount of their penalty.—6 Cow. Rep., 583.

Besides this remedy on the bond given by the Sheriff and his sureties, the former is indictable for wilfully neglecting any duty which is required, either by the common law or the statute.—1 Salk., 381; 2 Ld. Raym., 1189.

The judicial power of the Sheriff, which, in former times, was very great and extensive, has, by the constitution and laws of the state, been transferred, and with great propriety, to other establishments; for it is obviously incongruous that executive and judicial authority should be united in the same person.

The Sheriff, in his ministerial capacity, is the immediate officer to every court of record, to whom all writs and processes are regularly to be directed, and who is bound to execute the same without favor, fear or corruption. In the commencement of causes he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon, and return the jury; through him the courts enforce obedience to their orders, and

punish for contempts; and when a cause is determined, he must see the judgments of the courts carried into execution.

He is an officer of the court of chancery for the purpose of executing its process, and is amenable to that court in its execution, and may be punished by the court for any disobedience or default in the execution of the same. (2 R. S., 2d ed., 101, §§ 32, 33.) And he is bound, when any stated term of this court is held in his county, either by the chancellor, or a vice-chancellor, to give his attendance in such manner as the court shall direct, upon pain of being fined in the discretion of the court. And when so attending, he is, *ex officio*, sergeant-at-arms of the court, and may execute its orders and process in any county in the state.—*Ibid*, § 34.

He is also required to attend the terms of the supreme court during its session, and also to summon two constables of his county to attend during its session with him.—*Ibid*, 124, § 8.

He is required to summon as many marshals and constables to attend the circuit courts, and courts of oyer and terminer, as the presiding judge shall direct, and in case no direction is given him by the presiding judge, he is authorized to summon as many as he shall think necessary, to appear and attend upon the court during its sitting.—*Ibid*, 217, §§ 84, 85.

The district attorney of every county, at least twenty days before the time appointed for the holding of any court of oyer and terminer and jail delivery, in his county, shall issue a precept to be tested and sealed, in the same manner as process issued out of the courts of oyer and terminer and jail delivery, and to be directed to the Sheriff of his county. Every such precept shall mention the time and place at which such court is to be held, and shall command the said Sheriff,

1. To summon the several persons who shall have been drawn in his county pursuant to law to serve as grand and petit jurors at the said court to appear thereat :

2. To bring before the said court, all prisoners then being in the jail of such county, together with all process and proceedings any way concerning them in the hands of such Sheriff :

3. To make proclamation in the manner prescribed by law,

notifying all persons bound to appear at the said court, by recognizance, or otherwise to appear thereat; and requiring all justices of the peace, coroners, and other officers who have taken any recognizance for the appearance of any person at such court, or the examination of any prisoner or witness, to return such recognizances, inquisitions and examinations, to the said court, at the opening thereof, on the first day of its sitting.—2 R. S., 2d ed., 183, § 31; *Laws* 1836, p. 775, § 4.

The Sheriff to whom any such precept shall be directed and delivered, immediately on the receipt thereof, shall cause a proclamation, in conformity thereto, signed by him, to be published once in each week, until the sitting of the court, in one or more of the newspapers printed in the said county.—*Ibid*, 134, § 49.)

Every Sheriff, jailer, coroner, or other executive officer, is also required to serve all process directed to him, for the purpose of being executed from a surrogate's court, in the same manner as if issued by a court of record. And for any neglect or misfeasance in the execution of such process, is subject to the same actions, penalties and proceedings, as if the same had occurred in relation to any process issued by courts of record.—*Ibid*, 156, § 9.

He is also required to serve declarations and process issued by any supreme court commissioner, judge of the county courts, circuit judge or justice of the peace, in any proceeding authorized by law to be held before those officers (excepting civil suits before justices of the peace) and if he wilfully neglects so to do, may be fined by the officer issuing the process, not exceeding twenty-five dollars.—*Ibid*, 455, § 3; *Laws* 1833, 394, § 2.

He is also required to execute warrants issued by the county treasurer of any county, against delinquent collectors, within the time specified by the warrant, and pay over the money collected on the same. If the whole sum due from the collector shall be collected, the Sheriff shall so state in his return; but if a part only, or if no part of such sum shall be collected, the Sheriff shall state in his return the amount levied, if any, exclusive of his fees, and shall also certify that such collector has no goods or chattels, lands or tenements, in his county, from which the moneys, or the

residue thereof, as the case may be, could be levied; and in either case, the county treasurer shall forthwith give notice to the supervisor of the town or ward of the amount due from such collector. If any Sheriff shall neglect to return any such warrant, or to pay the money levied thereon, within the time limited for the return of such warrant; or shall make any other return than such as is above mentioned, the county treasurer shall forthwith proceed to collect, by attachment, the whole sum directed to be levied by such warrant. In case the county treasurer shall fail to collect such moneys by attachment, he shall certify to the comptroller, that he has issued such warrant, stating its contents; that the Sheriff has neglected to return the same, in the manner required by law, or to pay the moneys levied thereon, as the case may be, and that he has pursued the remedy by attachment without effect. The comptroller shall give notice thereof to the attorney-general, who shall immediately prosecute such Sheriff, and his sureties, for the sum due on such warrant, which sum when collected shall be paid to the treasurer of this state, and, by him, on the comptroller's warrant, to the county treasurer. (2 R. S., 2d ed., 390, §§ 13, 15—19.)

Also, whenever any person shall be removed from office, or the term for which he shall have been elected or appointed shall expire, and he shall on demand refuse to deliver over to his successor all the books and papers in his custody as such officer, or in any way appertaining to his office; and if on complaint thereof by his successor to the chancellor, any justice of the supreme court, any circuit judge of the circuit, or the first judge of the county where the person so refusing shall reside, it shall appear that such books or papers are withheld; then, if required by the complainant, such officer shall issue his warrant directed to any Sheriff or constable, commanding them, in the day time, to search such places as shall be designated in such warrant, for such books and papers as belonged to the officer so removed, or whose term of office expired, in his official capacity and which appertained to such office, and seize and bring them before the officer issuing such warrant. (2 R. S., 2d ed., 115, §§ 50, 51, 54.)

And, if any collector of tolls shall neglect to deposite, according to law and the directions of the comptroller, the moneys that, from the abstracts of returns made to the comptroller, he shall appear to have collected for tolls, the comptroller may issue a warrant under his hand and seal, directed to the Sheriff of any county where such collector or any of his sureties may be found, thereby commanding such Sheriff to cause the amount of tolls in the hands of such collector or any of his sureties (or such part thereof as the comptroller shall direct by the warrant) to be made and levied of the goods and chattels, lands, and tenements of such collector; and in case the same shall not be sufficient, then of the goods and chattels, lands and tenements of the sureties of such collector; and to return the money, together with the warrant and his doings thereon, to the comptroller within sixty days from the date thereof. The Sheriff to whom such warrant shall be directed, shall immediately cause the same to be executed, and may demand and collect the same fees for executing the same, as are allowed by law for the service of executions issuing out of the supreme court.—1 R. S., 2d ed., 222, §§ 125, 126.

And in case of proceedings for the collection of demands against ships and vessels, where a warrant is issued by the officer to whom an application has been made; the Sheriff to whom any such warrant shall be directed and delivered, shall forthwith execute the same, and shall keep the ship or vessel and other property seized by him to be disposed of as herein after directed. He shall also within ten days after such seizure, make a return to the officer who issued the warrant, stating therein particularly his doings in the premises; and shall make out, subscribe, and annex thereto, a just and true inventory of all the property so seized; which inventory shall be signed by him and annexed to his return. (2 R. S., 2d ed., 406, § 6.) And when an order is issued by such officer for the sale of said vessel, or the sale of her tackle, apparel and furniture, the statute prescribes: (*Ibid*, 400, § 22,) Within twenty days after the service of such order, the Sheriff shall proceed and sell the vessel so seized by him, her tackle, apparel and furniture, or such part thereof as shall be sufficient to

satisfy the claims exhibited, and the expenses incurred, upon the same notice, in the same manner, and in all respects subject to the provisions of law in case of the sale of personal property upon execution. The Sheriff shall return to the officer granting such order, his proceedings under the same; and the proceeds of such sale, after deducting his fees and expenses in seizing, preserving, watching and selling such vessel shall be retained by such Sheriff in his hands, to be distributed and paid as hereinafter directed. (2 R. S., 2d ed., 408, § 23.) When a distribution shall be made by such officer, pursuant to either of the provisions of said title, ("of proceedings for the collection of demands against ships and vessels,") he shall make an order on the Sheriff, having such proceeds in his hands, directing him to pay the same to the several attaching creditors entitled thereto, according to such distribution, and the same shall be paid accordingly; and all moneys remaining in the hands of such Sheriff, after such payment, and after deducting his commission shall be paid to the owner, agent, consignee, or master of such vessel. (*Ibid.*, 409, § 36.) Every Sheriff to whom a warrant may have been delivered, may be compelled by the officer having jurisdiction over the proceedings thereon, to return the inventory required to be taken by him, and to pay over the monies in his hands pursuant to any order for that purpose, by an order of such officer, and by process of attachment for disobedience thereof, on the application of any creditor.—2 *Ibid.*, 2d ed. 410, § 41.

The Sheriff, coroners and wreck masters, of every county, in which any wrecked property shall be found, when no owner or other person entitled to the possession of such property, shall appear, shall severally have power, and it shall be their duty, to pursue all necessary measures for saving and receiving such property; to take possession thereof, in whose hands soever the same may be in the name of the people of this state; to cause the value thereof to be appraised by indifferent persons; and to keep the same in some safe place, to answer the claims of such persons as may thereafter appear entitled thereto.—1 *Ibid.* 688, § 2.

If the property so saved shall be in a perishable state, so as to

render the sale thereof expedient, it shall be the duty of the officer in whose custody the same shall be, to apply to the first judge of the county, by a petition supported by an affidavit of the facts, for an order authorizing such sale; and if the judge to whom such application shall be made, shall be satisfied that a sale of the property would be most beneficial to the parties interested, it shall be his duty to make the order so applied for.—1 *R. S.* 688, § 3.

If such order be made, the officer having custody of the property directed to be sold, shall sell the same at public auction, at the time and in the manner that shall be specified in the order, and the proceeds of such sale, deducting the expenses thereof, as the same shall be settled and allowed by the judge making the order, shall be paid to the treasurer of the county in which the property shall have been found.—*Ibid*, 2d ed., 689, § 4.

All Sheriffs, coroners and wreck-masters, and all persons employed by them, and all other persons aiding and assisting in the recovery and preservation of wrecked property, shall be entitled to a reasonable allowance as salvage, for their services, and to all expenses incurred by them in the performance of such services, out of the property saved, and the officer having the custody of such property, shall detain the same until such salvage and expenses shall be paid.—1 *Ibid*, 690, § 12.

The whole salvage shall not exceed one half of the value of the property or proceeds on which such salvage shall be charged, and every agreement, order or adjustment allowing a greater salvage shall be void.—1 *Ibid*, 690, § 13.

Every Sheriff, coroner or wreck-master, into whose possession any wrecked property shall come, shall immediately thereafter publish a notice directed to all parties interested, for at least four weeks in succession, in one or more of the newspapers printed in the city of New-York.—1 *Ibid*, 691, § 21.

Public notice of every sale to be made of wrecked property, under the provisions of this title, shall be published by the officer making the sale, for at least two weeks in succession, in one or more of the newspapers printed in the city of New-York. Every such notice shall state the time and place of the sale, and

shall contain a particular description of the property intended to be sold.—1 *R. S.*, 2d ed., 691, § 20.

Every Sheriff, coroner, wreck-master or other officer, who shall detain in his hands any wrecked property, or the proceeds thereof, after the salvage and expenses chargeable thereon shall have been agreed to or adjusted, and the amount thereof shall have been paid or offered to be paid to him, or who shall have been guilty of any fraud, embezzlement or extortion, in the discharge of his duties, or who shall, in any manner, violate the provisions of this title, shall forfeit treble damages to the party injured, and shall be deemed guilty of a misdemeanor.—1 *Ibid.*, 691, § 4.

The Sheriff is also required to execute orders issued by the governor, directing the removal of intruders on public lands, (1 *ibid.*, 55 § 5;) and also to execute warrants issued by one of the judges of the court of common pleas, directing the occupants of public lands resold to be removed. (1 *Ibid.*, 191 § 57.) And he is to retain such warrant in his hands, and if any person so removed, shall return, to settle or reside upon such lands, without the consent of the surveyor-general, such person shall be forthwith removed by the Sheriff pursuant to the warrant.—1 *Ibid.*, 191, § 58.

He is also required to execute warrants issued by the president of any regimental or brigade court martial, for any contempt to such court martial, and keep the party in close confinement until he is discharged by law. (1 *R. S.*, 2d ed., 305, § 31.) He is also to receive into his custody any delinquents fined by the said courts, and keep them until they shall be discharged in due course of law.—1 *Ibid.*, 309, § 15.

The Sheriff, clerk, or first judge of each county who shall receive a notice of an election, shall without delay, give notice in writing of such election, to one of the inspectors of elections in each town or ward in his county.—*Ibid.*, 120, § 8.

Such Sheriff, clerk, or first judge shall also cause a copy of the notice to be published in all the public newspapers printed in his county, if there be any; if not, then in some newspaper printed in an adjoining county, once in each week, from the date of such notice until the election.—1 *Ibid.*, 120, § 9.

It shall be the duty of every inspector of elections, Sheriffs, constables and justices of the peace within this state, knowing that an offence has been committed under this act, or having good reason to believe that an offence has been committed, to give information thereof to the district attorney of the county in which the offence shall have been committed, whose duty it shall be to adopt efficient measures for the punishment of all persons violating the provisions of this act.—*Laws 1839, chap. 389, § 17, p. 366.*

No person shall wilfully disturb, interrupt, or disquiet any assemblage of people met for religious worship, by profane discourse, by rude and indecent behaviour, or by making any noise either within the place of worship, or so near to it as to disturb the order and solemnity of the meeting; nor shall any person within two miles of the place where any religious society shall be actually assembled for religious worship expose to sale or gift, any ardent or distilled liquors, or keep open any huckster shop in any other place, inn, store or grocery, than such as have been duly licensed, and in which such person shall have actually resided or carried on business; nor shall any person, within the distance aforesaid, exhibit any shows or plays, unless the same shall have been duly licensed by the proper authority; nor shall any person within the distance aforesaid, promote, aid, or be engaged in any racing of any animals, or in any gaming of any description; nor shall any person obstruct the free passage of any highway to any place of public worship, within the distance aforesaid.—1 *Ibid.*, 673, § 51.

It shall be the duty of all Sheriffs, and their deputies, coroners, marshals, constables, and other peace officers, who may be present at the meeting of any assembly for religious worship, which shall be interrupted or disturbed in the manner herein prohibited, to apprehend the offender, and take him before some justice of the peace, or other magistrate authorized to convict as aforesaid, to be proceeded against according to law.—1 *Ibid.*, 674, § 53.

Fourteen days before the holding of any circuit court, or sittings, or of any special court of oyer and terminer, when no

circuit is appointed to be held at the same time, or of any court of common pleas, or mayor's court, and in the city and county of New-York before the holding of the superior court of law, or the court of general sessions, the clerk of the county in which such court is to be held, shall draw the names of thirty-six persons, to serve as jurors at such court, and any number in addition thereto that shall have been ordered according to law.—2 *R. S.*, 2d ed., 334, § 24.

At least six days notice of such drawing shall be given by such clerk by publishing the same in a newspaper of the county, if there be any, and if not, by affixing such notice on the outer door of the house where the court for which such jury is to be drawn, is about to be held. A copy of such notice shall also be served on the Sheriff of the county, and upon the first or some other judge of the county courts, at least three days previous to the time appointed therein for drawing.—2 *Ibid.*, 334, § 25.

At the time so appointed, it shall be the duty of the Sheriff of the county in person, or by his under-sheriff, and of the first or other judge of the county on whom such notice shall have been served, to attend at the clerk's office of the county, to witness the drawing of such jury.—2 *Ibid.*, 334, § 26.

If the Sheriff or county judge so notified do not appear, the clerk shall adjourn the drawing of such jury for the next day, and shall, by written notice, require the delinquent Sheriff or judge, or some other county judge, or any two justices of the peace, to attend such drawing on the adjourned day.—*Ibid.*, 334, § 27.

If at the adjourned day, the Sheriff or under-sheriff, and a county judge, or justice of the peace, appear, or if any two county judges or justices of the peace appear, but not otherwise, the clerk shall proceed, in the presence of the officers appearing, to draw the jury.—2 *Ibid.*, 334, § 28.

A list of the names of the persons so drawn with their additions and places of residence, and specifying for what court they were drawn, shall be made and certified by the clerk and the attending officers, and shall be delivered to the Sheriff of the county.—2 *Ibid.*, 335, § 29.

The Sheriff shall summon the persons named in such list, to attend at such court, at least six days previous to the sitting thereof, by giving personal notice to each person, or by leaving a written notice at his place of residence, with some person of proper age. He shall return the said list to the court, at the opening thereof, specifying those who were summoned, and the manner in which each person was notified.—2 *R. S.*, 2d ed., 335, § 30.

It shall be the duty of the county clerk and of the Sheriff, to furnish any person applying therefor, and paying the price allowed by law for the same, a copy of the list of jurors drawn to attend any court.—2 *Ibid.*, 335, § 31.

The court to which any list of jurors so drawn shall be returned by the Sheriff, shall impose a fine, not exceeding twenty-five dollars for each day that any person duly summoned as a juror, shall, without any reasonable cause, neglect to attend. But if it appear by such return that any person was notified by leaving a written notice at his place of residence, the court shall suspend such fine, until the defaulting juror shall be notified, as provided by law.—2 *Ibid.*, 335, § 32.

Any judge holding any sittings, or circuit court in the city and county of New-York, the judge or judges holding the superior court of law, the judge holding the court of common pleas, or holding the court of the general sessions of the peace, in the said city and county, may, during the continuance of any such court, as often as it may be necessary, order a new panel of thirty-six jurors to be drawn to attend such court. Upon such order being served on the clerk of the city and county of New-York, he shall proceed to draw the jurors so ordered, and deliver a list of the names drawn to the Sheriff, in the same manner as provided in relation to other jurors. (2 *R. S.*, 2d ed., 337, § 43.) And the Sheriff shall summon such jurors in the manner directed respecting the first jury drawn, and shall in like manner return the names of those summoned to the court.—2 *Ibid.*, 337, § 44.

And when special juries are ordered to be struck, it is enacted: the Sheriff shall summon the persons whose names are contained

on the lists delivered to him by the clerk, in the same manner as other juries are required to be summoned, and shall return the names of those summoned to the court at which they are required to appear as jurors.—2 *R. S.*, 2d ed., 339, § 49.

Whenever a sufficient number of jurors, duly drawn and summoned, do not appear, or cannot be obtained, to form a jury the court may order the Sheriff to summon the by-standers, or from the county at large so many persons qualified to serve as jurors, as shall be sufficient; and the Sheriff shall summon the number so ordered, from among the inhabitants of the county duly qualified to serve as jurors in the cause, and return their names to the court.—2 *R. S.*, 2d ed., 339, § 54-5.

It shall not be a good cause of challenge to the panel or array of jurors in any cause that they were summoned by the Sheriff, who was a party, or interested in such cause, or related to either party therein, unless it be alledged in such challenge and be satisfactorily shown, that some of the jurors drawn by the clerk were not summoned, and that such omission was intentional.—2 *Ibid.*, 340, § 57.

Neither is it cause of challenge of an array of jurors that two sets of jurors are drawn at the same time from the jury box, for two distinct courts, if they are kept entirely separate, and a distinct panel of each is given to the Sheriff. (4 *Wend. Rep.*, 675.) But when a challenge to the array was made because the clerk drew out seventy two names from the box and put them in a list, and then designated thirty-six names so drawn, to be a panel for the circuit, and the other thirty-six a panel for the court of common pleas, and the defendant denied the truth of the fact, and offered to join issue thereon, but the judge refused to quash the *venire*, or pass the cause, and no issue was joined on the challenge; and the plaintiff, under these circumstances, refused to bring the cause on to trial; it was held by the supreme court, (9 *John. Rep.*, 260,) that the cause alledged for the challenge was sufficient, and that the judge ought not to have overruled it. Nor is it cause of challenge to the array that the jurors were drawn more than *fourteen days* before the sitting of the court at which

they are to serve. (4 *Wend. Rep.*, 675.) They must be drawn at least fourteen days (2 *R. S.*, 2d ed., 334, § 24,) before the court; but it need not be precisely fourteen days. The matter seems to be left in some degree to the discretion of the clerk. In some counties a longer time than this may be highly expedient, if not necessary.

Either party, plaintiff or defendant, has a right to challenge the array; and partiality, or some default in the Sheriff or his under-officer who arrayed the panel are good causes of challenge. (2 *Tidd*, 779.) If the facts alledged in the challenge are denied to be true, two triors are appointed by the court out of the panel, (*Co. Litt.*, 158,) or, perhaps, any two individual persons named by the court. If the triors pronounce the causes of challenge unfounded, the trial proceeds. If the facts are admitted, but are deemed insufficient, the court adjudges on them, and either quashes the array, or overrules the challenge. Since our statute authorizing the clerk to array the jury, a challenge lies in it, for partiality, or default in the clerk, who for many purposes, is substituted for the Sheriff in selecting and arraying the jury.

When a Sheriff, or other officer is authorized to select and summon a jury, he cannot after summoning a person to serve as a juror, discharge him from attendance, and summon another in his stead; if the officer, after hearing his excuses, summons the juror, he can subsequently be discharged only by the court before whom he is required to attend. (8 *Wend. Rep.*, 47.) Although the law has given to the Sheriff, or his deputy, the power of selecting the jurors in the first instance, when that selection has once been made, and the jurors have been regularly summoned to attend the court, he has no authority to change them, and to substitute others in their places. This would lead to tampering with officers and to alterations in the panel of jurors after their opinions had been ascertained; and might produce serious injury to the rights of parties. After the Sheriff has selected and summoned the jurors his powers on that subject are spent; and if he afterwards discharge those who have been regularly summoned, and substitute others in their places, either party has a right to

object to the regularity of the proceeding.—*per Ch. Walworth*, 8 *Wend. Rep.*, 63.

By an act passed April 27, 1833, and incorporated in the second edition of the Revised Statutes, (1 *R. S.*, 2d *ed.*, 411,) “to subject certain debts due to non-residents to taxation,” it is, among other things provided that, when it shall appear by the return of any collector, made according to law to a county treasurer, that any tax imposed on a debt owing to a person not residing in this state, remains unpaid, such county treasurer shall issue his warrant to the Sheriff of any county in this state, where any real or personal estate of such non-resident creditor may be found, commanding him to make of the goods and chattels and real estate of such non-resident the amount of such tax as specified in a schedule to be annexed to the said warrant, together with the sum of one dollar for the expense of issuing such warrant, and to return the said warrant to the treasurer issuing the same, and to pay to him the money which shall be collected by virtue thereof, except the said Sheriff’s fees, by a certain day therein to be specified, not less than sixty days from the date of such warrant.—1 *R. S.*, 2d *ed.*, 415, § 17.

Such warrant shall be a lien upon and shall bind the real and personal estate of the non-residents against whom the same shall be issued, from the time an actual levy shall be made upon any property by virtue thereof; and the Sheriff to whom such warrant shall be directed, shall proceed upon the same, in all respects, with the like effect, and in the same manner as prescribed by law in respect to executions against property, issued by a county clerk upon judgments rendered by a justice of the peace, and shall be entitled to the same fees for his services in executing the same, to be collected in the same manner.—1 *R. S.*, 2d *ed.*, 415, § 20.

In case of the neglect of any Sheriff to return such warrant, according to the directions therein, or to pay over any money collected by him in pursuance thereof, he shall be proceeded against in the supreme court, by attachment, in the manner, and with the like effect, as for similar neglects in reference to an exe-

cution issued out of the supreme court in a civil suit, and the proceedings thereon shall be the same in all respects.—1 *Ibid*, 2d ed. 415, § 21.

It shall be the duty of the Sheriff of every county to keep an office in some proper place in the city or village in which the county courts are held; of which he shall file a notice in the office of the clerk of the county. If there be more than one place of holding courts, the notice shall specify in which his office will be kept, or it may specify that an office will be kept in all such places if he thinks proper. Such office shall be kept open for the transaction of business every day in the year except Sunday, and the day observed as the anniversary of American Independence, in the city of New-York, from nine o'clock in the forenoon to four o'clock in the afternoon, and in all other parts of the state from nine to twelve o'clock in the forenoon, and from two to five o'clock in the afternoon.—2 *R. S.*, 2d ed., 214, § 56.

These are the principal provisions, dependent upon statute, except some few, which will be adverted to hereafter, that particularly concern the Sheriff, and are directly connected with his office. They are plain and simple in their requirements; admit of no little discussion; and have seldom been brought before our courts for adjudication.

But it is as the immediate executive minister of our courts of justice, in the service and execution of their ordinary writs and process, that the Sheriff fulfills his more frequent engagements, and answers the particular purposes for which he was elected; and to his duty in these respects, we shall now turn our our attention.

With regard to process issuing from the courts, the Sheriff's duty is to execute it, not to dispute its validity. It is the duty of an officer, in which he will be protected, to obey every precept put into his hands for service, without investigating the cause of action. Consequently his knowledge of facts, evincing the existence or want of a cause of action does not effect his liability. Though the writ be illegal, the Sheriff is protected and indemnified in serving it. (5 *Rep.* 64, 9 *ib.* 68.) From this general

rule, however, one exception must be taken and allowed. He must judge at his peril whether the court from whence the process issued, has, or has not jurisdiction of the cause. (10 Rep. 76; 2 Wils. 384.) And even in this case, the supreme court has decided (5 Wend. Rep. 170—231.), that a ministerial officer is protected in the execution of process, whether the same issue from a court of general or limited jurisdiction, although such court may not in fact have jurisdiction of the case; provided that on the face of the process it appears that the court has jurisdiction of the subject matter, and nothing appear in the same to apprise the officer but that the court has also jurisdiction of the person of the party to be affected by the process. And this protection is the same although the officer issuing such process be but an officer *de facto*. The officer is not bound to examine into the validity of the proceedings of the court or the regularity of its process. (10 John Rep. 138; Stra. 710.) The party who extended the jurisdiction of the court might be liable; and, *e converso*, a party who sues out and delivers to the Sheriff a valid process, is not responsible for any irregularity of the Sheriff in executing it, unless it appears, positively and affirmatively, that the Sheriff acted by his orders; for the party is answerable only for the validity of the process, and for good faith in suing it out. (9 John Rep. 117.) And no action can be maintained against the Sheriff for not executing a void process, or an execution not warranted by the judgment on which it is awarded; because the party in whose favor the process, or execution issued, could not have suffered by such neglect. (8 Mass. Rep. 79.) Neither will an action lie, at the suit of any individual, against an officer, either for misfeasance or nonfeasance unless the plaintiff can shew a special damage peculiar to himself. (19 John R. 223.) And in all actions for breach of duty, and for all civil purposes, the act of the deputy is to be considered as the act of the Sheriff himself; though the action may be brought against either, at the election of the party interposed.—2 Term Rep. 148; 1 Mass. Rep. 530, 12 *ib.* 449, 18 *ib.* 62; 19 John Rep. 227; 9 Wend. Rep. 47.

Thus it appears to be a well established principal that, execu-

tive officers, obliged by law to serve legal writs and processes, are protected in the rightful discharge of their duty; provided these precepts be sufficient in point of form, and issue from a court or magistrate having jurisdiction of the subject matter; and if the magistrate proceed unlawfully in issuing the process, he, and not the executive officer, will be liable for the injury consequent upon such act. Thus if an execution should issue from a court having jurisdiction, against the body of an executor or administrator, on a judgment against the estate of the deceased, the officer would not be a trespasser in arresting the body of the executor or administrator. (4 *Mass. Rep.*, 232.) But if an officer execute a process issuing from a court or magistrate who has no jurisdiction of the person against whom it issues, or of the subject matter of it, and this want of jurisdiction appear upon the face of the process, such officer will be liable as a trespasser. Thus if the officer take the property of another in pursuance of the order of a court having no legal authority to issue it, he will be liable.—14 *Mass. Rep.*, 210.

By the Revised Statutes it is enacted: When process of any description shall be delivered to a Sheriff to be executed, he shall give to the person delivering the same, if required by him, and on payment of the fee allowed by law, a minute in writing signed by such Sheriff, specifying the names of the parties in such process, the general nature thereof, and the day of receiving the same.—2 *R. S.*, 2d ed., 358, § 78.

Every Sheriff, or other officer serving process, shall upon the request of the party served, and without charging or receiving any compensation therefor, deliver to such party a copy thereof.—*Ibid.*, 358, § 79.

Every Sheriff, or other officer to whom any process shall be delivered, shall execute the same according to the command thereof, and shall make due return of his proceedings thereon, which return shall be signed by him. For any violation of this provision, such Sheriff or other officer shall be liable to an action at the suit of any party aggrieved, for the damages sustained by

him, in addition to any other fine, punishment or proceeding, which may be authorized by law.—*Ibid*, 358, § 80.

All process issued out of the supreme court, except attachments and writs of *habeas corpus*, shall be returned by the several Sheriffs, coroners, and other officers to whom the same may have been delivered as follows :

1. By the Sheriffs and other officers of the several counties composing the first and second senate districts, to the office of the clerk of the supreme court in the city of New York :

2. By the Sheriffs and other officers of the several counties composing the third and fourth senate districts, (excepting the counties of St. Lawrence, Otsego and Herkimer,) to the office of the clerk of the said court in the city of Albany :

3. By the Sheriffs and other officers of the county of St. Lawrence, Otsego and Herkimer, and the several counties composing the fifth senate district, the counties of Chenango, Broome, and Chemung, in the sixth district, and Onondaga and Cortland in the seventh district, to the office of the clerk of the said court in the city of Utica.—2 *R. S.*, 2d ed., 358, § 81 ; *Laws of 1836*, p. 635.

No return of any such process made to any other office than that required in the last section, shall excuse any Sheriff or other officer from the liabilities, penalties, fines or proceedings prescribed by law, or by the rules and practice of the supreme court, for a neglect to make a return according to law.—*Ibid*, 358, § 82.

After the first day of September (in 1830) the Sheriffs and coroners of the several counties of Chautauque, Cattaraugus, Erie, Niagara, Orleans, Genesee, Wyoming, Allegany, Steuben, Livingston, Monroe, Ontario, Wayne, Yates, Seneca and Cayuga, shall return all process issuing out of the supreme court, except attachments and writs of *habeas corpus* to the office of the clerk of the said court, in the village of Geneva, (*Laws of 1830*, chap. 104,) and shall return all attachments and writs of *habeas corpus*, at the times and in the manner now prescribed by law.—2 *R S.*, 2d ed., 359, § 83.

No return made by any Sheriff or coroner of either of the counties mentioned in section fifth (the section immediately above) of this act, of any process issuing out of the supreme court, to any other office than the one required by this act, shall be deemed sufficient to excuse such officer from the pains and penalties for a neglect to make returns according to law and the rules of the said court.—2 *R. S.*, 2d ed., 359, § 84.

The Sheriffs of the counties of Tompkins and Tioga shall after the tenth of April, (in 1830,) return all process issued out of the supreme court to the said office at Geneva, as other Sheriffs are required to do by the fifth section of the act hereby amended.—2 *Ibid.*, 359, § 85.

The third of these provisions is in exact accordance with the principles of the common law, and confirm the original requirement. (*Co. Litt.*, 213; *Dalton*, 100.) By requiring, as in the two first, a writing or receipt from the Sheriff, the remedy is expedited against him for not executing such writ, or making a false return as to the time the writ came to his hands.

The Sheriff to whom any writ shall be directed and delivered, ought to execute it with all speed and secrecy, and pursue the directions therein contained; else he cannot justify under it. When directed to attach the goods, estate, or person of a debtor, if by the delay of such officer having such warrant, the debtor absconds, or his goods are removed out of the jurisdiction of such officer, or are sold, or such goods or estate are by some other officer seized by virtue of lawful process, the officer thus delaying becomes liable to an action for such, his delay.—*Dalton*, 110.

The nature of an arrest, the manner of it, the duties of the Sheriff in making it, the privileges from arrest, &c. &c., will more properly be considered in another chapter. We would merely here remark that, the Sheriff is bound to serve process notwithstanding any claim of privilege. (1 *Wend. Rep.*, 32; 18 *John. Rep.*, 52.) Thus a Sheriff has been holden not liable to an action for arresting a certified bankrupt, a peer, or a discharged insolvent debtor, although these individuals are, by the English law, all privileged from arrest.—2 *Doug. Rep.*, 671.

Whenever a Sheriff or other public officer authorized to execute any process delivered to him, shall find or have reason to apprehend that resistance will be made to the execution of such process, he shall be authorized to command every male inhabitant of his county, or as many as he shall think proper, to assist him in overcoming such resistance, and if necessary, in seizing, arresting and confining the resisters, their aiders and abettors, to be dealt with according to law.—2 *R. S.*, 359, § 86.

Such Sheriff or other officer shall certify to the court from which such process issued, the names of the resisters, their aiders, and abettors, to the end that they be proceeded against for their contempt of such court.—2 *Ibid.*, 359, § 87.

Every person commanded by a Sheriff or other officer to assist him in the execution of process as herein provided, who shall refuse, or without lawful cause, neglect to obey such command, shall be deemed guilty of a misdemeanor, and subject to fine and imprisonment.—2 *Ibid.*, 359, § 88.

In case it shall appear to the governor that the power of any county will not be sufficient to enable the Sheriff thereof to execute process delivered to him, he shall, on the application of such Sheriff, order such a military force from any other county or counties of this state, as shall be necessary.—2 *Ibid.*, 359, § 89.

All these provisions, salutary as they are, are strictly in accordance with the old cases. The law is mild in its mandates, but it will be obeyed. It knows not, it presumes not, and it will suffer none of its ministers to know or presume, any power superior to its own. If any man, however great, says Lord Coke, (2 *Inst.*, 193,) might resist the Sheriff in executing the king's writ, it would be regular and justifiable in the Sheriff to return such resistance; but such a return would redound greatly to the dishonor of the king, and his crown; what redounds to the dishonor of the king and his crown is against the common law; and, therefore, if necessity require it, for the due execution of the king's writs, the Sheriff may by the common law take the *posse comitatus* to suppress such unlawful resistance.*

* In the matter of *Adams, Sheriff, vs. Supervisors of the county of Albany.*

When necessity requires it, the Sheriff not only may, but must at his peril employ the strength of his county. In the reign of Edward the second, a Sheriff had the king's writ to deliver the possession of the land; the Sheriff returned that he could not execute the writ by reason of resistance. This was considered as an insult upon the authority with which he was invested; and because he took not the power of the county, he was amerced at twenty marks.—2 *Inst.*, 194.

The case of *Coyles v. Harten* (10 *John. Rep.*, 85,) in the supreme court, is considered as a leading case, and presents a very strong instance, not only of the authority of the Sheriff, but how far his constructive presence extends. It was an action of assault and battery and false imprisonment. The defendant pleaded the general issue; but by the consent of the attorney of the plaintiff, was to be at liberty to give any special matter in evidence at the trial. The defendant was Sheriff of the county of Orange, and had a warrant from a justice of the peace to apprehend five persons, on a charge of having, in a riotous and tumultuous manner assembled together, and of having committed an assault and battery on *Thomas Edsall*. A witness for the plaintiff testified that the defendant called on the witness to assist him in apprehending certain persons against whom he had a warrant, and who were said to have taken refuge in the house of the plaintiff, near the outlet of the *Drowned lands*, and who were determined to resist by force the execution of the warrant. When the Sheriff and witness arrived at the plaintiff's house, it was found that the men against whom the warrant was issued had effected their escape. Some persons who were then present, charged the plaintiff with having assisted the men in making their escape, and after some conversation between the plaintiff and defendant, the defendant told the plaintiff he must go with him to Goshen, before a magistrate; and the plaintiff got his horse and went with the defendant to Goshen. The plaintiff having rested his cause, the defendant

on motion for mandamus Justice Cowen decided that the Sheriff had no claim upon the county for provisions furnished to those he had called to his aid in serving process upon Van Rensselaer's tenants.

called the magistrate who issued the warrant, as a witness. He proved the issuing of the warrant, &c., and stated that on the evening of the same day the defendant brought the plaintiff to the witness, and charged the plaintiff with having refused to aid him in apprehending the men named in the warrant, and with having assisted them to make their escape; and the witness bound over the plaintiff to answer to the charge at the next court of general sessions of the peace. Another witness for the defendant testified that, he was present at the plaintiff's house when the defendant came with the warrant, and read over the names of the men against whom it was issued, and asked the plaintiff if they were there, and the plaintiff said he believed some of them were there. A number of men were collected in a room above stairs, making a great noise, and threatening to sacrifice any person who should come up. The defendant requested the plaintiff to go up stairs, and persuade the men named in the warrant to deliver themselves up. The plaintiff said he would not go up for a thousand dollars. The defendant then requested the plaintiff to go to the foot of the stairs, and speak to them; but the plaintiff refused to do so, and said the defendant might do his duty, for he had nothing to do with the men and would not interfere. It appeared that the plaintiff was superintendant of the works at the outlet of the *Drowned lands*, and that the persons against whom the warrant was issued were laborers employed by him, and that he had been paying and discharging them. The defendant asked the plaintiff to give him the names of the persons collected in the room up stairs; but the plaintiff made no answer. The defendant then said he was determined to take the men on the warrant, and for that purpose would return to Goshen, and bring with him a greater force. The defendant then commanded the plaintiff, the witness, and two others to guard the house during his absence, and prevent the escape of the men. The defendant placed them at different posts round the house, but the witness did not recollect that any station was assigned to the plaintiff. During the absence of the defendant, in the dusk of the evening, the witness, hearing a great noise, left his post, and

found the plaintiff engaged with one of the other persons placed as a guard, in a violent quarrel. During this dispute, which drew the other guard also from his post, the men who were up stairs made their escape from the other side of the house. Three of the persons left by the Sheriff as a guard, but not the plaintiff, pursued them but without success. When the Sheriff returned and found that the men had escaped, the conversation, as before stated, took place between him and the plaintiff, and the defendant and he took the plaintiff to Goshen. The judge stated to the jury that, the mere refusal of the plaintiff to aid the Sheriff would not justify the latter in arresting him without a warrant, even for the purpose of taking him before the magistrate. That the Sheriff could not delegate to the persons left at the plaintiff's house the power of arresting, during his absence, the men against whom the warrant had been issued. The plaintiff, therefore, so far from being bound to prevent the men from escaping, would have rendered himself liable to an action if he had attempted to stop them. That, in his opinion, the plaintiff was clearly entitled to recover, but he did not think it a case for exemplary damages; that there was no ground to impute malice to the defendant, but on the contrary, his conduct evidently proceeded from an error of judgment alone. But the plaintiff, having sustained an injury was entitled to compensation, and the question of damages was exclusively for the consideration of the jury. The jury found a verdict for the plaintiff for fifty-one dollars. A motion was made to set aside the verdict as against law and evidence.

Kent, C. J., delivered the opinion of the court. The question of justification turned upon this fact, whether the plaintiff, contrary to his duty, aided or assisted the rioters in their resistance to the execution of the warrant, or in the escape. There were several and some of them strong circumstances, from which the jury might have inferred that fact against him; and if so the defendant was justified in arresting him. The Sheriff is, *ex officio*, a conservator of the peace; and it is not only his right, but his duty to arrest all persons with their abettors who oppose the execution of process. And, as *Sir Matthew Hale* has observed, (2

Hale's P. C., 85,) these ministers of public justice should have the greatest protection and encouragement in the due execution of their office. But the case is not such as to require the verdict to be set aside on the ground merely of being a verdict against evidence provided the law was laid down correctly to the jury by the court. The judge told the jury that the plaintiff was clearly entitled to recover; I apprehend that this expression was much too strong for the case; but still it was mere opinion, and left the jury to exercise their own judgment upon the facts. But when the jury were told that the defendant could not authorize the persons, left in the house in his absence, to arrest the rioters, and that it would have been unlawful to oppose their escape, I think there was a misdirection in point of law, and which very probably determined the verdict. The defendant had come to the place to execute the process, and meeting with resistance in the plaintiff's house which he had not strength to subdue, he went back to Goshen for assistance, and directed the plaintiff and others to aid and assist in preventing, in the meantime, the escape of the rioters during his temporary absence. The Sheriff may take the power of the county, if necessary, after resistance, to execute process. Every man is bound to be aiding and assisting upon order or summons, in preserving the peace, and apprehending offenders, and is punishable if he refuses. The Sheriff is, *quodam modo*, present by his authority, if he be actually engaged in efforts to arrest *dum feros opet*, and has commanded, and is continuing to command and procure assistance. When he is calling on the power of the county, or a requisite portion of it to enable him to overcome resistance, it would be impossible that he should be actually present in every place where power might be wanting. The law is not so unreasonable as to require the officer to be an eye or ear witness of what passes, and to render all his authority null and void except when he is so present. He could not, upon that construction, use the power of the county with effect, and it would be attended with great inconvenience and danger to the administration of justice. The question in these cases does not turn upon the fact of distance so long as the She-

riff is within his county, and is *bona fide* and strictly engaged in the business of arrest. In the execution of civil process, where there was no resistance, it was held by Lord Mansfield, in *Blatch v. Archer* (*Cowp. Rep.*, 63,) that the officer must be the authority to arrest, but he need not be the hand, nor present, nor in sight, nor in any exact distance prescribed. It is a question of fact for a jury, whether the officer was upon that business, and so *quodam modo*, present. The necessity of the doctrine of constructive presence, applies with much more force, and ought to be received with much more liberality, when the officer is serving criminal process and meets with resistance. There are many instances in the books of persons convicted of felonies committed by them, as aiders and abettors, though far beyond the power of seeing or hearing the actual perpetration of the act. The cases proceed upon the principle of mutual concert, aid, and protection in the execution of one common design, and the doctrine equally applies to this case where the Sheriff calls in aid to execute process. He is present in judgment of law, by his authority, and every person who aids him, in pursuance of his summons, acts under the same protection, and the same responsibility as if the Sheriff stood in his view. This we consider to be a sound and essential principle, and if it had been stated to the jury, we cannot say that they would have acquitted the defendant, on the ground that the plaintiff had, contrary to his duty, aided or countenanced the escape of the rioters during the absence of the Sheriff. This case, therefore, ought to be reviewed by another jury, and a new trial is, accordingly, awarded.

To entitle a party to the defence that he acted in aid, or assistance, or by the command of the Sheriff, there should be a request from the officer, or it should appear that aid or assistance was necessary, from which a request might be implied. And where the Sheriff prosecutes for a personal injury committed on him while in the execution of the duties of his office, it would seem proper, if not necessary, that he should produce on the trial the process under which he acted; otherwise the result may be that he himself was the original trespasser.—5 *Wend. Rep.*, 237.

And, notwithstanding the statute, a person acting in aid of an officer, and by his commandment in overcoming resistance to the execution of process, is a trespasser, if the officer is not justified by the process; as where on an action against A, property is attempted to be taken from the possession of B, who resists the officer, and a by-stander, commanded to assist, forcibly lays hands upon B to overcome his resistance; if it turns out that the property is the property of B, and not of A, the by-stander is liable for an assault and battery. (10 *Wend. Rep.*, 137.) The by-stander obeys at his peril; if the officer has authority to do the act, for the doing of which aid is required, the by-stander is bound to obey and is justified, and if he refuses or neglects, is guilty of a misdemeanor, and subject to fine and imprisonment; on the contrary, if the officer has no authority to do the act, the by-stander is not bound to obey, and if he yields obedience is a trespasser. The only difficulty in this case appears to be, that, a by-stander when called upon, and perhaps in a sudden emergency, to assist an officer, has no possible means of ascertaining whether that officer has authority or not. If he obeys, he may be prosecuted for trespass in a civil suit, and also be indicted; and if he disobeys, the statute announces his fate, he is to be indicted for a misdemeanor, and fined and imprisoned.

But not only is the Sheriff bound to execute all process delivered to him according to its command, but it is equally compulsory upon him to return his proceedings thereon signed by him; and for not so doing he is liable to an action at the suit of any party aggrieved for the damages sustained by him, in addition to any other fine, punishment or proceeding, which may be authorized by law.—2 *R. S.*, 2d ed., 358, § 80.

A return may be considered as the certificate of the Sheriff, to whom any process is directed, stating what he has done in obedience to the commands therein given, or the reason of his neglect in not fulfilling them, and is a material part of the Sheriff's duty; as the return ought to be, both in form and substance, according to law; otherwise the officer may be subjected to punishment, and the party employing him to damages. (*Dalton.*) All

that the officer is commanded by the writ to do, he must perform, and no more, or show a sufficient reason for his neglect; and make return of his precept to the proper court on or before the day mentioned therein for its return. (*Dalton*; 5 *Comyn's Dig.*, 444.) The return must always be attested by the officer and must be certain to every intent. (*Dalton*, 168.) And a return by the deputy Sheriff in his own name, as deputy Sheriff, is not a return by the Sheriff. (1 *Caines' Rep.*, 61.) It is not, in pursuance of the statute, a return by the officer to whom the writ was directed; and when a man acts in contemplation of law, by the authority and in the name of another, if he does an act in his own name, although alledged to be done by him as attorney, it is void.

The Sheriff cannot refuse to obey or return process for non-payment of fees; and he has been held indictable for refusing to execute a *fi. fa.* until those fees were paid.—2 *Stra. Rep.*, 1262; 1 *Salk. Rep.*, 184.

A Sheriff's return is not traversable, but he may be subject to an action for a false return.—*Loft.*, 372.

If the return of the Sheriff on an execution levied upon lands, in effect show that there were no goods or chattels belonging to the defendant it is good. But the Sheriff's return is not essential to the title of the purchaser. Such title is not created by, nor dependant upon the return, but is derived from the previous sale made by the Sheriff by virtue of his writ. It is sufficient for the purchaser that the Sheriff has competent authority, and sells and executes a deed to him. The proceedings in case of an *intent* upon an *elegit* do not apply to our writ of *feri facias*. On the writ of *elegit* no sale can be had; but the Sheriff takes an inquisition by a jury, who set off moities by metes and bounds. The inquisition is then necessary to be returned; and together with the return constitutes the title. On a *feri facias*, the sale and the Sheriff's deed are sufficient evidence of title. If the purchaser can show that the Sheriff had authority to sell it is enough; he need not look further.—5 *Cow. Rep.*, 529.

In *mesne* process the officer may return a rescue of the person arrested or goods seized; but not so on execution. And the rea-

son of the difference is said to be, that, in *mesne* process he is not obliged to call in aid the power of the county; but in doing execution he must, if necessary. (4 *Bac. Abr.*, 401.) But if one taken on *mesne* process be committed to prison, the Sheriff may not return a rescue; for the law presumes the Sheriff able to keep him there. (*Cro. Jac.*, 419.) So a rescue of one brought out of jail by *habeas corpus* between judgment and execution will not excuse the Sheriff. (1 *Str. Rep.*, 429.) So it is sufficient, on *mesne* process, to excuse the Sheriff in an action against him for an escape, that the defendant forcibly rescued himself, provided the fact be so; but if the defendant escape owing to any negligence of the officer, this will not justify the return of a rescue. (1 *Holt's Rep.*, 537; *Com. Dig.*, *tit. Rescues*.) And if a return of a rescue do not show where the defendant was arrested it is insufficient, for perhaps it was out of the county. (*Moore*, 422; 6 *Bac. Abr.*, 94.) As where a latitat was awarded against J. S., the Sheriff returned a rescue on such a day, but did not mention any place where the rescue was made; the court adjudged it a void return, because it did not appear that either the arrest or rescue was within the Sheriff's jurisdiction. But if it had appeared to have been done in the county, it should be intended to have been within the Sheriff's bailiwick. (*Yelv. Rep.*, 51.) So a return made by the Sheriff that the person arrested was rescued out of the custody of the bailiff has been held to be bad; the return must be that he was rescued out of *his* custody. (*Barnes's Rep.*, 429.) The Sheriff's return of a rescue, as in other cases is not traversable; and if the plaintiff suggest any fraud or falsehood he is driven to his action for a false return. It is therefore necessary that the return of a rescue should be certain.—*Yelv.*, 51; *Barnes*, 429.

If the defendant has been taken and is discharged on a bail bond, or on common bail, or on endorsing his appearance, the return is generally *cepi corpus*; if he be in custody, it is *cepi corpus in custodia*. (*Gra. Prac.*, 157.) If he be rescued, or superseded, or delivered over on *habeas corpus*, the return briefly states the facts. But if the party have been taken at all, the Sheriff is

bound to return *cepi corpus*, and when the Sheriff returned a defendant "*languidus*," it was held that such a return could not be received, and that the plaintiff was right in regarding it as a general return of *cepi corpus*; the return of *languidus* being founded on the peculiar structure of the English courts and having no relation whatever to our practice. (2 *Cow.*, 472.) And when the Sheriff, on being raled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody, the plaintiff was ordered to proceed as if the Sheriff had returned *cepi corpus*; and the court set aside an attachment issued against the Sheriff for not returning the writ.—*Marsh.*, 289.

Although the officer is required by the command of the writ to return it on the day mentioned in the body of it for that purpose, yet, before any proceeding by attachment can be founded upon his omission or neglect to do so, a notice must be served on him that he return the writ within the time allowed by the rules of the court from whence the writ issued, or that an attachment issue against him; (*Grah. Prac.*, 154) the writ must be returned by the Sheriff on the day on which the notice for returning the same expires, or in default thereof the plaintiff is at liberty to issue an attachment of course. (*Grah. Prac.*, 155; 4 *Term Rep.* 496.) He is, however, liable to an action without being noticed. (15 *J. R.*, 456; 13 *Id.*, 529,) and also to an attachment to compel a return of the process.

We shall now briefly remark on the power and duties of the Sheriff in the execution of his office as a conservator of the peace; the greater part of which are derived from the common law; independent of any statutory enforcement, and which will be found more particularly treated of under the title of Arrest in the third chapter of this work.

As the principal conservator of the peace in his county, and as the calm but irresistible minister of the law, the duty of the Sheriff is no less important than his authority is great.—And to preserve or restore the public tranquility, to quell outrage and resistance against the peace, and to enforce the effectual execution of his process, he is invested, as we have already seen, with the high

power of calling to his assistance the whole strength of the county over which he presides.

And while in the execution of these offices, the Sheriff is under the peculiar protection of the law. This special protection is founded in great wisdom and equity, and in every principle of political justice. Without it, the public tranquility cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders be amenable to justice. And for these reasons the killing of officers so employed has always been deemed malicious murder by the common law, as being an outrage wilfully committed in defiance of the law. And this rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business which brought him thither; for he is under the same protection, *eundo, morando, et redeundo*. And therefore if in coming to his office, he meets with violent opposition, and retires, if in the retreat he is killed, this will be murder. He went in obedience to the law, and in execution of his office, and his retreat was necessary to avoid the danger that threatened him. And upon the same principle, if he meets with opposition by the way, before he comes to the place, and his death ensues, such opposition being intended to prevent his doing his duty, which is a fact to be collected from circumstances, this likewise, by the common law, amounts to murder. He was strictly in the execution of his office, going to discharge that duty which the law required of him.—*Foster's Crown Law*, 308, 9.

The ministers of justice in civil suits, under proper limitations, are entitled to the same protection for themselves and followers, and upon the same principles of political justice.—*Ibid.* 310.

And in the case of arrests upon process whether by writ or by warrant, if the officer named in the process give notice of his authority, and resistance is made, and the officer, killed it will be murder; if in fact such notification were true and the process legal. (*Foster*, 311.) The Sheriff, as a keeper of the peace both at common law and by statute, has power to apprehend all persons who are guilty of a breach of the peace, or who attempt to break it. So if there be any affray, breach of the peace, or unlawful assem-

bly within his county, it is his duty to suppress it.—3 *Wend. Rep.*, 253; 7 *Com. Dig.*, 526.

In case of the committing a breach of the peace in his presence, or the commission of any other crime or misdemeanor, the Sheriff may arrest a person without warrant, and take him before a magistrate to answer; (4 *Black. Com.*, 292.) And here it may be as well to remark, though we may anticipate the observations in a subsequent chapter, that an arrest of a felon may be justified by any person without warrant, whether there be time to obtain one or not, if a felony has in fact been committed, by the person arrested. If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. But if no felony be committed by any one, and a private individual arrest without warrant, such arrest is illegal; an officer however would be justified if he acted upon information from another which he had reason to rely on. (3 *Wend. R.*, 350; 3 *Chit. Crim. Laws*, 15.) And if any person charge another with felony, and desire an officer to take him into custody, such charge will justify the officer, though no felony was committed; but the person making such charge will be liable. (*Doug. R.* 359.) So in the case of a search warrant upon a charge of theft, and where the warrant did not authorize the arrest; the goods were not found, but the plaintiff was arrested and carried before a magistrate, and discharged; the officer was justified in arresting the suspected person.—3 *Campb. Rep.* 420.

The supreme court of this state in deciding that under the act suppressing immorality, a justice of the peace has a right to arrest any person, disturbing a religious congregation, without warrant, at the same time remark: (3 *Wend. Rep.*, 253,) the disturbance of a religious meeting tends to a breach of the peace, and as justices of the peace and Sheriffs are placed upon the same ground both by statute and common law, it would seem that the same power is given to the Sheriff, and that he comes within the same principle, and may arrest without warrant for any breach or tendency to a breach of the peace, or any other unlawful act com-

mitted in his view, and take the offender before the proper magistrate for trial.* So a Sheriff may apprehend any felon within his county without warrant, and in case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he may, upon probable suspicion, arrest the felon, and for that purpose is authorized (as upon a justice's warrant) to break open doors for the purpose of arresting him.—4 *Blac. Com.* 272.

But, notwithstanding the protection which the law thus extends to its ministers, the penalty imposed upon resistance, and the justification afforded them according to the nature of the circumstances, and the exigencies of the case, it will visit with its severest displeasure any act of oppression; and while it will make the most liberal allowances and intendment when acting within the limits of their authority, it will not permit them to resort to the *ultima ratio* when the legitimate objects which it is their duty to effect, can be accomplished by milder means. Thus a Sheriff, says Justice Sutherland, (2 *Coven Rep.*, 185,) has no right to load an unresisting debtor, who quietly submits to his authority with bonds and fetters; and yet it is the most effectual means of preventing an escape. Lawless power, remarks another distinguished jurist, (*C. J. Kent*, in 13 *John. Rep.*, 446, 5 *John. Rep.* 125,) is never so dangerous as when exerted by public officers according to the forms of the law. The remedy for such abuses must be direct and ample. The following, whilst it exhibits the malpractice of an officer, will illustrate these observations: It was a cause which came up to the supreme court (*Rogers v. Brewster*, 5 *John. Rep.*, 125,) on a certiorari to a justice's court. The plaintiff brought on action on the case against the defendant for maliciously distraining a valuable horse out of his team for a militia fine, and refusing to take other property, by reason whereof a great sacrifice of the plaintiff's property was made. The defendant justified under a warrant from the president of a court-martial, and called for a jury. Upon the trial it was proved that the defendant required of the president of the court-martial the warrant against the plaintiff, and said he would collect it in such a man-

* This is now his duty by Stat.—Laws 1834, p. 82, Ante 39.

der that the plaintiff would remember it, and that he would take the property nearest to his heart; and that when he called on the plaintiff, he set his eye on the horse, as he thought the taking of it would most touch the plaintiff's feelings; that when he took the horse, the plaintiff showed to him six or seven large swine, and requested the defendant to take them and leave the horse; but the defendant replied that he would take that which would most touch the feelings of the plaintiff. The justice gave his opinion at the trial that, if an officer, wilfully and maliciously, took an unreasonable distress an action would lie. It appears that the defendant was a constable, and had the warrant for the collection of the fine. He had previously called on the plaintiff twice for the fine. After taking the horse he offered to re-deliver him on receiving the fine. On the next day the horse was returned to the plaintiff, on his *engaging* to produce him at the day of sale, which was done. The jury found a verdict for the plaintiff for five dollars damages, on which judgment was entered by the justice. On these facts, as stated in the return to the certiorari, the cause was submitted to the court without agreement.

Per Curiam. The statute concerning distresses, does not apply to the case of a levy upon personal property, by an officer, by warrant, in the nature of an execution. But the constable appears to have executed the warrant in an unreasonable and oppressive manner, and with the avowed and malicious design to vex and oppress the plaintiff below, when the oppression and malice are thus charged as the gist of the action, and are clearly made out an action on the case will lie. The oppression of officers, in the execution of process, is indictable, (*T. Raym.*, 216; *Cro. Jac.*, 426) and a great abuse of the powers of a Sheriff on execution, has been held sufficient to make him a trespasser; (*Noys*, 59; 9 *Cart.* 303, 4,) or to bring him into contempt. (*Shov.* 87.) If he be charged with a malicious and oppressive proceeding, the proper remedy for this abuse of power is a special action on the case, in which the malice and oppression must both be made manifest. In *Sutton v. Johnstone*, 1 *T. R.*, 593.) Baron Eyre, in giving the opinion of the court of exchequer, laid down this general principle.

that where it could be shown that one man had causelessly and maliciously exercised over another to his damage, powers incident to his situation of superior, a special action on the case lay. The judgment in that case was afterwards reversed, but the reversal does not affect the solidity of the principle in cases not arising under the exercise of military or naval authority. The seizing and selling the horse, in the case before us, was without any just cause, so long as other property was shown, which would have raised the money with equal facility. It was, therefore, a causeless and malicious proceeding. When a ministerial officer does any thing against the duty of his office, and damages thereby accrue to the party an action lies. The judgment must be affirmed.—*See Bac. Abr. Shff. N. Dolt, Shff.*, 109, 110.

So if an officer, having seized goods on a distress remove them to a great distance thereby increasing the charges of keeping and advertising, or insuring the sale, a special action on the case may be maintained against him; but he would not be a trespasser *ab initio*, if the goods were legally seized and carried away. (7 *Mass. Rep.*, 388.) And false imprisonment will lie against an officer and a complaint in a criminal prosecution, where they combine and extort money from a party accused, by operating upon his fears, although the party be in the custody of the officer, under a valid warrant, issued upon a charge of felony. (3 *Wend. Rep.* 350.) Whenever, and under whatever circumstances the officer lends himself to the unholy purpose of oppression, he loses the protection which the law would give him in the discharge of his official duty and becomes a trespasser, and so do those who act in concert with him. And although a Sheriff may *ex officio*, as a conservator, and without warrant arrest a breaker of the peace, and bring him before a justice; yet this must be done within a reasonable time after the affray.—15 *John. Rep.*, 267; 3 *Wend. Rep.*, 348; 1 *Hale's P. C.*, 587; *Hawk. P. C.*, cap. 13, 8.

There is a distinction between acts done by the Sheriff *colore officii* and *virtute officii*; in the former case, the acts are of such a nature that his office gives the Sheriff no authority for the commission of them; the latter acts are within the limits of his au-

thority, but he exercises that authority improperly, or abuses the confidence which the law reposes in him.—15 *John. Rep.* 267.

The sixth article of the amendments to the constitution of the United States provides that “the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.” In reference to this article of the constitution it has been decided that it is necessary that the precept under which the officer acts in entering a dwelling house by force to arrest the body, or seize the goods of a person, should be lawful on the face of it, otherwise he will be a trespasser.—13 *Mass. Rep.*, 286, 324.

If a precept should command him to break and enter a dwelling house, without stating any sufficient cause, he could not justify such act under such precept; because every one is presumed to know that the dwelling house of another cannot be lawfully forced unless for purposes specially provided for by law. But it is not necessary for an officer in order to justify the execution of a search warrant from a magistrate having jurisdiction over the subject, to shew that it was founded upon a complaint under oath, provided the warrant itself contain an allegation of that fact; because the officer is obliged to obey precepts directed to him without having evidence of the regularity of the proceedings of the magistrate. An officer cannot justify the execution of a warrant to search a dwelling house for goods, unless the person whose house is to be searched for the goods which are the object of the search, be so particularly described that they may not be mistaken. Thus if the house be described as the house of a company, such description will not authorize the searching of the house of an individual member of the company; and if the goods be described in general terms as goods, wares and merchandize, without any specification of their character, quality, number, or weight, or any other circumstance, tending to distinguish them, it is not such a particular description as the constitution requires; and the officer

who should execute the warrant, would be liable as a trespasser. In the case of smuggled goods, it may be difficult to describe them with minuteness, nor can this be required; but it would be necessary to mention the kind of goods to be searched for; or at least to describe them as having been taken out of some certain vessel, so that the officer who should undertake the search might not conceive himself at liberty to rifle the house, and disturb the arrangements of the family occupying it. But if an officer in execution of a warrant from lawful authority to search for goods, break and enter a dwelling house and carry away goods; and the warrant, by reason of its irregularity, be insufficient to justify him; he will, nevertheless, be permitted to show, in mitigation of damages, that no goods were taken except those which were proper objects of the search, and that no violence or injury was done, but what was necessary to obtain possession of the goods.—13 *Mass. Rep.*, 286, 324.

And in this state, by statute, to lay a foundation for issuing a search warrant to search for stolen goods, and to justify the sheriff or other officer in arresting the person suspected of the theft, there must be an oath by the applicant that his goods have been stolen, and that he strongly suspects that they are concealed in a specified place, and that they were stolen by a person distinctly pointed out, and the warrant must describe the goods, designate the person and place, and direct the officer to search such place, and arrest such person only. (2 *R. S.*, 2d ed., 625, § 25, 26.) If the preliminary requisites be omitted, or if the warrant be general, the proceedings are *coram non judicæ*, and the magistrate who issues the warrant, and the officer who executes it, are both liable in trespass to the party injured. (*Ibid*; 1 *Cow. R.*, 40.) And it is only when there is positive proof that the property has been stolen or embezzled, and is concealed in some particular house or place, that the warrant may authorize the searching of such house or place in the night time. (2 *R. S.*, 2d ed., 625, § 27.) And the search warrant can be executed by a public officer only, and not by any private citizen.—*Ibid*, § 28.

When property is burglariously stolen in one county, and the

offender is apprehended and committed for such offence to the jail of another county, if he is indicted in the county where the property is stolen, the court will on the application of the district attorney of that county, award a *habeas corpus* to bring up the prisoner so that he may be delivered to the Sheriff of the county within which the property was stolen, and there tried. In such case the Sheriff of the county where the prisoner is confined is authorized, on the production of a bench warrant issued by a judge of the county courts where the prisoner was indicted, duly endorsed by a justice of his own county, to deliver the prisoner to the Sheriff of the county where the property was stolen.—9 *Wen. R.*, 505.

The Sheriff as the principal or first officer of his county, having general authority to arrest persons upon criminal process issuing out of, and under the seals of any court of record in this state, and also to execute warrants issued by the judges of the supreme court at chambers, supreme court commissioners and judges of the county courts against persons for crimes and misdemeanors; also to carry into execution the sentences of courts of record upon persons guilty of felonies, misdemeanors and other crimes. The Revised Statutes have made the following provisions to guard against any wilful misconduct or culpable negligence in the performance of those duties :

If any Sheriff, jailer, coroner, marshall or constable,

1. Shall wilfully and corruptly refuse to execute any lawful process directed to them, or any of them, requiring the apprehension or confinement of any person charged with a criminal offence : or

2. Shall corruptly and wilfully omit to execute such process, by which such person shall escape : or

3. Shall wilfully refuse to receive in any jail under his charge, any offender lawfully committed to such jail, and ordered to be confined therein, on any criminal charge or conviction, or on any lawful process whatever : or

4. Shall wilfully suffer any offender lawfully committed to his custody, to escape and go at large : or

5. Shall receive any gratuity or reward, or any security or

engagement for the same, to procure, assist, connive at, or permit any prisoner in his custody, on any civil process, or on any criminal charge or conviction, to escape, whether such escape be attempted or effected or not :

He shall upon conviction be punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.—2 *R. S.*, 2d ed., 570, § 18.

Every Sheriff, coroner, marshal or constable, who shall be guilty of any offence specified in the last section, shall forfeit his office, and shall forever be disqualified to hold any office or place of trust, honor or profit, under the laws or constitution of this state.—2 *Ibid*, 570, § 19.

Besides these grounds for expulsion from office, and punishment by fine and imprisonment : The governor may remove the Sheriff at any time within the term for which he shall have been elected, giving such officer a copy of the charge against him, and an opportunity of being heard in his defence, before any removal shall be made.—1 *Ibid*, 113, § 47.

It is a general rule to admit proof by reputation that a person acts as a general public officer or deputy. In *Berryman v. Wise*, (4 *Term. Rep.*, 426;) the court of king's bench, in England, decided that, in the case of all peace officers, justices of the peace, constables, &c., it was sufficient to prove that they acted in those characters, without producing their appointment, and that even in a case of murder. But the acting in a public capacity merely raises a presumption of a due appointment, and does not exclude evidence to the contrary.—3 *Campb. Rep.*, 432.

After the apprehension, trial and conviction of any offender, it still remains for the Sheriff to carry into execution the sentence of the courts; to detain the convict in the county jail, or to convey him to his designated place of confinement, or to inflict upon him that death which the laws have awarded.

Whenever a sentence of imprisonment in a county jail shall be pronounced upon any person convicted of any offence, the clerk

of the court shall, as soon as may be, make out and deliver to the Sheriff of the county, a transcript of the entry of such conviction, in the minutes of the court, and of the sentence thereupon, duly certified by such clerk; which shall be a sufficient authority to such Sheriff to execute such sentence, and he shall execute the same accordingly.—2 *R. S.*, 2d ed., 619, § 11.

When any convict shall be sentenced to imprisonment in a state prison, the clerk of the court in which such sentence shall be passed, shall forthwith deliver a certified copy thereof to the Sheriff of the county, who shall without delay, either in person, or by a general and usual deputy, cause such convict to be transported to the proper prison, and delivered to the keeper thereof.—2 *Ibid*, 619, § 12.

Such Sheriff or deputy, whilst conveying a convict to the proper prison, shall have the same power and authority to require the assistance of any citizen of this state, in securing such convict, and retaking him, if he shall escape, as if such Sheriff were in the county for which he was elected; and all persons who shall refuse or neglect to assist such Sheriff, when required, shall be liable to the same penalties, as if such Sheriff were in his own county.—2 *Ibid*, 619, § 13.

Whenever any convict shall be sentenced to the punishment of death, the court, or a major part thereof, of whom the presiding judge shall always be one, shall make out, sign and deliver to the Sheriff of the county, a warrant stating such conviction and sentence, and appointing the day on which such sentence shall be executed.—2 *Ibid*, 547.

This section was enacted for the purpose of reforming the former practice, which as the revisers remark was extremely loose. An entry of the sentence was made in the minutes of the court, and this was the only authority the Sheriff had. In many of the states the governor is required to issue the warrant; and in England no execution of a person convicted at the Old Bailey takes place, without the warrant or order of the crown. (*Revisers' notes*, 3 *R. S.*, 810.) The former practice of England and that of our own country were precisely alike; and Blackstone, (4

Blac. Com., 318,) in his day, lamented "that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name, and under the seal of the court, without which the Sheriff cannot legally stir one step, and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note."

No judge, court or officer, other than the governor, shall have any authority to reprieve or suspend the execution of any convict sentenced to the punishment of death; except Sheriffs, in the cases and in the manner hereinafter provided.—2 *R. S.*, 2d ed., 547, § 15.

If after any convict shall have been sentenced to the punishment of death, he shall become insane, the Sheriff of the county, with the concurrence of the circuit judge of the circuit, or if he be absent from the county, with the concurrence of any judge of the court before which the conviction was had, may summon a jury of twelve electors to inquire into such insanity, and shall give immediate notice thereof to the district attorney of the county.—2 *R. S.*, 2d ed., 547, § 16.

The district attorney shall attend such inquiry, and may produce witnesses before the jury; for which purpose he shall have the same power to issue subpoenas, as for witnesses to attend a grand jury, and disobedience thereto shall be punished by the court of oyer and terminer which shall next set in such county, in the same manner as disobedience to any process issued by such court.—2 *Ibid*, 547, § 17.

The inquisition of the jury shall be signed by them and the Sheriff. If it be found by such inquisition, that such convict is insane, the Sheriff shall suspend execution of the warrant directing the death of such convict, until he shall receive a warrant from the governor of this state, or from the justices of the supreme court, directing the execution of such convict.—2 *Ibid*, 548, § 18.

The Sheriff shall immediately transmit such inquisition to the governor; who may, as soon as he shall be convinced of the sanity of such convict, issue a warrant appointing a time and

place for his execution, pursuant to his sentence.—2 *Ibid*, 548, § 19.

If a female convict, sentenced to the punishment of death, be pregnant, the Sheriff shall in like manner summon a jury of six physicians, and shall give the like notice thereof to the district attorney, who shall attend, and have power to issue subpoenas as herein before provided, and with the like effect. An inquisition shall in like manner be made and signed by the jurors and the Sheriff.—2 *Ibid*, 548, § 20.

If by such inquisition it appear that such female convict is quick with child, the Sheriff shall in like manner suspend the execution of her sentence; and shall transmit the inquisition to the governor.—2 *Ibid*, 548, § 21.

Whenever the governor shall be satisfied that such female convict is no longer quick with child, he shall issue his warrant, appointing a day for her execution pursuant to her sentence; or he may in his discretion commute her punishment to perpetual imprisonment in the state prison.—2 *Ibid*, 548, § 22.

The punishment of death shall in all cases be inflicted by hanging the convict by the neck, until he be dead.—2 *Ibid*, 548, § 25.

It only remains to notice the provisions of the statute prescribing the duties of the Sheriff, as it respects the place and formalities of the execution.

Whenever any person shall be condemned to suffer death for any crime of which such person shall have been convicted in any court of this state, such punishment shall be inflicted within the walls of the prison, or within a yard or enclosure adjoining said prison.—2 *Ibid*, 548, § 26.

It shall be the duty of the sheriff or under sheriff of the county to be present at such execution, and to invite the presence, by at least three days previous notice, of the judges, district attorney, clerk and surrogate of said county, together with two physicians, and twelve reputable citizens, to be selected by said Sheriff, or under sheriff. And the said Sheriff or under sheriff shall, at the request of the criminal, permit such minister or ministers of the gospel, not exceeding two, as said criminal shall

name, and any of the immediate relatives of said criminal, to attend and be present at such execution; and also such officers of the prison, deputies and constables as said Sheriff or under sheriff shall deem expedient to have present; but no other persons than those herein mentioned shall be present at such execution; nor shall any person under age be allowed to witness the same.—2 *R. S.*, 2d ed., 549, § 27.

The Sheriff or under sheriff and judges attending such execution, shall prepare and sign, officially, a certificate setting forth the time and place thereof, and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of this act; and shall procure to said certificate the signature of the other public officers and persons, not relatives of the criminal, who witnessed such execution. And the Sheriff or under sheriff shall cause such certificate to be filed in the office of the clerk of said county, and a copy thereof to be published in the state paper, and in the newspaper if any, printed in said county.—2 *Ibid*, 548, § 27.

The preceding provisions were drawn with a view to avoid the consequences frequently attending the parade of public executions. While on the one hand, the security of our fellow citizens requires that the punishment of death should never be inflicted in secret, on the other, it is believed by many, that the manner in which it is usually conducted, defeats the grand end in view—a solemn monitory example. A medium between the two has been aimed at.—*Revisers' notes*, 3 *R. S.*, 816.

CHAPTER II.

Under Sheriff and Deputy.

It is a general and wise rule, that a judge cannot constitute a deputy, or delegate his authority to another. For he cannot transfer his own mental qualifications, requisite for the interpretation of laws, to such substitute. But in ministerial offices, of the kind where little more than fidelity and attention are necessary to the due discharge of them, the reasoning and the rule do not equally prevail. If we consider the supreme executive magistrate himself, we see all the affairs of government carried on by his authority, and in regal governments, in his name; but comparatively few of them by his personal agency and intervention. In like manner those, who are invested with any kind of ministerial power directly derived from the government, may, in general, perform such functions by properly commissioned deputies. (3 *Wend. R.*, 150.) It is for this reason that the Sheriff had always the power of appointing an Under Sheriff; at least there is mention made of him so early as in the third year of Edward the First—*St. Westm.* 1, 3 *Ed. I.*, c. 15.

And it is impossible the High Sheriff can himself personally execute every branch and duty belonging to his office, and as the law, from the necessity of the thing, and in furtherance of justice, allows him to make a Deputy, hence it is necessary that such Deputy should in all things in which the Sheriff's personal presence is not required, have the same power as the Sheriff himself;

and as by the nomination of him, the sheriff implicitly confers on him a power of doing all such offices as he himself could execute, and may be transferred by the law, it has likewise been held, (1 *Salk.* 95; *Ld. Raym.* 658.) that the deputy's authority is by law so equal with that of the principal that any condition, covenant, or other bargain to restrain it, is void. (*Ibid.*) The sheriff, therefore, might also constitute as many other deputies as he thought fit, each possessing all the powers of a sheriff as a ministerial officer. (1 *Salk.*, 96.) But as to the under sheriff, as such, the sheriff could never appoint more than one. And where a writ of inquiry was executed before two under sheriffs, appointed by deputation under the hand and seal of the high sheriff, the inquisition so taken was set aside.—2 *Wils. R.*, 378.

By the Revised Statutes it is made imperative upon the sheriff to appoint an under sheriff.

The sheriff of each county in this state shall, as soon as may be after he takes upon himself the execution of his office, appoint some proper person under sheriff of the same county, to hold during the pleasure of such sheriff; and as often as a vacancy shall occur in the office of such under sheriff, or he may become incapable of executing the same, another shall in like manner be appointed in his place.—1 *R. S.*, 2d ed., 372, § 82.

Whenever a vacancy shall occur in the office of sheriff of any county, the under sheriff of such county shall in all things execute the office of sheriff of the county, until a sheriff shall be elected or appointed, and duly qualified; and any default or misfeasance in office of such under sheriff in the meantime, as well as before, shall be deemed to be a breach of the condition of the bond given by the sheriff who appointed him, and also a breach of the condition of the bond executed by such under sheriff to the sheriff by whom he was appointed.—*Ibid.*, 372, § 83.

Every sheriff may appoint such and so many deputies as he may think proper; and persons may also be deputed by any sheriff or under sheriff by an instrument in writing to do particular acts.—1 *R. S.*, 2d ed., 372, § 84.

Every appointment of an under sheriff, or of a deputy sheriff,

shall be by writing, under the hand and seal of the sheriff, and shall be filed and recorded in the office of the clerk of the county; and every such under sheriff or deputy sheriff shall, before he enters on the execution of the duties of his office, take the oath of office prescribed by the constitution. But this section shall not extend to any person who may be deputed by any sheriff or under sheriff to do a particular act only.—*Ibid*, 372, § 85.

It will here be perceived that the under sheriff and deputy are on an equality as to their powers, excepting that the former has the capacity of acting in the case of a vacancy in the office of sheriff, and of making deputations to special deputies for the performance of particular acts. And this power of deputing was given to the under sheriff in conformity to a decision of the supreme court, (5 *Johnson's Rep.*, 137; *Revisers' notes*, 3 *Revised Statutes*, 494) where the right of an under sheriff to depute a person to serve a capias was called in question. For, exclusive of the statute, an under sheriff, by common law, might depute a person to serve a writ or do a particular act. The general maxim, that *delegata potestas non potest delegari*, or that deputed power cannot be delegated, is correct when duly applied; for to make a deputy by a deputy, in the sense of the maxim, implies an assignment of the whole power, which a deputy cannot make. A deputy has general powers, which he cannot transfer; but he may constitute a *servant* or *bailiff*, to do a particular act. This distinction was taken and laid down by Lord Holt, who gave the opinion of the court of king's bench in the case of *Parker v. Kett*, (1 *Ld. Raym.*, 658; 12 *Mod.*, 467; 1 *Salk.*, 95.) In that case the steward of the manor of *Reswick* made his deputy steward, who appointed under his hand and seal, B, a third person, to be his deputy, to take a particular surrender, who took it, and one question which arose in ejectment, was, whether the surrender taken by the deputy was good. The court held it good, and said that B was not a deputy, in the proper sense of the term, since he had power only to do a particular act; whereas a deputy, from the nature of his deputation, has power to do all acts. They said it was every day's practice for under sheriffs to make bailiffs to do particular acts, and that they made them by virtue of their

general deputation ; for the moment a sheriff made an under sheriff, he, of necessary consequence, gave him power to make bailiffs. The case of *Leak vs. Howell*, (*Cro. Elizabeth*, 533) and the authorities there cited contain the same general doctrine. The inference from this reasoning is, that the under sheriff being vested with all the general powers of the sheriff, may authorize, in the name of the sheriff, any person to execute a particular official act, and for the purpose of executing such act, the special deputy has all necessary power, but that he can go no further ; for inasmuch as his office is only a delegated personal trust, arising merely from his appointment, which power and appointment may be taken from him at any time the sheriff shall think proper to remove him, it would be inconsistent to permit him to delegate power which he at any time might be deprived of, and which power, if so given, would be independent of the authority by which he was created. But by confining the exercise of authority to particular acts, the mischief is avoided. The special deputy, therefore, is a mere servant of the sheriff, whose power expires with the execution of the act for which he was created, and he need not take any oath of office. (2 R. S., 2d ed., 372, § 85.) And the mere fact of a *deputy sheriff* being directed by the under sheriff of the county, who had the principal charge of the business of the sheriff, to levy upon specific property, on an execution being placed in his hands, does not constitute him the servant or special agent of the sheriff for that particular service ; he will be deemed to act in his official character, and not as a mere servant or agent, and if the sheriff is subjected to damages in consequence of his acts in respect to such execution, he and his sureties are liable to indemnify the sheriff notwithstanding such instructions. (15 *Wend. Rep.*, 274.) To exonerate a *deputy* from responsibility under such circumstances, the directions must be so definite and specific as to debar him from the exercise of all discretion in the matter.

The duties of a sheriff were, in the origin of his appointment, and in England, in some measure, still continue, two fold, to wit, judicial and ministerial. A judicial act required of the sheriff, cannot be executed by deputy, and these are the only kinds of acts

in which the personal attendance of the sheriff is required. There are but very few cases, in which the personal attendance of the sheriff is required in the state of New-York, his duties being generally ministerial. Therefore a general deputy of the sheriff may serve writs and executions, and all kinds of process, in the same manner, and to the same extent that the sheriff himself may do. And the under sheriff or deputy may require the aid of all persons in his county to assist him in the execution of his process, where resistance is made to it, in the same manner as the sheriff might do.—7 *Com. Dig.*, 543.

A writ of inquiry may be executed by the under sheriff, or a deputy sheriff, as it is considered entirely as a ministerial act of the sheriff. (2 *John. Rep.*, 70.) The inquisition is a mere inquest of office, and the act of presiding is ministerial, and not judicial, notwithstanding there are some loose sayings to be gleaned from the books, that seem to countenance a contrary opinion. The sheriff gives no judicial decision upon the law, and concluding to judgment, any more than what might be requisite in the performance of every ministerial act. The reason given why jurors cannot be challenged on a writ of inquiry is, because it is only an inquest of office, and the sheriff does not act as judge. Even at the county court in England, the freeholders were considered as the real judges, and the sheriff no more than a ministerial officer, and consequently, the deputy might preside. There are numerous cases within the circle of a sheriff's duties in which these inquests of office are requisite, and in which no doubt has been entertained that a deputy was competent to summon a jury and take the inquest, although the objection would go to every inquest in every possible case. And it has been held perfectly immaterial in respect to the executing of a writ of inquiry, whether the inquest was taken before the under sheriff, strictly so called, or a general deputy. While the sheriff is in the exercise of his office, the under sheriff has no more power than any general deputy for these purposes.—2 *John. Rep.*, 73.

An under sheriff or deputy may execute a deed, in the name of the sheriff to a purchaser under a *fi. fa.* (10 *John. Rep.*, 223.)

In this case, the point was presented in an action of ejectment, where the plaintiff claimed title under a deed from the sheriff executed in the following form: "William Munro, sheriff of the county of Chenango, by his legal deputy, Jabez Robinson." The deed executed by the deputy sheriff, remarks the court, in the name and on behalf of his principal, was a good execution of the deed. A sale, and the consummation of that sale by deed, are acts which the sheriff may do by deputy, the law does not require them to be done by the sheriff in person. And a special authority from the sheriff to the deputy, authorizing him to execute the deed, need not be shown; if he is in fact a general deputy, that is enough to authorize his executing a deed for the sheriff, as well as any other act which may be done by deputy.—18 *John. Rep.*, 7.

The deputy sheriff may also give to the purchaser of land under a *fi. fa.* a certificate of sale according to the provisions of the statute; (2 *R. S.*, 2d ed., 293, § 42,) and may receive the redemption money on the same from any creditor, pursuant to the statute.—2 *Ibid.*, 293, § 45.

The under sheriff or deputy may proceed to complete the execution of process, and other duties, although the sheriff who appointed him, may be out of office, or his term of office has expired. (3 *Cow. Rep.*, 95; 20 *Wend. Rep.*, 602.) It was contended that a deed executed by a deputy sheriff, after the expiration of the official term of the sheriff, was void, because the authority of the deputy ceased when the new sheriff had taken the office upon him. The authority of the deputy is limited undoubtedly, by the duration of the authority of his principal, the sheriff. An execution against the property of a defendant partly executed by the old sheriff, shall be completed by him; and in relation to any such execution in the sheriff's hands when he goes out of office, he continues sheriff, and may act by deputy, as if he was still in office. He is in office as to that process, and the acts of the deputy in relation to such an execution are the acts of the sheriff himself. (6 *Wend. Rep.*, 224.) But if the under sheriff or deputy remove from the county for which he is appointed, he cannot proceed to complete the execution of process begun by him, but

it must be finished by the sheriff or some other deputy or under sheriff.—9 *Wend. Rep.*, 259.

In 1828, in December, *Haddock*, an under sheriff of the county of Herkimer, by virtue of an execution in favor of *Ferguson* against *Crandall*, levied on property mortgaged by *Gorton*, and then being in the possession of *Gorton*. In May 1829, the under sheriff removed from the county of Herkimer to the county of Oneida, where he continued to reside on the 19th of October, 1829, when he went with *Ferguson* to find and sell the property levied on by him. *Ferguson* having been sued for selling the property, the point was presented to the court whether the sale could be made by the under sheriff after he had removed from the county. *Savage*, chief justice, in discussing this point, says: the principle is well established that when a sheriff has begun to execute an execution, he has, after he goes out of office, a right to complete it; and in pursuance of this principle it has been held that a deputy of a sheriff, whose time of office has expired, possesses similar power. The authority of the deputy continues as long as the authority of the principal. But this supposes a continuance of authority derived from the principal, and not revoked by him. In such cases the principal must continue liable for the acts of the deputy. If a sheriff for any cause thinks proper to remove a deputy, does not the power of that deputy cease *in toto*? And are the sureties of the deputy any longer liable for his acts? If a deputy dies, there is surely an end of his acts, and if he resigns, is that resignation partial only, reserving a right to complete his unfinished business, or does he not return to the sheriff, or hand over to some other deputy his unfinished business? The case is not entirely analagous to that of a sheriff going out of office. It is not necessary that the deputy who begins to execute an execution should finish it, as it is with the sheriff. Every deputy acts in the name and on behalf of the sheriff, and the sheriff is responsible for the acts of all his deputies, but he is not responsible for the acts of a man from whom he has withdrawn all authority, or of one who has resigned his authority, or incapacitated himself by removing from the county. Had *Haddock*,

instead of removing a few miles into a neighboring county, gone to another state, or to Canada, or to Europe, could it be contended that he must execute the process. The trust reposed in the deputy is a personal confidence, which may be withdrawn at pleasure, and the sheriff may require a surrender of all process in the hands of the deputy. The sheriff may execute them himself or depute another. There is no necessity for a continuance of the deputy's authority after the removal or resignation, nor is it consistent with good policy, or the discreet administration of justice. If it be not in the power of the sheriff at once to stop an unworthy deputy of all authority, such deputy may ruin his sureties, or the sheriff, or both, though they may all endeavor to prevent it. If a removal by the sheriff takes away all power, as I hold it does, then a resignation or removal from the county must have the same effect; unless the sheriff continue the authority for the purpose of completing the unfinished business. If I am correct in this point, then the sale was without authority and void; it was not even under color of law, and the defendant was a trespasser. In accordance with this decision the Revised Statutes have enacted that every office shall become vacant on the happening of either of the following events, before the expiration of the term of such office:

The death of the incumbent; his resignation; his removal from office; his ceasing to be an inhabitant of this state; or if the office be local, of the district, county, town, or city for which he shall have been chosen or appointed, or within which the duties of his office are required to be discharged.*—1 R. S., 2d ed., 112, § 37.

We will now consider how far the sheriff is liable for the acts of his deputies. As a general rule the sheriff is liable *cevititu* for

* It is provided by statute (2 R. S. 2d ed., 296, § 65,) that if any sheriff, to whom an execution shall be delivered, die, or be removed from office before such execution be satisfied, his under sheriff shall proceed thereon, in the same manner as the sheriff might have done; and if a sheriff who has sold any real estate, die or be removed before executing any conveyance, in pursuance of such sale, such conveyance shall be executed by his under sheriff, in the same manner and with the like effect as if done by the sheriff.

the acts of his deputies; the meaning of which is, that he is liable in damages to the party injured for any act of his deputy in the execution of the ordinary and general duties appertaining to his office, but he is not liable criminally for any act but his own; and he is so liable for any act of malfeasance, or wrong doing by his deputies, as well as for any nonfeasance or neglect of duty by them, or any of them. (7 *John. Rep.*, 35; 7 *Cow. Rep.*, 739; 5 *Mass. Rep.*, 271; 17 *ibid.*, 224.) The deputies of the sheriff are all servants of the sheriff, and in law they are considered but one officer; the sheriff is therefore liable for the acts of his deputy done under color of his office, whenever the deputy would be liable for the same acts. (18 *Mass. Rep.*, 271.) Therefore the sheriff has been held liable to a defendant when his deputy has taken more fees upon an execution than the law authorized to be levied.—7 *John. Rep.*, 35.

An action of trespass *vi et armis* lies against a sheriff for the act of his deputy, in taking the goods of one person to satisfy a writ of execution against another person. (1 *Mass. Rep.*, 536; 17 *ibid.*, 244; *Doug. Rep.*, 40.) And if a deputy sheriff, under color of his office, attach property on a writ, whether it be legally attached or not, and the debtor be afterwards compelled to pay the debt with other property, the officer retaining the property attached, the sheriff will be answerable to the debtor for the injury. (18 *Mass. Rep.*, 271.) And it has been held in England that an action of trespass and false imprisonment lies against a sheriff, for trespass and false imprisonment committed by his officers in the execution of process.—3 *Wils. Rep.*, 317; 2 *Term. Rep.*, 155.

And the sheriff is liable for the acts of the deputy, when the deputy refuses to pay over money collected by him on execution, and this although the process on which the money had been received was erroneous. (1 *Wend. Rep.*, 16; 7 *Mass. Rep.*, 464; 6 *Cow. Rep.*, 465.) The sheriff has also been held liable to treble damages given as a penalty against officers by statute for taking too much fees, when his officer levied more fees than is allowed by statute. (2 *Term. Rep.*, 148.) And if the deputy, under color

of his office does what the law prohibits, the sheriff is answerable to the injured party.—7 *Mass. Rep.*, 123 ; 18 *ibid.*, 271.

And the sheriff has been held even to exemplary damages for the misconduct of his deputy, although the acts committed were done without his knowledge, or contrary to his orders, and where no particular injury ensued to the plaintiff. The case of *Hazard v. Israel* (1 *Binney's Rep.*, 240,) is a very strong instance of the last position. This was an action of trespass brought against the defendant, who was sheriff of the county of Philadelphia, to recover damages for the misconduct of his officer in the execution of a *fi. fa.* It was tried before BRACKENRIDGE, J., at *nisi prius*, in December, 1807, when the jury found a verdict for the plaintiff, seven hundred and fifty dollars damages. The defendant now moved for a new trial on the grounds that the verdict was against law and evidence, and the damages excessive.

The facts as reported by Judge Brackenridge, were as follows : *Lewis* as executor of *Fuller* brought a suit against the plaintiff and *Bringhurst*, as administrators with the will annexed of *Clarkson*, in which judgment was obtained for a considerable sum, reserving the question of assets. Upon this judgment a *fi. fa.* issued for the debt, to be levied of the testator's goods, and seven pounds ten shillings costs to be levied in like manner if goods were found otherwise *de bonis propriis* of the administrators. While the execution was in the hands of *Suter*, the deputy sheriff, he mentioned the circumstance to Mr. *Reed*, the attorney of the administrators on record, who told him that the costs were paid to the defendant ; and the fact was that before the execution issued, Mr. *Reed* had requested the sheriff to charge the costs to his private account, to which he assented. There was no pretence that Clarkson's administrators had any of his goods in their hands at the time of the execution or afterwards ; nevertheless, *Suter*, on the return day of the writ, went, between ten and eleven o'clock at night, to the plaintiff's house, and there proceeded in a rude and insolent manner to levy upon the furniture in the parlor to the amount of seven or eight hundred dollars, and then asked for more property. Mr. *Reed*, who was called in,

forbad *Suter* to levy, asked him to read the execution, told him that the plaintiff was answerable for costs only, and that they were paid. *Suter* answered that he knew his duty as well as Mr. Reed, and that he was levying for debt and costs; he then continued to make his inventory, and afterwards went away, but without removing any of the goods. On the next morning *Ingersoll* moved to set aside the levy; and in the course of the day the defendant wrote to the plaintiff that he rescinded the levy, and then made the following return to the *fi. fa.*: "No goods of Clarkson whereon to levy, &c., and for default thereof levied on divers goods, &c., of *Ebenezer Hazard* for the damages, which are since restored, as the amount of said damages were previously secured to me, and my bailiff, when the said levy was made, was not informed thereof."

TILGHMAN, C. J., after stating the facts, delivered the opinion of the court.

The counsel for the defendant in support of their motion have contended that there was no trespass, because the costs were only secured and not paid; and because even if they were paid, the officer had a right to enter the house to look for goods of *Clarkson*; and after he was in he committed no violence, nor took any thing away. As to the costs, the evidence warrants the plaintiff in saying that they were paid. When the defendant had agreed to look to Mr. Reed for them, he had no right to levy; and so the defendant himself seems to think in his return to the *fi. fa.*; for he there assigns as an excuse for the levy, that the deputy was not informed of the security which had been given. Then as to the entry being lawful to search for the goods of *Clarkson*, granting that to be the case, (concerning which, however, no opinion is given,) the subsequent conduct of the officer in levying for costs when none were due, makes him a trespasser.

It was also contended that the sheriff was not answerable in the action of trespass for the conduct of his deputy. We are clearly of opinion that for all civil purposes he is answerable, though not criminally. There appears to be some doubt on the point in the case of *Saunderson v. Baker et al.*, reported in 3 *Wilson*, 309,

but the doubt is probably owing more to the inaccuracy of the report, than to any other cause. The same case is better reported in 2 *W. Black.*, 832. In *Ackworth v. Kempe*, (*Doug.*, 40) where the case of *Saunderson v. Baker et al.* was considered, *Ld. Mansfield* looks upon the law to be quite clear in the manner I have stated it. It is a principle not lately introduced, but founded upon ancient authorities. And most inconvenient it would be if the law were otherwise; for the sheriff's deputies are frequently men of small property, and sometimes of bad character; and the responsibility ought to rest on the principal, who has the sole power of appointing and removing them.

The last reason offered for a new trial is, that the damages are excessive. This is the only point on which there could be a doubt. A distinction has been taken between exemplary damages, and those which are only a compensation for the injury sustained. This distinction is certainly worthy of great consideration by a jury, when a principal who has been no way to blame, is sued for the conduct of his deputy. But in point of law, if the sheriff is answerable at all, he must be answerable for such damages as the jury, on the whole circumstances, think proper to give. In the present instance, they have given exemplary damages; for the actual injury was nothing. They have thought it a necessary check to rude and improper behavior of the sheriff and his officers. The public safety requires that implicit obedience should be paid to the officers of justice in the execution of their duty. On the other hand, the happiness of society requires that these officers should be influenced by powerful motives to avoid all acts of rudeness and wanton injury. It does appear that the quiet of the plaintiff's family was invaded at a very unusual hour of the night, without just cause; and it also appears that the officer gave unnecessary uneasiness in the course of transacting the business; and this too, after he had been warned that he was doing wrong. I am well satisfied from the character of the defendant that he was not accessory to this improper behavior. From the view which I have been able to take of the evidence (imperfect to be sure because I did not hear it delivered on the

- trial,) the damages appear to me to be severe; but as the jury have thought proper to make the conduct of the defendant's deputy an object of public example, I cannot say that I think them so altogether wrong that a new trial should be granted.

The case of *Ackworth v. Kempe*, (*Doug. Rep.* 40,) which has been so often referred to in support of actions against the sheriff for the malfeasance of his officers was as follows:

The goods of one W had been conveyed to A, the plaintiff, by a bill of sale, and had actually been removed from the house of W, two writs of *feri facias*, at the suit of different persons against W, were delivered to the sheriff of S, (the defendant,) who commissioned his officer to execute them. The officer, in consequence of the warrants, took the goods above mentioned in execution, and sold them. Upon this A brought an action of trespass *vi et armis* against the sheriff, without joining the officer as a defendant. The cause was tried before Eyre Baron. The defence was, that the bill of sale to the plaintiff was voluntary and fraudulent. The jury found for the plaintiff. On the day when cause was shewn, the court was clearly against granting a new trial. Lord Mansfield said he had not the least doubt, from the evidence stated in the judge's report, that the bill of sale was fair; which he said, laid the question on the supposed misdirection out of the case. With regard to the objection to the form of action, the court took time to consider. Lord Mansfield observed that if trespass would not lie, no other action would, and that the point was, therefore, of very extensive consequence. Some days afterwards Lord Mansfield delivered the judgment of the court to the following effect: The only question now remaining is whether trespass *vi et armis* can be maintained against a sheriff for goods taken on execution by his bailiff, which turn out not to have been the goods of the person against whom the *feri facias* issued? On the part of the defendant it has been argued rather on authorities than on principle; the authorities cited were, 2 *Roll.* 552, *tit. Trespass*, Pl. 9, 10, and *Saunderson v. Bohen*, 3 *Wils.* 309. The passage in *Roller's Abridgement* does not warrant the objection. The case then, when rightly understood, will appear to

be a particular exception to the general rule ; and the true inference from it is, that where there is no exception the sheriff is liable. The bailiff of a franchise is not the officer of the sheriff ; he gives no security ; it is evident from Pl. 5, in the same page, that this was Roller's meaning. He there states that, if a sheriff takes one man for another, false imprisonment lies against him, and, although he says if a sheriff take, &c., he means his bailiff, for sheriffs never did execute process in person.

But the sheriff is not liable for any act of his deputy unless it is done in the usual course of his business as deputy sheriff, prescribed by law. And when the plaintiff gives the deputy special directions as to the manner of executing the execution, as by enlarging the time, giving credit to a purchaser of land, and prescribing the effect of the purchase, and the time and conditions of its consummation, the sheriff is not accountable for the money received by his deputy under the special arrangement, nor were the sureties given by the deputy sheriff to the sheriff liable to the sheriff for such moneys ; but the plaintiff by giving to the deputy special instructions made him his private agent. And although the sheriff executed to the purchaser a deed of the land sold, yet that did not operate to affirm the acts of his deputy, and adopt them as his own official acts, especially where his full knowledge of the special instructions to his deputy is not shewn—7 *Cow. Rep.*, 739.

And a sheriff is not answerable for any default of his deputy, unless it be a default in executing the power lawfully derived from the authority of the sheriff under which the deputy acts ; for when a deputy undertakes any business not resulting from the duties of his office, the sheriff is not responsible ; for in this respect he is not the deputy of the sheriff. (4 *Mass. Rep.*, 60 ; 7 *Ib.*, 123.) And the conclusion adopted by the courts is that the sheriff ought not to be liable for the acts or his deputies, unless his redress against the deputy and his sureties is unquestionable.—17 *Cow. R.* 746 ; 17 *Com. Law Rep.*, 367.

And the sheriff is not liable for the acts of his deputy done by him, after the relation between them has ceased.—19 *Wend. Rep.*, 295 ; 7 *Mass. Rep.*, 505 ; 8 *Term Rep.*, 505.

Neither is the sheriff answerable for the misconduct of a special deputy created by him at the request of the party; nor is he liable for the forthcoming of the prisoner until he is actually in jail, or otherwise in the actual custody of the sheriff. And the sheriff cannot be compelled by rule to return the writ delivered to such special deputy for execution, nor is he answerable to the plaintiff for its execution. (4 *Term Rep.*, 119; 2 *Blacks. Rep.* 752.) But if the defendant comes into the actual custody of the sheriff, after the arrest by the special deputy, the sheriff is accountable for his safe keeping.—8 *Term Rep.* 505.

The sheriff, where a special deputy is appointed by him, even at the request of the plaintiff, may require of him security for the faithful performance of his duties, especially where money is to be collected by him or process returned. (*Cro. Eliz.* 271; 10 *Wend. Rep.*, 562.) But where nothing remains but to execute a deed under a sheriff's sale, or to conclude some act of the sheriff security is not necessary.—10 *Wend. Rep.*, 562.

Application was made to the court for the appointment of some suitable person to execute a deed under a sheriff's sale, it being shewn that the sheriff who sold the property was dead, and that at the time of his death he had no under sheriff. The principal question was, whether the person to be appointed should be required to give the security referred to in the statute (2 *Rev. Stat.* 2d ed. 296, § 66,) upon this subject, it appearing that the sum bid at the sale had been paid to the plaintiff in the execution under which the property was sold, Mr. Justice Sutherland was of opinion that, when a deed was merely to be executed, and no money to be collected, or other act to be done, security was not necessary. And he accordingly granted a rule, appointing the clerk of Columbia county to execute the deed, without requiring security to be given by him.

The sheriff is liable for the declarations and admissions of an under sheriff or general deputy, and they are admissible against him in a suit brought against him for the acts of such deputy: (10 *John. Rep.* 478.) In an action on the case, brought against the sheriff for a false return upon an execution, the question was

whether admissions made by one of the deputies of having made a levy upon certain goods by virtue of an execution, was admissible evidence against the sheriff. The court said that they were, that the conversations testified to were, with the reputed and acting deputies of the defendant. What an accredited agent says, or a deputy sheriff says will, in certain cases, be competent evidence to charge the principal; that the confessions were made in the course of the business in relation to the execution, and were to be considered as part of the act of the deputy touching the execution of the writ, and were therefore to be received in evidence to charge the defendant as sheriff. The question in the case in 1 *Lord Ray. Rep.*, 190, was, if the confession of an under sheriff of an escape be any evidence against the high sheriff; and it was adjudged that it was. For though the sheriff is liable, yet the under sheriff gives him a bond to save him harmless, and therefore it will fall upon him. And consequently his confession is good evidence, because in effect it charges himself.

All actions for breach of duty of the office of sheriff, must be brought against the high sheriff, though the breach was by the default of the under sheriff. (*Cowper's Rep.*, 403.) And this is implied in the doctrine that the sheriff is the only person known legally in the execution of his office, and that the acts of his deputies are, in judgment of law, his acts.

But in trespass for an injury done to the property of a defendant or any other person, the sheriff or his deputy may be sued, but they cannot be sued jointly, unless they in fact committed a joint trespass. And if the plaintiff has sued either one and proceeded to execution against him for the acts of the deputy, it is a bar to an action against the other. The deputy therefore may be made defendant if the plaintiff chooses so to do, but if the plaintiff proceeds against him to judgment and execution, he cannot afterwards resort to the sheriff for the trespass so done by the deputy. (18 *Mass. Rep.*, 62.) And in an action against the sheriff for the misfeasance of his deputy, the sheriff can give nothing in evidence which his deputy could not were he the defendant.—6 *Mass. Rep.* 325.

The deputies of a sheriff, in relation to each other, must often be considered as several officers, with distinct rights, and acting with distinct liabilities. (13 *Mass. Rep.*, 114.) And one deputy sheriff may maintain an action against another deputy sheriff of the same sheriff, to recover possession of goods which they respectively claim to have attached at the suit of different creditors; for, although servants of the same master, they act independently of each other; and the one who first makes an attachment requires a special property which entitles him to an action against any person who interferes with his possession. (14 *Mass. Rep.*, 269; 16 *Ibid.*, 465.) But controversies between deputies respecting attachments of the same property at the suits of different creditors, ought to be adjusted by the sheriff, for the dispute is between his servants; and as there is no technical propriety in actions between them, where they claim no distinct rights, so there can be very little occasion for such actions, as the sheriff, in settling the right of each attaching creditor, must determine and proceed at his own peril.—9 *Mass. Rep.*, 112.

As it respects how far a deputy or under sheriff may make himself personally liable for a breach of duty, the general rule is, that an action will not lie against an under sheriff for a breach of duty in his office, although he may, as well as any other agent, make himself liable personally, by a special undertaking. (9 *Cow.* 212; *Cowper* 403.) A deputy sheriff must make a special promise founded upon some good consideration in order to charge himself personally for a breach of duty. And the promise must be absolutely and clearly made out in order to charge him. This is the rule which has been established by the supreme court, (7 *John. Rep.*, 472; 15 *Ibid.*, 3,) and it seems founded in good sense. The deputy sheriff is only an agent, and stands upon the same footing as any other agent who is known to be acting for another; and the rule in such cases is (*Comyn on Contracts*, 557,) that where the agent makes known his agency at the time of dealing, or where he is acting as a known agent, he is not personally liable unless he makes himself so by special promise.

Where an under sheriff embezzles money received by him as

under sheriff, it is a breach of the condition of his bond, which is, that he shall execute the duties of under sheriff according to law, and without fraud, and the sureties on the bond are therefore liable for the moneys so used by him. (5 *John. Rep.*, 168.) And for any breach of duty for which the sheriff's bond would be forfeited, it is presumed an action would lie against the deputy and his sureties upon *his* bond. In the language of the court, (6 *Wend.* 456,) what is a sheriff to do to prevent the penalty attaching to him and his sureties? He is faithfully to execute the office without fraud, &c. Does he fulfill the condition if he does not execute the office? I apprehend not. His neglect of duty is a breach of the bond though it should not involve in it any positive act of fraud, deceit or oppression. To keep the bond whole, he must do his duty faithfully, and he must do it without deceit, fraud or oppression. That this is the true construction is evident from other parts of the act prescribing the condition of the bond, and the duties of the sheriffs. The legislature must therefore have considered a default by the sheriff in his office a breach of the condition of the bond, as the act gives the right of prosecuting to the party aggrieved for *any default*, or misconduct in his office. The inference from this reasoning is, that any act or neglect by the deputy sheriff in the execution of the duties of *his* office, by which the sheriff has to pay money or is in any way damnified, is a breach of the condition of the deputy's bond to the sheriff. The party for any default of the under sheriff has the same remedy given to him by statute upon his bond, as he has against the sheriff. And the sheriff is not bound to discharge the sureties to the bond of the deputy upon their request to be discharged, or upon their refusing to stand as such surety any longer, nor does such refusal discharge the sureties. Nor is he under any obligations to remove the deputy at their request, and the sureties are therefore holden for all the defaults or misfeasances of the deputy during his continuance in office. (11 *Wend. Rep.*, 28.) And if the deputy becomes insolvent, and in consequence of his insolvency, the sureties request his removal from office, and the sheriff still retains him, the sureties on his bond are liable.—9 *Cowen's Rep.*, 693.

A deputy of the sheriff in his capacity of keeper of the jail is not in any sense a deputy sheriff; nor is a deputy sheriff a keeper of the jail; hence a deputy keeper of the jail does not stand in such relation to the sheriff or his deputies, who are authorised to serve writs, but that they may lawfully serve a writ or process in which the deputy jailer is a party. (11 *Mass. Rep.*, 181.) An under jailer or turnkey is not a deputy sheriff within the meaning of the statute. He is a mere servant of the jailer and can have no official control or agency in the execution of process directed to the sheriff, and is not therefore within the meaning of the statute (2 *Rev. Stat.* 2d ed. 293, § 41,) forbidding the sheriff or his deputies from purchasing any goods or chattels, lands, or tenements at any sale by virtue of any execution, and a purchase made by him is not void.—4 *Wend. Rep.*, 481.

When the sheriff has omitted to take a bond of indemnity from the jailer, if the jailer commits a breach of duty in regard to his trust, he is liable to the sheriff in an action of assumpsit on his implied undertaking to serve the sheriff with fidelity, but he cannot be charged as a wrong doer for any negligence, and an action on the case is not therefore a proper action against him. But Lord Holt, held that a jailer was liable personally in an action on the case for a wilful escape, but not for a negligence; this point was not decided by the supreme court in this state, but there seems to be no good reason why he should not answer for his wrongful acts as well as any other person.

CHAPTER III.

Arrest.

Arrest, derived, it is said, from the French word *arreter*, to stop, or stay, is the restraint of a man's person, obliging him to be obedient to law, and is always an execution of the command of some court or officer of justice. An arrest may be considered as the beginning of imprisonment: where a person is first taken and restrained of his liberty by power or color of a lawful warrant. None may be arrested in a civil action but by some writ, precept or command issued by a court, judge or justice having authority therein; but for treason, felony, or breach of the peace, the arrest may be, and frequently is made without a warrant or precept.

Arrests are either in civil or criminal cases; and the duties of the sheriff are important in each, whilst the same liabilities may attach to both.

An arrest in a civil cause is defined to be, the apprehending or restraining one's person by process, in execution of the commands of some court. These commands are addressed to the sheriff, and the arrest is to be made by him or one of his deputies; and can only be made by them in that county to the sheriff of which the process is directed.—7 *Taunt.* 233; *Doug.* 384; 1 *Term Rep.*, 187; 2 *New. Rep.*, 167.

When process against the body of the defendant has been issued and delivered to the sheriff, he is bound to cause the arrest

to be made ; and the day on which the writ is returnable is the latest allowed for making the arrest. (9 *John. Rep.*, 117. 2 *Burr. Rep.*, 812. 1 *Term Rep.*, 191.) If the sheriff omit to serve the writ, or neglect to return the same, he may be proceeded against by attachment after being notified to return it, the object of this being to bring him into contempt. (1 *Wend. Rep.*, 288 ; 9 *Ibid.*, 224 ; 10 *Ibid.*, 572.) It is however the duty of the sheriff to return the writ without being notified to do it ; and in case of his neglect, the party is not confined to his remedy by attachment, but may, at his election, bring an action upon the case for not returning it ;* to which the sheriff cannot plead that he had never been notified or ruled. (15 *John. Rep.*, 456.) And besides this, as his employment is for the good and convenience of the public, if the sheriff refuse to receive a writ or to execute it, this is an offence of a public nature and for which he may be fined and imprisoned.—5 *Plowd.* 74 ; *Dyer* 60 ; *Dalt.* 101.

An officer having process requiring the arrest of a party, is bound to use all reasonable endeavors to execute it, and should at least go to the residence of the party ; if he relies upon vague information of the absence of the party, derived from casual inquiries, he does so at the peril of being answerable for a false return. But an officer may return process on the morning of the day of its return, and is not responsible although he might subsequent to the return have arrested the party.—10 *Wend. R.*, 367.

The sheriff is never allowed to alledge errors either in the judgment or process as an excuse for an escape ; and if he arrests the party, he is bound to keep him until he is discharged by due course of law. For notwithstanding error in the process as if tested out of term for instance, it protects the sheriff in making the arrest. It is good until reversed, which can be done on the application of a party or privy only. (15 *John. Rep.*, 155.) A process is said to be irregular on the face of it, when that irregularity appears in the writ. It frequently, however, appears by a reference to extrinsic circumstances. Thus, in the instance just mentioned, a writ tested out of term is irregular. When and

* The party may not only have an *action* against the sheriff, but may also, at the same time, be proceeding by attachment to compel a return.

where the terms are held, and how long the court was in session, are not stated in the writ; a knowledge of this is derived from other sources; and yet it may truly be said that the writ is bad on the face of it.—1 *Cowen's Rep.* 711.

But when the neglect of the sheriff to arrest, is not inconsistent with the discretion allowed by the orders of the plaintiff, and especially where it is not imperious upon him to make the arrest, the officer is not liable. Thus, where a judgment creditor told the officer who had charge of the execution, to do the best he could with it, and that he, the creditor, would take no advantage, this was held a good defence for the officer in an action on the case against him by the judgment creditor for not arresting his debtor in execution.—7 *Mass. Rep.*, 177.

It is enacted by the Revised Statutes (2 *R. S.*, 2d ed., 269, §1,) that actions brought for the recovery of any debt or for damages may be commenced: 1. By issuing and serving of a *capias ad respondendum* against persons not privileged from arrest: 2. By summons against corporations: 3. By filing a declaration. By this it would seem that it is unnecessary to use the original writ in any case. A personal action may be commenced either by *capias* or declaration, except that a *capias* cannot be used where bail is required and the person is privileged from arrest. But a *capias*, such as is used in actions not bailable, may issue notwithstanding the statute prohibiting arrest and imprisonment in civil process in actions upon contract. Before the Revised Statutes the defendant was in fact arrested upon non-bailable process, and was required to endorse his appearance; but now the *capias* in a non-bailable action is a mere summons in effect, though the form is the same as formerly. If the defendant refuse to endorse his appearance the sheriff may return the writ personally served.—2 *R. S.*, 2d ed., 270, § 1; 18 *Wend. Rep.*, 644.

In a suit commenced by the filing and service of a declaration we would merely remark that, this mode of commencing the action may be adopted against any person whether privileged from arrest or not; except infants. (7 *Wend. R.*, 489.) And it may be adopted against any one found within the jurisdiction of the court, whether a resident or not. (12 *Wend. R.*, 12.) But in

the court of common pleas, and in the superior court of the city of New-York, it can be adopted only against residents within the jurisdiction of the court; and for an error in this respect the defendant may plead in abatement, or move to set aside the proceedings.—*Gr. Prac.*, 455.

A copy of the declaration endorsed with a notice to plead must be served *personally* upon the defendant. The service is required to be personal, the declaration being in the nature of process. (9 *W. R.*, 497.) The service may be made on the defendant at any time except on Sunday; (1 *R. S.*, 2d ed., 675, § 58; 20 *John. R.*, 140;) even on the day of a general election, (20 *W. R.*, 681,) at any place within the limits of the state but not out of the state. If there be several defendants, they should all, if possible, be served with the declaration, although, in case of actions *ex contractu*, if it appear that the service has been made upon any of them, the plaintiff may proceed in the action in the same manner as though all had been served. (*Laws of 1833*, p. 375, § 3.) The declaration may be served by a sheriff or coroner as in the case of a *capias*, or it may be served by any other person, even by the plaintiff himself. If intended to be served by a sheriff, an additional copy should be prepared and sent with it for the purpose of being certified and returned. The sheriff is required to serve the declaration with all convenient speed, and to return it with a certificate of the service endorsed, either to the office of the clerk of the court in which the suit is pending, or to the attorney whose name may be endorsed on the declaration. (*Ibid*, 394, § 2.) If the sheriff neglect so to return it within a reasonable time after delivery, he may be compelled to do so by notice and attachment in the same way as for not returning a *capias*. (*Ibid*; 10 *Wend.* 572.) And where the declaration has been served by a sheriff, the proof of its service consists of the certificate endorsed on the copy returned to the attorney or clerk and signed by the sheriff or his deputy. (*Laws of 1833*, p. 394, § 2; 1 *Bur. Prac.*, 502.) Or it may be an affidavit either on a copy or not. A certificate, except on a copy of the declaration is not proof of service.—*Ibid*.

The arrest is usually made by an actual seizure, or a laying of the hand on the person ; but the law is well settled that no manual touching of the body, or actual force is necessary to constitute an arrest or imprisonment. (1 *Wend.*, 210 ; 1 *Carr and Payne*, 152.) It is sufficient if the party be within the power of the officer, and submits to the arrest.

This is all very plain, but the difficulty is, what circumstances are necessary to constitute this submission.

Where a sheriff's officer, having a warrant to arrest a party for debt, went to the party, and read his warrant to him, and then, having taken a fee, proceeded to the party's attorney to let him know it, for bail to be put in. After this the officer returned that he had taken the party. The court was of opinion that this was no arrest. In this case they thought that there was neither an arrest nor imprisonment. The officer neither touched the person of the party, nor detained him. The fee has the appearance of being rather given for the purpose of preventing an arrest. The officer reads a paper, gets some money, and then goes away without requiring the party to go with him.—3 *Carr and Payne*, 464.

And where a sheriff's officer sent his servant to a party to inform him that there was a writ out against him, and that he must come and give bail to it, and the party went to the officer's house and executed a bail bond ; this was not considered as an arrest. Here the objection was, that the officer's man who went with the message had no warrant.—2 *Carr and Payne*, 503.

Upon the same principle where a sheriff's officer to whom a warrant upon a writ against A was delivered, sent a message to A, and asked him to fix a time to call and give bail, and A accordingly fixed a time, attended and gave bail ; the court held that this was not an arrest, and that an action for a malicious arrest would not lie against the party, although he had no cause of action. Here the officer's man did not take a warrant with him, nor did he tell the plaintiff that he came to arrest him, but merely gave notice of the writ, and asked him to fix a time for giving bail.—6 *Barn. and Cress.*, 528.

And if a warrant be shown by the officer who has the execution of it to the person charged with an offence, and he therefore, without compulsion, attend the officer to the magistrate, and after an examination be dismissed; this is not such an arrest as will support trespass and false imprisonment. (5 *Bos. and Pull.*, 211.) "I can suppose," says *Sir James Mansfield, C. J.*, "that an arrest may take place without an actual touch, as if a man be locked up in a room, but here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than as a summons. How can a man's walking freely to a magistrate prove him to be arrested." In accordance with this case is 1 *Salk.*, 79.

But if the officer tell the party that he must go with him, and the latter does so in order to prevent the necessity of actual force being used, this is an imprisonment, and gives the party thus consenting to go, an action of false imprisonment. And as every imprisonment includes an assault the plaintiff may recover on a count for a common assault.—*Ryan & Moody's R.*, 321; *Stark. Ev.*, 1449.

From these several cases it would appear that in order to constitute an arrest, the officer must exercise a controlling authority over the defendant, and have the process in his possession to enforce it; a submission, under such circumstances, without a manual caption, would be a sufficient arrest.

When a statute requires that a certain person shall execute process, and it is executed by another, such a proceeding is void. And on an arrest so made trespass and false imprisonment may be maintained. (7 *Cow.*, 269.) And he cannot be precluded from his action for his illegal imprisonment, unless he voluntarily submitted to it; and waived the irregularity in the process.

Mere words will never constitute an arrest. If the officer says "I arrest you," and the party runs away it is an escape; the party must acquiesce in the arrest, and go with the officer, to make it good. In *Garner v. Park*, (1 *Carr & Payne*, 152,) it was held that if the officer, in such case, had touched the party to be arrested, and the party had instantly ran away, this would

have been a perfect arrest, and the running away of consequence an escape.—1 *Salk.*, 79.

When a sheriff has illegally arrested a defendant in one action, he cannot detain him in another. (9 *Bing. R.*, 566 ; 1 *New. R.*, 175.) The question in this case was, whether the defendant was entitled to be discharged out of custody in the action, he having been detained by the sheriff of London under a *ca. sa.*, issued at the suit of the plaintiff, which had been lodged with them before the time of their arresting the defendant upon *mesne* process, issued at the suit of another plaintiff. The arrest had been made by one *Richard Jackson*, the son and assistant of *William Jackson*, one of the sergeants to the sheriff of London. At the time of such arrest the warrant was held by *William Jackson*, to whom it was directed, not by *Richard Jackson* ; but after *Richard Jackson* had arrested the defendant without any warrant, he delivered him into the custody of a police officer under a false charge of felony, and then brought his father to the police station, and the father by handing the warrant over to the son endeavored by fraud, to make the arrest appear to have been legal. On the ground of such fraud on the part of the sheriff's officer and his son, one of the judges on an application made before him in vacation, ordered the defendant to be discharged from that arrest. But the defendant being detained under the *ca. sa.*, a rule *nisi* was obtained to discharge him from this detainer on the ground that the apprehension by the sheriff could not justify a subsequent detainer.

The principle derived from this and other cases (2 *Bos. & Pull.* 282, 367 ; 2 *Barn. & Ald.* 743 ; 2 *W. Black.*, 823,) appear to be that when the sheriff arrests the defendant in one action it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time ; for it would be only an idle and useless ceremony to arrest the defendant in the rest ; it would be *actum ageu* ; and this detainer will hold good, though the court may, upon collateral grounds unconnected with the act of the sheriff, order the party to be discharged from the first arrest. But when the sheriff has, by his own act, illegally arrested the defendant, the defendant is not in custody under the first writ ; he

is suffering a false imprisonment, and such false imprisonment being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff.

A person arrested in one county, passing through another county in the ordinary route of travel from the place where he was arrested to the place where he is to be conveyed, according to the command of the process under which the arrest was made, is not subject to arrest in the county through which he passes; and if arrested, all persons concerned in the same, with the knowledge of the previous arrest, are answerable as for an unlawful arrest. (2 *R. S.*, 2d ed., 346, § 7.) The effect of the provision in the statute is to take from the officer making the second arrest all jurisdiction over the defendant in the process, while passing through his county, as much as though he had not entered the county, but had continued in that in which he was originally arrested. (9 *Wend. Rep.*, 204.) But the court consider it no cause to set aside an arrest under an order to hold to bail, that the defendant was brought into this state as a fugitive from justice. (10 *Wend. Rep.*, 573.) It seems, however, that had the criminal proceeding been a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civiliter*, that the defendant would have been discharged.

A person who has been arrested in another state and discharged from imprisonment by an act of the legislature of that state, may be arrested and held to bail here for the same cause of action, at the suit of the same plaintiff. (14 *John. Rep.*, 346.) But if a party be discharged from arrest on giving security, he cannot be arrested again for the same cause, if the security even turn out to be worthless, unless he has been guilty of fraud. (8 *Bing. Rep.*, 54.) And a plaintiff in a judgment who has taken notes as a collateral security for the payment thereof, cannot maintain an action upon the notes, if after the taking of the same he issues an execution and imprisons the defendant in the judgment. For it is a general rule of law that the taking of the body of the debtor in execution, is satisfaction of the debt while the imprisonment continues.—9 *Wend. Rep.*, 241.

Process void on its face will not warrant an arrest ; and if the officer attempt to execute it he will be liable. (7 *Cow. R.*, 249.) And in an action of assault and battery and false imprisonment, parol proof of the existence of process issued out of a court is inadmissible. The process itself must be produced, or a sworn copy, and if the original is lost it ought to be accounted for. (12 *John. R.*, 456.) In such cases purity of intention will not assist the officer. Though malice in common acceptation is a desire of revenge, or a settled anger against a person, yet, in its legal sense, it means doing an act without a just cause. Printers and publishers have been repeatedly convicted where it is probable, nay certain, that they were ignorant of the contents of the papers they were assisting to circulate.—3 *Barn. & Cress.*, 584 ; but see 20 *W. R.*, 236.

When particular time is not excepted, the sheriff may execute his process and make his arrest at any time, both in the night as well as by day.—9 *Cob.*, 66 ; 1 *Bing. R.*, 60.

Process cannot be served on Sunday. The Revised Statutes have enacted : (2 *R. S. 2d ed.*, 675, 558.) that no writ, process, warrant, order, judgment, decree or other proceeding of any court or officer of justice shall be served or executed upon the first day of the week, called Sunday, except in cases of breach of the peace, or apprehended breach of the peace, or for the apprehension of persons charged with crimes and misdemeanors, and except where such service shall be specially authorised by law ; and that the service of any such process or proceeding, in all cases, shall be utterly void, and shall subject the party offending to damages at the suit of any person aggrieved.

The above is nearly a transcript of the statute, (29 *Car. 2, c. 7.*) before the passage of which, ministerial acts upon a Sunday were lawful ; and under which it has been adjudged that a defendant arrested on another day and escaping may be retaken on a Sunday. (*Mod. Co.*, 281 ; *Salk*, 626.) So a person may be taken upon an escape warrant, but not after a voluntary escape ; (*Burnes*, 373,) nor a person arrested and liberated, there being at the time of liberation a detainer at the suit of another person. (5 *Term Rep.*, 25.) Bail may seize their principal on a Sunday,

but not sheriff's bail. (2 *Black. R.*, 1273.) So a person may be arrested on a Sunday on an attachment for a rescue, or for a constructive breach of the peace. (*Willis' R.*, 450.) But a defendant cannot be arrested on a Sunday for non-payment of a penalty under a conviction under a penal statute. (5 *Term Rep.*, 265.) So an attachment for non-payment of an award is only in the nature of a civil execution, and the party cannot be arrested; and so of an attachment for the non-payment of costs.—*Cowp. R.*, 136.

As this statute makes all arrests unlawful, it seems the better opinion that the killing of an officer who endeavors to arrest a person on a Sunday is not murder, though by the common law it had been otherwise if such public officer had been killed on an unprohibited day.—*Hawk. P. C.*, c. 32, § 58; 6 *Bac. Abr.*, 173.

Where a writ is returnable on a Sunday, it must be executed at latest on Saturday; and where a defendant in such case was arrested on the Monday morning, and detained until the writ was renewed, the arrest was held to be illegal. (2 *H. Black. R.*, 29.) So where a writ was served on Sunday, and the sheriff returned *cepi corpus*, on which the plaintiff proceeded and obtained judgment by default, and execution issued, the court ordered all the proceedings to be set aside with costs, on condition that no action should be brought against the sheriff for false imprisonment. (3 *John. R.*, 256.) The *teste* of a writ on Sunday is void; (22 *Wend. Rep.*, 648,) and the act of filling it up and delivering it to an officer is equally void. Not only the arrest but the whole proceeding is void, so as to subject the party arresting to an action for false imprisonment. The same principles of policy, as well as of religion and morality, would interdict the issuing as well as the service of process on Sunday.—12 *John. R.*, 178; 1 *Salk.*, 78; 3 *East.*, 155.

As a general rule, all persons are liable to arrest; there are however, certain exemptions which relate to individuals, to causes of action, to time, and to the occupation and continuance of particular offices.

Privilege from arrest has been considered as being either permanent or temporary.—1 *Arch. Pract.*, 76.

First. Persons permanently privileged from arrest, are the following :

1. Ambassadors, public ministers, (except consuls) and their domestic servants.—*Act of Congress, April 30, 1790*, § 25, 26.

2. Non-commissioned officers, privates, seamen, musicians and marines in the service of the United States. (*Ibid*, March 16, 1802, § 23; *Ibid*, July 11, 1798, § 5.) But midshipmen are not privileged.—*Navy Order, May 20, 1836*.

3. Persons sued in *autre droit*, or in their representative character, as heirs, executors, administrators, assignees, and trustees, unless they have incurred a personal obligation to pay the debt or demand claimed.—2 *R. S.*, 2d ed., 271, § 10.

4. Married women in actions *en delicto*.—1 *Gra. Prac.*, 2d ed., 127.

5. All females in actions *ex contractu*.—2 *R. S.*, 2d ed., 347, § 9.

6. Persons sued on recognizance of bail, or on bail or replevin bonds; or on any other bond in which any surety shall have joined, taken in the course of judicial proceedings, or by virtue of any statute.—2 *R. S.*, 2d ed., 270, § 8.

7. Corporations in their corporate capacity.—2 *Bac. Abr. tit. corporation pl.* 43.

8. Persons discharged under any insolvent law of this state; upon any cause of action accruing previous to the execution of an assignment of their estate under such law —1 *R. S.*, 2d ed., 782, § 33, 34.

9. Defendants who have before been holden to bail for the same cause of action; unless the first arrest has not been available to the plaintiff, and it can be made to appear that the second suit is not vexatious.—*Gra. Prac.*, 2d ed., 133, 136.

Secondly. Persons whose privilege from arrest is of a temporary nature, are the following :

1. Senators and representatives in congress during their at-

tendance at the session of their respective houses, and in going to and returning from the same, except in cases of treason, felony and breach of the peace.—*Const. U. S., art. 1, § 6.*

2. Members of the state legislature during their attendance at the session of their respective houses, (except on process in any suit for a forfeiture, misdemeanor, or breach of trust in any office, or place of public trust held by them,) and for the space of fourteen days previous to the session, and while going to and returning from the same; provided the time of going and returning do not exceed fourteen days. (1 *R. S., 2d ed.*, 140, § 6. The same privilege is enjoyed by them while absent with leave of the house to which they belong, (*Ibid*, § 9); and also after any adjournment of the legislature until its next meeting, when such adjournment shall not exceed fourteen days.—*Ibid*, § 8.

3. Officers of both houses of the legislature, while in actual attendance thereon.—*Ibid*, 141, § 10.

4. Attorneys, solicitors, and counsellors, during the actual and necessary attendance on their respective courts, except when sued with other persons. (*Ibid*, 218, § 87.) And to sustain the privilege in these cases, it is necessary that the attorney, &c., be employed in some cause pending, and then to be heard in court.—*Ibid*.

5. All other officers of courts of record, during the actual sitting of the court of which they are officers, except when sued with other persons.—*Ibid*.

6. Parties to a suit during their attendance at court, or before arbitrators, or referees, or upon other judicial proceedings, and in going to and returning therefrom.—*Gra. Prac.*, 129.

7. Witnesses who have been legally and in good faith subpoenaed or summoned to attend any court, judge, officer, commissioner or referee, during such attendance and while going and returning therefrom.—2 *R. S., 2d ed.*, 323, § 63–67.

8. Persons belonging to the militia of this state, during parade days, from sunrise to sunset.—1 *Ibid*, 298, § 27; 20 *Wend. Rep.*, 681.

9. Electors entitled to vote at elections (other than for militia

and town officers) during the continuance of such elections.—1 *R. S.*, 2d ed., 116, § 4.

A defendant claiming the benefit of the act of congress as domestic servant to a public minister must be really and *bona fide* his servant at the time of arrest; for though the process of law shall not take a *bona fide* servant out of the service of a public minister, yet, on the other hand, a public minister shall not take a person who is not *bona fide* his servant out of the custody of the law, or screen him from his just liabilities to others. (*Burr. R.*, 1676, 2016; *Ld. Raym.*, 1524.) The privilege, however, extends to the servants of a public minister, being natives of the country where he resides, as well as to his foreign servants; and not only to servants lying in his house, but also to actual servants lying out of his house. Nor is it necessary that their names should have been registered and transmitted; though unless this has been done the attorneys, officers, &c., cannot be proceeded against for arresting them. And the secretaries of ministers are protected as well as their servants. (*Str.*, 797; 3 *Wils. R.*, 35; *Burr. R.*, 1478, 1481; 3 *Term R.*, 79.) A secretary of legation is also entitled to all the immunities of a public minister. (1 *Dall. R.*, 117.) Consuls are not considered as public ministers, nor consequently privileged from arrest. (2 *Dall. R.*, 297.) If they were it would be attended with much inconvenience; for such persons are generally engaged in trade, and are frequently subjects of the countries in which their office is exercised.

There is no statute fixing the time during which a member of congress is to be privileged before or after the session of congress; and it has been held that this privilege is to be taken strictly, and is to be allowed only while the party is attending congress, or is actually on his journey going or returning from the seat of government.—*John. Ca.*, 222.

A sheriff cannot take notice of the privilege of an attorney, nor can he discharge him from his custody under process on his producing his writ of privilege. And if he does so he is liable for an escape for the amount of the debt with interest, and also for the poundage, if the plaintiff has paid any. They are reliev-

able from arrest only on motion, and under the circumstances of the case. If an attorney be taken on a *ca. sa.* during his attendance in court, he having business to transact, the court, on an affidavit of the fact, and on motion will discharge him from arrest, and this also may be done at the circuit or sittings.—18 *John. R.*, 52.

All persons who have any relation to a cause which calls for their attendance in court, whether they are compelled to attend by process or not, are entitled to privilege from arrest provided they come *bona fide*.* Nor have the courts been nice in scanning this privilege, (whether relating to the coming, attendance, or returning of any one concerned in the trial,) but have given it a large and liberal construction.—1 *Wend. R.*, 32; 5 *Wend. R.*, 90; 2 *John. R.*, 294; *Anth. N. P.*, 187; 4 *Dallas*, 329, 387; *Com. Dig. Privilege*, A. 1; *Stra.*, 986, 1094; 6 *Taunt.*, 358.

A defendant attending in a cause before an arbitrator to be examined as a witness under a rule of court is privileged from arrest, *eundo morando, et redeundo*. (3 *East.*, 89.) And a party to an action referred to the decision of the court upon a case stated, is privileged from arrest during his attendance upon the court. (6 *Mass. R.*, 245.) A party also attending a reference is entitled to privilege from arrest; (2 *Wend. R.*, 257,) but it extends only to a reasonable time after the hearing. A party might be indulged, the court remark, in remaining to learn the verdict of a jury, who cannot separate after a cause is committed until they pronounce a verdict. It is not so with a report of referees. Referees may separate, and a report may not be made until long after the hearing. And a witness attending before arbitrators from a foreign state is not liable to an arrest. (6 *Cow.*, 381.) But any suitor or witness attending court is not privileged from having pro-

* A person attending before a court or officer is not entitled to a witness' privilege from arrest, unless he attend *as a witness*; and this though he be sworn and examined after the arrest. Nor is a counsellor privileged from arrest while attending before an examiner, master, or judge out of court.—*Cole v. McClellan*, 4 *Hill R.*, 59; further as to the general doctrine, *Cowen & Hill's Notes to Phil. Ev.*, 15, 17; *Deyo v. VanVolkenburgh & Leland*, 5 *Hill R.*, 242.

cess served on him in a non-bailable action.—1 *Wendell's Reports*, 257.

A plaintiff who was attending from day to day at the sittings in expectation of his cause being tried, was held to be privileged from arrest whilst waiting for that purpose at a coffee house before the actual day of trial. (11 *East. R.*, 439.) And when the defendant was attending his cause at the sittings, and though it was put off early in the day, stayed in the court until five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, where he was arrested during dinner; the court held that such a necessary refreshment as this ought not to be looked upon as a deviation so as to cancel the defendant's privilege *redundo*. (*W. Black. R.*, 1113; 4 *Dal. R.*, 387.) Nor is the party bound to go the nearest way home, if he does not abuse his privilege for the purpose of going about other business of his own.—6 *Taunt. R.*, 358; 4 *Dal. R.*, 329.

In an action against husband and wife, the husband alone is liable to be arrested; and he will not be discharged unless he put in bail for himself and wife. (1 *Salk.*, 115; 6 *Mod. R.*, 17, 86.) If the wife be arrested on *mesne* process, she will be discharged on common bail; and that whether she be arrested singly or jointly with her husband; and though the writ was sued out against both, on which *non est inventus* was returned as to the husband. (*Cro. Jac.*, 145; 1 *Barne & Ald.*, 165; 1 *Term R.*, 486; 3 *Wils. R.*, 124.) When the wife applies to be discharged from arrest, she must apply on her own personal oath of the fact of coverture, and not upon the affidavit of another.—7 *Taunt. Rep.*, 55.

A judge is not liable to arrest by process issuing out of his own court, but must be proceeded against by bill.—8 *John. Reports*, 351.

Infancy is no ground for a discharge from arrest, but must be taken advantage of as a defence to the action.—1 *Boa & Pull.*, 480.

The court will not discharge a defendant out of custody on filing common bail, on the ground that he has become insane since

the arrest. (2 *Term Rep.* 390.) Nor even on the ground that he was insane at the time of the arrest. (4 *Term Rep.*, 121.) And the court of common pleas thought they could not, and accordingly refused to do it though a commission of lunacy issued against him previous to the arrest. (2 *Bos. & Pull.* 362.) Neither will the court discharge the bail on the ground of the defendants having been a lunatic since the commencement of the action.—6 *Term Rep.* 133.

The general rule is that a man shall not be arrested a second time for the same cause of action. But where a plaintiff has not been able to make the first arrest available, he may then, provided it be without any vexatious conduct on his part, arrest a second time. But it is questionable whether the exception can be extended to warrant a third arrest.—8 *Barn. & Ald.* 769.

An officer who has arrested a prisoner on *mesne* process may retake him before the return of the writ, though he voluntarily permitted him to escape immediately after the arrest.—2 *Term Rep.*, 172.

The protection from arrest which the law affords a person entitled to it, is considered as a personal privilege, of which the party may avail himself to prevent or defeat an arrest; but if he waive the privilege, and willingly submit himself in the custody of the officer, he cannot afterwards object to the imprisonment as unlawful or as made by a void authority. (12 *John. Rep.*, 89; 11 *Mass. Rep.* 11; *Cole v. McClellan*, 4 *Hill's Rep.* 59.) And persons privileged from being arrested or held to bail on *mesne* process, may sometimes be arrested upon execution in a civil suit, where they could not be lawfully arrested on original or *mesne* process.—4 *Mass. Rep.*, 29; *ibid.* 197.

How far, and in what cases the sheriff is justifiable in breaking doors, &c., in order to make an arrest on civil process, will furnish us with another subject for enquiry.

As a general rule an officer cannot justify a forcible entry into a dwelling house for the purpose of arresting the occupier or any of his family upon civil process. And not only the children and domestic servants of the occupier are of his family, and so entitled

to protection; but also permanent boarders, or those who have made the house their home, may properly be considered as part of the family. But a stranger, or perhaps, a visitor, would not enjoy the same protection; for, as they have acquired no right to remain in the house, if the occupier should refuse admission to the officer, after his purpose and authority were made known, the law would consider him as conspiring, with the party pursued, to screen him from arrest, and would not allow him to make his house a place of refuge. (3 *Inst.* 162; *Foster* 319; *Cro. Eliz.* 908; 13 *Mass. Rep.* 520.) If the occupier of a dwelling house, or one of his family, flee into his house, in order to avoid an intended arrest on civil process, the officer will be liable in trespass for entering the house forcibly in pursuit of him. But if an arrest have actually been made, and the person arrested escape, and take refuge in his dwelling house, the officer may justify breaking into the house in pursuit of him. (*Roll. Rep.* 138. *Palm.* 54. 6 *Mod. Rep.* 173.) And if on rapping at the door, it be opened to see who is there the officer rush forcibly in and arrest the occupant or one of his family, such entry and arrest are both unlawful. (*Hobb.* 62, 264.) But if a window be open, and an officer puts in his hand, and touches one against whom he has a warrant, he is thereby his prisoner, and he may break open the door to come at him. (6 *Mod. Rep.* 173, 211; 7 *Ibid.*, 288.) And where a bailiff, having a warrant, perceiving the debtor's hand, out of the window, seized it, the court held it a sufficient arrest to justify his breaking open the door.—1 *Vent.* 306.

Ever since the case of *Lee vs. Gansell*, it is holden to be clear law that when the outer door is open, the officer in execution of *mesne* process, may enter forcibly any inner door, or break open the door of a lodger's apartment. And there is no distinction between breaking open the inner door of a house, and breaking open a window after the outer door is open. As where a sheriff's officer, in execution of his process, peaceably obtained entrance by the outer door of the house and followed the defendant to his bed room, who locked himself therein, and refused to open the door, though informed by the officer of his business. The officer then

waited in the garden at the back of the house all night, and in the morning touched the defendant through a broken pane of glass, requiring him to surrender, and then entered the room in which the defendant was, through the window, which the officer in entering further broke, and arrested the defendant, it was held that the officer was justified. (8 *Taunt. Rep.*, 250.) The principle that every man's house is his castle depends upon this, that if the outer door be broken, it lays the house open to the invasion of every one; but when the inner door is broken that is not the case.

It is also clear as a general principle, and a principle strictly applicable to every case, that when once an officer is within the walls of a house by having peaceably and lawfully entered at the outer door, he may break open every inner door if necessary to execute his process. (2 *Mod. Rep.*, 207.) And where the front door of the defendant's house was generally kept fastened, and the usual entrance was through the back door, and the sheriff having entered by the back door while it was open in the night, broke open an inner door in which the defendant was with his family and arrested him, the arrest was held lawful.—17 *John. Rep.*, 127.

But where, in an action for breaking and entering the plaintiff's house, it appeared that the plaintiff's house stood in a stable yard, which was surrounded by a wall; there was a hatch gate at the foot of the stairs, which led to an open gallery, from which there were doors to the several apartments; at the top of the stairs was a door across that part of the gallery which led to the chamber where the plaintiff was; the under part of the house was in stables. The defendant, having gained admission into the yard, went up stairs, and broke open the door at the top of the stairs, and arrested the plaintiff. *Lord Kenyon* held that this was the outer door of the plaintiff's house and that the arrest was illegal.—*Exp. N. P.*, 99.

A sheriff cannot justify breaking the inner doors of the house of a stranger on the suspicion that a defendant is there, to search for him in order to arrest him. (6 *Taunt. Rep.*, 246.) And the plaintiff cannot maintain an action on the case for obstructing the

execution of *mesne* process unless he aver and prove that he had a cause of action against the person whose arrest was prevented.—2 *Wend. Rep.*, 559.

The mere raising a window, or lifting the latch of a door to obtain entrance into a dwelling house to make an arrest, or seize goods on civil process, is a breaking the house which cannot be justified. (*Com. Dig.* 229; *Curtis v. Hubbard*, 4 *Hill's Rep.*, 437.) But a legal entry having been obtained, the sheriff may break open, not only inner doors, but also trunks, and chests to to complete the execution of this writ. (2 *Show. Rep.*, 87.) But it seems that before breaking trunks and chests, the officer ought to demand that they be opened. (*Cro. Eliz.* 99.) And though the sheriff may not break a man's dwelling house, or out house thereto adjoining, to execute civil process against him or his goods, yet he may break open the door of a barn, standing at a distance from the dwelling house, without even requesting the owner to open it, in the same manner as he may enter a close. (*Sid. Rep.*, 189; *Keb. Rep.*, 698.) And in ejectment the officer, if necessary, may break open doors in order to execute a *habere facias possessionem*, if the possession be not quietly given up; or he may take the *posse comitatus* with him if he fear violence. And after he has got admission he may remove all persons, goods, &c., from off the premises before he gives possession.—5 *Co.* 91, b; 1 *Lev.* 145.

If an officer break into a dwelling house, an arrest made by him therein on civil process will not be void, notwithstanding the unlawfulness of his first entry.—5 *Co.*, 93, a; 1 *Mass. Rep.*, 155, 520.*

* But recent cases overrule this principle. In *Oystead v. Shed*, 13 *Mass. Rep.*, 520; *Ilseley v. Nichols*, 12 *Pick.*, 270, 275, it is decided that an officer shall not forcibly enter a dwelling in the execution of civil process by arrest against the occupant or any of his family, who have their domicile or ordinary residence there;—and that an arrest of any such person made on such forcible entry, is illegal. This protection, in Massachusetts, extends to permanent boarders, but not to strangers or visitors.

A recent case in New York, settles a principle which also, in this state, overrules the case in 5 *Co.* It is as follows:—The sheriff went to S. Hubbard's house with a *fi. fa.* to levy. Hubbard was absent, but his brother, who

When arrested, if the defendant refuse, or be unable to give the bail required on the arrest, the officer will detain him in custody, and commit him to the prison of the county. The defendant is entitled, however, in such case, to the liberties of the jail, on executing a proper bond for that purpose. (2 R. S., 2d ed., 352, 353, § 43-47.) What relates to the sheriff and the bail bond will be found in the next chapter; and the nature of the *liberties* will be explained when we come to treat of the duties of the sheriff in the execution of the *capias ad satisfaciendum*.

But before dismissing this branch of the subject, it is necessary to revert to the statute for some duties which are required of the sheriff, and some prohibitions which are laid upon him as regards the defendant whilst in his custody on civil process.

When a sheriff or other officer shall arrest any person by virtue of any mesne or final process, he shall not charge such prisoner with any sum of money, or demand, or receive from him any sum of money or any valuable thing, for any drink, victuals, or other thing whatsoever, furnished or provided for such officer, or for such prisoner, at any tavern, ale house, or public victualling or drinking house.—2 R. S., 2d ed., 345, § 1.

No sheriff or other officer who shall have arrested any person, shall, while such person is in his custody, demand or receive any gratuity or reward upon any pretence whatever, for keeping such

was there on a visit, forbad the sheriff coming on the premises. But the sheriff went through the yard to the house, and the outer door being only latched, went in and levied on a clock. In going away with it, he was forcibly but ineffectually resisted by the brother, who had forbidden his coming on the premises. The court held, that the outer door of a dwelling house being *latched* merely, the sheriff entered it contrary to the known will of the owner, and levied upon his goods therein, by virtue of a *fi. fa.*; and that such levy was illegal, though the owner was not in the house at the time; and that the levy gave the sheriff no right to remove the goods. Also, per Walworth, chancellor, *held*, further, that a guest in the house might lawfully resist the sheriff's attempt to remove goods thus seized, using no more force than was necessary; also, as a general rule, no one can acquire, by his own illegal act, a right to the custody of another's person or property.—*Curtis v. Hubbard*, 4 *Hill Rep.*, 437.

prisoner out of jail, or for waiting for such prisoner to find bail or agree with his adversary, or for waiting for any other purpose.—2 R. S., 345, § 2.

If any person be arrested and kept in any house other than the jail of the county, neither the officer arresting him, nor the person in whose custody such prisoner shall be, shall demand or receive from such prisoner, any other or greater sum for lodging, drink, victuals, or other necessary things, than shall have been prescribed by the court of general sessions of the county; or if no rate shall have been prescribed by such court, such officer or person shall not receive any other or greater sum than shall be allowed by a justice of the peace of the same town, upon proof that the lodgings or other things furnished, were so furnished at the request of such prisoner. And in no case shall such officer or person demand or receive any pay or compensation for any spirituous liquors sold or delivered to such prisoner.—2 R. S., 2d ed., 345, § 3.

A prisoner so kept in any house may send for and have any beer, ale, cider, victuals, and other necessary food, and such bedding, linen, and other necessary things, as such prisoner shall think fit, when and from whom he pleases, without any detaining or paying for the same, or any part thereof, to the officer arresting him, or to the person in whose custody such prisoner shall be.—*Ibid*, § 4.

No sheriff, jailer, or other officer, shall demand or receive any money or valuable thing whatsoever for the chamber rent of any prison, or any fees, compensation, or reward, for the commitment, detaining in custody, release, or discharge of any prisoner, other than such fees as are expressly allowed by law.*—*Ibid*, § 5.

* It has not been unusual for sheriffs to charge chamber rent while detaining persons alledged to be fugitive slaves. The claimant shall pay weekly, for the support of the fugitive, two dollars per week, so long as the fugitive remains in custody. (2 R. S., 464, § 18.) But the sheriff's custody ceases when the alledged fugitive is either discharged, or by the certificate of the court or officer delivered to the claimant or his agent. And if the sheriff detains the slave after this, it is not an official act, but merely as an agent.

An arrest in criminal cases, is the apprehending or detaining of the person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons are in general liable when accused of capital or violent injuries. The exemptions which exist in civil cases are here inapplicable. Thus a married woman when she has committed an offence for which she is subject to punishment, is liable to be apprehended; and though it has been enacted in England that clergymen shall not be arrested in churches and church yards, this is a privilege which extends solely to civil process, and in cases of crimes affords no protection to them above others. So peers and members of parliament have no exemption from arrest in cases of treason, felony, and actual breach of the peace, and according to the resolution of both houses of parliament, members are not privileged even when accused of a seditious libel. The same principles as it respects persons otherwise privileged have been recognized and apply to this state. *Burr.* 1681; *Cro. Jac.* 321; *Fortesq.* 359; *Hawk. b. 1, c. 1*; 2 *Wil. Rep.*, 159; 11 *Harg. St. Tr.* 305.

Sheriffs are not only enabled but empowered, to arrest felons, and all persons are required to be assisting to them therein upon their summons, and they are respectively punishable by fine and imprisonment in case they neglect their duty. The sheriff may also arrest a person suspected of a capital offence whose guilt is not certain. And if the sheriff be assaulted in the execution of his duty, he may apprehend the offender, and keep him in prison for a reasonable time, to be carried before a justice of the peace, to be committed or find bail to answer the offence.—1 *Saund.* 77; 2 *Hale* 87; 1 *Taunt.* 146.

And in every case of treason, felony, and actual breach of the peace, the offender may be apprehended without warrant, if such a crime has been actually committed by *some one*, and there is reasonable ground to suspect an individual to be guilty. (2 *Hale*, 72; 4 *Taunt. Rep.*, 45.) In this case the party making the arrest, though a private individual, will not be liable to any action, though it should ultimately appear that he was mistaken, and that the person suspected was innocent. (3 *Wend. Rep.*, 384;

Doug., 359; *Selv. N. P.*, 386.) But if no such crime was committed by any one, an arrest without warrant by a private individual, would be illegal; though a sheriff, or other peace officer, would be justified if no crime had been committed, and he acted merely on the information of others. (3 *Wend. Rep.*, 384; 3 *Campb. Rep.*, 420; 6 *Term Rep.*, 315.) And all persons whatever who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender. (11 *John. Rep.*, 486.) And though a private person cannot of his own authority arrest a person who has been engaged in an affray, or breach of the peace; yet, during the affray, any person may without a warrant, restrain any of the offenders, in order to preserve the peace. (*Ibid.*) But an officer may arrest him without a warrant, and bring him before a justice within a reasonable time after the affray. (3 *Wend. Rep.*, 384.) Or, if a sheriff has reasonable cause to suspect that a felony has been committed, he is justified in arresting the party suspected, of his own accord, even though it afterwards appear that no felony has been committed.—*Ld. Raym. Rep.*, 1301; 11 *Mod. Rep.*, 248; 6 *Barn. v. Cress.* 635.

In an arrest then the question is, has a felony been committed or not? And the fundamental distinction is, that if a felony has actually been committed, then a private person may as well as a peace officer arrest; if not, the question always turns upon this, was the arrest *bona fide*? was the act done fairly, and in pursuit of an offender, or by design, or malice, or ill will? Upon a high way robbery being committed, an alarm spread, and particulars circulated; and in the case of crimes still more serious, upon notice given to all the sea ports; it would be a terrible thing if, under probable cause, an arrest could not be made. Many an innocent person has been, and may be taken up upon suspicion, but the mischief and inconvenience to the public, in this point of view, are comparatively small.

And these observations also, apply in then full extent only to felonies and breaches of the peace. For no person can be taken into custody without warrant for a mere misdemeanor unattended

with violence, as perjury, or libel. (2 *Wils. Rep.*, 159; 2 *Salk.* 698.) And it has ever been holden in England, that a watchman cannot, of his own authority, justify the arrest of a man talking loudly, and making great disorder in the street, and that neither the sheriff, or constable, has any power to commit him to prison.* (2 *Stra. Rep.*, 704; 1 *Esp. Rep.*, 294.) Any person may, without warrant, apprehend and carry before a magistrate, a party about to expose an infant, and leave it to perish, or playing with false dice, or otherwise committing an indictable fraud affecting the public. (*Com. Dig. Pleader*, 3 *M.* 22; 1 *Leon.* 527.) So a private individual may arrest a lunatic who seems disposed to do mischief. (*Sir W. Jones*, 249; *Bac. Abr. Trespass, D.*, 3.) And when a felony is committed in view, every person not only may, but the law commands him to apprehend the offender. (11 *John. Rep.*, 486.) And a private person who has thus apprehended an offender, may deliver him into the hands of the sheriff, who is bound to receive him, or he may carry him to the jail of the county, or bring him immediately before some justice of the peace, (1 *Yale* 589; 2 *Ibid.*, 37; *Hawok. b.* 2, 13 § 7,) which last is recommended as the safer course.—1 *Chit. Crim. Law*, 20.

This summary course of proceeding without warrant, is frequently necessary, when there is an imminent danger of an escape, or where, from other circumstances, the utmost promptitude is requisite. But, whenever the case will admit, it is thought more prudent to obtain the authority of a magistrate, to give greater security to the parties by whom the arrest is to be effected.

The following causes of suspicion have been enumerated as generally justifying an arrest of an innocent person for felony:

1. The common fame of the country; but it seems that it ought to appear upon evidence in an action brought for such arrest, that such fame had some probable ground:
2. Being found in such circumstances as induced a strong pre-

* But in most, and it is presumed in all our cities, it is expressly otherwise, by their city laws, enacted in pursuance of powers given them by their charter or by statute.

sumption of guilt ; as coming out of a house wherein murder has been committed, with a bloody knife in one's hand, or being found in possession of any part of the goods stolen, without being able to give a probable account of coming honestly by them :

3. The party behaving in such a manner as betrays a consciousness of guilt ; as where a man accused of felony, on hearing that a warrant is taken out against him absconds :

4. The being found in company with one known to be an offender, at the time of the offence, or generally, at other times, keeping company with persons of scandalous reputation :

5. The living an idle, vagrant, and disorderly life, without having any visible means to support it.—2 *Hawk.*, c. 12; 2 *Inst.*, 52.

Persons arrested under any warrant issued for any offence shall, where no provision is otherwise made, be brought before the magistrate who issued the warrant ; or if he be absent, or his office be vacant, before the nearest magistrate in the same county ; and the warrant by virtue of which the arrest shall have been made, with a proper return endorsed thereon, and signed by the officer, or person making the arrest, shall be delivered to such magistrate.—2 *R. S.*, 2d ed., 591. § 12.

If any person against whom any warrant granted by any such alderman or justice shall be issued, shall escape, or be in any other county, out of the jurisdiction of such alderman or justice, it shall be the duty of any justice of the peace or other magistrate named in the first section of this title (2 *Rev. Stat.*, 590,) within the county where such offender shall be, or shall be suspected to be, upon proof of the hand writing of the magistrate issuing the warrant, to endorse his name on the same ; and there upon the person bringing the warrant, or any other officer to whom it may have been directed, may arrest the offender in the county where the warrant was endorsed.—2 *R. S.*, 2d ed., 590, § 5 ; *Post*, 117.

If the offence charged in the warrant be not punishable with death, or by imprisonment in the state prison, and if the person arrested require to be brought before a justice of the county in which he shall have been arrested, it shall be the duty of the officer or person arresting him, to carry such prisoner before a magistrate of such county.—*Ibid*, § 7.

If the offence charged in the warrant be not punishable with death or imprisonment in a state prison, such magistrate may take from the person so arrested, a recognizance, with sufficient sureties, for his appearance at the next court having cognizance of the offence to be held in the county where the offence shall be alledged to have been committed.—*Ibid*, § 8.

Such magistrate shall certify on the warrant, the fact of his having let the defendant to bail, and shall deliver the same, together with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which such prisoner shall have been recognized to appear.—*Ibid*, § 9.

If such magistrate refuse to let to bail the person so arrested, or if such person neglect to give bail, as above provided, the officer or person having him in charge, shall take him before a magistrate of the county in which the warrant was originally issued, as hereinafter provided.—*Ibid*, 591, § 10.

If the offence charged in the warrant, be punishable with death or with imprisonment in a state prison, the officer making the arrest, shall convey the prisoner to the county where the warrant was originally issued, before some magistrate thereof.—*Ibid*, § 11.

Then follows the duties of the magistrate in examining the prisoner, committing or discharging him, or letting him to bail; proceedings which are foreign to this work.

Persons arrested under a warrant for an offence, may also in certain cases, be brought before a magistrate other than the one who issued the process. But the title in which these sections are found, only relates to those criminal offences which the magistrate cannot himself finally decide. Therefore a person arrested by warrant on a charge of having violated the act to prevent the disturbance of religious meetings (1 R. S., 2d ed., 673, § 53,) cannot be taken by the arresting officer before any magistrate, other than the one who issued the process; the provisions of the statute authorizing persons arrested under a warrant, to be brought before the nearest magistrate, applying only to cases where the

accused may be required to enter into recognizance to appear at a court of criminal jurisdiction, or may be committed to jail. (17 *Wend. R.*, 211.) And it also seems that where the accused is brought before the nearest magistrate, the officer making the arrest should state in his return the absence of the officer who issued the warrant.—17 *Wend. R.*, 211.

The officer to whom the warrant is directed, should as soon as he conveniently can, proceed with secrecy to find out and arrest the party, not only to secure him, but also to subject him and all other persons to the consequences of escape; and if he refuse or neglect to execute the warrant he will be punishable for his disobedience or neglect. (*Cro. Eliz.*, 654; *Hale*, 581.) To constitute an arrest in such cases, the party against whom the process is awarded, must be either actually touched by the officer, or confined in a room, or must submit himself by words and actions to be in custody; and the merely giving charge, or causing him voluntarily to appear before a magistrate, without the person's being taken in actual custody will not amount to an arrest. (1 *Salk.*, 79; *Bull. N. P.*, 62; 1 *Esp. R.*, 431; 2 *New. R.*, 211; 3 *Black. Com.*, 288.) And when the officer employs others to assist him he must be so near as to be acting in the arrest in order to render it legal. (*Cowp.*, 66; 10 *John. R.*, 85.) And he may not only demand the assistance of the citizens in general, but may, if the warrant cannot be otherwise executed, call for the assistance of the military.—14 *East. R.*, 190; 9 *Co.*, 65; 10 *John. R.*, 85.

The arrest may be made in the night. And though arrests in general are prohibited on a Sunday, cases of treason, felony and breach of the peace are excepted; and as no time is usually prescribed in the warrant, it continues in force until fully executed, though it were seven years after its date, during the lifetime of the magistrate by whom it was originally granted; and a person may be twice apprehended under it, if the purposes of justice have not been effected.—*Peake's R.*, 234.

When a party is liable to be detained on a criminal charge, the court will not inquire into the manner in which the caption was

effected. (3 *East*, 157; 1 *Barn. & Cress.*, 258.) On this point a distinction has always existed between the practice in civil and criminal cases. In the former the court inquire into the manner in which the arrest is effected, and if that was improper they discharge the party; in the latter no inquiry is permitted. (3 *East*, 89; *Anstr.*, 85.) Thus where a party, against whom a true bill for perjury had been found, and a warrant for her apprehension granted, was apprehended abroad, and brought to England, and committed to prison for want of bail, the court refused to discharge her on the ground that she had been improperly apprehended in the foreign country.—9 *Barn. & Cress.*, 446.

The officer must, however, carefully observe the directions of the warrant, or resistance may be justifiable, and he will render himself liable to an action. If therefore a wrong person be arrested the officer will be a trespasser. (*Com. Dig., Imprisonment H*, 7.) And where a warrant was directed to the officer to "take up a disorderly woman," and he took up a person who did not answer to the description, the arrest was held to be illegal, and the officer liable to damages for the injury. (*Hawk.*, b. 2, c. 13, § 31.) So where a warrant was directed by a secretary of state to the king's messenger to arrest the "author, printer or publisher" of a libel, and he took a person who was neither author, printer, nor publisher, it was determined to be unjustifiable, because in neither case did the officer act in obedience to the warrant. (3 *Burr.*, 1742.) And where the warrant directed the officer to seize certain *sugars* supposed to be stolen, and he seized *teas*, he was not protected by the warrant. (2 *Bos. & Pull.*, 162; 2 *Maule & Selw.*, 261.) And where the officers improperly broke open doors, which they were not authorized by the warrant to do, they were held liable to be sued in trespass without a previous demand and refusal of the copy of the warrant.—2 *Maule & Selw.*, 261.

The sheriff having directed a warrant to A and all his other officers to arrest B, A afterwards inserted the name of C; held that the warrant was illegal, and the arrest by C void. (6 *Term. R.*, 122.) In remarking on this case *Lord Kenyon, C. J.*, observed: "this was clearly an illegal arrest; and it is proper that

it should be made known in the most solemn manner. I remember a case of a very serious nature happening some years ago, from the circumstance of altering a warrant; a gentleman who had obtained a warrant directed to a sheriff's officer to arrest his debtor, struck out the officer's name, and inserted his own in its stead; and he was shot by the defendant in arresting him; the defendant was tried for murder, and on the trial a special verdict was found; but it was held not to be murder, because the arrest was illegal, and that at most it was only manslaughter." Manslaughter, in England, was originally a capital felony; but was subsequently entitled to the benefit of clergy. The effect of this was, to discharge the offender, on a slight burning of his hand or cheek. (4 *Black. Com.*, 370.) In the 19th year of George III, the courts were directed to change the burning to "a moderate pecuniary fine," (6 *Evan's Collection*, 299,) and they were authorized to imprison not exceeding one year. And this is the only punishment in England for manslaughter. In this instance, and in this only, say the revisers in their notes on the statutes, (3 *R. S.*, 811, *Revisers' notes*,) is our code more severe than that of England.

And if the warrant be materially defective, or the officer exceed his authority in executing it, any third person may lawfully interfere to prevent an arrest under it, doing no more than is necessary for that purpose. (1 *Leach.*, 206; 5 *East*, 304.) But it has been held that, on circumstances, an arrest might be good to detain the party in custody, though the officer might be punishable for trespass or contempt. (*Lofft.*, 433.) But when by the contrivance of the plaintiff's attorney, a party had been arrested on a Sunday on a criminal process, for the purpose of effecting his arrest on civil process, and he was detained in custody until Monday, and then arrested on the civil process, the court ordered him to be discharged out of custody.—8 *Barn. & Cress.*, 769.

Suspicion that a party has on a former occasion committed a *misdemeanor*, is no justification to an officer for an arrest without a warrant, and there is no distinction in this respect between one kind of misdemeanor and another. (3 *Barn. & Adolp.*, 798.)

Otherwise had the party been caught in the act, or had the case been of a felony committed. (3 *Wend. R.*, 384; *Hale*, 88.) And in the execution even of criminal process against any man, in case of *misdemeanor*, it is necessary to demand admittance before the breaking of the outer door of the house can be justified. (*Burr.*, 592.) And it appears reasonable that the law should be so; for if no previous demand was made it would be impossible for a party to know what the object of the person breaking open the door may be. He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost.

It has been decided that a regular officer is not bound to exhibit his authority when he arrests a defendant, or apprehends an offender; though a special deputy is.*—10 *Wend. Rep.*, 514; *Cro. Jac.*, 485.

Though in *Hall v. Roche*, Lord *Kenyon*, C. J., remarks: it is an extremely dangerous doctrine that the warrant need not be shown at the time of the arrest. It may affect the party criminally in case of any resistance; and, if homicide ensue, the legality of the warrant enters materially into the merits of the question. It is in all cases very important that where an arrest is made by virtue of a warrant, the authority should be produced.—8 *Term R.*, 188.

After a peaceable arrest, however, if the party requires it the officer ought to shew the warrant, tell at whose suit, for what cause, by what process, and in what court returnable the arrest is made; otherwise it will be wrongful.—8 *Co.*, 94; 9 *Ibid*, 69.

In accordance with this, the court in *The Commonwealth v. Field* (13 *Mass. R.*, 321) say that, where a person not generally known as an officer makes an arrest, he will be obliged to produce his warrant or authority when demanded; provided the par-

* The statute directs that every sheriff or other officer serving process shall upon the request of the party served, and without charging or receiving any compensation therefor, deliver to such party a copy thereof. (2 *R. S.*, 358, § 79.) A non compliance with such request would be a misdemeanor, but would not make the service irregular.

ty arrested submits to the arrest. But where the party arrested immediately resists, and by his own wrongful act prevents the officer from doing his duty, he is not obliged to produce his authority; but the party thus resisting, and those who come to his assistance, do it at their peril.

It is therefore very important that in all cases where an arrest is made by virtue of a warrant, that the warrant should, at least if demanded, be produced, to leave a delinquent no excuse for resistance.

The cases in which doors may be broken open in furtherance of criminal process, is a subject of great delicacy and importance, as it becomes material in cases of homicide, and as it affects the peace and security of domestic habitations.

It seems to be well settled that even a private person may break doors after a proper demand and notice where he is certain a felony has been committed; and that an officer may do the same upon the information of the party in whom the knowledge or reasonable suspicion exists.—1 *Hale*, 589; 2 *Ibid*, 92; *Doug.*, 359.

As to how far doors may be broken open upon *suspicion of felony*, Lord Coke seems to imply (4 *Just.*, 117) that this may be done by the party originally suspecting, but by no other unless by the sheriff or constable in his presence. And therefore he contends that no justice can issue a warrant before indictment, unless the suspicion arise from himself; a decision at variance with numerous decisions since his time, and contrary to daily practice; and which if once true is now superseded by statute. Lord Hale lays it down in positive terms, (1 *Hale*, 583,) that doors may be broken open without warrant on *suspicion of felony*. This doctrine is as positively denied by Foster, (*Foster*, 321,) though his general leaning is against the protection of offenders for invading the sanctity of private dwellings. According to him a bare suspicion will never authorize an arrest, even though a felony has actually been committed. We have seen the reverse of this; and that suspicion and probable cause are sufficient to

justify an arrest by an officer, even without warrant, and where no felony has been actually committed.

Upon the whole, therefore, says Mr. Chitty, in his criminal law, it seems to be the better opinion that a private individual, in order to justify breaking open doors without a warrant, must in general prove the actual guilt of the party arrested, and that it will not suffice to shew that a felony has actually been committed by another person, or that reasonable ground of suspicion existed; but that an officer acting *bona fide* on the positive charge of another will be excused, and the party making the accusation will alone be liable. But the breaking an outer door is, in general, so violent, obnoxious, and dangerous a proceeding, that it should be adopted only in extreme cases, where immediate arrest is requisite.

But when a warrant of a magistrate for the arrest of an officer is obtained, it is now clear that in all cases doors may be broken open, if the offender cannot otherwise be taken, for treason, felony, suspicion of felony, or actual breach of the peace, or to search for stolen goods. (*Foster*, 320; 1 *Hale*, 583; 2 *ibid.*, 117; *Hawk. b. 2, c. 14, § 7*; 1 *East. P. C.*, 322.) In these cases too, a warrant is a complete justification to the person to whom it is directed, acting *bona fide* under it, even though the party accused should prove his innocence.* (4 *Black. Com.*, 288; *Cro. Eliz.*, 130.) And if in the attempt to execute a lawful warrant by breaking into the house of a felon, after previous demand for admittance, the officer be killed by the party resisting, it will be murder in all concerned; and if on the other hand he unavoidably kill any of the parties opposing him the homicide will be justifiable because in furtherance of justice. (1 *Hale*, 494; *Foster*, 276.) And even while there is some error in the process, which does not affect the justice of the case, the complexion of the offence of the party resisting will not be varied; though if it be

* It is proper here to remark, that this is a rule of *protection* merely; and that in civil process, in such cases, the officer cannot build up a title upon it so as to maintain actions against third persons.—1 *Hill* 118, *id.* 279; 5 *id.* 194; *Cowen & Hill's notes*, 1011, 1082.

altogether defective, as if there be a mistake in the name, or if the name of the officer be inserted, without authority, after the issuing of the process, or it be executed without the jurisdiction, the crime will be reduced to manslaughter. (*Foster*, 312; 1 *Hale*, 468; *Cro. Car.*, 371; *Ld. Raym.*, 1296; 5 *East*, 308.) It has been held in several cases that, where the defect in the process is substantial, or the officer exceeds his authority, third persons may lawfully interfere, and if they kill the officers it will amount only to manslaughter—because the view of an illegal arrest is sufficient to excite the provocation and coerce to resistance all men. But *Foster* (314) strongly contests the principle thus laid down, in which he is followed by Mr. *East*, (1 *East*, P. C., 328,) and they regard the earlier cases cited as decided on their own peculiar circumstances. At all events, if the party interfering wantonly strike with destructive weapons, from which malice may be fairly presumed, it is murder.—*Leach*, 206; 5 *East*, 308.

We have thus seen that on a warrant for treason, felony, or breach of the peace, the doors of the accused party may be broken open, if admittance cannot otherwise be obtained; but there is no authority for extending the right to misdemeanors unaccompanied by violence.

From the English authorities, however, it appears that a contempt of a court of justice, or of either house of parliament, will authorise this proceeding, under a warrant from the speaker. (14 *East*, 157, 162; 5 *Co.*, 91; *Foster*, 319.) And it seems whenever the crime is of a public nature this may be permitted, though it is clearly unjustifiable upon mere civil process. And if in the attempt to execute civil process by such forcible entry the officer, being a known bailiff, is killed, it will be manslaughter, and no more; manslaughter because he was known to be an officer, and no more, because his attempt was illegal. (1 *Hale*, 458; 1 *East*, P. C., 321.) And if he be no officer, or out of his proper district, he may lawfully be killed to prevent his entry. (*Ibid.*) It is however settled, that in case of an actual affray in a house, within the view or hearing of an officer, or where those who have

made an affray in his presence fly to a house, and are pursued by him, he may break open the doors to arrest the affrayers, or suppress the tumult. (2 *Hale*, 95; 3 *Wend. Rep.*, 384.) And it has been decided that, upon a violent cry of murder in a house, any person may break open the door to prevent the commission of a felony, and may restrain the party threatening, until he appear to have changed his purpose. (2 *Bos. & Pull.*, 260.) And in all cases whatever, it is absolutely necessary that a demand of admittance should be made, and be refused, before outer doors can be broken. (*Foster*, 320; *Hawk.*, b. 2, c. 14, § 1; 3 *Bos. & Pull.*, 229.) But where a party arrested by an officer breaks away, and shuts himself up in his house, the officer is justifiable in the attempt to retake him, to break open the outer door of the house of such party, without making known his business, on demanding admission and receiving a refusal; provided the pursuit is fresh, and the party consequently aware of the object of the officer.—10 *Wend. Rep.*, 300.

Upon search warrants, regularly granted and specifically directed, it seems to be settled that, after the proper precautions, the house to be searched may be broken open, and whether the property is found there or not, the officer will be excused. (10 *John. Rep.*, 263; 2 *Hale*, 151.) It appears, however, that the party maliciously procuring a search warrant is answerable to the person aggrieved in an action on the case. (1 *Term R.*, 535; 3 *Esp. Rep.*, 135; 3 *Bos. & Pull.*, 225.) Warrants to search "all suspected places," are illegal, and the sheriff or constable breaking open doors under the color of their authority, cannot be justified. (*Burr.*, 1767; *Lofft*, 18.) The general doctrine to be adduced from all the books relative to search warrants is, that if they are altogether illegal, the officer cannot be justified; but if they are legal in form, though improperly granted, he may safely break open the doors to execute them, whether his search succeed, or the charge be malicious or mistaken.

The house of a third person, if the offender fly to it for refuge, is not privileged, but may be broken open after the usual demand; (5 *Co.*, 91; 2 *Hale*, 117;) for as we have already shown, it may be

so upon civil process. But then it is said it is at the peril of the officer that the party against whom he has obtained the warrant be found there ; for otherwise he will be a trespasser. (2 *Hale*, 117 ; 5 *Co.*, 73, a.) And this doctrine, as far as it respects civil process, has been recognised in modern decisions. (3 *Bos. & Pull.*, 223 ; 1 *Marsh*, 565.) So also upon a *capias* from any court of record to compel a man to find sureties for his good behaviour, and even on a warrant of a justice for that purpose, doors may be forced, if necessary. (*Monr.*, 606, 668 ; *Foster*, 233.) And it has been decided (*T. Jones R.*, 233) that a constable or other officer having a warrant to levy the amount, adjudged by a justice to be levied, by virtue of any statute which authorises him to convict in a penalty, to a part of which the people are entitled, may break open doors in order to effect his purpose, though he is compelled first to show his warrant, if demanded. It is also to be observed that after a party has been once actually arrested, and escapes from custody, any door may be broken open to retake him after proper demand of admittance ; (*Foster*, 320, 6 *Mod.*, 173 ; *Salk*, 79 ; 1 *Hale*, 459 ;) and, if on fresh pursuit, as has already been noted, his own door may be broken without demand of admittance. (10 *Wendell's Reports*, 300.) And when the officer, after obtaining admittance, is locked in, or otherwise prevented from retiring, he may lawfully break out by any means in his power, whether he be engaged in executing civil or criminal process ; (*Cro. Jac.*, 555 ; *Fortesq.*, 319 ; 6 *Mod.*, 173 ; 1 *Hale*, 459 ;) and the sheriff may break open the door of a house to rescue his bailiff unlawfully detained within it. (*Cro. Jac.*, 555 ; 1 *Hale*, 459.) And, as we have already remarked, when once the officer has entered the house, he may, after ineffectually demanding entrance, break open any inner door that obstructs his progress.—*Foster*, 319 ; 1 *Hale*, 459.

When the officer has made his arrest, he is, as soon as possible, to bring the party to the jail, or to the justice, according to the import of his warrant ; and if he be guilty of unnecessary delay, it is a breach of duty. (2 *Hale*, 119 ; *Foster*, 143.) But if the time be unseasonable, as in or near the night, whereby he

cannot attend the justice, or if there be danger of a rescue, or the party be ill and unable at present to be brought, he may, as the case shall require, secure him in some proper place or manner until the next day, or until it may be reasonable to bring him. (2 *Hale*, 95, 119.) If an officer having arrested a party under a warrant, suffer him to go at large, upon his promise to come again and find sureties, it is doubted whether he can afterwards be arrested again upon the same process; (*Hawk.*, b. 2, c. 13, § 9, c. 19, § 12;) though it would seem, that as the public are interested in the offender's being brought to justice, there should be no well founded objection to such second arrest. And it is certain that if the escape be made without the concurrence of the officer, the defendant may be retaken as often as he flies, upon fresh suit, although he were out of view, or had reached another county. (*Dalton*, 169.) It is also clear that, if after a departure by the permission of the officer, the party returns into his custody, he may lawfully detain him, in pursuance of the original warrant. (*Hawk.* b. 2, c. 13.) When the prisoner is brought before the justice he is still considered to be in the custody of the officer, until he is either discharged, bailed, or committed to prison. (2 *Hale*, 120.) The officer may keep his warrant for his own justification, and need only return to the justice what he has done in pursuance of his commands.—*Ibid.*, 1196.

When a felony has been committed, if the party suspected fly, and endeavor to resist the attempt to apprehend him, or escape after his capture, and he be killed in the resistance or pursuit, an absolute necessity, and that alone will justify the officer. (2 *Hale*, 117; *Hawk.*, b. 1, c. 28.) But if the warrant be for a mere breach of the peace, the officer killing the party in the attempt to take him, will be guilty of felonious homicide.—*Ibid.*

If not bound over, or discharged by the examining magistrate, the party arrested is committed to the jail of the county, and the custody of the sheriff; except in those cases of petit larcenies, assaults and batteries, and certain misdemeanors, in which, at his option, he can be immediately tried, and receive his sentence from the special sessions.—2 *R. S.*, 2d ed. 594, § 1.

The common jails in the several counties of this state shall be kept by the sheriffs of the counties in which they are respectively situated, and shall be used as prisons.

1. For the detention of persons duly committed, in order to secure their attendance as witnesses in any criminal case:

2. For the detention of persons charged with crime, and committed for trial:

3. For the confinement of persons duly committed for any contempt: and,

4. For the confinement of persons sentenced to imprisonment therein, upon conviction for any offence.—2 *Ibid*, 632, § 1.

The keepers of the several county prisons are to receive and safely keep every person duly committed to their custody for safe keeping, examination or trial; or duly sentenced to such prisons upon conviction for any contempt or misconduct, or for any criminal offence, and shall not, without lawful authority, let out of prison, on bail or otherwise, any such person. (2 *Rev. Stat.*, 2d ed., 633, § 7.) Prisoners committed on criminal process, and detained for trial, and persons committed for contempt, are to be kept in rooms separate and distinct from those in which persons convicted and under sentence shall be confined; and on no pretence whatever are persons detained for trial, or persons committed for contempt, to be kept or put in the same room with convicts under sentence. (*Ibid*, § 8.) Male and female prisoners (except husband and wife) are not to be kept or put in the same room; and it is the duty of the keepers of the said prisons to keep the prisoners committed to their charge, as far as may be practicable, separate and distinct from each other, and to prevent all conversation between the said prisoners. (*Ibid*, § 9, 10.) Prisoners detained for trial, may converse with their counsel, and with such other persons as the keeper, in his discretion may allow; prisoners under sentence are not to be permitted to hold conversation with any person, except the keepers or inspectors of the prison, unless in the presence of a keeper or inspector. (*Ibid*, § 11.) Prisoners detained for trial, and those under sentence,

shall be provided with a sufficient quantity of inferior but wholesome food, at the expense of the county ; but prisoners detained for trial, may, at their own expense, and under the direction of the keeper, be supplied with any proper articles of food, and with cider or table beer. (*Ibid*, § 12.) It is the duty of the keepers of the several prisons, whenever any person shall be sentenced to hard labor therein, and any mode of labor shall be provided, to cause such prisoner to be kept constantly employed during every day, except Sunday ; and annually to account with the board of supervisors of the county for the proceeds of such labor ; and the keepers of the said prisons shall respectively have power, with the consent of the supervisors, to cause such of the convicts under their charge, as are capable of hard labor, to be employed upon any of the public avenues, highways, streets, or other works, in the county in which such prisoner shall be confined, or in any of the adjoining counties, upon such terms as may be agreed upon between the said keepers and the officers, or other persons under whose direction such convicts shall be placed ; and whenever any convicts shall be so employed, they shall be well chained and secured, and shall be subject to such regulations as the keeper legally charged with their custody, shall from time to time prescribe. (*Ibid*, § 13, 14, 15.) Whenever the physician of any county prison shall duly report to the keeper of such prison, that any convict confined therein is insane, it shall be the duty of such keeper to lay such report before the next court of oyer and terminer or general sessions, which shall be held in the county.—*Ibid*, § 17.

From the above provisions the sheriff of the city and county of New-York is excepted, who has the custody of the jail in that city and county, which is used for the confinement of persons committed on civil process only.—*Ibid*, 372, § 86.

When the authority is competent, the sheriff is bound to receive a prisoner, however irregular or defective the commitment or mittimus may be. And where the commitment omits the cause for which the party is to be imprisoned, it does not make it absolutely void, so as to subject the sheriff or officer to an action for

false imprisonment, or excuse him for an escape, for he may plead as an excuse that the imprisonment was for felony.—1 *Hale*, 584; 2 *Ibid.*, 133; 2 *Saund.*, 101, *y*, note 2.

It is also made the duty of the sheriff by statute to present to every court of oyer and terminer, and to every court of general sessions of the peace, to be held in his county at the opening of such court, a calendar stating:

1. The name of every person then detained in prison :
2. The time when such prisoner was committed, and by virtue of what process or precept : and
3. The cause of the detention of every such person.—2 *R. S.*, 2d ed., 635, § 25.

Before we close this chapter it is necessary to observe, that every sheriff is bound by the common law to treat his prisoners with humanity, and that if he oppress or confine more strictly than the law allows, any one in his custody, so that he die in consequence of his ill treatment, the party offending will be guilty of murder. (2 *Inst.*, 91; *Foster*, 321; 3 *Esp. R.*, 233.) And therefore, if the keeper of a prison takes a person in his custody into a room where an infectious disorder is known to be, and detains him there against his will, so that he catch it and die, it will be felony in the offender (2 *Str.*, 854; *Foster*, 322; *Barnes*, 204, 240, 253); or if he confine a prisoner in a damp and loathsome room, without fire or any convenience for the purposes of nature, so that he die by duress of imprisonment, he will be liable to punishment as a murderer. (*Ld. Raym.*, 1574.) On the other hand the sheriff has full power to secure a felon with irons if there is danger of his escaping. (1 *Hale*, 601.) And in case of an actual attempt to fly, and an assault made upon himself, he will be justified in killing the prisoner, whose flight cannot otherwise be prevented. (1 *Hale*, 496.) And if he or any of his officers be killed in the affray, it will be murder in all aiding the resistance.—*Foster*, 321.

CHAPTER IV.

Bail to the Sheriff.

The defendant in civil process having been arrested must either go to jail, or give security to the sheriff for his appearance at the return of the writ. This is called bail to the sheriff, in order to distinguish it from bail to the action, bail above, or special bail, which is afterwards required to be put in to abide the event of the suit.

At common law the sheriff was not obliged to bail a defendant arrested upon mesne process, unless he sued out a writ of main-prize, though he might have taken bail of his own account; (2 *Saund.* 60, c.) but this defect in the law was afterwards remedied by statute. (23 *Hen.*, 6, c. 9.) This statute of *Henry*, was once deemed a private law, (3 *Bull. N. P.*, 224,) but it is now determined to be a public act of which the courts will judicially take notice.—2 *Saund.*, 155, b. 15; 15 *East*, 320.

Bail to the sheriff is given by executing to him a bond, with sufficient sureties, conditioned for the parties' appearance at the return of the writ, and for no other purpose. (6 *Bac., Abr.*, 181; 1 *Term Rep.*, 422.) The enactment of the revised statutes on this subject is as follows: (2 *R. S.*, 2d ed., 271, § 11.) Every defendant arrested on mesne process, is entitled to be discharged upon executing to the officer making the arrest, with the addition of his name of office, a bond in a penalty equal to the sum endorsed up-

on the writ, with two sufficient sureties, conditioned that such defendant will appear in the action commenced by such writ, by putting in special bail within twenty days after the return day, specified in the writ, and by perfecting such bail, if required according to the rules and practice of the court.

It is the duty of the sheriff to accept such bond when offered, provided the bail is good, and he cannot refuse, and if he do refuse he is liable to an action on the case by the aggrieved party. (1 *John. Rep.*, 138; 7 *Wend. Rep.*, 192.) Nor can the sheriff refuse to take the bond because there are more than two sureties; as where a bond was offered to him with five sureties, three of whom were respectively worth more than double the penalty of the bond and he refused to take it, he was held liable to the defendant for refusing to liberate him. (5 *Maule & Selw.* 223.) And the clause in the statute requiring the sheriff to take two sureties is merely directory, and he may discharge the defendant upon a bond with one surety only, or without any bail, as he pleases, provided he has him on the return day of the writ in his custody. 5 *John. Rep.*, 182.

The sheriff must also take reasonable bail if it be tendered, otherwise a special action on the case lies against him by the defendant. (2 *Saund.*, 59, 61, *c. d.* 1 *Crompt. Pr.*, 51.) But in order to maintain such an action, it must appear that the parties who were offered as bail, had sufficient in the county where the arrest was made. (15 *East*, 320.) It does not seem, however, necessary that the bail offered should be a freeholder. And if the sheriff take insufficient sureties, or persons who do not inhabit within the county, he is not liable to an action for an escape; (2 *Saund.*, 60, *c. d.* 61, *d.*) but the plaintiff must proceed against him by attachment, after having ruled him to bring in the body of the defendant.—1 *Dunl. Pr.*, 157.

The sheriff need not personally arrest the defendant before taking the bail bond, but if he take the bail bond it is valid, though no formal arrest or caption of the defendant was made. (1 *Str.*, 444, 643.) But the bond must be given to the sheriff himself, and if taken in the name of his deputy it is void.—1 *Term. Rep.*, 422.

And although the sheriff or his officers may, if he will, discharge the defendant without taking a bail bond or any other security for his appearance, provided he has him at the return of the writ; yet if he have him not then, that is, if he have him not in custody, and neither puts in special bail, nor renders the defendant in due time, he will then be answerable in an action for an escape; (2 *Saund.*, 61, c.; 1 *Arch. Pra.*, 77;) and having been guilty of a breach of duty, he cannot recover over against the defendant, (*Peake's N. P.*, 144, n.; 8 *East*, 171,) unless he subsequently promise to indemnify the sheriff, for which promise the previous moral obligation to indemnify is a sufficient consideration. (14 *John. R.*, 378.) And if the sheriff permit the defendant to go at large without bail, he may protect himself by putting in and perfecting bail, as of the term in which the writ was returnable, but after an action for an escape has been commenced, he cannot, *stricti juris* defeat it by putting in bail in a subsequent term; (1 *Maule & Selw.*, 397; 6 *Taunt.*, 554,) even admitting that he would be allowed to put in bail as of the proper term.—*Esp. Rep.*, 87; 2 *Bos. & Pull.*, 38; *sed vide* 7 *Term. Rep.*, 105.

If the sheriff have, in fact, taken a bail bond, his denial that he had taken one, does not subject him to an action for an escape. (5 *Taunt.*, 325.) But in an action for an escape upon *mesne* process, it has been held that the sheriff's return of *cepi corpus*, and proof that the party did not put in bail above, and was not in the sheriff's custody at the return of the writ, was sufficient evidence on the part of the plaintiff. (3 *Campb.*, 397.) Though the sheriff is not bound to give the plaintiff any other notice of his having taken a bail bond than the endorsement on the writ.—7 *John. R.*, 137.

The bond must be executed before the return day of the writ upon which it is taken, or it will not be good, and is void in the hands of even the assignee of the sheriff, and the court put their decision upon the ground that, the authority of the sheriff expired with the return day of the writ, and he therefore had no authority to require the bond. (*Ld. Raym.*, 352; 4 *Maule & Selw.*,

359.) And it must be entirely filled up before the bond is executed, or it is void; (3 *Campb.*, 181;) and it must be equal to the sum endorsed on the writ, in its penal part, or when the writ is bailable of course, to the sum expressed in the *ac etiam* part or body of the writ. This however is merely directory to the sheriff, and a mistake in the sum for which the bond is taken will not avoid it if no intention to harrass or oppress the defendant is shown.—*Burr. R.*, 331: 2 *Wils. R.* 69.

As to the form of the bound, it must be given to the sheriff as the statute directs, by his name of office, with the condition that the defendant will appear by putting in special bail in the action named in the writ, within twenty days after the return day specified in the writ, and by perfecting such bail, if required, according to the rules and practice of the court. (2 *R. S.*, 2d ed., 271, § 11.) It is only necessary that the condition be substantially set forth as required by the statute, and a trifling inaccuracy will not vitiate the bond. (6 *Term. R.*, 702.) The statute does not require the nature of the action to be set forth in the condition, or the name of the plaintiff, and therefore a bond omitting these has been held good, and the name of the court is only required to be substantially set forth in the bail bond. (1 *John. R.*, 520.) But if the condition be that the defendant shall appear on a day not in term, that is an impossible condition, and void; and if it be to appear on a day different from the return day of the writ, or in a different court from that whence the writ issued, it is void, as it is not a compliance with the process. (1 *Dunl. Pr.*, 159.) It is the same if the cause of action be mistaken, as if trespass on the case upon promises be inserted when the action is trover or trespass, and so *vice versa*. (*Stra. R.*, 1155.) There is no set form of words for these bonds, but if, in substance, they appear according to the design of the writ it is sufficient, therefore any trifling informality, or variance of the condition from the writ, in the description of the plea, or of the time and place of appearing, will not avoid the bond; but there must be a condition, and if there is none the bond is void. (1 *Term. Rep.*, 240; 2 *Saund.*, 60.) When the bond is given on the arrest as mere

temporary security, and it is agreed that the defendant shall furnish other bail, and if he does not do so the bond shall be inoperative, the sheriff cannot enforce this bond, but may give it up to the security, and require new bail, and if it is not given he may again arrest the defendant, and confine him until he gives new bail. (7 *Wend. R.*, 188.) The reason given for this is, that the taking of the temporary bond was a mere humane relaxation on the part of the officer, for the benefit of the defendant, and that the bond was never delivered for the purposes required by the statute, and was therefore inoperative and void as against the surety.

And the security taken by the sheriff must be a bond; any other undertaking is void.—1 *Term. R.*, 418.

The sheriff arrested *Richard Stephens* by virtue of a writ of *latitat* out of the court of king's bench, and discharged him under the following agreement, made by the defendant:

"In the king's bench. *J. Torriano*, gent., against *Richard Stephens*. Returnable on Thursday next, after eight days of *St. Hilary*. Damages £40, bail for £35.7. *Theahstone* by *Evans* attorney. I do hereby undertake to put in good bail on or before the return, or surrender the body to Mr. S. Rogers one of the officers to the sheriff of Surry, or on default pay debt and costs. Dated 24th December, 1782.

"S. REEVES."

The sheriff was obliged to pay to the said *J. Torriano* forty-four pounds debt and costs by virtue of an attachment against him, which the plaintiff had paid to the sheriff.

The question for the opinion of the court was, whether the plaintiff was entitled to recover, upon the agreement, upon any of the counts of his declaration.

Ashurst, justice, decided, that the statute in such cases prescribed the form of the security, and declared all others void, and that the security must be in the form prescribed by the statute. The constant usage since the passing of the act, was for the sheriff to take a bond, but the one in question was only a simple

contract, and not of so high a nature as the security required by the statute.

Buller, justice, said that the undertaking was void in every point of view. That the statute did not authorize the sheriff or his officers to take obligations for the appearance of the defendants whom they arrested, and that the sheriff could not take a bond in any other form than that prescribed by the statute, though the plaintiff in the action might, or his attorney might, and that that was the distinction between the cases. The same point was afterwards presented to the court in another case, (*7 Term. Rep.*, 109,) and they adhered to the doctrine established in this case.

The same doctrine has been held in this state, in a case involving a similar principle.—*8 John. R.*, 98.

Strong, a deputy of the sheriff of Oneida, arrested one *Henry Pitcher* and *Isaac Spoor* on a *capias*, and, instead of requiring from them a bond, took from them a promissory note, and gave to them a receipt of which the following is a copy :

“Received from *Henry Pitcher* a promissory note drawn by *Nathaniel Tompkins* and *Nehemiah Tompkins*, payable to *Henry Pitcher* or order, dated May 9th, 1809, and payable the 1st May, 1809, which is left in my hands to be applied to the settlement of a demand, on which he is sued, in favor of *Nicholas Kilmore*, and also to the settlement of a demand of *Henry Avery* and *Charles Suydam* against *Isaac Spoor*, on which said *Spoor* also is sued. It is understood that the said *Pitcher* and *Spoor* are to attend to the entry of special bail, in the said causes in due season, and to do whatever is necessary to be done, to indemnify said *Strong*, as sheriff, in said suits, or to forfeit the amount of said note.

“JEREMIAH STRONG.”

It was admitted that the plaintiff was deputy sheriff, and acted as such when he took the note, and gave the receipt; and the judge was of opinion that the evidence was sufficient to prevent the plaintiff's recovery. The plaintiff offered to prove that he had paid the moneys recovered by the plaintiff in the suits

mentioned in the receipt, but the judge rejected the evidence, and non-suited the plaintiff. A motion was made to set aside the non-suit, and for a new trial.

The court decided that the bond was void, and the deputy sheriff had no right to take it; that it was not such a security as the statute authorized the sheriff to take, and could not be enforced; to give effect to such contracts would lead to the greatest abuse and oppression, and would be suffering the provisions of a very beneficial statute to be eluded.

And an undertaking by the attorney that the defendant shall give bail is also void.—4 *East*, 588.

The bond is also void if taken for any other purpose than in the proper discharge of the duties of his office. The words of the statute are: (2 *R. S.*, 2d ed., 214, § 60,) No sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security, taken otherwise than as herein directed shall be void. It was upon this statute that the agreements mentioned in the above cited cases were declared void, as being against the policy of the law, and tending to promote oppression.

It is difficult to lay down any precise rule in these cases, but it may be safely said that, when the sheriff only takes such bonds as the law authorizes, without attempting to save to himself or procure for himself a compensation which the statutes do not allow him, or to evade those responsibilities which are inherent to the nature of his office, his bonds will stand the test of judicial scrutiny, and the courts will sustain them.

When the sheriff may sue the bond taken by him, for his own benefit, and the proceedings thereon, and when he may assign it to the plaintiff will be sufficiently treated of in the chapter upon attachments.

It was formerly, before the Revised Statutes, optional with the sheriff to accept or not, the surrender of the principal in discharge of the bail bond. (4 *East*, 588.) But when the party did surrender himself to the sheriff before the return of the writ, and

that surrender was accepted, the bond might have been cancelled; after which the plaintiff could neither proceed against the sheriff, nor maintain an action against him for not assigning the bond. (2 *Saund.*, 61, c.) But in order to enable the bail to the sheriff to exonerate themselves without the expense and delay of entering special bail, it is provided:—2 *R. S.*, 2d ed., 304, § 30, 31:

Whenever a bail bond shall be taken on the arrest of a defendant, the bail therein may surrender their principal, or he may surrender himself in exoneration of his bail, in the same manner, except as hereinafter modified, before the same officers and with the like effect as provided with respect to special bail.

To effect such surrender two copies of such bond, proved by the affidavit of the sheriff to whom the same was given, or of a subscribing witness thereto, to be true copies, shall be produced, instead of certified copies of a bail piece; and an order of commitment shall be made on one of such copies, and be delivered to the sheriff, and the other of such copies shall be filed with the order for the discharge of the bail and with the other papers in such proceeding, with the clerk of the court in which the action may be pending.

CHAPTER V.

Fieri Facias.

None of the duties of the sheriff are more important, and frequently none are more intricate, than those required of him in the execution of the writ of fieri facias. The numerous and scattered decisions of the law, the various alterations and modifications made by statutes, the conflicting claims of judgment creditors, the valid or fraudulent assignments of debtors, &c., &c., are continually throwing difficulties in his way, which require judgment and sagacity to contend against, and, if he proceeds at his own peril, an intimate acquaintance with his duties, to surmount.

The nature of this work permits us to consider this writ so far only as the sheriff is immediately concerned with it, which includes the authority given him by it, and the mode of carrying that authority into effect; the manner of its execution, the property liable to it, and his necessary proceedings under it. And in attempting to do this, we shall endeavor to follow the writ from its reception by the sheriff, until its final consummation in the sale of property.

At common law, the party receiving a judgment could not have execution against the body or lands of the other party, except in special cases; but have execution only of his goods and chattels, of his corn, and of other present profits of his land; for which purpose the law gave him two several writs to be sued within the

year; one called a fieri facias, which was only of the goods and chattels; the other a levari facias, whereby the sheriff was commanded that of the lands and chattels of the defendant he should cause to be levied, &c. A writ of elegit was, by the statute of Westminster 2d, given in order to have execution of the lands themselves. All these objects are now effected in this state, by means of the fieri facias alone; under which every species of property which is subject to execution may be levied upon, and sold in satisfaction of the judgment.—2 R. S., 2d ed., 287.

We will, in the first place treat of the Writ of Fieri Facias, and of the sheriff's proceedings under it, as regards personal property.

In substance the writ of fieri facias is a command to the sheriff that of the goods and chattels of the party he cause to be made the sum recovered by the judgment (specifying it according to the form of action) and that he have the money and the writ before the judges of the court from which it issues, on the return day thereof, and generally containing a clause authorizing, if sufficient goods and chattels cannot be found, the sale of real estate.—2 R. S., 2d ed., 291, § 24; *how returned in New York, see note end of the chapter.*

The Revised Statutes provide, (*Ibid*, 289, § 17,) that the title of any purchaser in good faith, of any goods or chattels, acquired prior to the actual levy of an execution, without notice of such execution being issued, shall not be divested by the fact that such execution had been delivered to the officer to be executed before such purchase was made.

By the common law, goods were bound from the *teste* of an execution, so that the title of a fair purchaser was often defeated by this fiction. The statute of 29 Charles 2d, chapter 3d, § 16, interfered against this palpable injustice, and restricted such an effect to sales made after the delivery of the writ to the sheriff. (12 *John. Rep.*, 406; 18 *id.* 311.) The fiction however, still remained between the time of the delivery to the sheriff, and the time of an actual levy, so that a fact, of which an innocent purchaser would not be apprised, operated to strip him of his proper-

ty. The above section was proposed to remedy this evil, and to carry out the principle of the statute of Charles II. It is so guarded, in the opinion of the revisers, (*Revisers' notes*, 3, *Rev. Stat.*, 727,) that a plaintiff cannot be injured, whilst the officer is incited to vigilance, and trade and commerce protected; and no one can suffer from the negligence or fraud of an officer holding an execution. Since this statute, the question between the sheriff and a *bona fide* purchaser must turn entirely upon the validity of the levy actually made. And a levy on personal property which in law is valid as against the defendant in the execution, and will justify a sale under it, will operate to defeat a subsequent purchaser, though *bona fide*, and for a valuable consideration. (11 *Wend. Rep.*, 548.) But even before the statute, if the writ lay dormant in the hands of the sheriff without levy for a considerable length of time, a *bona fide* sale was valid. (9 *John. Rep.*, 133.) But the statute being made in favor of purchasers, does not alter the law as between the parties; therefore, if the execution be tested in the defendant's life time, it may be taken out, and executed after his death. (*Ld. Raym.*, 695, 850; *Willes*, 131; 1 *Bos., & Pull.*, 571; 12 *Mod. Rep.*, 5.) And the sheriff deriving his authority from the writ, it has been holden, that if the plaintiff die after a fieri facias sued out, it may be executed notwithstanding, and his executor or administrator shall have the money. Or if the plaintiff have made no executor, or administration be not committed, the money must be brought into court, and then deposited. (*Ld. Raymond*, 1073; *Salk.*, 322.) But there always was a material difference between the case of a *fi. fa.*, in England, and the state of New-York, arising from the doctrine of *market overt*; and which rendered the application of a statute similar to our own less necessary there than here. In England, if a defendant sells in market overt, even after the delivery of the writ to the sheriff, it divests the goods of the lien; it was otherwise however in New York, to which state the doctrine did not extend.—8 *Cow. R.*, 238.

On the reception of a *fi. fa.*, as on the reception of other ministerial writs, it is the duty of the sheriff, if it be regular on the

face, to obey its authority, not to dispute it. He is not bound to enquire whether there is a judgment to support the execution or whether the execution corresponds exactly with the judgment; if it is regular on its face, it is his duty to execute it; if there be any irregularity, that affects the parties, not the ministerial officer. (12 *Wend.* 96.) And it is a general principle that all process must be served on or before the return day. If the sheriff omits to levy until the return day is past, the execution is dead. (2 *Caines' R.*, 143; 13 *J. R.*, 255.) It has even been held that it is his duty to levy as soon as the writ comes to his hands, if the plaintiff show him property to levy on; and if he refuses, that an action may be supported against him for so doing. (18 *Serg. & Rawle's Rep.* 450.) And as the latest period for making the levy is the return day of the writ, if therefore the sheriff, having two executions in his hands, against the same defendant, the prior one being first returnable, make a levy under that execution after the return day, but before the junior execution is returnable, he must apply the proceeds of the levy in satisfaction of the junior execution. (13 *John. Rep.*, 255.) And if the sheriff levy after the return day, by the direction of the plaintiff's attorney, he and the attorney are both trespassers; but no action will lie against the plaintiff or his attorney for not countermanding an execution after the return day. (4 *John. Rep.*, 450.) It is also the duty of the sheriff on the receipt of any execution to endorse thereon the year, month, day, and hour of the day, when he received the same.—2 *Rev. Stat.* 2d ed. 288 § 10.

And if there be several executions issued out of a court of record against the same defendant, that which shall have been first delivered to an officer to be executed, shall have preference, notwithstanding a levy may be first made under another execution; but if a levy and sale of any goods and chattels shall have been made under such other execution, before an actual levy under the execution first delivered, such goods and chattels shall not be levied upon or sold by virtue of such first execution.—2 *R. S.* 2d ed. 289 § 14; 4 *Cow.*, 411, 469.

The sheriff's endorsement of the time when he received an ex-

execution will conclude him in respect to the creditor. (1 *Hall's Rep.* 579.) And a *fi. fa.* sent to the sheriff and received by him previous to the signing and filing of the record, is not irregularly issued if the sheriff be directed to endorse it as received of a subsequent day, and on that day the record be actually signed and filed, and a levy be not made until such proceedings are had. (22 *Wend.*, 556.) The sheriff *pro hac vice* is the special agent of the plaintiff. The sheriff may be made his special agent as well as any other person, and cannot be said to hold the writ as sheriff until the time expired. In that sense the writ was not issued until the proper time. It may be said to have lain with him as a private agent until that period; for he was in this respect under the control of the plaintiff's attorney. The delivery of a writ is as much an act *in pais*, as the delivery of personal property, which may always be qualified so as to make the receiver a mere bailee or agent up to a certain time, and the absolute owner afterwards. And in the case of an execution the attorney has power under his general warrant to control the sheriff, and make a deputy his private agent. (6 *Cow.*, 467; 7 *id.* 739.) And in a judgment against several defendants it is competent to the plaintiff's attorney to direct the sheriff to whom the *fi. fa.*, is delivered, to levy on the property of all or either of the defendants; and it seems the court will not look into equities as between the defendants to control such direction. (22 *Wend. Rep.*, 569.) So it has been held that where a sheriff misconstrues instructions received from a plaintiff in a *fi. fa.*, and relinquishes the property on which he had levied, he may, even after the return day of the execution retake the property; though in the mean time it has been transferred by the defendant to other creditors, for pre-existing debts, but who have not taken possession of the same. (1 *Wend. Rep.*, 365.) And although, ordinarily, where a levy has been made on property by virtue of an execution to an amount sufficient to satisfy the debt, the plaintiff is not permitted to withdraw the process and make a levy upon other property; yet the court will not set aside a second execution where one of several defendants has induced the sheriff to disregard the directions of the plaintiff's attorney, and to make

a levy under the first execution threatening to involve the plaintiff in litigation. (22 *Wend.*, 569.) The plaintiff in this case had a right to consider the *fi. fa.*, as totally unexecuted. Thus an execution may at any time be countermanded by the attorney who issued it, and the sheriff is bound to obey his instructions, and suspend proceedings upon the execution whenever he is directed so to do; unless it be a case of collision between the parties for the obvious purpose of defrauding the sheriff out of the fees, the plaintiff and his attorney both being insolvent or irresponsible.—4 *Wend.*, 480.

A sheriff cannot discharge an execution without payment. If he returns the execution satisfied, upon receiving the defendant's note instead of money, it is no satisfaction of the judgment or execution. (1 *Cow.*, 46, *n. a*; 4 *ib.*, 553.) But if after a levy on a *fi. fa.*, the officer discovers that the property is subject to an amount sufficient to exhaust the property, he may return the *fi. fa.*, *nulla bona*, and a *ca. sa.* subsequently issued will not be irregular. So on a *ca. sa.* if the sheriff take a promissory note in satisfaction of the execution, and discharge the defendant, it is void as between the sheriff and the maker; and the plaintiff may sue the sheriff for an escape. But if the plaintiff ratify the transaction, he may charge the sheriff as for money had and received, with interest on the amount from the return day of the *ca. sa.*, and then it would appear that the note becomes valid as between the sheriff and the maker. (6 *Cow.*, 465.) Thus the sheriff has not the power to discharge an execution, even by returning it satisfied, unless he proceed and execute it in due course of law. His taking the defendant's note, though negotiable, receipting it as payment in full, and returning the execution satisfied, will not operate as a legal discharge of the execution; even though the defendant afterwards pay such note to a third person to whom it has been transferred. (1 *Cow.*, 46.) But when the officer takes security for the debt in the regular course of the execution, this will be a satisfaction. As if he levy under a *fi. fa.* and take a receipt of the goods as security for the debt; and this though the property seized be insufficient, provided the security thereupon taken

be for the whole debt. (12 *John. Rep.*, 207.) And in such case if the officer on levying an execution, deliver the goods to a third person, on his giving a receipt to return them, or pay the amount of the execution, he cannot afterwards take other goods of the defendant in the execution. (*Ibid.*) And it is immaterial whether the property originally taken was sufficient to satisfy the execution or not; or that the officer had been unable to recover any thing on his receipt.

Neither can the sheriff with his own money pay the plaintiff on an execution out of the property of the defendant, nor can he take a bond or other security, and detain the execution in his hands, and use it afterwards to enforce the payment of the money advanced by him. (7 *John. R.*, 426; 1 *Lutw.*, 389.) The Supreme Court remark: The practice of sheriffs of paying executions themselves, and taking security and judgment bonds from the party over whom they have at the time such means of coercion, is to be strictly and vigilantly watched by the courts. Such humanity is imposing, but it may be turned into cruelty. Nothing is more important to the honor of the administration of justice, than that the officers of the court should not use its process as the means of making unequal bargains, and taking undue advantage.* (7 *John. Rep.*, 426.) Thus, where a deputy sheriff having a *fi. fa.* in his hands agreed with the defendant in the execution to delay the sale, and to join with the defendant in making a note on which money should be raised, and applied to the satisfaction of the judgment, provided that he should still retain the execution in his hands; and if he was called on for payment of the note, might then proceed to sell for his own indemnity. The note was accordingly made, the money raised and paid over to the agent for the creditor's attorney; the officer at the same time informing the agent that the execution was still to be kept in life for his own

* A sheriff having been attached for not returning a *fi. fa.*, the deputy to whom it had been delivered paid the judgment and took an assignment of it for his own indemnity; held that he could not enforce the collection of the judgment by execution, though the defendant had promised to pay it.—5 *Hill Rep.*, 566.

indemnity. The officer being afterwards called upon for the payment of the note, sold the defendant's property under the execution. Held, (15 *John. R.*, 443,) that the payment to the judgment creditor, not being a conditional payment, was a satisfaction of the judgment, and therefore the execution was spent, and could not be used by the officer to enforce his own agreement with the debtor, such agreement also being illegal, and tending to oppression and abuse; and that the defendant in the execution might maintain an action of trespass against the officer for the property taken and sold by him. In this case the creditor received his money, and gave a receipt for it to the officer, without any stipulation or condition. The court therefore deemed the debt satisfied as to the judgment creditor; and that fact being established, the law, founded on wise policy, considers the officer as *functus officii*. The direct and sole object of the *fi. fa.* was to raise the money to satisfy the judgment creditor; that object being attained, the power conferred by the writ is spent, and the officer is not permitted to use it for enforcing any bargain in which he may think himself aggrieved. The court further observe: To allow any man to wield the process of our courts in order to exact such a measure of justice as he may think due to himself, would not only lead to oppression and abuse, but would tend to subvert the foundation of private rights and of civil liberty. (15 *John. Rep.*, 445.) But an agreement entered into by a third person, on receiving property levied on by the sheriff, to deliver it to the sheriff on request, or *pay the debt*, is a valid obligation within the statute (2 *R. S.*, 2d ed., 214, § 60) declaring void all bonds taken by a sheriff or other office by color of his office, &c. The statute forbids what is illegal only, it vitiates securities taken for ease and favor, and does not render void securities authorized either by common law or statute. Unless there is duress or oppression, or illegal exaction, the bond is good.—21 *Wend. R.*, 605.

The course of our remarks leads us to consider the levy itself. What constitutes a levy, according to the practice in this state, has been well settled, and is not now open to dispute. The offi-

cer must take actual possession, and for this purpose the goods and chattels should be within and subject to his disposition and control. It is not necessary that he should remove them, or leave an assistant in possession; they may be left with the defendant, at the risk of the plaintiff or the officer, or security for delivery at a future day be taken. And making actual levy upon part of the property of the defendant, and including in the inventory other property, *not in the view* of the officer, is not such a levy upon such other property as will secure a priority, in conflict with other executions, although the property be designated by the defendant, and entered with his assent upon the inventory. (19 *W. R.*, 495.) The goods must also be within the power of the sheriff; and where the sheriff merely seized a few articles outside of a store or ware house, and proclaimed a levy on the goods locked up in the store, the court held this not to be a levy, but that the sheriff ought to break open the store, (not a dwelling,) and actually seize the goods and take an inventory of them. (16 *J. R.*, 287.) Further, the acts of the sheriff in making the levy should be public, open and unequivocal; he should assert his title to the goods, and nothing should be done by him to cast concealment over the transaction. It seems that the acts of the sheriff, as to the asserting of his rights, and the divesting of the possession of the defendant, should be of such a character as would subject him to an action of trespass, but for the protection of the execution. (14 *Wend. Rep.*, 123; 3 *Ibid*, 446.) And where a sheriff received an execution, and went with it in his pocket to the house of the defendant, but took no inventory, and did no act to enforce the execution for eleven months afterwards, not even apprising the defendant of the fact, it was held that no such levy had been made as would debar the landlord of the house occupied by the defendant from claiming the rent due to him, although it accrued subsequent to the pretended levy. (14 *Wend.*, 123.) But the omission of the officer at the time of the levy, to make a public avowal of his doings, will not, *per se*, effect the validity of the levy, when the fact of the actual levy is incontrovertibly established, although such omission be at the request of the plaintiff

in the execution. (11 *Wend. R.*, 548.) Any other rule would put it in the power of the defendant in the execution, under the Revised Statutes, greatly to embarrass, if not to defeat this process, unless possession immediately followed. He could always sell to a bona fide purchaser as soon as he knew of the levy, and be himself the witness to establish the absence of its notoriety, leaving the officer to defend himself in the best way he could.

If a sheriff makes a levy on goods under one execution, and afterwards a second execution comes to his hands, the levy on the first execution is sufficient for both; and he may sell the goods on the second execution as well as on the first. (17 *John. Rep.*, 116; 1 *Hill Rep.*, 559.) So a levy on a *fi. fa.* by the deputy of a sheriff is a constructive levy on the same property of a subsequent *fi. fa.* delivered to another deputy of the same sheriff. (5 *Cow.*, 390.) And this though the property first levied on be afterwards, before the delivery of the second execution, removed into another state, and remain there until after the return of the second execution.*

Where goods to satisfy the execution are levied upon, the debtor is discharged, even if the sheriff waste the goods or misapply the money arising from the sale, or do not return the execution; for by a lawful seizure the debtor loses his property in the goods. (4 *Mass. Rep.*, 402.) But a levy on sufficient property to satisfy a judgment, and a release of the property, will not operate to discharge the debtor when he procures the release by his own act, as pretending that the property is owned by another.—8 *Crown's Rep.*, 192.

By the seizure the sheriff acquires a special property in the goods and may maintain trespass or trover against the defendant for taking them away, or against any third person; (17 *John.*

* A sheriff having levied on personal property of H in virtue of a *fi. fa.* in favor of B, received another against H in favor of V. Afterwards by an arrangement between A and B, the first *fi. fa.* was withdrawn, and H sold the property, applying the proceeds on B's judgment. The sheriff having neglected to proceed against the property under the second *fi. fa.*; *held*, that he was liable to V for its value.—1 *Hill's Rep.*, 559.

Rep., 128;) or if stolen they may be charged in an indictment of complaint as the property of the officer. And in an action by the officer for the taking away of goods levied on by him by virtue of an execution, his indorsement upon the execution of the property levied upon, is proper evidence to identify such property. 10 *Wend. Rep.*, 165; 8 *Ibid.*, 445; 7 *Cow. Rep.*, 297; 8 *Ibid.*, 137.

Merely leaving property levied upon in the possession of the defendant in the execution, though with the consent of the plaintiff, is not *per se* fraudulent, either as against subsequent creditors or purchasers; otherwise where the sheriff is directed to delay the execution or sale. (3 *Cow.*, 272.) But where the purchaser of goods on a sale made under an execution suffered them to remain in the possession of the debtor for more than a year after the sale, without any agreement between them, or the debtor paying anything for the use of them, but permitting him to sell some of them, and apply the proceeds to his own use; the transaction was held fraudulent and void as against a subsequent creditor under whose execution the same goods had been taken and sold. (17 *John. R.*, 332.) And in all cases when a party purchasing goods levied upon under an execution issued by him, suffers them to remain in the possession of his debtor, this is *prima facie* evidence of fraud as against a subsequent execution. (15 *John. R.*, 430.) And where a creditor levies under an execution upon the property of his debtor consisting of a ponderous article, not easily removable, and allows it to continue in his possession, this is not *per se* evidence that the execution and levy were fraudulent, so as to render the property liable to be levied upon under a junior execution against the same debtor; but if the creditor permit the debtor to consume the property, being firewood, this is a ground for suspicion of fraud, and to prove the fraud, the creditor in the junior execution may produce evidence of a permission given to the debtor to use other property levied upon at the same time. And if the officer who made the first levy, brings an action of trover against the parties who were engaged in the second levy, they may show circumstances of fraud to defeat the action equal-

ly as if it had been brought by the creditor himself.—15 *John. R.*, 420.

If after the levy, however, the sheriff receives an express direction to delay the sale until a junior execution is received, this will render the transaction fraudulent. (11 *John. Rep.*, 110 ; 17 *ibid.*, 274 ; 3 *Cow.*, 272 ; 5 *ibid.*, 390 ; 7 *ibid.*, 560.) Thus where the plaintiff in the execution, after the levy ordered the officer to suspend further proceedings, until he gave further directions ; and during the suspension, the defendant in the execution, with whom the property was left, sold it to a purchaser, bona fide, and for a valuable consideration ; the court held that the plaintiff in the execution, in consequence of the direction given by him to the officer lost his lien upon the property ; that the execution became dormant ; and that it was not necessary that the delay should have been made with a view to defraud any one, but that where the plaintiff in an execution directs an indefinite stay of proceedings, such directions is a supersedeas to the execution, so far as third persons are concerned, and any other creditor has a right to take the property ; or a purchaser, for a valuable consideration, will acquire title to it.—2 *Wend. R.*, 421.

But where the officer, after seizing and removing the property, took it to a third person, who purchased the execution and directed the officer to return the property, and leave it with the debtor, no reason appearing to have been assigned for this direction, and the debtor afterwards sold the property as his own, and in the following month the officer took the property from the purchaser and sold it under the execution ; the court held that the leaving the property in the hands of the debtor generally, without any instructions to suspend or delay the execution, and without an express provision to the debtor to use the property, did not render the execution fraudulent as against the the purchaser, and that it might be so left until the day of sale, where that takes place as early as the return day of the writ, or within a few days after.—3 *Cow.*, 272.

And where an execution was issued in November, and instructions given to the officer to levy on the defendant's property,

which consisted principally of hides in vats, which could not be sold without sacrifice before spring, and the officer was for this reason at the same time instructed not to sell until May, but on other executions being issued was directed to hasten the sale under the first, the court held that there was no fraud but that the delay was proper.—7 *Cow.*, 360.

On a fieri facias, the sheriff is bound, at his peril, to take only the goods of the defendant; and therefore, if he takes the goods of a third person, though the plaintiff assure him that they are defendant's, he is liable. (4 *Term R.*, 633, 648; 7 *ibid*, 177; 3 *Maule & Selw. R.*, 175.) When fraud does not occur this rule appears to apply to every circumstance.

Thus where a sheriff under a writ of *fi. fa.* against A seized and sold the furniture in his house, where he lived with a woman to whom he had been married, and to whom the goods belonged before marriage: Held, that the woman, having afterwards discovered that the marriage was void, might maintain trover, and recover the value of the goods, although it exceeded the price for which they were sold. (9 *Barn. & Cress.*, 696.) It certainly may be hard upon the sheriff that he should be held liable in such a case, where no misconduct can be imputed to him or his officers, and it must be hard on the plaintiff in the former suit that he should be called upon to refund the money which he has received as the fruits of his execution. But if on account of such hardship it was otherwise, a well established rule of law would be violated; that if by process the sheriff is desired to seize the goods of A, and he takes those of B, he is liable to be sued in trespass or trover for them. And the woman in this case standing by and seeing the goods removed can make no difference. An execution is a proceeding *in initum*, and the plaintiff acquiesced because she did not know that she had the power to resist, but afterwards discovered her error. The case then is merely this, that the sheriff by mistake took her goods supposing them to be the goods of another; and mistake or misapprehension is no excuse for the officer. There was nothing like leave or license in the case. And on a *fi. fa.* any unlawful interference by the she-

riff with the goods of another will subject him to an action of *trespass de bonis asportates*. Any dominion exercised over them, he having no authority, constitutes him a trespasser. (10 *Wend.*, 322; 7 *Cow.*, 735.) But it has been decided that if the goods of a stranger are in possession of the debtor, and so mixed with those of the debtor, that the sheriff, on due inquiry, cannot distinguish them, the owner can maintain no action against him for taking them, until notice and a demand of his goods, and a refusal or unreasonable delay of the officer to redeliver them.—7 *Mass. R.*, 123.

If the sheriff have any doubt whether the goods are the defendant's, he may summon a jury of inquiry to satisfy himself. (10 *John. R.*, 98; 4 *Term R.*, 633, 648.) This may be given in evidence, in case of a prosecution of the sheriff, that he did not act maliciously; and will mitigate the damages against him for taking the goods of a third person. (*Gilb. Ex.*, 21; 3 *Maule & Selw.*, 175; 10 *John. Rep.*, 98.) And as it is not a proceeding immediately from the court, but merely to indemnify the sheriff in making his return to the writ, the court will not set aside the inquisition of a jury summoned by the sheriff, to inquire in whom the property of the goods seized by him under a fieri facias is vested. (6 *Term R.*, 88.) But this proceeding of the sheriff is not conclusive in any case; for inquests of office are always traversable; and therefore an inquisition, made by the sheriff's jury to ascertain to whom the property of goods taken under a fieri facias, belonged, though found in favor of A, is not admissible evidence in an action of trover for the goods, brought by A against the sheriff. (2 *H. Black.*, 437.) Nor is such an inquisition admissible evidence for the sheriff in an action on the case against him for a false return of *nulla bona*. (3 *Maule & Selw.*, 175.) If the sheriff has reasonable grounds of doubt, however, on the question of property, he is bound, if no indemnity is tendered to him by the plaintiff, to call a jury to try the title to the property. If they find it not to be the defendant's in the execution, he is justified in returning the execution *nulla bona*, unless an adequate indemnity in writing is then tendered to him. (15

John. R., 147; 8 *ibid.*, 185.) If it is, he is bound to proceed notwithstanding the finding of the jury. But a plaintiff is never bound to tender an indemnity until a jury have passed on the question of property. A sheriff acts at his peril in making a return under any other circumstances.—8 *Cow.*, 65.

In an action against the husband, the sheriff cannot take under a fieri facias goods vested in trustees before marriage for the benefit of the wife. (2 *Bac. Abr.*, 715; *Cowp.*, 432.) Therefore, where a woman before marriage, with the consent of her intended husband, conveyed all her stock in trade, and furniture to trustees to enable her to carry on her trade separately; it was held that, if the husband did not intermeddle therewith, and there was no fraud, such effects, though fluctuating, were not liable to be taken in execution for his debts. (3 *Term R.*, 618; 8 *East*, 477.) And a settlement after marriage would, it seems, have the same effect, if made in consequence of a prior agreement. (*Tidd.*, 1448; *Cowp.*, 432.) And it is no objection to the settlement in these cases that there is no inventory of the goods; and the possession of the husband, if consistent with the deed, will not subject them to an execution for his debts, provided it be satisfactorily proved that they were really and bona fide conveyed to a third person as a trustee for his wife, and possession taken by such third person. (*Esp. R.*, 594; 6 *East*, 257.) But when the settlement is fraudulent, if done without a fair motive as well as a valuable consideration, and the interest not actually declared and vested at the time of settlement, it cannot prevail against the rights of honest creditors. (6 *East*, 257; 4 *Dalt. R.*, 305.) So if the husband is suffered to carry on the trade intended for his wife, or his possession is not consistent with the deed, the goods are not protected. (8 *Term R.*, 82.) And a term vested in the wife before marriage may be taken in execution for the husband's debts. (4 *Term R.*, 638.) On a fi. fa. against the wife, who married pending the action, it would be irregular to take the goods of the husband. (3 *Maule & Selw.*, 559.) And it has been determined that a tradesman supplying a married woman, living apart from her husband, with furniture on hire, did

not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was legally incapable of contracting, or of acquiring it by any contract; and therefore if the sheriff take such goods in execution at the suit of the husband's creditors, trover lies by the tradesman.—15 *East*, 607.

On a fieri facias against an executor for his own debt, the goods of the testator in the hands of the defendant, cannot be taken in execution. (4 *Term. Rep.*, 621.) But it is laid down, that if an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt.—1 *Bos. & Pull.*, 293.

In actions against partners, the judgment and execution being joint, no difficulty can arise to the sheriff in levying the execution. The whole of the personal effects of the partnership, or a sufficient quantity thereof to satisfy the sum recovered, is to be seized and sold under the execution in the same manner as if they were the sole property of one defendant, against whom a separate judgment had been obtained. He can also seize the separate effects of each or any of the individual partners. (6 *Ves. Rep.*, 119; 1 *Bos. & Pull.* 547.) Under an execution against one of two partners, the sheriff must seize all their joint property, because their moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof, undivided, and the vendee will be tenant in common with the other partner. (1 *Salk.* 392; 15 *John. Rep.*, 179; *Cowp.*, 445; 1 *East*, 367.) But the sheriff can only sell the actual interest or proportion (12 *John. Rep.*, 282,) which such partner has in the partnership property, after the accounts are settled, or subject to the partnership debts. The sheriff therefore does not seize the partnership effects themselves; for the other partner has a right to retain them for the payment of the partnership debts. (16 *John. Rep.*, 106.) And perhaps, if the sheriff or his vendee, actually take possession of the goods, the other partners might maintain trover against him. (2 *John. Rep.*, 282.) And if the sheriff sell the whole of the property,

(*Tidd*, 406,) or more than a moiety, (15 *Mass. Rep.*, 82,) he will be liable to an action of trover, or for money had and received, at the suit of the other partners.* And where there are two exe-

* In *Waddell v. Cook*, (2 *Hill's Rep.*, 47,) it is decided that the sale by an officer of the entire property in goods owned by two jointly, on a *fi. fa.* against one of them, is an abuse of his legal authority which renders him liable as a trespasser *ab initio*. That the share of one of several partners in goods of the firm, may be seized and sold on a *fi. fa.* for his individual debt; and, as incidental to this right, the officer may take possession of the goods seized and deliver the whole to the purchaser.

On this heretofore unsettled point, the following note to the above case, by the learned Reporter, is important:

The case of *Phillips v. Cook*, (24 *Wend.* 389,) decides, that the sheriff may, *at law*, under a *fi. fa.* against one of several partners for his individual debt, seize and sell his share; and that in so doing, the sheriff may take possession of and remove the whole, and deliver the whole to the purchaser. (*S. P. Reed v. Shepardson*, 2 *Verm. R.* 120; *Whitney v. Ladd*, 10 *id.* 165; *Welch v. Clark*, 12 *id.* 686.) But the case itself, and the authorities cited, will be found to give no sanction whatever to the idea that the sheriff would be protected against an action of trespass, trover or replevin, at the suit of the other partners, provided he should expressly sell the whole interest. Chief Baron Comyn laid down the rule with a like restriction in the *King v. Manning*, (*Com. Rep.*, 619, decided in 12 *Geo.* 2.) He said—"If A, B, & C, are partners, and judgment and execution is sued against A only, his share of the goods can be sold. It is true the sheriff may seize the whole, because the share of each being undivided can not be known; and if he seize more than a third part, he can sell only a third part of what is seized; for B & C have equal interest with A in the goods seized; but the sheriff can only sell the part of him against whom the judgment and execution was sued." He cited several of the cases relied upon in *Phillips v. Cook*, all of which will be found to contain the restriction, that the debtor's share alone can be sold by the sheriff. That case held that the sheriff having a right to take the goods and sell them, necessarily took the incidental power of delivering them to the purchaser—that this was conferred by the law—according to the principle laid down in *Williams v. Amory*, (14 *Mass. Rep.*, 27;) viz: "when the law authorizes an act, and nothing is done but what is necessary to accomplish the act, those who perform it may not be considered trespassers." Therefore it was held, that a statute authorizing the sheriff to sell the debtor's *real estate* on execution, conferred, as a necessary incident, the right to enter and levy on a reversionary interest of the debtor in the land. Again, it is said, "In no case can a person be liable to an action as for a tort, for an act which he is authorized by law to do." (*Calender v. Marsh*, 1 *Pick.* 418, 435. *Vid. what was said by Walworth, Ch. in Burrall v. Acher*, 23 *Wend.* 609, 610.)

cutions in the hands of the sheriff, one against a firm consisting of two members, and the other against one of the members of the firm for his individual debt, upon both of which executions the partnership property is levied on and sold, and the sum raised by the sale is not sufficient to satisfy both executions, the creditor holding the execution against the firm is entitled to a preference; but when the property is sold on the execution against the individual partner, though after the delivery of the executions against both partners, the plaintiff in the execution on which the property was sold is entitled to the proceeds, if at the time of sale sufficient time had not elapsed for advertisement and sale under the other execution. (21 *Wend. R.*, 676; 1 *id.* 311.) And if a chattel be owned in common an execution against one part owner cannot be rightfully levied on the whole chattel; but the sheriff must sell the judgment debtor's share only.—15 *Mass. R.*, 82, 17 *id.* 405.

For the act of selling the proper share, and delivering possession of the whole, therefore, no action will lie by any one. And though the sheriff should even assume to sell the whole, it may be quite doubtful whether an action would lie by all the partners or their assignees. Such would probably be a misjoinder, within the reasoning in 24 *Wend.* 397, and the case of *Owings v. Trotter*, cited there, which will also be found directly sustained by the decision of the K. B., in *Jones v. Yates*, (9 *Barn. & Cress.*, 532; 4 *Mann. & Ryl.*, 613, *S. C.*)

But it is believed that no case can be found, save *Mersereau v. Norton*, cited in the text, denying the right of the injured partner, in his own name alone, to sue the officer. It is indeed true, as said in that case, that the legal effect of the sheriff's misconduct, carries no right to the purchaser beyond the particular share; but the principle that here is an authority given by law, which the sheriff has abused by going positively beyond it, and committing a misfeasance, was not adverted to. His right was to take and deliver possession of the particular goods seized, barely on the ground that he could not otherwise satisfy the exigency of the writ; like his entering the house of a stranger to take the goods of the debtor which happen to be there. He is bound in that case to do no unnecessary damage to the stranger in the exercise of his authority; and should he take the goods of the stranger in the house, or sell them, could there be a doubt that this would be such an excess as to render him a trespasser *ob initio*? So, of the share not liable—though possession be necessarily taken, yet a sale, or the exercise of any control over the property of a stranger to the writ, is a wrong; it is an excess of the legal authority, and a stranger having a present right of possession.

Under this writ the sheriff is authorised to seize and sell, as goods and chattels every thing of a tangible nature belonging to the defendant, excepting the following articles specially exempted by statute.

The following property when owned by any person being a householder shall be exempt from levy and sale, under any execution, and such articles thereof as are moveable, shall continue so exempt, while the family of such person, or any of them, may be removing from one place of residence to another.

1. All spinning wheels, weaving looms and stoves, put up or kept for use, in any dwelling house :

2. The family bible, family pictures and school books, used by or in the family of such person ; and books not exceeding in value fifty dollars, which are kept and used as part of the family library.

3. A seat or pew occupied by such person or his family in any house or place of public worship.

even after a delivery to the purchaser, may maintain his action as for a conversion of his own share, provided he sue in his own name alone. The objection which arises against trespass by the reversioner, for the sheriff seizing and selling the reversionary interest under an execution against the bailee for a term of time, does not, therefore, arise. That goes on the plaintiff not having a right to the possession of the goods at the time of the seizure, either exclusively or in common with any other person. Thus, though a sheriff may seize and sell the debtor's property, subject to the lien of A ; yet if he advertise or sell absolutely, A may bring replevin.—*Wheeler v. M'Farland*, 10 *Wend.* 318.

It is entirely settled, that the sheriff can not sell any more than the debtor partner's share. The doubt has been whether, even at law, he may sell that. In some cases it is said that he cannot ; and a recent learned opinion has been delivered to that effect by Parker J. of the N. H. superior court. (*Marrison v. Blodgett*, 8 *N. H. Rep.*, 238.) The contrary was settled by *Phillip v. Cook*, as the general rule in this state ; and most of the authorities on the point adverted to. The doctrine of preference in favor of partnership property, was there held to belong exclusively to a court of equity, as it has been also held in several other states.—*Vid. in addition to the cases cited in 24 Wend.* 402, 3, *Chatzel v. Bolton*, 3 *M'Cord.* 33, in connection with *Bouden v. Schatzel v. Bail. Eq. Rep.*, 360. *Vid. also Burton v. Green*, 3 *Carr & P.* 306, and the note to that case ; *Vienne v. M'Carty*, 1 *Dall.* 154 ; *McCoombe v. Dunch*, 2 *id.* 73 ; *Goodwin v. Richardson*, 11 *Mass. Rep.*, 472, per *Jackson, J.*

4. All sheep to the number of ten, with their fleeces, and the yarn or cloth manufactured from the same; one cow, two swine, the necessary food for them; all necessary pork, beef, fish, flour, and vegetables, actually provided for family use; and necessary fuel for the use of the family for sixty days.

5. All necessary wearing apparel, beds, bedsteads and bedding for such person and his family; arms and accoutrements required by law to be kept by such person; necessary cooking utensils; one table; six chairs; six knives and forks; six plates; six tea cups and saucers; one sugar dish; one milk pot; one tea-pot and six spoons; one crane and its appendages; one pair of andirons, and a shovel and tongs. (2 *Rev. Stat.*, 2d ed., 290 § 22.) Necessary household furniture, and working tools, and team owned by any person being a householder, or having a family for which he provides, to the value of not exceeding one hundred and fifty dollars; provided that such exemption shall not extend to any execution issued on a demand for the purchase money of such furniture, or tools, or team, or articles now enumerated by law.—*Laws of N. Y.*, 1824, p. 193, § 1.

In the construction of this act the supreme court have decided, that these exemptions from execution are personal privileges, of which the owner alone can take advantage, (1 *Cow.*, 114,) except where the judgment on which the execution issued, or any part thereof, was for the sale of intoxicating liquors. (*Laws* 1842, p. 194, § 3.) And that a party claiming exemption under it for his cooking utensils, must shew, positively and affirmatively, that thy were in fact necessary, not merely useful; (14 *J. R.*, 434,) and that the fleeces, or the yarn or cloth, manufactured from the fleeces of ten sheep are exempted from execution whilst in the hands of a householder, although he did not own the sheep from which grew the wool used in the manufacture of the article.—21 *Wend.*, 68; 11 *Ibid.*, 44.

When goods and chattels shall be pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods, of the person making such pledge, may be sold on execution against him, and the purchaser

shall acquire all the right and interest of the defendant, and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.—2 *R. S.*, 2d ed., 290, § 20.

Until very lately leasehold estates, or terms for years, might also be seized and sold as chattels; now, however, by an act of 1837, (*Sess. Laws*, 540,) when leasehold property, in which the lessee or his assignee has an unexpired term of at least five years, is sold under execution, the property may be redeemed: so also where the lessee or assignee is possessed of any building erected on the demised premises. (20 *Wend. R.*, 416.) And the interest of a person in possession of land under a contract for the sale of it cannot be sold in execution.—1 *R. S.*, 2d ed., 736, § 4.

The sheriff may levy upon and sell every kind of produce raised annually by labor,* except grass growing and fruit not gathered, (19 *J. R.*, 108; 17 *Ibid*, 368; 2 *R. S.*, 2d ed., 24, § 6,) and upon fixtures which may be removed by the tenant (17 *J. R.*, 116); and he may levy upon any current gold or silver coin belonging to the defendant, and he is to return and pay the same as so much money collected, without exposing the same for sale at auction. (2 *R. S.*, 2d ed., 290, §) So he may levy upon and sell any bills or other evidences of debt, issued by any money corporation, or by the government of the United States, and circulated as money, which shall belong to the defendant in such execution.—*Ibid*, § 19.

But furnaces, or apples upon trees, which belong to the freehold, and go to the heir, cannot be sold as personal property. (*Gilb. Ex.*, 19; *Tidd's Prac.*, 1040.) So the sheriff has no right under a fieri facias to seize and sell fixtures as personal property, when the house in which they are, is the freehold of the person against whom the execution issues. (5 *Barn. & Ald.*, 25; 1 *Dowl. & Ry.*, 247.) So where one mortgaged lands, with a windmill thereon, built chiefly of wood, the deed containing also

* *Potatoes* planted for family use are exempt from execution before they are dug, the same as when taken out of the ground and laid up in store.—25 *W. R.*, 370.

a bargain and sale of the mill; it was held, that it could not be taken in execution by order of his creditors, as personal property, although he remained in possession. (4 *Moore Rep.*, 281; 1 *Brod. & Bing.*, 506.) And where certain machinery, together with a mill, had been demised for a term to a tenant, and he, without permission of his landlord, severed the machinery from the mill, and it was afterwards seized and sold by the sheriff under a fieri facias; the court held that no property passed to the vendee, and that the landlord was entitled to bring trover for the machinery, even during the continuance of the term.—3 *Stark. Rep.*, 130; 5 *Barn. & Ald.*, 826.

When the growing crops of a tenant having been seized under a fieri facias, a writ of habere facias possessionem was subsequently delivered to the sheriff, in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the fieri facias, the court held that the sheriff was not bound to sell the growing crops under the fieri facias, in as much as they could not in point of law, be considered as belonging to the tenant, the latter being a trespasser from the day of the demise in the ejectment.—5 *Barn. & Ald.* 88; 9 *Price*, 287.

Rye growing in a field was levied on by the sheriff, under a fieri facias, but not sold; and a collector of taxes, by virtue of a warrant against the defendant, afterwards distrained upon and sold the same field of rye for a tax. Held that, after the levy by the sheriff under the execution, the rye was in the custody of the law, so that the collector had no right afterwards to sell it; and that the purchaser under him could not maintain trover against the purchaser under the sheriff, who in harvest time cut and carried away the rye.—17 *John. Rep.*, 128.

Personal property pledged by way of mortgage, may, after forfeiture, be levied upon by virtue of an execution against the mortgagee, though the property remains in the hands of the mortgagor. (9 *Wend. Rep.*, 258.) So the sheriff may sell a term in goods and chattels upon execution against the lessee, and the purchaser acquires a right to use the goods during the term.—2 *Cow.*, 542.

A rent charge, that is a rent reserved upon a lease in fee, con-

taining a clause to enter and distrain for the rent, is an interest in land, which is bound by the judgment, and may be sold on execution as real estate, and forms a specific portion of the premises, on which it is charged; a rent seck is not such an interest.—7 *Wend., Rep.*, 463.

Bank shares, or shares in a public library, being mere choses in action, cannot be seized and sold under execution. (9 *John. Rep.*, 114.) So the right of a turnpike corporation seems to be a franchise, a mere incorporeal hereditament, and, where no provision is made in the act creating it, by which it may be alienated, or taken in execution, it may require consideration, whether, on a judgment against the corporation, this franchise can in any manner be taken in execution. (4 *Mass. Rep.*, 595.) An equity of redemption in goods cannot be taken and sold on execution.—4 *Cowen*, 461.

It is said that the sheriff cannot take goods distrained, (*Willis*, 131; 5 *Moore*, 79,) or taken and in the custody of the sheriff upon a former execution; (2 *Show. Rep.*, 173; 2 *Brod. & Bing.*, 362,) nor can promissory notes, private papers and account books, be seized and sold on execution, for they are not considered as goods and chattels. (*Tidd Pr.*, 1042; 12 *Mass. Rep.*, 506; 15 *Ibid*, 534.) And though it be said, that, in the case of a lease of land, and of a stock of cattle for a year, they cannot be taken in execution during the term; that is, because the lessee himself could not have dispossessed his tenant during the year, and of course the lessor's creditor cannot: But subject to the right of the lessee, the goods may, it seems, be taken in execution.—3 *East*, 476; *Tidd Pr.*, 1042.

Where chattels are bona fide assigned in trust for the payment of debts or other specified purposes, the residuary interest of the assignor, after the purposes of the trust are satisfied is not a subject for sale on a fi. fa. (5 *John. Rep.*, 385.) So where a tenant assigns the household property to trustees, the resulting trust or equitable interest of the assignor cannot be sold under an execution.—8 *East*, 467.

Where a debtor confesses a judgment, and afterwards fraudu-

lently purchases and procures to be delivered goods, without paying for them, with intent to subject them to the execution of the judgment creditor, the title of the goods does not become vested in the purchaser; and the sheriff therefore cannot take them on an execution against him. (15 *John. Rep.*, 147; 1 *Paige Ch. R.* 492.) But the sheriff may take any goods which have been fraudulently sold by the defendant and conveyed away, for such sale is void as against creditors. Thus, if a person has notice of a judgment, and purchases with the view and for the purpose of defeating the creditor's execution, it is fraudulent and void, notwithstanding a full price has been paid by the purchaser.—8 *John. Rep.*, 446; 12 *id.*, 320.

Money paid on a *fi. fa.*, does not become the goods and chattels of the plaintiff until it has been paid over to him; and while it remains in the hands of the sheriff he cannot apply it to the satisfaction of another *fi. fa.*, against the former plaintiff. (1 *Cranch, Rep.*, 117; 6 *Cow.*, 494.) But where several executions have come to the hands of the sheriff and there are overplus moneys in the hands of the sheriff, after satisfying the first execution, the court, in a case where the rights of the parties are so clearly ascertained that there is no necessity for resorting to a court of equity, will on motion, direct the application of the surplus to the payment of the subsequent judgment creditors according to their priority, to be determined, where the proceeds arise from the sale of the lands, by the time of docketing their respective judgments, or, if from the sale of goods and chattels, by the delivery of their executions to the sheriff. (5 *John. Rep.*, 163; 18 *Ibid.*, 120: 3 *Caines' Rep.*, 84.) In England, if a sheriff cannot find sufficient effects of the defendant to satisfy the execution, the court will order him to retain for the use of the plaintiff, money which he had levied in another action, at the suit of the defendant. (*Doug., R.*, 231.) But it is not so in this state. Nor will the supreme court order a sheriff who has overplus moneys in his hands, arising from an execution, to pay it to the plaintiff on a subsequent execution against the same defendant, where the equitable rights of other claimants to the money are not clearly ascertained: as where an

assignee of the first judgment and who was a purchaser at the sheriff's sale, claimed the overplus money. Though they might make such an order in a case where the rights of the parties were clear, and there was no other means of satisfying the plaintiff in the second execution.—5 *John. Rep.*, 163.

Under this writ the sheriff may seize any goods which have been fraudulently sold, or conveyed away by the defendant; and the principal badge of fraud is the defendant's continuing in possession. What shall constitute fraud in the assignment of personal property has been much agitated in the English courts, as well as our own, and a detailed review of the cases on that subject would be neither profitable nor instructive, as they all appear to have settled down in the doctrine which has been since recognized and declared by statutory enactment (2 *R. S.*, ed., 70, § 5; *Grah. Pr.*, 372,) that every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual, and continued change of possession, of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers.

In the case of *Bissel v. Hopkins*, (3 *Cow.*, 166; *Grah. Pr.*, 372,) all the cases relative to actual or constructive frauds upon creditors by their debtors are fully reviewed; and the court determined that in every case where the question relates to the bona fides of the transaction, as to the sale of goods, the retaining possession of them, and the exercising acts of apparent ownership over them, are to be particularly looked to, and that though these appearances are prima facie evidences of fraud, yet they may be explained; that it is competent, in the face of all

these appearances, to show that property, which apparently belongs to one is in fact the property of another, that no deception has been intended, or practised, and that to whom the property in question, in truth belongs, and whether there has been any deception or fraud or not, are matters of fact. And in *Hall v. Tuttle*, (8 *Wend. R.*, 376,) after an acute and thorough examination of all the authorities by *Savage, C. J.*, the court held that possession by a vendor of personal property after a transfer by bill of sale or assignment though the conveyance be absolute in its terms, or possession by a mortgagor after forfeiture is only prima facie evidence of fraud and not conclusive; the possession may be explained, and if the transaction be shown to have been upon sufficient consideration, and bona fide, that is, without any intent to delay hinder or defraud creditors, the conveyance is valid. This we imagine is still the law; and that if the party prove a state of facts, which fairly tends to repel all idea of a fraudulent design, the conveyance is good.

Since the enactment of the statute, there have been several decisions respecting its application to sales and mortgages of personal property; and in which, without impugning former decisions, the whole question seems to have turned upon the validity of the special reasons assigned for the continued possession of the vendor or mortgagor. In the case of *Collins v. Bush* (9 *Wend. R.*, 198,) the sale of ponderous articles, where there could not be an immediate change of possession, was not considered as a sufficient reason for leaving them in the possession of the vendor. When upon a mortgage of personal property, the same was left in the possession of the mortgagor for his accommodation, the mortgage was held to be fraudulent and void. (2 *Ibid*, 297.) That the mortgagor wished to use the property, and that the mortgagee consented to such use, is not such a reason as will be approved of by the court. (17 *Ibid*, 53.) In *Doane v. Eddy*, (16 *Ibid*, 523,) it was held that the continued possession of a mortgagor was not satisfactorily explained by showing that he was a travelling or missionary preacher of the gospel, and that the use of the property mortgaged (a horse) was necessary to enable him to

pursue his vocation. And the temporary resumption of personal property by a mortgagor, although possession accompanied the execution of the mortgage, will be deemed fraudulent unless also satisfactorily explained; there must be a continued change of possession. (15 *Wend. R.*, 244.) In *Kidd v. Rawlson*, (1 *Bos. & Pull.*, 59, cited in *Putnam v. Wiley*, 8 *John. R.*, 435,) the purchaser under a *fi. fa.* was a *third person*, and not the creditor who issued the writs, and it was held, that his permitting the debtor to continue in possession of the goods was not fraudulent, as respected another creditor, to whom the debtor afterwards assigned the same goods in payment. It is required that every mortgage of goods and chattels shall be filed with the town clerk or in the county clerk's office of that town in which the mortgagor resides or it is void, as to creditors, purchasers and mortgagees.—2 *R. S.*, 2d ed., 71, § 9, 10.

But many circumstances are mentioned in the books which go to repel the conclusion of fraud in transactions of this kind. It was held that the property being mortgaged for a debt, a great part of which was due for rent, and of course already constituted a lien upon the property was an evidence of good faith, although the mortgagor retained the possession. (1 *Gow. R.*, 33.) So where the property was a house, and the object of leaving which in the hands of the debtor who had mortgaged it was, that he might settle and close his business as constable, he having no horse, and no judgment having been obtained against him until after the mortgage. (3 *Cowen*, 187.) But the cases of *Hoe v. Acker*, (23 *Wend. R.*, 653,) and *Hosford v. Archer*, (4 *Hill*, 271,) in the court of errors, overrule the principle laid down in *Doane v. Eddy*, so far as to submit the question of fraudulent intent to the jury. These cases contain the whole doctrine on the subject.

Where a creditor having taken the goods of a defendant in execution upon a judgment confessed on a warrant of attorney, bought them at public auction, and took a bill of sale from the sheriff for a valuable consideration, after which he let the goods to the former owner for a rent, which was actually paid;

it was held that the creditor had a title which could not be impeached as fraudulent by other creditors having executions against the same defendant. (4 *Taunt. Rep.*, 823; 3 *Caines' Reports* 225.) But a purchaser's title in such case would stand upon the same footing, as to other creditors of the defendant, as if he, the purchaser was a mortgagee. And if in such case there is no evidence to show why the property is left with the debtor, then it is prima facie evidence of fraud, as against a subsequent execution. (15 *John. R.*, 430.) And it would seem that goods purchased at a sale not made by the debtor himself, and over which he has no control, may, when no fraudulent intention is apparent, be left in possession of the debtor, without rendering them liable to executions subsequently issued. (17 *John. R.*, 332; 9 *Ibid.*, 135, 243; 1 *Maule & Selw.*, 251; 5 *Taunt. R.*, 216.) Goods seized and sold by the landlord under a distress for rent without any collusion, and purchased by a trustee of the tenant's estate under an assignment by such tenant, for the benefit of the creditors, out of the trust funds, are not liable to be taken in execution by a judgment creditor, although they are permitted by the trustees to remain in possession of the tenant. (1 *Stark.*, 294.) And the purchaser of goods sold at auction by trustees, under an assignment by an insolvent debtor is also protected, though he leave the goods in the possession of the prior owner, provided it be a matter of fact to be found by a jury, that the assignment was not made with a fraudulent intent and that the sale was notorious.—1 *Maule & Selw.*, 251.

If an execution be levied upon any goods or chattels in or on any demised premises, liable to a distress for rent, the officer holding the execution, on receiving a notice from the immediate landlord (6 *Wend.*, 392,) of such premises of the amount of rent claimed by him, to be due and the time during which the same accrued, verified by the affidavit of himself or his agent, (1 *Rev. Stat.*, 2d ed., 737, § 12; 12 *Wend.*, 197,) is required to levy the amount of such rent, in addition to the sum directed to be levied on the execution, (provided it do not exceed the last year's rent of the pre-

mises,) and to pay it over to the landlord or his agent. (1 *R. S.*, 2d ed., 737, §13.) But if the tenant deny the rent claimed to be due, he may always prevent its being levied, by delivering to the sheriff a bond with two sufficient sureties, to be approved by such officer, in a penalty of double the amount of the rent so claimed, to be executed to such landlord, with a condition that the obligors therein will pay all rent then due to such landlord, not exceeding one year's rent of the premises.—1 *Ibid*, § 15-17.

Under these provisions the court has decided that the mere occupation of premises without an agreement to pay a liquidated sum as rent does not give the landlord the right to require the sheriff to levy and pay over whatever sum he chooses to demand. (21 *Wend. R.*, 65.) And he is not entitled to rent not due at the time of taking the goods, nor to that which becomes due while the sheriff remains in possession, unless the sheriff remains in possession beyond a reasonable time, so as to injure his rights; when he may maintain an action on the case. (*Maule & Selw.*, 245; 18 *John. R.*, 1; 2 *Hill's R.*, 380.) And that the statute applies to executions sued out on the part of the defendant as well as to those sued out on the part of the plaintiff, and the executor or administrator of a landlord is within its provisions as well as the landlord himself. But if there be an execution sued out, and the landlord paid a year's rent, and soon after another execution came in, he is not entitled to another year's rent, though it be due; because it is his own laches, if he let more than one year's rent run in arrears. (2 *Stra.*, 1024.) But the landlord may claim rent in advance, if it be stipulated in the lease; (7 *Price*, 690;) or rent which became due the day the execution was put in, though the goods have before been distrained upon and replevied. (*Tidd*, 1054.) With regard to what shall be considered *rent*, it has been held, that if an agreement for the assignment of a piece of ground, on payment of a certain sum, contain a clause, that the party agreeing to take the assignment, shall pay at the rate of so much per annum, from the time of taking possession, until the completion of the purchase, in equal half yearly payments, a sheriff has a right to treat such

sum as rent and deduct it out of the proceeds of the execution.—
2 *Carr. & Payne*, 294.

As it regards the form of the notice, it has been held that a notice of rent due was sufficient to justify the sheriff in retaining the sum claimed as rent, although the time during which the rent accrued was not stated in the notice; and the officer has no right as against the execution creditor or the tenant to waive any substantial defect in the notice or affidavit, (5 *Hill's R.*, 562; *overruling the case in 12 Wend. R.*, 197;) and in another late case it was decided that the non-production of the affidavit which is to accompany the notice cannot be excused although waived by the sheriff at the time of the claim, unless the tenant consent to a sale to satisfy the claim of the landlord. (21 *Wend.*, 65.) The affidavit and notice are in the nature of process, and must make out a case on which the sheriff is warranted to levy rent.—
4 *Hill's R.*, 605.

Such notice and affidavit may be served on the party in whose favor the execution shall be issued, or on the officer holding the same at any time before a sale of such goods. (1 *R. S.*, 2d ed., 737, § 12.) Formerly notice alone was sufficient, and that might be at any time before the money was paid over to the plaintiff in execution (3 *Wend.*, 446; 3 *Taunt.*, 400; 4 *Barn. & Ald.*, 440.) But if the landlord accepts an undertaking from the sheriff or his officer to pay the rent, and applies all the money on the execution, the landlord cannot maintain an action against the plaintiff, though the undertaking be not valid from not expressing the consideration. (3 *Campb.*, 24; 3 *Esp. Rep.*, 66.) And on the other hand, if the attorney for the plaintiff in the execution, on being notified of a claim by the landlord for rent, direct the sheriff to withdraw the execution, and he do so, and the plaintiff sue out a ca. sa. for the debt, such execution creditor cannot bring an action against the sheriff for falsely returning to the fi. fa. that so much rent was due; and he will not be entitled to recover, though he shew that the supposed landlord had no right to the rent claimed, and that the attorney, at the time he directed the officer to withdraw the execution, did not know what the landlord's title was.—2 *Carr. & Payne*, 100; *Gra. Pra.*, 377.

In executing a writ of fieri facias, the sheriff cannot, as we have already noticed, break open the outer door of a dwelling house; nor, as is said, can he open the door, though it be only latched; or knock, and when the door is a little opened, thrust in with violence. But he may enter the house of the defendant, when the door is open, and seize the goods of the defendant there found; or the house of a stranger; and this by night or by day, if the door be open. (5 *Reports*, 92; 2 *Dun. Pra.*, 795.) So on a fi. fa. against the goods of an intestate, in the hands of his administratrix and her husband, the sheriff may enter the house of the husband, to search for the goods of the intestate, though none be found therein; because that is the most natural place of custody for them. (7 *Taunt.*, 765.) And if a fi. fa. be directed to the sheriff to levy the goods of A, and it happens that A's goods are in the house of B, if, after a request made by the sheriff to B, to deliver these goods, he refuse, the sheriff is justified in breaking and entering his house. (*Dalton*, 350.) There seems to be no settled rule as to how long the sheriff may continue in the house of the defendant or a stranger, upon a fi. fa.; but as his object in entering is to take the goods, he ought not to stay there without the consent of the tenant longer than is necessary or reasonable for that purpose. There is this difference too, between his entering the house of the defendant and that of a stranger; that in the former case his justification does not depend on his finding or not finding the defendant's goods therein; but in the latter case, he is not justified, unless it should turn out that the defendant has goods in the house which are liable to be taken in execution. (5 *Taunt.*, 769; *Ibid*, 246; *Gra. Pra.*, 386.) But a sheriff, in order to levy on a fi. fa., as well as to make an arrest, may break open a store, warehouse, or barn, not annexed to a dwelling house, or forming any part of the curtilage, as the inner doors of a dwelling house, trunks, &c. Indeed, when necessary, he must do so.—16 *John. R.*, 287; 9 *Ibid*, 132.

After the sheriff has levied on the goods and chattels of the party named in the writ, the latter may prevent further proceedings by paying the amount levied to the officer; and this will be

deemed a good payment to the plaintiff. (5 *Cowen*, 248; 2 *Lev.*, 203; 1 *Arch. Pra.*, 296.) If, however, the amount be not then paid, it is the duty of the sheriff to proceed and sell the property at auction, after giving due and legal notice of the same. And if the sheriff wilfully delay to sell for an unreasonable time, with a view to injure the defendant, he is liable to an action.—3 *Stark. Rep.*, 163.

The Revised Statutes contain the following provisions respecting the notice of sale :

No sale of any goods or chattels shall be made by virtue of any execution, unless previous notice of such sale shall have been given six days successively, by fastening up written or printed notices thereof, in three public places of the town where such sale is to be had, specifying the time and place where the same is intended to be had.—2 *R. S.*, 2d ed., 290, § 21.

If any person shall take down or deface any notice of a sale of real or personal property, put up by any sheriff, previous to the day of sale therein specified, unless upon satisfaction of the execution, by virtue of which such notice shall have been given, or upon the consent of the party suing out such execution, and of the defendant therein, such person shall forfeit fifty dollars to the party in whose favor such execution was issued.—*Ibid*, § 39.

The omission of any sheriff or other officer to give the notice of sale herein required, or the taking down or defacing of any such notice when put up, shall not affect the validity of any sale made to a purchaser in good faith, without notice of any such omission or offence.—*Ibid*, § 40.

Respecting the sale, the statutes provide that the sale of any real estate, or of any personal property by virtue of any execution, shall be at public vendue between the hour of 9 o'clock in the morning, and the setting of the sun.—*Ibid*, § 36.

No personal property shall be exposed for sale, unless the same be present, and within the view of those attending such sale; it shall be offered for sale in such lots and parcels as shall be calculated to bring the highest price.—*Ibid*, 291, § 23.

The sheriff or other officer to whom any execution shall be di-

rected, and the deputy of such sheriff, or officer, holding any execution, and conducting any sale of property in pursuance thereof, shall not, directly or indirectly, purchase any property whatever, at any sale by virtue of such execution; and all purchases made by such sheriff, officer or deputy, to his use, shall be void.—*Ibid*, 293, § 41.

The sale of goods under a fieri facias ought to be at the place where the goods are, so that they may be severally seen and examined; and where a sale was made six miles distant from the goods, it was held irregular and void. (17 *John. Rep.*, 116.) If part of the goods be present at the sale, and part absent, the sale is valid as to the property which is present. (19 *Wend. R.*, 475; 14 *J. R.*, 222.) The articles should be pointed out to the bidders, and sold specifically and separately. If sold collectively and without discrimination, the property therein is not transferred to the purchaser; and the court said that to sanction such sales would open a door to innumerable frauds. (14 *John. Rep.*, 352.) Still less is it admissible to sell real and personal property in one mass. (17 *John. Rep.*, 116.)* The proper course, both on sales of real and personal property, is to sell only so much of the property charged as will probably satisfy the execution, and which can be conveniently and reasonably sold separately.—8 *John. Rep.*, 333.

If a sheriff sell goods upon an execution without legally advertising the sale, and return that he advertised and sold them according to law, he will be liable to an action on the case for a false return; but the judgment creditor cannot maintain trover for the goods.—3 *Mass. Rep.*, 487.

A sheriff has a reasonable discretion in adjourning the sale. (5 *John. Rep.* 345; 2 *Coven*, 139.) He may sell the goods after the return of the writ, (4 *Wheat. Rep.*, 503,) and even after he has gone out of office, (*Salk.*, 323; *Ld. Raym.*, 1073,) without a *venditioni exponas*. So if a term of years be sold after the writ

* In a late case, where the sheriff of Columbia county set up and sold several head of cattle at once, on an application for a resale the court denied the motion, although the property sold at a very inadequate price, there being no evidence of fraud.

is returnable, an assignment subsequently executed is valid. (1 *Barn. & Ald.*, 230.) The sheriff having levied on goods, is not justified in selling to the highest bidder greatly under value; but if he cannot obtain a reasonable price, may return that the goods remain in his hands for want of buyers.—3 *Campb. Rep.*, 521.

In a case attended with aggravated circumstances of oppression on the part of the officer, in persisting to sell on the day appointed, at a great sacrifice of the property, and where the defendant had been absent from home at the levy, and did not return until the day of sale, and requested but a few hours to go three miles to get the money, to satisfy the execution; but the sheriff, acting by the directions of the plaintiff, refused to grant any delay, or adjourn the sale, although the return day was some weeks distant; and insisted that if the amount of the execution should be paid by the defendant, it must be in specie, and, the defendant being unable to comply, went on with the sale, and sold property, worth from twelve hundred to two thousand dollars, for three hundred, the plaintiff becoming the purchaser; the court remarked, that the officer is undoubtedly to take all necessary and lawful means to comply with the exigency of the writ, and thereby secure to the plaintiff in the execution the fruits of his recovery. As to time, place, and manner of sale, a sound discretion is vested in him, but in the full confidence that it will not be abused. It is indispensable to the due administration of justice, that the exercise of this discretion should never be under the direction of one party, so as to oppress and bring ruin on the other. The officer is bound to consult his own judgment, to act firmly but temperately, and in no case can he without just reprehension, lend himself to the views of either party, or become the instrument to average their real or imaginary wrongs. The court held that the officer was bound, when he saw that there must be a great sacrifice of property to have postponed the sale; and that he ought to have given the defendant a reasonable time to obtain the money, particularly when the sheriff could not possibly sustain any loss from the indulgence; and added that were these the only questions in the case they would not hesitate in saying that the sale should be set

aside. (2 Cowen, 139; 2 Paine & Duer, 338.) But when the property has passed to bona fide purchasers without notice, the sale may be held valid and the sheriff liable for damages. Where a sheriff sold three hundred dollars worth of property for thirty, the sheriff was held liable, on the ground that he ought to have returned that the property remained on bond for want of bidders.

The sheriff cannot deliver the defendant's goods to the plaintiff in satisfaction of his debt; nor can he redeliver them to the defendant, if he pays only part of the debt; and if the sheriff levies on the goods, and pays the plaintiff with his own money, yet he cannot keep the goods to his own use. (*Noy.*, 107; 1 *Lutw.*, 589) But where an execution creditor bids at the sheriff's sale, and the goods are knocked down to him, the sheriff may lawfully deliver the goods without receiving the money. It would be unreasonable and injurious to debtors, as well as creditors, to insist that the creditor in the execution should advance money on his bid, when the sole object of the sale is to put money in his pocket, by paying a debt due to him. Thus where a sheriff had sold the property of the debtor to his creditor as the highest bidder, and delivered it without receiving the money, and the judgment and execution were afterwards set aside as fraudulent and void, and the sheriff directed to apply the moneys collected on the execution, to satisfy other executions in his hands, and the sheriff not having actually received the money, returned *nulla bona*, &c., to an execution delivered to him; it was held that the sheriff was not liable to an action for a false return. (19 *John. Rep.*, 84.) And the sheriff is bound to pay the money collected on the execution to the plaintiff without any previous demand, or to pay it into court; otherwise he is subject to an attachment.—18 *John. Rep.*, 133; 3 *Hill*, 532.

And the ruling of, or notice to a sheriff to return an execution, after the commencement of a suit against him for the money received by him, is not an abandonment of the action; nor will the returns of the execution and the payment of the money into court after such proceeding, discharge the sheriff's liability. The proceeding is allowed in aid of the action, the money is considered as

voluntarily paid in and the defendant cannot avail himself of such payment but by compliance with the established practice in cases of payment of money into court. (13 *John. Rep.*, 529.) It is the duty of a sheriff to return the writ without being ruled or noticed; and, in an action against him, what he has done upon it may be proved by parol. (15 *John. Rep.*, 456.) But still the plaintiff in an execution is not obliged to rely upon this parol evidence, but has a right to insist upon a return by the sheriff as collateral to, and in aid of his action against him. (*Ante*) The object of compelling a return of the writ, is to ascertain under the hand of the sheriff himself what he has done, and not to compel him to bring into the court the money which he may have made upon it. The ruling of the the sheriff, therefore, is not an abandonment of the action against him, nor in any manner inconsistent with it. 2 *Wend., Rep.*, 260.

Where several parcels of property are sold under an execution at one bid, though the sale might have been fairer, and the property brought more, in separate parcels, yet a third person, not a creditor, has no right to object to the manner of sale. The title passes by such a sale as to strangers. (9 *Cowen*, 274.) And a delay in selling property levied under an execution, does not render the sale void in respect of an execution issued subsequent to the sale. (14 *John. Rep.*, 222.) So a sale under an execution to a bona fide purchaser, cannot be defeated for error or irregularity in the judgment or execution, or on the ground that no levy was made until after the return day. (3 *Ibid*, 97.) And an execution issued after two years without the judgment being revived by scire facias, or an irregular scira facias, is voidable only, and cannot be called in question in a collateral action, so as to defeat the title of a purchaser under the execution. (1 *Ibid*, 537.) Neither can a purchaser at a sheriff's sale be affected by any matter subsequent to the sale arising between the parties to the payment, to which he is a stranger, (8 *Ibid*, 281.) And it seems that a bona fide purchaser of lands on an execution issued on a judgment which has been paid, but on which no satisfaction is entered on record, nor the execution returned satisfied, will be protected in his purchase.

But it is otherwise if he had notice of the payment, either actual or presumptive. And if the party to the execution purchase, he will not be protected, for he is chargeable with notice.—1 *Cowen*, 622.

Where a sheriff sold property on a *fi. fa.*, against a defendant, and endorsed the amount of sales upon the execution, but the property turned out to belong to a third person, who recovered its value in an action against the sheriff and the plaintiff jointly; the court ordered the endorsement to be stricken out, and that an alias *fi. fa.*, should issue for the whole.—5 *Ibid*, 280.

Although a plaintiff bidding on his own execution is not bound to pay the money, yet, if there be a dispute between him and other creditors as to which execution the money is to apply, the sheriff may refuse the plaintiff's bid; or refuse to deliver the property until the money be paid, and proceed to sell again if it be not paid according to the bid made. But if he sell and deliver the property to the plaintiff he cannot maintain an action for the price bid. (*Ibid*, 390.) And an action does not lie against an officer for not paying over money collected by him on execution, where he has been sued, and a recovery had against him for selling property, by the sale of which the money collected by him was made, where such recovery is equal to, or exceeds the amount of the execution; and such action does not lie although the plaintiff in the execution, on the delivery of the process, executed a bond of indemnity to the officer, and notwithstanding that the officer has brought an action upon such bond.—21 *Wend. R.* 1264.

If the sheriff delivers goods seized and sold on execution, without recovering the money, he is answerable for the amount. (9 *John. Rep.*, 96.) And it is questionable whether in case of a *venditioni exponas*, the sheriff is not concluded by the value of the goods, as stated in his return to the *fi. fa.*, that he had taken goods and chattels to the value of the damages in the execution. (*Id. Raym.*, 1072; 6 *Mod. Rep.*, 296; 6 *Mass. Rep.*, 325; 10 *ibid*, 470.) The general rule being that an officer is not allowed to contradict his own return. And a defendant whose goods have been taken under a *fi. fa.*, is entitled to call on the sheriff to re-

turn the writ, whether the goods have been sold to another, or redeemed by himself. (7 *Taunt.* 5.) In England, when a sheriff acts in good faith, an action cannot be maintained against him for money had and received on an execution, without a previous demand; and where such action is brought, and application is made in time, the court will stay the proceedings on payment of the money received without costs. (3 *Barn. & Ald.*, 596.) But here an action may be maintained for not returning the *fi. fa.*, (and of course for the money) without demand.—3 *Hill*, 552.

A sheriff who advertises for sale on but one execution, cannot sell under that execution and another execution coming subsequently to his hands, by virtue of the same advertisement.—3 *Cowen*, 334.

Where the sheriff has two executions against the same defendant, and, having levied part of the amount of the prior execution, proceeds after the return day of the execution, to make another levy, he must apply the sum thus made in satisfaction of the junior execution; the latest period which the law allows for the service of a writ being the day on which it is returnable. And if the plaintiff in the junior execution obtains a rule directing the sheriff to pay over the money to him, he is not bound to proceed by attachment, but may maintain an action of *assumpsit* against the sheriff.—13 *John. Rep.*, 255.

And a sheriff who holds an execution against the property of the defendant in the process, is not bound, it seems, to suspend proceedings on the production to him of an insolvent's discharge granted to the defendant; at all events, if he do so, he incurs the peril of an action against him if the discharge be shewn to be void.—21 *Wend. Rep.*, 351.

Where two *fi. fa.*'s. are delivered on the same day to the sheriff, who executes the last first on the goods of the defendant, the execution is good, but he is liable to the plaintiff in the first. (*Ld. Raym.*, 251.) And where after the *fi. fa.* is executed, the judgment is reversed, the defendant is entitled to recover, but he can recover only to the amount of the money which has been made by the sale.—2 *Saund.*, 69.—See *Appendix*.

Where two executions in favor of different plaintiffs for different amounts, are delivered to the officer at the same time, and personal property is sold, but not enough to satisfy both, the money must not be applied *pro rata*, but dollar for dollar, till the less is extinguished, and then the balance upon the larger.

The court will not stay goods, taken by *fi. fa.*, in the hands of the sheriff, until a dispute between the plaintiff and a stranger, concerning the property, is decided, unless for the protection and at the request of the sheriff.—2 *Black. R.*, 1064.

When the plaintiff interferes and directs a deputy sheriff to take a course in the collection of an execution, out of the line required by law, as, by giving credit, &c., he thereby makes the deputy his private special agent, and discharges the sheriff.—6 *Cow. R.*, 467.

An auctioneer selling goods levied on by execution, in pursuance of orders from a sheriff, and receiving money for them, is accountable only to the sheriff, and cannot be held as the trustee of those who may have claims on the sheriff for the proceeds.

2d. Of the fieri facias, and the proceedings of the sheriff under it as it regards real property.

If sufficient goods and chattels cannot be found by the sheriff to satisfy the execution, then (and not before) he is commanded by the writ to cause the amount so deficient to be made of the real estate owned by the party at the time of docketing the judgment, or at any time subsequent, into whose hands soever the same may have come.*—2 *R. S.*, 2d ed., 291, § 24.

As the time of docketing the judgment is to be specified in the writ, (*Ibid.*) the sheriff is always informed of the day to which the execution relates, and is bound to sell every species of real estate on which that judgment is a lien.—5 *Hill*, 228.

As to the lien of judgments upon lands the statutes provide that all judgments rendered in any court of record shall bind and be a charge upon the lands, real estate, and chattels real of every person against whom such judgment shall be rendered, which

* Since the *Rev. Stat.*, there have been the following enactments :

No judgment or decree which shall be entered after this act takes effect,

such person may have at the time of docketing such judgment, or which he may acquire at any time thereafter. (2 *R. S.*, 282, § 3.) And that from and after ten years after the time of docketing such judgment, it shall cease to bind or be a charge upon any such property as against purchasers in good faith, and as against incumbrancers subsequent to such judgment, by mortgage, judgment, (*Note*, § 31,) decree, or otherwise. (*Ibid*, § 4.) The time, however, during which the execution of such judgment may be suspended by injunction or writ of error, is, under certain regulations, allowed to be deducted from such period of ten years.—*Ibid*, § 5, 6; 1 *Burr. Pra.*, 280.

The judgment is also in some cases a lien, and the execution may be levied upon equitable interests, such as the equity of redemption of lands mortgaged, (1 *Cowen*, 50) unless the judgment be for the debt secured by the mortgage (2 *R. S.*, 2d ed., 219, § 31); and trust estates, (except such as are connected with some power of disposition by the trustees (1 *Ibid*, 722, § 48); such as

shall be a lien upon real estate, unless the same shall be docketed in books to be provided and kept for that purpose by the county clerk of the county where the lands are situate.—*Lawe*, 1840, 334, § 25.

After this act takes effect, the decrees of the court of chancery shall be docketed in the same manner and with the like effect as judgments of the supreme court.—*Ibid*, § 27.

After this act takes effect, the judgments of the superior court of the city of New York, and of all mayor's courts, shall be docketed with the clerk of the county where the court is held, before the same shall become a lien.—*Ibid*, § 28.

The judgments of the superior court of the city of New York, and of any court of common pleas, recovered after this act takes effect, may be docketed in the manner above mentioned, in any other county than that in which the judgment was rendered, with the like effect as is above provided in relation to the judgments of the supreme court.—*Ibid*, § 29.

A fieri facias upon any judgment docketed as provided for in the next preceding section, may be issued out of the court in which the judgment was rendered, to the sheriff or other proper officer of any county where the judgment is docketed, with the like effect as though issued to the sheriff of the county where the court was held. Such execution shall be returned to and filed by the clerk of the county into which it was issued.—*Ibid*, 335, § 30.

The lien of every judgment or decree to be docketed after this act takes effect, shall cease to have preference over other judgment creditors,

arise or result by implication of law ; and such express trusts as are authorized by statute.—*Ibid*, § 50.) But it is no lien on the interest of a person holding a contract for the purchase of land.—*Ibid*, 736, § 4 ; 1 *Burr. Pra.*

If one convey before judgment against him, and transcript filed as required by the statute, the judgment of course creates no lien, provided the conveyance be bona fide, and for a valuable consideration, which the law will intend it to be until the contrary is shewn (4 *Cowen*, 599) ; but if the conveyance be to a purchaser who has notice of the judgment, with intent to elude the judgment creditor, such conveyance will be regarded as void as to the judgment debtor and the purchaser from him, but not as to a bona fide purchaser from the latter. (13 *John. Rep.*, 471.) And the judgment in equity attaches to lands in the defendant's possession when the judgment is obtained, though they are holden adversely to him (9 *Cowen*, 233) ; but not to a mere naked claim to be the owner of land unaccompanied by possession. (1 *Wend.*, 502.)

purchasers and mortgagees, at the expiration of five years from the day when the judgment was perfected or the decree entered ; subject, however, to the provisions of Article first, Title four, Chapter six of the third Part of the Revised Statutes.—*Ibid*, § 31.

All judgment or decrees which are or shall be docketed before this act takes effect, if the lien now provided by law shall not sooner terminate, shall cease to have a preference over other judgment creditors, purchasers and mortgagees, at the end of five years from the time this act shall take effect, subject, however, to the provisions of the said first article.—*Ibid*, § 32.

The execution now issues in the same form as heretofore, in directing a levy and sale of real estate ; but the sheriff sells subject to any liens obtained or interest acquired thereon by any other person, subsequent to the docketing the judgment and prior to filing the transcript, provided the transcript was not filed within the ten days after docketing the judgment. Or in case no transcript at all has been filed then the sheriff, in case of deficiency of personal property, levies upon, and sells the real estate ; the levy creating a good lien from the day the levy is made. These are the principles laid down by the chancellor, on an objection to a judgment creditor's bill, where the objection was that the remedy at law had not been exhausted, no transcript having been filed in the county to which the execution went. And the supreme court has decided the same principle, on a motion to set aside an execution, on the ground that no transcript had been filed in the county to which the execution issued.

And where one, after a judgment is obtained against him, aliens a part of his real estate, on which the judgment is a lien, on motion to the court in which judgment was obtained, or on filing a bill in chancery, the judgment creditor will be compelled by an order or decree, to exhaust the estate remaining in the debtor's hands, before selling the part so aliened.—9 *Cowen, Rep.*, 403; 1 *Paige*, 228.

The lien of a judgment is suspended by taking the body of the debtor in execution, that being regarded so long as it continues, to all intents, as a satisfaction of the judgment (3 *Wend.*, 184; 1 *Cowen*, 56); but if the defendant be afterwards discharged, under any of the insolvent acts exonerating the body from imprisonment, (13 *John. Rep.*, 533) or escape, (5 *Wend.*, 240) the lien of the judgment, as against the debtor, revives, although its priority over liens acquired by others during its suspension, is not restored. But a stipulation not to take out execution against the body, or personal estate of the defendant, in consideration of his confessing a judgment, does not prevent the judgment from operating as a lien upon his real estate (1 *Cowen*, 501); nor is the lien created by a judgment waived, by recovering and perfecting a judgment thereon in another court; unless in a United States court.—1 *Cow.*, 178; *Gra. Pra.*, 346.

A judgment continues to be a lien on real estate, after the expiration of the five years, as against the defendant in the judgment, or his grantee without valuable consideration, although not as against bona fide purchasers or incumbrancers. (*Laws* 1840, p. 335, § 32; 2 *Paige*, 54.) And it has been held that where the ten years lien of a judgment has expired, (now five years from entering judgment;) if the purchaser collude with the judgment creditor to deprive the creditor of his lien upon the lands purchased, knowing that the judgment is unpaid, or if he purchase under circumstances indicating an intention to deprive the creditor of the means of collecting his judgment, such purchaser will not be protected as a bona fide purchaser of the land, discharged of the lien of such judgment, although he pay the full value of the land; although a mere notice of the existence of a judgment of more than

ten (now five) years' standing, will not deprive a purchaser of the protection of the statute as a bona fide purchaser of the land upon which the judgment was a lien.—5 *Paige*, 493.

Real estate, like goods and chattels may be sold by the sheriff, under execution, where it has been fraudulently conveyed away. The provisions of the statutes, respecting fraudulent conveyances of real estate, are as follows :

Every conveyance or assignment, in writing, or otherwise, of any estate or interest in lands, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, made with the intent to hinder, delay, or defraud creditors, or persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent as against the persons so hindered, delayed, or defrauded, shall be void.—2 *R. S.*, 2d ed., 72, § 1.

Every conveyance, charge, instrument, or proceeding, declared to be void by the provisions of this chapter as against creditors or purchasers, shall be equally void, against the heirs, successors, personal representatives, or assignees of such creditors or purchasers.—*Ibid*, § 3.

The question of fraudulent intent, in all cases arising under the provisions of this chapter, shall be deemed a question of fact, and not of law; nor shall any conveyance or charge be adjudged fraudulent as against creditors or purchasers, solely on the ground, that it was not founded on a valuable consideration. (*Ibid*, § 4.) The provisions of this chapter shall not be construed, in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear, that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.—*Ibid*, § 2.

The term 'lands,' as used in this chapter shall be construed as co-extensive in meaning with 'lands, tenements, and hereditaments;' and the terms 'estate and interest in lands,' shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in

lands as above defined. The term 'conveyance' as used in this chapter, shall be construed to embrace every instrument in writing (except a last will and testament) whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, or surrendered.—2 *R. S.*, 2d ed., 73, § 6.

Fraud may be inferred from circumstances, such as the smallness, or inadequacy of the consideration expressed, compared with the fair value of the property conveyed; the want of any price or consideration actually paid; the grantor continuing in possession, and exercising acts of ownership; or circumstances attending the delivery and execution of the deed. The possession of land, and taking the rents and profits after an absolute conveyance, is evidence of fraud within the statute, unless such possessions be consistent with the terms and object of the deed, or the character of it be openly and explicitly understood.—2 *John. Ch. Rep.*, 35; 2 *Paine & Duer*, 349.

Fraud was considered inferible from the fact, that on a sale of real estate, no security, other than the personal responsibility of the purchaser, was taken for the consideration; and subsequent transactions, as the assignment of debts by the grantor to the grantee, to secure money advanced after the sale, by the latter to the former, or the sale of personal property to a great amount by the grantor to the grantee, and taking his personal security only, were held to be circumstances leading to the conclusion of fraud. 12 *John. Rep.*, 559.

Where one in unembarrassed circumstances on the eve of judgments against him, sold out his real estate, which was considerable, to his son-in-law, who was in low circumstances, the son-in-law giving a mortgage for the purchase money, and the grantor still continuing in partial possession, and exercising some control over the property, and the son-in-law acting with deference to his directions, making suspicious declarations, and actually taking a fraudulent conveyance of the grantor's principal property, and removing it out of the county to avoid executions against the grantor; all these circumstances appearing, and not being explained

on the trial, though the jury found in favor of the validity of the real estate, as against a sale under the judgments, the court set aside the verdict, and ordered a new trial.—7 Cowen, 301; 13 John. Rep., 471.

The judgment itself constituting a lien on lands, the only mode of levying upon real estate is, by giving public notice of the sale thereof under the *fi. fa.*

The notice of the time of sale, and the mode of making the sale, are regulated by the following provisions of the revised statutes:

The time and place of holding any sale of real estate, pursuant to an execution, shall be publicly advertised, previously, for six weeks successively, as follows: 1. A written or printed notice thereof shall be fastened up in three public places, in the town where such real estate shall be sold; and if such sale be in a town different from that in which the premises to be sold are situated, then such notice also shall be fastened up in three public places of the town in which the premises are situated: A copy of such notice shall be printed once in each week, in a newspaper of such county, if there be one: 3. If there be no newspaper printed in such county, and the premises to be sold are not occupied by any person against whom the execution is issued, or by some person holding the same as tenant or purchaser under such person, then such notice shall be published in the state paper once in each week.—2 R. S., 2d ed, 293, § 34.

In every such notice, the real estate to be sold shall be described with common certainty, by setting forth the name of the township, or tract, and the number of the lot, if there be any, and if there be none by some other appropriate description.—*Ibid*, § 35.

The sale of any real estate, or of any personal property, by virtue of any execution, shall be at public vendue, between the hours of nine o'clock in the morning, and the setting of the sun.—*Ibid*, § 36.

Any officer who shall sell any real estate, without the previous notices herein directed, or otherwise than in the manner herein prescribed, shall forfeit one thousand dollars to the party injured,

in addition to any damages which such party may sustain.—*Ibid*, § 37.

When real estate offered for sale by virtue of any execution shall consist of several known lots, tracts or parcels, such lots, tracts or parcels, shall be separately exposed for sale; and if any person claiming to be the owner of any portion of such estate, or of such lots, tracts, or parcels, or either of them, or claiming to be entitled by law to redeem any such portion, shall require such portion to be exposed for sale separately, it shall be the duty of the sheriff to expose the same for sale accordingly. No more of any real estate shall be exposed for sale, than shall appear necessary to satisfy the execution.—*Ibid*, § 38.

The sheriff or other officer to whom any execution shall be directed, and the deputy of such sheriff, or officer, holding any execution, and conducting any sale of property, in pursuance thereof, shall not directly or indirectly purchase any property whatever, at any sale, by virtue of such execution; and all purchases made by such sheriff, officer or deputy, or to his use, shall be void.—*Ibid*, 294, § 41.

The same penalties are imposed upon persons who tear down or deface a notice of sale, as in the case of personal property; but the omission of the sheriff to give notice of the sale, or the taking down or defacing of any notice when put up, shall not affect the validity of a sale to a bona fide purchaser, without notice.—*Ibid*, § 40.

Although the legislature have enacted, as above, that no more of any real estate shall be exposed to sale, than shall appear necessary to satisfy an execution issued upon a judgment; yet this provision can be considered only as directory to the sheriff, and the sale to a bona fide purchaser must be holden to be valid, even if the requirements of the statute are not complied with. The only effect, when the purchase is bona fide, is to subject the sheriff to the penalty prescribed; but when the purchase is not bona fide, the sale will be set aside. (6 *Wend. R.*, 522.) In this case the sheriff's sale was set aside as fraudulent, because real

estate worth ten thousand dollars, was sold to satisfy a judgment of one hundred dollars, and when the premises were so situated, that a portion, which would, probably, have brought more than sufficient to satisfy the judgment, could conveniently have been sold separately.

A bona fide purchaser at sheriff's sale, upon execution not absolutely void, but voidable only, acquires a good title. And it seems, a bona fide purchaser of lands on an execution issued upon a judgment which has been paid, but on which no satisfaction is entered of record, nor an execution returned satisfied, will be protected in his purchase. (1 *Cowen*, 622.) And a sale of land under a fi. fa. will not be avoided, though the judgment be afterwards reversed for error. (*Ibid*, 711.) But it is otherwise of an irregular execution, that is, one not merely erroneous; which, when set aside, is considered a nullity from the beginning, and this even against a bona fide purchaser under it.—*Ibid*.

In a sale of land under a fi. fa., the sheriff can deliver the legal possession only, and in order to obtain the actual possession, the purchaser must resort to his action of ejectment. (13 *John. Rep.*, 340; *Tidd*, 950.) But it has been decided that, a purchaser of real estate under a fi. fa., may enter and take possession of the premises, when entitled to occupy them, in a peaceable manner, though some goods of the former proprietor be left on the premises, and though they may be occasionally occupied by his servants. (1 *John. R.*, 42.) And in *Taylor v. Cole*, (3 *Term Rep.*, 292,) which was an action of trespass against a sheriff for breaking and entering a house, and expelling the plaintiff, the defendant justified under a fi. fa., by which he sold the interest of the plaintiff in the premises to one *Harris*, who afterwards peaceably entered and expelled the plaintiff. The court of king's bench held that a purchaser under a sheriff's sale on an execution might peaceably enter and retain possession, and might plead that it is his soil and freehold; that whoever had a right of entry could not be considered as a trespasser for asserting that right, unless he did it by force. The common plea of *liberum tenementum* proved this. *Buller, J.*, was inclined to think, that the sheriff

on the *fi. fa.*, might turn the debtor out of possession. And in the case of *Jackson, ex dem Kane v. Sternberg*, (1 *John. Ca.*, 153,) it was held that the debtor in possession, becomes, by the sheriff's sale, *quasi* a tenant at will to the purchaser, and that in such case no adverse possession would be presumed. However, as at present the purchaser of land at a sheriff's sale has not the immediate right of possession, it is presumed that these cases have little application.

To constitute a bona fide purchaser on an execution, it is not enough to show a conveyance good in form, but payment of the consideration must be made out. It must be actually paid, not merely secured to be paid; for otherwise the purchaser would not be hurt.—1 *Cowen*, 622.

When judgments are equal as to the date of the lien, that one gains a priority whose execution has first begun to be executed. Thus when two judgments in favor of different plaintiffs against the same defendant, were filed and docketed on the same day, and one of them took out a *fi. fa.*, and had the lands of the defendant seized, and advertised for sale by the sheriff three weeks before the execution on the other judgment was delivered, and the sheriff afterwards sold the land under the advertisement; it was held that the first *fi. fa.* having been begun to be executed before the second was delivered to the sheriff, had gained a priority as to the time of sale, which could not be defeated by the second execution. (*Gilb. on Ex.*, 55; 1 *Term R.*, 729.) In this state, the lands being *bound* from the docketing of the judgment, or from the docketing and filing a transcript, it is doubted whether any preference can be gained short of an actual sale of the land upon one of the executions before the other reaches the sheriff's hands.

Lands mortgaged cannot be sold on an execution against the mortgagee, before a foreclosure of the equity of redemption, though the debt be due, and the estate of the mortgagee has become absolute at law.* The court remark: (4 *John. R.*, 41:)

* Our statute has made the following provision to regulate proceedings at law on the bond:—When a judgment shall be recovered for a debt secured

until foreclosure, or at least, until possession taken, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt, and in reason and propriety, it cannot, and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor, who holds the bond. It is difficult to conceive what right can be sold which does not carry the debt with it. The control over the mortgaged premises must essentially reside in him who holds the debt. It would be absurd in principle, and oppressive in practice, for the debt and the mortgage to be separated, and placed in different and independent hands. There is no way to render a mortgage vendible but by allowing the debt to go with it; and this would be repugnant to all rule, for it is well understood that a chose in action is not the subject of sale on execution. Even in cases where a mortgagee makes a voluntary assignment of both debt and mortgage, it has been held (*4 Vesey R.*, 127,) to be very indifferent security, unless done with the privity of the mortgagor, because the assignee would take subject to the account between the mortgagor and mortgagee. But to attempt to sell the mortgage alone, without the debt, and that, too, before foreclosure, appears in every point of view to be extremely unfit, and equally inadmissible, as it would be to sell the bond of the mortgagor.—*4 John. R.*, 41.

by mortgage of real estate, or for any part of such debt, it shall not be lawful for the sheriff to sell the equity of redemption of the mortgagor, his heirs or assigns, in such estates, by virtue of any execution upon such judgment.—*2 R. S.*, 291, § 31.

Whenever any execution against the property of the defendant shall be issued upon such judgment, the plaintiff's attorney shall endorse thereon a brief description of the premises mortgaged, referring to the page and book of the record in which such mortgage is recorded, with a direction to the sheriff not to levy such execution upon the said premises, or any part thereof. *Ibid*, 292, § 32.

If such execution shall not be collected of the other property of the defendant, the sheriff shall return the same unsatisfied, in whole or in part, as the case may require.—*Ibid*, § 33.

Sales in mass of real estate, held in several parcels, are not to be countenanced or tolerated. They are oppressive and unnecessary, and deserving of animadversion. (13 *John. Rep.*, 132; 1 *Binney Rep.*, 61; 1 *John. Ch. Rep.*, 502.) And where the real estate of a debtor consists of a lot of land, divided into separate farms, occupied by several and distinct tenants, the sheriff cannot sell the whole together under the general description of a lot of land, of a certain number, without any specification of the parcels occupied as separate farms. And if he does so, the court, on motion, will set aside the sale. And a sheriff is not bound to obey the instructions of a party in executing a *fi. fa.*, if he sees it will produce a great sacrifice of property; but should rather postpone the sale, especially where the plaintiff cannot sustain any injury by the delay.—2 *Cowen*, 139.

A sale under execution will not pass an equitable interest which a court of law cannot protect or enforce. As where A agreed to sell and convey land to B, who was to pay part of the purchase money down, and the rest by three instalments; and A was to convey on the payment of the second instalment, and receive a mortgage for the third; B paid the part down, and entered into possession, but neglected to pay the instalments. Two years after the instalments were due, B assigned the contract to S, who entered and made improvements. S, without paying the instalments assigned the contract to P, with a knowledge of a judgment existing against S before the assignment. It was held that the interest of S was not the subject of lien or execution.—17 *John. Rep.*, 350; 1 *John. ch. Rep.*, 52.

A creditor who, having two judgments against his debtor, issues execution upon the younger judgment, and sells the land, does not, in a case unaffected by fraud, impair the lien of his older judgment upon the same land, but may afterwards issue execution on his prior judgment and under it cause the land to be sold again. (1 *John. ch. Rep.*, 512.) And a variance between the judgment and execution, being amendable, cannot be taken advantage of on a trial for the recovery of land sold by virtue of an execution.—4 *Wend.* 262.

When on the sale of property under a *fi. fa.*, a plaintiff inadvertently bids a sum less than the amount of his execution, the sale, on his application, will be set aside, and a re-sale ordered. 2 *Wend.*, 260.

On a sale of real estate, under a senior execution, a junior judgment creditor is entitled to the surplus moneys. (1 *Wend.*, 87.) Otherwise the right of a junior judgment creditor to redeem, might frequently be of no use; for if the property was sold at its full value, and the surplus paid to the defendant, or to his order, it would be of no benefit to the junior judgment creditor to redeem. The only way, therefore, in which the judgment can be rendered availing, is for the sheriff to pay over the surplus moneys to him. And where lands are sold under an execution, on a judgment subsequently reversed, the fact of the owner receiving the surplus of the avails of the sale, after satisfying the execution, will not be considered such an acquiescence in the sale, as to prevent the setting up his title, if the owner did not by any act of his encourage the purchaser to bid at the sale. (8 *Wend.* 9.) The acquiescence in such case, is not considered voluntary, but compulsory. Had he refused to receive the surplus, such refusal would have been of no avail; the validity of the sale of his property would not have been affected by it.

The supreme court will not set aside a sale of land on a *fi. fa.*, and order a resale, on the ground that the plaintiff's agent bid less for it than he was instructed to bid by his principal. (7 *Cowen*, 413.) And where the defendant has no title to land sold on a *fi. fa.*, for which the sheriff has given a certificate of sale to the purchaser, and endorsed the sum bid, on the *fi. fa.*, relief will not be granted on motion; but the purchaser should go to a court of equity. (5 *Ibid.*, 38.) But the common pleas may set aside or otherwise control an execution issued by the county clerk, on a judgment rendered by a justice of the peace, transcribed and docketed by the clerk of the county. (5 *Ibid.*, 31.) And if one levy more upon a judgment than is due, the defendant may recover back the excess in an action. (5 *Ibid.*, 488.) And the court will interfere summarily, and direct how money levied on an execution shall be applied.—4 *Ibid.*, 461.

When the sheriff sold the property of the plaintiff on an execution for a larger sum than was due on the execution, and executed a conveyance to the purchaser, without receiving from him the surplus money, (though requested by the plaintiff not to give a deed, until he received the money,) contrary to his duty as sheriff, an action on the case was held to lie against him at the suit of the plaintiff. (19 *John. R.*, 298.) Assumpsit for money had and received to the plaintiff's use, would not in this case lie, as the defendant never received the money. And where the sheriff is sought to be charged for the avails of property sold, and it is uncertain what the property did in fact bring, evidence on his part that the interest of the defendant in the execution in the premises sold, was of little or no value, is competent and admissible.—7 *Wend. R.*, 259.

Lands cannot be sold on an execution issued after the death of the defendant, although the execution bears teste as of a day previous to the death of the defendant. (10 *Wend. R.*, 206.) But it is otherwise respecting the goods and chattels of the deceased.—*Ld. Raym.*, 849.

Upon every execution delivered to the sheriff must be endorsed the amount of the debt or sum actually due, the time from which the interest is to be computed, and the amount of the costs, as the sheriff's direction for the sum which he is to levy, together with his fees and poundage.—2 *R. S.*, 2d ed., 288, § 10.

Where an execution was originally issued without an endorsement of the amount due, but the sheriff was afterwards directed to levy the amount actually due, the court denied a motion to set it aside, but directed the plaintiff to pay the defendant the costs of the application.—2 *Caines' R.*, 254.

Upon an erroneous judgment, if there be a regular writ, the party may justify under it, until the judgment be reversed; (1 *Str. R.*, 509;) for an erroneous judgment is the act of the court, and the sheriff if justifying need only give the execution in evidence. (12 *John. R.*, 395.) But if the judgment or execution has been set aside for irregularity, the party cannot justify under it; for this is a matter in the privity of himself or his attorney;

and if the sheriff or officer, in such case join in the same plea with the party, he forfeits the benefit of his defence. (3 *John. R.*, 523; 15 *East*, 615.) The sheriff or officer, however, may justify under an irregular judgment, as well as an erroneous one; for he is not privy to the irregularity; and so as the writ be not void it is a good justification, however irregular, and the purchaser will gain a title under the sheriff; for it would be very hard, if it should be at the peril of the purchaser under a *fi. fa.*, whether the proceedings were regular or not. (5 *Barn. & Ald.*, 746.) Accordingly, if the sheriff sell a term under a writ of fieri facias, which is afterwards set aside for irregularity, and the produce of the sale be directed to be returned to the termor, the latter cannot maintain an ejectment to recover his term against the vendee, under the sheriff.—1 *Maule & Selw.*, 425; see also 4 *Hill's R.*, 619.

The sheriff when an execution is delivered to him, is bound to endorse thereon the year, month, day and hour of the day when he received the same, (2 *R. S.*, 2d ed., 358, § 75, 76,) and to give the person delivering the same, if required by him, and on payment of the fee allowed by law, a minute in writing, signed by him, specifying the names of the parties in the execution, its general nature, and the day of receiving it. And on serving it he is bound, on the request of the party served, and without any charge to deliver a copy.—*Ibid*, § 76.

After completing the sale of the land at the time and place designated in the notice, the sheriff is not authorized, as in the case of personal property, to convey a title to the purchaser immediately upon the sale; a certain period being allowed by law for the redemption of the property. All that the purchaser receives as evidence of his title is an official certificate of the sale, subscribed by the sheriff; a duplicate of which is required to be filed in the office of the clerk of the county in which the sale was made, within ten days after the sale. (*Ibid*, 293, § 42, 43.) If there be two or more purchasers a certificate is to be delivered to each. Such original certificate, upon being proved or acknowl-

edged in the manner required by law to entitle deeds to be recorded, or a copy of such original, duly certified by the clerk, in whose office such original is filed, shall be received as presumptive evidence of the facts therein contained.—*Ibid*, § 44.

The sheriff's omission, however, to file the certificate of sale will not prejudice a purchaser. This act not being a condition precedent, but being merely directory to the sheriff.—5 *Cowen*, 17.

This certificate, and the duplicate certificates made out and subscribed by the shersff, are to contain : 1. A particular description of the premises sold : 2. The price bid for each distinct lot or parcel : 3 The whole consideration money paid : (4 *Cowen*, 334,) 4. The time when such sale will become absolute, and the purchaser will be entitled to a conveyance pursuant to law.—2 *R. S.*, 2d ed., 293, § 42.

By this means a sale of land upon execution, does not carry a title to the purchaser but only a lien until after fifteen months. And it is such a lien as he may release or discharge without the consent of junior judgment creditors.—7 *Cowen*, 546.

Within one year from the time of the sale, the party whose right and title were sold, or in case of his death, his heirs, devisees, grantees, or other representatives, are entitled to redeem the estate so sold, by paying to the purchaser, his personal representatives or assigns, or to the officer who made the sale, the amount bid by such purchaser at the sale, with interest at the rate of ten per cent, from the time of sale ; upon which payment being made, the sale of the premises so redeemed, and the certificates thereof shall be null and void.—2 *R. S.*, 2d ed., 294, § 45-49 ; *Burr. Pra.*, 301.

After the expiration of one year, the right of the debtor, or his grantee, &c., to redeem is gone ; but within three months thereafter (19 *W. R.*, 87,) any judgment creditor of such debtor, whose judgment shall have been recovered at any time before the expiration of fifteen months from the time of the sale (and which is a lien on the premises,—2 *Cowen*, 497,) may redeem the same, by paying the amount paid on the sale with seven per cent interest. (2 *R. S.*, 2d ed., 295, § 55.) And in the same manner, any third

or other creditor may purchase from the second third or other creditor on the same conditions.—*Ibid*, § 56.

The right to redeem real estate, sold under execution did not formerly apply to terms for years; (17 *Wend.* 674,) but by an act, passed May 16, 1837, (*Sess.*, 1837, p. 540,) the redemption of real estate is made applicable to leasehold property, where the lessee, or the assignee of the lessee shall be possessed of at least five years' unexpired term of the lease, and also of any building or buildings that may be erected thereon.—20 *Wend.*, 416.

A party who has an equitable right to a sheriff's deed, but has not obtained the deed itself, is not entitled as standing in the place of a grantee of the judgment debtor, to redeem the land of which he is entitled to a deed, from the effect of a subsequent sale, although he was delayed in obtaining his deed by an injunction sued out on a bill in chancery, filed by the judgment debtor. (20 *Wendell*, 416.) As against the judgment debtor, under the doctrine of relation, the deed of the party thus seeking a redemption, would be deemed to have been executed on the day when it ought to have been executed; but that doctrine does not apply to the purchaser at the subsequent sale, or his assignee, unless he was an actor, or privy in producing the refusal of the sheriff to execute the deed.—22 *Wendell*, 116.

To entitle any creditor to acquire the title of the original purchaser, or to become a purchaser from any other creditor, pursuant to the foregoing provisions, he shall present to and leave with such purchaser or creditor, or the officers who made the sale, the following evidence of his right (7 *Cowen*, 540; 1 *ibid*, 443): 1. A copy of the docket of the judgment, or decree under which he claims the right to purchase, duly certified by the clerk of the court, or of the county, in which the same is docketed: 2. A true copy of all the assignments of such judgment or decree, which are necessary to establish his claims, verified by his affidavit, or by the affidavit of some witness to such assignments: 3. An affidavit by such creditor, or by his attorney or agent, of the true sum due on such judgment, or decree, at the time of claiming such right to purchase.—2 *R. S.*, 2d ed., 295, § 60.

If any sheriff shall die or be removed from office, after having made sale of any real estate, the moneys herein required to be paid to him for the redemption of such estate, or for the purpose of acquiring the title of the original purchase, may be paid to his under sheriff or to the clerk of the county, in the same manner and with the like effect as if paid to such sheriff.—*Ibid*, § 65.

To entitle a creditor to redeem lands sold under execution, the requirements of the statute as to the evidence to be produced by him, showing his right to redeem must be strictly complied with; and accordingly where a creditor omitted to produce, within the time prescribed by the statute, a copy of the docket of the judgment under which he claimed to redeem, it was held that though a deed was executed to him by the sheriff, his title was defective, and that a bill in equity filed by him to redeem the premises sold under a foreclosure of a mortgage by advertisement could not be sustained.—20 *Wendell*, 555.

- In computing the time for redemption, the full fifteen months from the day of sale are to be allowed; and the months are calendar, not lunar months. (2 *Cowen*, 518; 2 *R. S.*, 615.) But if the last day of the fifteen months happen on Sunday, a redemption the next day is too late.—1 *Wendell*, 42.

It should be borne in mind, that redemption of lands under execution, is a creature of the statute, unknown to the common law, and hence it is obvious we must look to its provisions alone for the steps necessary to acquire a right to it; and consequently the requirements of those provisions must be strictly fulfilled. And it has been held that though the money paid by the creditor in his attempt to redeem, was actually paid over, and received by the original purchaser at the sheriff's sale, such facts were unavailing where it appeared that the money was received by the purchaser under a misrepresentation that the requirements of the statute had been complied with, and that the original purchaser had offered to refund such money.—20 *Wend.* 555.

It has also been decided, that a junior judgment creditor in order to redeem of the purchaser, must, within fifteen months from the time of sale, pay the amount bid by the purchaser; together

with the interest thereon, allowed by the statute, from the time of sale, or he is not entitled to a deed; nor can the sheriff dispense with the payment of that sum, or any part thereof; and if he give a deed, without receiving the money, it will be void, for he is a special agent, and must pursue his authority strictly. And it was held that if less than the interest allowed by the statute be paid to the sheriff, though the deficiency be paid to him after the fifteen months, by the judgment creditor, it will not vary the case; for the payment of the money with the interest, within the time prescribed, is a condition precedent; and it makes no difference, that both the sheriff and creditor mistake the rate of interest allowed by the statutes, which leads to the short payment; it is a mistake, against which the court cannot relieve, although they might, perhaps, against a mistake of fact; as a miscalculation.—1 *Cowen*, 481; 7 *ibid*, 540.

And a second or subsequent creditor, who redeems after a redemption already made, must present the evidences of his right to redeem, and make payment of the moneys necessary to be paid to the last redeeming creditor, or to the sheriff who made the sale; payment to the original purchaser in such case is not sufficient. Payment, however, to a deputy sheriff, who made the sale, is good, although the term of office of his principal has expired. But payment in a check on a bank is not good; money or its equivalent must be paid.—20 *Wendell*, 602.

Where a sale has been made, and after the expiration of the fifteen months, a conveyance given, the liens of all junior judgment creditors upon the land cease, so that they are not afterwards entitled to redeem, if the land is again sold under a still older judgment. (4 *Cowen*, 133.) But a senior judgment creditor may redeem under a sale upon a junior judgment; and though a judgment creditor has once redeemed upon his judgment, and taken a title, it is not a satisfaction, but he may redeem again in virtue of the same judgment; especially from a sale on a judgment senior to his own and the one from which he first redeemed.—7 *Cowen*, 540.

It has been held, that a judgment of more than ten (now five)

year's standing, although it cease to be a lien as to bona fide purchasers, and junior judgments, yet continues to be a lien, within the language of the act, as to the judgment debtor and his heirs; and that it ranks in effect as a judgment junior to later judgments, and entitles the creditor to redeem from a sale under them. And where several judgments are of more than ten years' standing, they are held to rank in relation to one another according to their actual priority of date. (*Ibid.*) And the Revised Statutes do not seem to have altered the law in this respect.

After a sale any judgment creditor may redeem of the purchaser, without reference to the priority of liens. And if a judgment creditor become the purchaser, a younger judgment creditor than himself may redeem of him, without paying the amount of his judgment, but on paying the purchase money only, as he is not bound on redeeming to pay intermediate judgments. Nor can the creditor, in *such case*, after redemption sell the same land for the balance, and thus defeat the title of the purchaser. (5 *Hill's R.*, 228.) Nor can the creditor effect the same end, by redeeming from a sale under an older judgment. (*Ibid.*) And where the creditor sells and becomes the purchaser at a sum exceeding the amount of his debt, the lien of his judgment is gone, so that he cannot afterwards redeem from a sale under an older judgment. (*Ibid.*) But when lands are bid in by a third person for less than the amount of the judgment and redeemed by the *debtor*, they may be re-sold on the same execution for the balance, though the return day had passed before the redemption took place. (*Ibid.*) And where a sale was made under a judgment, and a younger judgment creditor became the purchaser, and a still younger judgment creditor redeemed of him, paying him the purchase money only, it was held, that the second judgment creditor did not in consequence of his becoming a purchaser, lose his right to redeem of the youngest, on paying the money advanced by him and interest; but that, to redeem of the youngest creditor, was the only, and the proper course to secure himself after the youngest creditor had redeemed of him as purchaser.—7 *Cowen*, 660, 540.

A judgment created upon full consideration, though for the

express purpose of enabling the creditor to redeem is valid. (2 *Cowen*, 518.) The debtor may in this manner confer the power of redeeming upon as many as he pleases. It keeps up the auction, and is thus within the policy of the statute.

The three months, (after the expiration of the year given to the debtor to redeem) commence running on the day succeeding the expiration of the year, and that day is counted inclusively; thus if the year expire on the eighteenth day of a month, the succeeding day is counted as part of the three months.—19 *Wend.*, 87.

A tender of money due upon a judgment, to the sheriff, although it is his duty to accept it, yet if he refuses it, does not of itself discharge the judgment, so as to take away the lien of the judgment creditor, and his right of redemption. In such case the course is, in order to make the tender effectual, to bring the money into court, and move for and obtain satisfaction on the record. (5 *Cowen*, 248; *ibid.*, 641.) But the officer who made the sale is not at liberty to waive the production of a copy of the docket of the judgment duly certified, when the judgment creditor comes to redeem.—19 *Wend.*, 87.

The Revised Statutes contain provisions, specifying particularly the kind of enjoyment of the premises to which the debtor is entitled during the fifteen months, what acts will constitute waste and providing for summary proceedings to prevent it; (2 *R. S.*, 2d ed., 260, § 22,) the consideration of which does not fall within the scope of this work.

After the several periods allowed for redemption have expired, it is the sheriff's duty to convey to the purchaser, or to the person who has acquired by redemption the rights of the purchaser, all the right, title and interest, of the defendant in the property sold. (*Ibid.*, 296, § 62; 1 *Wend.*, 46; 2 *ibid.*, 507; 7 *ibid.*, 83.) This conveyance must be by deed, (12 *John. Rep.*, 73; 5 *Cowen Rep.*, 529; 11 *Wend. Rep.*, 422,) and must describe the property with reasonable certainty, otherwise nothing passes to the grantee. (12 *John. Rep.*, 73; 13 *ibid.*, 97, 537; 5 *Cowen Rep.*, 529.) It may be executed by the deputy in the name of

the sheriff, during the continuance of the latter in office; (2 *R. S.*, 2d ed., 296, § 65,) and in case of the death or removal of the sheriff before the conveyance is executed, it may be executed by the under sheriff; or if there be no under sheriff, the court from which the execution issued, on application of the person entitled to a conveyance may appoint a proper person to execute the same. 2 *Ibid.*, § 66; 10 *Wend.*, 562; 2 *Burr. Pra.*, 302.

If the person entitled to such conveyance die before its delivery, it must be executed and delivered to his executors, or administrators. (2 *R. S.* 2d ed., 296, § 63.) And the real estate so conveyed shall be held in trust for the use of the heirs of such deceased person, subject to the dower of his widow, if there be any; but may be sold for the payment of his debts by the order of any surrogate, or court of equity, in the same manner as lands whereof such deceased person died seized.—*Ibid.*, § 64.

And the sheriff may also execute the deed to any person or persons to whom the certificate of sale shall be duly assigned, according to the provisions of the act of May 2, 1835, or to the executors or administrators of any deceased assignee. That act is as follows:

In all cases where any sale of real estate has been, or shall hereafter be made under execution, and a certificate thereof given to the purchaser, but no deed executed pursuant to the provisions of article second, title fifth, chapter sixth, part third of the Revised Statutes, it shall be the duty of the sheriff making such sale, and in case of death or removal from office, of his under-sheriff, to execute a deed of the estate so sold and remaining unredeemed, to any person or persons to whom such certificate shall have been, or shall be duly assigned, or to the executors or administrators of any deceased assignee.—*Ibid.*, 297, § 68.

Before any assignee, or his personal representative, shall be entitled to a deed under this act, he shall cause the execution of any and every assignment under which such deed is claimed, to be duly acknowledged or proved, as deeds are required by law to be acknowledged or proved to entitle them to be recorded, before some officer authorized to take acknowledgment and proof of

deeds ; and shall cause all such assignments, with their certificates of proof or acknowledgement, to be filed in the office of the clerk of the county in which the real estate so sold is situated ; but it shall not be necessary to have acknowledged the execution of any assignment heretofore made of such certificate.—*Ibid*, § 69.

Any officer, authorized by law to take the proof of deeds, is authorized and required to take the acknowledgment or proof of such assignments, and to certify the same ; which certificate, or a copy certified by such clerk, shall have the like force or effect as in case of deeds.—*Ibid*, § 70.

In case any deed shall be executed to executors or administrators by virtue of this act, the estate thereby conveyed shall be held, and may be sold, as is provided in the sixty-fourth section of the said article.—*Ibid*, § 71.

In a sheriff's deed the land sold must be described with reasonable certainty, and he can sell nothing under an execution, which the creditor cannot enable him so to describe ; therefore nothing will pass by his deed under a general clause of " all other the lands, &c., of the defendant." (13 *John. Rep.*, 537.) So a sheriff's deed to a purchaser under an execution, describing the premises sold no otherwise than as " all the lands and tenements of the defendants, situate, lying and being in the Hardenberg Patent," is void for uncertainty. (13 *John. Rep.*, 97.) No estimate of the value of the lands offered for sale, could be made from this general and indefinite description ; and without some definite information as to its situation, there must generally be a sacrifice of property either by the debtor or purchaser. In most instances, if not invariably the former would experience the loss ; and it is the duty of the officer to prevent such a consequence.

The misrecital of the judgment in a sheriff's deed is not material, provided it appear in fact that the sale was under a subsisting judgment and execution. (5 *Cowen*, 529 ; 9 *John. Rep.*, 90.) And the order in which the premises are enumerated in a sheriff's deed, is not evidence that the premises were sold in that order. (11 *Wend.*, 422.) And if the recital of execution in a sheriff's deed describe them correctly in several particulars, but add others

which are inaccurate, the latter may be rejected as surplussage. (9 *Cowen*, 182.) All that is necessary is, that the deed shew that the sheriff acted under the authority of the execution, even admitting a recital to be important. But the executions need not be set forth or recited in a sheriff's deed, and if recited and described inaccurately the variance will not affect the deed.

And where the real estate of an individual is sold at sheriff's sale, and in the deed conveying the property to the purchaser, the sale is recited to have been made under and by virtue of these executions, particularly set forth; it is not allowable to a third person, collaterally, to show that the sale was had only by virtue of and under one execution, although such third person is neither a party or privy to the sheriff's deed. (7 *Wendell*, 83.) The remedy of a party injured in such case is by a summary application to the court, under the authority of whose process the officer acts, or by a bill in equity; and the court remark, (*Ibid.*) it is much better that he should be confined to these modes of redress than to render all titles derived under judicial sales doubtful, and subject to be defeated by allowing the written instruments by which they are evidenced to be attacked collaterally by parol evidence.

Neither can a sheriff's deed, conveying several parcels of land, by virtue of several executions, (specially set forth) and a sale had thereon, when set up by way of defence against a recovery in an action of ejectment, be attacked by parol proof, that a portion of the premises conveyed by the deed was sold under only one of the executions specified in the deed; or, in other words, the fact averred in the deed that the premises conveyed were sold under all the executions, cannot be contradicted by parol proof that a portion of the premises was sold under only one of the executions. (11 *Wendell*, 422.) In this case the mention of the execution is not mere recital, but forms a component and substantial part of the deed. If the part of the deed which refers to the execution is rejected, the property is not conveyed under any execution, and the deed is inoperative and void.

A sheriff's deed is, *per se*, evidence of title in the grantee; and parol evidence is inadmissible to contradict the recital, or to

show that the land was sold under a different judgment and execution from those recited in the deed, though such evidence may be admitted to shew a fraud in the sale. The proper course for the debtor or other judgment creditor aggrieved by the proceedings under the execution, seems to be, by application to the court to set aside the sale and the sheriff's deed.—20 *John. Rep.*, 49 ; 7 *Wend. Rep.*, 83.

If a deed has been imprudently executed to the purchaser, and the sheriff is subsequently directed to execute a deed to a redeeming creditor, the court will not direct the first deed to be cancelled, but leaves the creditor to enforce his rights as he shall be advised.—7 *Wendell*, 463.

Where a sheriff executed a deed for land sold by him at auction, under a *fi. fa.*, and delivered it to the attorney of the plaintiff to be delivered to the grantor on the payment of the purchase money ; it was held that no estate passed by the sale or by the deed until the purchase money was paid, or condition performed.—8 *John. Rep.*, 406.

Where land is sold under *fi. fa.*, and a deed executed by the sheriff, the court under the circumstances of the case will presume a levy on it to have been made.—10 *Wendell*, 562.

A sale, and the consummation of that sale by deed, are acts which the sheriff may do by deputy ; and the deputy may execute the deed in the name of the sheriff, in the manner of deeds executed by attorney. (10 *John. Rep.*, 223 ; 18 *ibid.*, 7 ; 7 *Cowen*, 739.) But whether the deed be executed by the sheriff or his deputy, he is precluded from denying facts alledged in it.—12 *J. R.*, 162.

Whatever the sheriff does by virtue of the *fi. fa.*, he must report or return to the court, together with the writ, on the return day specified. If the return be not thus made, he may be proceeded against by notice and attachment to compel a return. And he is allowed until the expiration of the notice to make his return.—1 *Burr. Pra.*, 304.

And the sheriff may be notified to return the writ by the defendant in the action. The sheriff having seized the defendant's

goods under a *fi. fa.*, the defendant afterwards paid the debt, costs, and poundage, the sheriff insisting on the latter; and having commenced an action against the sheriff for extortion, ruled him to return the writ. It being resisted, on the ground that the defendant had no right to rule him, the court said: where the plaintiff delivers a writ to the sheriff to be executed, and money is paid to the sheriff by the owner of the goods, the plaintiff is entitled to call on the sheriff for a return of the writ, and the right of the defendant is reciprocal.—7 *Taunt. Rep.*, 5; 2 *Maule & Selw.*, 330. Poundage is here allowed, in such case.

And though the sheriff make no return, an action of debt, account, or assumpsit, will still lie against him, or his executors if money has been levied. (2 *Show. Rep.*, 79, 281.) And in such an action the defendant could plead the statute of limitations; for though until the writ be returned, it is not a matter of record, yet it is founded upon a record and has a strong relation to it. *Tidd*, 934; 2 *Show. Rep.*, 79.

But in *The People ex rel. Southwick vs. Everest, late sheriff of Essex*, (4 *Hill. Rep.*, 71,) held, that though an action against the sheriff for not returning a *fi. fa.*, be barred by the statute of limitations, he may still be proceeded against by attachment, in order to compel a return, (*Brockway vs. Wilber*, 5 *John. Rep.*, 356;) also held that in such case the court will not impose a fine for the benefit of the party instituting the proceeding, but will discharge the sheriff on his returning the *fi. fa.*, and paying costs. In *Brockway v. Wilber*, (*Ibid*, 555) when the sheriff was brought up on the attachment he was discharged; it appearing that the *fi. fa.* was delivered to the deputy fourteen years before, and had absconded and died abroad; and it did not appear what had become of the writ.

The returns commonly made by the sheriff to a *fieri facias*, are first *fieri feci*; that he has caused to be made of the defendant's goods and chattels, or of his goods and chattels, lands and tenements, the whole or a part of the debt directed to be levied, which he has ready to be paid to the plaintiff. This return however is usually made by endorsing the word 'satisfied' when the whole

amount has been collected. So if the money has been paid to the plaintiff the return is 'satisfied.'

The sheriff's return of fieri feci, however, furnishes no proof that he has paid the money over to the creditor. The defendant, a judgment creditor, after the bankruptcy of A B, sued out execution. In an action against him for money had and received, an examined copy of the fieri facias, and the sheriffs' return that he had levied the money, were produced in evidence, and upon that the plaintiff rested his case; insisting that it must be presumed that the sheriff had discharged his duty, and therefore that he had paid the money over to the defendant. But *Lord Ellenborough*, C. J., was of opinion that no such inference could be drawn, and that the plaintiff was bound to shew that money had been paid over, and directed a non suit. On motion to set it aside, the court concurred with the chief justice, saying, the sheriffs return was prima facie evidence that he had levied, but it was certainly no proof that he had paid the money over.—1 *Maule & Selw.*, 599.

Where the sheriff, by mistake, returned to a fieri facias that he had money in his hands, ready to be paid over to the plaintiff, whereas it had been paid over, through the misconduct of his officers to the solicitor of a commission of bankruptcy issued against the defendant (the original debtor) under which commission one of the plaintiffs was appointed assignee, who knew of and did not object to such payment; the court held that this amounted to an assent on the part of such plaintiff to ratify the payment, and consequently that the sheriff was not liable to pay over to the plaintiff the sum which he stated in his return to have received for them.—2 *Brod. & King*, 77.

When the sheriff on levying an execution deliver the goods to a third person, on his giving a receipt to return them, or pay the amount of the execution, he cannot afterwards take other goods of the defendant in execution; and in such case it is immaterial whether the property originally taken was sufficient to satisfy the execution or not, or that he had been unable to recover any thing on the receipt.—12 *John. Rep.*, 207.

If a levy have been made, but before a sale the sheriff has

been compelled to return the writ, and has been unable to effect a sale before the expiration of the notice, his return will be that he has levied upon goods or real estate of the defendant which remain unsold for want of buyers. (1 *Burr. Pra.*, 304.) In which case the plaintiff may sue out a *venditioni exponas*, reciting the former writ and return, and commanding the sheriff to expose the goods to sale, and have the moneys arising therefrom in court at the return thereof; (*Cowp. Rep.* 406,) or if goods are not taken to the value of the whole, the plaintiff may have a *venditioni exponas* for part, and a *fieri facias* for the residue in the same writ. And it is said that if a sheriff seize goods to the value he is bound to find buyers. (*Tidd*, 1060.) But it is not so here.

But, on motion, the court will not direct a specific return, on the ground that the sheriff's officer has wasted the property seized. On motion that a sheriff might be compelled in his return to specify the goods which he had sold under a *fieri facias*, on the ground that several things had been taken of which he had ordered no account, and wasted the property in a riotous wasteful manner, the court said, we do not commonly interfere unless some criminal act be shewn; the plaintiff's best course is by action, if any misconduct has been experienced in the bailiff.—6 *Taunt. Rep.*, 576; *Marsh*, 293.

And the court has refused to grant an attachment against the sheriff, because he had returned to a writ of *venditioni exponas* that part of the goods levied remained in his hands for want of purchasers.—1 *Bos. & Pull.*, 359.

A sheriff having returned a levy under a writ of *fieri facias*, cannot return to a *venditioni exponas*, that he has sold the goods, but detains the money for another plaintiff under a prior writ of execution; and the court quashed such return on motion, and would not give the sheriff leave to amend it. (9 *Price*, 317.) But where a writ of *venditioni exponas* for goods already taken in execution, with a clause of *fieri facias* for the residue; the sheriff returned that he had made a certain sum of the goods, but omitted by mistake, to return *nulla bona* to the *fieri facias*, the court allowed the sheriff to amend the return, and set aside an at-

tachment issued against him for not making it.—1 *Marsh.* 344 ; *Tidd*, 1037.

If the sheriff has been unable to find property of the defendant in his bailwick, to satisfy the execution in whole or in part, his return will be *nulla bona* ; or in the language usually adopted, no goods, or chattels, lands or tenements. This return also is proper where the goods, &c., in possession of the defendant are claimed by a third person ; but in this case, before such return can be made, the sheriff is bound, if no indemnity be tendered by the creditor, to call a jury and try the title. (8 *Coven*, 65 ; 5 *Wendell*, 309.) But where the sheriff has been prevented from taking goods of the defendant, by the allowance of a writ of error, which operates as a supersedeas, he should not return *nulla bona*, but the special fact of a writ of error being sued out.—1 *Burr. Pra.* 305 ; *Tidd Pra.* 761.

A sheriff who levies on property, and returns *nulla bona* assumes upon himself the responsibility of proving property out of the defendant in the execution, and thus supporting his return.—5 *Wendell*, 309.

If the return of the sheriff be not true, the plaintiff may maintain an action against him for a false return ; in which action the sheriff cannot go into circumstantial evidence to impeach the judgment on the ground of collateral fraud. (2 *Stark. N. P.*, 218.) And where the sheriff returns *nulla bona*, and there is a recovery against him for his false return, that vests no property of the goods in him or the plaintiff, but they remain in the defendant and are liable to a subsequent execution for his debt.—2 *Vern. Rep.*, 239 ; *Black. Rep.*, 694.

Upon a *fi. fa. de bonis intestatoris* issued upon a judgment by confession against an administrator, if he do not produce assets, this justifies the sheriff in returning a *devastavit*.—4 *Coven*, 445.

In New York, writs of a *fi. fa.* are made returnable sixty days from the receipt thereof by the sheriff or other officer, to whom the same shall be directed, and may be made returnable before the justices or judges of the court from which the execution issued ; without mentioning any particular place where returnable.—*Laws*, 1840, p. 334, § 24 ; *Ante.*, 140.

CHAPTER VI.

Capias ad Satisfaciendum.

After what has been said on the subject of arrest, little remains to be added as to the duty of the sheriff in the execution of this writ.

The *capias ad satisfaciendum* (termed for brevity the *ca. sa.*) is a judicial writ, issuing out of the court in which the judgment was recovered, directed to the sheriff of the county in which it is issued, or if he be a party, to some person not interested in the suit to be designated by the court, (*Tidd*, 1067,) commanding him to take the party named in it, if he may be found in his bailwick, so that he may have his body before the justices of the court at the return day, to satisfy the party issuing the writ of the amount of the judgment &c. ; concluding with the usual clause of attestation or teste. (*Ibid* ; 1 *Burr. Pra.*, 308.) If part of the demand has been already levied under a *fi. fa.*, the *ca. sa.* is only for the residue. And it may be considered a general rule that a *capias ad satisfaciendum* will lie in all cases where aailable *capias ad respondendum* might have been used as the process to bring the defendant before the court.

It was formerly necessary that a party entitled to an execution, should first issue it to the sheriff of the county in which the venue was laid, and on its return, he might have a testatum writ directed to the sheriff of another county. But under the present prac-

tice, a party may issue his execution in the ordinary form to the sheriff of any county in the state, without a previous testatum. (19 *Wendell*, 86.) And he may issue several executions simultaneously to different counties. (2 *R. S.*, 2d ed., 288, § 6.) But a ca. sa. cannot be issued while there is a fl. fa. not returned, nor vice versa, unless by order of the court—*Ibid*; 1 *Burr. Pra.*, 289.

It is the duty of the officer to whom this writ is directed to proceed and execute it by arresting the defendant, the time, place, and mode of the arrest, together with the privilege from it, being in all respects the same as in other civil process, and as stated and commented upon in chapter III., of this volume.

This writ does not lie against members of corporations aggregate, for any matters relating to their corporate concerns; nor against an heir on a special judgment for the debt of his ancestor, to be levied of the lands descended; nor against executors or administrators unless a devastavit be returned.—*Bing. on Ex.*, 106.

There is no rule more clearly laid down, or more firmly established, than that a plaintiff, who has delivered the process to the sheriff to be executed, has nothing to do with the official misconduct or mismanagement of the under sheriff or deputy; and that where, by the arrest of an under sheriff or general deputy, the prisoner is in legal estimation in the custody of the high sheriff, the latter is exclusively liable. That a prisoner in actual custody on one writ is, by operation of law, in custody on every other writ lodged against him in the sheriff's office, and that if he escape, the plaintiff may declare that he was arrested by virtue of such other writ, appears to be equally clear. (5 *Co.*, 89; *Salk.*, 273.) Upon this principle therefore, it has been decided that the sheriff is liable for an escape, where he has returned non est inventus to a ca. sa. which has been delivered to him, if prior to the return day, his deputy had the defendant in custody under another ca. sa., and discharged him; though it do not appear that the sheriff knew of the latter writ, or that the deputy knew of the former. (9 *Serg. & R. Rep.* 390.) In an action for an escape, against the sheriff, it has been held, however, that if the prisoner be on the limits, the

mere delivery of the *capias ad satisfaciendum* to the sheriff is not of itself an arrest, so as to place the defendant in custody on the execution.—8 *John. Rep.*, 379.

If the defendant be in custody at the time judgment is rendered, either upon the original process in the suit, or upon a surrender by his bail, the plaintiff must charge him in execution (that is, by suing out and delivering a *ca. sa.* to the sheriff,) within three calendar months after the last day of the term next following that at which judgment shall have been obtained. And, in case of a surrender after judgment, within three months after such surrender, or if a *fi. fa.* have been issued within three months after its return.—2 *R. S.*, 2d ed., 459, § 36.

If the plaintiff neglect so to charge the defendant in execution the latter may be discharged from custody by a *supersedeas*, and cannot afterwards be arrested upon any execution which shall be issued on such judgment. (*Ibid*, § 37 ; 1 *Caines' R.*, 516.) But if the defendant hinder the plaintiff from proceeding by bringing a writ of error, or obtaining an injunction, he is not entitled to a *supersedeas*, if the plaintiff proceed in due time after the writ of error has been determined, or the injunction dissolved. (1 *Burr. Pra.*, 309 ; 2 *Arch. Pra.*, 133.) And an agreement between the parties for a settlement or compromise of the matters in dispute, if made in writing, and signed by the defendant or his attorney will prevent the defendant from obtaining a *supersedeas* while it remains in force.—3 *Wils. R.*, 455 ; 2 *Arch. Pra.*, 133.

When the writ of *supersedeas* is granted it must be served on the sheriff, and thereupon the defendant is forthwith entitled to his discharge, and may depart out of custody without a formal discharge from the sheriff, who cannot lawfully detain him.—4 *John. R.*, 32.

When the sheriff has made the arrest on the *ca. sa.*, he cannot release the defendant from the execution, upon his giving security for the payment of the debt ; and such security when given is void. (13 *John. R.*, 366 ; 8 *ibid*, 98.) So in a *qui tam* action, the plaintiff having no right to discharge the judgment, or compound with the defendant, without leave of the court or pay-

ment of the judgment, the defendant's discharge, so far as relates to the moiety of the penalty belonging to the people, is void and cannot excuse an escape. (11 *John. R.*, 476.) But if the plaintiff having the defendant in execution, consent to his discharge, though it be on terms which are not subsequently fulfilled, or upon giving fresh security, which afterwards becomes ineffectual, the debt is extinguished; (*Barnes*, 205; 2 *Bac. Abr.*, 719; 1 *Barn. & Ald.*, 297; 11 *John. R.*, 476;) and the plaintiff cannot resort to the judgment again, or charge the defendant's person in execution, although discharged upon an express agreement that he should be liable to be retaken, in case of non-compliance with the terms. (5 *John. R.*, 364; 2 *East*, 243; *Bing. on Ex.*, 266.) And if the plaintiff consent to discharge one of several defendants taken on a joint ca. sa., he cannot afterwards retake him or take any of the others.—6 *Term R.*, 525.

Upon the ca. sa. being issued and delivered to the sheriff, it is his duty to use all reasonable endeavors to execute the same, notwithstanding any directions he may receive from the plaintiff or his attorney. (2 *R. S.*, 304, § 33.) And where it appeared that a ca. sa. had been sued out by the plaintiff against the original defendant, and left at the sheriff's office, with directions to return *non est inventus*, though the defendant was then actually in the custody of the sheriff, and in prison, and such return was made by the sheriff, and an action brought against the bail, judgment entered up, execution issued out, and the money levied; the court set the return aside, together with all subsequent proceedings against the bail, and ordered the money levied under the execution to be returned to him.—4 *Bos. & Pull.*, 251.

If a party escape or be rescued from arrest on a ca. sa., though the sheriff is thereby liable, because he might have taken the posse comitatus, yet the plaintiff may retake such prisoner on a new ca. sa., or sue out another kind of execution on the judgment, and shall not be compelled to take his remedy against the sheriff. (2 *Bac. Abr.*, 719; *Bing. on Ex.*, 256.) He may proceed, however, against the sheriff for the escape, who cannot

take advantage of a want of a scire facias to ground the ca. sa. upon.—*Salk.*, 273 ; 2 *Burr.*, 1188.

Upon being arrested, the defendant either pays the debt, or gives bail to the liberties, or, in default of so doing is committed to prison.

Where the sheriff commits the party to prison on the writ, he must take him there with all convenient speed ; but he is not liable for an escape by allowing him a little reasonable indulgence in arranging his affairs or providing for his family, even if he deviates from the route to the prison for that purpose. (10 *John. R.*, 420.) In the case cited the court remark :—going with the prisoner, the afternoon on which he was arrested, two miles from the direct road to the jail, to a tavern, on the prisoner's suggestion that the execution might perhaps be settled, and then going with the prisoner the same afternoon, one mile further, to the prisoner's house, to enable him to get his clothes and see his wife before he went to jail, cannot be said to be an escape. The officer was only to take the prisoner to jail with all convenient and reasonable diligence, and he was not to relax but for some laudable and compassionate purpose ; and going to a tavern to see if the demand might not be satisfied, and then to the prisoner's house for a very humane purpose, all within the space of a few hours, cannot be deemed an escape.

What is convenient time is a question for the determination of the court, which will admit of all reasonable delay ; but if that be made use of by the sheriff, as a means of giving more liberty than he ought, he will be liable for an escape.—1 *Bos. & Pull.*, 24.

If the defendant do not satisfy the execution by payment of the debt, he is entitled to be admitted to the liberties of the jail of the county in which he is arrested, by executing a bond to the sheriff or his assigns with one or more sufficient sureties, in not less than double the amount directed to be levied by the execution.—2 *R. S.*, 2d ed., 352, § 43, 44.

By the act of 30 March, 1801, jail liberties were for the first time established in this state, and prisoners entitled to the benefit of them, on giving a bond and sufficient sureties to the sheriff, that they would remain true and faithful prisoners, and not at any time or in any wise escape. This has been considered but as a reenactment of a then existing law, as it regarded escapes. The rights and liabilities of sheriffs before the allowance of the limits, were not, nor could they be, a matter of litigation; the law in this respect, and upon that point, had been too well settled. The decisions which had long since been acquiesced in, in England, which had again and again been recognized in our courts, and which are expressly admitted by the supreme court in the case of *Tillman v. Lansing*, (4 J. R., 43,) were, that for an involuntary escape from the walls of the prison, reception on fresh pursuit, or a voluntary return of the prisoner to the prison before suit brought, was a complete defence to the sheriff. The act of 1809 was afterwards passed, which made those bonds given for the jail liberties assignable to the plaintiff, and authorized him to sue as the assignee of the sheriff; and in that condition, with some slight modifications, they have since remained.

It is provided by statute, that the liberties of the jails of the city and county of New York, of the city and county of Albany, and of the several counties of this state, as the same have been already established according to law by the courts of common pleas of the said counties, and of the said cities and counties respectively or otherwise, shall be and remain the liberties thereof.—2 R. S. 2d ed., 351, § 36.

It is further provided, that wherever such liberties have not been established, and in counties hereafter erected, the court of common pleas of such county shall appoint and designate a reasonable space of ground, adjacent to the jail or jails of such county, to be denominated the liberties thereof; and these liberties are not to exceed five hundred acres in extent. (*Ibid*, § 37.) And the courts of common pleas may alter the liberties in their discretion, not oftener than once in three years, subject to the restrictions prescribed by the statute. (*Ibid*, 352, § 38, 39.) A copy

of the minutes of the court of common pleas, establishing the liberties of any jail, and of the minutes making subsequent alterations, is to be made and certified by the clerk of the county, and by him delivered to the keeper of such jail; and certified copies of any original establishment of liberties, and of all alterations which shall be made in the liberties of any jail, shall, immediately after the entry of the same in the minutes of the court, be made out and delivered to the keeper of such jail. (*Ibid*, § 41.) The keeper of every jail to whom such certified copies shall be delivered, shall keep the same exposed to public view in some open and public part of the jail; and it shall be the duty of such jailer to exhibit the same to every person who shall be admitted to the liberties of such jail, at the time of his executing the bonds for that purpose, hereinafter prescribed.—*Ibid*, § 42.

It has been held that where the liberties as described in the map and survey or record are uncertain and contradictory, the reputed limits may be the best evidence of the actual liberties.—7 *John. Rep.*, 175.

The statutory provisions, prescribing the form, requisites, and effects of the bonds given for the liberties, and also allowing the sheriff afterwards to recommit, or the sureties to surrender the debtor are as follow :

Every person who shall be in the custody of the sheriff of any county, by virtue, 1. Of any *capias ad respondendum*: or 2, of any execution in a civil action; or 3, By virtue of any attachment for the non-payment of costs in a civil action; or 4, In consequence of a surrender in exoneration of his bail: Shall be entitled to be admitted to the liberties of the jail which shall have been established in such county according to law, upon executing a bond to such sheriff and his assigns as prescribed in the next section.—2 *R. S.*, 2d ed., 352, § 43.

Such bond shall be executed by the prisoner and one or more sufficient sureties, being inhabitants and householders of the county in a penalty which shall be as follows: 1. It shall be not less than double the amount of the sum in which the defendant was required to hold the defendant to bail, if he be in custody on

mesne process, or be surrendered in exoneration of his bail before judgment docketed against him. 2. It shall be not less than double the amount directed to be levied by the execution or attachment, if he be in custody upon attachment or execution. 3. It shall not be less than double the amount for which judgment shall have been rendered against him, if he be surrendered after judgment docketed.—*Ibid*, § 44.

Such bond shall be conditioned, that the person so in custody of such sheriff, shall remain a true and faithful prisoner, and shall not, at any time or in any manner escape, or go without the limits and boundaries of the liberties established for the jail of such county, until discharged by due course of law.—*Ibid*, 353, § 45.

Every such bond taken for the liberties of any jail shall be valid, and shall be held for the indemnity of the sheriff taking the same, and of the party at whose suit the prisoner executing such bond shall be confined.—*Ibid*, § 46.

If a sheriff who shall have taken any such bond for the liberties of any jail, shall discover that any surety to such bond is insufficient, he may commit the prisoner who executed the same to close confinement in such jail, until other good and sufficient sureties shall be offered.—*Ibid*, § 47.

The sureties in any bond given for the liberties of any jail may surrender their principal at any time before judgment shall be rendered against them on such bond, but such bail shall not be exonerated thereby from any liability incurred before the making such surrender.—*Ibid*, § 48.

Such surrender may be made as follows: the bail may take their principal to the keeper of the jail; and upon the written requirement of such bail, the keeper shall take such principal into his custody, and thereupon endorse upon the bond given for the limits and acknowledgment of the surrender of such principal; and such keeper shall also, if required, give the bail a certificate acknowledging such surrender.—*Ibid*, § 49.

The statute is imperative upon the sheriff, who is bound to grant the liberties to a prisoner, on his tendering a sufficient bond; but as this bond is intended only for the sheriff's indemnity, he

may waive it, and grant the liberties without taking the bond, and he will not be liable on that account for an escape. (3 *John. Ca.*, 73; 6 *John. Rep.*, 121.) But the sheriff is not bound to grant the liberties until they are defined by visible bounds according to the directions of the statute; and that they are vaguely defined will not justify an escape in an action brought against him.—5 *J. R.*, 89; 7 *ibid.*, 167.

The liberties are to be considered merely as an extension of the walls of the prison; and if a prisoner, who has given to the sheriff a bond for the liberties, voluntarily goes beyond the limits, his bond is forfeited, and the sheriff may retake him on fresh pursuit and recommit him to close custody, or bring an action on the bond. (10 *John. Rep.*, 549.) The bond is not the price of the liberty of the prisoner, it is the price of his admission from a straiter to a larger place of confinement, not limited by bolts or bars, but by lines, which neither the laws, nor the moral feelings of an honest man ought to permit him to violate. The sheriff is compelled to take the security; he may not truly estimate the ability of the bail; their circumstances may materially change after they have been accepted; they may prove insolvent, after the escape; and most assuredly the bond, without satisfaction, could not be a fair price of the prisoner's liberty, for though the sheriff may be compelled to pay the debt, his indemnity may depend on a precarious, or even desperate security. Suppose the sheriff to recover on his bond, and to prove insolvent, yet he leaves the plaintiff with unimpaired rights against his debtor; he may issue a new execution against the defendant, or his estate, for the satisfaction to the sheriff is collateral; it can neither cancel nor diminish the plaintiff's debt. Neither positive law then, nor necessary implication have taken from the sheriff, to him the most essential corrective of negligent escapes, the power of fresh pursuit and recaption, and his defence of pleading those circumstances in bar. The establishment of the liberties is therefore a mere expansion of the jail, and when a prisoner escapes thence, the sheriff may retake him, prosecute on his bond, and commit him to close custody; for the condition of the bond having been broken, the sheriff is not

compellable to expose himself to the risk of subsequent escapes in consequence of a bond which has been legally forfeited.—*Ibid.*

And where a bond is given to the sheriff for the jail liberties, and the prisoner escapes, but is afterwards taken into custody, and a new bond with new sureties is given to the sheriff, this does not take away the sheriff's right of action against the surety on the first bond, in consequence of the sheriff's having been sued for the escape. (12 *Ibid.*, 88.) The escape relied on in this case, was proved to have been made before the second bond was given, and the recovery against the sheriff was for that escape. The new bond was prospective, and could not release the surety on the former bond for the previous escape.

The enjoyment of the liberties of the limits by the prisoner is the consideration of the bond; and when the consideration fails, the obligation must be at an end. The bond is taken for the indemnity of the sheriff only; but when the prisoner is in close confinement, the sheriff wants no indemnity. If he should desire it, he cannot take it. Thus where a prisoner once enjoying the jail limits under a bond of surety, conditioned that he shall remain a true and lawful prisoner, was arrested on a felony, and committed to close confinement, and while so confined broke the jail and escaped; it was held that the surety was not liable. (3 *Cowen*, 128.) And the bond for the jail liberties being given to the sheriff for his indemnity only, neither he nor his assignee can recover on such bond without shewing he is injured or damnified; and to an action on such bond by the sheriff or his assignee, it is a good plea in bar that the prisoner voluntarily returned before suit brought.—10 *John. Rep.*, 563.

Where the liberties are allowed, and no bond is taken by the sheriff, his right of recapture remains in full force, and a voluntary return before suit brought, is equivalent to recaption which will purge a negligent escape. (6 *Ibid.*, 121.) And the limits or liberties of the jail, being considered as an extension of the walls of the prison, a return within the limits is the same as a return within the jail. And where a creditor authorises, even by parol

the sheriff to discharge his debtor, the former will not be liable for so doing.—2 *Mass. Rep.*, 520.

The condition of the bond must conform substantially to the terms of the act, or it will come within the following provision of the revised statutes. "No sheriff or other officer shall take any bond, obligation, or security by color of his office, in any other case or manner than such as are provided by law; and any such bond, obligation or security taken otherwise than as herein directed shall be void.—2 *R. S. 2d ed.*, 214, § 60.

Under a similar provision it was held, that a bond for the liberties, containing a clause in the condition that, "the defendant should at the request of the sheriff surrender himself to the prison" was to be deemed to be taken *colore officii* and void. (19 *John. Rep.*, 233.) And it was also held that if the sheriff after a voluntary escape, arrest the defendant again on the same execution, and take from him a bond for the liberties, jointly and severally, with another as his surety, such bond is void for duress, not only as to the defendant but also as to the surety. (15 *John. Rep.*, 256.) And where the sheriff, in addition to the bond, took a warrant to confess judgment, on which a judgment was entered, and execution issued, the court ordered them to be set aside as the warrant was void.—1 *John. Ca.*, 129.

In an action on a bond for the liberties, a plea that the prisoner remained a true and faithful prisoner, to be a valid bar, must cover the whole time during which the sheriff remained liable; it must sometimes be not only whilst he continued in office, and until a successor was appointed, but until the prisoners were assigned, or the expiration of ten days after the certificate of the county clerk. And if the old sheriff has a right of action on the limit bond, a recovery against the new sheriff for the same escape is no bar. Nor is a voluntary return of the prisoner, before suit brought against the sheriff, a bar; a limit bond is not strictly a bond of indemnity; the sheriff being liable to an action when an escape happens, may forthwith bring his suit.—21 *Wend. R.*, 223.

In a suit on the bond for the liberties, it is no defence that no action was brought against the sheriff within a year after the escape; the sheriff may avail himself of such short limitation, but not the obligors of the bond.—*Ibid.*

We have seen that where a prisoner has been allowed the liberties of the county, on giving the bond prescribed, in case any such prisoner shall go at large without the liberties of such county, without the assent of the party at whose suit such prisoner shall be in custody, the same shall be deemed an escape, and forfeiture of the bond so executed. The following are the provisions of the statute relative to the actions to be brought by the sheriff upon the bond after forfeiture. In every suit brought by a sheriff on such bond, the defendants may plead a voluntary return of the prisoner to the jail from which he escaped or the liberties thereof, or a recaption of such prisoner by the sheriff from whose custody he escaped, before the commencement of such suit, and may give evidence thereof in bar of such action; and such defendant shall be entitled to make such, or any other defence to such suit, which might be made by such sheriff, to an action against him for such escape.—2 R. S., 2d ed., 353, § 51.

But if an action shall have been brought against such sheriff for such escape, and the notice thereof shall have been given to the prisoner and his sureties, who executed the bond for the jail liberties, the judgment against such sheriff shall be conclusive evidence of his right to recover against such prisoner and his sureties, to whom such notice was given, in an action on such bond, as to all matters which were, or might have been, controverted in the action against the sheriff.—*Ibid.*, 354, § 52.

In every such action, brought by a sheriff on a bond executed for the jail liberties, if it shall appear to the court that judgment has been rendered against such sheriff for the escape of the prisoner, and that due notice of the pendency of the action against the sheriff was given to such prisoner and his sureties, to enable them to defend the same, such court shall render judgment in the suit upon such bond, at the same term in which the writ by which

such action shall be commenced shall be returned duly served.—*Ibid*, § 53.

But to entitle any sheriff to move for such judgment, he shall have filed his declaration, and shall show to the court that he had given twenty days' notice of such motion.—*Ibid*, § 54.

If it shall appear on the hearing of such motion that the defendants have any meritorious cause of defence, which was not controverted in the action against the sheriff, and which, by law, could not have been so controverted, the court shall suspend proceedings on such judgment, until a trial in such action shall be had; but such judgment shall remain as a security for the sheriff.—*Ibid*, § 55.

If such defence be established the court shall vacate such judgment, and render judgment as in other cases.—*Ibid*, § 56.

In every action brought by a sheriff on such bond, the recovery of a judgment against him for the escape of the prisoner, shall be evidence of the damages sustained by him, in the same manner as if such judgment shall be collected; and such sheriff shall be entitled to recover the costs, and his reasonable expenses in defending the suit against him, as part of his damages.—*Ibid*, § 57.

Instead of proceeding against the sheriff for the escape, the plaintiff, or in case of his death, his executors or administrators may take an assignment of the limit bond, and bring an action thereon as an assignee of the sheriff. (*Ibid*, § 58, 59.) But by taking this course he waives his remedy against the sheriff for the escape.—*Ibid*, 355, § 60.

If the plaintiff, instead of taking an assignment of the limit bond, elect to sue the sheriff for the escape, the court will, by rule, stay all proceedings on the judgment against the sheriff, until he shall have had a reasonable time to prosecute the bond taken by him, and to collect the amount of any judgment he may recover thereon. (*Ibid*, § 62.) But this provision does not extend to cases where the escape was voluntary, on the part of the sheriff.—1 *Burr. Pra.*, 313.

The following are the several returns which the sheriff may make to the ca. sa. :

If the defendant has been taken, and has not paid the debt, whether he be in close custody or on the limits the sheriff returns, *cepi corpus in custodia*; or in the language usually adopted, "defendant taken."

If the defendant have paid the amount of the execution it may be returned "satisfied."

If the sheriff have not been able to find the defendant, he returns *non est inventus*, or as the return is actually endorsed, "not found." Or he may make a special return that the defendant is privileged. And in either of these cases the truth of the return may be contested by an action for a false return.—1 *Burr. Pra.*, 315; *Arch. Pra.*, 307.

CHAPTER VII.

Escapes.

An escape is generally understood to be, where any person who is under lawful arrest, and restrained from his liberty, either violently or privily evades such arrest and restraint, or is suffered to go at large before delivered by due course of law.

In civil process, if the sheriff return *non est inventus* to the writ, where he might have taken, but neglected to take the defendant, he is liable to an action for a false return at the suit of the plaintiff in the writ; if he refuse or neglect to arrest the defendant, the plaintiff may maintain an action against him, or notify him to return the writ; if there be no omission or neglect to arrest or to return the writ, but the sheriff has discharged the defendant, or permitted him to depart from his custody, he is answerable in an action for an escape.

It seems agreed as a general rule in all civil cases, that wherever a sheriff or other officer has a person in custody, by virtue of an authority from a court which has jurisdiction, that the suffering such person to go at large, even for the smallest time or the shortest distance, is an escape. (*Moore*, 274; *Dyer*, 175; 2 *Saund.*, 101; 1 *Cowen*, 309.) And the officer is not permitted to judge of the validity of the process or other proceeding of such court, and therefore cannot take advantage of errors in them. (9

John. R., 386 ; 4 *Cowen*, 158.) Hence the law allows him in an action of false imprisonment to plead such authority, which will excuse him though it be erroneous. But if the court have no jurisdiction of the matter, then all is void, and consequently the officer not punishable for suffering a person taken up on such void authority to escape. Thus a writ wrongly tested as to the name of the chief justice is amendable ; and where this mistake occurs, the sheriff cannot take advantage of it in an action for an escape. So in debt for an escape from a ca. sa., the sheriff cannot object to its irregularity ; as that it issued after a year and a day without a sci. fa. ; or that the judgment on which it issued had been discharged.—8 *Cowen*, 192 ; 13 *John. R.*, 529 ; 15 *Ibid.*, 378.

It also appears to be equally well settled that after the defendant is taken in execution, if he is seen at large without the liberties of the jail, for ever so short a time, as well before as after the return of the writ, it is an escape in the sheriff ; and he can protect himself from the consequences only by a fresh pursuit and recaption, or by the voluntary return of the prisoner before suit brought. But as early as *Boyton's case*, (5 *Co. Rep.*, 43,) it was resolved by the court that there was a difference between the custody of one in execution without the county where the common jail is, and when the sheriff has the custody of one in execution out of the county. And in *Hassan v. Griffen*, (18 *John. R.*, 48,) the supreme court of this state decided that, where the sheriff has a prisoner in custody on a *habeas corpus ad testificandum*, according to the exigency of the writ, he is not bound to keep him always in sight, or with the same strictness as before ; and if the prisoner of his own head, should go about for a short time, on his own business, and out of view of the sheriff, it is not an escape. If he necessarily takes the prisoner out of his county, and return him when the exigency of the writ is answered, it is all that is required.

Our statutory enactments are in aid of these common law principles. If any prisoner committed to any jail, by virtue of any *capias ad respondendum*, or other mesne process, or upon a sur-

render in exoneration of his bail, made either before or after judgment rendered, shall go or be at large without the limits and boundaries of the liberties of such jail, without the assent of the party at whose suit such person shall have been committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party in an action of trespass on the case, to the extent of the damages sustained by him.—2 *R. S.*, 2d ed., 356, § 65.

If any prisoner committed to any jail in execution in a civil action, or upon an attachment for the non payment of costs, shall go or be at large without the boundaries of the liberties of such jail, without the assent of the party at whose suit such prisoner was committed, the same shall be deemed an escape of said prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party for the debt, damages, or sum of money for which such prisoner was committed, to be recovered by an action of debt.—2 *R. S.*, 2d ed., 356, § 66.

The going at large of any prisoner who shall have executed such bond, (the bond for the liberties,) or of any prisoner who would be entitled to the liberties of any jail, upon executing such bond, within the limits of the liberties of the jail of the county in which he shall be in custody, shall not be deemed an escape of such prisoner; but in case any such prisoner shall go at large without the liberties of such county, without the assent of the party at whose suit such prisoner shall be in custody, the same shall be deemed an escape and forfeiture of the bond so executed, and the sheriff in whose custody such prisoner shall have been, shall have the same authority to pursue and retake such prisoner, as if such escape had been made from the jail.—2 *Ibid*, 353, § 50.

In debt against a sheriff for an escape on execution, the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely: the sum endorsed on the writ, and the legal fees of execution. (1 *Term Rep.*, 126; *Black. Rep.*, 1048.) The reason for such liberty is this: at common law, an action on the case only, lay against the sheriff, or jailer for an escape, in which case the creditor might recover damages for the officer's miscon-

duct, but still he had a right to recover the debt against the original debtor. But the statutes gave an action of debt against the sheriff or jailer, to recover at once the sum for which the prisoner was charged in execution. Now those being affirmative statutes did not take away the common law remedy, so that the creditor has his election. But if he adopted the latter, he must recover the whole sum.—10 *John. Rep.*, 175; *ibid*, 389.

So the supreme court held that the common law remedy to proceed against the sheriff by an action on the cause; for an escape in execution, was not taken away by the statute, enabling the party in whose favor an execution issues against the body of the debtor upon his escape, to maintain an action for the debt and damages for which he was committed. (2 *John. Rep.*, 453.) And if an action on the case is brought it may be inquired what was lost by the escape, and the jury may give such damages as they suppose the party has sustained; but in the action of debt against the sheriff on such escape, every inquiry of that kind is improper, for the statute has fixed the extent of the sheriff's liability, which is the original debt and damages recovered. And as the sheriff can go into no circumstances of mitigation, the plaintiff is confined to the precise amount of the original judgment with costs. (5 *Mass. Rep.*, 310; 2 *ibid*, 526.) But in an action of debt against a sheriff for the escape of a prisoner in execution, the plaintiff is not entitled to recover interest on the debt or damages for which the prisoner was committed. (1 *Wendell*, 398.) Neither will debt lie against the administrators of a sheriff for an escape in the life time of their intestate; (*Courp. Rep.*, 375; 1 *Caines' Rep.*, 124,) for although the action be *ex contractu*, yet it is for an offence which dies with the person. But debt may be maintained by an executor for an escape out of execution in the life time of the testator.—*Ld Raym.*, 971.

An action of debt will lie against a sheriff or jailer for the escape of a prisoner in execution, though the escape was without the knowledge or fault of either; who, in such case can avail themselves of nothing but the act of God, or common enemies as an excuse. (2 *H. Black.*, 108.) And when a coroner or consta-

ble has arrested one on execution, he can only carry the prisoner to the jail, and offer to deliver him, with a copy of the precept; and if the sheriff be not there, nor any keeper appointed by him, to receive and confine the prisoner, the coroner or constable has done his duty, and if afterwards the prisoner go at large it will be the escape of the sheriff.—11 *Mass. Rep.*, 181; 5 *ibid*, 310.

If a writ of execution be delivered to the sheriff against A, at the suit of B, and before the return of such writ, A is taken in execution by the deputy at the suit of C, and then escapes; it has been held (1 *Bos. & Pull.*, 24,) that B may maintain debt against the sheriff for the escape, although the party was not arrested under the writ at the suit of B. And if husband and wife are taken in execution, and the wife is suffered to escape, although the husband continues in prison, yet an action of debt will lie against the sheriff for this escape, in which action the whole debt shall be recovered. (1 *Roll. Abr.*, 810; 1 *Schw. N. P.* 569.) But the arrest on a ca. sa., and discharge of one of several joint debtors by consent of the creditor discharges and extinguishes the judgment as to all the debtors. (6 *Term Rep.*, 515.) Thus where one of two joint debtors was arrested on a ca. sa., and gave bond for the limits, and escaped, and the sheriff was sued for the escape, and then the other debtor was arrested on an alias ca. sa., and on paying part was discharged by consent of one of the creditors, pending the escape suit; held, that the whole judgment was extinguished; that this formed a valid plea to the action for the escape, which the sheriff should have pleaded, (the discharge being in season for his doing this,) and his neglect to defend on this ground was in his own wrong; and though he had suffered a recovery and paid the money in an action for the escape, he could not collect the amount paid by him upon the limit bond, of the defendant who had escaped. But if an agent of the plaintiff discharge the defendant from execution without satisfaction of the debt, the sheriff in an action for the escape, must give clear and decisive evidence of the authority of the agent, before the party can be concluded by such an high handed measure as the discharge of his debtor by a third person, without satisfaction, and

such an act would not be binding on the plaintiff, or a defence to the sheriff, even if done by the regular attorney on record.—9 *Cowen*, 128; 10 *John. Rep.*, 220; 8 *ibid*, 361; 6 *ibid*, 51.

A bond for the limits, given by a defendant who had been charged in execution, and to whom the plaintiff had previously given permission to go at large beyond the jail liberties, does not revive the judgment, so that an action can be maintained against the sheriff for an escape.—3 *Wendell*, 184.

It is well settled, that if a creditor gives his debtor, who is in execution, permission to go at large beyond the jail liberties, the judgment is discharged, and the plaintiff can neither issue a new execution, nor maintain an action for the escape against the sheriff. (7. *Cowen*, 276; *Barnes*, 205; 7 *Term R.*, 420; 16 *J. R.*, 183; 11 *ibid*, 486.) Such being the case, if the judgment is discharged, the bond for the liberties subsequently given, is a mere nullity; it has no efficacy independently of the judgment, and that cannot be revived and restored by the giving of a new bond for the limits, not only the judgment, but the debt is gone. No matter what the actual intention of the plaintiff in the execution may have been, the judgment of law is, that a voluntary discharge of his debtor from the limits discharges the judgment and the debt. In almost all the reported cases, it appears affirmatively that nothing was more remote from the intention of the plaintiffs than to discharge their judgments, or in any manner to impair their security. In *Yates v. Van Rensselaer & Schermerhorn*, (5 *John. Rep.*, 364,) the defendants covenanted and agreed that the plaintiff might retake them on the same execution, or issue a new execution against them, and confine them until the debt and costs were paid; and yet it was held, that, as the plaintiff had given them permission to go beyond the jail liberties, the debt was discharged, and the arrest of the defendants was illegal, and amounted to false imprisonment. But a sheriff, prosecuted for an escape, cannot plead in his discharge, that the defendant was arrested, and committed on a previous execution, for the same cause, and discharged from custody with the assent of the plaintiff; none but the party himself can complain of the second ar-

rest. And one strong reason why the sheriff shall not take advantage of the error in the process is, for aught that appears, the party does not wish to avail himself of it.—8 *Wendell*, 545; 1 *Cowen*, 30; 2 *Saund.*, 101.

But an order of a court of common pleas for the discharge from custody of an imprisoned debtor who had made a voluntary assignment, is a defence to the sheriff in an action for the escape of the prisoner, although fourteen days had not elapsed, according to the requirements of the statute, (1 *R. S.*, 2d ed., 789, § 3) between the arrest of the prisoner and the granting of the order; for the protection of the sheriff, it will be intended that the plaintiff waived full notice.—20 *Wendell*, 236.

Consent or agreement by the plaintiff to an escape, after it has happened, without consideration, will not discharge the sheriff. (7 *Cowen*, 274.) Otherwise when it is upon good consideration. Thus, where the plaintiff agreed with the sheriff, in consideration that he would not take W, who had escaped from a ca. sa., at the suit of the plaintiff, that he would not sue the sheriff without notice, and reasonable time to take, &c.; held, that he could not sue without such notice, the consideration being a good one. (*Id.*) But an assent or agreement subsequent to the escape, that the debtor may remain out of the limits, is no discharge; for a right of action respecting the escape having once accrued, can only be defeated by a release under seal, or an agreement for a valuable consideration.—16 *John. Rep.*, 181.

And where a debtor in execution left the limits of the jail liberties on Sunday, and came to the plaintiff's house, and there obtained a written permission from him to go at large until nine o'clock the next morning; held, that the license or permission was no defence to an action for an escape, especially as the debtor obtained it fraudulently, supposing that he would thereby be discharged from the judgment. But a previous consent of the creditor that his debtor in execution may leave the liberties, will excuse the escape, and discharge the judgment.—16 *J. R.*, 181

In an action of debt against the sheriff for an escape of a pri-

soner in execution, on a *ca. sa*, parol evidence is admissible to show the issuing of the execution, its delivery to the sheriff, and the arrest of the party thereon; the defendant having neglected to return and file the *ca. sa*, and having refused to produce it at the trial though due notice for that purpose had been given to him before trial. (13 *John. Rep.*, 529.) It was the duty of the sheriff to return the writ without rule of court, and he cannot avail himself of his neglect of duty to defeat the plaintiff's action.

A suit against the sheriff for an escape is an election on the part of the plaintiff to consider the prisoner out of custody; it is the determination of the election of the plaintiff to look to the sheriff, and of course not to look to the defendant; and during the pendency of the suit the debtor may depart from the jail with impunity. (1 *Wendell*, 398.) If the plaintiff fails in his suit, he has no further remedy against the sheriff, but must pursue his remedy against the original debtor. And therefore where the plaintiff brings an action against the sheriff for an escape, he cannot resort to any remedy which would be an acknowledgment of the debtor's being in his custody. (4 *John. Rep.*, 121.) After bringing an action against the sheriff for the escape, he cannot oppose the discharge of the prisoner under the act for the relief of debtors with respect to the imprisonment of their persons. Neither can the sheriff avail himself of the acts of the plaintiff subsequent to the suit commenced recognizing the prisoner to be still in custody; such recognition being inoperative, as the plaintiff by suing the sheriff has determined his election.—13 *John. Rep.*, 121.

For an escape on mesne process, the only civil remedy against the sheriff is by an action on the case; and in which action the plaintiff can recover damages only for what he has lost by the escape; (2 *R. S. 2d ed.*, 356, § 65,) and the jury may find such damages as they think the plaintiff has sustained under all circumstances. (7 *John. Rep.*, 189.) This action on the case is given to the plaintiff, by way of indemnity for the actual injury which he sustains by reason of the escape. The jury are not confined to the

exact damages in the final judgment, or to the amount of the plaintiff's demand, but have a power and discretion to assess such damages as they shall suppose the plaintiff has sustained under all the circumstances of the case. (2 *Term Rep.*, 132; 5 *ibid.*, 40; 2 *Wils. Rep.*, 295; 6 *John. Rep.*, 270; 2 *Mass. Rep.*, 526.) Thus the insolvency of the prisoner, or the payment of the demand by him, can always be given in evidence in mitigation of damages. And where the plaintiff having real and competent security for his debt relinquishes it after knowledge of the escape, the sheriff, in an action against him, may avail himself of this in mitigation of damages; and where the jury in such case gave nominal damages only the court refused to set aside the verdict. (7 *John. Rep.*, 189.) And in an action against the sheriff for an escape on mesne process, the plaintiff was nonsuited, because he could not prove any debt against the prisoner who escaped. (4 *Term R.*, 611.) However, in such action, the admission of the debtor, has been decided to be evidence of the debt against the sheriff, as it would be against the party himself. (1 *Ph. Ev.*, 227; 2 *Campb. Rep.*, 188; 2 *Esp. N. P.* 695.) And it would seem that in an action on the case against a sheriff even for a voluntary escape, the measure of damages is the actual loss or injury sustained by the plaintiff. (17 *Wend.* 543.) The plaintiff, says the court, is entitled prima facie to recover his whole debt which is presumed to be lost by the escape, but it may be reduced down to nominal damages by evidence that if the party had not escaped, a greater sum could not have been recovered of the original defendant by the coercion of confinement. This authority is considered as against the understanding in Westminster Hall, though even there it is sustained by somewhat analogous principles. *Moore & Payne Rep.*, 284.

Besides the difference in the consequences of an escape on mesne process and on execution, another material difference is, that on the former, the officer may permit the prisoner to go at large, or keep him in his own custody, provided he has him at the return of the writ; but in the latter, if the officer voluntarily per-

mit the prisoner to go at large, though only for a minute, he cannot retake him. Thus, where the sheriff having arrested a party on mesne process permitted him to go at large, without taking a bail bond, and before the expiration of the rule to bring in the body, put in bail; held, that he was not liable either to an action of escape, or false return. (2 *Boss. & Pull.*, 35.) So, if after the commencement of an action of escape against the sheriff for not taking a bail bond, good bail be put in and justified in the room of bail before put in, who by the practice of the court were a mere nullity; the plaintiff cannot recover. But although after an arrest on mesne process, it is sufficient for the sheriff if he has the body on the day of the return, yet if the prisoner escape at any time thereafter he is liable to an action. Where a prisoner arrested on mesne process, after judgment in this suit, but before execution was issued, escaped, but voluntarily returned on the same day; it was held, that the sheriff was liable, unless he proved a return or recaption before suit brought. And it makes no difference in such case whether the escape was voluntary or negligent.—5 *John. R.*, 182.

In an action for an escape upon mesne process, it is enough, without giving direct evidence of the arrest or escape to prove the sheriff's return of cepi corpus, and to show that the party did not put in bail, and was not in the sheriff's custody at the return of the writ.—3 *Campb. Rep.*, 397.

When the sheriff suffers a person who has been arrested to go at large, without taking a bail bond, the court will not suffer him to render the defendant after action commenced against him for an escape; though he has not been ruled to return the writ, or bring in the body before action commenced.—2 *Marsh.* 261; 7 *Term R.*, 109; 1 *Bos. & Pull.*, 225.

The smallest departure beyond the boundaries of the limits amounts to an escape. Thus where a defendant in execution, and admitted to the liberties of the jail, walked beyond the limits, knowingly and voluntarily, on the pretence of avoiding a bank of snow, which obstructed his usual walk, it was held that the cause assigned did not justify a departure from the limits, and that it was an escape for which the sheriff was liable. (5 *John. R.*,

89.) And where the liberties of a jail were not defined by visible marks or boundaries, and the prisoner went beyond them into a building, which was supposed to be within the limits, and staid an hour and then returned, the sheriff was held liable. And in an action against the sheriff for this escape, he pleaded that the prisoner inadvertently, and without an intention to escape, went into an office sixteen feet beyond the limits, and returned in one hour, and that such office was commonly reputed to be within the limits, the plea was held bad for not stating the return to be before action brought. That the limits were vaguely defined does not justify the escape, for the sheriff is not bound to grant the liberties on bail, until they are defined by visible bounds, according to the direction of the statute.—5 *John. R.*, 89.

But where a defendant had been surrendered by his bail, and permitted by the sheriff to go at large within the liberties of the jail, on giving security by bond according to the statute, and a ca. sa. at the suit of the plaintiff was afterwards delivered to the sheriff, who did not take a new bond, and the defendant on the next day went beyond the liberties; it was held, in an action for an escape on the execution, that the mere delivery of the ca. sa. was not, *ipso facto et eo instanti*, an arrest, so as to place the defendant in custody on the execution, and that the sheriff was not liable. The doctrine in *Frost's case*, (5 *Co.*, 89,) as to constructive arrests, the court thought only applied when the prisoner was in close custody. These liberties are in many instances spacious, and it might be hours before the sheriff could find the prisoner, so as to secure him against the increased responsibility which the escape of a prisoner in execution might create. The doctrine in *Frost's case* is founded on the fact that it would be an useless and idle ceremony to arrest a person already in the close custody of the officer. But a prisoner on the limits is not in such custody, and the sheriff can, on a new arrest, essentially change his condition by requiring new security, or by confining him.—18 *John. R.*, 296.

A person who has given security for the liberties of the jail, is bound at his peril, at the risk of his sureties, to keep within

the liberties ; and though the limits established by the court of common pleas are in part vague and indefinite, it is the duty of the prisoner to keep in places clearly defined, and within the limits ; for he is bound to know and observe them. It is not the duty of the sheriff to ascertain the bounds of the limits, but he is required to let the person in execution go at large within the liberties when established by the court of common pleas. (7 *John. Rep.*, 168.) But where the bounds of the liberties of the jail were marked by no visible monuments, and the survey of them, as appointed by the court of common pleas, was, in some parts, vague and uncertain, and a prisoner who had given a bond to the sheriff for the liberties, without intending to go beyond them, went into a house within the reputed limits, but which proved to be not within the actual liberties, and returned before suit brought, it was held that this being an inadvertent and involuntary escape, and a return before suit brought, the sheriff was not liable for an escape.—7 *Ibid*, 175.

To constitute an escape within the intent of a bond given to obtain the liberties of the prison, it has been decided that there must be some agency of the debtor employed ; and a conveying him without the limits of the prison, he not consenting, is no escape, if he return as soon as he has the ability. (4 *Mass. Rep.*, 361.) Hence, if while within the limits of the yard he be visited by sudden sickness, so extreme that he is carried to an adjoining house without the limits, without any agency or direction of his own, but by the humanity of others, this would be no escape, if he should return as soon as he had reason and strength, and if he should die before, the bond would be saved. (10 *Ibid*, 206.) Nevertheless, if any force, not of an enemy, should break open a jail, and a prisoner, availing himself of the breach, should leave the prison, or suffer himself to be rescued, it would be an escape. And if a prisoner, having given bond for the liberty of the prison, be forcibly rescued by individual citizens or subjects, although without his consent and against his will ; or if he be carried without the limits by any other force than that of an enemy, if it be not by the act or providence of God, it is an escape

within the condition of the bond; for in a government of laws and not of men, no illegal violence is to be regarded as a case of physical necessity, or unavoidable casualty.—*Ibid.*

In 2d *Connecticut Reports*, page 477, *Gould*, J. remarks: It has been suggested upon the principle of the defence, that a prisoner may be in the daily and hourly practice of transgressing the limits of the jail yard, and yet by seasonably returning, screen the sheriff from liability; and that in this way the intended effect of imprisonment considered as the coercive means of collecting judgments may be in a great measure defeated. This suggestion is not well founded. The law has provided a sufficient check for such irregularities in prisoners. For if, upon notice to the sheriffs or jailers of any such temporary escapes, they do not commit and confine the party so escaping, within the walls of the prison, any subsequent transgression of the limits by the same party will be deemed a voluntary escape, which cannot be purged either by his voluntary return, or a re-capture on fresh suit.

The delivery of a writ to a messenger to carry to a coroner, to be served on a sheriff in a suit for the escape of a prisoner from the limits, is the commencement of the suit; and if at that moment the prisoner is off the limits, the plaintiff is entitled to recover for the escape. (9 *Wend.*, 209; 18 *John. R.*, 14, 496.) In such case the writ, in judgment of law, is not issued until delivered to the messenger, and thus put in motion on its way to the coroner, although previous to its delivery to the messenger the attorney has filled out the writ and taken it with him, with the intention to deliver or send it to a coroner in case he found the prisoner off the limits. And where a *capias ad respondendum* against a sheriff for the escape of a prisoner, was delivered to the wife of a coroner at his dwelling house, (the coroner being then absent,) while the prisoner was actually off the limits of the jail liberties, though he immediately thereafter returned, it is a sufficient commencement of an action against the sheriff before the return of the prisoner to the jail liberties, so as to make the sheriff liable for the escape.—17 *John. R.*, 63.

In an action against the sheriff for an escape the plaintiff has

nothing to do with the liberties in making out his action. It is enough for him to show the judgment and execution, and the prisoner taken, and then at large without the walls of the prison. It lies with the sheriff to justify his being at large, by shewing liberties established and defined according to law, and if he does not he fails in making out his defence. It is sufficient evidence *prima facie* on the part of the plaintiff to entitle him to recover that the prisoner was seen at large, or walking the streets. (7 *Ibid*, 165.) But when proof of the limits is established to support an action for an escape, the fact of the prisoner being beyond the limits of the jail liberties must be affirmatively and satisfactorily shewn, by direct and positive proof. (18 *Ibid*, 496.) Nothing will be intended or inferred. And in an action brought by a sheriff on a bond taken for his security on granting the liberties of the jail to a prisoner in execution, against the sureties, the record of a judgment of recovery against the sheriff for an escape of the prisoner is conclusive evidence for the plaintiff. (7 *John. R.*, 168.) A sheriff who had taken a bond with sureties for the liberties of the jail granted to a prisoner in execution, was sued for an escape, and a judgment recovered against him. He gave notice to the sureties of the suit, which was regularly defended by him and the sureties. The sheriff afterwards brought an action on the bond for his indemnity, and it was held that the recovery in the former suit was conclusive evidence in the suit on the bond, and that the defendants could not, on the trial of the suit against them on the bond, controvert the fact of the escape. (*Ib.*, 158.) To prove a voluntary escape on execution, the party who has escaped is a competent witness; the reason assigned is, because an escape is a thing of secrecy, a private transaction between the prisoner and the sheriff or jailer. (2 *Ph. Ev.*, 227; 2 *Campb.*, 188; 2 *Esp. N. P.*, 695.) But in an action for an escape on final process, the sheriff may shew that the escape was by the fraud and covin of a party interested in the judgment.—*Moody & Walk.*, 269.

So every liberty given to a prisoner, not authorized by law, is an escape. (5 *Mass. Rep.*, 310.) If an officer, having arrested a

debtor on execution, commit him to the custody of a third person, who, without the knowledge of the officer, voluntarily permit the prisoner to go at large, such permission will be considered as the act of the officer, and consequently an escape. (4 *Ibid*, 391.) Where the deputy sheriff arrested a defendant, and went to serve other process, and did not take him to jail until the next day, it was held to be an escape for which the sheriff was liable; the persons in whose custody the party was left having no authority to detain him, in the absence of the deputy sheriff. (9 *John. Rep.*, 329.) If the sheriff make a jailer of the prisoner, and give him the keys, it is an escape of the sheriff; for the prisoner by being the keeper, and having the keys, is no longer imprisoned or restrained of his liberty. (5 *Mass. Rep.*, 310; 11 *ibid*, 181.) But where a sheriff, after arresting a defendant in execution, allowed him a small and reasonable indulgence, from laudable and compassionate motives, it was held not to be an escape.—10 *John. Rep.*, 420.

And if the sheriff, on the execution of a ca. sa, liberate the prisoner, on the payment of debt and costs, it has been holden that he is answerable for an escape, unless he pay the money immediately over.—*Ld Raym.* 339; *Cro. Eliz.*, 408; *Mod.*, 194; *Lutw.*, 223.

Upon the execution of a writ of *capias ad satisfaciendum*, which required the sheriff to take and keep the body of A, so that he might have it on the return day of the writ at Westminster to satisfy the plaintiffs of their damages, costs, and charges, the sheriff, the defendant, before the return day of the writ, received the money due from his prisoner, and therefore liberated him before he had paid it over in satisfaction, to the party entitled to it. In an action for an escape, Lord Ellenborough, C. J., being of opinion that the substantial purposes of the writ had been satisfied by the sheriff's receipt of the money under the execution, directed a nonsuit. On motion to set it aside his lordship said: at the trial he was too strongly impressed with the hardship of suffering the sheriff to detain the prisoner after full satisfaction. But upon a review of the authorities, he had changed his opinion. The sheriff

being strictly no agent of the plaintiffs, but the officer of the court for the execution of its process, he could not therefore substitute one mode of proceeding in lieu of another which he is commanded to pursue. No authority can be shewn to warrant the officer in levying upon the goods under a writ against the person; can, then the plaintiffs, who elected to take out their writ against the person of their debtor, have, by the mere act of the sheriff, his own responsibility substituted in the place of the person of their debtor? The best way would have been for the sheriff, after having fallen into the error, to have moved the court to stay proceedings, on payment to the plaintiffs of their original demand, and of all subsequent costs incurred. However, if the sheriff had immediately upon the receipt of the money paid it over to the plaintiffs, he might have exonerated himself. Rule absolute. (14 *East Rep.*, 468.) Should a similar case come before the supreme court, especially when the amount due was endorsed on the writ, they have strongly intimated their opinion that they would not hold the sheriff responsible, if he obeyed the directions thus given. (9 *John. Rep.*, 363.) The sheriff, however, can receive nothing in satisfaction of a ca. sa., but money or its equivalent. And if he discharge the party arrested on receiving his draft upon a third person, this will be considered an escape.—4 *Cowen*, 553.

Where an attorney having a lien on a judgment recovered by his client, for nominal damages and costs, or an assignee having an equitable interest in the judgment, takes out a ca. sa., giving the sheriff notice of his equitable interest, and the sheriff having arrested the defendant, suffer him to escape; the party beneficially interested may maintain an action against the sheriff for the escape in the name of the plaintiff in the original suit, which the sheriff cannot defeat by taking a release from the nominal plaintiff.—15 *John. Rep.*, 405.

Where on a judgment in a bailable action, a ca. sa. is issued without a fi. fa. having been previously issued and returned nulla bona, pursuant to the statute; the sheriff in an action against him for an escape cannot avail himself of the irregularity, but ap-

plication must be made to the court to set aside the ca. sa., on the ground of such irregularity.—13 *Ibid*, 529.

In actions against the sheriff for escapes, the prisoner, in judgment of law, is committed to jail when in the custody of the sheriff. Thus in an action against a sheriff for an escape of a prisoner arrested upon an attachment for the non-payment of costs, an averment in the declaration that the sheriff arrested the party and had and detained him in custody, is equivalent to an averment that he was committed to jail.—8 *Wend*. 545.

Escapes are likewise either voluntary or negligent; voluntary, when they arise from the express consent or permission of the sheriff; negligent, when the prisoner escapes through the want of proper care or diligence, but without his assent or knowledge.

If an officer, after having arrested a debtor on an execution, commit him to the custody of a third person, who, without the knowledge of the officer, voluntarily permits the prisoners to go at large, such permission will be considered as the act of the officer, and consequently a voluntary escape. (4 *Mass. R.*, 391.) But the consent is not voluntary unless it be with the consent or by the default of the officer; his allowing the liberties of the prison is no default in him, because the law not only sanctions, but commands it. And if the prisoner goes beyond the limits, this must be taken to be a negligent escape, and not a voluntary one.—2 *Term R.*, 126.

And the sheriff is liable for a voluntary escape out of execution, even though the prisoner return on the same day, and the plaintiff proceed to final judgment against him.—1 *Mod. R.*, 116.

W, being indebted to the plaintiff, and in custody of the warden of the fleet, at the suit of another person, was regularly charged in custody at the suit of the present plaintiff, in Trinity term. Afterwards, upon the first day of October, the defendant voluntarily permitted the said W to escape out of prison. The plaintiff, knowing of such escape, on the said first of October, did, notwithstanding, proceed in his said cause against W,

and in the then next term obtained judgment against him; and after having so obtained judgment, commenced his present action against the defendant, the warden. But W, having so escaped on the first of October, returned to the Fleet prison on the same day, and ever since continued a prisoner. The question was, whether the plaintiff was entitled to recover, having proceeded to judgment against W, as is above mentioned. *Per curiam*. The quantum of the damages is nothing to the purpose; for if the jury had power in this case to give damages, we must now take it that they have done right; the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper; for this being an action upon the case, the damages were totally uncertain. It is objected for the defendant, the warden, that the escape was but for a single day; that the plaintiff knew nothing thereof, and proceeded to final judgment, and might have charged the defendant in execution, as he returned to the fleet the same day, and is now there. But whenever a jailer permits a voluntary escape, from that moment he commits a tort; and the plaintiff has a right to recover such damages as the jury shall please to give for the same. The prisoner, when voluntarily suffered by the jailer to escape, is instantly at large; the jailer cannot afterwards retake him and detain him for the same matter. The plaintiff may retake him by an escape warrant, but has his option to proceed as he pleases, either against W to judgment and execution, as in this case, or against the warden. W is not now a prisoner at the plaintiff's suit, although he be locked up every night; and though the plaintiff might lawfully proceed to judgment against him, yet he could not charge him in execution. (1 *Mod. R.*, 116.) The case of *Key v. Briggs*. (*Skin. R.*, 582.) If an escape be voluntary in the jailer, nothing afterwards will purge it.—*Salk.*, 271.

The great difference then between an arrest on mesne process, and an arrest in execution is this: on the former the sheriff may permit the prisoner to go at large, provided he has him at the return of the writ; but in the latter case, if the sheriff volun-

tarily permit the prisoner to go at large, though for the shortest time, he cannot afterwards retake him. But although, when a sheriff permits a defendant in execution to escape, he cannot of his own authority arrest or detain him, yet the plaintiff in the execution may issue new process; nor can the sheriff retain him on his surrender, unless the plaintiff in the execution does some act showing his election to hold him on the old process. And if the sheriff arrest the defendant on the same execution and take from him a bond for the jail liberties, jointly and severally with another person, such bond is void for duress, not only as to the defendant, but also as to the surety. (15 *John. R.*, 256.) And one who escapes from a ca. sa., though with the consent of the sheriff, the plaintiff not consenting, may be always again arrested on a second ca sa.—4 *Cowen*, 553.

An attorney on record for the plaintiff cannot, by virtue of his general character as attorney, discharge a defendant from custody on execution, without satisfaction. (8 *John. R.*, 361.) And where a defendant being in custody on a ca. sa., the attorney of the plaintiff on record, without satisfaction of the judgment, or consent of the plaintiff, consented and desired the sheriff to permit the defendant to go at large, for the purpose of obtaining the means of settling the execution, and the sheriff knowingly suffered the defendant, by the direction of the attorney, to go at large; it was held that the sheriff was liable for an escape.—*Ibid.*

A promise to indemnify the sheriff for a voluntary escape already made is valid. Thus, where a defendant taken on a ca. sa. was allowed to go at large by the deputy sheriff, and the plaintiff in the execution having recovered judgment against the sheriff for the escape, the amount of which was paid by the sheriff, the defendant afterwards promised to pay the same to the sheriff, such promise will support an action; there being a moral obligation on the part of the defendant, accompanied by an express assumption; and he has besides received a benefit by being exonerated from his liability to the original plaintiff, which is not liable to the objection that it was a past consideration without a previous request; for the benefit of the defendant, connected with

his subsequent promise, is equivalent to a previous request. (14 *John. R.*, 378.) But if an officer permit a prisoner to go at large on his promise to pay the debt to the creditor, in consequence of which he is obliged to pay the creditor himself, he cannot recover back the money from the debtor; being guilty of a breach of duty, out of which he cannot derive a cause of action. (8 *East R.*, 171.) So an agreement to indemnify an officer against a voluntary escape, is void, as against the policy of the law. (4 *Mass. R.*, 370.) Where an officer having a defendant in execution, A promised that if the officer would release the defendant, he would pay the amount of the execution if he failed to redeliver him to the officer on a certain day, and the officer accordingly released him; it was held that it was a voluntary escape, and that the officer could maintain no action against A, on the non-performance of his promise. (13 *John. R.*, 366.) In an action against a sheriff for an escape, if it be averred or found on the record that the sheriff permitted the prisoner to escape, it is equivalent to a finding of a voluntary escape.—3 *John. Ca.*, 73.

In an action against an officer for the escape of a defendant in execution, the latter is a competent witness for the officer; his interest, if any, being against the party calling him.—14 *John. R.*, 362.

In a case of negligent escape, if the prisoner return before suit brought, the escape is purged, and he is of course a prisoner again at the suit of the plaintiff. But in case of a voluntary escape, although the prisoner return before suit brought, the escape is not *ipso facto* purged, as in case of a negligent escape, but the plaintiff may prosecute for it. He may, however, affirm him in prison, but such affirmation will not be presumed. It requires some positive act, either new process, or notice, that the prisoner is received again as a prisoner at the plaintiff's suit. The sheriff's rights, however, in relation to the prisoner are very different. In case of a negligent escape, the sheriff may pursue and retake the prisoner; in case of a voluntary escape, he cannot without authority from the plaintiff; but yet it seems, in case

of a voluntary return of the prisoner, the sheriff may receive him into custody, but cannot detain him without the authority or assent of the plaintiff. (15 *John. R.*, 258; 1 *Wend.*, 398; 2 *John. Ca.*, 3; 2 *Wils. R.*, 295.) But when a new sheriff receives a prisoner from his predecessor, he is bound to detain him, notwithstanding a voluntary escape in the time of his predecessor. And a prosecution and judgment for such escape, against the former sheriff, is a bar to an action against the new sheriff for a subsequent escape.—4 *John. R.*, 469.

In case of a negligent escape, the sheriff may always have his remedy against the debtor; for in such case the debtor is a wrong doer as to the officer. And neither a negligent nor a voluntary escape, is any bar to an action on the judgment by the creditor, unless the creditor himself consents to the discharge of the debtor from the arrest. (10 *Mass. Rep.*, 59; 11 *ibid.*, 11; 4 *ibid.*, 391.) And it is a good defence to an action for a negligent escape, that the prisoner was taken on fresh pursuit, or voluntarily returned before suit brought, and was in custody at the time of suit brought. (6 *Cowen*, 732.) For a recaption on fresh pursuit, or voluntary return of a prisoner before suit brought purges a negligent escape, and a subsequent escape will not revive the right of action for a former one. After an escape by the defendant in custody on a ca. sa., the plaintiff may proceed against the sheriff for the escape, and at the same time take out a fi. fa. against the property of the defendant, for the remedies are not inconsistent with each other.—8 *John. Rep.*, 281.

As we have seen, a recaption, or voluntary return of the debtor before suit brought against the sheriff, is a good defence to the action for an escape. On this subject the statutes provide that, in every action against a sheriff or other officer, for the escape of any prisoner, the defendant may plead or give notice that before the commencement of such action, such prisoner voluntarily returned to the jail from which he had escaped, or to the liberties thereof; or that such defendant retook such prisoner, and had him within the jail from which he had escaped, or within the liberties thereof, before the commencement of such action; and

in either case that such escape was made without the consent of such defendant. (2 R. S., 2d ed., 356, § 67.) And further, all actions against sheriff, or other officers, for the escape of persons imprisoned on civil process, shall be commenced within one year from the time of such escape and not after.—2 R. S., 2d ed., 224 § 21.

In *Barry v. Mandell*, (10 John. Rep., 573,) the court of errors decided that the recaption on fresh pursuit, or voluntary return of the prisoner before action brought, being a good defence to the sheriff, in an action brought against him for an escape, it is equally a good defence to the prisoner, and his bail in a suit against them by the sheriff or his assignee on the bond. By this decision the previous decisions of the supreme court in *Mandell v. Barry*; (9 John. Rep., 234,) in *Tilman v. Lansing*; and in *Dash v. Van Kleeck* (4 *Ibid*, 43,) were respectively reversed.

Although the issuing of the writ is the commencement of the suit, yet this has been held to be applicable to cases where the writ might be executed, or some efficient act done under it; and that therefore a suit cannot be commenced on a Sunday; for both the issuing and service of process on Sunday are illegal and void at common law and by statute. And where a prisoner on execution, admitted to the liberties of the jail, went beyond the limits on Sunday, and the plaintiff on the same day, before the prisoner return, filled up a capias against the sheriff for the escape, and delivered it to the coroner; it was held that the process being issued on a Sunday was void; and therefore not such a commencement of a suit, as would prevent the sheriff from pleading a voluntary return before suit brought.—12 John. Rep., 178.

And an action against the sheriff for an escape is not well commenced by handing a writ to a person, with directions to go and see the prisoner off the limits of the jail liberties, and then to deliver the writ to the coroner; the writ must be actually delivered to the coroner, or left at his office, or be issued and sent to him, with absolute, positive, and unequivocal intention to commence the suit, while the prisoner is off the limits.—18 John. Rep., 496.

To support an action against the sheriff for an escape on exe-

cution, the following proof is necessary:—1. An examined copy of the record: 2. The writ of ca. sa. ; or, in case the writ has been returned, an examined copy thereof: 3. The delivery of the writ to the sheriff must be proved; and here it is to be observed, that when the writ has been returned, the endorsement of such return upon the writ, under the hand of the sheriff, will be sufficient evidence of the writ having been delivered to him: (*Coup. Rep.*, 63; *Bull. N. P.*, 573.) 4. A legal arrest under the writ must be proved. If the sheriff pleads no escape, he cannot give in evidence no arrest; for the plea admits the arrest. Debt for an escape under the statute lies only when the prisoner is in execution; and under our law a prisoner is not in execution until a writ of execution has been issued and delivered to the sheriff. Therefore, when a person surrendered into the custody of the sheriff by bail escapes, an action of debt will not lie. The proper remedy then is an action on the case.—6 *J. R.*, 270.

It seems that a second execution cannot be issued within the statute, on the ground that the defendant has escaped, unless the escape continue until the time of its issuing. The escape must be such as will charge the sheriff. (6 *Cowen*, 65.) In this case, it appeared that a judgment was perfected in favor of the plaintiffs for four hundred and forty-two dollars and ninety-six cents, in October, 1817. That soon afterwards a testatum capias ad satisfaciendum was issued on the judgment, upon which the defendant was imprisoned in the common jail of Herkimer county, and having procured bail for the limits, had continued a prisoner upon the liberties from that time to the present upon the ca. sa. That on the 3d day of February 1826, a testatum fieri facias was issued upon the judgment, and placed in the hands of the sheriff of Herkimer, by virtue whereof he had levied on a large amount of personal property, owned by the defendant. Various counter affidavits were read, shewing that the defendant had made various escapes from the liberties since he was arrested, and before the issuing of a fi. fa., and the plaintiff claimed it issued properly within the statute, (2 *R. S.*, 2d ed., 288, § 8.) which provides that if any person who shall be taken on any execution, or com-

mitted thereon to any prison, shall escape by any ways or means however, the creditor at whose suit such person was taken, may retake such prisoner by any new *capias ad satisfaciendum*, or sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken in execution. But it appeared that the escapes were principally on Sunday; and that when the *fi. fa.* issued, the defendant had returned, and was within the jail liberties. For the defendant it was insisted that the statute did not apply to a temporary escape, from which the prisoner has returned, and is in custody at the time of the second execution. The escape intended, it was argued, is a permanent one; and such an escape as will work a forfeiture of the jail bond. And the court were inclined to think that the true construction of the statute was, as contended for by the counsel for the defendant, remarking that this construction was strengthened by the phraseology of the statute, in relation to a second *ca. sa.*, which is, that the plaintiff may retake the defendant by a new *ca. sa.*, or sue forth any other kind of execution. Now how can he retake the defendant, when he has already returned into custody, and remains there? This can only be where there is a continued escape, and we think a remedy by any kind of execution must depend on the same condition. There is nothing in the statute making a distinction, and giving a *fi. fa.*, where a second *ca. sa.* would not lie.—6 *Cowen*, 65.

The duties of the sheriff on the escape of a prisoner from his custody on criminal process, and his power of recaption, have already been considered. Where that escape is with his knowledge and consent the statutes provide that, if any sheriff, jailer, coroner, marshal, or constable, shall wilfully suffer any offender, lawfully committed to his custody to escape and go at large, he shall upon conviction, be punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.—2 *R. S.* 2d ed. 570 § 18.

Every sheriff, coroner, marshal, or constable, who shall be convicted of the offence specified in the last section, shall forfeit his

office, and shall for ever be disqualified to hold any office or place of trust, honor or profit, under the laws or constitution of this state.—*Ibid*, § 19.

If any person confined in a county jail, or in a state prison, upon conviction of a criminal offence, shall escape therefrom, he may be pursued, retaken, and imprisoned again, notwithstanding the term for which he was sentenced to be imprisoned may have expired at the time when he shall be retaken; and shall remain so imprisoned, until tried for such escape, or until he be discharged, on a failure to prosecute therefor.—*Ibid*, 571, § 20.

And since all persons are bound to submit themselves to the judgment of the law, whoever escapes from it by any artifice or contrivance, is considered guilty of a high contempt punishable with fine and imprisonment. (4 *Black. Com.*, 129.) So any person having another in custody, is guilty of an escape by suffering him to go at large, before he has delivered him over to a competent authority to try whether he be guilty or not.—2 *Hawk. P. C. c.* 20., § 1.

The sheriff is also liable to an indictment where the prisoner in criminal process escapes through his negligence.

The defendant was indicted for the escape of one W, convicted of a misdemeanor for attempting to counterfeit exchequer bills; and after judgment that he should stand in the pillory, the sheriff, out of favor, delayed the execution beyond the usual time, and in that time W escaped; and on the indictment, defendant being found guilty, it was moved that he be fined. *Holt, C. J.*: In this case, the sheriff ought to be prosecuted and fined grievously; for the judgment ought to be executed in a convenient time; and the sheriff's resisting it is an affront to the justice of the nation. But if he had retaken the malefactor before an indictment was found against him for the escape, he ought not afterwards to be troubled for the escape.—12 *Mod. Rep.*, 227; *Salk.*, 272.

In criminal cases, where the public are interested, the rule does not apply as in civil cases that, where the sheriff suffers a prisoner to escape he cannot afterwards retake him. And where a person convicted of a crime, by a court of competent jurisdiction, is sen-

tenced to pay a fine and is committed in execution until that fine is paid ; although the officer to whose custody he is committed, voluntarily permit him to escape before the payment of the fine, yet it is afterwards his bounden duty to retake him.—1 *Gow. Rep.*, 473.

In passing judgment on the sheriff or jailer for an escape from criminal process, affidavits both in aggravation and extenuation may be read.

The keeper of the prison of St. A. having been convicted of permitting an escape, and being brought up for judgment, an affidavit of aggravation was produced, and on objection the court said : if the affidavits contain matter of such aggravation as would induce the court to inflict a heavier punishment, then the defendant must have an opportunity of answering them. (1 *Term Rep.*, 106.) Accordingly the affidavit was read and time given to answer it.

In order to constitute an escape, the arrest must be actual, and also justifiable. And the imprisonment must be continuing at the time of the escape, and grounded on that satisfaction which the public justice demands for the crime committed. (2 *Hawk. P. C.*, c. 19, § 1, 2, 4 ; 1 *Hale*, 594.) But it is an escape to suffer a prisoner to have more liberty than the law allows him. (1 *Hawk. P. C.*, c. 19, § 5.) And if a jailer permit a prisoner to go at large, though he returns, it is an escape, and his liability is the same whether the escape be voluntary or negligent.—*Dalton*, 159.

The indictment against the sheriff for an escape, must state, that, the prisoner was in his custody, and that he went at large ; and if the escape be voluntary, that the defendant feloniously and voluntarily suffered the prisoner to go at large ; and must also allege the particular kind of felony with which the prisoner was charged, though if the indictment be for a negligent escape, it seems such certainly as to the offence is not required.—2 *Hawk. P. C.*, c. 19, § 14.

CHAPTER VIII.

Writ of Possession.

The writ of possession, or writ of *habere facias possessionem*, as it is technically called, is a judicial writ attendant upon a judgment in ejectment, which issues for the purpose of putting the plaintiff in possession of a term of years, or the fee; or if in dower, when brought to recover dower which had been admeasured before action brought, of an estate for life which had been recovered in the action.—2 R. S., 237, § 55.

The duties of the sheriff in the execution of this writ, are few and simple, and will not detain us long in their consideration.

The plaintiff recovering in ejectment is entitled to a writ of possession, which is substantially in the following form: (2 R. S., 2d ed., 234, § 34.

The People &c., to the Sheriff &c.:

Whereas A B has lately in our supreme court of judicature, [or in the court of common pleas, held in and for the county of ——— as the case may be,] by the judgment of the said court recovered against C D one messuage, &c. [describing the premises recovered with convenient certainty,] which said premises have been, and are still unjustly withheld from the said A B, by the said C D, whereof he is convicted as appears to us of record; and for as much as it is adjudged in the said court, that the said A B have execution upon his said judgment against the said C D,

according to the force, form, and effect of his said recovery : therefore we command you, that without delay you deliver to the said A B possession of the said premises so recovered with the appurtenances ; and that you certify to &c., at &c., on &c., in what manner you shall have executed the writ, [if there be costs to be collected the proper clause is here inserted, or a separate execution may be issued therefor,] witness, &c.

The sheriff, previous to executing this writ, may demand an indemnity of the plaintiff. And when he has to deliver possession of any particular number of acres, he must estimate them according to the custom in which the lands are situated.—*Adams on Eject.*, 342.

The possession to be given by the sheriff is a full and actual possession, and he is armed with all power necessary to that end. If necessary he may break open doors to execute it, if the possession be not quietly given up, or he may take the *posse comitatus* with him if he fear violence, (5 Co. 91; b.) and after he has got admission, he may remove all persons, goods, &c., from off the premises before he gives possession.—1 *Lev.*, 145.

And in a case where a sheriff returned that, in the execution of the writ, he removed all the persons, whom upon diligent search he could find on the premises, and gave peaceable possession to the plaintiff, and that immediately after he was gone, three men who were secretly lodged in the house, immediately expelled the plaintiff, upon notice of which he returned to the house to put the plaintiff in full possession, but met with such resistance that he could not do it but at the peril of his life ; the court held that the same was no execution of the writ, and awarded to the plaintiff a new writ.—*Adams on Eject.*, 343 ; 1 *Leon.* 145.

And the writ is not understood to be completely executed until the sheriff and his officers are gone, and the plaintiff is left in quiet possession. (*Adams on Eject.*, 343 ; 2 *Dunl. Pr.*, 1048.) And in order that the sheriff may give full and ample possession, he may break open doors for that purpose, and if necessary call to his aid the power of the county over which he is sheriff to assist him in so doing. (*Ibid.*) But before he proceeds to break open the

doors, he should signify the cause of his coming, and request that the doors may be opened, so that possession may be given peaceably. (*Adams on Eject.*, 34.) And if resistance is offered, the court, on affidavit, will grant an attachment against the party, whether it be the defendant or a stranger; because the writ is the process of the court, and any disturbance given in the execution of it is a contempt of the authority from whence it issues, and as such will be punished by the court.—*Tidd*, 1082.

The sheriff executes this writ under the direction of the plaintiff or his attorney, who points out to him the premises recovered; and if the recovery is for several messuages or lands in the occupation of different persons, the sheriff must go to each house or to the land occupied by each of the tenants, and deliver the possession thereof by turning out the tenants; for the delivery of one messuage or parcel of land in the name of all is not, in that case, a good execution of the writ, because the possession of one tenant is not the possession of the other, each tenant having a several possession.—*Adams on Eject.*, 342.

But if all the lands and messuages were in the possession of one tenant, it is sufficient to give possession of one messuage or parcel of land in the name of all. And this indeed seems to be the safest way for the sheriff, for if he gives possession of any messuage or land not recovered and not included in the writ of possession, he is a trespasser, for he executes the writ at his peril. (*Ibid.*) And where part of the premises are covered by or intersected by a public road or highway, the sheriff should deliver the possession of the premises described in the writ subject to a passage across it.—*Tidd*, 1091.

If the sheriff refuse to give the possession of the premises according to their description mentioned in the declaration, or according to the direction of the plaintiff's attorney the court will require him by rule to do so.—3 *Cowen*, 291.

In ejectment in the city of New-York, the plaintiff recovered certain premises particularly described in a special verdict found by the jury. The declaration was under the old practice, and the judgment was in the usual general form under these proceedings

for five acres of land in a certain ward in the city of New-York. Judgment having been entered for the plaintiff, a writ of possession was thereupon issued to the sheriff of the city and county of New-York, who declined executing it, on account of the doubt which existed whether any land in possession of Gould, the tenant, with whom Rathbone had been admitted to defend as landlord, was included in the description in the special verdict; the sheriff holding himself bound by this description. A motion was made by the plaintiff for a rule upon the sheriff, requiring him to execute the writ of possession according to the direction of the plaintiff's attorney, or to the extent of the description in the special verdict, which, as he contended, covered the premises of which the plaintiff sought to obtain possession.

This was opposed by the defendant on the ground that the land described in the special verdict was not in the possession of the defendant, and the location of the same by the description of the verdict and the maps accompanying it covered nothing in the possession of the tenant, and that therefore the writ of possession could have no effect whatever.

The court said they were with the defendant, that upon a general declaration, and a verdict and judgment equally general, the plaintiff might take possession at his peril, subject to be put right by the court if he took more than the premises in question upon the trial; yet when there was a special verdict, as in this case, locating the premises, the parties and sheriff should be guided by this. That the court had very carefully examined the questions which had been raised to them as to the location, and were satisfied that the directions by the attorney of the plaintiff to the sheriff did not go beyond the description contained in the verdict, and that a rule must therefore be made upon the sheriff that he deliver possession, pursuant to those directions.—3 Cowen, 291.

Under the old rule, if after executing the writ, and putting the plaintiff into peaceable possession, he was again ousted or deprived of the possession, even before the return of the writ, the sheriff could not proceed to reinstate him in his possession, but the plaintiff might move for an *alias habere facias possessionem*, if the

possession was obtained by the defendant or any one claiming under the same title, and who knew of the suit; but now it would appear to be otherwise.

At January term judgment was entered for the plaintiff upon a cognovit. About the first of March a writ of habere facias possessionem, returnable at the next May term, was issued and executed, by delivering possession of the premises claimed to an agent of the plaintiff, who continued in possession four or five days, when one *Alfred Pitcher* entered by force, as alledged on the the part of the plaintiff; *Pitcher*, however, insisting that he found the possession vacant when he entered. A motion was made for an alias habere facias possessionem, which was resisted by *Pitcher* on various grounds, and, among other things, that he was the owner of the property.

The court says, (11 *Wendell*, 184,) that they are satisfied that the practice in this state has been to award a new writ of possession, where the first has not been returned, where the defendant has entered on the plaintiff's possession. Decisions to that effect, they are confident have been made within the last ten years, and Mr. Justice Sutherland concurred with the chief justice in his recollection of this point, but no reported cases could be found to that effect. Some members, it is remarked, have adopted the practice of having the writ of possession without any return day, and of not calling for a return, so that it may be executed as often as the defendant may forcibly enter upon the possession from which he has been removed. No good reason, I apprehend, can be given why it should not be so. When a plaintiff has recovered and obtained possession by legal process, he should be protected until the possession shall be legally taken from him. The defendant may bring his action if he has the better title. It is unnecessary to say whether this practice should extend to a stranger; the same reason does not exist. In the case now before us, *Alfred Pitcher* is not a stranger; his title is derived from *Hawley*, and is the same title; and for the purposes of this motion it must be considered as if the court had passed upon that title, and adjudged the plaintiff's to be the better title.

Hawley gave a confession, he was satisfied that he had no title. There is no collusion shewn between him and the plaintiff. The motion was granted with costs.

But if the plaintiff be ousted by a stranger he shall be driven to another ejectment; and the reason assigned for this distinction is, that in the one case the defendant shall never by his own act keep the possession which the plaintiff has recovered from him by due course of law, and in the other, that as the title was never tried between the plaintiff and a stranger, he may claim the land under a title paramount to that of the plaintiff, and therefore the recovery and execution in the former action ought not to hinder the stranger from keeping that possession to which he may have a right.—*Adams on Eject.*, 344; 11 *Wend.*, 182.

Therefore if a stranger gets into possession after the plaintiff is in possession under the writ of possession, the sheriff cannot proceed to re-execute the writ. By a stranger, is meant one who claims under a different title from the one set up by the defendant, and under a different source of title. Thus in the case in *Wendell's Reports*, just cited, Chief Justice Savage says, "Alfred Pitcher is not a stranger; his title is derived from Hawley (the defendant) and is the same title; and for the purposes of this motion, it must be considered as if the court had passed upon that title, and adjudged the plaintiff's the better title." In cases of doubt the safest course would be to have the plaintiff move the court for a rule upon the sheriff, or for a new writ of possession, so that the doubtful matter might be adjudicated upon, which would protect the sheriff so far as the right of possession is concerned.

On the other hand, if, after the sheriff has delivered to the plaintiff the proportion that he has recovered in ejectment, and after the return day of the writ the plaintiff ousts the defendant of the whole, the court will not restore the defendant in a summary way, though it might be otherwise if there is an actual ouster before the return day.—2 *Binn. R.*, 450; 11 *Wend.*, 182.

The right of dower, as well as the proceedings by which it is

enforced have undergone almost an entire change by the adoption of the Revised Statutes—the right being placed upon distinct statutory ground—and the old remedy by writ of dower having given place to the more simple proceeding of ejectment.—10 *Wend.*, 528; *Grah. Pra.*, 838.

Instead of the writ of possession issuing and the sheriff assigning the dower as formerly, the statutes have the following provisions :

If the action be brought to recover the dower of any widow which shall not have been admeasured to her before the commencement of such action, instead of a writ of possession being issued, such plaintiff shall proceed to have her dower assigned to her in manner following :

1. Upon the filing of the record of judgment, the court upon the motion of the plaintiff shall appoint three reputable and disinterested freeholders, commissioners for the purpose of making admeasurement of the dower of the plaintiff, out of the lands described in the record ; and the commissioners so appointed shall proceed in like manner, possess the like powers, and be subject to the like obligations and control as commissioners appointed pursuant to the seventh title of the eighth chapter of this act.

2. The report of the commissioners may be appealed from by any party to the action, within the same time, and the like proceedings shall be had thereupon, as are prescribed in the said seventh title of the said eighth chapter.

3. Upon the confirmation of the report of the commissioners, a writ of possession shall be issued to the sheriff of the proper county, describing the premises assigned for the dower, and commanding the sheriff to put the defendant in possession thereof.—2 *R. S.*, 2d ed., 237, § 55.

Where the writ of possession thus issues for dower recovered in ejectment, and describing the premises as above mentioned, the sheriff puts the plaintiff in possession according to the description. His powers and his duties are the same as we have already treated of in the ordinary cases of ejectment.

When a writ of possession contains the *feri facias* clause under

the statute, the sheriff proceeds to levy the amount directed to be made by the execution, in the same manner as in the other writs of fieri facias, and he is governed by the same principles.

When the collecting clause in a writ of possession is in the form of a ca. sa., the sheriff arrests the defendant in the same manner as in a ca. sa. in other suits, and is governed by the principles applicable to them.

CHAPTER IX.

Writ of Habeas Corpus.

The writ of *habeas corpus* has always been considered the most important writ which is given to the individual; the strongest protector of his private liberty, and his surest guarantee against oppression. It is a writ of right, and is forever secured to the citizen by the constitution of the United States, (*Const. U. S., Art. 1, § 9,*) and by that of the state of New-York; (*Const. state N. Y., Art. 7, § 6,*) and can only be suspended in cases of rebellion and actual invasion, when the public safety requires it. The history and object of this writ, together with the provisions of the statute respecting it, will convey a clear idea of the duties of the sheriff, and his responsibilities when called upon to carry it into effect.

A *habeas corpus* is a writ of right, which the citizen is at all times entitled to, and has an absolute right to demand, and is the most usual remedy by which a man is restored to his liberty, if he has been, against law, deprived of it. But where it appears that the party imprisoned is in custody on any process, notice of the suing out of a *habeas corpus* to relieve him from imprisonment must be given to the party interested in continuing the imprisonment, although the latter do not reside in the county where the former is imprisoned, or where the proceeding is had for a *habeas corpus*; it must be given without reference to residence.

(14 *Wend.*, 48; 2 *R. S.*, 2d ed., 471, § 48.) And where the party is detained on any criminal accusation, no order shall be made for his discharge, until a sufficient notice shall be given to the district attorney of the county within which the court or officer granting the habeas corpus shall be.—14 *Wend.*, 231; 2 *R. S.*, 2d ed., 271, § 49.

The writ of habeas corpus does not interfere with the other rights and remedies of the party imprisoned, and if he has been imprisoned contrary to law, though he is entitled to a habeas corpus, yet he may also have an action of false imprisonment, in which he shall recover damages in proportion to the injury he has sustained.—2 *Inst.*, 55; 11 *Co.*, 98.

In speaking of the writ of habeas corpus, one of our most eminent jurists makes the following very lucid and pertinent remarks.—2 *Kent's Com.* 2d ed., 26.

The right of personal liberty is another absolute right of individuals which has long been a favorite object of the English laws. It is not only a constitutional principle that no person shall be deprived of his liberty without due process of law, but effectual provision is made against the continuance of all unlawful restraint or imprisonment, by security of the privilege of the writ of habeas corpus.

Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner in which the restraint is effected. Whenever any person is detained with or without due process of law, except in cases of treason and felony plainly and specially expressed in the warrant of commitment, or unless such person be a convict, or legally charged in execution, he is entitled to his writ of habeas corpus. It is a writ of right which every person is entitled to *ex merito justitiæ*; but the benefit of it was in a great degree eluded in England, prior to the statute of Charles II., as the judges only awarded it in term time, and they assumed a discretionary power of awarding or refusing it. The explicit and peremptory provisions of the statute, (31 *Charles II.*, c. 2,) restored the writ of habeas corpus to all the efficacy to which it was entitled at

common law, and which was requisite for the due protection of the liberty of the subject. That statute has been re-enacted or adopted, if not in terms yet in substance and effect, in all these United States. The privilege of this writ is also made an express constitutional right at all times, except in cases of insurrection or invasion, by the constitution of the United States, and by the constitutions of most of the states in the union. The citizens are declared in some of these constitutions to be entitled to enjoy the privilege of this writ in the most "free, easy, cheap, expeditious and ample manner," and the right is equally perfect in those states where such declaration is wanting. The right of deliverance from all unlawful imprisonment to the full extent of the habeas corpus act, is a common law right; and it is undoubtedly true that the common law of England, so far as it was applicable to our circumstances, was brought over by our ancestors upon their emigration to this country. The revolution did not involve in it any abolition of the common law. It was rather calculated to strengthen and invigorate all the just principles of that law, suitable to our state of society and jurisprudence. It has been adopted or declared in force by the constitutions of some of the states, and by statute in others; and where [it has not been so explicitly adopted, it is nevertheless to be considered as the law of the land, subject to the modifications which have been suggested, or to express legislative repeal.

The substance of the provisions on the subject of the writ of habeas corpus may be found in the statute, 31 Charles II., c. 2, which is the basis of all the American statutes on the subject. The statute of New-York, 1787, was a literal transcript of the English statute, and the habeas corpus act in the subsequent revisions of the New-York statute code in 1801 and 1813, was essentially the same. But the New-York statute of 1818 enlarged the extent of the application of the writ. It gave the officer before whom the writ was returnable authority to revise the cause of commitment, and to examine into the truth of the facts alleged in the return. The English statute of 56 George III., c. 100, conferred the like power. By the Revised Statutes all the sta-

tute provisions on the subject of the writ of habeas corpus were redigested, and some material amendments, and more specific directions added. The substance of the Revised Statutes contains equally no doubt the substance of the statute provisions on the subject in every state in the union (for they are all taken from the same source,) with the remedy and the sanction somewhat extended.

All persons restrained of their liberty under any pretence whatsoever, are entitled to prosecute the writ unless they be persons detained, 1. By process from any court or judge of the United States, having exclusive jurisdiction in the cause, or 2. By final judgment or decree or execution thereon of any competent tribunal of civil or criminal jurisdiction, other than in the case of a commitment for any alledged contempt. The application for the writ must be to the supreme court, or chancellor, or a judge of the court or other officer having the powers of a judge at chambers, and it must be by petition in writing signed by or on behalf of the party; and it must state the grounds of the application, and the facts must be sworn to. (2 *R. S.*, 2d ed., 466, § 23, 24 25.) The English statute did not require the petition to be verified by the oath of the applicant.

The penalty of \$1,000 is given in favor of the party aggrieved against every officer and every member of the court assenting to the refusal, if any court or officer authorized to grant the writ shall refuse it when legally applied for. (2 *R. S.*, 2d ed., 468, § 33. The penalty for refusing to grant the writ was by the English statute conferred to the default of the chancellor or judge in vacation time, whereas the penalty and suit for refusal to grant the writ applies under the Revised Statutes to the judges of the supreme court sitting in term time. This is the first instance in the history of the English law that the judges of the highest common law tribunal, sitting and acting, not in a ministerial, but in a judicial capacity, are made responsible in actions by private suitors for the exercise of their discretion according to their judgment in term time.—5 *John. Rep.*, 282; 6 *ibid.*, 337.

If the (sheriff or other) person to whom the writ is directed



shall not promptly obey the writ by making a full and explicit return, and shall fail to produce the party without a sufficient excuse, he is liable forthwith to be attached and committed by the person granting the writ, to close custody until he shall have obeyed the writ. (2 R. S., 2d ed., 469, § 36.) The former statute instead of this summary remedy gave a penalty to the party aggrieved recoverable by suit.

The party suing out the writ is to be remanded if detained: 1. By process from any court of the United States having exclusive jurisdiction: or, 2. By virtue of a final decree or judgment, or process thereon of any competent court of civil or criminal jurisdiction: or, 3. For any contempt specially and plainly charged by some court or person having authority to commit on such charge, and the time for which the party may be legally detained has not expired. (2 *Ibid*, § 42.) If the party be in custody by civil process from a competent power, he may be discharged when the jurisdiction has been exceeded, or the party has become entitled to his discharge, or the process was unduly issued, or was not legally authorized. (*Ibid*, 470, § 43.) But no inquiry is to be made into the legality of any process, judgment, or decree, in the case of persons detained under process of the United States, where the court or officer has exclusive jurisdiction, nor where the party is detained under the final decree or judgment of a competent court, nor where the commitment is for a contempt made by any court, or officer, or body, according to law, and duly charged. (*Ibid*, § 44.) The court or officer awarding the writ may, in other cases, examine into the merits of the commitment, and hear the allegations and proofs arising thereon in a summary way, and dispose of the party as justice may require. A person discharged upon habeas corpus is not to be imprisoned again for the same cause; but it is not to be deemed the same cause, if he afterwards be committed for the same cause by the legal order of the court in which he was bound to appear, or in which he may be indicted and convicted, or if the discharge was for a defect of proof, or defect in the commitment in a criminal case, and he be again arrested on sufficient proof and legal process; or if in a civil

case, or discharge on mesne process he be arrested on execution, or on a mesne process in another suit after the first suit is discontinued. (2 *Ibid*, § 62, 66.) And finally, if any person solely, or as a member of any court, in execution of any order, knowingly re-imprison such party, he forfeits a penalty of \$1250, to the party aggrieved, and is to be deemed guilty of a misdemeanor and is liable to fine and imprisonment. (2 *Ibid*, § 62, 66.) This last provision is distinguished from any former statute on the subject by applying the penal sanction to the members of any court acting judicially, and by making the act of re-imprisonment an indictable offence.

The revised statutes have made particular provision for the issuing of the writ of habeas corpus in the following case, and in which exclusive jurisdiction appears to be given to the supreme court in granting or allowing the writ.

When any husband and wife shall live in a state of separation without being divorced, and shall have a minor child, or children of the marriage, the wife if she be an inhabitant of this state, may apply to the supreme court for a habeas corpus to have such minor child brought before it.—2 R. S. 2d ed., 82, § 1.

On the return of such writ, the court on due consideration may award the charge and custody of the child, so brought before it to the mother, for such time, under such regulations and restrictions, and with such provisions and directions as the case may require.—*Ibid*, § 2.

At any time after the making of such order the supreme court may annul, vary, and modify the same.—*Ibid*, § 3.

In a late case, *The People ex. el. J. Nickerson, vs. ———*, (19 *Wendell*, 16,) and in which these sections of the statute were particularly adverted to, the court entered into a close investigation of the right of the father to the custody of his minor child, and appear to have examined the principles of all the law relating to the subject. It was a habeas corpus in the case of a minor child on the question of its custody, as between the parents. The mother in this case had withdrawn herself from the protection of her husband, and went to reside in the house of her father, and

took with her an infant child; to obtain the custody of which the father sued out a habeas corpus. On the return of the writ numerous affidavits were produced on both sides, and after hearing counsel, the following opinion of the court was delivered by Nelson, C. J.

The father is the natural guardian of his infant children, and in the absence of good and sufficient reasons shewn to the court, such as ill usage, grossly immoral principles or habits, want of ability, &c. is entitled to their custody, care and education. All the authorities concur on this point.—1 *Strange*, 579; *Ld. Raym.*, 1334; *Burr.*, 1436; 5 *East*, 221; 10 *Vesey*, 51; 12 *Ibid*, 492; 8, *John. Rep.* 328; 2 *Kent's Com.* 220, 194.

Many of the cases are very strong and decisive in vindication of this paternal authority. In the *King vs. De Manneville*, (5 *East*, 221,) the child was only eight months old, and had been forcibly taken from the mother, and there was some ground of apprehension that the father intended to carry it out of the kingdom. But the court refused to interfere. Lord Ellenborough observed that the father was the person entitled by law to the custody of his child; that if he abused the right to the detriment of the child the court would protect it. Having the legal right and not having abused it in that case, he was entitled to have it restored to him. The case of *Mr. Lytton and Sir W. Murray*, referred to by *Lawrence, J.*, in the same case were equally decisive upon the point. In the case of *De Manneville*, the mother had separated from her husband on an allegation of ill usage, and taken the child with her. This same case afterwards came before Lord Eldon, (10 *Vesey*, 51.) who also refused the mother the custody of the child, as she had withdrawn herself from the protection of her husband; but restrained him from removing the child out of the kingdom. In the case *ex parte Skinner*, (*J. B. Moore*, 278,) the infant was six years old, and the court refused to take it from the custody of the father and deliver it over to the mother, and placed the refusal upon the authorities above cited. In *Ball vs. Ball*, (2 *Simon*, 35,) it was decided by the vice chancellor that the court had no jurisdiction to deprive the father of his common

law right to the care and custody of his infant children, even though he was living in a state of adultery, unless he brings the child in contact with the woman. All the cases on the subject he said proceeded upon that distinction, and which appears to have been conceded by the counsel for the mother. In the great case of *Wellesley vs. the Duke of Beaufort*, (2 *Russell*, 9,) Lord Eldon, in vindicating the power of the court of chancery, to control the authority of the father over his infant children, concedes that the law makes the father the guardian of his children by nature and by nurture; and places the right of the court to interfere upon the abuse of the trust or special interest of the child. The same ground is stated in *Lyons vs. Bleckin*. (*Jacob*, 245; 4 *Cond. Ch. Rep.*, 120.) So fully does the law recognize the authority of the father on this subject, that he is permitted to perpetuate it beyond his own life; for he may by will or deed, duly executed, dispose of the custody and tuition of such (his) child, during its minority, or for any less time, to any person in possession or remainder. (2 *R. S. 2d ed.*, 83, § 1.) And by the following section such a disposition is declared "valid and effectual against every person claiming the custody or tuition of such minor as guardian in socage or otherwise."

In one specified case, the Revised Statutes have enlarged the power of this court over the subject beyond what appears from the above authorities to have existed at common law; and provide that on the application of the mother, being an inhabitant of this state, in case the husband and wife live in a state of separation without being divorced, "the court on due consideration may award the charge and custody of the child so brought before it, (on habeas corpus,) to the mother for such time, under such regulations and restrictions, and with such provisions and directions as the case may require." (2 *Ibid*, 82, § 1, 2.) It may also annul or modify the order at any time after it is made. (*Ibid*, § 3.) It may well be doubted, I think, whether this statute was intended to apply when the wife withdraws from the protection of the husband, and lives separate from him without any reasonable excuse; because then the separation would be unauthorized,

and in violation of the law of the land. It was probably designed to remove the difficulty that existed at common law in denying or restraining the authority of the father in the case of an authorized separation, such as for ill usage, or by consent where no ground existed for impeaching that authority upon common law principles. The legislature could not have intended that the court should ever award to the mother the care and education of her minor children when she had wilfully and without pretence of excuse abandoned her family and the protection of her husband, if he was in a situation to take care of them, and no well founded objection existed in the case.

The interference of the court with the relation of the father and child, by withdrawing the latter from the natural affection, kindness and obligations of the former, is a delicate and strong measure; and the power should never be exerted except for the most sound and solid reasons. In this country, the hopes of the child in respect to its education and future advancement, is mainly dependent on the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this relation would not only tend to wither these motives to action, but necessarily in time, alienate the father's natural affections; and if property should be accumulated, the child, under such circumstances, could hardly expect to inherit it.

In another still later case, *Barry v. Mercein*, (3 *Hill R.*, 339,) where the wife had voluntarily left her husband and was residing with her father, the court ordered the child delivered to its father; *Nelson, C. J.* dissenting. This order was subsequently reversed by the court of errors, and the child left in the care of the mother. The like order was made by the chancellor, (8 *Paige*, 47,) giving the custody of the child to the mother; and also in still another and earlier application (25 *Wend.*, 64) the court of errors made the like decision. The tender age of the child was the main point, though other facts and circumstances may have very materially influenced the decisions.

Where a habeas corpus is under this statute sued out on the

application of a mother, in respect to the care and custody of the minor children, on the coming in of the return, denials of material facts set forth in the return, and new allegations in support of the application will be received, provided the same be made under oath; but in such case the father will be allowed to give further evidence on his part. And in cases of this kind, in the exercise of its discretion, the wishes of the children will be consulted by the court.—18 *Wend.*, 637.

This is the substance of the efficacious remedy against the abuse of the right of personal liberty, afforded by the celebrated writ of habeas corpus. By the specific provisions which we have considered, the remedy for all unjust detention is distinctly marked, and even in cases of valid imprisonment, care is taken that it be not unreasonably or unnecessarily protracted. Persons confined upon any criminal charge are to be discharged within twenty-four hours after the discharge of a grand jury of the county, and who shall not have been indicted, unless satisfactory cause can be shewn for the delay. (2 *R. S.*, 2d ed., 635, § 26.) And persons indicted are to be tried at the next court after such indictment found, or they will be entitled to be discharged unless the trial was postponed at their instance, or satisfactory cause shewn by the public prosecutor for delay. (2 *Ibid.*, § 28, 29, 30.) If there be good reason to believe that any person illegally confined will be carried out of the state before he can be relieved by habeas corpus, the court or officer authorized to issue the writ may by warrant cause the prisoner and the party detaining him forthwith to be brought up for examination, and to be dealt with according to law.—2 *R. S.*, 2d ed., 473, § 65, 66, 67.

The habeas corpus act has always been considered in England as a stable bulwark of their civil liberty, and nothing similar to it can be found in any of the free commonwealths of antiquity. Its excellence consists in the easy, prompt and efficient remedy afforded from all unlawful imprisonment, and personal liberty is not left to rest for its security upon general and abstract declarations of right.

What we have already said on this subject applies peculiarly

to the writ of *habeas corpus ad subjiciendum*,* distinguished by its paramount importance as the habeas corpus, and which issues for the purpose of an inquiry into the causes of imprisonment or detention ; but there is another kind of habeas corpus which will also fall within the limits of this chapter, and is known as the *habeas corpus ad testificandum*. The duties of the sheriff are the same in both.

The writ of habeas corpus *ad testificandum* is allowed by any court of record upon the application of any party to any suit or proceeding, civil or criminal, pending in any such court for the purpose of bringing before said court any prisoner who may be detained in any jail or prison within this state, for any cause excepting a sentence for a felony, to be examined as a witness in such suit or proceeding in behalf of the party making such application. (2 *Ibid*, 462, §1.) The chancellor, or any justice of the supreme court, or an officer authorized to perform the duties of a judge at chambers, upon the like application of any party to any suit or proceeding pending in a court of record, or pending before any officer or body who may be authorized to examine such witness in any suit or proceeding, or upon the application of any party to a suit before a justice of the peace, when the prisoner or person wanted as a witness is confined in any jail of the same county, or in the county next adjoining where such justice may reside, in order that he may be examined as such witness.—2 *R. S.*, 2d ed., 452, § 3, 4.

The application must be verified by an affidavit and must state: 1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired, and 2. That the testimony of such prisoner is material and necessary to such party, as he is advised by counsel and verily believes. If the application be made by the attorney-general or district attorney, it shall not be necessary to swear to such advice or counsel.—*Ibid*, § 2.

* The whole doctrine on this subject is laid down by *Mr. Hill*, in his Reports, vol. 3, p. 647.

We will now endeavor to ascertain the duty of the sheriff upon each of the above writs.

The writ of habeas corpus can only be served by an elector of some county in this state; and the service shall not be complete unless the party serving the same shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, coroner, constable or marshal, the fees allowed by law for bringing up such prisoner, nor unless he shall also give a bond to such sheriff, coroner, constable or marshal, as the case may be, in a penalty double the amount of the sum for which such person may be detained, if he be detained for any specific sum of money, and if not, then in the penalty of one thousand dollars; conditioned that such person will pay the charges of carrying back such prisoner, if he be remanded, and that such person will not escape by the way either in going to or returning from the place to which he is taken. But this section does not apply where the writ is sued out by the attorney-general or district attorney.—*Ibid*, 475, § 80, 81.

Every writ of habeas corpus may be served by delivering the same to the person to whom it is directed; if he cannot be found it may be served by leaving the same at the jail or other place in which the prisoner is confined with any under officer or other person of proper age having charge for the time of such prisoner.—*Ibid*, 476, § 82.

If the person upon whom the writ ought to be served, conceal himself, or refuse admittance to the party attempting to serve the writ, it may be served by affixing the same in some conspicuous place on the outside either of his dwelling house, or of the place where the party is confined.—*Ibid*, § 83.

It shall be the duty of every sheriff, coroner, constable or marshal upon whom a writ of habeas corpus shall be served, whether such writ be directed to him or not, upon payment or tender of the charges allowed him by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof. And it shall be the duty of every other person upon whom such writ shall be served, having the

custody of the individual for whose benefit the writ shall be issued to obey and execute such writ according to the command thereof, without requiring any bond or the payment of any charges, unless the payment of such charges shall have been required by the officer issuing such writ.—*Ibid*, § 84.

If the writ be returnable at a certain day, such return shall be made, and such prisoner shall be produced at the time and place specified therein; if it be returnable forthwith, and the place be within twenty miles of the place of service, such return shall be made, and such prisoner shall be produced within twenty-four hours; and the like time shall be allowed for every additional twenty miles.—*Ibid*, § 87.

If the person having the custody of the prisoner be designated either by his name of office, if he have any, or by his own name; or if both names be unknown or uncertain, he may be described by an assumed appellation; and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name or description, or to another person. If the person who is directed to be produced, be designated by name, or if his name be uncertain or unknown, he may be described in any other way, so as to designate the person intended.—*Ibid*, 468, § 31.

If a writ of habeas corpus be issued, the person or officer on whom it shall have been served, shall also bring the body of the person in his custody, according to the command of such writ; except in the case of the sickness of such person, as is provided by a subsequent section of the statute.—*Ibid*, § 35.

If the sheriff or other officer to whom the writ is directed, or on whom it is served, do not promptly and immediately obey the writ by making a full and explicit return, and shall fail to produce the party, without a sufficient excuse, he is liable to be forthwith attached and committed to close custody in the jail, where the court or officer allowing the writ may be, without being allowed the liberties of the jail, until he shall make return to such writ, and comply with any order that may be made by such court or officer in relation to the person for whose relief the writ shall have been issued.—*Ibid*, 469, § 36.

The court or officer by whom any such attachment may be issued, may also, at the same time, or afterwards, issue a precept to the same sheriff or other person to whom such attachment shall have been directed, commanding him forthwith to bring before such court or officer the party for whose benefit the writ of habeas corpus has been allowed, and such person shall thereafter remain in the custody of such sheriff or person, until he shall be discharged, bailed, or remanded, as such court or officer shall direct.—*Ibid*, 469, § 38.

The return to the habeas corpus made by the sheriff must state plainly and unequivocally :

Whether he have, or have not, the party in his custody, or under his power or restraint :

If he have the party in his custody or power, or under his constraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large :

If the party be detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return ; and the original shall be produced and exhibited on the return of the writ to the court or officer before whom the same is returnable.

If the person upon whom the writ is served shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause, and by what authority such transfer took place.

The return must be signed by the person making the same ; except where such person is a sworn public officer, and shall make his return in his official capacity, it shall be verified by his oath.—*Ibid*, 468, § 34.

In case the party named in the writ cannot be produced by the officer, in consequence of his being infirm or sick, the officer or person must state such to be the fact in his return to the writ, and must verify the same by his oath.—*Ibid*, 471, § 51.

The sheriff, if he is impeded or prevented by any force from

executing the writ, may call to his aid the power of the county, as in other cases of resistance to his authority.—*Ibid*, 469, § 39.

If the sheriff, for the purpose of eluding the service of the writ, or to avoid the same, shall transfer the prisoner from his custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, he shall be guilty of a misdemeanor. (*Ibid*, 473, § 64.) This is in cases where the prisoner is only entitled to the writ. And the next section imposes the like penalty for the like acts after the writ has been actually issued.

If the sheriff refuses to deliver a copy of any order, warrant, process, or authority, by which he detains any person, to any one who shall demand such copy, and tender the fees of making the same, he shall forfeit the sum of two hundred dollars to the person so detained.—*Ibid*, 475, § 74.

The provisions of the common law in regard to the writ of habeas corpus are abrogated, except so much and such parts thereof as are necessary to carry into full effect the provisions of the statute upon that subject.—*Ibid*, § 75.

The omission of the words, *to testify*, in a habeas corpus ad testificandum, is not material. So though it do not specify a place of return within the county, as at the office of the first judge—for this is to be intended. And the alteration of the writ after it is executed, without the knowledge or privity of the sheriff, will not deprive him of the right to give it in evidence for his justification, though such alteration be made by the deputy who executed it. If a habeas corpus ad testificandum be issued by an officer of competent authority, and be not void on its face, the sheriff is bound to obey it.—5 *Cowen*, 176.

It is said in general, that upon the return of the habeas corpus the cause of the imprisonment ought to appear as specifically to the court or judge before whom it is returned, as it did to the court or person authorized to commit. For if the commitment be against law, as being made by one who had no jurisdiction, or for a matter for which by law no man ought to be punished, the court are to discharge him, and therefore the certainty of the commitment

ought to appear ; and the commitment is liable to the same objection when the cause is so loosely set forth, that the court cannot adjudge whether it were reasonable ground of imprisonment or not.—1 *Vaugh.*, 137 ; *Doug.*, 159 ; 5 *Term Rep.*, 89.

The above, with the statutory provisions, contain, we believe, a full and comprehensive view of the duties of the sheriff in executing this important writ, and a correct exposition of the law upon the subject. The officer will be enabled at once to discover what is required of him in regard to this part of his official duty, and to avoid incurring any penalty by omissions.

CHAPTER X.

Writ of Replevin.

The action of replevin, say the revisers in their notes, in many cases, one of the most useful known to our law, is at the same time one of the most difficult and perplexing. The object of the revised statutes, therefore, was to simplify the practice, and to prevent unnecessary and vexatious expenses and delay. This in a great measure has been accomplished. The action has also been so extended, as to make it a substitute for detinue, and a concurrent remedy, in all cases of the unlawful caption or detention of personal property, with trespass and trover. In order to remedy the numerous defects found in the then existing practice, and to carry out the new principles introduced in the action, it became necessary to make express provision for most of the proceedings in the cause.—3 R. S., 767.

The sheriff is so important an actor in replevin, and so materially interested in some of the proceedings of the suit, that a short view of the general objects of the action itself, becomes necessary and proper, if not useful. The sheriff not only executes the process in the action but a part of the business transacted applies to his discretion.

At common law, the action of replevin lay to recover goods which had been tortiously taken, together with damages for their detention, and was confined to cases where trespass would have been sustainable on account of the tortiousness of the original

taking. (7 *John. Rep.*, 140; 17 *ibid.*, 116; 10 *ibid.*, 369.) Where the taking was lawful and the subsequent conversion alone formed the ground of the action, detinue was the only remedy by which the articles, in specie, could be recovered. They were both possessory actions, the former, however, being governed by the principles applicable to trespass, *de bonis asportatis*, and the latter by those applicable to trover. The action of detinue has however been abolished, (2 *R. S.*, 2d ed., 456, § 15,) and that of replevin has been extended to all cases where goods or chattels have been wrongfully taken or detained, as well as to all cases where executors, or persons suing in autre droit are authorized to maintain trespass.—2 *Ibid.*, 430, § 12; *Grah. Pra.*, 85.

The statute by giving the action of replevin when the goods are wrongfully detained, has altered the law, as it was considered in this state, before the revision. In the case of *Gardner v. Campbell*, (15 *John. Rep.*, 402,) it was decided that when the original possession of the defendant was lawful, but the subsequent detention was illegal, that replevin would not lie. In discussing this question under the former law, the court say that, were they then for the first time, in the case at bar to give a construction to the old statute, (1 *R. L.*, 91,) they should decide that replevin could be sustained for the illegal detention of goods, where the defendant's possession was originally lawful. But they were governed by the case above mentioned, of *Gardner v. Campbell*, and decided this point agreeably to the law then established.—1 *Wendell*, 114.

But in Massachusetts, the rule has ever been the same as the revised statutes have established it. The point was distinctly presented to the court in the case of *Baker v. Fales*, (16 *Mass. Rep.*, 147,) and it was decided that where the original taking was lawful, but the subsequent detention contrary to law, replevin could be sustained.

But replevin will not lie for property taken by virtue of a warrant for the collection of a tax, assessment or fine in pursuance of any statute of the state. (2 *R. S.*, 2d ed., 430, § 4.) Nor will it lie at the suit of a defendant in an execution or attachment to recover

goods or chattels seized by virtue thereof, unless such goods or chattels are exempted by law from such execution or attachment; and it will not lie for such goods or chattels at the suit of any other person, unless he has at the time a right to reduce into his possession the goods taken.—2 *Ibid*, § 5.

This last section is an enactment of the common law principle as it stood before the revision. It has always been understood that when goods were in the custody of the law, that is, held by virtue of any regular legal process, they could not be replevied from the officer. This doctrine was established in the case of *Clark v. Skinner*; (20 *John. Rep.*, 467,) and the case itself affords a clear explanation of the meaning of the above provision of the statute, and of the principle as it then stood at common law. The judge who then delivered the opinion of the court, said:—By goods taken in execution, I understand goods *rightfully taken* in obedience to the writ; but if through design or mistake the officer take goods which are not the property of the defendant in the execution he is a trespasser, and such goods were never taken in execution in the true sense of the rule laid down by Baron Comyn. (6 *Comyn Dig. Replevin*, D.) Creditors who have not indemnified the officer, have no right to complain of the delay of a replevin, and as regards the interest of creditors who indemnify no greater inconvenience can result from the action of replevin than from a suit in trespass against the officer who levies.

The loose *dicta*, and apparent contradiction and confusion of ideas, in many of the reported cases on this point, have arisen from the want of precision of language, or the misapplication of the phrase that “goods cannot be taken from the custody of the law.” Sir Edward Coke says, “a replevin lies where goods are distrained,” thus giving an example for a definition, and even the learned and discriminating Sir William Blackstone was led into the error that, replevin lies “only in the instance of an unlawful taking, that of wrongful distress.” (3 *Black Com.*, 146.) Baron Gilbert says, a replevin is a judicial writ to the sheriff, complaining of an unjust taking and detention of goods and chattels.

(*Gilb. Rep.*, 58.) In *Baker v. Fales*, (16 *Mass. Rep.*, 147,) it was held that replevin lies for a wrongful detention of goods, although the original taking was justifiable. In *Shannon v. Shannon*, (1 *Sch. & Lef.*, 324) Lord Rosendale holds that there must be an unlawful taking from the possession of the plaintiff to maintain a replevin. But the question is, what is meant by possession in such a case? I understand by it, not the actual but the constructive possession of the owner; and by a constructive possession I mean the right to reduce the chattels to immediate possession. If the plaintiff in replevin shows a possession in himself or his bailiff, the law then casts the *onus probandi*, or weight of proof, upon the defendant as to the property. In the case of *Thompson v. Button*, Chief Justice Thompson said, "as a general principle, it is undoubtedly true that goods taken in execution are in the custody of the law; and it would be repugnant to sound principles to permit them to be taken out of such custody, when an officer has found them in, and taken them out of the possession of the defendant in the execution." But in that case the goods were taken while in the possession of the plaintiff in replevin, who was not defendant in the execution, and the general rule as laid down by the Chief Justice, had no necessary application to that case. In the case of *Gardner v. Campbell*, (15 *John. Rep.*,) this court recognized the rule as laid down in *Thompson v. Button*, and gave it its proper application; that is, to a case where the defendant in the execution brought replevin against the officer, and it was held not to lie. In *Thompson v. Button*, (14, *J. R.* 86,) Ch. J. Thompson also remarks, that "the utmost extent to which the case of *Pangburn v. Partridge* (7 *John. Rep.*, 140,) can be carried, is to permit replevin to lie where an action of trespass might be brought." That is precisely the extent to which the ancient authorities sanction the doctrine.

The general rule was, that the plaintiff in replevin must have a general or special property in him at the time of the unlawful taking of which he complains; that is, he must have either the actual possession, or the right of reducing it to his actual possession at the time of the wrongful taking. Sir Edward Coke says, "it

is a general rule that the plaintiff must have the property of the goods in him at the time of the taking. But yet if the goods of the villein be distrained, the lord of the villein shall have a replevy; because the bringing of the replevy amounts to a claim in law; and vests the property in the plaintiff." (*Co. Lit.*, 145, b.) Bacon says "not only a general property which every owner has, but also a special property, such as a person has who has goods pledged to him, &c., is sufficient to maintain a replevin; and in such like cases either party may bring replevin. (*Bac. Abr.*, tit. *Replevin*, F.) The same is again said in the case of *Clark v. Skinner*, above cited.

In the case now before us, the plaintiff in replevin, had not a general and absolute property in the goods at the time of the seizure, but in my judgment he had not even parted with the actual possession of them. The testimony of *John Clark*, the only witness upon that point is, that at the time of levy and seizure by *Skinner*, he (the witness came to Waterloo, on business for his son, (the plaintiff,) and had the plaintiff's horse, cutter and harness; and drove them under a shed, and went to *Mr. Slack's* for boot binding for his son, the plaintiff; and while so under the shed the defendant seized the horse, &c., under the execution against *John Clark*." There was no lending, no letting for hire, nor any kind of bailment of the chattels to *John Clark*. He was not only in use of the plaintiff's property, but he was using it in the business and employment of the plaintiff, at the time of the levy. Suppose a *fi. fa.*, against a labourer, who is employed by me to plough my land with my horses, or against a stage driver on the highway; can it be contended, that the horses at the plough, or with the post coach on the highway, are not in the actual possession of the proprietors? Or if entrusting a chattel to a servant to be used in the business and employment of the owner, be in any sense a bailment, can the doctrine be endured, that it cannot be replevied by the owner if taken on an execution against the servant whilst so using it?

If goods be taken on a *fi. fa.*, as the property of the defendant named in the execution, and the writ is from a court of competent

jurisdiction, and not void for any defects on its face, the officer, as against such defendant, is never a trespasser nor a wrong doer. As to such defendant, the property is in the custody of the law, and he is concluded by the judgment against him. To allow *him* to question the validity of the seizure in an action of replevin, would indeed, be against public policy; for it would be moving in a circle, and the creditor would never receive the fruits of his execution. But such reasoning has no application to the rights of a stranger whose property has been wrongfully taken on an execution against another person.

And in every adjudged case that I have found, when it was held that goods taken in execution, or goods in the custody of the law could not be replevied, that doctrine has been applied to cases where the defendant in the execution was plaintiff in the replevin, and to none other.—20 *John. Rep.*, 467.

The same doctrine has been held in a late case by the supreme court of this state, (2 *Wendell*, 280,) upon the principle of the case above cited. The court say: The plaintiff having the property in the goods in question, had the constructive possession: for the property draws the possession.

The following decision has been made upon that part of the statute which provides "that no replevin will lie for any property taken by virtue of any tax, assessment or fine in pursuance of any statute of this state." (*See Appendix.*)

Motion for a mandamus. *Groat*, as president of a court-martial issued a warrant directing the collection of a military fine of four dollars, from *H. Hammond*, a member of the society called *Shakers*. The warrant was executed by *Enos*, a constable, by levying upon property belonging to the society of Shakers, and two of its members caused the property to be replevied by plaint returnable in the Albany common pleas. *Groat* and *Enos* being made defendants in the replevin, moved the court to set aside the plaint, which they refused on the ground that it was not shewn that *Hammond* had been summoned to appear before the court-martial to shew cause against the fine.

By the court, *Savage*, Chief Justice. The revised statutes pro-

vide that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this state. The common pleas supposed that they had the right upon the motion before them to inquire into the regularity of the proceedings of the court-martial, which I apprehend is a mistake. If it appears upon the face of the warrant in the possession of the officer that he is authorised to collect any tax, assessment or fine, replevin is not the proper remedy to correct his mistakes or trespasses. The warrant upon the face of it authorised the officer to take the property of *Hammond*; it refers to and purports to be in pursuance of a statute of this state. The officer took property belonging to the society of which *Hammond* was a member; whether he had a right to take it or not, is not to be inquired into on this motion, nor in this action. The legislature have thought proper to say, that replevin shall not be brought in such a case; any other appropriate remedy may be resorted to. The same provision is found in the revised laws of 1813, (2 *Rev. Laws*, 95, § 12,) and also in the revision of 1801. (2 *Kent & Radcliff*, 102, § 12.) The object of the legislature was no doubt to prevent delay in collecting taxes, assessments, and fines; and if any error or irregularity occurs in the proceeding, the party complaining must adopt some other form of action. A peremptory mandamus is granted.—7 *Wendell*, 485.

And although, by the Revised Statutes, the action of detinue is abolished, and the remedy by replevin so extended as to include cases of the wrongful detention, as well as wrongful taking of goods; yet the distinction between taking and detention must be kept up both in the writ and declaration. Therefore where an officer by virtue of an execution levies upon personal property which has been mortgaged, but which remains in the possession of the mortgagor, the money not having become due, and replevin is brought against him for asserting his claim under such levy, and refusing to surrender the property after the mortgage money has become due, the plaintiff must declare for the detention, and not for the taking of the property.—17 *Wend.*, 53; 19 *ibid.*, 498; 23 *ibid.*, 372.

The above authorities having sufficiently explained the nature of the action, we will now attend to the sheriff's duties in the execution of the writ or replevin. The Revised Statutes, whilst they have enlarged the benefits of the action of replevin, have stripped it of most of the technicalities by which it was surrounded by common law, and greatly simplified the proceeding by which it is to be enforced. In further treating the subject therefore, we are necessarily confined to the proceedings as pointed out by statute.

Actions of replevin must, in all cases, be commenced by writ, which shall be issued out of the court in which it shall be made returnable, and shall be substantially as follows :

The people, &c., to the sheriff, &c.,

Whereas, A B complains that C D has taken and does unjustly detain [or does unjustly detain, as the case may be] one horse, one cow, and five sheep, [or one ore silver tankard, one mahogany table, and six chairs, &c., particularly describing the goods and chattels to be replevied,] therefore, we command you, that if the said A B shall give you security as required by law, to prosecute his said complaint, and to return the aforesaid goods and chattels, if return thereof shall be adjudged, and to pay all such sums of money as may be recovered against him hereupon, that you cause the same goods and chattels to be replevied and delivered to the said A B without delay ; and also that you summon the said C D to appear before our justices of the supreme court of judicature at the Capitol, in the city of Albany, [or before the judges of the court of common pleas, &c.,] on the — day of — next, [some day on which writs in personal actions may be made returnable,] to answer the said A B in the premises. And in case you cannot find the aforesaid goods and chattels within your county so as to replevy the same as you are above commanded, then we do further command you that you take the body of the said C D, and that you have him before our said justices, (or the said judges,) at the place and on the day above mentioned, to answer the said A B in the premises. Witness, &c. (2 *R. S.*, 2d ed., 430, § 6.) The writ must describe the property also

with reasonable certainty, so that the sheriff may know what he is bound to deliver. And where a writ was sued out for about four hundred tons of bog ore, it was held that the sheriff was not bound to deliver seven hundred and twenty tons, and that the sheriff would have been justifiable in refusing to execute a writ thus vaguely describing the property. Where, however, the sheriff did execute such a writ, and deliver to the plaintiff seven hundred and twenty tons of ore, and the defendants obtained judgment of return, and executed a writ of inquiry to assess the value of the property and damages for detention, it was held that it was competent for the plaintiff to show in mitigation, that shortly after the delivery of the property to him, the defendants re-possessed themselves of the greater part thereof. (13 *Wendell*, 496.) The writ must be directed, tested, sealed, and made returnable as in ordinary actions.

The writ cannot, however, be executed in any case, unless the following provisions are complied with :

1. An affidavit must be made by the plaintiff in the action, or by some one in his behalf, stating that the plaintiff in such action is the owner of the property described in the writ, or that he is then lawfully entitled to the possession of the same, and that the same has not been taken for any tax, assessment or fine, levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of such plaintiff, liable to execution. The affidavit must be sworn to before some proper officer, and must be annexed or delivered with the writ. (Such affidavit cannot be taken before the sheriff or coroner, but it must be before a person duly authorized to administer oaths, such as any judge of any court of record, any circuit judge, supreme court commissioner, commissioner of deeds, or clerk of any court of record.)—2 *R. S.*, 2d ed., 213, § 50.

2. The plaintiff in the action, or some one in his behalf, shall execute a bond to the sheriff, or other officer to whom the writ is directed, with the addition of his name of office, with sufficient sureties to be approved by such sheriff, in a penalty at least double the value of the property specified in the writ, which va-

due shall be ascertained by the oath of one or more disinterested witnesses to be sworn and examined by the sheriff. Such bond shall be conditioned that the plaintiff will prosecute the suit to effect, and without delay, and that if the defendant recover judgment against him in the action, he will return the same property, if return thereof be adjudged, and will pay to the defendant all such sums of money as may be recovered against him by such defendant in the said action, for any cause whatever. (2 R. S., 2d ed., 430, § 7.) The first subdivision of this section of the statute is new, and was intended to prevent the improper use which was sometimes made of the writ, and to justify the arrest of the defendant. The second subdivision is intended as a substitute for the two bonds prescribed by the then existing statute. To produce uniformity in the practice, and to guard the rights of persons in possession of property, the bond is required as an indispensable pre-requisite in all cases, and the condition is made the same in all. The condition of the bond is also considerably extended from what it was formerly, so as to make it a security not only for the return of the goods, but for damages and costs, and also for the value of the goods, or the amount of the rent in arrear, where the defendant elects to take judgment in that way, under the provisions contained in a subsequent part of the title. This extension of the bond was considered perfectly just, as the damages and costs may often much exceed the value of the property. (See *Revisers' notes*, 3 R. S., 769.) Under this provision it was in one case held that the sheriff may accept a replevin bond with only one surety at his peril. (16 *Wendell*, 547.) The decision in this case, however, was subsequently reviewed by the Chief Justice in the case of *Smith & Herrick, v. McFall & McMellen*, (18 *id.*, 521,) in which a motion was made to quash a writ of replevin, on the ground among others that the sheriff had taken a bond with only one surety; and the Chief Justice held that it was the duty of the sheriff to require at least two sureties, and granted the motion to quash the writ unless the plaintiff within thirty days filed a new bond with at least two sureties, who should justify, &c., observing that the case of *Kesler v. Hayes* (6 *Ibid.*,

547) was decided, principally on the ground that there the motion was to set aside a default, and on such a motion, after a party had slept upon his rights, the court refused to quash the writ. This decision has been confirmed by the subsequent decisions in *Hawley v. Bates*, (19 *Ibid*, 632,) and in *Whaling v. Shales*. (20 *Ibid*, 673.) So that it is now well settled that the sheriff cannot take less than two sureties in the bond. And where there is but one surety the defendant may move to set aside the proceedings, and is not bound to except. (*Ibid*, 674.) But where a replevin bond is imperfect in itself, and executed with but one surety, it will be amended after service of the writ upon payment of the costs of motion to set aside the proceedings; and by filing a new bond with sureties and the sureties justifying. (19 *Ibid*, 632; 20 *ibid*, 673.) If the sheriff wholly omit to take sureties, he is still liable as at common law, but then the omission should be directly and distinctly alledged; if the declaration in this respect be equivocal, it will be adjudged defective. (19 *Ibid*, 531.) And in justifying the taking of property by a sheriff under a writ of replevin, it must be averred that a bond for the return of the property was delivered with the writ to the sheriff; it is an indispensable pre-requisite in all cases to the execution of the writ; (19 *Wendell*, 283; 12 *ibid*, 294;) it is no longer optional with the sheriff to dispense with a bond.—18 *Wendell*, 581.

Upon receipt of the writ and of the affidavit and bond above required, the sheriff shall forthwith proceed to execute the writ by delivering possession of the property named therein to the plaintiff or his authorized agent, and by summoning the defendant according to the tenor of the writ. (2 *R. S. 2d ed.*, 431, § 8.) And after the writ is executed by delivering the goods to the defendant, he never can recover their possession except upon a judgment in that case; and a writ of replevin issued by a defendant to obtain a redelivery of the property taken from him by virtue of a writ of replevin issued against him, is irregular, and will be superseded with costs, if the motion be made before the return of the writ, or set aside if after the return. (5 *Wend.*, 71.) And a defendant in replevin, who puts in a claim of property, and

agrees that his possession shall be considered the possession of the sheriff until the claim be tried, is estopped from denying the sheriff's possession; and on demand and refusal to deliver up the property, may be proceeded against by action of replevin. (23 *W. R.*, 289.) And the sheriff is entitled to recover the full value of the property. The action is for the benefit of the plaintiff in the first suit, who has given a bond for its return, and upon which he stands liable for the value, in case he fail in his action, although there has been no deliverance of it to him.

The summons must be served on the defendant by delivering to him personally, if he can be found, a brief note in writing signed by the officer serving the same, and stating the name of the plaintiff in the writ, and his attorney, if the writ be prosecuted by one, the court from which it issued, and the time when and place where the defendant is required to appear; but need not specify the property sought to be recovered; (4 *Hill*, 537;) if he cannot be found, it may be served by leaving at his usual place of abode, with his wife or with some person of proper age, a like note in writing. (2 *R. S.*, 2d ed., 431, § 9. This provision is new as to the mode of summoning the defendant. The ceremony of the former summoners was considered as unnecessarily expensive.—*Revisers' notes*, 3 *R. S.*, 769.

If the property to be replevied, or any part thereof, be secured or concealed in any dwelling house, or other building or inclosure, the officer shall publicly demand deliverance thereof, and if the same be not delivered by the defendant or some other person, he shall cause such house, building, or enclosure to be broken open, and shall make replevin according to the writ, and if necessary he shall take to his assistance the power of his county.—2 *Ibid.*, 2d ed., 431, § 10.

If the property described in the writ have been removed or concealed, so that the sheriff cannot make delivery thereof, he shall arrest the body of the defendant, and keep him in his custody as on a *capias ad respondendum* in a personal action, until he shall execute the bond prescribed in the next section, or be otherwise legally discharged. (*Ibid.*) The defendant shall be entitled

to be discharged from such arrest at any time before final judgment shall be had in the cause, upon executing to the officer who shall have made such arrest, with the addition of his name of office, a bond in a penalty of at least double the value of the property described in the writ, as such value shall have been ascertained by such officer, in the manner above prescribed, with such sureties as shall be approved by such officer, conditioned that such defendant shall abide the order and judgment of the court in such action, and that he will cause special bail to the action to be put in, if the same be required.—*Ibid*, 432, § 12.

Where a writ of replevin is sued out, and the whole of the property claimed be not found, so that deliverance may be made, the plaintiff is not bound to accept part, but may cause the defendant to be arrested. And if the plaintiff accept part, he may sue out an alias writ of replevin, followed by a pluries to obtain possession of the residue; but there must be no delay in the prosecution of the suit.—22 *Wendell*, 602.

According to the old mode of proceeding, where a return was made that part of the goods were eloiigned, the plaintiff might either take out the *capias in withernam* for other cattle, or proceed for damages for the part not found. This is agreeable to the forms as given in the books, and consistent with the general course of proceeding in the suit. Since we have dispensed with this writ, the latter is the only remedy left, and no difficulty is perceived in making it effectual. If only some of the goods are taken, and defendant is duly summoned to appear and defend the declaration is in the usual form for unjustly taking or detaining, as the case may be, the whole of the property which is specified therein. No change in this respect is necessary. The only variation from the ordinary mode of proceeding would be at the trial, and in the form of the record. If the plaintiff recover he is entitled, in addition to damages for unjustly taking or detaining the part replevied, to an assessment of the value of the property not found. For this purpose the plaintiff includes the whole in his declaration. (4 *Hill*, 57.) If the defendant succeed, he is entitled to a return only of the articles replevied, or an assess-

ment of the value thereof together with damages for the detention. In this way, the whole cause of action is disposed of in a single suit, consistently with the usual course of proceeding therein, and with perfect justice between the parties. If the plaintiff cannot find the whole of the property, he is not bound, however, to take any part of it, except at his election, but may proceed and take the body. Where a part of the property is taken on the first writ, an *alias* or *pluries* should not be required as essential to the regularity of the proceedings. If the plaintiff, to avoid delay, chooses to go on upon the return that the residue cannot be found I perceive no objection to the practice. The defendant cannot complain, as no injury can thereby result to him. Still the plaintiff is entitled to these several writs to obtain the possession of the whole of the goods, if practicable, but there should be no unnecessary delay; and should it intervene, the court will take measures to hasten the plaintiff. (22 *Wend.*, 602.) Thus where a year elapsed after the return of the first writ, by virtue of which deliverance was made of three-fourths of the property claimed, and no farther proceedings were had on the part of the plaintiffs, other than the mere suing out of an *alias* and *pluries* writs, on which nothing was done, it was held that third persons standing in the relation of assignees to the defendants might rule the plaintiff to declare and proceed to judgment of non pros, although special bail had not been filed.—*Ibid.*

If the defendant, or any other person who may be in possession of the goods and chattels specified in the writ, shall claim property therein or any part thereof, and shall pay to the sheriff his fees, and the fees of the jury for trying such claim, the sheriff shall take the goods described in the writ, and detain them in his custody, and shall forthwith summon a jury to appear before him, at such time and place as he shall specify, which time shall be within two days thereafter, to try the validity of such claim. (2 *R. S.*, 2d ed., 432, § 13.) The sheriff shall give notice to the parties, their agents, or attorneys, of the time and place at which such jury will appear; at which time he shall swear the jury and such proofs and allegations as the parties may produce shall be

submitted to them. (*Ibid*, § 14.) Process of subpoena may be issued under the seal of the court in which the action is pending, to compel the attendance of any witness before the sheriff and the jury, in the same manner, and with the like effect, as upon the execution of writs of inquiry in personal actions; and the sheriff shall have power to administer oaths to the witnesses produced.—*Ibid*.

If by their inquisition the jury find that the property in such goods and chattels, is not in the person claiming them, the sheriff shall forthwith make deliverance to the plaintiff in the replevin. (*Ibid*, § 16.) If the jury find that the property in such goods and chattels is in the person who shall have made such claim, the sheriff shall not deliver the same unless the plaintiff in such replevin, shall indemnify such sheriff to his satisfaction, for delivering the property claimed, and shall refund to such claimant the fees of the sheriff and jury, required to be paid by him as aforesaid; in which case the sheriff may deliver the said property to such plaintiff.—2 *R. S.*, 2d ed., 432 § 17.

Any sheriff or other officer to whom a writ of replevin may be delivered, who shall deliver to the plaintiff any goods and chattels, which shall have been claimed as above provided, with due notice of such claim, and before the same is inquired into and decided according to law, shall forfeit to the person making such claim two hundred and fifty dollars, besides being liable for all damages which such person may have sustained by such delivery; which damages may be recovered in the same action or in another suit, at the election of the party.—2 *Ibid*, 433, § 18.

Previous to the amendment of the statute relative to replevins, the sheriff, on a writ or plaint of replevin, had no right to take possession of the goods, where a claim of property was interposed, until after a trial of such claim on a writ *de proprietate probanda*; now he may do so, but he must within two days summon a jury to try the validity of such claim. When therefore the sheriff, on a plaint in replevin after a claim of property, and before trial of such claim, removed goods from the store of the defendant to an adjoining store belonging to other persons, it was held, notwith-

standing the removal, no deliverance having been made, that the claim was in season, and that on interposing it, the defendant was entitled to the possession of the property until the claim was tried and found against him, and that the sheriff was liable as a trespasser. (11 *Wendell*, 58.) It has been held also that a defendant in replevin may interpose a claim of property, in the thing of which deliverance is sought, although he be not the possessor thereof; it being well settled that a party having a special property in the thing, and in possession of the same, is equally with the general owner entitled to interpose such claim. The sheriff has no discretion whether he will or will not regard a claim of property made by the defendant in the replevin, or by the possessor; if the claim be made, he must desist from making deliverance until it be enquired into by a jury under a writ de proprietate probanda. A sheriff is not authorized to make deliverance until after summons of the defendant in replevin; and a claim of property interposed at the time of summons is in season.—8 *Wendell*, 667.

Under the Revised Statutes, the sheriff takes possession of the property on the execution of the writ of replevin, and the defendant who claims property in the goods must not only give notice of his claim, but must also demand a trial of its validity, and tender the necessary fees of the officer and jury, previous to the delivery of the property to the plaintiff.

In the case of *Miller v. Franklein, Sheriff of Chenango*, (17 *Wend.*, 278,) the only question was, whether the plaintiff claimed the property, and tendered the necessary fees in season, to put the deputy of the defendant in fault for delivering the wagon to the plaintiff in replevin before the claim of property was tried. The court, per Nelson, Ch. J., remark: In this case no claim of property, within the meaning of the statute, or tender, or offer to pay the fees were made until after the property had been delivered to the agent of the plaintiff. It is true, the defendant in the replevin, claimed the property in the wagon before and at the time it was taken, but he did not intimate that he intended to have the claim tried, nor did he take any of the necessary steps for that

purpose. The officer, surely, was not bound to keep possession and wait his convenience. Abundance of time elapsed after service of the summons, and before delivery of the property for the making of the claim and tender of the fees. The officer was not bound to conform the execution of the process to the after thoughts of the defendant, or to advice obtained by him; indeed we do not perceive how it was in his power to have reclaimed the property from the agent, after it had been delivered to him in the regular execution of the writ. We have already decided that the claim is in season if made at the time of the service of the summons. This secures to the defendant the benefit of the summary trial provided by law. If he fail to avail himself of it, it is his own fault. It must be sought within the time required by statute, and not at the convenience of the party. A reasonable time should undoubtedly be given to procure the fees; the defendant may be called on unexpectedly, and be unprepared to pay them; but in such case, he should make known his desire to have the validity of his claim tried, and ask indulgence for the payment of the fees. This at least he should do. So where goods were removed by virtue of a writ of replevin from one apartment of the house of the defendant to another, under an arrangement that such removal should have the like effect as though the goods were taken to the house of a third person and a claim of property is made, but not until after the defendant is summoned and the goods are removed from one apartment to the other, an action of trespass under the statute will not lie against the officer for subsequently carrying off such goods without trying the claim. (17 *Wend. Rep.*, 518.) After the sheriff has lawfully dispossessed the party of the goods, or in other words removed them out of his possession under and by virtue of the writ, the claim of property comes too late. This principle is conceded in all the cases. (2 *Ibid*, 345; 8 *ibid*, 667; 11 *ibid*, 58.) And in this case the transaction is to be regarded in the same light as if the goods had been removed to a neighboring store.

If the goods and chattels specified in the writ of replevin, have not been delivered to the plaintiff, he may proceed in the action,

for the recovery of the said goods and chattels or the value thereof.—2 R. S., 2d ed., 433, § 19.

The sheriff is required to return the writ at or before its return day; and to annex to it, and transmit with it, the affidavit delivered to him, together with the names of the persons who were sureties in the bond taken by him for the plaintiff with their additions, occupations, and place of residence. (*Ibid*, § 20.) He is also required to state in his return, in what manner he has executed the writ, and if the goods and chattels specified in it have not been replevied, to state the cause of his omission to make deliverance thereof. (*Ibid*, § 21.) If the defendant has been arrested, and has been discharged from the arrest, upon the execution of the bond prescribed, the sheriff is also required to return the names of the sureties in the bond, with their additions, occupations, and places of residence.—*Ibid*, § 22.

The plaintiff may except to the sufficiency of such sureties, within the same time, and in the like manner, as is provided by law for excepting to bail in personal actions; and he must give the like notice thereof. (*Ibid*, § 23.) If no execution shall have been entered as above directed, to the sureties taken by the sheriff on the arrest of the defendant, such sheriff shall be discharged and exonerated from all liability for the sufficiency of such sureties, and the bond shall thenceforth be held by him for the security of the plaintiff, and shall be assigned by such sheriff to such plaintiff or his representatives, upon their request, in the cases hereinafter prescribed.

Within twenty days after the notice of exception to the bail to the sheriff, good special bail to the action shall be put in, and the bail shall justify, in the same manner and within the same time as is prescribed by law in personal actions. (*Ibid*, § 24.) If such bail shall not be put in as above directed, the party making such exception may proceed against the sheriff, in the same manner as in cases of arrest in personal actions; and the sheriff shall have the same rights, and be subject to the same duties and obligations, and may in like manner maintain an action on the bond taken by him. And all such proceedings and actions

shall be subject to the provisions of law concerning attachments against sheriffs, for not putting in bail in personal actions, and concerning actions by sheriffs upon bonds taken by them on the arrest of a defendant in personal actions. (*Ibid*, § 25.) If no exception shall have been entered to the bail taken on the arrest of the defendant, such bail shall be deemed special bail to the action, liable in the same manner, and in the same cases, and to the same extent as such bail in personal actions; and such bail and any special bail that may be put in, in such action, shall have the same right to surrender their principal, and with the like effect as in other actions; and all the provisions of law concerning special bail in other actions shall apply to such bail.—*Ibid*, § 26.

The defendant in any action of replevin may except to the sufficiency of the sureties taken of the plaintiff, by the sheriff upon the receipt of the writ. Such exception shall be made within twenty days after the return of the writ, and the like notice shall be given to the sheriff and to the plaintiff as is prescribed by law in the case of exceptions to bail taken on the arrest in personal actions. (*Ibid*, 434, § 28.) Within twenty days after the service of such notice of exception on the sheriff the sureties in the bond so executed by the plaintiff, shall justify by making an affidavit that each of them is a householder, worth double the amount of the penalty of such bond, over and above all demands, or within the same time, a new bond, similar to that herein required of a plaintiff prosecuting a writ of replevin, shall be executed by such plaintiff with new sureties, who shall justify in the same manner herein provided. Such affidavits, and such bond when executed, shall be filed in the office of the clerk of the court, and a notice thereof shall be served on the defendant or his attorney within the twenty days above specified. (*Ibid*, § 29.) Such justification, also, may be *ex parte* and no previous notice thereof to the opposite party need be given.—10 *Wendell*, 615.

If such sureties shall not justify, or if such new bond shall not be executed and filed, and notice thereof be given as above pro-

vided, the court shall at the next term after such default, render judgment of discontinuance against the plaintiff, and such other judgment as the state and nature of the case may require, in order to restore to the defendant the property replevied and to compensate him for his damages. (2 R. S., 2d ed., 434, § 30.) For this purpose a motion must be made upon affidavit, at the next term of the court. If no excuse be shown they will render judgment under this provision; although it is further provided by statute that the court may allow the plaintiff to file such new bond, with new sureties, who shall justify in the same manner herein prescribed, at the term at which application for such judgment shall be made, on such reasonable terms as the court shall impose; and upon such bond being filed the cause shall proceed. —*Ibid*, § 31.

If no exception shall have been entered to the sureties in the bond given by a plaintiff in replevin, as above provided, the sheriff shall be discharged from all liability for the sufficiency of such sureties, and the bond of the plaintiff shall thenceforth be held by such sheriff for the security of the defendant, and shall be assigned to such defendant or his personal representatives if judgment be rendered for him in such action. (*Ibid*, § 32.) This section was intended as a substitute for the former severe liabilities of the sheriff. By the Revised Statutes the law in relation to the liability of sheriffs in respect to the sureties on executing a writ of replevin is changed. Formerly the sheriff was answerable for the sufficiency of the sureties in all cases; now he is liable only where the defendant in replevin has excepted to their sufficiency, and they or new sureties have failed to justify. And the declaration must accordingly contain averments to that effect to bring the case within the statute or it will be bad. (19 *Wendell*, 531.) Under the old statute, (1 R. L., 92, § 4, 8,) say the court, (18 *Wend.*, 581,) whether a bond was taken or not—and when taken, if the sureties were insufficient or not—the proceedings upon the replevin were regular, and the only consequence was the liability of the sheriff to the defendant for the damages sustained by reason of such omission or defect. On this subject

there was no difference in respect to the proceedings whether the security was taken or should have been taken under the statute of *Westminster* 2, or 11 *George* II, of which the fourth and and eighth sections of our act are copies. Under the statute of *Westm.* 2, from which section four was taken, the practice of the sheriff was to take a bond from the pledges or sureties. (*Ld. Raym.*, 278; 2 *H. Black.*, 549.) The sum in which the bond should be taken was not defined. To make this security more effectual the 11 *Geo.* II fixed the responsibility, and made the bond assignable. The effect of the two bonds is the same; and in practice but one was taken under either statute. (10 *Wendell*, 329.) In England the court will not grant an attachment against a sheriff for not taking a replevin bond even under 11 *Geo.* II, nor stay the suit. (*Willes*, 375; 2 *Term R.*, 617.) The sheriff is himself responsible to the party injured for the insufficient security under either statute in England, or under either section of our former statute. (2 *H. Black.*, 36, 547; 4 *Term R.*, 433.) Even after an assignment of the bond, and suit, an action might be brought against the sheriff, as the assignment is no waiver of proceedings against him.—1 *Saund.*, 195, n 3.

It was under this view of the law, and of the liability of the sheriff, no doubt, that led to the remark by the chief justice in *Kesler v. Haynes*, (6 *Wend.*, 547,) that if he omitted to take sufficient surety in replevin, he would be responsible, but the proceedings would not be irregular; without adverting at the time to the change in the proceedings under the Revised Statutes. By these statutes the bond must now be taken in all cases of replevin; and we have before remarked upon the peculiar language and provisions of the act, showing that the suit cannot regularly be commenced without it.

The defendant now being at liberty to except to the sureties, and special care taken that he shall be enabled to do so, we think that this officer is no longer responsible as before. As the defendant now has the control of the matter there would seem to be no longer any necessity or propriety in making the sheriff amenable to him.—18 *Wendell*, 581.

If an exception shall have been made to the sureties in the bond given by a plaintiff in replevin as above provided, and judgment of discontinuance shall be rendered against the plaintiff for his sureties not justifying, the sheriff shall be liable to the defendant for the sufficiency of such sureties as heretofore provided by law; and such sheriff shall be entitled to the same remedy on the bond taken by him, as in cases of bonds given on the arrest of a defendant in personal actions; and all the provisions of law respecting actions on such bonds, and respecting the staying of proceedings against the sheriff shall be applicable to actions by the sheriff on such replevin bond, and in actions against him in relation thereto.—2 R. S., 2d ed., 434, § 33.

The appearance of the defendant to the action, the declaration of the plaintiff, the plea, avowry or cognizance of the defendant, together with the proceedings and incidents relating to the trial, are not immediately connected with the sheriff, and, consequently form no subjects for our examination.

If the plaintiff recover judgment upon the whole record, and the goods and chattels have not been replevied and delivered to him, the execution commands the sheriff to levy the plaintiff's damages and costs of the goods and chattels, land and tenements of the defendant as in other executions; and also to replevy the goods and chattels described in the declaration, (specifying them,) and to deliver them to the plaintiff if they can be found within his county; and if the same cannot be so found, then that he levy the value of such goods and chattels, (specifying them,) together with the aforesaid damages and costs &c., of the defendant, as the same shall have been assessed by the jury on the trial, or upon the writ of inquiry. (2 R. S., 2d ed., 437, § 50.) The writ is issued in the usual manner. If such execution be returned unsatisfied in whole or in part, the plaintiff may have a ca. sa. as in ordinary personal actions.—*Ibid*, § 52.

The execution for the defendant must of course, as in all other cases, pursue the judgment, whether it be for a return of the property, for damages and costs, or for costs only. At common law, when the defendant had judgment, he was entitled to issue execution by a

writ *de retorno habendo*, to have a return of the things distrained, and *fi. fa.* or *ca. sa.* for his costs; or in England, if he had judgment under the statutes, Henry VIII., c. 19, he was entitled to a writ *de retorno habendo*, and also to a *fi. fa.* or *ca. sa.* for his damages and costs. (2 *Arch. Pra.*, 84.) Our statute is silent as to the mode of issuing execution; but by keeping in view the general rule to which we have above adverted, but little difficulty will be found to exist.—*Grah. Pra.*, 905.

As it respects the execution of the writ by the sheriff, it is well settled that he is not bound to execute a writ *de retorno habendo*, unless some person attend on behalf of the defendant to shew him the goods; and it will be a good return to the writ, to say that no person did so attend.—2 *Saund.* 74, b, c.

At common law if to the *retorno habendo* the sheriff returned that the goods &c. were eloigned, (that is, conveyed to place unknown to him, &c., that he could not execute the writ,) the defendant might then sue out a *capias in withernam*, (2 *Leon.* 174,) requiring the sheriff to take other cattle &c. of the plaintiff to the value of the cattle &c. eloigned, and deliver them to the defendant, to be kept by him until the plaintiff should deliver to him the cattle &c. originally replevied. If this writ were returned *nihil*, the defendant might sue out an *alias*, and after that a *pluries*, and if the *pluries* were returned *nihil*, the defendant might then sue out a *scire facias* against the plaintiff's pledges to shew cause why the price of the cattle &c. eloigned, should not be made of their lands and goods, and rendered to the defendant. If no cause were shown to this *scire facias*, a writ issued to take the cattle &c. of the pledges. But if they had none, and the sheriff returned *nihil* to the writ, the defendant might then have a *scire facias* against the sheriff himself, requiring him to shew cause why he should not render to the defendant cattle &c. to the value of those eloigned.—*Hub.* 77; 1 *Saund.* 195, (n. 3,) *Grah. Pra.*, 905.

The writ of *withernam*, however, is abolished by the Revised Statutes, (2 *R. S.*, 2d ed., 439, § 63,) and the defendant's only remedy now is either by *alias* or *pluries* writs *de retorno habendo*,

as in case of other executions, or by the simple and direct remedy on the bond given by the plaintiff on suing out the writ of replevin.

We have already considered the mode of giving the bond by the plaintiff at the commencement of the suit in replevin, and its effects. It remains only to notice the right of the defendant to proceed for a breach of it, in what manner that right is to be enforced, and the sheriff's duty respecting it. On this subject it is provided by statute, that if any writ of return or other execution issued in favor of the defendant in the action, shall be returned unsatisfied in whole or in part, such defendant or his representatives may have an action upon the bond executed by the plaintiff and his sureties, to recover the value of the property replevied, and the moneys, damages and costs awarded to such defendant, as the case may be, and such bond shall be assigned to such defendant or his representative on their request. (2 R. S., 2d ed., 439, § 64.) The assignment is made by an endorsement under seal upon the bond and executed by the sheriff, or by the under sheriff, (1 *Stra.* 60; 4 *Campb.* 36,) in the presence of two witnesses; the same as in case of a bail bond. This was under the old statute expressly required, (1 R. L., 519,) although the revised statutes are silent as to the manner of the assignment.—2 R. S., 2d ed., 271, § 13.

In such action the plaintiff shall assign breaches of the condition of such bond, as in other cases, and the return of the sheriff to the execution issued in the action of replevin shall be evidence of such breach; the amount recovered in such action of replevin, shall be the measure of the damages, if the value of the property replevied shall have been so recovered, and if not so recovered such value shall be added to the amount of the damages and costs recovered, in the the action of replevin, and together therewith shall form the measure of the damages to be assessed. (*Ibid.*, 439, § 65.) And in any action prosecuted on such bond given by the plaintiff in replevin, for the deliverance of any property distrained for rent, or for doing damage, the defendant may shew in mitigation of damages, the amount of the plaintiff's

claim in the action of replevin for such rent or for such damage ; and if such amount with interest be less than the value of the property replevied, a corresponding deduction shall be made from such value.—*Ibid*, § 66.

Under these provisions it has been held, that an action on a replevin bond by a party cannot be maintained, unless previous to the suit on the bond, a writ of *retorno habendo* has been returned unsatisfied in whole or in part. The issuing and return of such writ is, however, mere matter of proof, and need not be averred in the declaration. (10 *Wendell*, 333.) And in an action on a replevin bond, the plaintiff is bound to prove a *retorno habendo*, or other execution in his favor, returned unsatisfied in whole or part, or he will fail in his suit. And such proof must be given, although the plea of *non est factum* only be interposed, where it is not averred that the execution was not returned unsatisfied. (12 *Wend.*, 120.) And averments that the replevin suit was discontinued, that the defendant therein had judgment of *retorno*, and that no return of the goods had been made by the plaintiff, but that on the contrary he had converted them to his own use, will not relieve the plaintiff in the suit on the bond, from furnishing the required proof.—*Ibid* ; *Grah. Pra.*, 907.

Where the property taken by virtue of a writ of replevin, is a living animal, and there is judgment of *retorno habendo*, in an action on the replevin bond for a breach of its condition, it is a good plea in bar that before the judgment in the replevin suit, the animal died without the default of the plaintiff in such writ.—12 *Wendell*, 589.

When a sheriff upon a writ of replevin delivered to the plaintiff seven hundred and twenty tons of iron ore, and the defendants obtained judgment of return, and executed a writ of inquiry to assess the value of the property, and damages for detention, it was held, that it was competent for the plaintiff to shew in mitigation, that shortly after the delivery of the property to him, the defendants repossessed themselves of the greater part thereof.—13 *Ibid*, 496.

A release executed by a defendant in a replevin suit, is no bar to a suit prosecuted by the sheriff, on a replevin bond, when such

release is executed subsequent to the commencement of a suit. Had the suit in fact been commenced by the defendant in replevin for his benefit, although in the name of the sheriff, and such fact had been alledged, it seems that the plea of release would have been held good; but the mere averment that the suit was prosecuted in the name of the sheriff, in trust for, and to the sole use and benefit of the defendant in the replevin suit, being consistent with the fact that the suit was prosecuted by the sheriff for his own indemnity, it was held, on demurer, that the plea could not be sustained. Where a suit on a replevin bond is prosecuted by the sheriff, and the defendants have satisfied the claims of the parties for whose benefit the bond was taken, namely the defendants in the replevin suit, the remedy of the party to stay the suit, is to apply to the court for relief on motion.—12 *Ibid*, 302; *Grah. Pra.*, 907.

Whenever an action of replevin shall be brought by or against the sheriff of any county, the writ and all process in any cause shall be awarded to and executed by the coroners of the county, but executions therein shall be awarded and executed as in other such cases. (2 *R. S.*, 2d ed., 439, § 67.) By the common law, the writ of replevin is always to be executed by the sheriff, even in his own case, when he may have distrained the goods. (*Gilb. on Repl.*, 124.) The practice has always prevailed in this state, of awarding writs and plaints in replevin, in such cases, to coroners; and it was thought best to confirm it by an express provision.—*Revisers' notes*, 3 *R. S.*, 772.

CHAPTER XI.

Writ of Inquiry.

After an interlocutory judgment, a writ of inquiry is in general awarded, which is another judicial writ directed to the sheriff of the county where the action is laid, setting forth the proceedings which have been had in the cause, and that the plaintiff ought to recover his damages by occasion of the premises; but because it is unknown what damages he hath sustained by reason thereof, the sheriff is commanded that by the oath of twelve good and lawful men, he diligently inquire the same, and return the inquisition into court.

Judgment by default is always interlocutory in *assumpsit*, *covenant*, *trespass* and *case*, the sole object of these actions being damages. And in *replevin* it is provided by statute, (2 R. S., 2d ed., 438, § 56,) that if the property replevied shall have been distrained for rent, the defendant (when he shall be entitled to a return of the property replevied) instead of taking judgment for a return thereof, may, in the following cases, proceed as follows; 1. If the defendant shall not have made an *avowry* or *cognizance*, and therein set forth the arrears of rent, he may make a suggestion in the nature of an *avowry* or *cognizance*, for the rent in arrear, and the court shall thereupon award a writ of inquiry to the sheriff of the proper county to ascertain the sum in arrear at the time of such distress taken, and also the value of the proper-

ty distrained; and upon the return of the inquisition taken by such sheriff, the defendant shall have judgment to recover against the plaintiff the arrearages of such rent, in case the property distrained shall amount to that value; and in case it shall not amount to that value, then so much as the value of the property so distrained shall amount to; for which sum he shall have execution against the property or the person of the plaintiff as in other cases: 2. If judgment shall have been given for the defendant upon demurrer, he may make the like suggestion of the arrears of rent, if the same shall not already have been pleaded by him, and the court shall award a like writ of inquiry; upon which the same proceedings shall be had to judgment and execution as above provided.

The interlocutory judgment merely establishes the plaintiff's title to damages; but the amount still remains to be ascertained. This is usually done by the writ of inquiry. As the inquest, however, is only for the purpose of informing the conscience of the court, the court themselves may, in all cases, if they please, assess the damages, and therefore give final judgment; (3 *Wils.* 61, 62; 2 *Wils.*, 372, 374; 1 *Doug.*, 316; 4 *Taunt.*, 148; 3 *John. Cu.*, 80; 2 *John. Rep.*, 70,) and it has accordingly been the usual practice, and is now made compulsory by statute, (2 *R. S.* 2d ed., 280, § 1, 2,) to refer bills of exchange, promissory notes, orders, or drafts for the payment of money, contracts for the absolute payment of money only, contracts for the payment of a sum certain though payable in specific articles, and contracts for the delivery of specific articles, at a value or price stipulated in the same contract, to the clerk of the court to examine, ascertain and report what sum the plaintiff ought to recover for his damages. The same had before been usual in actions of covenant for non-payment of a liquidated sum, (*Doug.*, 316) as for non-payment of money lent upon mortgage, (8 *Term Rep.*, 326,) or for non-payment of rent, (6 *Taunt.*, 356; 8 *Term Rep.*, 410,) or the like.

The writ is tested and made returnable in term; and must be executed against all of the defendants jointly, who have allowed judgment to go by default.* If two defendants, even in trespass,

* See note, end of chapter.

suffer judgment by default, and the plaintiff execute writs of inquiry against them separately, and take several damages against them, it will be irregular; and if final judgment be entered up for those several damages it will be error. The only way the plaintiff has of remedying the mistake, is, by applying to the court before final judgment to set aside his own proceedings; which they will allow him to do upon payment of costs.

The writ is in all cases directed to the sheriff, unless he be a party, or interested, in which case it goes to the coroner; and if he be also interested, it will then be directed to elisors; but the court have refused to appoint elisors merely upon the ground that the sheriff and coroner were members of a corporation which was interested in the question in controversy. (3 *Cowen*, 296.) It may, however, under special circumstances, be executed at the circuit, although it is only when some difficult point of law is likely to arise in the course of the inquiry, or where the facts are important, that the court will grant this indulgence; and in an action of assault and battery, it has been held that the mere circumstance of the battery having been a severe one, is not sufficient to take the case out of the ordinary course.—*Halst.*, 330.

According to the former understanding where the writ was executed by a judge at the circuit, it was considered that he acted as assistant to the sheriff, and could exercise no judicial power; (1 *Barnes*, 135; 12 *Mod.*, 610; 2 *John. Rep.*, 107; *Grah. Pra.*, 795,) but in the case of *Ellsworth v. Thompson*, (13 *Wend.*, 658) the supreme court repudiated this motion.

This was an action for an assault and battery. The defendant having suffered a default, the plaintiff obtained a rule to have a writ of inquiry executed at the circuit in the county where the venue was laid. He accordingly appeared at the circuit, and prayed that the writ might be executed, and proposed that the names of twelve jurors to take the inquisition should be drawn from the box containing the names of the jurors summoned to attend the circuit. To this the counsel for the defendant objected, insisting that the sheriff should summon such jurors as he thought proper, and proceed to take the inquisition; and the counsel further contended that upon the execution of such a writ at the circuit. the

circuit judge acted merely as an assistant to the sheriff, and could not exercise any judicial power whatever. The circuit judge (the Hon. ESEK COWEN,) told the counsel that he understood the rule of this court, ordering the writ of enquiry to be executed at the circuit, as directing the machinery of the circuit court to be employed in its execution, and that he would therefore take the same directions of the cause, in the empannelling of the jury and in the other proceedings to be had, that he would in the taking of an ordinary inquest at the circuit; and the clerk, by his order, proceeded to draw the jury. The third juror drawn was challenged by the plaintiff as not indifferent. The two jurors first drawn were sworn as triors, and after hearing testimony and receiving the charge of the judge, they pronounced the challenge well taken, and the juror was excluded. The jury being completed, the plaintiff produced his testimony; and after the judge had instructed the jury as to the law of the case as laid down by this court, in *Lee v. Woolsey*, (19 *John. Rep.*, 319,) on the subject of provocation in cases of assault and battery, he directed the sheriff to take charge of the jury who did so accordingly. The jury found an inquisition with \$1000 damages. The defendant moved to set aside the inquisition, on the ground that the writ of enquiry, in the manner in which it had been executed as above stated, had been irregularly executed.

By the court, *Savage C. J.* The first question arises on the regularity of the proceedings. It is certainly singular that the practice in cases like the present has never been settled. Instances have been numerous in which writs of inquiry have been executed at the circuits, and the course pursued in this case is that which has been usual on such occasions, as was remarked by the circuit judge.

There seems to be no rule of court or adjudication upon the subject. The oldest *dictum* to be found is in 12 *Mod.*, 620. It is anonymous, and is as follows: "Holt, chief justice. A judge of *nisi prius*, upon trial of a writ of inquiry, is only an assistant of the sheriff, and has no judicial power; and if the parties come to any agreement then, the way to make it effectual is, to bring

it to him to sign, and afterwards move above to have it made a rule of court." That a judge, while sitting in his judicial capacity, should be only an assistant to a sheriff on the execution of a writ of inquiry, which the books all say is a ministerial act by a sheriff, must strike the mind of every lawyer as a legal absurdity. Rather than admit such a proposition, it would be more reasonable to suppose there must be some mistake in the report of the case—particularly when the only authority for such a proposition is found in an anonymous case, published by an anonymous reporter—in a book of no authority, and of very little repute. I have copied the whole case. There is the same reason for considering one part of it authoritative as the other ; but every practitioner knows, there is no such practice, as is there stated, to enforce an agreement or settlement between the parties. It seems probable that if any thing was said by Holt, he must have alluded to the aid which a judge might think proper to give the sheriff unofficially. Mr. *Sellon*, in introducing the case, remarks : " Sometimes the writ is executed before a judge ; in which cases he is only an assistant to the sheriff, and has no judicial powers," &c.—not necessarily implying that the writ must be executed in court at nisi prius, where the judge certainly has judicial power. Mr. *Archbold* says that a writ of inquiry is usually executed before the sheriff or his deputy ; it may, however, under special circumstances be executed before the chief justice, or before a judge of assize. (2 *Arch. Pra.*, 23.) He refers to 12 *Mod. R.*, 610, but says nothing about the subordinate character in which the judge is there stated to act. He adds that it is only when some difficult point of law is likely to arise in the court of inquiry, or where the facts are important, that the court will grant this indulgence ; and a notice of such execution is given for the sittings or assizes generally in the same manner as a notice of trial is given. The execution here referred to seems to be the act of the judge.—2 *Arch. Pra.*, 25 ; *Tidd*, 512 ; 1 *Sellon*, 353.

If it be strictly correct that the execution of a writ of inquiry is merely a ministerial act, as has often been decided, (2 *John. R.*, 70, and cases there cited,) it seems strange that a judge should

be called upon to assist a sheriff in the performance of his ministerial duties; besides, the reason given why a judge is to assist is opposed to this view of the subject. Cases are sent to the sitting when some difficult question of law is likely to arise. The decision of a difficult question of law is surely not a ministerial act; nor is it an occasion in which it would be fit and proper for a judge to act subordinate to the sheriff. The rule is broadly laid down, that in executing a writ of inquiry the sheriff acts ministerially; and generally that is correct. Where no objection is made before him to the proceedings, his acts are all ministerial; but if an objection is made to a juror, the sheriff may, for cause satisfactory to him, set him aside and summon another; and if he refuse to do so, it would be a good ground for an application to set aside the inquisition. The act of deciding whether a juror is indifferent between the parties is not a ministerial, but a judicial act. So too, the admission or rejection of evidence is a judicial act. There is one class of cases in which provision is made by statute for the execution of a writ of inquiry at the circuit, viz: actions on bonds conditioned for the performance of covenants. In such cases, with some exceptions, damages are to be assessed by the circuit judge and a jury, in the same manner in which an inquest is taken. In such cases the writ commands the sheriff to summon the jury to appear at the circuit, and the judge to certify the inquisition before him taken, to the court at the next term. (2 *Lill. Ent.*, 609; *Tidd's App.*, 143; 1 *R. L.*, 518, § 7.) The Revised Statutes provide that in such cases a writ of inquiry may be executed and returned as other writs of inquiry, or a circuit roll may be made up, and the circuit judge shall proceed in the same manner as in other causes sent to that court to be tried, and shall in like manner return the verdict of the jury thereupon. This proceeding is strictly applicable to actions on bonds with condition for the performance of covenants other than the payment of money. It is however an appropriate mode, in the opinion of the legislature, of assessing damages in cases where there is no certain mode by calculation of ascertaining the damages which the plaintiff should recover. In actions sounding in

damages, or where the demand is unliquidated, it is said that the court may assess the damages themselves, and that the inquisition before the sheriff is merely to inform the conscience of the court; but whatever theories we may indulge, the assessment of damages by a jury, when it cannot be done by calculation, is a proceeding which the court have no right to depart from. I apprehend, however, that the court have the same power to direct the circuit judge to assess the damages which they have to direct the sheriff; I apprehend, also, that when this court directed the writ of inquiry to be executed at the circuit, it was not the intention of the court, if they had the power, to authorize the sheriff to hold the circuit court—a power which by the constitution and laws appertains only to the judges of this court and the circuit judges. The circuit judge was right in supposing that this court, by ordering the writ of inquiry to be executed at the circuit court, intended to employ the machinery of the circuit in the assessment of the damages. They took the execution of the writ from the sheriff, for reasons not now necessary to be explained and they gave to the circuit judge the control of the proceedings. They intended, for instance, that the jury should be drawn from the circuit jurors, as being probably more indifferent and better qualified than a jury would be, summoned by the sheriff for the express purpose of assessing the damages in this suit; they intended to constitute the judge, and not the sheriff, the presiding officer—as being better qualified to decide any question of law which might arise, and to advise the jury upon any matter in which advice might be proper. All this must have been intended by this court or there was no fitness or propriety in directing the writ of inquiry to be executed at the circuit. I have not the writ now before me, but think, in such cases, it should direct the sheriff to return the jury at the circuit court, and the circuit judge to take the inquisition. If the writ in this case is not in that form, it should be amended in that particular. The proceedings should be in all respects similar to the assessment of damages upon an inquest, so far as respects the empannelling the jury, and the assessment of the damages. I am therefore of opinion

that there was no irregularity in the form of conducting the execution of the writ of inquiry.

From the above, it would also appear that the duties of a sheriff in executing a writ of inquiry are not strictly ministerial, but that he exercises a judicial capacity when an objection is taken in the course of the proceedings. The writ, however, may be executed before the under sheriff, or a general deputy, as well as by the sheriff himself.—2 *John. Rep.*, 63; 5 *ibid.*, 487.

The writ, like all other writs, must be executed on or before the return day, and if executed after the return day, the inquest is void, and will be set aside by the court; (*Tidd*, 627,) and it cannot be executed on Sunday; and the jury cannot retire on Saturday night, and bring in their verdict on Sunday; (15 *John. Rep.*, 179;) unless they retired before 12 o'clock.—2 *R. S.*, 205, § 7.

And the sheriff must summon proper jurors, and if there is any objection made to the jurors, the sheriff should hear it, and, if it is good and sufficient, set the juror or jurors aside, and summon others; and if he refuses so to do the court will set aside the inquisition. (1 *Cowp. Rep.*, 112.) The English courts left it to the discretion of the sheriff whether he would admit a challenge to the jury; (1 *Salk. Rep.*, 81,) but the decision of the supreme court seems to make it imperative upon the sheriff to set aside the juror upon good cause of challenge. (1 *Cowen*, 436) But it is no cause of challenge to a juror that he is not a freeholder. (1 *Cowp. Rep.*, 436.) But if he is related to either party, or is interested in the event of the suit, or has expressed an opinion, or is biassed, he is incompetent; and any of the general causes of challenge, with the exception of want of property is good; and an inquest has been set aside where the officer executing the writ was attorney for the plaintiff.—*Ibid.*

The sheriff may adjourn the taking of the inquest if the plaintiff or defendant is not ready, even after it is entered upon; (15 *John. Rep.*, 179; *Strange*, 1259,) but if the defendant is ready, and the plaintiff does not go on, but has the cause adjourned, the plaintiff must pay the defendant's costs of attending; and where the plaintiff is not ready, the sheriff may withdraw a juror, and

adjourn to some future day, but the adjournment must not be beyond the return day of the writ.—*Gra. Pra.*, 643.

In actions *ex contractu*, the plaintiff on the execution of the writ, need not prove a cause of action, because that is admitted technically, by the default of the defendant, in not pleading to the declaration, but he must prove his damages; but this technical admission only goes to the causes of action spread upon the declaration, and if the plaintiff support his cause of action by a written instrument not set forth in the record, he must prove it, and all the defendant can controvert before the sheriff's jury is the plaintiff's damages.—*Dunl. Pra.*, 275, 388, 395.

Judgment having been given against the defendant on demurrer, the plaintiff, at the execution of the writ of inquiry, proved that the defendant had acknowledged the debt to a certain amount; the defendant, on the other hand, adduced evidence to shew that she had only acted as agent for her husband. The under sheriff directed the jury that, if they should be of opinion that the defendant really acted as agent for her husband, they ought to find a verdict for the plaintiff with only one shilling damages. This they accordingly did. A motion was made to set aside the inquiry on the ground of improper evidence having been admitted on the part of the defendant. The court were clearly of opinion that this evidence ought not to have been admitted; that the only question to be decided by the jury was the amount of the debt; and that the question whether the defendant contracted the debt as agent for her husband, or in her separate capacity must be taken to be determined by the record. (1 *Bos. & Pul.*, 368.) Upon the principle of this case, it was held, that a lease, mentioned in the condition of a bond, set out by the defendant on *oyer*, need not be proved; (1 *Esp. Rep.*, 175,) and a bill of exchange or promissory note, if declared upon, need not be proved, but it must be produced, in order to satisfy the jury that there have no payments been made upon it and which have been endorsed thereon; and the interest on the note being frequently assessed by way of damages, must be proven to the jury. (3 *Term Rep.*, 301; *Doug.* 316.) Neither can the defendant prove a set off against the plain-

tiff before the jury, by way of reducing the damages recovered, though he may give evidence controverting the plaintiff's testimony as to the amount of damages claimed. (14 *East*, 578.) And generally speaking, with regard to damages, the plaintiff is always entitled to nominal damages, to be assessed to him by the jury, whether he prove any damages or not; that extent of damages being admitted to him by the default of the defendant.—3 *Cowen*, 396.

But in an action for torts, where the actual damages resulting from this act complained of, are to be given to the plaintiff by the jury, he must prove them, or he will be entitled to nominal damages only. Thus, in trespass for taking and carrying away the plaintiff's goods, the court held that the plaintiff on the inquiry need not prove his property in the goods, yet he must shew their value.—*Dunl. Pra.*, 374.

But where the jury are to imply the amount of damages from the nature of the injury, and where no special damages could be proved unless laid in the declaration, the plaintiff is entitled to recover more than nominal damages, though he offer no proof.

Case for words imputing perjury. Judgment for the plaintiff by default. At the execution of the writ of inquiry, the plaintiff offered no evidence, but his counsel addressed the jury, and they assessed the damages at forty pounds. A motion was made to set aside the inquisition, and it was contended that the jury were not justified in giving damages without some evidence by which they might be guided in giving the amount; or that the damages, at all events should have been nominal. Abbot Ch. J. I think we cannot disturb the finding of the jury. The defendant, by suffering judgment by default, admitted the speaking of the words as alledged in the declaration. It was, therefore, unnecessary to that effect. The plaintiff did not produce any evidence in aggravation, it cannot therefore be presumed that the jury were misled, or that they estimated the damages on erroneous grounds. The motion denied. (10 *Eng. Com. Law Rep.*, 139.) In actions of injuries to the person a different rule prevails. In such cases the plaintiff, as in cases of trespass *de bonis asportatis* trover and

the like, must shew actual damages, and the time when the injury was done.

Motion that a writ of inquiry be executed at the circuit. The action was for an assault and battery. The day laid in the declaration was on the second day of January 1830. The defendant did not plead, and a writ of inquiry was executed, and inquisition found for two hundred dollars; which inquisition was set aside and a new inquiry held. On the hearing before the sheriff and the jury, the plaintiff proved that on the day laid in the declaration he was severely beaten, but did not prove that the defendant inflicted the injuries complained of. The counsel for the plaintiff insisted that the defendant, by his default in pleading, admitted not only that he had been guilty of an assault and battery, but also that he had been guilty of the assault and battery committed on the plaintiff on the day laid in the declaration. This was denied by the counsel for the defendant, who contended that, though the default admitted an assault and battery, that it did not admit the assault and battery committed on the day laid in the declaration; and as there was no proof that the defendant committed the injuries suffered by the plaintiff on that day, the plaintiff was entitled to nominal damages only. The jury could not agree upon the inquisition. Under these circumstances, so that the jury might be correctly instructed as to the law of the case, it was moved by the defendant that the writ of inquiry be executed at the circuit. The motion was resisted on the part of the plaintiff, and it was admitted that the law as contended for on his part before the sheriff was erroneously insisted on, and that therefore there was no necessity of sending the cause to the circuit. The defendant consented to withdraw his motion, on the court expressing its opinion upon the question of law.

The court say, Marcy, Justice, delivering the opinion, that default in a case like this, admits an assault and battery; but it does not, I apprehend, entitle the plaintiff to any thing more than nominal damages. It admits only the traversable allegations in the declaration. Neither the specific day when the injury was done, nor the circumstances of aggravation are traversable. They are

therefore not admitted by the default. A plea in this case denying a battery on the second day of January, (that being the day laid in the declaration,) would have been clearly bad, because the plaintiff to entitle him to recover, is not confined in his proof to a battery on that day. The admission of the defendant is of a battery committed within the period, to which the plaintiff is confined by his proof. The battery may have been on the second day of January, but not necessarily so. It may as well have been on any other day in any of the three or four preceeding years. If the plaintiff receive on that day a personal injury, the default does not establish the fact, in the absence of all other proof, that the defendant inflicted it. Before damages can be awarded against him for it, the plaintiff must shew, either by direct proof, or by circumstances, sufficient to produce a reasonable conviction in the minds of the jury that the defendant inflicted the injury.—5 *Wendell*, 134.

The same rule applies as to the admissibility of evidence on writs of inquiry upon bonds for the performance of covenants, as in actions for wrongs done to the person or personal property. (1 *Dunl. Pra.*, 388.) Therefore an action on a bond conditioned for the performance of covenants, notwithstanding the form of action, and of the judgment which is for the entire penalty, the plaintiff must prove the damages actually sustained, before the sheriff's jury on the writ of inquiry; otherwise he can recover only nominal damages. And it is made the duty of the jury by the statute to inquire into the truth of the breaches assigned by the plaintiff, and to assess the damages of the plaintiff sustained thereby.—1 *R. S.*, 2d ed., 300, § 8.

By bond for the performance of covenants is meant a bond with a condition other than for the payment of money, or for the nonperformance of any covenant or written agreement. But bonds for the payment of money stand upon the same footing as notes or any other contract for the payment of money.—*Ibid*, § 1.

After the jury have heard the evidence, they must retire and make up their inquisition, before hearing any other inquests; and if they proceed to hear evidence in several cases before they re-

tire to make up the inquisition, the inquisition will be set aside. But this irregularity is cured, if the parties consent they may do so.—3 *Wendell*, 478.

The sheriff must permit no one to mingle with the jury during their deliberations, and if he does it is irregular.

Bogert moved to set aside an inquisition assessing very small damages, on account of the sheriff's having permitted a person to remain and converse with the jury whilst deliberating on their verdict. The court say, no one ought to mix with a jury whilst deliberating. They should, to preserve the purity of justice, be kept by themselves, and, on this point, there is no difference between an inquiry before the sheriff and a trial. The inquisition was set aside.—3 *Caines' Rep.*, 96.

The sheriff, unless when at the circuit, is the presiding officer in these inquests of office, and, of necessity, must decide upon the admissibility or rejection of evidence; determine upon questions of law that may arise, and direct the trial the same as a judge at nisi prius. Much is left to the exercise of his discretion, which in all cases should be carefully employed, so as to preserve the rights of parties, and the purity of justice. No general rule therefore can be laid down, so as to give him a line of conduct which he might safely follow; as every case must present its own peculiar circumstances.

Witnesses may be compelled to attend the execution of a writ of inquiry, by subpoena under the seal of the court from which it issues, and they are liable for attachment for disobedience, to the same extent as for not attending at the circuit, as it is a contempt of the court from which the writ issues.—2 *R. S.*, 2d ed., 441 § 1.

The same rule applies in cases of inquests for damages done to lands, as in assaults and batteries and the like; actual damages must be proved, or the plaintiff only recovers nominal damages.—*Ibid*, 265, § 20.

The inquisition must be in writing and signed by the sheriff and jurors; and it is usually sealed, though this is not necessary; (*Cowen*, 212, *note*;) it is usually drawn up by the plaintiff's

attorney. It should be executed immediately after the case has been submitted; and it is, as we have already seen, irregular for a sheriff and jury, on executing writs of inquiry, to hear the evidence in several causes, before they retire to make up their inquisitions. (3 *Wendell*, 478.) Such irregularities may, however, be waived by the assent of the parties; and can only be taken advantage of by motion to set aside the proceedings, and not by writ of error. (*Ibid.*) After execution of the writ of inquiry, it is filed with the sheriff's return and inquisition annexed, and a rule for judgment entered; the plaintiff then has his costs taxed, and perfects his judgment.

The verdicts of juries of inquiry when rendered, are much respected by the courts; for it has been decided that they will not set them aside on frivolous grounds, and that they will not examine into the effect of any particular piece of evidence upon the jury's mind; for unless it appears that there was no proper evidence before them, the court will presume that they had sufficient grounds for their inquest. (1 *Dall.*, 82; *Duml. Pra.*, 395, 6, 7.) The defendant, however, may move to set aside the inquisition for want of due notice, (*Coleman*, 56,) or on account of an objection to the jury, (*Cowp.*, 112,) or for excessive damages. (*Burr.*, 1846; 3 *Wils.*, 63.) But in an action of slander, the court will not interfere on account of damages, unless the case is very gross, and the recovery enormous. (2 *John. R.*, 74.) And in a late case, on a writ of inquiry assessing the damages of a defendant in an action of replevin, after a discontinuance of the suit, the court would not set the inquest aside on the ground of the excessiveness of the damages, when the proceeding on the part of the plaintiff was vexatious, and no rule of law had been violated by the jury. (20 *Wend.*, 172.) The court thought that in such case they could not disturb the verdict of the jury without interfering with settled principles.—15 *Wend.*, 368; 15 *John. R.*, 493.

The plaintiff may move to set aside the inquisition, when the damages are too small, and there has been contrivance, (*Salk.*, 646,) or surprise; (*Stra.*, 515;) as if the witness to prove his demand declined giving evidence, and the sheriff, through igno-

rance of his authority, refuse to adjourn the inquiry; (*Stra.*, 1259;) or where there has been a mistake of the sheriff or jury, in point of law; (*Stra.*, 425, 1259;) but not for insufficiency of damages alone, (*Barnes*, 230; *Doug.*, 509,) unless perhaps, in case of a clear mistake.—19 *John. R.*, 244; 3 *Ibid.*, 254.

If improper evidence has been admitted, as if the defendant has been allowed to give evidence in denial of the cause of action, (1 *Boss. & Pull.*, 366,) the inquisition will be set aside, if it appear that injustice has been done; but unless this is shown the court will not interfere. (3 *John. Ca.*, 80.) Nor will they set aside the inquisition on this ground, if the parties have agreed, that any evidence might be given on the execution of the writ, that could be given on the trial; for in such case the inquest is to be considered in the nature of an arbitration.—2 *John. Ca.*, 117.

The court will not set aside a writ of inquiry before it has been returned, because until this is done, it is not before the court, and the plaintiff may issue a new writ. (1 *Caines' R.*, 250.) If the sheriff permit any person to remain and converse with the jury, whilst deliberating on their verdict, the inquisition will be set aside, each party paying his own costs, as neither is to blame. (3 *Ibid.*, 96.) If the damages are separately assessed on each count, where there is but one cause of action, the inquisition will be set aside. (3 *John. R.*, 254.) And when, from sudden and dangerous illness, the defendant's attorney was prevented from attending on the execution of the writ, the inquest was set aside; but this was only done on terms.—2 *Caines' R.*, 381.

Where a writ of inquiry and inquisition was lost, they were allowed to be made out anew from the sheriff's notes.—*Stra.*, 1077.

After a writ of nuisance issued, if the defendant shall not appear according to the rules of the court, or shall make default after appearance, a writ of inquiry shall go to the sheriff of the proper county, commanding him to go to the place where the nuisance is alleged to exist, and by the verdict of a jury to in-

quire thereof, and of the damages occasioned thereby, and on the return of such inquest, the plaintiff shall have judgment.—2 R. S., 2d ed., 257, § 5.

It is also as part of the duties of the sheriff, provided by the Revised Statutes, that whenever the governor of this state shall be authorized by law to take possession of any lands or tenements within this state, for the use of the people of this state, and he cannot agree with the owner or owners of such lands or tenements, for the purchase thereof, he shall cause application to be made to the court of chancery, for a writ of inquiry of damages, which shall thereupon be issued to the sheriff of the county within which such lands or tenements shall be situated, unless the chancellor shall direct such damages to be assessed by a foreign jury.—2 R. S., 2d ed., 488, § 66.

Such writ shall describe the said lands and tenements with the like certainty as required in a declaration in ejectment; and shall command the sheriff, that by the oaths of twelve good and lawful men of his county, he shall inquire whether the person or persons owning the said lands or tenements, or any of such persons, will sustain any and what injury by reason of the taking of such premises for the use of the people of this state; and that he return the said writ, with the finding of the jury thereupon, to the court of chancery without delay.—*Ibid*, § 67.

Upon such writ being delivered to the sheriff, he shall give at least three weeks' notice of the time and place of executing the same, by publishing a notice thereof in a newspaper printed in his county.—*Ibid*, § 68.

The sheriff shall summon twelve qualified jurors of his county, to attend at such time and place, and shall then and there administer to each of the said jurors, an oath that he will diligently inquire concerning the matters specified in the said writ, and will give a true verdict, according to the best of his judgment without favor or partiality.—*Ibid*, § 69.

After the jury shall have been duly sworn, they shall proceed to view all the lands and tenements specified in the writ; and having duly considered the value thereof, they shall proceed to

assess the damages which the owner, or if there be several, which the respective owners of such lands and tenements will sustain, by being deprived thereof. They shall make an inquisition, to be signed by themselves and by the sheriff, in which they shall set forth the names of the several owners of the lands and tenements in question, and the rights of each owner respectively, so far as the same can be ascertained by them, together with the amount to be paid therefor by the people of this state, and to whom particularly; which inquisition the sheriff shall forthwith return, together with the writ, to the court of chancery.—*Ibid*, 488, § 70.

Note ante p. 297.—Where a default is suffered as to part of the declaration, and issue is joined as to the residue, or where some of several defendants suffer a default, and others plead to issue, the damages on the default in these cases must be assessed by the same jury who try the issue; and you cannot therefore proceed upon the default beyond the rule for interlocutory judgment. And by statute, you may go to trial upon the issues without entering interlocutory judgment on the default.—*Laws of 1833*, p. 394, § 1; 2 *Burr. Pra.*, 372.

CHAPTER XII.

Attachments.

An attachment is a writ issuing from a court of competent jurisdiction in the nature of a criminal process, and is designed for the punishment of contempts of court. (1 *Wils.*, 300.) Its purpose is to bring into court the party against whom it is issued, to answer interrogatories, which, upon the return of it, are to be exhibited against him; but in its design and effect, it is frequently no more than a civil proceeding.—5 *J. R.*, 117; 6 *Cowen*, 42; 1 *Bos. & Pull.*, 336; 2 *R. S.*, 443, § 18, 19.

Indeed the attachments for most of the species of contempt, and especially for non-payment of costs, and non-performance of awards are to be looked upon rather as civil executions for the benefit of the injured party, though carried on in the shape of criminal process, for a contempt of the authority of the court.—4 *Chitty's Black.*, 222.

There are other kinds of attachments under our statutes, which are in the nature of process, and are entirely civil in their nature:

Attachments against absent and absconding debtors.—1 *R. S.*, 2d ed., 764.

Attachments against ships and vessels.—*Ibid.* 767.

Attachments issued by the county treasurer against the lands of non-residents for the non-payment of taxes upon personal property.—*Ibid.*, 387.

Attachments against foreign corporations.—2 *Ibid.*, 375.

Attachments or warrants issued by a county treasurer against delinquent town collectors.—*Ibid*, 389.

Attachments or warrants issued by the comptroller against delinquent collectors of canal tolls.—*Ibid*, 221.

Before proceeding to investigate who are liable to attachments for contempts, it becomes necessary to ascertain the different kinds of contempts. These consist of two, civil and criminal.

Criminal contempts are :

Disorderly, contemptuous, or insolent behaviour, committed during the sitting of any court, in its immediate view or presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

Any breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

Wilful disobedience of any process or order lawfully made or issued by it.

Resistance wilfully offered by any person to the lawful order or process of the court.

The contumacious and unlawful refusal of any person to be sworn as a witness ; and when so sworn the like refusal to answer any legal and proper interrogatory.

The publication of a false or grossly inaccurate report of its proceedings ; but no court can punish as a contempt the publication of true, full and fair reports of any trial, argument, proceedings or decision had in such court.—*Ibid*, 207, § 12.

The court may punish summarily any contempt committed in its view and presence, but in all other cases the party charged shall be notified of the accusation, and have a reasonable time to make his defence.—*Ibid*, § 12.

Punishment for these contempts may be by fine or by imprisonment in the county jail where the court may be sitting, or both, in the discretion of the court ; but the fine shall in no case exceed two hundred and fifty dollars, nor the imprisonment thirty days. And when the person shall be committed to prison, for the non-payment of such fine, he shall be discharged at the expiration of thirty days.—*Ibid*, § 11.

These provisions do not affect any proceedings against the parties or officers, as for a contempt to enforce any civil right or remedy. And the summary punishment by the court is no bar to an indictment for such contempt. (*Ibid*, 208, § 14, 15.) Neither do the above exactly fall in the nature of the contempts treated of in the present chapter, though they are punishable by process in the nature of an attachment. The contempt at present under examination, regards the sheriff in his official capacity, and the attachment issued thereon is in the nature of a civil remedy.

All attorneys, counsellors, solicitors, clerks, registers, *sheriffs*, coroners, and all other persons in any manner duly selected or appointed to perform any judicial or ministerial services, for any misbehaviour in such office or trust, or for any wilful neglect or violation of duty therein; for disobedience of any process of such court, or of any lawful order thereof, or of any lawful order of a judge of such court, or of any officer authorized to perform the duties of such judge: parties to suits, attorneys, counsellors, solicitors, and all other persons, for the non-payment of any sum of money ordered by such court to be paid, in cases where by law execution cannot be awarded for the payment of any such sum, or for the collection thereof; and for any other disobedience to any lawful order, decree, or process of such court: and all other cases where attachments and proceedings as for contempts, have been usually adopted and practised in courts of record to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party: (*Ibid*, 441, § 1,) and some other cases included in the second, fourth fifth, sixth, and seventh subdivisions of the same section, are made cases of misconduct which courts may punish by attachment; and in fact any misconduct by which the rights or remedies of a party in a cause may be defeated, impaired, impeded, or prejudiced, in the cases specified in the first section may be punished in the same manner.—*Ibid*.

We have seen that the sheriff or any other officer to whom any process shall be delivered, shall execute the same according to the command thereof, and shall make due return of his proceedings

thereon, which return shall be signed by him. For any neglect of this duty, he is liable to an action at the suit of the party aggrieved for his damages, and to an attachment.—2 R. S. 2d ed., 358, § 80.

Although the officer is required by the command of the writ to return it on the day mentioned in the body of it as the return day, yet before any proceeding can be had against him by attachment for his omission or neglect to do so, at any time after the return day of the writ, either party must serve a notice upon him, requiring him to return such writ within twenty days after service of such notice; and, if not so returned, upon filing an affidavit of the service of such notice, and of the delivery of the writ, the sheriff's default may be entered, and an attachment issued of course. (*Sup. Court Rules*, R. 15.) Service of the notice may be made personally upon the sheriff, but not on his deputy; or by leaving the same at the office of the sheriff between the hours of nine o'clock and twelve o'clock in the morning; or between the hours of two and five in the afternoon. But the service cannot be made by leaving it in the office if there is any person there, but it must be delivered to such person. (2 R. S., 2d ed., 214, § 57.) But, if the sheriff has no office the service of papers directed to him, may be made by leaving the same at the county clerk's office with the clerk or his deputy, and the same shall be deemed equivalent to personal service on the sheriff.—*Ibid*, § 58.

In bailable cases, the sheriff is also liable to an attachment, where he has returned the defendant in custody upon the *capias*, provided good special bail is not put in by the defendant.

After the sheriff has returned *cepi corpus*, if the defendant be still at large, and bail be not perfected, the plaintiff has his election, either to wait until there is a default in the condition, and take an assignment of the bail bond, or at the expiration of twenty days after the return of the writ to proceed against the sheriff. For this purpose the statute provides that, if special bail shall not be put in within twenty days after the return day of the writ on which the arrest was made, upon filing an affidavit that such bail has not been put in and perfected, and that such writ has been

returned served, a rule may be entered with the clerk of the court, in which the writ has been returned, in vacation or term, requiring the sheriff or other officer who made the arrest to put in special bail within twenty days after service of notice of such rule. (2 R. S., 2d ed., 271, § 15.) If such bail be not put in and perfected within the time specified in such rule, upon filing an affidavit of the service of notice thereof, a rule may be entered in vacation or term that an attachment issue against the sheriff or other officer who may have made the arrest, and such attachment may be issued accordingly.—2 *Ibid*, § 16.

The sheriff or other officer who shall have made an arrest, may for his own indemnity, put in special bail to the action, when such bail shall have been required as herein directed and the putting the same in shall have been neglected by the defendant, &c., as to subject such sheriff to an attachment; and the putting in such bail, by such officer shall not be deemed a performance of the condition of the bond taken on such arrest; but such officer may, notwithstanding, prosecute such bond, and recover the amount of all damages he may have sustained by the neglect of the defendant, to put in such bail.—1 R. S., 2d ed., 271, § 17.

These provisions were intended as a substitution of the common law rule against the sheriff to bring in the body of the defendant and the same rules of practice apply as under the former rule.

If the defendant should put in special bail within the twenty days after the return of the writ, the plaintiff cannot proceed against the sheriff, but must except to the special bail, and serve notice of the exception on the defendant or his attorney. And the notice must be in writing; a verbal notice will not answer the purpose.—8 *Term Rep.*, 137, 258; 1 *H. Black.*, 107.

If the plaintiff excepts to the special bail put in either by the sheriff or defendant, the exception is entered upon the back of the bail piece filed in the clerk's office, within twenty days after service of notice of the bail's being put in; the time of justification is eight days from the day of notice of exception; and notice of justification is to be given four days before the day of justification. Bail may justify before a justice of the supreme court at chambers,

a circuit judge, or a supreme court commissioner, with a right of appeal by either party to the court.—*Rules Sup. Court, R. 13.*

It becomes proper here to inquire who are competent special bail in such cases :

First. He must be a freeholder or house keeper ; if he is not either he cannot be bail.—5 *Taunt.*, 174 ; 1 *Chitty, Rep.*, 174.

The term house-keeper, in its legal sense, with reference to the qualification of bail, means a person actually occupying part or the whole of the house, being the party responsible to the landlord for the entire rent, and assessed or liable for the parochial rates and taxes ; and the rule excludes those who have not a fixed and permanent residence. (3 *Petersd. Ab.*, 103 ; 2 *Price* 8.) But in some cases, an actual residence in the house is not material ; as where the bail and partner owned a house in their manufactory, but the bail did not reside in it, he was allowed ; the court saying if persons thus situated were to be considered incompetent, it would lead to the rejection of many competent persons living at a distance from the house in which their business was conducted. (*J. B. Moore*, 529 ; *Bing.* 450.) And if the bail be a house-keeper, the amount of rent he pays is not material.—8 *Moore*, 365.

Second. The special bail must be a person liable to arrest upon the process of the court. Therefore a person who is exempted from arrest is not competent special bail ; and the reason assigned is, the difficulty of proceeding against him. (4 *Taunt.*, 489 ; 1 *Dowl. & Ryl.*, 127.) But since, by the revised statutes, (2 *R. S.*, 2d ed., 269 § 1,) a suit may be commenced against a person privileged from arrest by service of a copy of the declaration with notice to plead, this reason would seem to cease.

Third. He must be solvent, and able to pay the amount for which he becomes responsible. He cannot therefore be received unless he is worth double the amount for which the defendant is held to bail, although the species of property is not material. (3 *Petersd., Ab.*, 106 ; 2 *Chitty Rep.*, 97.) And he must be the owner of the property in his own right, and the property, generally speaking, must be within the jurisdiction of the court, and liable to the ordinary process of the law. And the general rule is, that

bail cannot justify in respect to property out of the jurisdiction of the court, but when the property has been shortly expected, the rule has been departed from. (11 *Price*, 158; *Burr.*, 2526; 4 *Maule & Selw.*, 371; 1 *Chitty Rep.*, 285.) And in general the bail must be good and solvent; and a person who is insolvent cannot be bail.—1 *Chitty Rep.*, 9, 116.

There are other objections to persons as bail. Thus, the judges of courts cannot be special bail, because of the necessity of their attendance in the court where they belong. (1 *H. Black.* 636.) Attorneys and sheriffs cannot be bail, and this rule extends to the partner of the attorney. (15 *John. Rep.*, 535; 1 *Wendell*, 35.) The reason why sheriffs and other officers of the court cannot be bail is, on account of the oppression necessarily resulting to them as bail. (2 *Bos. & Pull.*, 129; 20 *John. Rep.*, 129.) The court say in the case last cited:—"We have decided that an attorney is not good bail, if excepted to; and for the same reason we think a sheriff ought not to become bail; and such is the rule of the English courts, (*Stra.*, 890; *Doug.*, 466; 1 *Bos. & Pull.*, 150,) which do not allow any person concerned in the process of the court to become bail." This rule excludes deputy sheriffs, and jailers from being bail. And if the bail is indemnified by the defendant's attorney, they are not competent. (1 *Bing.*, 64.) But this rule does not extend to persons who have been indemnified by the sheriff to become bail. (1 *Bos. & Pull.*, 21; 1 *Chitty Rep.*, 714.) And it is no objection to the bail that he is liable on the same instrument with the defendant, on which the suit is brought.—1 *Chitty Rep.*, 287, 306.

And if a person has been once rejected as bail, he cannot afterwards become bail. But if he was rejected because the defendant's attorney indemnified him, the rule does not apply. The rejection must have been for infamy of character, or for insufficiency. And if the reception was in an inferior court the rule applies.—1 *Dowl. & Ryl.*, 488; 3 *ibid.*, 5.

We have before seen that the special bail piece (after having been duly acknowledged,) must be filed in the office of the clerk of the county, and if the attorney for the defendant, or the de-

fendant himself, neglect or refuse to do it, the court will compel him, *nunc pro tunc*.—*John. Rep.*, 73; 7 *Coven*, 422.

Although the act abolishing imprisonment (*Laws*, 1830, p. 257,) for debt has abrogated arrests, and holding to bail upon contracts, yet the doctrine we have been considering in relation to the duties of the sheriff will apply in replevin, and in those exceptions under the statute where the right to hold to bail is not taken away.

After the bail has been put in by the defendant, or, in his behalf, by the sheriff, the plaintiff may except to them, and they must justify, or put in new bail who must also justify.

When the bail intend justifying, the defendant or his attorney must give notice of the time and place of justification, and the name of the officer before whom they justify; though if at the same time and place, it may be before a different officer from the one named in the notice. (2 *Wend.*, 293.) The notice must be given by the same attorney who gave the original notice of bail, unless a rule has been duly entered to change the attorney, of which notice must be given, otherwise the bail will not be permitted to justify. The notice must be served at least four days before the time of justification, if served personally upon the plaintiff's attorney, and eight days if it is served upon his agent. *Doug.*, 217; 6 *Taunt.*, 532; *Sup. Court Rules*, R. 13.

But if the attorney for the defendant refuse to go on with the justification, the court will allow the bail to appear and justify by their own attorney. (7 *Taunt.*, 47.) And when the defendant's attorney gave notice of bail, and the bail to the sheriff, by their attorney gave notice of adding and justifying other bail, the court held it to be sufficient.—2 *Barn. & Ald.*, 604.

For the purpose of justifying, the bail appear before either of the officers we have mentioned, at the time and place stated in the notice of justification, with an affidavit usually prepared before hand, stating their circumstances; or they may be examined *viva voce* as to their circumstances by the opposite party, and if the officer be satisfied as to their sufficiency, a rule or order will be granted for their allowance.—1 *Dunl. Pra.*, 180.

The bail usually testify that they are householders or freeholders, worth double the sum over and above all debts due from them, in which the defendant is held to bail. But where the amount of bail required of the defendant is very large, the court will not require the sureties to be worth double the amount. As where the defendant was held to bail in the sum of forty-five thousand dollars, the bail in the aggregate were required to justify in only the sum of forty-five thousand dollars each. (1 *Wendell*, 107.) But in ordinary cases, if the bail cannot justify in double the amount in which the defendant is held to bail they will be rejected.—1 *Grah. Pra.*, 153; 2 *Hill*, 379.

Bail may be opposed on the ground that they personate another, or have assumed, or feigned; and the personating of another as bail is made felony by the statute; (2 *R. S.*, 2d ed., 563, § 48,) and in such case the court will order a *vacator* to be entered upon the bail piece. But this power has been exercised with great caution; and if the personation has been felonious, relief will be refused until the person personated has prosecuted to effect the person guilty of wilfully personating him.—1 *Dunl. Pra.*, 180.

In general, however, if any fraud or malpractice have been used in procuring the justification of the bail, and which was not known to the plaintiff or his attorney at the time of justification, the court, upon application, will set aside the rule of allowance; in which case you may immediately proceed against the sheriff on the bail bond taken by him.—3 *Dowl. & Ryl.*, 4.

It does not belong to the province of this work to go into the practice of the courts in setting aside an allowance of bail upon a fraudulent justification. Our only purpose has been to shew the necessity of good faith in the matter.

Before the time of justification expires, if one of the bail cannot justify, new bail may be added, who must justify; but he must be added as fresh bail. And if neither of the former bail justify, the bail added must be treated as new bail, and give notice accordingly. The notice of justification besides giving the time and place of justifying, the officer's name before whom the justi-

fication will take place, must give the names and additions and places of residence of the bail, and must give the proper title of the cause.—1 *Dowl. & Ry.*, 356.

We will now proceed to the attachment against the sheriff, for neglect of duty in not returning the writ, or for not perfecting bail, as required by the statute; and for not returning the writs of execution that may be put in his hands for collection, &c.

The practice to compel a return to a *capias*, and to an execution when the sheriff has neglected to return them are essentially the same.

After the expiration of the time limited by the notice requiring the sheriff to return the writ, if the writ be not returned, on filing an affidavit of the service of the notice and of the delivery of the writ, the officer's default, as we have before remarked, may be entered, and an attachment issues of course.—*Supreme Court Rules, R. 15.*

And it is not necessary that the writ should have been received personally by the sheriff, but if it is in the hands of his deputy or his under sheriff, he is liable.—6 *Cowen*, 41.

Until the attachment is issued, the proceedings are entitled in the original cause; after it issues, they are in the name of the people.—9 *J. R.*, 160.

The attachment, if against the present sheriff, is directed to the coroner; if against the late sheriff, to the present sheriff; and may be returnable at any day in term, when the court is in session, though the regular return day in term is past.—2 *R. S.*, 2d ed., 123, § 5.

When the attachment is issued, it is the duty of the coroner to take the sheriff into his custody, and bring him personally before the court issuing the attachment, and he must keep and detain him in his custody, until such court shall have made some order in the premises; unless such defendant shall entitle himself to be discharged, as prescribed in the next section.—*Ibid*, 442, § 12.

In cases where a sum shall have been endorsed on any attachment issued by the special order of any court, and when any sum

shall have been endorsed in which to hold the defendant to bail, either by the court, or by a judge or other officer, the defendant shall be discharged from arrest on such attachment, upon executing and delivering to the officer making the arrest, at any time before the return day of the attachment, a bond with two sufficient sureties, in the penalty endorsed on such attachment, to such officer by his name of office and his assigns, with a condition that the defendant will appear on the return day of such attachment, and abide the order and judgment of the court thereupon. But where the attachment is issued without the special order of the court, and an order specifying the amount in which the defendant is to be held to bail is not endorsed thereon, the defendant will be entitled to be discharged from arrest, on executing a bond in the penalty of one hundred dollars with sureties, in the same manner and with the like condition as before mentioned.—2 *R. S.*, 2d ed., 442, § 10, 11, 13.

In a late case, (21 *Wendell*, 57,) the supreme court decide that a bond executed by a sheriff to be relieved from arrest on an attachment issued against him for not returning an execution, where the penalty exceeds one hundred dollars is void, if an attachment was issued without an order fixing the amount in which the party proceeded against should be held to bail. And that in a declaration on such bond it should be averred that the bond was ordered by the court to be delivered to the plaintiffs to be prosecuted; and that an averment that it was ordered to be delivered up to be prosecuted without naming the plaintiffs, or authorizing them to prosecute, would not be held sufficient on demurrer. They further remark that the statute expressly requires that when such an attachment issues, the party entitled to the writ shall procure an order from a judge or commissioner, directing the penalty of the bond, or the defendant shall be discharged from arrest on executing a bond in the penalty of one hundred dollars; and that a previous statute in the same volume, (2 *R. S.*, 2d ed., 214, § 60) declares, "no sheriff or other officer shall take any bond, obligation or security by color of his office in any other case or manner than such as are provided by law; and any such bond, obliga-

tion or security taken otherwise than as herein directed, shall be void." They thought the bond in question was taken by color of the sheriff's office in a case other than such as is provided by law for so large a bond. It could not legally have been for more than one hundred dollars.

Where an attachment is issued by the special order of the court, a certificate to that effect must be endorsed thereon by the clerk, and if no sum be specified in which the defendant shall be held to bail on such writ, he will not be entitled to be discharged from the arrest on giving a bond, or in any other manner, except by the special order of the court issuing the attachment.—2 *Ibid*, 443 § 14.

And if the officer executing the attachment do not return the same by the return day thereof, without any previous rule for that purpose he may be attached, and an attachment issues against him of course upon being allowed by a judge of the court, or some officer authorized to perform the duties of a judge at chambers; and in such allowance the cause of issuing the same against the officer must be stated; and he cannot be discharged upon bail or in any other manner than by the order of the court.—*Ibid*, § 17.

The officer must also return with the attachment, the bond taken by him from the defendant, which must be filed with the attachment.—*Ibid*, § 16.

In case the officer who had the original attachment, is attached for not returning it on the return day, pursuant to the 17th section of the statute, the person attaching him, must arrest him, and bring personally before the court, and detain him in actual custody, until the order of the court.—*Ibid*, § 18.

If the party charged with the misconduct be in the custody of any officer, by virtue of an execution, or by virtue of any process for any other contempt or misconduct, the officer having the attachment so returns, and the court may award an alias attachment, and a writ of habeas corpus to bring up such person. (22 *Wend.*, 635.) Or if the attachment issued without a special order of the court, the writ of habeas corpus may be allowed by any judge of the

court, or an officer authorized to perform the duties of such judge in vacation. And such writ authorises the officer in whose custody the defendant in the attachment is, to bring him before the court in which the writ of attachment is returnable, and to detain him at the place where such court shall be sitting, until some order is made by the court for his discharge.—2 *Ibid*, 442, § 7, 8; 5 *Cowen*, 415.

We shall here insert, as part of the general duties of the sheriff in the service of attachments, the few sections of the statute relating to the process of attachment for disobedience of a subpoena.

Whenever any person has been duly subpoenaed as a witness to appear at a circuit court, or before the court of common pleas as a witness to testify in any cause to be tried therein, and shall neglect or refuse to attend upon such writ, the court has power to award an attachment against him for such neglect or misconduct. There can be no bail upon this attachment, as thereby the remedy would be defeated, which is to compel the attendance of the witness, to testify as well as to answer the contempt.—2 *R. S. 2d ed.*, 445, § 34, 35, 36.

Whenever the defendant in the attachment is brought before the court upon the attachment, interrogations are administered to him, specifying the facts and circumstances alledged against the defendant, and requiring his answer thereto; to which the defendant must make answers within a reasonable time upon oath, which time will be allowed by the court. The answers of the defendant may be contradicted by other proof, and he may bring proofs to confirm the same. And upon such proof the court shall determine whether the defendant is guilty of the misconduct alledged.—*Ibid*, 443, § 19.

If the court find him guilty they will proceed to punish him by fine or imprisonment, or both as the case may require.—*Ibid*, § 20.

But if the misconduct complained of, consists in the omission of some act or duty, which is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed

such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceeding. And the order of commitment in such case shall specify the act or duty to be performed, and the amount of the fine and the expenses to be paid.—2 *Ibid*, 444, § 23, 24.

But if an actual loss or injury shall have been produced to any party by the misconduct alledged, a fine shall be imposed sufficient to indemnify such party and to satisfy his costs and expenses, which shall be paid over to him by the court; and in such case the payment of the fine and acceptance by the party injured, shall be a bar to the injured party's maintaining an action to recover damages for such injury or loss.—*Ibid*, 443, § 21.

But in all other cases the fine imposed shall not exceed two hundred and fifty dollars over and above the costs of the proceeding.—*Ibid*, 444, § 22.

If the defendant against whom the attachment issues has been arrested, and the writ returned, does not appear on the return day of the attachment, an *alias* attachment may be awarded or an order entered to prosecute the bond taken on the arrest, or both. And such order operates as an assignment of the bond to any injured party, who shall be authorised by the court to prosecute the same; and such party may sue on the same as the assignee of the sheriff or other officer to whom it was given, in the same manner as in other actions or bonds, conditioned to perform covenants other than for the payment of money.—*Ibid*, § 28.

The measure of damages in the action shall be the extent of the loss or injury sustained by such aggrieved party by reason of the misconduct for which the attachment was issued, and his costs and expenses in prosecuting such attachment.—*Ibid*, 29.

A declaration on a bond given by a sheriff or other officer to be relieved from an arrest on an attachment is not bad in substance, if it omit to alledge the misconduct for which the attachment issued; nor is it bad in substance if it omit to specify the manner in which the plaintiff is connected with the proceeding; it is enough if it be alledged that he is the party aggrieved. It is not necessary to aver in such declaration that the attachment on which the

defendant was arrested is returned; nor to alledge that the defendant was called on the return day, and that his default was entered. The averment of the non-appearance of the obligor on the return day is equivalent to an allegation of special damage, under which the plaintiff will be entitled to recover damages for the misconduct, and the costs of the attachment. Non-appearance alone at the return day is the *gravamen*, and an averment of that is equivalent to an allegation of special damage. The misconduct is matter of proof, at all events the non-appearance at the return day is enough to shew a forfeiture of the penalty and raise the legal intendment of some damage.—17 *Wendell*, 59.

An order to prosecute a sheriff's bond given by him to be released from arrest on attachment will not be granted until after a default upon a second call of the sheriff, on motion days at a general term. The sheriff may be called on two non-enumerated days next succeeding or including the return day, If the attachment be returnable after the non-enumerated days have passed, he may be called on the day of the return of the process, and a second time on the first non-enumerated day in the next term; for this purpose notice must be given to the sheriff; but it is irregular after a call of the sheriff in one term, to permit a term to intervene before making a second call, without previous notice to the sheriff; otherwise the whole proceeding would be a complete surprise to the sheriff. Where the attachment is returnable after all the non-enumerated days are past, the first call may be made on the return day. So much the sheriff must hold himself ready to meet, and, if in default on the second call, his bond may be prosecuted on the usual order for that purpose, or a further attachment may issue, or both may follow according to circumstances.—20 *Ibid*, 612.

By section second of the "Act relative to suits commenced by declaration," (*Laws* 1833, c. 271, § 2,) the sheriff may be compelled to return declaration served by him, by notice, in the same manner as he may be compelled to return a *capias*.

The duty of a sheriff in returning a writ of *fieri facias* or other

execution, is like his duty in returning a *capias*; and the proceedings against him are the same.

The defendant was brought up on an attachment for not returning an execution, and objected that the defendant in the suit in which the execution issued had duly sued out a writ of error to remove the judgment. By the court. That is no excuse; unless the defendant has obtained a stay of execution by putting in and perfecting bail, the plaintiff is entitled to have execution of his judgment.—9 *Wend.*, 224.

This case clearly establishes the duty of the sheriff that he must proceed upon the execution, unless he is legally stopped. There is no discretion given to him, but he must go on and execute the process according to its mandate, leaving to the defendant to take legal means to arrest his progress if the *fi. fa.* has been improperly issued, or its execution suspended.

But where an attachment issues against the sheriff for the want of a proper appearance by the defendant, or where the defendant does not put in special bail to the writ, the proceedings are materially different from what they are upon an attachment for not returning the *capias*, declaration or execution.

Where a sheriff is brought into court for not putting in bail to the action, the court may by summary proceedings ascertain the amount due to the plaintiff in the action, in the same manner as if interlocutory judgment had been entered against the defendant,—2 *R. S.*, 2d ed., 272, § 19.

If the court shall determine that the amount so ascertained ought to be paid by the sheriff, and if the sheriff shall confess a judgment to the plaintiff for the amount so ascertained, with the costs of the suit and the proceedings, the court shall thereupon stay all other proceeding against him until he shall have had a reasonable time to obtain judgment on the bond taken on the arrest of the defendant, and to collect the amount so ascertained to be due to the plaintiff.—*Ibid.*, § 20.

The sheriff upon being served with such attachment, may, at his option, confess a judgment to the plaintiff for the amount due

him, with the costs of the suit and proceedings, and shall thereupon be discharged from arrest upon such attachment; and proceedings on such judgment shall be stayed as prescribed in the last section, and no execution shall be issued without leave from the court.—*Ibid*, § 21; *H. Black.*, 233.

If in any action, after a reasonable time is allowed, the sheriff shall not satisfy the plaintiff in the action the amount due him, with costs and interest, the court shall award execution on the judgment confessed by such sheriff, as above provided; and if the execution against the sheriff is returned unsatisfied, in part or in whole, the same proceedings shall be had upon the official bond of such sheriff to collect such deficiency as are provided in other cases of delinquency of the sheriff.—2 *R. S.*, 2d ed., 272, § 22.

We have before seen that upon the return of the attachment, the court will cause interrogatories to be filed specifying the facts and circumstances of the alleged misconduct, and requiring the answer of the sheriff thereto upon oath.

These must be filed within four days after the return of the attachment, and the defendant either remains in custody, or puts in bail, or his recognizance is taken to appear from day to day until the court shall determine the case. (3 *Cowen*, 341.) And if the interrogatories are not exhibited within that time, the defendant may move to be discharged from custody, or if he is out on bail that his recognizance be discharged.—2 *Wendell*, 617.

Upon the filing of the interrogatories, the defendant must answer thereto in writing, within such reasonable time as the court shall allow.—2 *R. S.*, 2d ed., 443, § 19.

But if the sheriff refuse to answer he may be re-committed, or if he is out on bail, and he do not attend to be examined, his recognizance may be forfeited, or the court may attach him for his second contempt, and punish him in their discretion.—1 *Dallas*, 319; 2 *Arch. Pra.*, 344.

If the interrogatories are improper or irrelevant the defendant may except to them. (*Strange*, 444.) And the interrogatories may be amended for the purpose of explaining an ambiguity, or obtaining a more full answer to the matters already stated; and

for this purpose a new interrogatory may be added. But not for the purpose of introducing any new matter.—6 *Coven*, 41; 1 *John. Ca.*, 31.

After the interrogations are filed the defendant may come in and confess the contempt, but he cannot do so before filing, for until the filing there is no charge in court against him to which he can plead. (*Burr.*, 2105; 5 *Term Rep.*, 362.) But upon an attachment against the sheriff for not returning a writ of *fi. fa.* the court refused to discharge the sheriff until he paid the debt and costs, and the costs of the attachment, because it appeared there was fraud on his part in the matter. Although the sheriff in his answer to the interrogatories, admitted that he by mistake returned the execution to the wrong officer. (1 *H. Black.*, 533.) But where the defendant has been indicted for the contempt, the court must take that into consideration in inflicting upon him punishment under the attachment.—2 *R. S.*, 2d ed., 444 § 26.

On the return of the attachment, if there be no party aggrieved by the misconduct for which the attachment was issued, the court, in case the defendant shall fail to appear, according to the condition of the bond taken on the arrest, shall order the same to be prosecuted by the attorney-general, or by the district attorney of the county in which the bond was taken, in the name of the officer who took such bond, and in such case, the whole penalty of such bond shall be forfeited and recovered, and from the moneys arising and collected thereon, the court shall order such sum to be paid to the party prosecuting the attachment, as the court ordering the prosecution shall think proper to satisfy the costs and expenses incurred by him, and to compensate him for any injury he may have sustained by the misconduct for which such attachment issued; and the residue of the moneys shall be paid into the treasury of this state.—§ 30, 31.

It is also provided that, if on the return of executions duly issued on such judgment obtained on such bond, it shall appear that the sureties to the bond at the time of taking them were insufficient, and that the officer recovering them had reasonable grounds to doubt their sufficiency, he shall be liable in an action

on the case to the party aggrieved who may have prosecuted such suits for the amount of the judgment recovered by him, and for his costs and expenses in such suit, or if such suit was brought by the attorney-general or district attorney, an action on the case may in like manner be brought by them in the name of the people of this state for the amount of the judgment so recovered; and the same disposition of the moneys collected in such action on the case against such officer, shall be made as directed above, in the last section.—*Ibid*, 32.

But if the sureties are apparently responsible, and are in apparent credit when taken, it would probably be sufficient though they should be insolvent at the time the bond was prosecuted, or judgment obtained upon it, by the attorney-general or district attorney as prescribed in the sections above cited.—5 *Taunt.*, 86.

If there is any irregularity in the proceedings against the sheriff, the court will set them aside, or any attachment founded upon them. Or if any previous proceedings of the plaintiff against the bail are irregular, the sheriff is not liable to an attachment if the bail is not afterwards perfected. Thus, if bail be put in in time and before the expiration of the rule against the sheriff, and the plaintiff does not except to them properly; or the notice of exception is entitled in the wrong court, or the like, the attachment against the sheriff will be set aside for irregularity; and this will be done though the irregularity be waived by some subsequent act of the defendant in the attachment. And in cases of attachments against the sheriff, it is as a general rule thought best to hold parties to strict regularity in their proceedings.—1 *H. Black.*, 80, 106; 1 *Arch. Pra.*, 96.

And where the arrest is made by a special deputy, as in such case the plaintiff cannot regularly rule the sheriff, either to return the capias, or bring in the body, the court will set aside an attachment against him, for irregularity, with costs. (2 *Maule & Selw.*, 562.) And if the plaintiff declare in chief, before bail is put in or perfected, he discharges the sheriff, and an attachment taken out, in such case, against the sheriff, would be clearly irregular.—8 *John. Rep.*, 72.

If the plaintiff, without the knowledge of the sheriff, take a cognovit from the defendant for the payment of the debt by installments, he cannot afterwards proceed against the sheriff, even though it be especially agreed that, in case of default in paying any of the installments, that such right of moving against the sheriff for an attachment shall not be impaired. (1 *Taunt.*, 159.) But where time was given to the defendant at the instance of one of the special bail, the court refused to set aside an attachment against the sheriff on the application of the bail. (16 *Com. Law Rep.*, 43.) But if there has been any unnecessary delay to obtain the attachment against the sheriff, the court will, in general, set it aside.—1 *Bos. & Pul.*, 151; 17 *J. R.*, 37.

We shall now consider the duty of the sheriff upon attachments delivered to him against parties for the non-payment of money. The statute provides,

When any rule or order of a court shall have been made for the payment of costs, or any other sum of money, and proof by affidavit shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may issue a precept to commit the person so disobeying to prison, until such sum, and the costs and expenses of the proceeding be paid. (2 *R. S.*, 2d ed., 441, § 4.) Demanding of the attorney will not answer.—9 *Paige R.*, 609.*

And in all such cases, where payment of costs shall be required on the granting of any motion, or the performance of any condition, or where the order shall require such payment or performance, the party whose duty it is to comply therewith, has twenty days for that purpose, unless otherwise directed by the

* The statute has the following new provision as to the collection of costs awarded on *special motion* by courts of law. All orders awarding costs upon granting or denying special motions, shall specify the amount of such costs; and where the order for the payment of costs, or any sum of money upon a special motion, is not conditional, a precept to enforce payment of such costs or sum of money, may be issued without any demand or application to the court.—*Laws* 1840, p. 333, § 15.

rule or order. And where by the terms of any order any act is to be done *instantly*, it shall be understood to mean twenty-four hours.—*Sup. Court Rules, R. 60.*

We pass over as foreign to our subject, any detail of the practice of the courts as to the taxation of costs, or the notice of taxation required to be given.

The costs must be regularly demanded, except as provided by the law of 1840, and a copy of the taxed bill of costs, and a copy of the rule giving them must be served upon the party, at the same time exhibiting to him the original rule. In chancery, by rule 199, the amount of costs in certain cases, is inserted in the order, and no taxation is then necessary. The demand must be made by the party who is authorized to receive them, and, if the demand is not made by the party authorized to receive them, the party demanding them in such case, must have a power of attorney to receive them, which must likewise be shewn, and a copy of the rule as certified by the clerk must be attached to the copy of the taxed bill of costs. It is not necessary that the copy certified by the clerk should be attached.—6 *Coven*, 39; *Dunl. Pra.*, 740; 1 *Wendell*, 294.

The party who is to pay the costs is under no obligation to pay them until they are regularly taxed.* (*Dunl. Pra.*, 293.) But this remedy extends only to interlocutory costs, and does not extend to the costs of the action recovered upon the obtaining of the judgment final. And this is the only remedy that can be pursued to recover interlocutory costs.—*Ibid*, 750.

There is a rule in the court of chancery similar to the rule of the supreme court above cited. By the rule in chancery—where a party is ordered to pay the costs of any interlocutory proceeding, and no time of payment is specified in the order, he shall pay them within twenty days after the filing of the taxed bill and affidavit, and service of a copy of the order and of such taxed bill;

* Where relief is obtained or a favor granted on payment of costs, then the party obtaining the relief or favor must seek the opposite party and offer to pay them, or he loses the benefit of his rule. If the amount is not fixed by the rule, the party who is to pay may require the costs to be taxed.

or if a gross sum is specified in this order within twenty days after service of a certified copy of the order ; and if he refuses or neglects to pay such costs within the time prescribed as aforesaid, or specified in the order, the adverse party, on an affidavit of the personal service of such copies, and a demand of payment, and that such costs have not been paid, may have an *ex parte* order to commit such delinquent party to prison.—*Chan., Rules, R. 171.*

In cases where costs are allowed to the complainant upon exceptions to the answer of the defendant under the 58th and 59th rules in chancery, a different course is pursued from that pointed out in the above rule, in order to attach the defendant for non-payment of costs of the exceptions. In those cases the defendant is entitled to a copy of the taxed bill of costs ten days before the time of putting in the further answer expires, or he may put in such answer without paying the costs. But the complainant may afterwards proceed by attachment to compel the payment of the costs, if they are not paid within twenty days after service of a copy of the taxed bill of costs on the defendant or his solicitor.—*Laws of 1831, p. 396.*

In the cases under the 171st chancery rule, a personal demand of the *defendant* must be made for the costs, and a copy of the taxed bill and order served on him, before he is in contempt ; whereas under the 58, 59 and 60th chancery rules, a service of the taxed bill of costs upon the defendant's *solicitor* only, and the non-payment thereof in twenty days after such service renders him liable to the attachment.

The following decisions shew the manner in which attachments for the non-payment of money under an order of the court of chancery should be served, and the duties of the sheriff in executing them, until the court dispose of the contempt.

In Chancery, March 4, 1834.—4 *Paige, R. 397.*

The defendant having allowed proceedings against him to a writ of assistance to turn him out of possession, was ordered to pay the costs, and was taken and imprisoned on a precept. A motion was to discharge him.

By the Chancellor. The counsel for the defendant is under a

mistake in supposing that his client is exempt from imprisonment in this case under the act to abolish imprisonment for debt, and to punish fraudulent debtors. (*Laws of 1831, p. 396.*) The precept for commitment in this case is in the nature of civil execution, and the defendant is therefore entitled to the privilege of the jail liberties. (2 *R. S.*, 352, § 43.) But he is imprisoned for costs of a proceeding as for a contempt to enforce a civil remedy. This case, therefore, is expressly excepted from the operation of the act of April 1831, by the provisions of the second section of that act. The precept under which he is imprisoned, issued under and in conformity with the fourth section of the revised statutes, (2 *Ibid.*, 441, § 4,) which relates to proceedings as for contempt to enforce civil remedies. And it was the intention of the legislature to except proceedings under that title from the operation of the non-imprisonment act. The case of *The People ex rel. Richardson, vs. Onondaga Common Pleas*, (9 *Wend.*, 430,) cited by the defendant's counsel, came within the letter of the act of 1831, and was not embraced within any of the exceptions specified in the second section. If an order for the non-payment of interlocutory costs cannot be enforced by the imprisonment of a party, the adverse party would, in most cases, be without remedy, although the property of the person chargeable with the payment of such costs, was more than sufficient to pay all his debts. If a party is really unable to pay a bill of costs of this description, and to the payment of which he is sometimes subjected by the bad advice of his counsel, without any fault on his part, he ought not to suffer perpetual imprisonment. I, therefore, can see no good reason why such cases should have been excepted from the benefit of that article of the revised statutes (1 *R. S.*, 2d ed., 789, art., 6,) which provides for the discharge of imprisoned debtors upon a voluntary surrender of their property to the creditor by whom they are imprisoned. In the present case I can give no relief to the defendant, and if he cannot get discharged under any of the insolvent acts, his only remedy is by an application to the legislature to extend the provisions of this article of the revised statutes to the case of an imprisonment for the non-

payment of costs. The application to discharge the defendant from the custody of the sheriff is denied.—*Hoffn. Ch. Pr.* 429, n. 2.

But where the precept or attachment issues for the non-payment of money other than costs, the sheriff may take bail for the limits; and from the opinion of the chancellor, above cited, the defendant upon an attachment for costs is entitled to the limits.

The following case, first decided by the vice chancellor of the first circuit, and confirmed by the chancellor, upon an appeal to him, establishes the proposition, that the defendant in such case may be discharged under the insolvent law.—3 *Paige*, 38.

The defendant was committed under several precepts issued from the court of chancery, for not paying money ordered to be paid as alimony. He presented a petition under the Revised Statutes, (1 *R. S.*, 2d ed., 789.) The vice chancellor examined the clauses of the previous acts of the legislature, (*act of 1789*, 2 *Johes & Varick*, 408; *act of 1813*; *Revised Laws*, 348,) and the English statutes of which our former statute was a copy, and several cases in the common law courts of England, (*Cowp.*, 136; 4 *Term Rep.*, 316; 1 *Bos. & Pul.*, 336,) in which it held, that the lord's act extended to all attachments for non-payment of money between party and party; that it was an execution. The court then say, that there was no decision in England extending their statutes to the court of chancery, and that a special statute was passed for that purpose; (43 *Geo. III. Cap.* 6,) and the regulation was retained in the English statute of 1813. That before the revised statutes were passed, the principle of the English cases at common law would have decided the question; but that under the provisions of the revised act referred to, coupled with the statute as to contempts, there would be no doubt. That the precept was, to all intents and purposes, an execution; and the party under it was imprisoned in a civil cause, for it was a cause between party and party, where the one was pursuing a civil remedy against the other, and it did not partake in the least of a public prosecution. The court confined his remarks to the fourth section of the statute concerning contempts.

The above decisions apply as well to cases for non-payment of

costs under the supreme court ordering the payment of interlocutory costs. By comparing the rules of the court of chancery, and the rules of the supreme court upon the same subject, the language of the rules of both courts will be found substantially the same. The above decisions will serve as a safe guide to the sheriff in executing the attachment after the decision of the court upon the contempt, and would doubtless be recognized by the supreme court as good authority.

It sometimes becomes the duty of the sheriff to execute attachments other than for the non-payment of money. The sheriff in these cases when the attachment is for misconduct or other contempt in the cases prescribed by law (excepting on attachments for the non-payment of costs,) when the party is committed to jail, he shall be actually confined and detained until discharged by due course of law,* or shall be removed to some other jail or place of confinement in the cases provided by law. And if any sheriff or keeper of a jail shall permit or suffer any prisoner so committed to such jail to go or be at large out of his prison, except by writ of habeas corpus, or rule of court, or in such other cases as may be provided by law, he shall be liable to the party aggrieved, for his damages sustained thereby, and shall be deemed guilty of a misdemeanor.—2 R. S., 2d ed., 355, § 64.

The above provision sufficiently indicates the duty of the sheriff upon this species of attachment, where the defendant is committed to his custody by the order of the court, as a punishment for the contempt.

But as a general rule, in the execution of attachments for contempts, before the decision of the court thereon, whenever an officer is required to keep any person arrested upon an attachment, in actual custody, and to bring him personally before any court, the inability, from sickness or otherwise, of such person to attend such court personally, shall be a sufficient excuse for not bringing him before such court. Nor shall such officer be required in such cases to confine any person arrested upon an attachment to answer for misconduct, in any prison, or otherwise to restrain

* See note page 346.

him of personal liberty, except so far as shall be necessary to secure his personal attendance.—*Ibid*, 445, § 37.

What we have said embraces the whole of the duties of the sheriff, or any other officer in the executing of attachments, for the enforcing of a civil remedy, and for the omission or neglect of duty by the officer in returning process delivered to him to be executed; and also for the contempts incurred by parties and witnesses in disobeying the process of the court, requiring their attendance as witnesses, or the performance of any other act or duty. The doctrine of criminal contempts, it is believed, is sufficiently illustrated to enable the reader to discover the difference between that kind of contempt, and the species of contempt to enforce a civil remedy. We have endeavored to make the line of demarkation between the two offences plainly perceptible.

We will next proceed to the duties of the sheriff upon the several kinds of attachments, that are in the nature of executions, to enforce the collection of money in particular cases.

The sheriff to whom any warrant against an absent or absconding debtor is directed and delivered, is required immediately to attach the real estate of the debtor, and all his personal property, including money and bank notes, (excepting property exempt from execution,) and to take into his custody, all books of account, vouchers and papers, relating to the property, debts, credits, and effects of the debtor, together with all evidences of his title to real estate; and to keep the same safely to be disposed of as the statute directs. (1 R. S., 2d ed., 766, § 7.) Any property of the debtor which may be taken by execution may be seized by an attachment under the act relative to absconding debtors. (9 John. R., 220.) But the statute also makes choses in action liable to the warrant and attachment. The sheriff is likewise required immediately, on making such seizure, with the assistance of two disinterested freeholders, to make a just and true inventory of all the property so seized, and of the books, vouchers and papers taken into his custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable; which inventory, after being

signed by the sheriff and the appraisers, shall, within ten days after such seizure, be returned to the officer who issued the warrant; and the sheriff shall, under the direction of such officer, collect, receive and take into his possession, all debts, credits and effects of such debtor, and commence such suits and take such legal proceedings in the name of such debtor, as may be necessary for that purpose; and which suits and proceedings may be continued by the trustees to be appointed as hereinafter directed, until a final termination thereof.—*Laws* 1840, 296, § 1.

A seizure made by virtue of any attachment issued under the provisions of the statute, shall be deemed to supersede any seizure that may have been previously made under any warrant which shall have issued at the instance of any overseer or superintendents of the poor against any person pursuant to the provisions of law, respecting the relief and support of indigent persons, or respecting the support of bastards; but the surplus of any property so seized, after satisfying the creditors shall be paid to the overseers, or superintendents, at whose instance any warrants so superseded, may have issued.—1 R. S., 2d ed., 775, § 74.

If any of the property seized under the attachment, other than vessels, be perishable, the sheriff is required to sell the same at public auction, under an order of the officer who issued the warrant, and to retain in his hands the proceeds of the sale, after deducting his expenses, to be allowed by such officer, which proceeds are directed to be disposed of in the same manner as the property so sold would have been, had it remained unsold.—*Ibid*, 766, § 9.

Whenever a sale of perishable property is thus ordered by the officer, he is required in the order to prescribe the time, place and notice of sale, and how the same shall be published.—*Ibid*, 769, § 27.

If any goods or effects seized as the property of the debtor, other than vessels, are claimed by, or in behalf of, any other person as his property, the sheriff is directed to summon and swear a jury to try the validity of such claim, in the same manner, and with the like effect as in cases of seizure under execution.—*Ibid*, 767, § 10.

If by their inquisition, the jury find the property of the goods and effects so seized, to be in the person so claiming them, the sheriff must forthwith deliver them to the claimant, or his agent, unless the attaching creditor, by bond with sufficient sureties, indemnifies the sheriff for the detention of such goods and effects. (1 *Ibid*, § 11.) In case of such indemnity, the sheriff must detain such goods and effects to be disposed of as the statute directs. (8 *Coven*, 67; 5 *Wendell*, 310.) And the inquisition of the jury may be given in evidence to shew that the sheriff has not acted maliciously, and will mitigate damages in an action of trespass against him for taking the goods of such claimant. (3 *Maule & Scho.*, 175; 4 *Term Rep.*, 633; 10 *John. Rep.*, 98.) But the inquisition is not admissible as evidence for the sheriff, nor is it admissible at all to ascertain the property, in an action against the sheriff for the value of the goods.—2 *H. Black.*, 437.

If the property in such goods be found to be in the claimant, the costs and charges arising from the inquisition, to be allowed by the officer issuing the warrant, must be paid out of the estate of the debtor; but if the property in the goods be found in the debtor, then the costs and charges, to be ascertained in the same manner, must be paid by the claimant.—1 *R. S.* 2d ed., 767, § 12.

Upon the appointment of trustees being made, every sheriff to whom any warrant against the estate of the debtor may have been issued, is required to return the same, with his proceedings thereon to the officer who issued it, or to the officer who issued the first warrant against the debtor, in case warrants shall have been issued by several officers; and such officer is directed to cause the same to be filed within thirty days thereafter, in the office of a clerk of the supreme court.—1 *R. S.*, 2d ed, 774, § 66.

And every sheriff to whom a warrant may have been delivered, may be compelled by the officer having jurisdiction over the proceedings thereon, to return such warrant and the inventory required to be taken by him, by an order of such officer, and by process of attachment, for disobedience thereon the application of any creditor, or of the debtor, and on proof of the neglect of the sheriff.—*Ibid*, § 67.

Other duties of the sheriff result from attachments against ships and vessels.

The sheriff to whom the warrant is directed and delivered must forthwith execute the same, and must keep the ship or vessel, and other property seized by him, to be disposed of as directed by the statute.

Within ten days after the seizure, he must make a return to the officer who issued the warrant, stating therein, particularly, his doings in the premises; and must make out and subscribe, and annex thereto a just and true inventory of the property seized; which inventory must be signed by him and annexed to his return.—2 *Ibid*, 406 § 6.

Within twenty days after the service of the order of sale, the sheriff must proceed and sell the vessel so seized by him, her tackle, apparel and furniture, or such part thereof, as shall be sufficient to satisfy the claims exhibited, and the expenses incurred, upon the same notice, in the same manner, and in all respects subject to the provisions of law, in case of the sale of personal property upon execution.—*Ibid*, 408, § 22.

The sheriff must return to the officer granting the order, his proceedings under the same; and the proceeds of the sale, after deducting his fees and expenses in seizing, preserving, watching, and selling the vessel, are to be retained by the sheriff in his hands, to be distributed and paid as directed by the order of distribution.—*Ibid*, § 23.

When a distribution of the moneys arising from the sale of the vessel is made by the officer before whom the proceedings are pending, he is ordered to draw an order on the sheriff having such proceeds of sale in his hands, directing him to pay the same to the several attaching creditors entitled thereto, according to such distribution, and the same must be paid accordingly; and all moneys remaining in the hands of such sheriff, after such payment, and after deducting his commission, are required to be paid to the owner, agent, consignee, or master of said vessel.—*Ibid*, 409, § 35, 36.

The sheriff to whom a warrant has been delivered, may be

compelled by the officer having jurisdiction of the proceedings thereon, to return the inventory required to be taken by him, and to pay over the moneys in his hands pursuant to any order for that purpose by an order of such officer, and by process of attachment for disobedience thereof, on the application of any creditor.—*Ibid*, 410, § 41.

If the sheriff after seizing the vessel, lets her go out of his possession, without taking the bond required by statute, he is liable to the creditors, who issue an execution upon a judgment upon the attachment. It is the duty of the sheriff to keep the vessel or take a bond, and he must not discharge the vessel without a sufficient bond.—11 *Wendell*, 641.

The application may be made to the officer who issued the warrant, who, before the appointment of trustees by him according to the statute, on receiving a bond from the owner, consignee, agent, or commander of the ship or vessel, in at least double the amount of the penalty sworn to by the creditors, conditioned to pay all such claims and demands as the attaching creditors shall establish, to be subsisting liens upon the ship or vessel, according to the provisions of the statute at the time of exhibiting the same respectively.—2 *R. S.*, 2d ed., 407, § 13, 14.

Upon such bond being executed and delivered, the officer issues his order discharging the warrant that may have been issued by him, and no further proceedings are to be had against the vessel on the warrant founded upon any demand included in the bond. This bond is held for the general benefit of all the creditors in the attachment, and may be sued by any of them severally, or all of them jointly in respect to their demands.—*Ibid*, § 18.

We have already had occasion, in the first chapter, when enumerating some of the duties of the sheriff, to recite the statute of 1833, (*Laws of 1833*, 360, § 18,) respecting the warrant issued by the county treasurer, to collect certain taxes assessed upon debts due to non-residents, and also those parts of the revised statutes which refer to the duty of the sheriff upon warrants of the comptroller against collectors of canal tolls; we shall therefore

omit these, and attend at present to the proceedings under attachments against foreign corporations.

In these cases, the sheriff to whom such attachment shall be directed and delivered, shall proceed thereon in all respects in the manner prescribed by law in case of attachments against absent debtors, shall make and return an inventory, and shall keep the property seized by him, or the proceeds of such as shall have been sold to answer any judgment which may be obtained in such suit, and shall, under the direction of the officer issuing such attachment, collect, receive, and take into his possession all debts, credits, and effects of such debtor, and commence such suits and take such legal proceedings, either in his own name or in the name of such foreign corporation, as may be necessary for that purpose, and discontinue the same at such time and on such terms as the said officer may direct.—*Laws* 1840, p. 296, § 2.

If any property seized is perishable, or if any part of it is claimed by any other person than the corporation, or if any part of it consist of a vessel belonging to any port or place in this state or the United States, or of any foreign vessel; or of any share or interest in any vessel, the same proceedings are required to be had in all respects as are provided by law against absent debtors. (2 R. S., 376 § 22.) These proceedings we have just been considering.

Any bond required to be given to the sheriff serving such attachment, shall be held for the benefit of the plaintiff in the suit.—*Ibid*, § 23.

In case any judgment be rendered for the plaintiff in any such suit, and an execution be awarded thereon, the sheriff shall assign to the plaintiff any bond taken by him in the course of the proceedings, and all debts, credits and effects of such corporations as he may have seized, shall pay over to such plaintiff the proceeds of all sales of perishable property, and the proceeds of all said debts, credits or effects as he may have received, or of any vessel or share, or interest in a vessel sold by him, or so much thereof as may be necessary to satisfy such execution; and if any balance remain due, he shall sell under such execution, so much of the pro-

perty of such corporation remaining in his hands, as may be necessary to satisfy such balance.—*Laws 1840, p. 297, § 3.*

If the plaintiff in any such action be non-suited, or discontinue the same, or judgment for any cause passed against him, every such bond taken by the sheriff, all the proceeds of such sales, and all the property of such corporation remaining in his hands, shall be delivered by such sheriff to the defendants or their agents in the same manner, and upon the same terms as are prescribed in the case of an attachment against an absent debtor being discharged; and in case of the failure of such corporation to comply with such terms the sheriff shall proceed in like manner as directed in case of an absent debtor.—*2 R. S., 376, § 25.*

We shall, lastly, consider the duty of the sheriff upon warrants issued by county treasurers against delinquent collectors of town taxes.

If any collector shall refuse or neglect to pay to the several town officers of his town or to the county treasurer, the sums required by his warrant to be paid by them respectively, or either of them, or to account for the same as unpaid, the county treasurer shall, within twenty days after the time when such payment ought to have been made, issue a warrant under his hand and seal, directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid and unaccounted for by such collector, of the goods and chattels lands and tenements of such collector, and to pay the same to the county treasurer, and return such warrant within forty days after the date thereof; which warrant the county treasurer shall immediately deliver to the sheriff of the county; but no such warrant shall be issued by the county treasurer for the collection of moneys payable to town officers, without proof, by the oath of such town officers of the refusal or neglect of the collector to pay the same, or account therefor as above prescribed.—*1 R. S., 2d ed., 389, § 13.*

The sheriff to whom such warrant is directed, shall immediately cause the same to be executed, and shall make return thereof to the county treasurer within the time therein specified, and shall

pay to him the money levied by virtue thereof, deducting for his fees the same compensation that the collector would have been entitled to retain. Such part of the moneys collected, if any, as ought to have been paid by the collector to town officers, shall be paid by the county treasurer to the officers to whom the collector was directed to pay the same; but if the whole amount of moneys due from the collector, shall not be collected in such warrant, the county treasurer shall first retain the amount which ought to have been paid to him before making any payment to the town officers.—*Ibid*, § 14.

If the whole sum due from the collector shall be collected, the sheriff shall so state in his return; but if a part only, or if no part of such sum shall be collected, the sheriff shall state in his return the amount levied, if any, exclusive of his fees, and shall also certify that such collector has no goods or chattels, lands or tenements in his county, from which the moneys, or the residue thereof, as the case may be, could be levied; and in either case, the county treasurer shall forthwith give notice to the supervisor of the town or ward of the amount due from such collector.—*Ibid*, § 15.

If any sheriff shall neglect to return any such warrant, or to pay the money levied thereon, within the time limited for the return of such warrant, or shall make any other return than such as is above mentioned, the county treasurer shall, forthwith, proceed to collect by attachment, the whole sum directed to be paid by such warrant.—*Ibid*, 390, § 17.

The proceedings upon this attachment are the same as in cases for not returning an execution in a civil suit, and he must be proceeded against in the supreme court.—2 *Ibid*, 458, § 32.

In case the county treasurer shall fail to collect such moneys, by attachment, he shall certify to the comptroller, that he has issued such warrant, stating its contents, that the sheriff has neglected to return the same, in the manner required by law, or to pay the money levied thereon, as the case may be, and that he has pursued the remedy by attachment without effect.—1 *Ibid*, 390, § 18; 9 *Wendell*, 29.

The comptroller is required to give notice thereof to the attorney general, who is required to sue the sheriff's bond for the sum due upon the warrant, and collect the same.—1 R. S., 2d ed., 391, § 19.

Note to page 337.—The 2d R. S., 443, § 19, provides that when any defendant arrested upon an attachment, shall have been brought into court, or shall have appeared therein, the court shall cause interrogatories to be filed, specifying the facts and circumstances alledged against the defendant, and requiring his answer thereto; to which the defendant shall make written answers on oath, within such reasonable time as the court shall allow. The court may receive any affidavits or other proofs, contradictory of the answers of the defendant, or in confirmation thereof; and upon the original affidavits, such answers and such subsequent proof, shall determine whether the defendant has been guilty of the misconduct alledged; and § 20 as admended, (*Laws, 1843, c. 9,*) provides that if the court shall adjudge the defendant to have been guilty of the misconduct alledged, and that such misconduct was calculated to, or actually did, defeat, impair, impede or prejudice the rights or remedies of any party in a cause or matter depending in such court, it shall proceed to impose a fine or imprison him, or both, as the nature of the case shall require; but in all cases which have arisen or may hereafter arise under the provisions of this title, the court or tribunal ordering such imprisonment, may in their discretion, (in cases of inability to perform the requirements imposed,) relieve the person or persons so imprisoned, in such manner and upon such terms as they shall deem just and proper.

CHAPTER XIII.

Fees of the Sheriff.

Fees are certain perquisites allowed to the officers in the administration of justice, as a recompense for their labor and trouble. These, in the state of New York, are now ascertained by statute.—*2 R. S. 2d ed.*, 536, § 39.

By the common law, no officer, whose office relates to the administration of justice could take any reward for doing his duty, but what he was to receive from the king. (*9 John. Rep.*, 253 ; *Coke Litt.*, 368.) This law was considered of so much honor to the king, and conduced so much to the welfare of the subject, that all prescriptions whatsoever, contrary to it, were holden void. Though there might be certain fees allowed by custom, yet the custom like all others, must be reasonable. (*2 Roll. Abr.*, 226.) The reason of this rule probably arose from the exalted rank of the sheriff, as has been explained in the introductory part of this work, and from the high dignity of his being the immediate representative of majesty itself, in executing the laws in the different counties in England. The reason of the rule has now ceased ; and it is generally admitted that, at the present time, the office of sheriff is sought after, more for the profit accruing from its various duties, than for any distinction conferred upon the successful incumbent. We will consider first, what fees the sheriff is entitled to.

For serving a <i>capias ad respondendum</i> , writ of replevin, summons, or any other process by which a suit shall be commenced in a court of law, citation, scire facias, or declaration when there has been no process previous thereto, - - - - -	50
For travelling per mile, for going only, for each mile, to be computed from the court house only of the county; but if there be two or more court houses, from that which shall be nearest to the place where the service shall have been made, - - - - -	6
For taking a bond from the plaintiff in replevin, or taking a bond on the arrest of the defendant, or taking his endorsement of appearance, or for taking a bond in any other case where he is authorized to take the same for which no fee is herein allowed, - - - - -	37½
For a certified copy of such bond, - - - - -	25
For a note of every <i>capias</i> delivered to a defendant on request, - - - - -	6
For a copy of every summons, scire facias, or declaration served by him, when made by a sheriff, if in the supreme court, for every 100 words, - - - - -	12½
For the same services in the common pleas, for every 100 words, - - - - -	9
For a copy of every other writ when demanded or required by law, (<i>see note, ante 121,</i>) - - - - -	19
Returning a writ, - - - - -	12½
For serving an attachment for the payment of money or an execution for the collection of money, or a warrant for the same purpose, issued by the comptroller, or a county treasurer, for collecting the sum of \$250 or less, for every dollar collected, - - - - -	2½
For every dollar collected over \$250, - - - - -	1½
Advertising goods or chattels, lands or tenements for sale on any execution, - - - - -	2 00
But if the execution be stayed or settled before sale and after advertising, - - - - -	1 00

The printer's fees allowed by law for publishing every sale of real estate for not more than six weeks, and for continuing such advertisement more than six weeks, or for publishing the postponement of any such sale, shall be paid by the party requiring such continuance and postponement.

The fees allowed upon collecting an execution, for serving and advertising thereon, shall be collected by virtue of such execution in the same manner as the sum therein directed to be levied.

But where there shall be several executions in the hands of the same sheriff against the defendant, at the time of advertising his property, there shall be but one advertisement for the whole, and the sheriff shall elect on which execution he will receive the same.

For drawing every certificate of sale where the execution over \$250, in the supreme court, for every 100 words,	25
For a copy of the same, for every 100 words, -	12½
But no charge for more than two copies.	

For drawing the like certificate in the supreme court when the sum in the execution is \$250 or under, for every 100 words, - - - - -	18

For copying the same, not more than two copies, for every 100 words, - - - - -	9

The above fees are taken from the statute allowing such fees to attorneys for drafts and copies in the above courts, and which same compensation is allowed to the sheriff. The sheriff is entitled to the above fees, exclusive of the clerk's fees for filing certificates.

For drawing a deed and executing the same pursuant to a sale of real estate, - - - - -	1 00
To be paid by the grantee in such deed.	

Serving a writ of possession, or of restitution ; putting any person entitled into possession of the premises, and removing the tenant, - - - - -	1 25

Travelling fees on the same for each and every mile going,	6

To be computed as upon the service of a *capias ad respondendum*.

Taking a bond for the liberties of the jail, - - -	37½
For any person committed to jail on civil process, and for every person discharged from jail on civil process,	
For receiving, - - - - -	25
For discharging, - - - - -	25
To be paid by the plaintiff in the process.	
For summoning a jury to attend any court for each cause noticed for trial, or placed upon the calendar thereof for trial, - - - - -	50
Summoning a jury upon a writ of inquiry, and returning the inquisition, and attending such jury, - - -	1 50
Summoning a jury in any case where it shall be necessary to try the title to personal property, attending such jury and returning the inquisition, - - - - -	1 50
Summoning a foreign or special jury, pursuant to a venire for that purpose, and returning the panel of jurors, - - -	1 12½
Summoning a jury pursuant to any precept or summons of any officer, in any special proceeding, - - -	1 00
Attending such jury when required, - - - - -	50
Bringing a prisoner on habeas corpus to testify or answer in any court, - - - - -	1 50
For travelling each mile with such prisoner from the jail, - - -	12½
For attending any court with such prisoner for each day, - - -	1 00
And all actual necessary expenses.	
Bringing up any prisoner upon any habeas corpus, with the cause of his arrest and detention, - - - - -	1 50
Travelling with such prisoner, for each mile from the jail, - - -	12½
Attending before any officer with a prisoner, for the purpose of having him surrendered in exoneration of his bail, - - - - -	1 00
Attending to receive a prisoner so surrendered, who was not committed at the time, and receiving such prisoner in custody, - - - - -	1 00
Attending a view, for each day's attendance, - - -	1 87½

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For each day going, - - - - -	1 25
For each day returning, - - - - -	1 25
Serving an attachment upon ships or vessels ; or upon the property of any debtor, - - - - -	50
With such additional compensation for his trouble and expenses in taking possession of, and preserving the property attached, as the officer issuing the warrant shall certify to be reasonable.	
When the property so attached shall be sold by the sheriff for collecting the sum of \$250 or less, for each dollar, - - - - -	2½
And for every dollar collected more than two hundred and fifty, - - - - -	1½
For making and returning an inventory and appraisal, such compensation, not exceeding one dollar per day, to each of the appraisers, for each day actually employed, as the officer issuing the attachment shall allow.	
For drafting the inventory when the sum is over two hundred and fifty dollars for every hundred words, -	25
For copying the same for every hundred words, -	12½
For drafting the inventory, where the property attached is of the value of \$250 or less, for every 100 words,	18
For copying the same, for every 100 words, - -	9
The statute allows to the sheriff the same fees for this service as are allowed to attorneys in the supreme court, and, therefore, the same rate of fees has been given as is allowed to them.	
For advertising the sale of the property attached, -	2 00
If settled before sale and after advertising, - -	1 00
And the same rule as to printer's fees as upon executions.	
For executing any warrant to remove any person from lands belonging to the people of this state, or to Indians, such sum as the comptroller shall audit , and certify to be a reasonable compensation.	

For giving notice of any general or special election to the electors of the different towns or wards in his county ;	
for each town or ward, - - - - -	1 00
And the expenses of publishing such notices as required by law, to be paid by the county as a part of the contingent expenses thereof.	
For summoning constables to attend the supreme court, or any other court ; for each constable, - -	50
For each day's attendance upon the supreme court,* -	2 00
For mileage on every execution, for each mile, going only,† - - - - -	6
<i>In special proceedings in civil cases, where the services may be performed by a constable or sheriff, § 41.</i>	
Serving summons, - - - - -	12½
Serving a warrant, - - - - -	19
Mileage per mile, for going only, - - - - -	6
Serving a warrant of distress for rent, - -	1 00
Making and certifying an inventory of the articles taken, the cause of the distress, and the amount of the rent due, and leaving a copy thereof, - - -	1 00

* A sheriff is entitled to *per diem*, in going to and returning from the Supreme Court, when compelled to attend.—13 *John. Rep.* 123.

But is not entitled to a *per diem* compensation for attending either the circuit, oyer and terminer, or the common pleas and sessions, in his county.—2 *Hill's Rep.*, 411.

† "For mileage on execution," is an amendment of this (39,) section, and is no doubt intended to supply a defect in the second clause, and means mileage for *serving* an execution. When a *capias ad respondendum* or *ca. sa.*, is returned *non est*, or *fi. fa. nulla bona*, it is not, in contemplation of statute, a *service*. A *ca. sa.* is served by arresting the party, (5 *John. Rep.*, 252,) and a *fi. fa.* by levying property, and thereupon the sheriff, in both cases, is entitled to mileage and poundage. (*Ibid* ; 13 *ibid*, 178 ; 9 *W. R.*, 435.) The mileage is from the court house to the place where such service is made. If this were not the rule, the sheriff might charge for every mile he carried the execution, under pretence of searching for the body or for property. I am not aware that this point, as to mileage when there is no service, has ever been decided as between the attorney and sheriff ; though on an appeal from taxation, it has been decided in supreme court, that mileage cannot be taxed as prospective, in the bill of costs.

Summoning and swearing appraisers, and taking the appraisalment, - - - - -	50
To each appraiser, - - - - -	25
Advertising and selling any property distrained for rent, or doing damage, or levying any fine, penalty, or sum, pursuant to any warrant, for every dollar collected to \$50. (2 R. S., 192, § 228,) - - - - -	5
For every dollar collected over \$50, - - - - -	2½
For every mile, going only, more than one mile, - - - - -	6
Computed from the place of abode of the defendant, or where he shall be found, to the place where the precept is returnable.	

The above under § 41, relate to services which may be performed by a constable.

Serving an execution upon a judgment confessed before a justice of the peace, where the execution is issued by county clerk, for every dollar collected to the amount of \$50, (2 R. S., 192, § 228.) - - - - -	5
For every dollar collected over \$50, - - - - -	2½
The same fees are allowed to a sheriff for services which may be rendered by a constable as are by law allowed for services to a constable.	

The sheriff is allowed the same fees for collecting taxes upon debts of non-residents, upon a county treasurer's warrant as upon justice's executions.

When a sheriff is required by any statute to perform any service for, and on behalf of the people of this state, not chargeable to his county, or to some officer or other person, his account shall be audited by the comptroller, and be paid out of the treasury (1 R. S., 373, § 87 ; *ibid*, 177, 22,) from the general fund.

We will now endeavor to ascertain when, and under what circumstances, a sheriff shall be entitled to his fees.

And first upon a writ of fieri facias. Where the execution is executed by the sheriff, by levy and sale of the property, he is entitled to his fees. The only material questions that have arisen, have been, where the matter has been compromised by the par-

ties, after the levy and before the sale, or where executions have been issued into several counties at the same time, and returned satisfied in one county only, whether the sheriff is entitled to charge his poundage and other fees.

The following case settles one of the points in favor of the sheriff :

In July vacation, 1798, a *testatum fieri facias*, in favor of the defendant against Calvin Young, directed and delivered to the plaintiff as then sheriff of the county of Montgomery, endorsed as follows : " Levy \$7,500 with interest from the 24th of January, 1796, and twenty-two dollars and fifty nine cents costs, besides your fees." The writ was transmitted to the plaintiff in a letter from the attorney of the defendant, containing the following direction : " Enclosed I send you an execution against Calvin Young, for a large sum of money. He purchased a piece of land from the plaintiff, situate in the east part of your county, near Maysfield, if my information is correct. Your attention to the within will oblige your obedient, &c." After the receipt of the writ, and before its return, the plaintiff levied on the goods and chattels of Young, to a small amount, and also went on the land, as above pointed out to him, and made a seizure thereof ; but, before the return day of the writ, the plaintiff was requested to delay the sale of the property so seized, the parties in the original suit having settled the execution. The plaintiff neither returned the writ, nor sold the property seized by virtue of it.

On this statement of facts, it was submitted to the court whether the plaintiff was entitled to fees for the whole amount endorsed on such execution, or for any other, and what sum. It was admitted that the value of the land seized was equal to the amount of the sum ordered to be levied on the execution, and that Young had also given to this defendant a mortgage to secure the payment of it.

The court decided, and the decision has uniformly been sustained since, that after a levy of an execution, and satisfaction of the judgment, the sheriff is entitled to poundage on the sum endorsed on the writ, although he do not sell the property levied on. 1 *Cainer's Rep.*, 192 ; 9 *Wendell*, 437 ; 17 *ibid.*, 14.

The true construction to the act, say the court, is, that where the sheriff proceeds to sell, he is entitled to his poundage only on the sum actually raised. And wherever the plaintiff interposes, and a compromise takes place, he is entitled to poundage on the sum realized by the plaintiff, or that might have been collected from the property levied on. To say that a sheriff should be entitled to no poundage where a compromise takes place, would be manifestly unjust. He may have incurred all the risk and responsibility, for the safe keeping of the property, and it will then be in the power of the parties to deprive him of compensation for it. It may be said that there is no risk where the levy is on land; this may be true; but it is observable that, perhaps, in nine-tenths of the cases, the money on execution is raised out of the personal property, and that the act makes no distinction. Suppose on the very day of sale, and before the vendue commences, the defendant should pay the sheriff the money, would he not be entitled to his poundage? And I can see no material difference whether the money be paid to the plaintiff or the sheriff in that stage of the business. Cases, no doubt, may be supposed, where the sheriff will receive more than a valuable consideration, for his services. But they thought that much less injustice would be done by adopting the rule laid down, than to say the sheriff shall be deprived of all his poundage where a compromise takes place.

The plaintiff in another case, (*5 Term Rep.*, 470,) having obtained judgment, sued out a *fieri facias*, and delivered it to the sheriff, who levied on the defendant's goods; and after being in possession two days, the plaintiff and defendant compromised before the sheriff sold any of the defendant's goods. The question presented to the court was, whether the sheriff was entitled to his poundage before he quitted the possession of the goods; and the court held that he was undoubtedly entitled to his poundage.

This case in Term Reports, seems to establish the doctrine, that, although the plaintiff and defendant in the execution may have compromised the execution, the sheriff may proceed to make his fees by sale of the property. This point came before the supreme court, and they say: The sheriff had no right to sell for the pur-

pose of collecting his fees, after due notice of the settlement and discharge of the judgment. The sheriff has no interest in the judgment which will authorize him to interfere with, or control any settlement or arrangement which the parties may think proper to make. His fees are no part of the judgment. They are but incident to it; and if the judgment itself is satisfied or discharged, he must look to the plaintiff or his attorney for the fees. He cannot collect them from the defendant by a sale of his property. An execution may at any time be countermanded by the attorney who issued it, and the sheriff is bound to obey his instructions, and suspend proceedings upon the execution whenever he is directed so to do, unless it be a case of collusion between the parties for the obvious purpose of defrauding the sheriff out of his fees, the plaintiff and his attorney both being insolvent and irresponsible.—4 *Wendell*, 479.

The following case shews when the sheriff may retain his fees, where he has executions upon judgments of different ages, and has collected moneys upon all of them.

A *fi. fa.* was issued in this cause to John Doty, Esq., late sheriff of the county of Washington, about the first of September, 1820, directing him to collect \$1273.64, with interest from 7th May, 1819. Doty then had in his hands several writs of *fi. fa.*, against the defendant, in favor of different plaintiffs, which were arranged and paid; but the sheriff claimed fees upon them to \$31.51. The defendant had personal property to the value of two or three hundred dollars, which was levied upon about the first of June, 1822, by virtue of several justice's executions; and sold about the 27th of July following. In August, 1821, preceding, and at two different times afterwards before the first of April 1822, the plaintiff in this cause directed the sheriff to stay proceedings on the *fi. fa.*, on condition that the defendant paid the interest, which, however, was not done; but the sheriff contended that the plaintiff had lost his lien by these delays. In 1822, the plaintiff directed the defendant's property to be advertised and sold on his execution; in consequence of which, the sheriff advertised the real estate of the defendant for sale on several executions,

being the plaintiff's, and the several executions above referred to. The real estate was sold about the 15th September 1822, and purchased by the plaintiff for less than the amount due on his *fi. fa.*, from which the sheriff claimed to deduct \$22, his fees for this, and \$31.51, for fees on the other executions, which were satisfied when his was delivered. Seven dollars and twenty-four cents of the \$31.57, were thus claimed on two judgments docketed subsequent to this, as the parties supposed, though it was agreed that this might be corrected by the docket.

The court say: The sheriff may retain on his elder judgments, but not on those which are younger than the plaintiff's. Payment of the debts did not pay the fees, and unless the sheriff is allowed to retain upon the elder, the consequence would be that the plaintiffs in the executions must pay the fees out of their own pockets; while sufficient property remains for that purpose. But the sheriff is liable to refund \$7.24, unless the two judgments, supposed to be docketed subsequent to Knickerbocker's, shall appear by the docket to be earlier.—3 *Cowen*, 333.

Where several executions are issued at the same time to different counties, upon the same judgment, and satisfaction is made upon one execution, the sheriff of every other county to whom an execution is issued, and who has levied upon sufficient property to satisfy the same is entitled to poundage which he may demand from the plaintiff; but he cannot levy it of the property of the defendant.

Two executions on the judgment obtained in this cause were issued; one to New-York, the other to Chenango. The sheriff of Chenango was directed to levy on and advertise several tracts of land, which he accordingly did. Previous to the day of sale, the sheriff of Chenango was informed by the plaintiff's attorneys, that the amount of the judgment had been collected by the sheriff of New-York, on the execution issued to that county, and was told that he, the sheriff of Chenango, was not entitled to poundage; or if entitled, that he could only collect it from the defendant in the execution. The sheriff had his fees on the execution taxed by a

commissioner, who allowed \$82.17, as poundage on the execution. A motion was made by the plaintiff for a retaxation.

The plaintiff contended that in order to entitle the sheriff to poundage, he must actually collect the money, and that this was the true construction of the Revised Statutes (2 R S., 2d ed., 536, § 39,) upon the subject. That under the former statute he was entitled to poundage, if he merely made a levy, but that the law was altered by the revision. The court say: The Revised Statutes have not altered the law as to the right of sheriffs to poundage in a case like the present. The provisions on this subject are substantially the same as they were in the former statutes, and under them it has been uniformly held, since *Hildreth v. Ellice*, (1 Caines' Rep., 192,) that after a levy of an execution, and satisfaction of the judgment, the sheriff is entitled to poundage, although he do not sell the property levied upon. Nor does the statute, authorising plaintiffs to issue executions into different counties at the same time change the law from what it was before; a plaintiff always had a right to do so, subject to the peril of paying sheriff's fees upon every execution except that upon which the money was actually collected. The motion for a retaxation was denied.—9 Wendell, 436.

The following rule has been established as to the charge for advertising the lands and tenements of a defendant upon execution by the sheriff.

This was an action against the defendant as an attorney, who had issued a fi. fa., for the fees of the sheriff of Erie, on the execution and for the printer's bill in advertising the real estate of the defendant for sale. The advertisement was commenced on the ninth day of September 1828, sale to be on the 15th October. The sheriff postponed the sale from time to time, until the 18th November, when the plaintiff's attorney having, on the third November, signified his assent to a postponement of the sale for sixty days, the sheriff postponed the sale to the 13th January 1829, when, without further directions, he postponed the sale, from time to time, until the 20th November 1829, during all which time the advertisement was continued in the newspaper. A *testatum fi. fa.*

had been issued to the sheriff of New-York, and returned satisfied, and the advertisement in Erie county was discontinued. The sheriff of Erie claimed the whole bill, and claimed to recover of the attorney for the advertising from September 1828, to November 1829. The defendant in this suit, having obtained an order for the taxation of the sheriff's bill, certain items were deducted, but the defendant, being dissatisfied with the taxation, appealed therefrom.

Savage, Chief Justice, decided, that the sheriff was entitled to poundage on the sum directed to be levied, to his advertising fee to amount of the printer's bill for six weeks, and as much longer time as the defendant in this cause authorized a postponement of the sale, or subsequently recognized or assented to a postponement, and to the fee allowed by statute for returning the execution; beyond those items the plaintiff has no claim upon the defendant; and a retaxation was ordered accordingly.—6 *Wend.*, 535.

Secondly, of the sheriff's fees upon the *ca. sa.*

The sheriff is entitled to poundage on a *ca. sa.*, on serving the execution. The plaintiff, as sheriff, claimed his poundage on a *ca. sa.* issued in favor of *Edward Durant*, and *Joseph Roberts*, against *Barzillai Worth*. The plaintiffs in that execution were non-residents, and the present defendant was their attorney. *Worth* was arrested on the *ca. sa.*, and detained in custody, until discharged under the act for the relief of debtors with respect to the imprisonment of their persons. One of the questions raised for the consideration of the court (5 *John. Rep.*, 252,) was, whether the sheriff was entitled to poundage.

Thompson, Chief Justice. Under the English statutes, it has been considered as settled that the sheriff was entitled to his poundage on executing the *ca. sa.*, without making it depend upon the sum which the plaintiff should ultimately recover of the defendant, and without suspending his right to fees until that event arrived. The case of *White v. Haugh*, (*Str.* 1262,) shows evidently that this was the sense of the court of king's bench. Mr. Justice Foster said in that case, that if the prisoner charged in execution was brought before him on habeas corpus, to be

removed to the king's bench prison, he would not turn him over until the poundage was paid. Duffey, in his *Sheriff*, (page 126,) considers this as the established rule, and says it was so ruled in the year 1785, in the king's bench, on a case reversed by Lord Mansfield.

The sheriff, by the statute of Elizabeth, and by our act, is to have his fees for serving an execution. This service when applied to a ca. sa., according to the provisions of the statute of Elizabeth, evidently means the taking of the body in execution; and this must necessarily be the import of the terms in our act. The sheriff has then performed the service of arresting and imprisoning the debtor, pursuant to the command of the writ, and has subjected himself to the peril of his escape, and of being answerable for the whole debt due; and it is just and reasonable, that he should then be paid what the law deems an adequate compensation for this service, and for this risk. The invariable practice of allowing the sheriff poundage, is a strong corroboration of this construction. The latter words in the act do not weaken this construction; they are only intended to regulate the amount of poundage, and do not create the right to it; that is given by the former part of the clause. I am accordingly of opinion, upon the first point, that the sheriff is entitled to poundage.

The language of the Revised Statutes (2 R. S. 2d ed., 536, § 38,) authorises the application of the above decision to cases arising under them. The statute gives fees or poundage to the sheriff *for serving* any execution or attachment for the payment of money and is in substance like the statute under which the court decided the case above referred to.

And when the defendant has been arrested upon a ca. sa., irregularly issued, and afterwards discharged from custody, in consequence of the setting aside of the ca. sa. for such irregularity, the sheriff is entitled to his fees and poundage.

In this case (13 *John. Rep.*, 378,) the question was, whether *Simon Fleet*, late sheriff of the city and county of New-York, was entitled to poundage on the ca. sa., in this cause, under the following circumstances :

The plaintiff having recovered a judgment against the defendant in this cause, in which special bail had been filed, his attorney, inadvertently, issued a ca. sa., when no fi. fa. had been previously issued and returned, pursuant to the provision in the seventh section of the act concerning judgments and executions. (*Laws of 1813, 502; same provision, 2 R. S., 2d ed., 287, § 4.*) The defendant having been arrested on the ca. sa., was, in consequence of the irregularity, discharged from custody, but without paying any fees. The defendant then confessed a new judgment, for precisely the amount of the former one, because it was apprehended that his arrest upon the ca. sa. might operate as an extinguishment of the first judgment, and the first judgment was satisfied upon record, *pro forma*, by a special satisfaction piece, but no payment or satisfaction was actually received. Upon the new judgment a fi. fa. and a ca. sa., were afterwards regularly issued, and upon the second ca. sa. the defendant was again arrested and taken into custody. The poundage and all other fees were paid to the sheriff on the second ca. sa., and he claimed poundage and other fees upon the first ca. sa.; his claim to caption and jail fees was admitted, but the demand of poundage resisted.

The court decided that the act prohibiting the issuing a ca. sa., upon judgments rendered in actions, wherein special bail had been filed, until after a fi. fa., does not render a ca. sa. issued before a fi. fa. void; it is only voidable at the instance of the party against whom it is thus issued. The sheriff certainly incurred the risk and liability for an escape on the first ca. sa., for he could not set up in action against him for an escape, that the ca. sa. had issued irregularly. The sheriff therefore gained a perfect title to his poundage, unaffected by the subsequent discharge of the prisoner. It is no answer to the sheriff's claim for poundage, that he has received poundage upon another judgment between the same parties, and for the same original debt; it is legally a new debt as far as the sheriff is concerned. The allowance of poundage is for the risk incurred, and that risk is in proportion to the amount of the sum to be levied, and as the sheriff was exposed to two risks, he is entitled to the poundage on both executions.

The sheriff must execute the process though his fees are not paid to him before the service; he cannot require a payment of the fees as a condition precedent to executing the writ. The sheriff has no discretionary power left him whether to perform the service or not. He is bound to execute every legal process delivered to him before he can demand his fees. (5 *John. Rep.*, 255; *Str.* 814.) And if he takes the fees before they are due, or in other words, requires them to be paid to him before he serves the writ, he is liable to an indictment for extortion, and to an action for not doing his duty.

In *Hescott's* case, (*Salk.* 330) the under sheriff refused to execute a *capias ad respondendum*, until he had his fees, and upon motion against him, the court said: The plaintiff may bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion.

McCarthew moved that an under sheriff might attend for refusing to execute a *fiery facias* until his shilling pence was paid. The court would not grant the rule, but said it was extortion for which he might be indicted.—*Ibid.*, 331.

And if the sheriff takes greater or more fees than is allowed by statute, he is deemed guilty of a misdemeanor, and is liable to the party aggrieved for treble the damages sustained by him. (2 *R. S.*, 2d ed., 542, § 5, 6, 7.) And the sheriff is liable for the acts of his deputy or under sheriff, to the party aggrieved, and either party that pays the money is a party aggrieved within the meaning of the statute.—2 *Term Rep.*, 155.

The plaintiff or party in whose favor the execution is levied, is responsible to the sheriff for his fees; and the attorney is, in all cases liable to the sheriff. (5 *John. Rep.*, 255; 4 *Wend.*, 479.) But if the sheriff elects to look to the attorney exclusively, and gives him the whole credit, he cannot afterwards look to the client of the attorney for his fees.—9 *John. Rep.*, 114.

When the sheriff arrest a party upon a *capias ad satisfaciendum*, who is exempted from arrest, he is not entitled to his fees.

The defendants, while attending the sittings in the city of New-York, the one as a suitor in a cause to be tried, and the other as

a witness who had been duly subpoenaed were arrested on a *ca. sa.*, issued on a judgment recovered against them at the suit of the plaintiff; and, upon application to the Chief Justice, were discharged from the arrest. Neither the sheriff, nor the plaintiff, at the time of the arrest, knew that the defendants were thus attending the sittings; and after the defendants were discharged, the sheriff insisted upon the plaintiff's paying his caption fees and poundage, on the execution; and the question as to the liability of the plaintiff to pay those fees was submitted to the court.

The opinion of the court was, that the *ca. sa.*, having been served on the defendants whilst they were privileged from arrest, such service was irregular, void, and of no effect; and, consequently, the sheriff was not entitled to any fees.—10 *John. R.* 93.

The decisions above cited apply to all process that are given to the sheriff to execute, and, together with the statutes, upon the subject, give a full outline of the rights of the officer so far as a remuneration for his services comes in question:

The fees of the sheriff, in criminal cases, are also regulated by statute:—2 *R. S.*, 2d ed., 630, § 12. (*Albany*, see page 364.)

For every person committed to prison, - - - 37½

For every person discharged from prison, - - - 37½

For summoning a grand jury for a court of oyer and terminer, or general sessions, - - - - 10 00

For serving a warrant, or performing any other duty which may be performed by a constable, the same fees as are allowed by law to a constable for such service. (2 *R. S.*, 538, § 39, 41; *ibid.*, 192, § 228.)

Arresting and committing any person pursuant to process, 50

Mileage, going only, - - - - - 6

For conveying a single convict to the state prison, for each mile from the county prison from which such convict shall be conveyed, - - - - - 37½

For conveying two convicts for each mile, as aforesaid, 67

For conveying three convicts for each mile as aforesaid, 69

For conveying four convicts for each mile as aforesaid, 71

For conveying five convicts for each mile as aforesaid, 73

And for all additional convicts, such reasonable allowance as the Comptroller may think just, which said allowances, with one dollar per day, for the maintenance of each convict on the way to the state prison, shall be in full of all charges and expenses in the premises.

The amount to be paid to the sheriffs of counties for the maintenance of each convict while on the way to the state prison, shall be such sum as shall be actually expended for such maintenance, not exceeding the rate of one dollar for every thirty miles travel. *Laws of 1822, c. 271, § 7.*

The agents of the respective prisons, shall pay to the sheriffs or deputies, for transporting convicts to the prisons, the fees to which they are by law entitled.—*Ibid, 1835, c. 302, § 15.*

The fees herein allowed by services, except those which by law are otherwise provided for, shall be county charges, and shall be audited by the board of supervisors of the county, in which such services are rendered, and shall be paid in the same manner as other contingent charges of the county.—*2 Rev. Stat. 2d ed., 631, § 13.*

By a late statute, (*Laws, 1844, chap. 80, § 3,*) it is provided that the sheriff of the city and county of Albany shall be allowed for services as jailor, receiving and discharging prisoners and for statements and certificates of conviction, in lieu of all fees heretofore allowed,

	- - - - -	\$500 00
For conveying a single convict to the house of refuge,		
including all expenses, - - - - -		25 00
For conveying two, including all expenses, - - -		35 00
Each additional convict, - - - - -		5 00

No mileage shall be allowed to the sheriff of Albany for serving any criminal process unless the distance actually travelled exceeds two miles.—*Ibid, § 4.*

The sheriff, clerk, district attorney, police justice, and all judges and justices of the peace of the city and county of Albany, within twenty days after the collection of any moneys for fines, forfeitures, penalties, fees, costs and jury's fees, payable to the county

treasurer, shall account for and pay over all such moneys so collected and received, and shall at the same time render a statement under oath of all and any moneys so collected and received, to be filed with the county treasurer, who is hereby authorized to administer such oath.—§ 6.

CHAPTER XIV.

Of Coroners.

Although the duties of coroners do not come distinctly within the title of this work, yet, as they, in some cases, are the substitutes of the sheriff, and, in other cases are the immediate ministers of the courts in the service of process, it was thought proper briefly to notice their powers and duties. This is the more necessary in order that the sheriff may be informed as to the limits of their jurisdiction, and their duties so far as he is concerned.

The office of coroner is one of great antiquity in the common law, and he derives his name, *coronator*, from the circumstance that he had properly to do with pleas of the crown. Coroners are conservators of the peace in the county where generally elected. Their authority is judicial and ministerial; judicial, where one comes to a violent death, and to take and enter appeals of murder, pronounce judgment upon outlawries, &c.—1 *Black. Com.*, 346.

The ministerial power of the coroner is, where he executes the king's writs on exception to the sheriff, as by his being party to the suit, kin to either of the parties, or on default of the sheriff, &c. 4 *Just.*, 271; 1 *Plowd.*, 73.

In the state of New-York, the office of coroner, as far as it is ministerial, appears to be confined to cases where the sheriff is a party, and it is only of his duty as such officer that we propose to treat in this chapter.

By the Revised Statutes, (2 R. S., 2d ed., 360, § 90,) whenever a sheriff of any county, shall be a party to any suit, all process in such suit, except when otherwise provided by law, shall be executed by the coroner of the county, to whom the same shall be delivered in the same manner, in all respects, subject to the same obligations and liabilities, and with the like authority, and entitled to same privileges, as are prescribed by law in respect to sheriffs, except in cases specially provided for.

When any process is directed to the coroners of a county generally, the same may be executed, and a return thereto may be made, and signed by any one of the coroners; but such act or return shall in no degree prejudice the other coroners not participating therein.—*Ibid*, § 91.

If process for arresting the sheriff of the county be delivered to a coroner, he shall execute the same in the manner prescribed by law in respect to the execution of similar process by sheriffs; and shall be authorized to take a bond on the arrest, or a bond for the jail liberties to himself by the name of his office, in the same cases, and in the same manner in which a sheriff would be authorized to take the same; which bond shall have the like effect, and be subject to the same provisions, as bonds taken in like cases by sheriffs; and the proceedings, rights and liabilities thereon, shall be the same in all respects.—*Ibid*, § 92.

The duties of the coroner in these cases will be found under the heads of arrests, &c., in the previous chapters, which treat of the powers and duties of the sheriff in such cases; and in cases of bonds taken by him, to the appropriate chapter under that designation.

If a sheriff, on being arrested by a coroner on civil process, requiring him to be held to bail, shall refuse or neglect to give the bond required by law to entitle him to be discharged; or if a sheriff shall be arrested on execution against his body, or an attachment, he shall be confined by the coroner in some house situated within the liberties of the jail of the county, in the same manner as sheriffs are required by law to confine prisoners in the jail of their counties respectively. Such house shall, therefore, become the

jail of the county, for the use of the corner, and all laws relating to the jails of counties shall be applicable to the same, while such sheriff shall be confined therein.—*Ibid*, § 93, 94.

For any escape of such sheriff from such house, the coroner shall be liable in the same manner, and to the same extent, as sheriffs for the escape of their prisoners, and may plead and give in evidence the same matters allowed to sheriffs in similar actions.—*Ibid*, § 95.

The reader will find the liability and privileges of coroner under this section in the chapter upon escapes.

A sheriff so confined, shall be admitted to the liberties of the jail of the county, established for other prisoners, in the same cases, and upon executing the like bond to the coroner in whose custody he shall be as provided in other cases. For any escape of such sheriff from such liberties, the coroner shall be liable, in the same manner, and to the same extent as sheriffs for similar escapes, and may plead and give in evidence the same matters allowed by law to sheriffs.—*Ibid*, § 96.

The coroner may prosecute any such bond taken by him, and shall be entitled and subject to all the provisions of law, in respect to similar bonds taken by sheriffs; and such bond may be assigned by him to the party at whose suit such sheriff shall have been arrested, and the same proceedings shall be had thereon, in all respects, as on bonds taken and assigned by sheriffs in similar cases.—*Ibid*, § 97.

If any person be arrested by a coroner on process issued in a suit in which the sheriff of the county is a plaintiff, he shall be committed to the common jail of the county, in cases where a commitment is required by law; but such coroner shall not be liable for any escape of such prisoner from such jail, after he shall have been committed thereto. Such prisoner, when so committed, shall be kept in all respects, as other prisoners committed on civil process, and shall be entitled to be discharged if he be committed on mesne process, on executing a bond to the coroner, in the same manner, and in the same cases, in which such bond is required to

be given to a sheriff, which shall have the like effect, and be proceeded on in the same manner in all respects.—2 *Ibid*, § 98.

Such prisoner shall be entitled to the liberties of the jail in the same cases as other prisoners, on executing to the coroner a bond, in all respects similar to that required to be given to sheriffs, which shall have the like effect, and shall be assigned and proceeded on in the same manner. For any escape of such prisoner from such liberties, the coroner shall be answerable, in the same manner, and to the same extent, as sheriffs for similar escapes, and may plead and give in evidence the same matters.—*Ibid*, 361, § 101.

In all cases where a judgment shall be obtained in any court against the sheriff of any county, either singly or with others, instead of directing the execution thereon to the coroner of the county, it may be directed and delivered to any person (except a party in interest in the suit,) who shall be designated by the court in term, by an order to be entered in the minutes or by any judge thereof in vacation, by an order to be endorsed on such execution. The person so designated, and receiving such execution to execute the same, shall in respect to such execution, be deemed a coroner of the county, and shall be liable in all respects to all the provisions of law respecting sheriffs so far as the same may be applicable.—*Ibid*, 288, § 11, 12.

In the action of replevin when the sheriff is a party the execution is not awarded to the coroner, but only the process in the cause, including the writ and every other process to the execution. The execution is awarded and executed as in other cases of replevin.—*Ibid*, 439, § 67.

The fees of the coroner in his ministerial duties are :

For all services rendered by him the same fees as are allowed to the sheriffs for similar services.

For confining a sheriff in any house on civil process for

each week he is so confined, - - - - \$2 00

And these fees are to be paid by such sheriff before he is entitled to his discharge.—2 *R. S.*, 2d ed., 538, § 41.

Whenever a vacancy shall occur in the office of sheriff of any

county, and there shall be no under theriff of such county then in office, or the office of such under sheriff shall become vacant, or he become incapable of executing the same, before another sheriff of the same county shall be elected or appointed, and qualified, and if there shall be more than one coroner of such county then in office, it shall be the duty of the first judge of the county forthwith to designate one of such coroners by an instrument in writing, signed by such judge, and filed in the office of the county clerk, to execute the office of sheriff of such county, until a sheriff shall be elected or appointed and qualified. Upon the filing of such designation, by the first judge, the clerk must immediately give notice thereof to such coroner, who must within six days after receiving such notice execute with sureties a joint and several bond to the people of this state, in the same amount and with the same number of sureties, and to be approved of in the same manner, and be subject in all respects to the same regulations as the bond required of the sheriff of the county. And after the execution of such bond, the coroner so designated shall execute the duties of sheriff of such county until the election or appointment and qualification of a sheriff. If the coroner selected fails to comply with these requirements, another coroner is to be selected by the first judge, and he is to continue such selections, if necessary, until all the coroners in the county shall be designated. The same requirements are made of each successive coroner designated, as of the first.—1 *Ibid*, 372, § 89, 90, 91.

If there is but one coroner in the county, he is to enter upon the duties of the office, subject to the same regulations and requirements as where there is a selection. If these attempts to fill the office of a sheriff by a coroner fails, the first judge is to appoint some suitable person under his hand and seal, and file such appointment in the office of the county clerk, and such person is thereupon to fill the office, until a sheriff is duly qualified. The county clerk must give the person appointed notice of his appointment, and the person appointed must within six days thereafter give the same security as the sheriff of the county, and subject to the same regulations, and he is then to execute the office until

the qualification of the new sheriff.—1 *R. S.*, 2d ed., 374, § 92, 93, 94, 95.

And until the office of sheriff is filled in this manner, the coroners of the county are to execute it, and whenever an under sheriff, or coroner or coroners or other person execute the duties of the office, they are subject to all the duties, penalties, and liabilities imposed upon the sheriff.—*Ibid*, § 96, 97.

And the coroner must execute his duties in person, and not by deputy; and if he does not he is liable to penalties for neglect of duty, and it is no objection to his serving process on the sheriff that he is one of his deputies. (7 *Mass. Rep.*, 475.) But this doctrine must apply only when he acts as coroner; and when he is substituted for the sheriff in the case of a vacancy, he may undoubtedly appoint deputies, the same as the sheriff could. The statute, after the substitution by the first judge, makes him sheriff in fact until a new sheriff is elected or appointed; giving to him all the rights and powers of a sheriff, and subjecting him to equal penalties and liabilities.

CHAPTER XV.

Forms.

Form of the Bond given by the Sheriff.

Know all men by these presents, that I Edw. L. Porter, sheriff of the county of Tompkins, and we John Doe, and Richard Roe, freeholders of the said county of Tompkins, as sureties of the said Edw. L. Porter, are held and firmly bound unto the people of the state of New York in the sum of ten thousand dollars, [the bond of the sheriff of the city and county of New York is to be in twenty thousand dollars,] lawful money of the United States, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated the first day of January, 1841.

Whereas the above bounden Edw. L. Porter, hath been elected to the office of the county of Tompkins, at the general election held therein on the third, fourth, and fifth days of November in the year 1840.

Now therefore the consideration of the above obligation is such that if the said Edw. L. Porter shall well and faithfully in all things, perform and execute the office of sheriff of the said county of Tompkins during his continuance in the said office of sheriff of the said county of Tompkins by virtue of the said election, with-

out fraud, deceit or oppression, then the above obligation to be void, or else to remain in full force.

	EDWARD L. PORTER, <i>Sheriff.</i>	[L. s.]
	JOHN DOE,	[L. s.]
Witness,	RICHARD ROE,	[L. s.]
JOHN JONES.		

Oath of Sheriff.

I do solemnly swear [or affirm, as the case may be,] that I will support the Constitution of the United States, and the Constitution of the State of New-York, and that I will faithfully discharge the duties of the office of sheriff of the county of Tompkins according to the best of my ability.

EDWARD L. PORTER.

Subscribed and sworn before
me, this day of , 1841.

A. D. *First Judge of Tompkins Com. Pleas.*

Oath of Surety on Bond and Approval thereof.

STATE OF NEW-YORK, }
County of Tompkins, } ss.

John Doe and Richard Roe, sureties named in the within bond, being severally duly sworn, each for himself, says that he is a freeholder within the State of New-York, and worth five thousand dollars over and above all debts whatsoever owing by him [in the city and county of New-York, each the sum of twenty thousand dollars; and if in any other county such sum shall be proportioned to the number of sureties bound in such bond, and to the amount of the bond required in such county, over and above all debts whatsoever owing by him].

JOHN DOE.
RICHARD ROE.

Subscribed in my presence, and sworn to
before me, by said John Doe and
Richard Roe, this 2d day of January,
1841.

W. G. *Clerk of the County of Tompkins.*

I approve of the competency of the within sureties.

W. G. Clerk of Tompkins County.

Filed this 2d day of January, 1841, in the office of the Clerk of Tompkins county.

W. G. Clerk.

Form of Indenture from old to new Sheriff, conveying Prisoners, Jail, &c.

STATE OF NEW-YORK, { ss.
Albany County.

This indenture, made the first day of January, 1845, between Amos Adams, Esquire, late sheriff of the county of Albany, of the one part, and Christopher Batterman, Esquire, now sheriff of the said county of Albany, of the other part, witnesseth that the said Amos Adams, by virtue of a writ of discharge of his late office to him directed, hath delivered and set over to the said Christopher Batterman, the county house, jail and appurtenances, situate in and belonging to the said county of Albany, with the appurtenances thereunto belonging or in any wise appertaining; and I have further set over and delivered unto the said Christopher Batterman, now sheriff as aforesaid, the following writs, to wit: One writ of *capias ad respondendum* against James Jackson, in favor of John Stiles, returnable on the first Monday in May, 1845, before the Justices of the Supreme Court of Judicature of the State of New-York, at the City Hall in the city of New-York, in a plea of debt to the damage of the said John Stiles of \$5000; together with the bodies of Richard Roe and John Doe, arrested upon a certain writ of execution called a *Ca. Sa.*, in favor of John Stiles, against the said Richard Roe and John Doe, for the sum of \$1000, and by virtue of which said writ, the said Richard Roe and John Doe are confined to, and are now prisoners upon the limits of the liberties of the jail of the said county of Albany; together with the bodies of John Fen, confined within the walls of the common jail of the said county of Albany, upon a charge of grand larceny, and Richard Roe, junior, confined within the

walls of the common jail of the said county of Albany, upon a charge of burglary.

In witness whereof, I have affixed my seal and name of office, the day and year first above written.

AMOS ADAMS, *late Sheriff*. [L. s.]

Appointment of Under-Sheriff or Deputy.

To all to whom these presents shall come, greeting: Know that I, Christopher Batterman of the city of Albany in the county of Albany, sheriff of the county of Albany aforesaid, reposing special trust and confidence in Joshua I. Jones of the city of Albany in the county aforesaid, have constituted and appointed, and by these presents do constitute and appoint him, the said Joshua I. Jones, under-sheriff [or deputy-sheriff] of the said county of Albany under me the said sheriff. And I do hereby grant unto him the said Joshua I. Jones, full power and authority as my under-sheriff [or deputy-sheriff] throughout the said county of Albany, to use and exercise the said office of under-sheriff [or deputy-sheriff] according to the laws of this State, relative to and regulating the office of under-sheriff [or deputy-sheriff] aforesaid, until he shall be legally discharged therefrom.

In witness whereof, I have hereunto affixed my seal, and subscribed my name and office, this first day of January, 1845.

CHRISTOPHER BATTERMAN,

Sheriff. [L. s.]

Form of a bond from the Under-Sheriff or Deputy-Sheriff to the Sheriff.

Know all men by these presents, that we, Parker Sargent, James Jackson and John Stiles, are held and firmly bound unto Christopher Batterman, Esquire, sheriff of the county of Albany, in the sum of dollars, lawful money of the United States, to be paid to the said Christopher Batterman, or to his successors in office, or to his or their certain attorney or assigns, to which payment well and truly to be made and done, we bind ourselves jointly and severally, and our and each of our heirs, executors and

administrators jointly and severally, firmly by these presents. Sealed with our seals, and dated the first day of January, 1845.

The condition of this obligation is such, that whereas the above named Parker Sargent is, at his special instance and request, appointed by him, the said Christopher Batterman, his deputy-sheriff under him, the said Christopher Batterman, in and for the said county of Albany: Now if the said Parker Sargent shall well and faithfully, in all things, perform and execute the office of deputy-sheriff of the said county of Albany, during his continuance in said office, by virtue of the said appointment, without deceit, fraud or oppression, and shall save and keep harmless and indemnified the said Christopher Batterman, his executors and administrators, of and from all actions, suits, troubles, costs, charges, damages and expenses whatsoever, on account or by reason of any malfeasance, misfeasance, or nonfeasance, of him the said Parker Sargent, in his said office of deputy-sheriff, then this obligation shall be void and of no effect, otherwise to remain in full force and virtue. Signed, &c.

Form of the Oath of the Deputies and Under-Sheriff.

I, Joshua I. Jones, do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of New-York, and that I will perform and execute the office of under-sheriff [or deputy-sheriff] of the county of Albany to the best of my ability.

Form of returns to Writs.

Upon a Capias ad respondendum when personally served.

"I have taken and arrested the said John Doe, within named, as I am by the writ of the People of the State of New-York within commanded."

When one of the defendants is returned not found, then further say, "and the said Richard Roe cannot be found within my bailiwick, after diligent search and inquiry."

When the defendant, upon a non-bailable process, is summoned by the sheriff he is allowed to indorse his appearance, which may be in the following form: "I, John Doe, the defendant, or [one of the defendants] in the within writ named, do agree to appear on the return day of the within writ, and pray the court to enter my appearance accordingly."

If the defendant refuses to endorse his appearance, the sheriff may make the following return: "The said John Doe having refused to endorse his appearance upon the within writ, I return the same as personally served upon the said John Doe."

When the defendant is imprisoned for want of bail. (2 R. S. 350, § 22). "I have taken the within named John Doe, who remains imprisoned within the common jail of Albany county, in my custody for want of bail."

CHRISTOPHER BATTERMAN, *Sheriff*
or "defendant imprisoned for want of bail;" or "taken and in custody."

Where the defendant is rescued.

By virtue of this writ to me directed, I took and arrested the within named John Doe, according to the exigency of the said writ, and safely kept him in my custody, until John Stiles of and divers other persons to me unknown, on the day of at aforesaid, with force and arms, assaulted and ill treated me, and the said John Doe out of my custody then and there rescued, and the said John Doe then and there rescued himself, and escaped out of my custody, against the peace of the People of the State of New-York; and afterwards the said John Doe is not found in my bailiwick.

CHRISTOPHER BATTERMAN, *Sheriff*.

Sheriff's Return of Service of Declaration, where Suit is commenced by Declaration.

City and County of Albany, ss.

I, Christopher Batterman, Sheriff of the city and county of Albany, certify that on the day of 1845, I served upon the within named John Doe a copy [or John Doe and Richard Roe severally, copies] of the within declaration [note and notice] and also notice to plead, of which a copy is hereon endorsed, by delivering the same to him [or them] in person; and on the day of 1845, I made the like service of the like upon Richard Roe personally.

CHRISTOPHER BATTERMAN,
By J. I. JONES, *Under-Sheriff*.

The statute has made the "certificate endorsed thereon," as effectual to authorise the entry of the defendant's appearance and default, as if the same had been sworn to by such officer, 2 R. S. 270, § 3. But when the certificate of service is not on a copy of the declaration, the proof must be by affidavit. The official character in the affidavit is omitted, and the deponent who made the service signs his own name only.

Proof by Affidavit.

TITLE of CAUSE.

Albany County, ss.

John Smith, being duly sworn, says, that on the day of 1845, he personally served the above named defendant Richard Dickson with a copy of the declaration in the said cause, by delivering the same to him, together with a notice thereon endorsed, requiring him to plead thereto in twenty days after service of said notice, and copy of said declaration; that annexed to and served with said copy narr. and notice, was copy note and notice thereof as plaintiff's only cause of action.

JOHN SMITH.

Sworn, &c. before me.

Return of Nulla Bona to Fieri Facias.

The within named defendant has no goods or chattels, lands or tenements, in my bailiwick, whereof I can cause to be made the damages [or debt and damages] within mentioned, or any part thereof, according to the exigency of this writ.

CHRISTOPHER BATTERMAN, *Sheriff.*

by PARKER SARGENT, *Deputy.*

Return of Nulla Bona Testatoris, nec Propria, in an Action against an Executor or Administrator.

The within named John Doe has no goods or chattels which were of the within named Richard Roe deceased, at the time of his death, in his hands to be administered in my bailiwick, whereof I can cause to be made the damages within mentioned or any part thereof; and he has not any of his own proper goods or chattels in my bailiwick, whereof I can cause to be made the within mentioned sum of parcel of the sum of or any part thereof, according to the exigency of the writ.

CHRISTOPHER BATTERMAN, *Sheriff.*

by PARKER SARGENT, *Deputy.*

Return of a Fieri Feci to a Fi. Fa.

By virtue of this writ to me directed, I have caused to be made of the goods and chattels, lands and tenements, of the within John Doe, the damages [or debt and damages] within mentioned; which I have ready at the day and place within contained, to render to the said Richard Roe for his damages [or debt and damages] aforesaid, as I am within commanded.

CHRISTOPHER BATTERMAN, *Sheriff.*

Or, "Satisfied."

C. B. *Sheriff.*

Return of the like, where the Sheriff has paid part of the Sum levied to the Landlord for Rent.

By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within named John Doe, to the value of \$300; and I further certify that I have paid to to John Den, the landlord of the premises on which the goods and

chattels were taken, the sum of fifty dollars for one quarter's rent due to him for the said premises on the first day of May last, and that I have retained in my hands the sum of dollars for poundage upon the sum of \$250, making together with the sum of \$50 the sum of dollars ; and the remaining sum of dollars I have ready as I am within commanded. And the said John Doe hath not any other or more goods and chattels, lands or tenements, in my bailiwick, whereof I can cause to be made the residue of the damages [or debt and damages] within mentioned, or any part thereof.

CHRISTOPHER BATTERMAN, *Sheriff*.

Return to Fi. Fa. where the Property remains unsold for want of buyers.

By virtue of this writ to me directed, I have taken goods and chattels of the within named John Doe, to the value [or part] of the damages [or debt and damages] within mentioned ; which goods and chattels remain in my hands unsold for want of buyers ; therefore I cannot have that money at the day and place within contained, as I am within commanded.

CHRISTOPHER BATTERMAN, *Sheriff*.

Short form of the above.

Goods taken, but unsold for want of buyers.

C. BATTERMAN.

Return of Capi Corpus to a Capias ad Satisfaciendum.

I have taken the within named defendant, whose body I have ready at the day and place within contained, as within I am commanded.

CHRISTOPHER BATTERMAN, *Sheriff*.

Return of Non Est Inventus to the Like.

The within named defendant is not found in my bailiwick.

CHRISTOPHER BATTERMAN, *Sheriff*.

Return where the Ca. Sa. is paid or settled.

Satisfied.

CHRISTOPHER BATTERMAN, *Sheriff*.

Or, Defendant discharged by the plaintiff from this execution.

C. B. *Sheriff*.

Returns upon Writs of Scire Facias.

I do hereby return to the Justices of the Supreme Court of Judicature of the People of the State of New-York, that I have made service upon the within named John Doe, by delivering to the said John Doe, on the 1st day of May, 1841, a copy of the within writ duly certified by me.

C. B. *Sheriff*.

If the party against whom the writ issued cannot be found, but has a dwelling house, the Sheriff returns as follows :

I do hereby return to the Justices of the Supreme Court of Judicature of the People of State of New-York, that the said John Doe could not be found in my bailiwick, so that I could make personal service of the within writ, and thereupon I made due service of the same by leaving a copy thereof duly certified by me at the dwelling house of the said John Doe, with a person of proper age, whom I found in said dwelling house, on the first day of January, 1845.

C. B. *Sheriff*.

If the defendant cannot be found, and has no dwelling house within the sheriff's bailiwick, the return will be as follows :

I do hereby return to the Justices of the Supreme Court of Judicature of the People of the State of New-York, that the said John Doe, after diligent search, could not be found within my bailiwick, and has no house within my bailiwick, so that I can serve the within as I am commanded.

C. B. *Sheriff*.

Return to a Writ of Habere Facias Possessionem.

By virtue of the within writ to me directed, on the first day of January, 1845, I have caused the within named John Doe to have possession of the premises within described, for his term within written, with the appurtenances as in all things by the said writ I am commanded.

CHRISTOPHER BATTERMAN, *Sheriff*.

Return to a Writ of Habere Facias Seisinam.

By virtue of the within writ to me directed, I do hereby make known unto the within named justices that on the first day of January, 1845, I have caused the within named John Doe to have full seizin of the premises within described in all things, as by the said writ I am commanded.

CHRISTOPHER BATTERMAN, *Sheriff*.

Return to Writ of Replevin.

1st. *Where the goods were replevied.* By virtue of the within writ, and the affidavit accompanying the same, I have duly replevied and delivered to the plaintiff within named, the goods and chattels within specified, as within I am commanded, and I have also duly caused the within defendant to be summoned to appear according to the exigency of the within writ. And I do certify that the sureties in the replevin bond given to me, by the within named plaintiff, are A. B. of , and C. D. of [giving the additions, occupations, and residence of each].

CHRISTOPHER BATTERMAN, *Sheriff*.

2d. *Or if only part of the goods are replevied*, then state as follows: after "I have duly replevied and delivered the plaintiff within named," add "a part only of the goods and chattels contained in the said writ, to wit [here specify the particulars], and that the residue thereof I could not find, the same being removed or concealed, so as to make replevin or delivery thereof." *Where*

part only of the goods are found and plaintiff elects to arrest the defendant, "I certify and return to the within writ, that I could find only part of the goods and chattels therein mentioned, so as to make replevy and delivery thereof; wherefore, by the direction of the plaintiff, I took the body of the said John Doe, who with sureties, to wit [naming them], executed to me a bail bond to appear according to the exigency of the said writ in the penalty of dollars, and I have also duly caused the said defendant to be summoned," &c. [as in the first form].

3d. *If no part of the goods sought to be replevied can be found,* then as follows: I do certify and return to the within writ that no part of the goods and chattels therein mentioned, could be found by me, so as to make replevin and delivery thereof, as within I am commanded; wherefore, I took, &c. [as in the last form; but, if the defendant cannot be found, then, instead of the words "wherefore, I took," &c., insert "and I do further certify and return that the defendant within named cannot be found in my bailiwick"]].

4th. *If a claim of property was interposed, and found by the jury in favor of the claimant, and the plaintiff is unable or unwilling to give the second bond required by the statute,* then this return: I do certify and return to the within writ, that I took the within specified goods and chattels in order to make delivery thereof to the plaintiff within named; but before such delivery was made John Doe [the claimant], claimed the same, and demanded that such claim should be tried by a jury; wherefore a jury was called by me, and such jury under their oaths made and returned to me the inquisition hereto annexed. By reason whereof I could not replevy and make delivery, as within I am commanded.

5th. *But if the claim of property be found by the jury against the claimant,* then this return: after the words in the last form "by reason whereof," add, I proceeded to make delivery to the said plaintiff of the goods and chattels within contained, notwithstanding such claim, as within I am commanded.

6th. *If the claim of property be found in favor of the claimant, and the plaintiff still persists to have the property, and gives the*

second bond required by the statute, then these words: after "by reason whereof I could not replevy and make delivery, as within I was commanded," add, until the said plaintiff within named, together with [naming the sureties], executed to me a second bond in the penalty of dollars, that being at least double the value of the said goods and chattels, as appraised by the oath of [naming the appraiser], and in the sum required by law, and thereupon, on the execution and delivery to me of such last mentioned bond as aforesaid, I did replevy and make delivery to the said plaintiff the said goods and chattels, as within I am commanded.

In every return which the Sheriff makes to the writ of replevin he must state the names, amounts, &c., of the plaintiff's sureties to him, and that the said defendant was summoned to appear, except [of course] when he cannot be found.

Inquisition returned with the Writ of Replevin.

CHARLES TOMPKINS,
 vs.
 JOSEPH HENDERSON,

We whose name are hereto subscribed, and seals affixed, being a jury called to try a claim of property put in by [the claimant] to certain goods and chattels [specifying them], and sought to be replevied by virtue of the annexed writ of replevin, do upon our oaths say, that the property of the said goods and chattels so claimed, is [or "is not," as the case may be] in the said [the claimant]. Witness our hands and seals at, &c., on, &c.

[Here the signatures and seals of the twelve jurors, and of the Sheriff.]

Form of Summons to Defendant in Replevin.

To JOHN DOE :

By virtue of a writ of replevin issued out of the Supreme Court of judicature of the people of the State of New York, you are summoned, according to the statute in such case made and provided, to be and appear before the justices of the said Supreme Court, at the City Hall of the city of New York [or Capitol in the city of Albany, or such place and time as the next term of the court is appointed], on the first Monday in May next, to answer Richard Roe, who prosecutes by F. H. Hastings, his attorney, of a plea of taking and unjustly detaining his silver cup. Dated, January 1, 1845.

CHRISTOPHER BATTERMAN, *Sheriff*.

If the writ of replevin is in the *detinet*, or for detaining only, it must be so stated in the summons. The summons is *sufficient*, though it do not specify all the articles.

FORM OF RETURNS TO WRITS OF HABEAS CORPUS.

Ordinary Return containing Cause of Detention.

I do hereby return to the justices of the Supreme Court within named [or to the Hon. Amasa J. Parker, circuit judge, &c.], that before the coming to me of the within writ, the said John Doe was committed to my custody, and is detained by virtue of another writ to me directed, a copy of which annexed I transmit to you. Nevertheless, I have the body of the said John Doe before you at the day and place within mentioned, as I am within commanded.

CHRISTOPHER BATTERMAN, *Sheriff*.

Return of Languidus.

By virtue of this writ I do hereby certify to the justices of the Supreme Court, within named [or to the Hon. Robert Monell, circuit judge, &c.], that before the coming of this writ to me, by virtue of another writ before directed to me, the said John Doe

within named, was detained by me in the prison at the city of Albany, in the county of Albany [a copy of which writ is hereto annexed], and he now lies in the said prison, sick and infirm, and so remains, so that I cannot for fear of his death [or for fear of doing great injury to him, so as to endanger his life], remove him. Therefore, I cannot have the body of the said John Doe at the day and place as I am within commanded.

CHRISTOPHER BATTERMAN, *Sheriff*.

Return of Elongata.

I do hereby return to the justices, &c., that the within named John Doe before the coming to me of the within writ, was eloigned to places unknown to me, by James Jackson and John Stiles [or by persons to me unknown], by reason of which I cannot have the said John Doe before you, as I am within commanded.

CHRISTOPHER BATTERMAN, *Sheriff*.

Return to Writ or Inquiry.

The execution of this writ appears in the inquisition hereunto annexed.

CHRISTOPHER BATTERMAN, *Sheriff*.

Inquisition on a Writ of Inquiry in Ordinary Cases.

County of Albany, ss.

An inquisition taken on the twenty-second day of December, in the year of our Lord one thousand eight hundred and forty-four, before me, Christopher Batterman, Sheriff of the county of Albany, at the City Hall in the city of Albany, and county aforesaid, by virtue of a certain writ of inquiry of damages to me directed, and to this inquisition annexed, to inquire of and concerning certain matters in the said writ contained and specified,

by the oaths of A. B., C. D., &c. [the jurors], twelve good and lawful men of the said county, who being chosen, tried and sworn, say, upon their oaths, that the plaintiff in the said writ named, hath sustained damages by reason of the premises in the said writ mentioned, over and above his costs and charges by him about his suit in that behalf expended to dollars, and for those costs and charges to six cents.

In witness whereof, as well I, the said sheriff, as the said jurors, have set our hands and seals to this inquisition, the day and year above written.

CHRISTOPHER BATTERMAN, [L. s.]

A. B. [L. s.]

C. D. [L. s.]

[And the signatures and seals of the other jurors. But their names are not usually inserted in the body of the inquisition].

Inquisition on a Writ of Inquiry in Debt on Bond.

Albany County, ss:

An inquisition indented, taken at the City Hall, in the city of Albany, in the said county of Albany, on the tenth day of January, in the year of our Lord one thousand eight hundred and forty-five, before me, Christopher Batterman, Sheriff of the county aforesaid, by virtue of a writ of the people of the state of New York, to me directed, and to this inquisition annexed by the oaths of A. B., C. D., &c. [the jurors naming], twelve good and lawful men of the county aforesaid, who, being chosen, tried and sworn, say upon their oaths that, &c. [here set out the finding of the jury upon the breaches assigned], and they further say upon their oaths that the said plaintiff hath sustained damages by the aforesaid breaches of the said condition of the said writing obligatory, besides his costs and charges by him about his suit in this behalf expended to dollars, and for those costs and charges to six cents. In witness, &c. [as in the last form to the end].

Bail Bond.

Know all men by these presents, That we, C. D. [or if the defendant be sued by a wrong name, say C. D. arrested by the name of E. D."], of _____, I. N., of _____, and J. S., of _____, are held and firmly bounden to Christopher Batterman, Sheriff of the county of Albany, in the sum of _____ dollars [the sum endorsed on the writ], lawful money of the United States of America, to be paid to the said Sheriff or his certain attorney, executor, administrator or assigns; for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the _____ day of _____, in the year of our Lord 1845.

Whereas, A. B. has sued and prosecuted out of the Supreme Court of judicature of the people of the state of New York a certain writ of *capias ad respondendum* against the above bounden C. D., in a plea of trespass [or as the plea is in the writ], returnable on the _____ day of _____ next, before the justices of the Supreme Court of judicature aforesaid, at the _____ in the city of _____, by virtue of which said writ the above bounden C. D. has been arrested by the above named Sheriff.

Now therefore, the condition of this obligation is such that if the above bounden C. D. shall appear in the action commenced by the said writ by putting in special bail, within twenty days after the return day specified in the said writ, and by perfecting such bail, if required, according to the rules and practice of the said court, then the above obligation to be void; otherwise to remain in full force and virtue.

C. D.	[L. s.]
J. N.	[L. s.]
J. S.	[L. s.]

Sealed and delivered in the presence of

R. B.

T. V.

Assignment of the above by the Sheriff.

Know all men by these presents, That I, Christopher Batterman, Sheriff of the county of Albany, hereby assign the within written bail bond to the within named A. B., at his request, to be sued by him, according to the force, form and effect of the statute in such case made and provided. In testimony whereof, I have hereunto set my hand and seal, this day of
in the year of our Lord 1845.

CHRISTOPHER BATTERMAN, *Sheriff*. [L. s.]

Sealed and delivered in the presence of

R. B.

T. V.

The penal part of all bonds to the Sheriff, being invariably the same, except in the amount of the penalty, and respecting which sufficient directions have already been given, it would be a useless repetition to insert them further.

Condition of a Bond of Indemnity to a Sheriff on the Levy and Sale of Goods.

Whereas the above named obligee, as Sheriff of the county of Albany, hath received for service a certain writ of fieri facias [or "testatum fieri facias," or "execution"], in favor of John Doe against John Stiles, whereby the said obligee as such Sheriff is directed to levy and collect the sum of dollars, besides his fees; and whereas, the said obligee, as such officer, hath been requested, on behalf of the plaintiff named in the said execution, to levy by virtue thereof on [state the property particularly]; but because such property is claimed to belong to one James Jackson, and because said obligee doth not know whether such claim be well founded or not:

Now therefore, the condition of this obligation is such that if the above named obligors shall well and truly save harmless and indemnified him, the said obligee, his under sheriff or deputies or either of them, of, from and against all damages, costs and

charges which the said obligee, or his under sheriff or deputies or either of them, may sustain or be put to, for or by reason of levying on, taking away, removing or selling the aforesaid described property, or any part thereof, of or upon the said execution, then this obligation to be void, else to remain in full force and effect.

[Signatures and seals.]

Sealed and delivered in presence of

Plaintiff's Bond in Replevin. (2 R. S., 2d ed., 431, § 7.)

Condition. The condition of this obligation is such that if the above bounden A. B. shall prosecute to effect and without delay a certain suit which he has commenced in the [naming the court], against C. D., for taking and unjustly detaining [or "for unjustly detaining"] the following goods and chattels, to wit [here specifying every article named in the writ]: and that if the defendant recovers judgment against him in such action, he will return the same property, if return thereof shall be adjudged, and will pay to the said defendant all such sums of money as may be recovered against him by such defendant in the said action, for any cause whatever, then the above obligation to be void, else to remain in full force and virtue.

[Signatures and seals of obligors.]

Sealed and delivered in the presence of

Condition of Second Bond of Plaintiff to the Sheriff in Replevin.

Whereas in and by virtue of a writ of replevin issued out of the [naming the court], tested [the time], and returnable [the return day], and directed and delivered to the said Sheriff, he, the said Sheriff, was commanded [reciting the writ]. And whereas, upon the taking of the said goods and chattels, by virtue of the said writ, in order to make delivery thereof to the said plaintiff, one A. B. [naming the claimant], before such delivery, claimed

property in the said goods and chattels ; and thereupon a jury was summoned by the said Sheriff to try such claim ; and which said jury have, by their inquisition under their hands and seals, found in favor of such claim ; and the said plaintiff having still persisted and demanded of the said Sheriff, notwithstanding the said inquisition found by the said jury, to have delivery made to him of the said goods and chattels of and upon such writ of replevin :

Now therefore, the condition of the above obligation is such that if the said John Doe, his heirs, executors and administrators, shall well and truly indemnify and save harmless him, the said Sheriff, his heirs, executors and administrators, of and from all damages, costs and charges, which he, the said Sheriff, his heirs, &c., shall sustain or in any wise be put to, for or by reason of the delivery by him, the said Sheriff, of the property claimed as aforesaid to the said John Doe, and demanded as aforesaid to be delivered to him, then, &c., otherwise, &c.

[Signatures and seals of obligors.]

Sealed and delivered in the presence of

Condition of Defendant's Bond in Replevin. (2 R. S., 2d ed.,
432, § 12.)

The condition of this obligation is such that if the above bounden James Jackson shall abide the order and judgment of the [naming the court from which the writ issued], in an action of replevin, commenced in the said court by one John Doe, against the above bounden James Jackson, and shall cause special bail to the said action to be put in, if the same be required, then this obligation to be void, otherwise to remain in full force and virtue.

JAMES JACKSON, [L. s.]

JOHN DOE, [L. s.]

Sealed and delivered in presence of

Condition of Bond given to the Sheriff for the Limits.

Whereas the above bounden John Doe is now in custody of the above named sheriff, by virtue of a writ of *capias ad respondendum* [or "*capias ad satisfaciendum*"], issued out of the [naming the court according to the writ], at the suit of James Jackson against the said John Doe, in a plea of trespass on the case [or whatever the form of action is], for the sum of dollars [the sum endorsed on the writ], tested the day of in the year of our Lord one thousand eight hundred and forty-five, and returnable .he the of next.

Now therefore, the condition of this obligation is such that if the above bounden John Doe, so in custody of the above named sheriff as aforesaid, shall remain a true and faithful prisoner, and shall not at any time, or in any manner escape or go without the limits and boundaries of the liberties established for the jail of the county of until discharged by due course of law, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN DOE, [L. S.]

JOHN STILES, [L. S.]

JOHN DEN, [L. S.]

Sealed and delivered in presence of

If the defendant is in custody on mesne process, the penalty of the above bond is not less than double the amount in which the sheriff was required to hold the defendant to bail; if in custody on execution, not less than double the amount directed to be levied by the execution. 2 R. S., 2d ed., 352, § 44.

Condition of Bond on an Attachment against the Sheriff.

The condition of the above obligation is such, that if the said Christopher Batterman shall personally appear before the Justices of the Supreme Court of Judicature of the People of the State of New-York, at on [the day and place of the return of the attachment,] and abide the order and judgment of the said court, of and upon a certain attachment returnable that day, and

issued out of the said court against the said Christopher Batterman, Esquire, as Sheriff of the said county of Albany, for an alleged contempt in not returning a certain [declaration or] writ of *capias ad respondendum* issued out of the said court, and to him directed and delivered in favor of James Freeman against Richard Jones, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of
V. O.
N. W.

C. B. [L. s.]
L. E. [L. s.]
D. G. [L. s.]

Form of Sheriff's Certificate to Purchaser of Land.

TITLE OF CAUSE.—*Fi. Fa.* to levy \$500 with interest from October 1st, 1844, besides Sheriff's fees and poundage.

Tested November 4th, 1844, returnable in sixty days from its receipt.

I, Christopher Batterman, sheriff of the county of Albany, do certify, that by virtue of the writ of *fieri facias* issued in the above cause, to me directed and delivered, I have this day sold all the right and title of the said John Stiles of and in and to the following described piece of land (describing the premises sold) together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, unto James Quigg, for the sum of three hundred dollars, that being the highest sum bid therefor. And the said James Quigg will be entitled to a sheriff's deed for the above described premises at the expiration of fifteen months from this date, unless the same shall be redeemed within that time, pursuant to the statute in such case made and provided, by some person or persons authorised to redeem the same.

Given under my hand this 3d day of January, 1845.

C. B. *Sheriff.*

Give "1. A particular description of the premises sold. 2. The price bid for each distinct lot or parcel. 3. The whole consideration money paid. 4. The time when such sale will become absolute," &c. 2 *R. S.*, 2d ed., 293, § 42.

Form of Sheriff's Deed to Purchaser under Fi. Fa.

To all to whom these presents shall come, I, Christopher Batterman, Sheriff of the county of Albany, send greeting :

Whereas, by virtue of a writ [or two or more certain writs] of Fieri Facias, issued out of and under the seal of the [naming the court] in favor of James Jackson against John Stiles to the said sheriff directed and delivered, commanding him that of the goods and chattels of the said John Stiles in his bailiwick, he should cause to be made certain moneys in the said writ [or writs] specified, and if sufficient goods of the last named person could not be found, that then he should cause the amount of such judgment to be made of the lands, tenements, real estate, and chattels real, whereof the said last named person was seised at a certain time in the said writ specified, as on reference to the said writ [or writs] now of record in the said court, will more fully appear : and whereas, because sufficient goods and chattels of the said last named person in the said writ [or writs] could not be found, whereof he, the said sheriff, could cause to be made the moneys specified in the said writ [or writs], he, the said sheriff, did, in obedience to the said command, levy on, take and seize all the estate, right, title and interest of the said last named person, of, in and to the lands tenements, real estate and premises herein-after particularly set forth and described, with the appurtenances, and did on the day of one thousand eight hundred and sell the said premises at public vendue, at [naming the place and house], in the said county, he having first given notice of the time and place of such sale by advertising the same according to law ; at which sale the said premises were struck off, and sold to William Quigg, for the sum of [naming the sum], he, the said William Quigg, being the highest bidder, and that being the highest sum bidden for the same. Whereupon the said sheriff, after receiving from the said purchaser the said sum of money so bidden as aforesaid, gave to him such certificate as is by law directed to be given, and a certificate of such sale was duly filed in the office of the clerk of the court :

and whereas, the fifteen months after such sale, and the giving and filing of such certificate thereof have expired, without any redemption of the said premises having been made, and [here, if the case require, insert the transfer of the sheriff's certificate to any subsequent purchaser, and by him to some other, and from him to the present owner]. Now this indenture witnesseth that I, Christopher Batterman, the sheriff as aforesaid, by virtue of the said writ, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of money above mentioned, to me in hand paid as aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, released, assigned, conveyed and confirmed, and by these presents do grant, bargain, sell, release, assign, convey and confirm unto the said William Quigg, his heirs or assigns, all the estate, right, title and interest of the said person against whom the said [several] writ [or writs] of execution has [or have] been issued as aforesaid, whereof he was seized or possessed on the day of one thousand eight hundred and [being the day and year mentioned in the said writ or writs], or any time afterwards, of, in and to all [describing the lands or real estate conveyed]. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining; to have and to hold the said above mentioned and described premises with the appurtenances unto the said William Quigg, his heirs and assigns forever, as fully and absolutely as I, Christopher Batterman, the sheriff aforesaid, can, may, or ought to, by virtue of the said writ, and of the statute in such case made and provided, grant, bargain sell, release, assign, convey and confirm the same. In witness whereof, I, the said sheriff, have hereunto set my hand and seal the day and year first above written.

CHRISTOPHER BATTERMAN, *Sheriff*. [L. s.]

Sealed and delivered in the presence of

Sheriff's Return of Warrant with Inventory annexed under Proceedings for the Collection of Demands against Ships and Vessels.

In obedience to the within warrant, I do certify and return to the Honorable Amasa J. Parker, Judge, &c., that I have attached and seized the vessel therein named, together with her tackle, apparel and furniture, and she is now and ever since hath been safely kept by me as within I am commanded.

CHRISTOPHER BATTERMAN, *Sheriff*.

A just and true inventory, made and signed by me of all the property seized by virtue of the annexed warrant, that is to say: One sloop or vessel, called, &c., the burden, &c., with the following tackle, apparel and furniture [enumerating them].

CHRISTOPHER BATTERMAN, *Sheriff*.

Form of an Inventory and Appraisal of the Property of an Absent and Absconding Debtor, seized under a Warrant.

An inventory of the real and personal estate of John Doe, an absent and absconding debtor, including money, bank notes, accounts, bills, bonds, promissory notes and choses in action, and all papers and vouchers relating thereto, as far as the same have come to my hands, possession or knowledge, together with all books of account relating to the same, and the evidences of his title to his real estate, seized by me, Christopher Batterman, sheriff of the county of Albany, by virtue of a warrant issued by the Honorable Amasa J. Parker, circuit judge of the third circuit, taken with the assistance of James Quigg and William Quigg, two disinterested freeholders, summoned and sworn by me to assist in taking the same pursuant to the statute in such case made and provided, this first day of January, 1845.

Here follows the list of property, stating such as is perishable together with the signatures of the sheriff and the appraisers.

Oath of Appraisers.

You and each of you shall well and truly make a full and just inventory, and well and truly appraise the property of John Doe, an absent and absconding debtor, seized by me, Christopher Batterman, sheriff of the county of Albany, by virtue of a warrant issued by the Honorable Amasa J. Parker, circuit judge of the third circuit, according to the best of your judgment. So help you God.

This oath may be administered by the sheriff, and it is proper that it should be in writing, signed by the appraisers, and returned with the inventory.

Rule granted by the Court directing an Attachment to issue.

James Freeman <i>vs.</i> Richard Jones.	}	L. H. PALMER, <i>Atty.</i>

On reading and filing a certified copy of a rule entering the default of the sheriff of Albany for not bringing in the defendant's body, or shew cause this day why an attachment shall not issue against him, and an affidavit that the said sheriff hath not hitherto brought in the body as required by the said rule thereupon, and on motion of Mr. L. H. Palmer, attorney for the plaintiff, [no cause being shown against the same by the said sheriff] it is *Ordered*, That an attachment issue against him.

Attachment for not returning execution.

[Same in all respects as on page 398 substituting "fieri facias" of "capias ad satisfaciendum," for "capias ad respondendum," whenever necessary.]

Attachment against Sheriff for not returning Capias ad Respondendum.

The People of the State of New-York, to the coroner of the
 [Seal.] county of Greeting: We com-
 mand you that you attach J. K., Esquire, sheriff of our
 said county, so that you may have him before our Justices of our
 Supreme Court of Judicature, at the capitol in the city of Albany,
 on the first Monday of January next, to answer to our said Justi-
 ces for certain trespasses and contempts, done and committed in
 our court before our Justices aforesaid: and have you then there
 this writ. Witness, Samuel Nelson, Esquire, our Chief Justice,
 at the [capitol] in the city of [Albany,] the [fifteenth] day of
 [November,] in the year of our Lord one thousand eight hundred
 and [forty-four.]

HALLET, HUMPHRY & SUTHERLAND, *Clerks.*

E. F., *Attorney.*

Endorsed.

Supreme Court. The People of the State of New-York *ex rel.*,
 A. B. v. J. K., sheriff of the county of Attachment,
 returnable 1st Monday of January, 1845. E. F., attorney.
 Issued for not returning a writ of *capias ad respondendum* between
 A. B., plaintiff, and C. D., defendant. Let the defendant be held
 to bail in the sum of \$ [Nov. 15h, 1844.] O. E.,
 Circuit Judge.

Interrogatories to the Sheriff.

In the Supreme Court. Interrogatories to be administered to A
 McD., Esq., sheriff of the city and county of Albany, touch-
 ing a contempt alledged against him in not returning a certain
 [declaration or] writ of *capias ad respondendum* [filed in, or]

issued out of this court, in favor of James Freeman, plaintiff,
and Richard Jones, defendant.

First Interrogatory. Did you or not, in person, by deputy, or otherwise, at any and what time, receive for service a certain declaration or writ of capias ad respondendum, to you directed, as sheriff of the city and county of Albany, between J. F. plaintiff, and R. J. defendant? if a writ, add tested the day of, and returnable, state return as to *time and place* Declare fully.

Second Interrogatory. Did you at any and what time, receive any and what notice of a rule to return such writ or declaration, and state the purport of that notice? Declare.

Third Interrogatory. Did you execute or serve that writ or declaration, and if yea, how and when particularly? Declare.

Fourth Interrogatory. Have you or have you not returned that writ or declaration, and if yea, when, where, and how in particular? And if nay, why have you not returned the same? Declare fully and particularly. Dated, &c.

L. H. PALMER, *Att'y. for Plffs.*

Attachment against Coroner for not returning the preceding.

The People of the State of NewYork, to I. N. and I. S., appointed elizors by our Justices of our Supreme Court of Judicature to execute this writ, Greeting : We command you respectively to attach L. L., Esquire, coroner of our county of so that you may have him before our Justices, &c., *as in last form.*

Endorsed.

Supreme Court. The People, &c., v. L. L., coroner of the
county of Attachment, returnable
1845. E. F., attorney. Issued for not returning an
attachment against J. K., Esquire, sheriff of the county of

Allowance of the foregoing Attachment.

Due proof having been made before me of the default of L. M., Esquire, coroner [or, "one of the coroners"] of _____ in returning a certain attachment directed and delivered to him, commanding him to attach L. K., Esquire, sheriff of _____ for an alleged contempt in ["not returning a certain writ of *capias ad respondendum* heretofore issued to the said sheriff, between A. B., plaintiff, and C. D., defendant, in a plea of _____," or whatever the cause of contempt is.] I do therefore allow the within attachment to issue, and the cause of issuing the same is the default of the said coroner in making return to the attachment as above mentioned, and the said L. M. is not to be discharged on bail, or in any other manner, but by order of the court. Dated, &c.

AMASA J. PARKER, Circuit Judge.

*Notice to Sheriff to return Capias.**Supreme Court.*

A. B. }
v. }
C. D. }

Sir—Please to take notice, that you are hereby required to return the writ of *capias ad respondendum*, issued in this cause, and to you directed and delivered therein, within twenty days after service of this notice. Dated, [Albany, January 10th, 1845.]

Yours, &c.,

To J. V. D., Esq.,

E. F., plaintiff's attorney.

Sheriff of the county of [Kings.]

Notice to Sheriff to return Fi. Fa.

[*Title of the cause.*] Sir—Please to take notice, that you are hereby required to return the writ of *fieri facias*, issued in this cause and to you directed and delivered therein, within twenty

days after service of this notice, or an attachment will issue. Dated, &c.

Yours, &c.

E. F., *Atty. for Plff.*

To P. Y., Esq., Sheriff of the county of Albany.

Affidavit of Service of Notice that Sheriff return Capias.

Supreme Court.

A. B. }
v. }
C. D. }

[*Venue.*] E. E. the attorney for the plaintiff in this cause, [or, "O. P. of student at law"] being duly sworn deposes and says, that on the day of last, [or, "instant"] he personally served J. A., Esquire, sheriff of the county, [or, "city and county"] of with a true copy of the annexed notice, by delivering the same during office hours to K. L., one of the deputies of the said sheriff, in the office of the said sheriff," or otherwise, according to the mode of service.] And deponent further says that he has this day searched in the office of the clerk of this court for the return of the writ of *capias ad respondendum* issued in this cause, but that no such writ was filed there. And further says not.

Sworn, &c.,

Affidavit on Proceedings against Sheriff to compel Appearance.

Supreme Court.

A. B. }
v. }
C. D. }

[*Venue.*] E. F., the attorney for the plaintiff in this cause being duly sworn, says, that the *capias ad respondendum* in

this cause was issued to the [late] sheriff of the county [or "city and county"] of _____ returnable on the _____ day of _____ last, on which day the said writ was returned by the said sheriff with an endorsement thereon, that the defendant had been taken. And deponent further says, that more than twenty days have elapsed from the time of such return, and that special bail has not been put in and perfected in this cause, according to the rules and practice of this court. And further, &c.

Sworn, &c., E. F.

Notice from the Landlord.

The sheriff of Albany, and A. B. the plaintiff in an execution against J. H. are required to take notice, that the sum of two hundred dollars is now due to me by the said J. H. for, and the same is claimed as, *rent* for the use and occupation of certain premises situated [describe briefly the premises,] and such rent accrued during the space of six months, to wit, from the _____ day of, to the _____ day of, &c. [be particular as to these dates,] and this notice is accompanied by the subjoined affidavit of the truth thereof. Dated, &c.

Your obedient servant,

L. M. [or, L. M.
by X. Y. his *Agent*.]

Affidavit of Rent being due.

Schenectady, ss. L. M. [or "X. Y. agent of L. M."] of the city and county of Schenectady, being duly sworn, says that the above written notice is true in substance and matters of fact.

Sworn, &c.

L. M. [or "X. Y."]

Bond given by Tenant.

Know all men by these presents, that [here insert the names of the tenant and his two sureties—make the *penalty* double the rent claimed. The *obligee* must be the sheriff. The rest in the usual form.]

Condition of Bond.

The condition of this obligation is such, that if the said [obligors] shall pay [the landlord] the rent now due him from J. H. for [describe the premises,] not exceeding one year's rent for the same, then, &c. otherwise, &c.

Sheriff's Advertisement of the Sale of Real Estate (p. 183).

By virtue of an execution issued out of the Supreme Court of the State of New York, to me directed and delivered, I have seized and taken all the right, title and interest which J. S. had on the 7th day of February, 1842, or which he may since have acquired of, in and to all those farms, pieces or parcels of land, in the town of Bern, in the county of Albany, and in the manor of Rensselaerwyck. The one piece bounded as follows, to wit: [description]. The other said piece or parcel of land is bounded as follows: [further description], which aforesaid property I shall expose for sale at the rotunda in the Merchant's Exchange in the city of Albany, on the 24th day of December, 1844, at 12 o'clock noon of that day. Dated Albany, November 11th, 1844.

C. BATTERMAN, *Sheriff*.

This form will answer for the sale of personal property. It is customary to sell the right and title of the defendant, only in which case, it may be well to state the defendant's name, and the intention to sell his right only, &c., which he had on the
 day of A. D. , or at any time afterwards,
 in whose hands soever the same may be, although the general advertisement would perhaps be sufficient if the terms and extent of the sale are announced at the time thereof.

Assignment of Sheriff's Certificate of Sale of Land (p. 198).

In consideration of dollars, to me, W. Q., paid, by J. K., the receipt whereof is hereby acknowledged, I hereby sell, assign and transfer the within certificate to said J. K., with all my right, title and interest in said certificate.

W. Q. [L. s.]

Signed, sealed and delivered this day
of 1845.

[This must be acknowledged in the same manner as a deed.]

Notice of a Distress for Rent.

STATE OF NEW YORK, }
County of Albany, } ss.

To C. D., the tenant named in the warrant of distress, whereof the annexed is a copy :

You are hereby notified, that the undersigned authorized to make the distress by said warrant required, have for the cause and for the rent therein mentioned, as due to your landlord therein named, distrained and taken the goods and chattels, of which the following is an inventory, to wit: [here designate them with such certainty, that the articles distrained may be distinguished from other similar articles, and if any cattle have been distrained and secured in any other place than on the demised premises, add to this notice a statement of such facts, and a description of the place where such cattle are impounded, or such goods secured.]

Dated at &c., on &c.

Officer's Signature.

Statement of the Appraisement of Goods Distrained for Rent.

STATE OF NEW YORK, }
County of Albany, }
Town of Knox, }

The undersigned two disinterested freeholders of the said town,

having been summoned and sworn by the sheriff of the said county [or, "by E. F., a constable of the said town"], well, truly and impartially, to appraise the hereinafter described goods and chattels by him distrained (for rent as by the warrant of distress in that behalf as authorized and required) according to the best of our understanding, have at _____ in said town on the _____ day of _____ A. D. 1845, appraised and hereby appraise the said goods and chattels at the several sums or value set opposite to the following description of the said goods and chattels respectively, to wit:

Goods and chattels distrained.	Sums or value at which they are respectively appraised.
A mahogany bureau, 12 yellow windsor chairs,	\$25 12

\$37 being the

aggregate of said appraisement. Made and stated in writing under the hands of the undersigned at &c., aforesaid, on &c. aforesaid.

Signatures of the Appraisers.

Summons to Appraisers in case of Distress for Rent.

To John Doe and Richard Roe.

Whereas by virtue of a warrant of distress issued by C. D. landlord, I have distrained the goods and chattels of A. B. his tenant, you are therefore hereby commanded, in pursuance of the statute in such case made and provided, to repair forthwith to the premises of the said A. B. (to the place where the goods distrained are kept), there to appraise the said goods and chattels distrained. Dated at, &c., this _____ day of _____ in the year, &c.

G. JENKINS, *one of the Constables of, &c.*

*Oath of Appraisers.**Albany County, ss.*

John Doe and Richard Roe, householders of the town of in said county, being duly sworn, do, and each for himself doth say, that he will well, truly and impartially appraise the goods and chattels mentioned in this inventory, according to the best of his understanding.

JOHN DOE,
RICHARD ROE.

Sworn the day of 1845,
 be'ore me.

J. STREETER, *Constable, &c.*

Notice of the Sale of Distrained Goods and Chattels.

STATE OF NEW YORK, {
County of Albany, } ss.

The undersigned sheriff of the said county [or "E. F. a constable of the town of Knox in said county"], hereby gives notice, that at in the town of Knox in said county, on the [here state the day and time of the day], he will sell at public auction at the best price that can be obtained for the same, the goods and chattels whereof the following is a description, to wit: [here insert it], which have been distrained for rent. Dated at &c., on &c.

[Officer's Signature.]

Bond in order to procure a Stay on Execution against the Body.

(2 R. S., 280, § 23.)

Know all men by these presents, that we, &c., are held and firmly bound to [naming the plaintiff in the execution, and the penalty must be double the amount required to be collected on the execution; the rest is in the usual form].

The condition of this obligation is such, that if [naming the

county to which the execution is directed], so as to be arrested upon any execution that may be issued against him, upon a judgment obtained in the Supreme Court of this state, in favor of defendant], shall be found within the county of [the [the plaintiff], against him the said [defendant], within six months after the date thereof, then, &c., otherwise, &c.

[Signatures and seals of obligors.]

Sealed and delivered in presence of

[Subscribing witnesses.]

Certificate of Sheriff that Petitioner is Imprisoned.

[Title of cause.]

I do certify, that A. B. the defendant in the above suit, is a prisoner confined within the jail of the county [or "city and county"] of [] in execution at the suit of the above named plaintiff, by virtue of a writ of *capias ad satisfaciendum*, issuing out of this court [or if out of any other court, specify such court], and lodged in my office against him; whereupon I am directed to levy and receive the sum of [] dollars, exclusive of my fees. Dated, &c.

C. B., *Sheriff of the*
City and County of Albany.

Certificate of Sheriff on Commitment of Defendant.

I certify that C. D., the within named defendant, has been committed to, and remains in my custody, by virtue of a *commitment* of him, in exoneration of his bail, at the suit of the plaintiff, in the plea within mentioned. Dated [the fifteenth day of January, 1845].

C. B., *Sheriff of the*
City and County of Albany.

Witness,

O. P.

*Certificate of Sheriff, of Defendant being in Custody.**Supreme Court.*

A. B. }
 v. }
 C. D. }

I certify that C. D. the above defendant is in my custody in the jail of the county of Albany, on a surrender made by his bail in this suit on the [thirteenth day of September last], and after the recovery of judgment in the said suit. And I do further certify that there was not delivered to me any writ of *capias ad satisfaciendum* in the said suit within three months from the time of such surrender [or otherwise as the case may require]. 2 R. S., 459, § 36. Dated this first day of January, 1845.

C. B., *Sheriff, &c.*

Witness,

O. P.

Albany County, ss.

O. P. of [the town of Knox, in said county], being duly sworn, deposes and says, that on the first day of January 1845, he saw C. B., Esquire, sheriff of the county of Albany, subscribe his name to the foregoing certificate, and that at the same time he, this deponent, subscribed his name as a witness thereto.

O. P.

Sworn, &c.

*Notice of Rule that Sheriff put in Special Bail.**Supreme Court.*

A. B. }
 v. }
 C. D. }

Sir—Please to take notice, that a rule has, this day, been entered in this cause, in the book of common rules, kept in the office of the clerk of this court, at the [city of Albany], requir-

ing the sheriff [or "late sheriff"], of the [city and] county of [Albany], to put in special bail in said cause, within twenty days after service of notice of said rule. Dated, [Albany, January 8th, 1845].

Yours, &c.

E. F., *Plaintiff's Attorney.*

To C. B., Esq.,

Sheriff of the county of Albany.

Notice of Exception to Bail.

Supreme Court.

A. B. }

v. }

C. D. }

Sir—Please to take notice, that I have excepted to the sufficiency of the bail put in for the defendant in this cause. Dated, [Albany, December 20th, 1844].

Yours, &c.

E. F., *Pliffs Atty.*

To G. H., Esq., *Defts Atty.*

Claim to Property Replevied.

To *Esq., sheriff [or coroner] of the county of Albany.*

Sir—I hereby claim property in the goods [beasts], and chattels [or if a *part* be only claimed, state *the part* particularly], sought to be replevied by C. T. on a writ of replevin, issued out of the Supreme Court and directed to you, against J. H., and I demand that my claim may be tried by a jury before you. Dated, &c.

[Signature of claimant.]

Notice of time when Jury will try Title.

[Title of cause.]

Please to take notice, that the jury summoned to try the claim of the said C. D. to the property, for the recovery whereof the writ of replevin in this cause was issued, will appear at the dwelling house of O. P., innkeeper, commonly called, or known by the name of, &c., situate in, &c., [or otherwise, according to the place where the jury are to meet], on, &c. Dated, &c.

Yours, &c.

C. B., Sheriff, &c.

To C. F. Esqr., *Atty. for Plff. or Defl.*

Oath to Jury called to Try a claim of Property in Replevin.

You and each of you do swear in the presence of the ever living God, that you will well and truly try the claim of property put in by G. H., upon a writ of replevin against said G. H., in favor of L. M., and a true inquisition find according to evidence.

Oath of Witness.

You do swear in the presence of the ever living God that the evidence you shall give to the jury, touching a claim of property put in by G. H., upon a writ of replevin against said G. H., in favor of L. M., shall be the truth, the whole truth and nothing but the truth.

Oath to Sheriff's Jury on Executing a Writ of Inquiry.

You and each of you do swear in the presence of the ever living God, that you will well and truly hear and determine this matter in difference, wherein A. B. is plaintiff and C. D. defendant, and a true inquisition find according to evidence.

Return to a Ca. Sa.

"Defendant discharged by the plaintiff from this execution."

Sheriff's Return on Subpœna.

STATE OF NEW-YORK, }
 County of Albany, } ss.

I certify that on the first day of May instant, at Albany in said county, I subpœnaed the within named E. F. as I am within commanded, by showing to him the within subpœna, and at the same time and place, giving to him a copy of the said subpœna, and at the same time I paid [or tendered] to him dollars cents. Dated at Albany aforesaid, May 1st, 1845.

[Sheriff's Signature.]

Notice from the Sheriff to one of the Supervisors or Assessors in each Town or Ward in his County, (page 37.)

SIR,—A general [or special] election is to be held in the county of _____ on the _____ days of _____ at which will be chosen the officers mentioned in the notice from the secretary of state, of which a copy is annexed, and of which you will please take notice.

C. B., Sheriff of the County of _____

To _____
one of the
Inspector of Elections in the town of _____ or to any
other Inspector of such Town [or Ward].

[If it is a special election under a proclamation of the governor, or by order of the board of canvassers, a copy of proclamation or order will accompany the notice to the inspector.]

Notice for Publication, (page 38.)

A general [or special] election is to be held in the county of _____ on the _____ days of _____ at which will be chosen the officers mentioned in the notice from the secretary of state, [or in the order from the board of canvassers, or in the proclamation, as the case may be,] of which a copy is annexed.
 Dated at _____ this _____ day of _____ in the year _____

C. B., Sheriff.

[Copy of the notice from the secretary of state, or board of canvassers, or of the proclamation of the governor, as the case may be, to be subjoined.]

Certificate of Service of Comptroller's Notification to a Defaulter, (page 30.)

STATE OF NEW-YORK, {
 County of Albany, } ss.

I certify, that on the first day of May instant, at Albany, in

said county, I served the within notification, by delivering a copy thereof to the within named A. B., [or "by leaving a copy thereof at the usual place of abode of the within named A. B."]
Dated at Albany, May 1st, 1845.

[Sheriff's Signature.]

Report relative to Trespasses on Lands belonging to the People of this State, (p. 38.)

STATE OF NEW-YORK, }
County of Albany, } ss.

To the District Attorney of said county :

Having been by the commissioners of the land office, required to examine and report to them, and the district attorney of said county, any trespasses committed on lands situated in said county, and belonging to the people of said State, the undersigned sheriff of said county, having examined as aforesaid, hereby pursuant to the provisions of § 72, Article 5, Title 5, Chapter 9, Part 1, of the Revised Statutes of said State, reports, that A. B. of the town of in said county, [or some person or persons whose name or names cannot, after diligent inquiry, be by the undersigned ascertained,] hath committed trespasses on [here describe the land and the trespasses, and in the same manner all other such trespasses, on the same or other public lands in said county.] Dated at Albany aforesaid, the day of A. D. 1845.

[Sheriff's Signature.]

The report addressed "to the commissioners of the land office," may be a transcript of the above.

Appointment of a Bailiff, p. 74.

STATE OF NEW-YORK, }
County of Albany, } ss.

I do hereby depute A. B. of the town of Berne, in said county, to execute the within [or annexed, as the case may be] writ [or

other process mentioned by its name, or to do any other particular and described act,] Dated May 1, 1845.

*Signature of Sheriff, or Under
Sheriff of said county.*

*Representation for the Removal of a Sheriff in custody for the
non-payment of Moneys; (p. 370.)*

STATE OF NEW-YORK, }
County of Albany, } ss.

To the Governor of said State.

Pursuant to § 88, Article 4, Title 2, Chapter 12, Part 1, of the Revised Statutes of said State, the undersigned, one of the coroners of the said county, represents that A. B., Esquire, the sheriff of said county, has been committed to said coroner's custody by virtue of an execution [or attachment,] founded on the non-payment of moneys received by him, by virtue of his said office of sheriff, and has remained so committed for the space of thirty days successively. Dated at Albany in said county, the first day of May, A. D. 1845.

[Coroner's Signature.]

Designation of a Coroner to Execute the Office of Sheriff, (p. 370.)

STATE OF NEW-YORK, }
County of Albany, } ss.

A vacancy having occurred in the office of sheriff of the said county, and there being no under sheriff of said county in office, [or "the office of under sheriff of the said county, having become vacant," or "the under sheriff of said county having become incapable of executing the said office,"] and there being more than one coroner of said county in office, pursuant to the Revised Statutes of said state, the undersigned first judge of the said county, hereby designates A. B., Esq., one of the said coroners, to execute the office of sheriff of the same county, until a sheriff thereof shall

be elected, or appointed and qualified. Given under the hand and seal of the said first Judge, at Albany in said county, the 1st day of May, A. D. 1845.

P. GANSEVOORT, *First Judge*, [L. s.]

Notice of said Designation, (p. 370.)

STATE OF NEW-YORK, }
County of Albany, } ss.

To Levi Chapman, one of the Coroners of said county:

Notice is hereby given to you, that by the first judge of the said county, you have been in due form of law designated to execute the office of sheriff of the same county, until a sheriff thereof shall be elected, or appointed and qualified. Dated May 1, 1845.

WILLIAM MIX, *County Clerk*.

Appointment of a Person to Execute the Office of Sheriff, p. 370.

STATE OF NEW-YORK, }
County of Albany, } ss.

Vacancies in the offices, both of sheriff and under sheriff of the said county, having occurred, and A. B. the coroner of the same county, solely in office, having neglected, [or refused, or both according to the fact] to execute within the time prescribed by the Revised Statutes of said state, the bond required [or “and all the coroners of said county, in office on the happening of such vacancies, having successively neglected, or refused to execute within the time required,] the undersigned, first judge of the said county, hereby appoints C. D. a suitable person to execute the office of sheriff of the same county, until a sheriff shall be duly elected, or appointed and qualified. Given under the hand and seal of the said first judge, at Albany in said county, the first day of May, A. D. 1845.

P. GANSEVOORT, *First Judge*, [L. s.]

Sheriff's Return of County Treasurer's Warrant against Collector, (p. 33.)

STATE OF NEW-YORK, }
 County of Albany, } ss.

I certify and return that I have executed the within attachment, by collecting the whole sum therein directed to be levied, [or "that I have in part executed the within attachment, by collecting exclusive of my fees \$ part of the sum of \$ which I was therein directed to levy,—and I also certify, that the collector therein named, has no goods or chattels, lands or tenements, in my said county, from which the residue of the said sum of \$, or any part thereof, could be levied" or "that the collector in the within warrant named, has no goods or chattels, lands or tenements in my said county, from which the monies in said warrant directed to be levied, or any part thereof could be levied"]. Dated &c.

[Sheriff's Signature.]

Sheriff's Proclamation for Oyer and Terminer, &c., (p. 33.)

STATE OF NEW-YORK, }
 County of Albany, } ss.

The undersigned sheriff of the said county, in conformity to a precept to him in this behalf directed and delivered, by this, his proclamation, requires all persons bound to appear at a court of oyer and terminer, and jail delivery to be holden at the court house in in and for said county, on the day of next [or instant] at ten o'clock in the forenoon, by recognizance or otherwise, to appear thereat, and the undersigned hereby requires all justices of the peace, coroners, and other officers who have taken any recognizance for the appearance of any person at the said court, or who have taken any inquisition, or the examination of any prisoner, or witness to return such recognizances, inquisitions and examinations to the said court at the opening thereof, on the first day of its sitting. Signed at the

sheriff's office in said county, on the day of A. D. 1845.
[Sheriff's Signature.]

Sheriff's Notice of the Place of keeping his Office, (p. 327.)

STATE OF NEW-YORK, }
County of Albany, } ss.

The undersigned sheriff of the said county, hereby gives notice, that he keeps an office in [here describe some proper place] in the city of Albany in said county. Dated at, &c., on, &c.

[Sheriff's Signature.]

Affidavit to Prevent a Subpœnaed Witness's Arrest in a Civil Suit,
(2 R. S. 323 § 67.)

STATE OF NEW-YORK, }
County of Albany, } ss.

C. D. of, &c., being required by the sheriff of said county [or other officer, as the case may be] to make this affidavit, and duly sworn, says, that he, the said C. D. has (according to the best of his knowledge and belief) been legally subpœnaed as a witness to attend before [here mention the court or officer] at on in [describe the cause or matter in which the witness has been subpœnaed, according to the fact] and the said deponent further saith, that he has not been so subpœnaed by his own procurement, with the intent of avoiding the service of any process [and here it would seem necessary (although like the time above mentioned, not required by the statute) to state that the deponent is either going to the place where he is required by the subpœna, to attend, or remaining thereat, or returning therefrom.] Wherefore the said C. D. claims an exemption from arrest, &c.

[Deponent's Signature.]

Sworn, &c. [before the sheriff or
other officer authorised to arrest.]

Sheriff's written Summons left, &c. for a Juror, (p. 41.)

STATE OF NEW-YORK, {
 County of Albany, } ss.

To A. B. of the town of Berne in said county, farmer :

You are hereby notified and summoned, to attend as a juror at [here state the title of the court, and the place where, and day and time of day, when, &c.] for which purpose you have been in due form of law drawn. Dated at, &c., on, &c.

[Sheriff's Signature.]

Return of Jurors' List.

The sheriff's return of the list to him delivered may be, as follows :

STATE OF NEW-YORK, {
 County of Albany, } ss.

To the Court of, &c. now here :

The undersigned sheriff of the said county, to whom was delivered the annexed [or within] certified list, hereby returns the same, and specifies that six days previous to the sitting of the said court, he summoned by giving personal notice to each of them in due form of law, the next hereinafter named persons, whose names, additions, and places of residence, are in said list contained, to wit: A. B., G. H., &c., and the undersigned further returns and specifies, that six days previous to the sitting of the said court, he summoned by leaving written notices in due form of law at their respective places of residence, with persons of proper age, the hereinafter named persons whose names, additions, and places of residence, are in said list contained, to wit: I. K., L. O., &c., all which is respectfully returned pursuant to the provisions of the Revised Statutes of the said State.

[Sheriff's Signature.]

*Endorsement on a Duplicate of the Instrument Assigning the
Prisoners, &c., to the new Sheriff.*

STATE OF NEW YORK, {
County of Albany, } ss.

I sheriff of the said county, hereby acknowledge the receipt of the property, process, documents and prisoners specified in an instrument to me delivered, and of which the within is a duplicate. Dated at &c., on &c.

[Sheriff's Signature.]

Coroner's Inquest.

STATE OF NEW YORK, {
Albany County, } ss.

An inquisition, indented and taken at the house of in the of in the county of Albany, this day of in the year of our Lord one thousand eight hundred and forty before me, one of the coroners for the county aforesaid, on the view of the body of then and there lying dead, upon the oaths and affirmations of good and lawful men of the state of New York, duly chosen, and who being then and there duly sworn, and charged to inquire on the behalf of the people of said state, when, where, how, and after what manner the said came to death, do upon their oaths and affirmations, say, that the said

In witness whereof, we, the said jurors, as well as the coroner aforesaid, have to this inquisition set our hands and seals, on the day and year and the place aforesaid.

[Signatures and seals.]

*Subpœna issued by the Coroner.**The People of the State of New York to N. S., Greeting:*

You are hereby required forthwith to appear before the undersigned one of the coroners of the said county, at [here state the place] forthwith [or "on] to testify on an inquest, then and there to be taken, concerning the sudden death [or "slaying," or "dangerously wounding"] of A. B. [or, "a person unknown"]. Issued at on

[Coroner's signature.]

Recognizance of a Material Witness against the Prisoner.

STATE OF NEW YORK, }
 County of Albany, } ss.

The undersigned N. S. of and G. H. of respectively acknowledge themselves to be severally indebted to the people of the said state in the sums following, to wit: the said N. S. in the sum of \$ and the said G. H. in the sum of \$ to be levied of the respective goods and chattels, lands and tenements of the undersigned, to the use of the said people, if default is made in the following condition of this recognizance, to wit: It appearing in due form of law, that the offence hereinafter mentioned has been committed, and that there is probable cause to believe that C. D., who was, in due form of law, arrested and brought before E. F., Esq. [here state the official title], and charged with having committed the said offence to be guilty thereof, to wit: slaying [or "dangerously wounding"] of A. B. [or, "of a person whose name is to them unknown"], and the jury of inquest concerning the sudden death [or slaying or dangerously wounding] of A. B. [or, of a person whose name is unknown to them], having before Esq., one of the coroners of the said county of Albany, at on in due form of law, found that murder [or "manslaughter," or "assault"] has been committed. Therefore if the above bounden N. S., a material witness against the said prisoner

C. D., shall appear and testify at [here insert the title of the next court] having cognizance of the said offence, and in which the said prisoner C. D. may be indicted, or if having so appeared, the said shall not be required so to testify, then this recognizance to be void, otherwise to remain in full force.

N. S. [L. s.]

G. H. [L. s.]

*Process issued by a Coroner for the Apprehension of the Person,
by an Inquest, accused, &c.*

STATE OF NEW YORK, }
County of Albany, } ss.

*The People of the said State: To any Constable of any town in
said county :*

The jury of inquest [proceed as in the last precedent, substituting "undersigned" for " Esq." to the word *committed* inclusive, and thence as follows]: and C. D. the party charged with the said offence, not being in custody. You are therefore hereby commanded forthwith, to [apprehend and] take the above named C. D., [the said party so charged] and to bring him before the undersigned at [here state the place] to be dealt with according to law. Issued under the hand and seal of the undersigned,
at on

[Coroner's Signature.] [L. s.]

Certificate of Testimony.

STATE OF NEW YORK, }
County of Albany, } ss.

I the coroner (by whom the above mentioned jury was summoned and sworn, and to whom they delivered their

inquisition in writing, which is herewith returned) hereby certify, that the above [or "annexed"] is the testimony of all the witnesses examined before the said jury, and that the said testimony was at the time and place first above mentioned, reduced to writing by me.

[Coroner's Signature.]

APPENDIX.

Ante page 29. Though a public officer against whom a judgment has been obtained for an act done by virtue of his office brings error and reverses the judgment, he is not entitled to double costs upon the writ of error. *Dockstader v. Sammons*, 4 Hill 546.

Ante p. 50. The military ordered by the Governor from other counties are under the direction of the sheriff, unless the resistance amounts to an insurrection or such an outbreak as calls for the interposition of the authority of the Commander-in-Chief.

In ordinary cases the object is to increase the sheriff's *posse*. Companies, or individual citizens, from beyond the sheriff's bailiwick, may also tender themselves to aid the sheriff.

The military ordered by the Governor will be supplied from the public stores with arms and rations.

Ante p. 110. When there are two families in one house, occupying different parts of it, and a common hall, the officer having lawfully gained admittance to the hall, may break inner doors.

Ante p. 78. Office of deputy sheriff is vacated by resignation of the sheriff, and he must have a new appointment from the undersheriff, which must be recorded in the clerk's office, and he must be resworn; there cannot be an officer *de jure* and another *de facto*—so that when an under sheriff is rightfully in possession of the office of sheriff, a *de facto* deputy of a former sheriff cannot legally levy an execution. *Boardman v. Halliday*, before the Chancellor, April 3, 1843.

Ante p. 176. The sheriff is liable for money collected on erroneous process. *The People v. Dunming*, 1 Wend 160.

Ante p. 179—Sec. 31 and 32, limiting the lien of judgments, &c., to five years repealed. Laws of 1844, p. 466, § 3.

Ante p. 179. An unregistered mortgage is not postponed by a subsequent judgment. A purchaser after judgment and before transcript filed, with notice, is not affected by the judgment any more than by purchasing personal property under the same circumstances. There is no lien created till transcript is filed.

Real, like personal property, may be held from the time of levy. See note at page 179.

Ante p. 183. If transcript of judgment is not filed, then it would seem that the sheriff ought to go to the premises to make his levy, as is the practice in some New England States, in serving an attachment; because the judgment does not bind the land nor is it a lien upon it. Nor is the land in the custody of the law before the execution issues. See *Green v. Burke*, 23 Wend, 498. *Wood v. Colvin*, 5 Hill 230.

Ante p. 183. The statute requires the notice of sale of real estate to be "advertised, previously, for *six weeks successively*," as follows:

1. A notice shall be fastened up in three public places.
2. A copy of such notice shall be printed once in each week in a newspaper.

These six insertions are usually made in five weeks and one day's time, which is sufficient; but it would seem that the notices are to be *posted* during six full weeks; and if so, the sale ought not be made till the expiration of six weeks from the first insertion in the papers. This question is now pending and will soon be determined by the Supreme Court. The sale, we have seen, might be valid, though the sheriff should subject himself to penalties by omitting to give notice.

Ante p. 192. A person, under whose execution lands have been sold, is not authorized to redeem in virtue of the judgment on which the execution issued, either from a purchaser or a cred-

itor ; and this though no part of the proceeds of the sale were realized upon his execution, but were wholly exhausted by other and prior executions under which the property was sold at the same time. *Exparte Paddock*, 4 Hill 544.

Where, after one creditor had redeemed lands sold under a *fi. fa.* a second creditor with a view of redeeming from the first paid unconditionally to the sheriff the amount, but immediately thereafter served an injunction in his own favor restraining the sheriff from paying it over ; *held* nevertheless that he was entitled to the sheriff's deed. *Exparte Newell, Receiver, &c.*, 4 Hill 589.

Ante p. 194. Creditors wishing to redeem from purchaser at sheriff sale must comply strictly with the statute. *Russell v. Allen*, 10 Paige Rep.

Ante p. 233. In an action against a sheriff's sureties to recover the amount of a writ of *fi. fa.* which came to the hands of the sheriff's deputy for execution—the deputy is a competent witness for the debt. unless it be proved by the plaintiff that he, in consequence of negligence or misfeasance, had made himself liable to the principal for the amount of the writ, 1 Watts and Searg, R. vol. 1, 227, *Junietta Bank v. Beale*.

Ante p. 251. The power of the court of chancery to give possession to the purchaser at the master's sale by summary proceedings extends only to those persons who are parties to the foreclosure suit or who have come into possession under or with the assent of those who are parties subsequent to the commencement of the suit. In chancery Aug., 1843, *Boynton v. Jackway*.

Ante p. 282, 382. If sheriff replevies part of the property, defendant cannot be arrested—plaintiff's remedy being only by a pluries for the residue. *Snow, et al. v. Roy, et al.* 22, Wend 602.

Ante p. 332. Where the plaintiff on the return of cepi corpus brought an action against the sheriff for an escape and recovered,

the court held that he could not after this rule the sheriff to bring in the body. *Bortwink v. Walton*, 2 Barn. and Ald. 623.

Ante p. 334. Where a party is committed for the nonpayment of a fine imposed upon him by the court for the breach of an injunction, or other contempt, he must be confined within the walls of the prison. *The People v. Bennett*, 4 Paige 282.

Sheriff was attached and fined for not returning execution, and fined equal to the amount of the debt. Subsequent execution issued by same plaintiff to another county upon the judgment. Defendant moved to set aside this execution on the ground that the fine paid by the sheriff ought to be taken as a satisfaction of the judgment. The motion went off on some technical objection, still it is quite clear that the court would not have granted the motion.

When an order is made setting aside a judgment and execution upon which sheriff has sold property, no action can be maintained by the defendant against the sheriff for a trespass till a further order cancelling the docket; unless perhaps, when the order is entered by the clerk where the record is filed.

A prisoner arrested by virtue of a warrant endorsed pursuant to 2 R. S. 707 § 5, for an offence punishable by imprisonment in state prison cannot be let to bail in the county where the arrest is made, but must be taken back to the county in which the warrant issued. *Clark v. Cleveland*, 6 Hill 344.

Though in such case the prisoner be let to bail in the county where the arrest was made and released from custody, he may nevertheless be retaken under the warrant; the act of releasing him being equivalent to suffering a voluntary escape. *Id.*

After an escape from an arrest under criminal process, the officer is bound to retake the prisoner, whether the escape be voluntary or otherwise. *Id.*

In civil cases if the officer suffer a voluntary escape after an

arrest on *final* process, he cannot retake the defendant; though otherwise as to *mesne* process. *Id.*

An action will not lie for maliciously causing the plaintiff to be arrested on a criminal charge before a magistrate, unless the proceeding complained of be so far ended that nothing more can be done by the prosecutor without commencing anew. *Id.*

This distinction between *mesne* and *final* process does not apply to criminal cases.

Under the act of 1820, relating to the redemption of lands sold on execution, a creditor whose judgment was a lien on only a part of the premises sold, acquired no right to redeem the whole. *Huntington and another, v. Forkson*, 6 Hill, 149.

The provision in the revised statutes, giving this right applies only to sales made after the 1st of January, 1830, and was not intended to operate *retrospectively* so as to interfere with purchases previously made. *Id.*

Accordingly, where real estate was sold on execution in October, 1829, and a judgment creditor, whose lien extended only to a *portion* of the property sold, sought to redeem the *whole* under the revised statutes, *held*, that he had no such right. *Id.*

A creditor can in no case redeem by virtue of a lien upon a portion of the debtor's property not sufficiently described in the sheriff's advertisement, &c. *Id.*

Whether a *rent charge* reserved upon a lease in fee can be sold on execution as real estate and redeemed by a creditor, *quere. Id.*

It is error to issue an attachment for not returning a fi. fa., before an affidavit of the delivery of the writ is filed. *People v. Adams, sheriff, &c.*, 6 Hill, 236; *People v. Brown*, Special Term Rep. 67, Dec., 1844.

Where a sheriff elected by the people is removed and a person appointed to discharge the duties of the office pursuant to 1 R. S. 124 § 19, the Governor may at any time before a new sheriff is elected, remove the person so appointed though no charges are

preferred against him, and appoint another in his place. *People v. Parker*, 6 Hill, 49.

Where a sheriff having seized goods under a *fi. fa.* sufficient to satisfy it, left them with the debtor, taking a receipt from a third person, in which the latter promised to deliver the goods, &c., or pay the debt, and afterwards they were casually destroyed by fire; *held*, in an action by the creditor that the sheriff was not liable.

If, in a suit against the receiptor, it turn out that the officer is not liable to the creditor, the action can not be maintained. *Browning et al. v. Hanford, sheriff, &c.*, 5 Hill, 588.

Though a sheriff, after levying upon goods in virtue of a *fi. fa.* suffer them to remain for a year without selling, yet if the plaintiff be chargeable with nothing beyond mere *acquiescence* in the delay, and has neither said or done any thing to sanction or encourage it, the court will not declare the *fi. fa.* dormant in respect to subsequent executions. *The Herkimer County Bank v. Brown*, 6 Hill, 232.

A mere levy upon *real estate* in virtue of a *fi. fa.*, never amounts to a satisfaction. *Taylor v. Ranney*, 4 Hill, 619.

Where in *scire facias* to revive a judgment, the tere-tenant pleaded that the plaintiff issued a *fi. fa.* upon the judgment, and that in virtue thereof the sheriff caused to be levied "The damages, &c. on the goods and chattels, *lands and tenements*" of the defendant: *held*, not sufficient to show the judgment satisfied, and that the plea was therefore bad. *Id.*

Otherwise, had the allegation in the plea been that the damages, &c., were levied of the goods and chattels, lands and tenements, &c. *Id.*

A *fi. fa.* having been returned satisfied, an entry was made in the entry of the docket of the judgment pursuant to 2 R. S. 362 § 25, and the return was afterwards vacated by order of the court: *held*, that lands sold by the execution debtor to a *bona fide* purchaser, after the entry in the docket and before the *vacatur* could not be effected by the judgment. *Id.*

As against the judgment debtor, however, his heirs, &c., such order will operate retrospectively, and carry back the lien of the judgment to the date of the original docket. *Id.*

Goods of a mere *under-tenant* which have been removed from the demised premises before any rent became due, are not liable to be distrained for subsequently accruing rent. *Acker v. Witherevell*, 4 Hill, 112.

Otherwise, if the goods belong to one who occupied as *assignee* of the original tenant. *Id.*

Ante p. 167. *Of Distress for Rent.* (2 R. S., 2d ed., 411.)—

§ 3. Every distress for rent shall be made by the sheriff of the county, or one of his deputies, or by a constable or marshal of the city or town where the goods are, who shall conduct the proceedings throughout.

§ 5. No distress shall be driven out of the town where it shall be taken, except to a pound within the same county, not above three miles distant from the place where such distress shall have been taken.

§ 6. All beasts or goods or chattels taken as a distress at one time, shall be kept, as near as may be, in the same place.

§ 7. Whoever shall violate either of the provisions contained in the two last sections, shall, for every offence, forfeit to the party aggrieved, fifty dollars, besides being answerable to such party for all damages sustained thereby; which damages may be recovered in the same action, or in another suit, at the election of such party.

§ 8. No officer shall proceed to make distress for rent, unless there be annexed to, or delivered with, the warrant of distress, an affidavit made by the landlord for whose benefit the distress is to be made, or by his agent or receiver, before some officer authorized to administer oaths, specifying the amount of rent due, and the time for which it accrued.

§ 9. Within ten days after any goods that shall have been dis-

trained for rent, by any officer, shall be sold, or after such goods shall have been replevied, such officer shall file in the office of the town clerk, the original warrant of distress, with the original affidavit of the landlord, his agent or receiver, delivered with such warrant. In the city and county of New York, in the city and county of Albany, in the cities of Troy, Hudson and Schenectady, such warrant and affidavit shall be filed in the office of the clerk of the county. Any officer violating this provision, shall forfeit fifty dollars to the person whose property shall have been distrained.

§ 10. The following articles shall be liable to be distrained for rent:

1. Goods, wares, merchandise, utensils, furniture, cattle, provisions, and all other personal chattels, except such as are by law exempt from sale under executions in civil cases, and such as are by law exempt from distress:

2. Things annexed, for the purpose of trade or manufacture, to the freehold, or to any building, and not fixed unto the wall of such building, so as to be essential for its support:

3. Wheat, corn, or any kind of grain, grass, hops, roots or other produce, whether growing upon the demised premises, or whether the same be in cocks, or sheaves, or loose, or in the straw, in any barn or grainery, or elsewhere upon the land charged with the rent.

§ 11. All goods or chattels that may be lawfully distrained, may be cut, gathered, secured, locked up and detained, in such place on the premises, as may be most convenient, or in such other place as may be provided by the landlord, and approved by the officer making the distress; but the articles enumerated in the second subdivision of the last section, and the produce of the soil in the ground, shall not be removed, until after a sale thereof as herein provided.

§ 12. It shall be lawful for the landlord to distrain any cattle or stock of the tenant, feeding or pasturing upon any common, in any way belonging or appurtenant to the premises charged with rent.

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§ 13. Beasts of the plough, sheep, and the implements of the mechanic's trade, shall not be distrained for rent, until other chattels sufficient for the demand cannot be found.

§ 14. Personal property deposited with a tenant, with the consent of the landlord, or hired by such tenant, or lent to him, with the like consent, shall not be distrained for any rent due to such landlord: nor shall any property belonging to any other person than the tenant, which shall have accidentally strayed on the demised premises, or which shall be deposited with a tavern-keeper, or with the keeper of any ware-house, in the usual course of their business, or deposited with a mechanic or other person, for the purpose of being repaired or being manufactured, be subject to distress or sale for rent: but the officer making the distress, shall not be liable for seizing or selling property not belonging to the tenant, unless before such taking or sale, notice of the claim of a third person, be given to such officer.

§ 15. The property of boarders at taverns and boarding-houses, shall not be liable to distress for rent; but no officer making a distress shall be liable for seizing or selling property belonging to any such boarder, unless, upon such taking or sale, notice of the claim of such boarder be given to such officer.

§ 16. [Sec. 15.] Any goods or chattels of the tenant, which shall be carried off from any demised premises, either before or after any rent shall become due, such rent being left unpaid, may be seized as a distress for any rent due at the time of such seizure, wheresoever they shall be found, within thirty days after their removal, if any rent be due at the time of such removal, or shall become due within the said thirty days: and if no rent be due or become due, within that time, then such seizure may be made at any time within thirty days after the rent shall become due: and the goods so seized, shall be sold, as if they had been distrained upon the demised premises.

§ 17. [Sec. 16.] Such seizure shall not be valid in any case, unless made within six months after the removal of such goods; and no such goods shall be liable to be seized, which shall have

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been sold before such seizure made, in good faith and for valuable consideration, to a person not privy to such fraudulent removal.

§ 18. [Sec. 17.] Any tenant or lessee, who shall remove his goods from any demised premises, either before or after any rent shall become due, for the purpose of avoiding the payment of such rent; and every person who shall knowingly assist such tenant or lessee in such removal, or in concealing any goods so removed; shall forfeit to the landlord of the demised premises, his heirs or assigns, double the value of the goods so removed or concealed.

§ 19. [Sec. 18.] Whenever it shall satisfactorily appear to any justice of the peace, by the affidavit of any landlord, or of any other competent witness, that any goods so removed from any demised premises, have been put or are kept in any house, out-house, or other place, for the purpose of preventing their being seized as a distress for rent, such justice may issue his warrant to the officer authorized to make such distress, commanding him to go with the landlord or his agent, in the day time, to the house or place named in such warrant as that where the said goods are kept, to search for the same, and if need be to break open such house, or any enclosed place, and to seize such goods as a distress.

§ 20. [Sec. 19.] All distresses for any rent, shall be reasonable; and whoever shall take an unreasonable distress, shall be liable to an action on the case, at the suit of the party aggrieved, for the damages sustained thereby.

§ 21. [Sec. 20.] Whenever any beasts are distrained for any cause, they shall be put in open pound, in the same county where they shall be taken, or in some convenient place on the premises, or in such other place as the officer distraining shall approve, and the owner of them may give them their feed without disturbance, so long as they shall be impounded. .

§ 22. [Sec. 21.] Whenever beasts are impounded, or any goods that have been distrained, are secured and kept on the premises charged with rent, they may be kept on the premises

until sold ; and it shall be lawful for any person to come and to go, to and from, such place or part of the premises, in order to view, appraise, buy or to remove the same when purchased.

§ 23. [Sec. 22.] Whenever any cattle that have been distrained, shall be impounded, or any goods distrained, shall be secured in any other place than on the demised premises, due notice in writing, of such place, shall be immediately given by the person making such distress, to the tenant, by personally serving the same, or in case of his absence, by leaving the same at his place of abode, with some person of mature age.

§ 24. [Sec. 23.] Upon any pound breach, or rescue of any cattle, goods or chattels, distrained for rent, the person aggrieved thereby, shall, in an action of trespass, or in a special action on the case, for the wrong thereby sustained, recover treble the damages that shall be assessed by the jury, against the offender in any such rescue or pound breach, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession.

§ 25. [Sec. 24.] Whenever any goods or chattels shall be distrained for rent, the officer making the distress, shall immediately give notice thereof, with the cause of such distress, the amount of rent due, and an inventory of the articles taken, by leaving the same with the tenant, or in case of his absence, at the chief mansion-house, or at some other notorious place on the demised premises.

§ 26. [Sec. 27.] If at the expiration of five days from the day of the service of such notice, the amount of rent due, together with the costs of the distress, shall not be paid, and the goods distrained shall not be replevied according to law, the officer making such distress, shall summon two disinterested householders, who shall be sworn by such officer, well, truly and impartially to appraise the goods and chattels so distrained, according to the best of their understanding ; and the said appraisers shall thereupon appraise the goods and chattels so distrained, and shall state the same in writing under their hands.

§ 27. [Sec. 26.] Upon such appraisement being made, the officer conducting the proceedings, or any constable of the county, shall give five days' public notice of the sale of the goods and chattels so distrained, by affixing such notice on a conspicuous part of the demised premises, and also in two public places in the town; and on the day, and at the place appointed, shall proceed to sell the said goods at public auction, at the best price that can be obtained for the same, and shall apply the proceeds of such sale to the satisfaction of the costs and charges of the said proceedings, and of the rent for which the said goods were distrained; and shall pay over the surplus, if any, to the owner of the goods.

§ 28. [Sec. 27.] The owner, and his personal representatives, of any goods that shall be distrained for rent, pretended to be due, when in truth no rent is due, may, by an action of trespass, or trespass on the case, recover against the person so distraining, or his personal representatives, double the value of the goods so distrained.

§ 29. [Sec. 28.] When any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not therefore be deemed unlawful, nor the party making it a trespasser from the beginning; but the party aggrieved may maintain an action of trespass, or of trespass on the case, and may recover full satisfaction for the special damages he may have sustained by such irregularity or such unlawful act, with full costs of suit, and no more, unless tender of amends hath been made by the party distraining, or his agent, before such action brought; which tender shall prevent the recovery of any costs in such action.

§ 30. [Sec. 29.] In any action of trespass, or trespass on the case, brought in relation to any entry upon premises charged with rent or service, for the purpose of collecting or demanding such rent or service, or in relation to any distress, seizure or sale of any goods thereupon, the defendant may plead the general issue, and give the special matter in evidence.

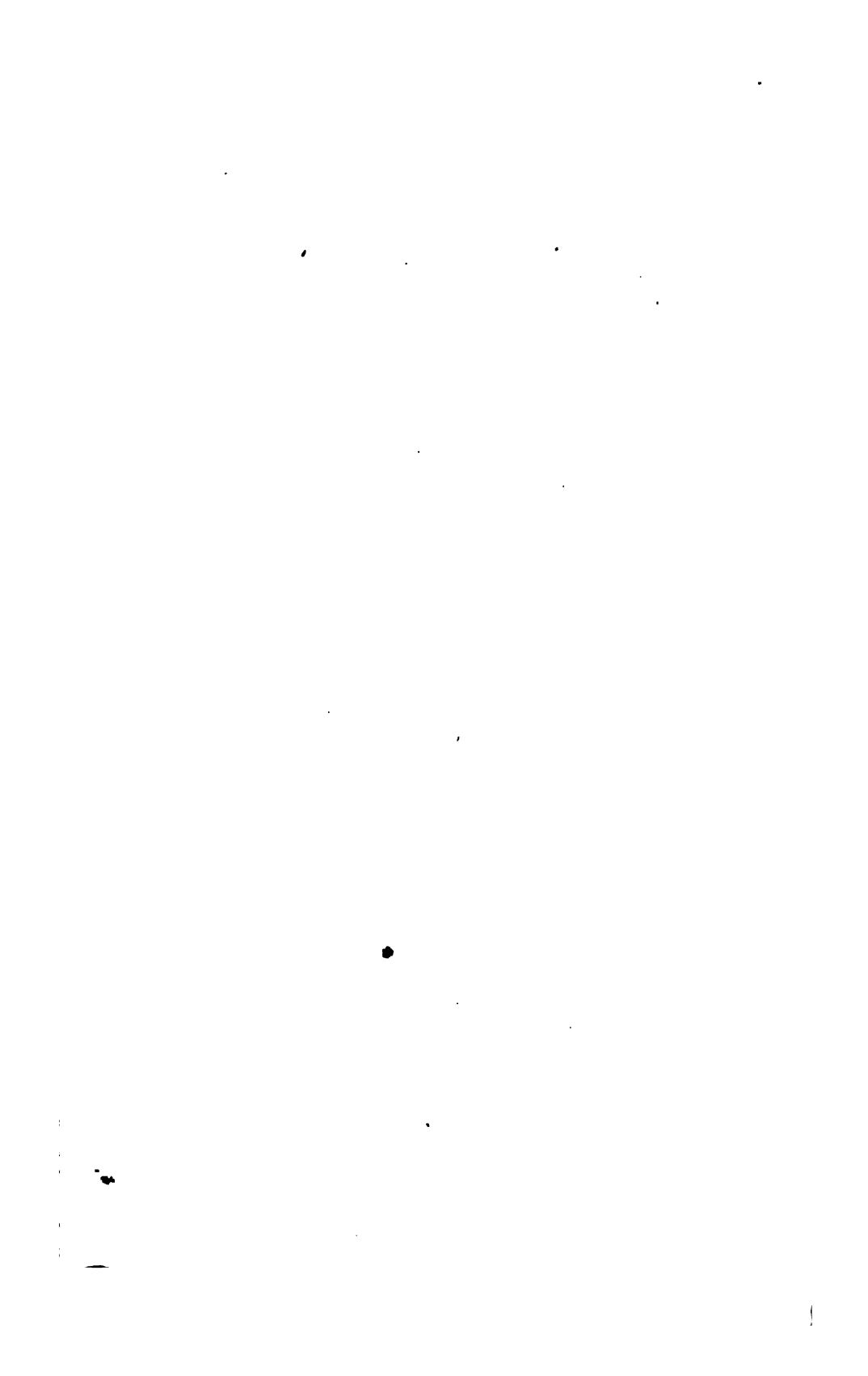
Ante p. 209. Although it was not the intention of the plaintiff to discharge the debt, a voluntary discharge by a creditor of his debtor from the limits discharges the judgment and debt. *Poucher v. Holley*, 3 Wend., 184.

Ante p. 158. The late Judge COWEN in his treatise, page 1048, says, "in *Hardistey & Barney*, Comb. 356, Holt said, 'upon a *fi. fa.* the sheriff may take any thing but wearing apparel; nay, if the party hath two gowns he may take one of them.' This exception in favor of *necessary wearing* apparel existed at common law, and still exists, for aught that I have seen to the contrary. It is entirely independent of the statutory provision on the same subject which applies only to *householders*, and the case in 19 Wend., 475, does not at all affect the common law rule."

The Law relating to sheriff duty in notifying elections has been modified, as follows:

The sheriff, clerk, or first judge of each county, who shall receive a notice of an election, shall, without delay, deliver a copy of such notice to the supervisor or one of the assessors of each town or ward in his county. He shall also cause a copy of such notice to be published in all the public newspapers in his county, once in each week until the election therein specified; if there be none printed in his county, then in some newspaper of an adjoining county. *Laws 1842, p. 114, § 14.*

As to the removal of sheriff. Whenever the sheriff of any county shall be committed to the custody of any other sheriff, or to the custody of any coroner or coroners, by virtue of any execution or attachment founded on the non-payment of moneys received by him by virtue of his office, and shall remain so committed for the space of thirty days successively, such fact shall be represented to the governor by the officer in whose custody such sheriff may be, to the end that such sheriff may be removed from office. 1 R. S., 373, § 88.



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