11. *Will a bare trespass upon the lands and goods of another, which is a ground for a civil action, forfeit a recognizance?*—256.

It will not, unless accompanied with a wilful breach of the peace.

12. *Will mere reproachful words forfeit a recognizance?*—256.

They will not, unless they amount to a challenge to fight; merely reproachful words, as calling a man knave or liar, being looked upon to be merely the effect of unmeaning heat and passion.

CHAPTER XIX.

OF COURTS OF A CRIMINAL JURISDICTION.

1. *What distinction obtains among the several courts of criminal jurisdiction?*—258.

They are either such as are of a public and general jurisdiction, or such as are of a private and special jurisdiction.

2. *Can a man be tried twice, in a criminal way, for the same offense?*—259.

No; especially if acquitted upon the first trial.

3. *What is the high court of parliament?*—259.

The supreme court in the kingdom, not only for the making, but also for the execution of the laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment.

4. *What are the courts of criminal jurisdiction, as designated according to their dignity, beginning with the highest?*—258–275.

They are: 1. The high court of parliament.

2. The court of the lord high steward of Great Britain, for the trial of peers, indicted for treason or felony, or for misprision of either.

3. The court of king's bench.

4. The court of chivalry.

5. The high court of admiralty.

6, 7. The courts of oyer and terminer, and general jail delivery.

8. The court of general quarter sessions.

9. The sheriff's tourn.

10. The court leet.

11. The court of the coroner.

12. The court of the clerk of the market.

Of the preceding courts, the five first named are of public and general jurisdiction; the others of local jurisdiction and confined to particular districts.

5. *In what degree are the criminal courts independent of each other?*—259.

At least, so far as that the sentence of the lowest of them can never be controlled, or reversed, by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial.

6. *What offenders are tried by the high court of parliament?*—259.

Great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment.

7. *What criminal cognizance has the court of admiralty?*—268.

It has cognizance of all crimes and offenses committed either upon the sea or on the coasts, out of the body or extent of any English county.

8. *Before whom are the courts of oyer and terminer and general jail delivery held?*—269.

Before the king's commissioners, among whom are usually two judges of the courts at Westminster.

CHAPTER XX.

OF SUMMARY CONVICTIONS.

1. *Into what kinds are proceedings in the courts of criminal jurisdiction divisible?*—280.

Two kinds: summary and regular.

2. *What is meant by a summary proceeding?*—280.

Such as is directed by several acts of parliament for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament.

3. *By whom are all trials of offenses and frauds contrary to the laws of the excise, and other branches of the revenue, inquired into and determined?*—281.

By the commissioners of the respective departments, or by justices of the peace in the country.

4. *Of what sorts are the contempts immemorially punished in the summary way of attachment, by the superior courts of justice?*—283.

They are either direct, or consequential.

5. *What contempts are direct, and what consequential?*—283, 284.

Those are direct which openly insult or resist the powers of the courts, or the persons of the judges who preside there; and those consequential which, without gross insolence or direct opposition, plainly tend to create a universal disregard of their authority.

6. *What are the principal instances, of either sort, that have been usually punishable by attachment?*—284, 285.

They are chiefly of the following kinds: 1. Those committed by inferior judges and magistrates; by acting unjustly, oppressively, or irregularly. 2. Those committed by sheriffs, bailiffs,

jailors, and other officers of the court; by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty. 3. Those committed by attorneys and solicitors; by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. 4. Those committed by jurymen in collateral matters relating to the discharge of their office; such as making a default when summoned, refusing to be sworn or to give any verdict, &c. 5. Those committed by witnesses; by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit or proceeding before the court; as by disobedience to any rule or order, made in the progress of a cause, by non-payment of costs awarded by the court upon a motion, &c. 7. Those committed by any other persons under the degree of a peer, and even by peers themselves, when enormous and accompanied with violence; such as forcible *rescous* and the like; or when they import a disobedience to the king's great prerogative writs of prohibition, *habeas corpus*, and the rest.

7. *How is the attachment for contempts, by parties to suits and proceedings, to be regarded?*—285.

The attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And, therefore, it has been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon.

8. *What if the contempt be committed in the face of the court?*—286.

The offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.

9. *From what results this power, in the supreme courts of justice, to suppress contempts by an immediate attachment of the offender?*—286.

From the first principles of judicial establishments; and it must be an inseparable attendant upon every superior tribunal.

10. *How ancient is the exercise of this power of attachment?*—286.

We find it actually exercised as early as the annals of our law extend.

11. *What is the course of proceeding, as to matters of contempt that arise at a distance?*—286, 287.

The judges either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances, the attachment issues in the first instance.

12. *For what is the process of attachment intended?*—287.

Merely to bring the party into court.

13. *When there, what follows?*—287.

He must either stand committed, or put in bail, in order to answer on oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt.

14. *What is the nature of these interrogatories?*—287.

They are in the nature of a charge or accusation.

15. *What if any of the interrogatories is improper?*—287.

The defendant may refuse to answer it, and move the court to have it struck out.

16. *What if the party can clear himself of the contempt upon oath?*—287.

He is discharged, but, if perjured, may be prosecuted for the perjury.

17. *What if he confesses the contempt?*—287.

The court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporeal or infamous punishment.

18. *What if the party wilfully and obstinately refuses to answer the interrogatories of the court, or answers in an evasive manner?*—287.

He is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

19. *What if he clears himself by his answers?*—288.

The complaint is totally dismissed.

CHAPTER XXI.

OF ARRESTS.

1. *Under what general heads may the regular and orderly method of proceedings, in the courts of criminal jurisdiction, be distributed?*—289.

They may be distributed under these twelve general heads, (following each other progressively): 1. Arrest.

2. Commitment and bail.
3. Prosecution.
4. Process.
5. Arraignment, and its incidents.
6. Plea and issue.
7. Trial and conviction.
8. Clergy.
9. Judgment, and its consequences.
10. Reversal of judgment.
11. Reprieve or pardon.
12. Execution.

2. *What is an arrest?*—289.

It is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime.

3. *What charge only will justify an arrest?*—289.

Such as will, at least, justify holding the party to bail when taken.

4. *How may an arrest be made?*—289.

In four ways: 1. By warrant. 2. By an officer without warrant. 3. By a private person, also, without warrant. 4. By a hue and cry.

5. *By whom may a warrant be granted?*—289.

In extraordinary cases by the privy council, or secretaries of state; but, ordinarily, by justices of the peace.

6. *In what cases may justices of the peace issue warrants?*—290.

In any cases where they have a jurisdiction over the offense, in order to compel the person accused to appear before them. And this extends to all treasons, felonies, and breaches of the peace; and also to all such offenses as they have power to punish by statute.

7. *How has Sir Edward Coke stated the power of a justice of the peace, in issuing warrants to apprehend for felony?*—290.

That a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found.

8. *What has Sir Matthew Hale maintained upon the same point?*—290.

As the doctrine of Sir Edward Coke would in most cases give a loose to felons to escape without punishment, Sir Matthew Hale has combated it with invincible authority and strength of reason, maintaining, 1. That a justice of the peace has power to issue a warrant to apprehend a person accused of felony, though not yet indicted; and, 2. That he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion.

9. *How is the justice to proceed before issuing a warrant for felony?*—290.

In both cases, as last stated, it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there

is a felony or other crime actually committed, without which no warrant should be granted; as, also, to prove the cause and probability of suspecting the party against whom the warrant is prayed.

10. *What is the proper form of a warrant by a justice of the peace?*—290, 291.

It ought to be under the hand and seal of the justice; should set forth the time and place of making, and the cause for which it is made; and should be directed to the constable, or other peace officer (or, it may be, to any private person by name), requiring him to bring the party either generally before any justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a special warrant.

11. *Is a general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, illegal and void; and why?*—291.

It is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion.

12. *Is a warrant to apprehend all persons guilty of a crime therein specified, a legal warrant?*—291.

It is not; for the point upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is, therefore, in fact, no warrant at all, for it will not justify an officer who acts under it; whereas a warrant, properly penned (even though the magistrate who issues it should exceed his jurisdiction), will, by statute, at all events, indemnify the officer who executes the same ministerially.

13. *Where may warrants be executed?*—291, 292.

A warrant from the chief, or other justice of the court of king's bench, extends all over the kingdom, and is teste'd, or dated, England; not of any particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there.

14. *By what officers may arrests without warrant be executed?*—292.

By, 1. A justice of the peace; 2. The sheriff; 3. The coroner; 4. The constable; 5. Watchmen.

15. *May any private person that is present when a felony is committed, arrest the felon?*—292, 293.

Yes, he is bound by law to do so, on pain of fine and imprisonment, if the felon escapes through his negligence as a stander-by. And he may justify breaking open doors upon following such felon.

16. *May a private person, upon probable suspicion, arrest a felon, or other person suspected of felony?*—293.

Yes; but he cannot justify breaking open doors to do it.

17. *If either party kill the other in such attempt, why is it no more than manslaughter?*—293.

It is no more, because there is no malicious design to kill; but it amounts to so much, because it would be of most pernicious consequence, if, under pretense of suspecting felony, any private person might break open a house, or kill another; and, also, because such arrest upon suspicion is barely permitted by the law, and not enjoined, as in the case of those who are present when a felony is committed.

18. *What is arrest by a hue and cry?*—293.

It is a species of arrest, wherein both officers and private men are concerned, made when a hue and cry is raised upon a felony committed. A hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another.

CHAPTER XXII.

OF COMMITMENT AND BAIL.

1. *What is the justice, before whom a prisoner is brought, bound at once to do?*—296.

To examine the circumstances of the crime alleged, by taking in writing the examination of such prisoner, and the information of those who bring him.

2. *What should, then, be done with the prisoner?*—296.

If upon the examination of the party arrested, it manifestly appears either that no such crime as alleged was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him; otherwise he must either be committed to prison, or give bail, that is, put in securities for his appearance to answer the charge against him.

3. *When should bail be taken?*—297, 298.

The commitment being only for safe custody, whenever bail will answer the same intention, it ought to be taken, as in most of the inferior crimes; but in felonies, and other offenses of a capital nature, no bail can be a security equivalent to the actual custody of the person.

4. *What offense is it to refuse or delay to bail any person bailable?*—297.

It is an offense against the liberty of the subject in any magistrate, by the common law, as well as by statute.

5. *What if the magistrate take insufficient bail?*—297.

He is liable to be fined, if the criminal does not appear: on the other hand, excessive bail ought not to be required.

6. *Why, in cases where the imprisonment is only for safe custody before the conviction, and not for punishment afterward, is bail ousted or taken away, whenever the offense is of a very enormous nature?*—298.

Because then the public is entitled to demand nothing less

than the highest security that can be given, viz., the body of the accused, in order to insure that justice shall be done upon him, if guilty.

7. *Before the conquest what offenses were bailable?*—298.

All felonies, till murder was excepted by statute.

8. *What court may bail for any crime whatsoever?*—299.

The court of king's bench; be it treason, murder, or any other offense, according to the circumstances of the case.

9. *In imprisonment for safe custody only, how should the prisoner be treated?*—300.

He should be used with the utmost humanity, and not subjected to other hardships, than such as are absolutely requisite for the purpose of confinement only.

CHAPTER XXIII.

OF THE SEVERAL MODES OF PROSECUTION.

1. *In what ways are offenders prosecuted?*—302.

Their prosecution, or the manner of their formal accusation, is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding.

2. *In what ways do grand juries find?*—301.

Either by presentment or indictment.

3. *What is a presentment, properly speaking?*—301.

It is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment laid before them; as the presentment of a nuisance, a libel, and the like.

4. *What is an inquisition of office?*—301.

The act of a jury, summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them.

5. *What is an indictment?*—302.

It is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury.

6. *Of what number may the grand jury consist?*—302.

Of twelve at the least, and not more than twenty-three, that twelve may be a majority.

7. *Who instructs the grand jury?*—303.

The judge who presides upon the bench.

8. *Of what nature is the finding of an indictment?*—303.

Only in the nature of an inquiry or accusation, which is afterward to be tried and determined, and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it.

9. *Should a grand jury be thoroughly persuaded of the truth of an indictment?*—303.

They should so far as their evidence goes.

10. *Where, in general, must all offenses be inquired into, as well as tried?*—303.

In the county where the act was committed.

11. *If larceny be committed in one county, and the goods carried into another, where may the offender be indicted?*—305.

In either, for the offense is complete in both.

12. *To find a bill, what number of the grand jury must agree?*—306.

At least twelve.

13. *What things must be precisely and sufficiently ascertained in an indictment?*—306.

All indictments must set forth the christian name, surname,

and addition of the state and degree, mystery, town or place, and the county of the offender; and all this to identify his person. The time and place are also to be ascertained, by naming the day, and township, in which the fact was committed. The offense itself must be set forth with clearness and certainty.

14. *When must particular words of art, which are so appropriated by the law to express the precise ideas which it entertains of the offense, that no other words, however synonymous they may seem, are capable of doing it, be employed?*—307.

In indictments for murder, it is necessary to say that the party indicted "murdered," not killed, or slew, the other. In all indictments for felonies, the adverb "feloniously" must be used; and for burglaries "burglariously." In rapes, the word "ravished" is necessary. So, in larcenies, the words "feloniously took and carried away," are necessary to every indictment, for these only can express the very offense.

15. *In indictments for murder, should the length and depth of the wound be expressed?*—307.

The length and depth of the wound should, in general, be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death.

16. *Of what sorts are informations?*—308.

Of two sorts: first, those which are partly at the suit of the king and partly at that of a subject; and, secondly, such as are only in the name of the king.

17. *Is there not another species of informations?*—312.

Yes, that in the nature of a writ of *quo warranto*. The modern information tends to the same purpose as the ancient writ.

18. *What is an appeal, as a criminal prosecution?*—312.

It denotes an accusation by a private subject against another for some heinous crime, demanding punishment on account of the particular injury suffered, rather than for the offense

against the public. This private process for the punishment of public crimes, had probably its origin in those times when a private pecuniary satisfaction, called a *weregild*, was paid to the party injured, or his relations, to expiate enormous offenses.

19. *What are the only appeals now in force?*—314.

Appeals of felony and mayhem.

20. *If the appellee be acquitted, can he afterwards be indicted for the same offense?*—315.

He cannot.

CHAPTER XXIV.

OF PROCESS UPON AN INDICTMENT.

1. *Can the indictment be tried in the absence of the defendant?*—318.

It cannot be tried unless he personally appears.

2. *What is the proper process, on an indictment for any petty misdemeanor, or on a penal statute, to cause the offender to appear?*—318.

A writ of *venire facias*, which is in the nature of a summons to cause his appearance.

3. *On indictments for treason or felony, and in the case of misdemeanors, what is the usual process?*—319.

A *capias* is the first process; and in the case of misdemeanors, upon certificate of an indictment found, a writ of capias is awarded immediately by any judge of the court of king's bench, to bring in the defendant.

4. *What is the punishment for outlawries upon indictment for misdemeanors?*—320.

Forfeiture of goods and chattels.

5. *What does an outlawry in treason or felony amount to?*—319.

To a conviction and attainder of the offense charged in the indictment, as much as if the offender had been found guilty by his country.

6. *Who may arrest an outlaw on a criminal prosecution?*—320.

Any person.

7. *How may an outlawry be reversed?*—320.

It may frequently be reversed by writ of error; the proceedings therein being exceedingly nice and circumstantial.

8. *During what stage of the prosecution may a writ of* certiorari facias *be had, and with what effect?*—320, 321.

It may be had at any time before the trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench.

9. *For what purpose is the indictment so removed by* certiorari facias?—320.

For one of four purposes: 1. To consider and determine the validity of appeals or indictments and the proceedings thereon, and to quash or confirm them as there is cause; 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below; 3. To plead the king's pardon there; 4. To issue process of outlawry against the offender in those counties, or places, where the process of the inferior judges will not reach him.

10. *At whose instance may a* certiorari *be granted?*—321.

At the instance of either the prosecutor or the defendant of the former as a matter of right, of the latter as a matter of discretion.

CHAPTER XXV.

OF ARRAIGNMENT, AND ITS INCIDENTS.

1. *What is arraignment?*—332.

To call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.

2. *Why is the prisoner then called upon, by name, to hold up his hand?*—323.

Because thereby he acknowledges himself to be of the name by which he is called. If he refuse to do so, however, any other acknowledgment that such is his name will answer as well.

3. *What does the accused when arraigned?*—324.

He either stands mute, or confesses the fact; or else he pleads to the indictment.

4. *When is the party arraigned said to stand mute?*—324.

Regularly, a prisoner is said to stand mute when, being arraigned for treason or felony, he either, 1. Makes no answer at all; or, 2. Answers foreign to the purpose; or, 3. Upon having pleaded not guilty, refuses to put himself upon the country.

5. *To what does standing mute amount?*—328.

It, by statute, now, in all cases, amounts to a constructive confession of the charge.

6. *What is the consequence of the prisoner's actual confession of the indictment?*—329.

In such case the court has nothing to do but to award judgment.

7. *But what is confession by approvement?*—329, 330.

It is when a person indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded, and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. It can only be made in capital offenses, and has been long disused.