*leigh's Case*, cited Co. 3 Inst. 27 n, by all the judges, that the statute of 1 & 2 Mary abrogated the statute of 33 H. 8, for the end of challenge is to have an indifferent trial, and all Acts of Parliament made before the Act of 1 & 2 Ph. & Ma., for trial of high treason, petit treason, or misprision of treason, contrary to the due course of the common law, with challenges incident in those cases, are restored: Ibid., p. 27. The statute of 33 H. 8, c. 23, was thus decided to be in derogation of the common law. It was provided by this same act, that if a man attainted of treason, became mad, notwithstanding this, he should be executed; "which cruel and inhuman law" (says Coke) "lived not long, but was repealed, for in that point, also, it was against the common law, because, by intendment of law, the execution of the offender is for example; but so it is not when a madman is executed, but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others:" Ibid., p. 6.

10. Again, the statutes of 1 Edw. 6 and 5 Edw. 6 provide, that, for treason, petit treason, &c., &c., there shall be two sufficient and lawful witnesses, &c.; the latter statute using the words "two lawful accusers," in reference to which it was adjudged in *Lord Lumley's Case*, Dyer's R., 1 Hil. 14 El., that, as there were no other "accusers" known to the common law, but lawful accusers or witnesses, they must be such as the common law requires, namely, lawful witnesses. And, by the ancient common law, one accuser or witness was not sufficient to convict any person of high treason, for, in that case, "it shall be tried before the constable and marshal by combat, as by many records appeareth. But the constable and marshal shall have no jurisdiction to hold plea of anything which may be determined or discussed by the common law:" Co. 3 Inst. 26. That two witnesses were required at common law appears also by the Mirror, ca. 3, *ord. deat.*, and by Bracton, l. 5, fol. 354; and "accusers" and "witnesses," in the above acts, were held to be synonymous.

11. Britton says, if felons come in judgment to answer, &c., they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer but at their free will: cap. 5, fo. 14. And, again, he says, "and of prisoners we will that none shall be put in irons but those which shall be taken for felony, or trespass in parks or vivaries, or which be found in arrearages upon account, and we defend that otherwise they shall not be punished nor tormented:" Britton, c. 11, fo. 17. And the Mirror—"It is an abuse that prisoners be charged with irons, or put to any pain, before they be attainted:" cap. 5, § 1. And Sir Edward Coke says—"It appeareth, that where the law requireth that a prisoner should be kept in *salva* and *arcta custodia*, yet that that must be without pain or torment to the prisoner:" Co. 3 Inst. 35. The Duke of Exeter having brought in the rack or brake, which is allowed in many cases by the civil law, Sir John Fortesque, Chief Justice of England, wrote his book in commendation of the laws of England, showing that all torments and tortures of parties accused were directly against the common law of England, and also showed the inconvenience thereof, by fearful example: Fortescue, ca. 22, fo. 24. A question, in reference to this matter, having been put to the judges, they unanimously declared that the rack was unknown to the laws of England: 4 Bla. Com. 326.

12. "By the common law, to avoid all extortions and grievances of the subject, no sheriff, coroner, gaoler, or other of the king's ministers, ought to take any reward for doing of his office, but only of the king, and this appeareth by our books, and is so declared and enacted by Act of Parliament of 3 Edw. 1. And a penalty is added to the prohibition of the common law by that act. But after that this rule of the common law was altered, and that the sheriff, coroner, gaoler, and other the king's ministers, might in some case take of the subject, it is not credible what extortions and oppressions have thereupon ensued." So dangerous a thing is it, adds Coke, to shake or alter any of the fundamental rules of the common law; which, in truth, are the main pillars and supporters of the fabric of the commonwealth: 2 Co. Inst. 73.

13. St. Germain, in his "Doctor and Student," c. 7. fo. 23 (said to have been written in 1518), says—"By the old custom of the realm, no man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answer by the law of the land. And this custom is confirmed by Magna Charta, cap. 26." Coke, in his 2 Inst. c. 29, p 45, explains the phrase "by the law of the land," here used, to mean "by the common law, statute law, or custom of England, which have been declared and interpreted by authority of Parliament, by our books, and by precedents." He also renders it "by due process of the common law;" 2 Inst. 50; and, thus, "No man (shall) be put to answer without presentment before justices, or thing of record, or by due process, or by writ original, according to the old law of the land:" Ibid.

14. As regards these styles or appellations of the common law, Sir Matthew Hale furnishes an enumeration of them, and the reasons on which they are founded. Of that, above referred to, from St. Germain and Lord Coke, he says—"'Tis called sometimes by way of eminence, *Lex Terræ*, as in the statute of Magna Charta, cap. 29:" Hale's Hist. of Com. Law 29; adding, that there the common law is principally intended by those words *aut per legem terræ*, as appears by the exposition thereof in several subsequent statutes, and particularly in the statute 28 Edw. 3, c. 3, which is but an exposition and declaration of Magna Charta.