Northampton County ss The Commonwealth

To any Constable Greeting Whereas
Jacob Ebur duly Sworn upon Frederick
his Attendance before me this Day to
in a certain Action wherein George
& Nicholas Waggoner Deft w[ith] he has
& to do. These are therefore to comman
the said Frederick Fuhz & by Force com
forthwith before me to testify in
herein fail not Given under my
Febry 12th 1798.

Jos

h of Pennsylvania
Subpoena hath
Hutz requiring
certify the Truth
Hartzell is Pl.
refused or Neglected
You to Attach him
& him to come
the above Suppers
Hand & Seal

h Hon Field

Northampton County } The Commonwealth of Pennsylvania

To any Constable Greeting Whereas a Subpoena hath
been issued & to me duly Served upon Frederick Kutz requiring
his Attendance before me this Day to testify the Truth
in a certain Action wherein George Hartzell is Pl.
& Nicholas Waggoner Deft & he has refused or Neglected
so to do. These are therefore to command You to Attach him
the said Frederick Kutz & by Force compel him to come
forthwith before me to testify in the above Suspenses
herein fail not Given under my Hand & Seal
Febry 12th 1798

Joseph Horsfield

Order of 2. Justices on
the Complaint of the
Overseers of the Poor
on Act of an Absconded
Husband for his
Wife

North.n County ss —

Whereas Complaint is made to us the Subscribers, two of the Justices of the Peace in and for s.d County, by N. N. and N. N. Overseers of the Poor in and for the Township of —— in the County aforesaid, that (agreeable to a Complaint made to them by Margaret Owen) Nathan Owen of the same Place on or about the — Day of ——, did abscond and desert from his Wife (the s.d Margaretta) leaving her and One Child without reasonable Cause, and left them thus, neglected and destitute of Support, And that the s.d Margaretta with s.d Child (which Child is about one Year & four Months of Age and infirm) are now actually residents and residing within, and likely to become chargeable to the s.d Township of Upperaquacon — And the s.d N. N. & N. N. Overseers of the Poor aforesaid, Do further say, that the s.d Nathan Owen (to the best of their Knowledge) is yet seized of and in certain Lands and Tenements, Goods and Chattels, lying and being within the s.d Township of Upperaquacon, which should contribute to the Maintainance of the s.d Margaretta & her s.d Child &c —

To the Overseers of the Poor of N. N. Township —

You are hereby ordered to take and Seize the Goods and Chattels, and receive the Annual Rents and Profits of the Lands and Tenements of the abovementioned Nathan Owen, for the Purpose of Providing for his said Wife the above mentioned Margaretta, & for maintaining and bringing up the s.d Child abovementioned, as the Law directs; And that you make Return of this Order and your Proceedings thereupon to the next Court of Quarter Sessions to be held at Eastown in and for the s.d County of Northampton on —— Monday the Day of —— next in order to have the same confirmed &c. Given under our Hands and Seals this 20 Day of —— in the Year of our Lord One thousand seven hundred and Ninety four ——

J. Pacis
J. Pacis

North[d] County ss.

The Commonwealth of Pennsylvania, To the Sheriff of the County of Northampton Greeting

Whereas due Proof was this Day made before us the Subscribers two of the Justices Assigned to keep the Peace &c. in and for the s[d] County by N N & — of the Town[ship] of in the County aforesaid that they the s[d] were on the Day of 1792 quietly & peaceably possessed of a Lot of Land situate (description of Premises) with the Appurtenances, And being so thereof possessed they the s[d] did N did on the Day Day of demise the s[d] Lot of Land with the Appurtenances to N N. N. N. to hold to the s[d] N. N. his Ex[rs] Admin[rs] and Assigns for and during & until the full End and Term of One Year from [the] Day &c. yielding and paying therefore and thereout on the Day next the Rent or Sum of Sixteen Pounds, And that the s[d] Term is fully expired & Ended — And Whereas further Proof was also at the same Time made unto us by the s[d] N N that the said N N and the s[d] N. N. N. N having made Complaint to us that being desirous to have possession of the s[d] Premises so demised, did on the Day of demand and require the s[d] (in writing) to remove from and deliver up the Possession of the s[d] Premises unto them the s[d] N. N. and that the said N. N. hath hitherto refused and still doth refuse to comply therewith. These are therefore in the Name and by the Authority of the said Commonwealth of Pennsylvania to command you, that you Summon 12 Substantial Freeholders of your Bailiwick to appear before us the s[d] Justices at the House of in the Town[ship] of on the Day of next at 10 o[c] Clock in the forenoon, and that you Summon the s[d] W[m] Latt[a] to be and appear before us and the s[d] Freeholders at the Day and Place last mentioned to shew Cause if any he has, why Restitution of the Possession of the s[d] demised Premises should not be forthwith made to the s[d] And this you shall in no wise omit. Witness Esq[r] at the Justices aforesaid the Day of 1793 —

Ward to the Sheriff

to Summon 12 persons

Scire facias

Northampton ss. To any Constable

Whereas A. B. having on the 2d day of ... last past
Obtained Judgment against C. D. of ... Before me I. H. Esq
one of the Justices &c as well for a certain Debt of £ ——
And Whereas it is represented to me by A. B. that notwithstan
the Judgment so obtained, the s. Debt have not been discharge
neither hath Execution ... Issued (or Exec. have been Issued) f
the same. These are therefore to require & Command You, to
Summon the said C. D. So that he be & appear before me on th
day of this instant at the Hour of &c the same day, to Shew
Cause if any he hath why Exec. Should not be Issued against he
Goods & Chattles on the said Judgment in order to discharge
the said Debt so due to the s. A. B as aforesaid, hereof fail not

Honored Sir /

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Carnegie Museum

VAULT

CONDUCTOR GENERALIS:

OR THE

OFFICE, DUTY AND AUTHORITY

OF

JUSTICES OF THE PEACE,

HIGH-SHERIFFS, UNDER-SHERIFFS, CORONERS, CONSTABLES, GOALERS, JURY-MEN, AND OVERSEERS OF THE POOR.

AS ALSO,

THE OFFICE OF CLERKS OF ASSIZE AND OF THE PEACE, *&c.*

TO WHICH ARE ADDED,

Several Choice MAXIMS in LAW, &c.

Compiled chiefly from BURN's Juſtice, and the ſeveral other Books on thoſe Subjects.

By JAMES PARKER, ESQUIRE, late Juſtice of the Peace in Middleſex County, in NEW JERSEY.

Adapted to theſe UNITED STATES.

The whole Alphabetically digeſted under the ſeveral Titles; with a TABLE *directing to the ready finding out the proper Matter under thoſe Titles.*

NEW-YORK:

PRINTED by JOHN PATTERSON, for ROBERT HODGE, No. 237, *Queen-Street.*

M.DCC.LXXXVIII.

THE PREFACE TO THE READER.

THE good reception a book of this title met with ſome years ago, in theſe parts, induced me to undertake the compiling of this; and the univerſal acceptance and character of Burn's Juſtice in England, at that time. engaged me to make uſe chiefly of him; although there are a great variety of matters uſeful for American juſtices and others in this book, that are not in Burn's, whilſt every thing that our juſtices have properly cognizance of, that lie diſperſed in his four volumes, at a price more than treble this, are here collected into one. Beſides which, there is added; the office and duty of a conſtable, a curious tract on that ſubject, by Saunders Welch, Eſq; as alſo, the duty of ſheriffs: and theſe two alone were there nothing elſe, would have been a great addition to what is taken from Burn's; therefore, when the reader ſhall find the many other articles ſubjoined, ſuch as, the guide to juries; clerk of the peace's office; ſome general maxims and rules in law, and a greater variety of forms and precedents, more adapted to theſe ſtates, than in any other book, he will be induced to think it the cheapeſt and moſt uſeful compilation of the kind ever publiſhed: And I am perſuaded, that when any perſon conſiders the great difficulty, as well as coſt, that our American juſtices are at for books from England, fit to inſtruct them in their duty, where thoſe articles wherein they have cognizance, lay ſo much intermixed with matters which no way concern theſe parts of America, many of which may be juſt hinted at, as, caſes of bankruptcy, bread, butter, cheeſe, county-rates, exciſe, (a very large article in England) hunting, fiſhing, manufactures, taxes, and a greater variety than moſt people would readily imagine, which are either quite free, or not extended hither, or are otherwiſe provided for by the reſpective legiſlatures of theſe ſtates; they will ſee the utility and benefit of this book, which contains almoſt every thing neceſſary for any one of our country juſtices, excluſive of the laws of the reſpective ſtates they belong to. But inaſmuch as the greateſt part of the duty of juſtices is taken from Burn's, whoſe method, I have moſtly followed, I think it not improper to give a part of his preface in his own words, as follows:

'The materials which the author hath made uſe of, are chiefly of four kinds—The ſtatutes at large—the ſeveral treatiſes concerning the pleas of the crown; the reports of caſes adjudged in the court of king's bench; and the books concerning the office of a juſtice of the peace.

'As

'As to the ſtatutes at large, or acts of parliament, the author hath not thought himſelf at liberty, as Mr. Dalton and others, have done, to deliver the import thereof in his own words; but hath conſtantly abridged the act, in the words of the act itſelf, leaving out as little as poſſible which may ſeem any ways material. And to each diſtinct clauſe, he hath annexed the interpretation thereof, where the ſame hath been determined in the court of king's bench, or expounded by other good authority.

'The treatiſes concerning the pleas of the crown, are thoſe of Stamford, Coke, Hale, and Hawkins. Of the firſt of theſe, the author hath made little uſe, further than he is adopted by the other three. As to which three great authorities, where the law hath been declared by lord Coke, and not controverted by any other, nor altered ſince his time by any act of parliament, or judicial determination, the author hath given to him the preference. And where any of theſe differeth from the other, he hath noted the difference.

'In citing of Mr. Hawkins, he hath not thought it allowable, as is uſual with others, to omit the ſeveral degrees of caution and aſſent, with which he delivered his opinion; as, *it ſeemeth*, or *it hath been ſaid by ſome*, or *it ſeemeth to be the better opinion*, or *it ſeemeth to be agreed*, and the like; which are by no means arbitrary words without much meaning, but are inſerted by him with the utmoſt deliberation and judgment.

'As to the books of reports, where the caſes therein have been conſidered by Mr. Hawkins, and the other learned perſons before mentioned, the author hath judged it very proper to leave the matter there, as ſettled by them. As to the reſt, he hath by no means thought himſelf of ability to proceed in Mr. Hawkin's manner, by laying together all the reports on the ſame ſubject, and thereupon extracting an opinion out of the whole: but hath inſerted the ſame at large, or what he hath thought moſt material thereof, and left the determination thereupon to the reader's better judgment.

'And here it may be requiſite, that the reader be admoniſhed, not to expect that the book ſhall be more perfect than the materials of which it is compoſed. All the books of reports are not of equal authority. Some, as thoſe of Keble, Salkeld, Lord Raymond, Sir John Strange, and many others, are approved or allowed by the judges: others, which are perhaps not of leſs internal authority, have not received that ſanction; ſuch, for inſtance, are thoſe of Lord Coke. During the greateſt part of his late Majeſty's reign, no authentic collection of reports hath been publiſhed, of ſome caſes adjudged in matters relating to the ſubjects of this book. Herein the author could do no otherwiſe than make uſe of the materials he hath. Such are, particularly, Andrew's reports, and two volumes of Seſſions caſes publiſhed without the author's name. Of theſe it may be obſerved that in the main they do agree very well with books of good authority, where they happen to report the ſame caſes; and have no appearance of wilful falſification in caſes

cases not reported elsewhere. But for these, or any other, the author himself voucheth not: And as he doth not add to their credit, so he doth not detract from it: but leaveth every author (as he needs must) to answer for himself. For he hath made it an invariable rule, upon all occasions, to cite his authorities what such soever they be; and, in all material instances, in the very words of the original authors: that so, what may be of good authority in itself, shall not be rendered less so by his handling of it. And where no authority is alledged, he desires the reader will look upon it as such, namely, as having no authority; the same being nothing else but the author's own private observations, which are submitted to every reader's judgment, to approve or reject as he shall see cause.

'The books of authority concerning the Office of a Justice of the Peace, are those of Fitzherbert, Crompton, Lambard and Dalton; the last of which was published in the reign of king James the first: since which time no book under that title hath been allowed as sufficiently authentic. And even the additions which have been made to Dalton since his death, seem to have no bettter claim to an uncontroulable authority, than other collections which have not obtained it. And Dalton himself is much injured in the modern editions, in like manner as was observed before of Mr. Hawkins, by delivering that as absolute, which Mr. Dalton published under the several degrees of assent or doubtfulness before mentioned; and which the author, in justice to Mr. Dalton, hath restored.

'Where Dalton hath adopted Lambard, Crompton, and Fitzherbert (which he doth most frequently in their own words) the author hath thought it sufficient to cite Dalton's single authorities. And generally, in all other cases, where authors are agreed, he hath judged it unnecessary to alledge more than one or two good vouchers."

[*So far Burn's.*]

THAT part shewing the office, duty and authority of Sheriffs, &c. is a collection from the book so well known and approved of, entitled *The Office and Duty of Sheriffs*. And in this collection it is presumed, you will find full directions to high sheriffs, and undersheriffs, in all the parts of their office, with the name and nature of all the capias's or writs, and how, when, and where they may, and may not, be executed: With directions to gaolers, concerning prisons, prisoners, escapes, &c.

In the next place the duty of clerk of assize, and the guide to Juries, are collected out of the particular treatises concerning those offices.

It will be needless to say any more of the usefulness and excellency of this book; since every man that has occasion to peruse it, and follow its directions, will find it so, and be sensible of the benefit of its rules and directions, in the course of the several parts of the law, wherein his respective office calls him to officiate. And tho' it is not doubted but this book will meet with Momus, yet it is hoped there are some, who, upon finding its usefulness, will kindly accept what is here collected and offered to public view, for the benefit of our countrymen.

An

An Explanation of ſeveral Writs, Law Terms and Abbreviations, uſed in the following Treatiſe.

ALIAS, is a ſecond or another writ, which iſſues from the courts, after a firſt writ has been ſued out without any effect.

Array, a ranking and ſetting forth a jury.

Aſſumpſit, from the Latin, is taken in the law for a voluntary promiſe, whereby a perſon aſſumes or takes upon him to perform or pay a thing; And when any one becomes legally indebted to another for goods ſold, the law implies a promiſe that he will pay this debt; and if he do not, *indebitatus aſſumpſit*, or action of the caſe lies againſt him.

Audita querela, is a writ that lies where a perſon has any thing to plead but hath not a day in court for pleading it; as when one is bound in a ſtatute or recognizance, or where judgment is given in debt, and the defendant's body in execution, then if he have a releaſe, or other ſufficient cauſe to be diſcharged from it, this writ may be granted him againſt the perſon that has recovered.

B. R. Bancus Regius, the court of king's bench.

Capias, a writ before judgment.

Capias ad ſatisfaciendum, a writ where a man has recovered an action perſonal, as for debt, damages, detinue, &c.

Capias utlegatum, a writ againſt one outlawed; and by ſpecial *capias utlegat*, the ſheriff is commanded to ſeize all the defendant's lands, goods, and chattels.

Cepi Corpus, I have the body of ſuch a man.

Diſtringas, a writ to diſtrain one for a debt to the king, or for his appearance at a day.

Diſſeiſor, he that diſſeiſeth, or putteth another out of his land.

Elegit, a writ for him that hath recovered debt or damages, or upon recognizance.

Exigent, a writ where the defendant cannot be found, for the ſheriff to call him five county days to appear, under pain of outlawry.

Fieri facias, is a judicial writ that lies where a perſon has recovered judgment for debt or damages in the king's courts againſt any one, by which the ſheriff is commanded to levy the debt and damages on the defendant's goods.

Habere facias poſſeſſionem, a writ to give a man poſſeſſion of lands.

Habere facias ſeſinam, a writ commanding the ſheriff to give a man that hath recovered lands, ſeiſin.

Latitat, a writ where a man in perſonal actions is called to the king's bench.

Non eſt inventus, he is not to be found.

Non aſſumpſit, is the general plea in a perſonal action, whereby one denies any promiſe made.

Outlawry, is where a perſon is outlawed, that is, deprived of the benefit of the law, and therefore held to be out of its protection; as where an original writ, and the writs of *capias*, *alias*, and *pluries*, have been iſſued againſt him, and are returned by the ſheriff *non eſt inventus* and after proclamation made for him to appear, &c. if he omits it, he becomes outlawed.

Pluries, is the name of a writ that iſſues after two former writs have gone out without effect.

Quantum meruit, is a certain action of the caſe, brought where one employs a perſon to do a piece of work for him, without making any agreement about the ſame; in this caſe the law implies, he muſt pay for the work, ſo much as he has deſerved.

Re-diſſeiſin,

Rediſſeiſin, is a diſſeiſin made by him who before was adjudged to have diſſeiſed the ſame man of his lands and tenements.

Tales, A book of jurymen's names.

Venire facias, a writ to cauſe twelve men of the county, to come and ſay the truth upon the iſſue joined.

Venditione exponas, a writ to the ſheriff, commanding him to ſell goods in his hands taken in execution.

In order to keep the book within a reaſonable compaſs, the following abbreviations are made uſe of.

The word *juſtice*, is always to be underſtood to mean juſtice of the peace, when not otherwiſe expreſſed.

The words *one juſtice*, ſhall always be underſtood to ſignify one or more juſtices; ſo that what is directed to be done by one, ſhall not be intended thereby to exclude others from joining with him.

In like manner, *two juſtices*, when not otherwiſe expreſſed, ſhall be underſtood to ſignify two juſtices or more.

So alſo a conviction on the oath of *one witneſs*, ſhall be underſtood to denote two or more witneſſes.

And *two witneſſes*, ſhall denote two or more witneſſes.

(1 *Q.*) ſhall be underſtood to ſignify one whereof is of the quorum.

The *juſtices in ſeſſions*, ſhall ſignify the ſaid juſtices, or the major part of them.

The word *warrant*, ſhall always ſignify warrant under hand and ſeal, where not expreſſed otherwiſe.

Judges or juſtices of *aſſize* ſhall be underſtood to ſignify all thoſe of *niſi prius*, oyer and terminer, and general gaol delivery.

The word *overſeer* ſhall be underſtood to mean overſeer of the poor, where not expreſſed otherwiſe.

Where a penalty, or part thereof, is expreſſed to be given to the poor, that ſhall always be underſtood to denote the poor of the pariſh where the offence was committed, if not otherwiſe limited.

In all caſes of diſtreſs and ſale, it ſhall be underſtood, that the overplus muſt be returned to the owner; after the ſum or ſums to be thereout deducted, ſhall be ſatisfied and paid.

In the blank ſpaces for the names in the precedents, inſtead of inſerting initial letters arbitrarily, it is thought it may be ſome ſmall help to the memory, that A. O. ſhall ſignify the offender, A. I. the informer, A. W. the witneſs, J. P. the juſtice of the peace, and the like. [This method is only uſed in what is taken from Burn's.]

Alſo, for brevity ſake, ſums of money and other numbers are uſually expreſſed by figures, and not in words at length; but it is be remembered, that in the forms of warrants, convictions, and other proceedings before the juſtices, they ought to be expreſſed in words at length, and not in figures.

The initial letters, in the beginning of many paragraphs, thus:

A. 7 *A.*---*T.* 10 *G.*---*M.* 4 *G.* 2. or *H.* 8 *G.* 2.---are thus to be read, eaſter term, the 7th year of queen Anne.----Trinity term, the 10th year of king George the firſt---Michaelmas term, the fourth year of king George the ſecond, or Hillery term, the 8th year of king George the ſecond; being the contractions of terms eſtabliſhed for holding the courts of king's bench at Weſtminſter---all the other places with ſuch initials are read in the ſame manner.

Some general rules to be obſerved in the conſtruction of ſtatutes, or acts of Parliament.

Regularly, a ſtatute in the affirmative doth not repeal a precedent affirmative ſtatute. 11 *Co.* 61.

But

But if the latter is contrary to the former, it amounteth to a repeal of the former. L. Raym. 160.

A ſtatute made in the affirmative, without any negative expreſſed or implied, doth not take away the common law; and therefore the party may wave his benefit by ſuch ſtatute, and take his remedy by the common law. 2 Inſt. 200.

By repealing of a repealing ſtatute, the firſt ſtatute is revived. Read. Pearl.

In all caſes where juſtices may take examinations, or other accuſation or proof tho' the ſtatute doth not expreſſly ſet down that it ſhall be upon oath, yet it ſhall be intended that it ſhall be upon oath. Dalt. c. 115.

Generally, it is holden, that where a ſtatute appoints a thing to be done by one or more juſtices, without giving any appeal to the ſeſſions; there the juſtices in ſeſſions may do that thing: but where an appeal is given to the ſeſſions, the juſtices in ſeſſions cannot proceed originally therein, becauſe that method would take away the power of appealing.

Many ancient ſtatutes are penned in the form of charters, ordinances, commands, or prohibitions from the king, without mentioning the concurrence of either lords and commons; yet inaſmuch as they have always been acquieſced in as unqueſtionably authentic, this eſtabliſhes and confirms their authority, and the defect is ſalved by ſuch univerſal reception. Hawkins's preface to the ſtatutes.

The preamble or rehearſal of a ſtatute is deemed true; and therefore good argument may be drawn from the preamble. 1 Inſt. 11.

Where the ſtatute directs the doing of a thing, for the ſake of juſtice, or the public good; the word *may* is the ſame as the word *ſhall*: as where the ſtatute of the 14 C. 2. c. 12. enacts that the overſeers may make a rate to reimburſe the conſtables, this is conſtrued they ſhall; for they are compellable ſo to do. 2 Salk. 609.

Where a ſtatute gives power to the juſtices, to require any perſon to do a thing, as to take the oaths, the law implicitly gives them power to make a warrant to have the body before them; for when the law granteth any thing to any one, that alſo is granted, without which the thing itſelf cannot be: And it is againſt the office of the juſtices, and the authority given them by the law, that they ſhall go and ſeek the parties. 12 Co. 130, 131.

Where a ſtatute gives power to the juſtices of the peace to hear and determine an offence in a ſummary way; it is neceſſarily implied, and ſuppoſed, as a part of natural juſtice, that the party be firſt cited, and have opportunity to be heard and anſwer for himſelf. 1 Haw. 154.

Where an act of parliament gives power to two juſtices finally to hear and determine an offence, it is neceſſarily ſuppoſed, that they ſhall be both together, or, which is the ſame thing in other words, that they ſhall hold a ſpecial ſeſſions for that purpoſe. For it is unknown to the laws of England, that two perſons ſhall act as judges in the ſame cauſe, when at the ſame time one of them is in one part of the country, and the other in another.

Where a ſtatute appoints a conviction to be on the oath of one witneſs, this ought to be by the ſingle oath of the informer; for if the ſame perſon ſhould be allowed to be both proſecutor and witneſs, it would induce profligate perſons to commit perjury, for the ſake of the reward. L. Raym. 1545.

Where a ſtatute directeth, that a perſon ſhall be convicted of an offence upon the oath of one or more witneſſes, and ſaith nothing of the confeſſion of the party; yet if the offender ſhall before the juſtice confeſs the offence, he may be convicted upon ſuch confeſſion: for confeſſion is ſtronger evidence than the oath of witneſſes. Dalt. 109, 262. Str. 546.

A

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ACCESSARY.

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II. Of acceſſaries before the fact.
III. Of acceſſaries after the fact.
IV. How they are to be proceeded againſt.

I. Of acceſſaries in general.

ACCESSARY *(quaſi* accedens *ad culpam)* is *he that is not the chief actor, but one that is concerned in the felony by commandment, aid, or receipt.*

In the higheſt capital offence, namely, high treaſon, there are no acceſſaries, neither before nor after; for the conſenters, aiders, abetters, and knowing receivers and comforters of traitors, are all principals. 1 *Hale's Hiſt.* 613.

But yet as to the courſe of proceeding, it hath been, and indeed ought to be the courſe, that thoſe who did actually commit the very fact of treaſon, ſhould be firſt tried, before thoſe that are principals in the ſecond degree: becauſe otherwiſe this inconvenience might follow, that the principals in the ſecond degree might be convicted, and yet the principals in the firſt degree may be acquitted, which would be abſurd. 1 *H. H.* 613.

In caſes that are criminal, but not capital, as in *petit larceny* and *treſpaſs*, there are no acceſſaries; for the acceſſaries *before* are in the ſame degree as principals; and acceſſaries *after*, by receiving the offenders, cannot be in law under any penalties as acceſſaries, unleſs the acts of parliament that induce thoſe penalties do expreſsly extend to receivers or comforters, as ſome do. 1 *H. H.* 613.

It remains therefore, that the buſineſs of this title of acceſſaries refers only to *felonies*, whether by the common law, or by act of parliament. 1 *H. H.* 613.

Concerning which, Lord *Coke* obſerves generally, that when any offence is felony, either by the common law, or by ſtatute, all acceſſaries both before and after are incidentally included. 3 *Inſt.* 59.

But as to felonies by act of parliament, Lord *Hale* diſtinguiſhes thereupon as follows: Regularly (he ſays) if an act of parliament enact an offence to be felony, tho' it mention nothing of acceſſaries before or after, yet virtually and conſequentially thoſe that counſel or command the offence, are acceſſaries before, and thoſe that knowingly receive the offender are acceſſaries after. 1 *H. H.* 613.

But if the act of parliament that makes the felony, in expreſs terms comprehend acceſſaries before, and make no mention of acceſſaries after, namely, receivers or comforters, there it ſeems there can be no acceſſaries after; for the expreſſion of procurors, counſellors, or abettors, all which import acceſſaries before, make it evident,

that the law-makers did not intend to include acceſſaries after, which is an offence of a lower degree than acceſſaries before. 1 *H. H.* 614.

And although it be generally true, that an act of parliament creating a felony, renders conſequentially acceſſaries before and after within the ſame penalty, yet the ſpecial penning of the act of parliament in ſuch caſes ſometimes varies the caſe: Thus the ſtatute of 3 *H.* 7. *c.* 2. for taking away women, makes the offender, and the procuring and abetting, yea and wittingly receiving alſo, to be all equally *principal* felonies, and excluded of clergy. Again, the ſtatute of 27 *Eliza. c.* 2. makes the coming in of a jeſuit *treaſon*, the receiving or relieving of him *felony*, the contributing of money to his relief a *præmunire*. So that acts of parliament may diverſify the offences of acceſſary or principal, according to the various penning thereof, and ſo have done in many caſes. 1 *H. H.* 614 615.

Alſo a ſtatute excluding the principals from the benefit of clergy, doth not thereby exclude the acceſſaries before or after; neither doth a ſtatute, excluding the acceſſaries, thereby exclude the principals. 2 *Haw.* 342.

II. Of acceſſaries before the fact.

An acceſſary before the fact committed, is he that being abſent at the time of the felony committed, doth yet procure, counſel, command or abet another to commit felony.

Being abſent at the time of the felony committed] For if he is preſent, he is not an acceſſary, but a principal.

So alſo, if divers come to commit an unlawful act, and be preſent at the time of the felony committed, tho' one of them only doth it, they are *all* principals. *Hale's Pl.* 215.

So if one preſent move the other to ſtrike; or if one preſent did nothing, but yet came to aſſiſt the party if needful; or if one hold the party while the felon ſtrikes him: or if one preſent deliver his weapon to the other that ſtrikes: for they are *preſent*, aiding, abetting, or comforting. *id.* 216.

But if one came caſually, not of the confederacy, tho' he hindered not the felony, he is neither principal or acceſſary, altho' he apprehend not the felon: but for his negligence he is puniſhable by fine and impriſonment. *Hale's Pl.* 216. 2. *Haw.* 313.

Alſo in ſome caſes, even a perſon abſent may be principal: as he that puts poiſon into any thing to poiſon another, and leaves it, tho' not preſent when it is taken: And ſo it ſeems all that are preſent whenever the poiſon is ſo infuſed, and conſenting thereunto. *Hale's Pl.* 216.

Procure, counſel, command or abet] But here note ſome diverſities: As,

1. *When the principal doth not accompliſh the fact altogether in the ſame ſort, as it was before hand agreed between him and the acceſſary.* And

And therefore if one command another to lay hold upon the third perſon, and he lays hold upon him and robs him, the perſon commanding is not acceſſary to the robbery; for his command might have been performed without any robbery. *Dalt. c.* 161.

But if the command had been to beat him, and the party commanded doth kill him, or beat him ſo that he dieth thereof; the perſon commanding ſhall be acceſſary to the murder: for it is a hazard in beating a man, that he may die thereof. *Dalt. c.* 161.

2. *He that commandeth or counſelleth any unlawful act to be done, ſhall be adjudged acceſſary to all that ſhall enſue upon the ſame evil act, but not to any other diſtinct thing.* As if one command another to ſteal a horſe, and he ſtealeth an ox; or to rob a man by the highway of his money, and he robs him in his houſe of his plate: or to burn ſuch an one's houſe, and he burneth the houſe of another: Theſe are other acts and felonies than he commanded to be done, and therefore he ſhall not be adjudged acceſſary to them. *Dalt. c.* 161.

3. *But if a perſon commit the ſame felony, which another did command or counſel to be done, tho' he doth it at another time, or in another place, or in another ſort than was commanded or counſelled, yet here ſuch perſon commanding or counſelling ſhall be acceſſary.* As if he doth counſel to kill a man by poiſon, and he kills him with a dagger: or to kill him by the highway, and he kills him in his houſe: or to kill him one day, and he kills him on another day: in theſe and the like caſes, he ſhall be acceſſary. *Dalt. c.* 161.

4. *Theſe offences which in the conſtruction of law are ſudden and unpremeditated, cannot have any acceſſaries before.* As killing a man by miſadventure, in his own defence, or manſlaughter: For in ſuch caſe there can be no procuring, counſelling, commanding, or abetting. But there may be acceſſaries after. 1 *H. H.* 616.

5. It ſeems to be generally agreed, that *he who barely conceals a felony, which he knows to be intended, is guilty only of a miſpriſion of felony, and ſhall not be judged an acceſſary*: for this is not procuring, counſelling, or abetting. 2. *Haw.* 317.

6. Alſo, if a man counſels or commands another to kill a perſon, and before he hath killed him, he who counſelled or commanded it, repents, and *countermands* it, charging him not to kill him, and yet after he doth kill him: here ſuch perſon countermanding ſhall not be adjudged acceſſary to the murder: For the law adjudgeth no man acceſſary to a felony before the fact, but ſuch as continue in that mind at the time that the felony is done and executed. *Dalt. c.* 161.

7. But if a perſon adviſe a woman to kill her child as ſoon as it ſhall be born, and ſhe kill it in purſuance of ſuch advice: he is an acceſſary to the murder, tho' at the time of the advice, the child not being born, no murder could be committed of it: For the influence of the felonious advice continuing till the child was born, makes the adviſer as much a felon, as if he had given his advice after the birth. 2 *Haw.* 315.

III. Of

III. Of acceſſaries after the fact.

Acceſſary after the fact is, where a perſon knowing the felony to be committed by another, relieves, comforts, or aſſiſts the felon. 1 *H. H.* 618.

Knowing the felony to be committed] There can be no doubt, but that it is neceſſary that the receiver have notice of the felony, either expreſs or implied, and ſo to be laid in the indictment, that the receiver *knew* that the perſon received by him, had committed the principal felony. 2. *Haw.* 319.

The felony] This, as hath been ſaid, holds place only in *felonies*, and in thoſe felonies, where by the law judgment of death regularly ought to enſue: and therefore not in petit larceny. 1 *H. H.* 618.

And therefore if a perſon do barely receive, comfort, or conceal an offender guilty of any common treſpaſs, or inferior crime of the like nature tho' he knew him to have been guilty, and that there is a warrant out againſt him, yet he is not an acceſſary to the offence: but perhaps in ſuch caſe he may be indictable for a contempt of the law, in hindring the due courſe of juſtice. 2 *Haw.* 311.

Relieves, comforts, or aſſiſts the felon] In the explication of theſe words, ſeveral things are conſiderable:

1. Generally, any aſſiſtance whatſoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or ſuffering the puniſhment to which he is condemned, is ſufficient to bring a man within this deſcription, and make him acceſſary to the felony: as where one aſſiſts him with a horſe to ride away with, or with money or victuals to ſupport him in his eſcape. 2. *Haw.* 317.

2. But if a man knows that a perſon hath committed a felony, but doth not diſcover it, this doth not make him an acceſſary, but it is a miſpriſion of felony, for which he may be indicted, and upon his conviction, fined and impriſoned. 1 *H. H.* 618.

3. Alſo if a man ſees another commit a felony, but conſents not, nor yet takes care to apprehend him or to levy hue and cry after him, or upon hue and cry levied doth not purſue him: this is a neglect puniſhable by fine and impriſonment, but it doth not make him an acceſſary. 1. *H. H.* 618.

4. In like manner if one commit a felony, and come to a perſon's houſe before he be arreſted, and ſuch perſon ſuffer him to eſcape without arreſt, knowing him to have committed a felony, this doth not make him acceſſary; but if he take money of the felon to ſuffer him to eſcape, this makes him acceſſary: And ſo it is if he ſhut the fore-door of his houſe, whereby the purſuers are deceived, and the felon hath opportunity to eſcape, this makes him an acceſſary: for here is not a bare omiſſion, but an act done by him to accommodate the felon's eſcape. 1. *H. H.* 619.

5. Alſo it ſeems to be ſettled at this day, that whoſoever reſcues a felon from an arreſt for the felony, or voluntarily ſuffers him to eſcape, is an acceſſary to the felony. 2 *Haw.* 318.

6. But

6. But if a felon be in prison, he that relieves him with necessary meat, drink, or cloaths, for the sustentation of life, is not accessary. 1 *H. H.* 620.

7. So if he be bailed out, it is lawful to relieve and maintain him, for he is still in some sort in custody, and is under a certainty of coming to his trial. 1 *H H.* 620.

8. But if a felon be in gaol, for a man to convey instruments to him to break prison to make an escape, or to bribe the gaoler to let him escape, makes the party an accessary; for though common humanity allows every man to afford such persons necessary relief, yet common justice prohibits all unlawful attempts to cause their escapes. 1 *H. H.* 621.

9. The sending a letter in favour of a felon, or advising to labour witnesses not to appear, makes no accessary; but it is a high contempt. *Hale's. Pl.* 219.

10. A man may be accessary to an accessary, by the receiving of him knowing him to be an accessary to felony. 1 *H. H.* 622.

11. If a man hath goods stolen, and he receives his goods again, simply, without any contract to favour the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes him not an accessary, but if he take money of him to favour him, whereby he escapes, this makes him accessary. 1 *H. H.* 619.

12. And if any person shall receive or buy stolen goods, knowing them to be stolen, or shall receive, harbour, or conceal the thieves, he shall be deemed an accessary and be transported for fourteen years. 3 *W. c.* 9. *f.* 4. And buying the goods at an under value, is a presumptive evidence that he knew they were stolen. 1 *H. H.* 619.

13. It seems agreed, that the law hath such a regard to that duty, love, and tenderness, which a wife owes to her husband, as not to make her an accessary to felony by any receipt given to her husband; yet if she be any way guilty of procuring her husband to commit it, it seems to make her an accessary before the fact, in the same manner as if she had been sole. Also it seems agreed, that no other relation besides that of a wife to her husband, will exempt the receiver of a felon from being an accessary to the felony; from whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessaries in the same manner as if they had been mere strangers to one another. 2 *Haw.* 320.

14 But if the wife alone, the husband being ignorant of it, do receive any other person being a felon, the wife is accessary, and not the husband. 1 *H. H.* 621.

15. But if the husband and wife both receive a felon knowingly, it shall be judged only the act of the husband, and the wife shall be acquitted. 1 *H. H.* 621.

IV. How they are to be proceeded againſt.

By 3 *Ed.* 1. *c.* 15. Thoſe who are *accuſed of the receipt of felons, or of commandment, or of force, or of aid of felony done, ſhall be bailable*; but this ſeemeth to be only where it ſtands indifferent whether the party be guilty or innocent; for if there are ſtrong preſumptions of guilt, it ſeemeth that he is not bailable. 2 *Haw.* 102.

Where a perſon is felonioufly ſtricken or poiſoned in one county, and dies thereof in another county, the acceſſary may be indicted in the county where the death ſhall happen. 2 & 2 *Ed.* 6. *c.* 24. *ſ.* 2 3.

Where a murder or felony ſhall be committed in one county and a perſon ſhall be acceſſary in another county, the acceſſary may be indicted in the county where he was acceſſary: and the judges of aſſize, or two of them, of the county where the offence of the acceſſary ſhall be committed, on ſuit to them made, ſhall write to the keeper of the records where the principal ſhall be convicted, to certify them whether ſuch principal be attainted, convicted, or otherwiſe diſcharged; which he ſhall certify under his ſeal. 2 & 3 *Ed.* 6. *c.* 24 *ſ.* 4.

The acceſſary may be indicted in the ſame indictment with the principal, and that is the beſt and moſt uſual way: but he may be indicted in another indictment, but then ſuch indictment muſt contain the certainty and kind of the principal felony. 1 *H. H.* 623.

It ſeemeth that the acceſſary may be put to anſwer before the principal hath appeared; but his plea cannot be tried before ſuch appearance, unleſs he deſires it himſelf; but if he will put himſelf upon his trial, before the principal be tried, he may; and his acquittal or conviction, upon ſuch trial, is good. 1 *Haw.* 322. 1 *H. H.* 623.

But it ſeemeth neceſſary in ſuch caſe to reſpite judgment, till the principal be convicted; for if the principal be after acquitted, that conviction of the acceſſary is annulled, and no judgment ought to be given againſt him: But if he be acquitted of the acceſſary, that acquittal is good, and he ſhall be diſcharged. 1 *H. H.* 623, 624.

It ſeems to be ſettled at this day, that if the principal and acceſſary appear together, and the principal plead the general iſſue, the acceſſary ſhall be put to plead alſo; and that if he likewiſe plead the general iſſue, both may be tried by one inqueſt: but that the principal muſt be firſt convicted: and that the jury ſhall be charged, that if they find the principal not guilty, they ſhall find the acceſſary not guilty. But it ſeems agreed, that if the principal plead a plea in bar or abatement, or a former acquittal, the acceſſary ſhall not be forced to anſwer, till that plea be determined; for if it be found for the principal, the acceſſary is diſcharged; if againſt the principal, yet he ſhall after plead over to the felony, and may be acquitted. 2 *Haw.* 323. 1 *H. H.* 624.

Anciently, the acceſſary could not be tried, unleſs the principal were *attainted* (3 *Ed.* 1 *c.* 14.) but by the 1 *Ann. ſtat.* 2. *c.* 9. *ſ.* 1.

If

If the principal be convicted, or ſtand mute, or peremptorily challenge above twenty of the jury, the acceſſary may be tried and puniſhed as if the principal had been attainted; and this, altho' the principal be admitted to his clergy, pardoned, or otherwiſe delivered before attainder.

It ſeemeth not reaſonable, where a perſon is charged as acceſſary to more than one principal, to try him on the conviction of one, before all of them have appeared; becauſe hereby he may be ſubject to the hardſhip and hazard of two trials for his life for the ſame offence, which is contrary to the general courſe of the law. 2 *Haw.* 323.

If the principal be erroneouſly attainted, yet the acceſſary ſhall be put to anſwer, and ſhall not take advantage of the error in that attainder; but the principal reverſing the attainder, reverſeth the attainder of the acceſſary. 1 *H. H.* 625.

If one perſon be indicted as principal, and another as acceſſary, and both be acquitted; yet the perſon indicted as acceſſary may be indicted as principal, and the former acquittal as acceſſary is no bar. 1 *H. H.* 625.

But if a perſon be indicted as principal and acquitted; he ſhall not be indicted as acceſſary before: And if he be, he may plead his former acquittal in bar, for it is in ſubſtance the ſame offence. 1 *H. H.* 626.

But if he be indicted as principal and acquitted; he may be indicted as acceſſary after, for they are offences of ſeveral natures. 1 *H. H.* 626.

And ſo it is, if he be indicted as acceſſary before and acquitted; yet for the ſame reaſon he may be indicted as acceſſary after. 1 *H. H.* 626.

ADDITION.

TO prevent the inconvenience of troubling one perſon for another, it is enacted by 1 *H.* 5. *c.* 5. that 'in every original 'writ of actions perſonal, appeals, and indictments, in which the 'exigent ſhall be awarded, to the names of the defendants additions 'ſhall be made, of their eſtate or degree or myſtery, and of the 'towns, or hamlets, or places, and counties, of the which they were, 'or be: And if by proceſs upon the ſaid original writs, appeals, 'or indictments, in the which the ſaid additions be admitted, any 'outlawries be pronounced, they ſhall be void; and before the out-'lawries pronounced, the ſaid writs and indictments ſhall be abated 'by the exception of the party.'

In which the exigent ſhall be awarded] The *exigent* is a writ whereby the ſheriff is commanded to proclaim the party in the county court, in order to his being outlawed. And by theſe words the act extendeth only to caſes where proceſs of outlawry may be awarded; and

and therefore it extendeth not to an indictment for encroaching on a highway, becauſe in that caſe proceſs of outlawry lieth not, but a diſtreſs. *Croke Eliz.* 148.

To the names of the defendants] Regularly by the common law, every natural man, having no name of dignity, ought to be named in all originals and other ſuits by his chriſtian name and ſirname, and that, before this act, ſufficed; but if he had a name of inferior dignity (as knight or baronet) he ought to be named by his chriſtian name and ſirname, and by the addition of his name of dignity. 2 *Inſt* 666.

If there be a corporation of one ſole perſon, that hath a fee ſimple, and may have a writ of right, he may be named by the common law by his chriſtian name without any ſirname, as *John* biſhop of *P.* 2 *Inſt.* 666.

If it be a corporation aggregate of many able perſons, as mayor and commonalty, dean and chapter, the mayor or dean need not be named by his chriſtian name, becauſe that ſuch a corporation ſtandeth in lieu both of the chriſtian name and ſirname. 2 *Inſt.* 666.

A duke, marquis, earl, viſcount or baron, might by the common law be named by his chriſtian name, and by the name of his dignity; as *John* duke of *M.* 2 *Inſt* 666.

Additions to be made] The addition as well of the eſtate, degree, or myſtery, as the town, hamlet, or place, ought by force of this act to be alledged in the firſt name; for an addition after the *alias dictus* is ill: As for inſtance, where the indictment was againſt *W. R.* otherwiſe called *W. R.* of *H.* for without the *alias dictus* there is no addition of the vill; and if the party is not ſufficiently named in the firſt part, the *alias* cannot aid or help it. 2 *Inſt.* 669. 3 *Salk.* 20.

Where there are ſeveral defendants of different names, and the ſame addition, it is the ſafeſt to repeat the addition after each of their names, applying it particularly to every one of them. 2 *Haw.* 187.

Where a father hath the ſame name and the ſame addition with a defendant being his ſon, the action is abateable unleſs it add the addition of *the younger* to the other additions; but where the father is the defendant, it is ſaid that there is no need of the addition of *the elder*. *Haw.* 187.

Of their eſtate or degree.] Eſquire is a good addition; and the ſons of all peers and lords of parliament in the life of their fathers, are in law eſquires, and ſo to be named. Alſo the eldeſt ſon of a knight is an eſquire. 2 *Inſt.* 667.

And it ſeems clear, that no one can be well deſcribed by the addition of a temporal dignity of any other nation beſides our own; becauſe no ſuch dignity can give a man a higher title here, than that of an eſquire. 2 *Haw.* 187.

Gentleman and gentlewoman are good additions; and if a gentlewoman be named ſpinſter, ſhe may abate and quaſh the writ or indictment. 2 *Inſt.* 668.

A gentleman by reputation, that is neither gentle by birth, nor by

by office, nor by creation, but commonly called gentleman, and known by that name, is a ſufficient addition; but if he be named yeoman, he cannot quaſh the indictment. 2 *Inſt.* 668.

Lord *Coke* ſays, he that hath taken any degree in either of the univerſities, may be named by that degree without queſtion. 2 *Inſt.* 668. But this is doubted by others. 2 *Haw.* 187.

Clerk is a good addition of a clergyman. 2 *Inſt.* 668.

Yeoman and labourer are good additions, and are applied only to the man, and not the woman. 2 *Haw.* 188.

Widow or ſinglewoman, or (as ſome ſay) wife of ſuch a one, are all of them good additions of the eſtate and degree of a woman; but no ſuch like addition is good, for the eſtate and degree of a man. And ſpinſter is a good addition for the eſtate and degree of a woman, and perhaps alſo for that of a man. 2 *Haw.* 188.

Or myſtery] This includeth all lawful arts, trades and occupations, as taylor, merchant, mercer, pariſh clerk, ſchoolmaſter, huſbandman, labourer, and the like. 2 *Haw.* 188.

But ſervant, groom, or farmer, are not additions within this act, becauſe they are not of any myſtery. And chamberer, butler, pantler, or the like, are additions of offices, and not of any myſtery or occupation. 2 *Inſt.* 668.

Neither doth this act extend to unlawful practices, as extortioner, maintainer, thief, vagabond, heretick, and ſuch like. 2 *Haw.* 188.

If a man have divers arts, trades, or occupations, he may be named by any of them; but if a gentleman by birth be a tradeſman, he ſhall not be named by his trade, but by the degree of gentleman, becauſe it is worthier than the addition of any myſtery. And in general a man ſhall be named by his worthieſt title of addition. 2 *Inſt.* 668, 669.

And of the towns or hamlets] If there be two towns in a county of the ſame principal name, with different additions to diſtinguiſh them from one another, as *Great Dale* and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant be named only of the principal town without any addition, as of *Dale* only, the defendant may plead that there are two *Dales* in the ſame county, and none without an addition. But if there be two towns of the ſame name in a county, without any addition to diſtinguiſh them, it may be ſufficient in ſuch caſe to name the defendant generally of either ſuch towns, without adding any thing to diſtinguiſh it from the other. 2 *Haw.* 189.

If the defendant live in a hamlet of a town, it is ſaid to be in the election of the party to name him either of the hamlet or of the town. 2 *Haw.* 189.

But the addition of a pariſh, if there be two or more towns in it, is not good, but if there be but one town, the addition of pariſh is good. 2 *Inſt.* 669.

The addition of the place of habitation of a wife, is ſufficiently

ſhewn, by ſhewing that of the huſband; becauſe it ſhall be intended that the wife lives where the huſband does 2 *Haw.* 190.

Or places] If the defendant lives in a place known by a ſpecial name, and lying out of any town or hamlet, he may be well named of ſuch place; but if he live in any place known within a town or hamlet, it is ſaid to be the ſafeſt to name him of the town or hamlet. 2 *Haw.* 189, 190.

Of the which they were, or be] The addition of the eſtate, degree, or myſtery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of ſuch a degree or myſtery; but it is a good addition to name the defendant *late* of ſuch a town or place, becauſe men do often remove their habitation. 2 *Inſt.* 670.

Shall be void] This being a judgment in law, is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *capias utlagatum*; for tho' the ſtatute ſaith they ſhall be void, yet they are but voidable by a writ of error or plea. 2 *Inſt.* 670.

By the exception of the party] But if the defendant appeareth upon proceſs, and plead, taking no advantage thereof by exception, he hath loſt the benefit thereof: But it ſeemeth that the bare appearance of the party, without plea, doth not ſalve the want of a good addition. 2 *Haw.* 190.

AFFRAY.

I. What is an affray.
II. How far it may be ſuppreſſed by a private perſon.
III. How far by a conſtable.
IV. How far by a juſtice of the peace.
V. Puniſhment of an affray.

I. What is an affray.

AN *affray is a public offence to the terror of the people, and is an* Engliſh *word, and ſo called, becauſe it affrighteth and maketh men affraid.* 3 Inſt. 158.

From whence it ſeemeth clearly to follow, that there may be an *aſſault*, which will not amount to an *affray*; as where it happens in a private place, out of the hearing or ſeeing of any, except the parties concerned, in which caſe it cannot be ſaid to be to the terror of the people. 1 *Haw.* 134.

Alſo it is ſaid, that no quarrelſome or threatening words whatſoever, ſhall amount to an affray; and that no one can juſtify laying his hands on thoſe who ſhall barely quarrel with angry words, without coming to blows; yet it ſeemeth, that the conſtable may, at the requeſt of the party threatened, carry the perſon who threatens to beat him, before a juſtice in order to find ſureties. 1 *Haw.* 135.

Alſo, it is certain, that it is a very high offence to challenge another

another, either by word or letter, to fight a duel, or to be the meſſenger of ſuch a challenge, or even barely to endeavour to provoke another to ſend a challenge, or to fight; as by diſperſing letters to that purpoſe, full of reflections, and inſinuating a deſire to fight. 1 *Haw.* 135.

But altho' no bare words, in the judgment of law, carry in them ſo much terror as to amount to an affray, yet it ſeems certain, that in ſome caſes there may be an affray, where there is no actual violence; as where a man arms himſelf with dangerous and unuſual weapons, in ſuch a manner as will naturally cauſe a terror to the people; which is ſaid to have been always an offence at the common law, and is ſtrictly prohibited by ſtatute: For by 2 *Ed* 3. *c.* 3. it is enacted, that 'no man of what condition ſoever, except the 'king's ſervants in his preſence, and his miniſters in executing their 'office, and ſuch as be in their company aſſiſting them, and alſo 'upon a cry made for arms to keep the peace, ſhall come before the 'king's juſtices, or other of the king's miniſters doing their 'office, with force and arms, nor bring any force in affray of peace, 'nor go nor ride armed, by night or day, in fairs or markets, or in 'the preſence of the king's juſtices, or other miniſters, or elſe-'where; upon pain to forfeit their armour to the king, and their 'bodies to priſon at the king's pleaſure. And the king's juſtices 'in their preſence, ſheriffs and other miniſters in their bailiwicks, 'lords of franchiſes and their bailiffs in the ſame, and mayors and 'bailiffs of cities and boroughs within the ſame, and borough-hold-'ers, conſtables and wardens of the peace within their wards, ſhall 'have power to execute this act. And the judges of aſſize may 'puniſh ſuch officers as have not done their duty herein.'

Upon a cry made for arms to keep the peace] It is holden upon theſe words of exception, that no perſon is within the intention of this ſtatute, who arms himſelf to ſuppreſs dangerous rioters, rebels, or enemies, and endeavours to ſuppreſs or reſiſt ſuch diſturbers of the peace and quiet of the realm. 1 *Haw.* 136.

In affray of peace] *En effrayer de la pees*; Lord *Coke* has it *pais*, of the country, or the people; and ſo, he obſerves, that the writ grounded upon this ſtatute ſaith, In quorundam *de populo* terrorem; and therefore the printed book, *in affray of peace*, ought to be amended. 3 *Inſt.* 158.

And it is holden upon theſe words, that no wearing of arms is within the meaning of this ſtatute, unleſs it be accompanied with ſuch circumſtances as are apt to terrify the people; from whence it ſeems clearly to follow, that perſons of quality are in no danger of offending againſt this ſtatute, by wearing common weapons, or having their uſual number of attendants with them, for their ornament or defence, in ſuch places, and upon ſuch occaſions, in which it is the common faſhion to make uſe of them, without cauſing the leaſt ſuſpicion of an intention to commit any act of violence, or diſturbance of the peace. 1 *Haw.* 136.

Nor to go nor ride armed] It is holden, that a man cannot excuſe the

the wearing such armour in public, by alledging that such a one threatened him, and that he wears it for the safety of his person from his assault; but it hath been resolved, that no one shall incur the penalty of the said statue for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is his castle. 1 *Haw.* 136.

Their bodies to prison] The statute of 20 *R.* 2. *c.* 1. adds a fine likewise.

Wardens of the peace] It is holden that any justice of the peace, or other person who is impowered to execute this statute, may proceed thereon *ex officio*; and if he find any person in arms, contrary to the form of the statute, he may seize the arms, and commit the offender to prison; and that he ought also to make a record of the whole proceeding, and certify the same into the exchequer. 1 *Haw.* 135.

II. How far it may be suppressed by a private person.

It seems agreed, that any one who sees others fighting, may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable to be carried before a justice, to find sureties for the peace. 1 *Haw.* 136.

And the law doth encourage him hereunto; for if he receives any harm by the affrayers, he shall have his remedy by law against them; and if the affrayers receive hurt, by the endeavouring only to part them, the standers by may justify the same, and the affrayers have no remedy by law. 3 *Inst.* 158.

But if either of the parties be slain, or wounded, or so stricken that he falleth down for dead; in that case the standers-by ought to apprehend the party so slaying, wounding, or striking, or to endeavour the same by hue and cry; or else for his escape they shall be fined and imprisoned. 3 *Inst.* 158.

III. How far by a constable.

It seems agreed, that a constable is not only impowered, as all private persons are, to part an affray which happens in his presence, but is also bound at his peril to use his best endeavours to this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment. 1 *Haw.* 137.

And it is said, that if a constable see persons either actually engaged in an affray, as by striking or offering to strike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice, to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation: But it seems, that he has no power to imprison such an offender in any other manner, or for

any

any other purpoſe; for he cannot juſtify the committing an affrayer to goal, till he ſhall be puniſhed for his offence: And it is ſaid, that he ought not to lay hands on thoſe, who barely contend with hot words, without any threats of perſonal hurt; and that all which he can do in ſuch caſe, is to command them under pain of impriſonment to avoid fighting. 1 *Haw.* 137.

But he is ſo far intruſted with a power over all actual affrays, that tho' he himſelf is a ſufferer by them, and therefore liable to be objected againſt, as likely to be partial in his own cauſe, yet he may ſuppreſs them; and therefore, if an aſſault be made upon him, he may not only defend himſelf, but alſo impriſon the offender, in the ſame manner as if he were no way a party. 1 *Haw.* 137.

And if an affray be in an houſe, the conſtable may break open the doors to preſerve the peace; and if affrayers fly to an houſe, and he follow with freſh ſuit, he may break open the doors to take them. 1 *Haw.* 137.

But it is ſaid, that a conſtable hath no power to arreſt a man for an affray done out of his own view, without a warrant from a juſtice, unleſs a felony were done, or likely to be done; for it is the proper buſineſs of a conſtable to preſerve the peace, and not to puniſh the breach of it. 1 *Haw.* 137.

IV. How far by a juſtice of the peace.

There is no doubt, but that he may and muſt do all ſuch things to that purpoſe, which a private man or conſtable are either enabled or required by the law to do: But it is ſaid, that he cannot without a warrant authorize the arreſt of any perſon for an affray out of his own view; yet it ſeems clear, that in ſuch caſe he may make his warrant to bring the offender before him, in order to compel him to find ſureties for the peace. 1 *Haw.* 137.

V. Puniſhment of an Affray.

All affrayers in general are puniſhable by fine and impriſonment. 1 *Haw.* 138.

And they are inquirable in the leet, as common nuiſances. 3 *Inſt.* 158.

Warrant to apprehend affrayers.

New York, Ulſter County. } *To any conſtable of the ſaid county.*

WHEREAS A. I. of——yeoman, hath this day made oath before me J. P. eſquire, one of the juſtices of the peace of the people of the State of New-York, for the ſaid county, that on the—— day of——in the——year of the independence of the State of New-York——A. O. of——yeoman, and B. O of——yeoman, at——in the ſaid county, in a tumultuous manner made an affray, wherein the perſon of the ſaid A. I. was beaten and abuſed by

by them the said A. O. and B. O. without any lawful or sufficient provocation given to them, or either of them, by him the said A I. These are therefore to command you forthwith to apprehend the said A. O. and B. O. and bring them before me, or some other of the people's justices of the peace for the said county, to answer the premises, and to find sureties as well for their personal appearance at the next general quarter-sessions of the peace to be holden for the said county, then and there to answer to an indictment to be preferred against them by the said A. I. for the said offence, as also for their keeping the peace in the mean time, towards the people of the State of New-York, and especially towards him the said A. I. Hereof fail not, as you will answer the contrary at your peril. Given under my hand and seal at———in the said county, the———day of, &c.

ALE-HOUSES.

ALE-HOUSES and inns, were allowed for the benefit of travellers, who have certain privileges whilst they are in their journies, and are in a more peculiar manner protected by law; 'tis for this reason that the inn-keeper shall answer for those things which are stolen *infra hospitium*, though not delivered to him to keep, and though he was not acquainted that the guest brought the goods to the inn; for it shall be intended to be through his negligence, or occasioned by the fault of him or his servants. So if he puts a horse to pasture without the direction of his guest, and the horse is stolen, he must make satisfaction.

But if a neighbour who is not a traveller, lodges in an inn, and loseth his goods, or if the guest is robbed by his own servant in the inn, or by any one who came thither with him, or by leaving his goods in one room when the inn-keeper desired to leave them in another, in such cases he shall not be answerable.

If one who keeps a common inn, refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same; he is not only liable to render damages for the injury, in any action on the case at the suit of the party grieved, but may also be indicted and fined at the suit of the people. *Haw.* 225.

Drunkenness excuseth no crime; but he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober. 1 *Haw.* 2.

Since inn-keepers are bound by the law to receive guests, for that reason they may detain their goods till they are paid. 1 *Salk.* 388.

Holt. C. J. doubted whether a man is a guest by setting up his horse at an inn, though he never went into the inn himself; but the other three justices held, that such a person is a guest, by leaving his horse, as much as if he had staid himself, because the horse must be fed, by which the inn-keeper has gain; otherwise, if he had left a trunk, or dead thing. 1 *Salk.* 388.

By

By the cuſtom of the realm, if a man lies in an inn one night, the innkeeper may detain his horſes, until he is paid for the expences; but if he gives the party credit for that time, and lets him depart without payment, then he hath waved the benefit of the cuſtom, and muſt rely on his other agreement. *T. 9 G. Mod. C. in L. & E.* 172.

Alſo, if any inn keeper, ale-houſe-keeper, victualler, or ſutler, in giving any account or reckoning in writing or otherwiſe, ſhall refuſe or deny to give in the particular number of quarts or pints, or ſhall ſell in meaſures unmarked; it ſhall not be lawful for him, for default of payment of ſuch reckoning, to detain any goods or other thing, belonging to the perſon or perſons from whom ſuch reckoning ſhall be due, but he ſhall be left to his action at law for the ſame, any cuſtom or uſage to the contrary notwithſtanding. 11 & 12 *W. c.* 15. *ſ.* 2.

It is ſaid, that if a perſon brings his horſe to an inn, and leaves him in the ſtable there, the inn-keeper may keep him till the owner pay for the keeping; and if he eat out as much as he is worth, the maſter of the inn, after a reaſonable appraiſement, may ſell the horſe and pay himſelf. *Yelv.* 66.

But if one bring ſeveral horſes to an inn, and afterwards takes them all away but one, the inn-keeper may not ſell this horſe for payment of the debt of the others, but every horſe is to be ſold to ſatisfy what is due for his own meat. 1 *Bulſt.* 207.

Alſo, if an inkeeper bids his gueſt take the key of his chamber and lock the door, and he will not take the charge of the goods; yet if they are ſtolen, he ſhall be anſwerable; becauſe he is charged by law for all things which come to his inn; and he cannot diſcharge himſelf by ſuch or the like words. *Dalt. c.* 56.

[In the United States, ale-houſes and inns, are licenſed according to the ſeveral acts of the legiſlatures in the ſaid States, and the penalties inflicted or forfeitures ariſing therefrom, muſt be recovered and diſpoſed of according to thoſe acts, which vary almoſt in every State.]

A Warrant againſt one for ſelling ſtrong liquor without *licence.*

To the conſtable of, &c.

New-York, ſs. WHEREAS we whoſe names are hereunto ſubſcribed, two of the juſtices of the peace of the people of the State of New-York, for the ſaid county, have been credibly informed upon oath, that *A. B.* of, *&c.* doth retail and ſell ſtrong liquors without licence, contrary to the laws in that caſe made and provided: Theſe are therefore to will and require you to bring the ſaid *A. B.* before us, or one of us, or ſome other of the peoples juſtices of the peace for the ſaid county, to be dealt with according to law; And thereof fail not. Given under our hands and ſeals, &c.

APPRENTICES

APPRENTICES.

THE children of such parents who are not able to maintain them, may be put out apprentices; and the parents refusing to suffer them, may be bound over to the sessions. *Dalt.* 184.

But this must be by the assent of two justices, and the overseers of the poor, or the greater part of them, are to place out such children, and the law hath made them judges of the disability of the parents: And one justice may compel any person meet to be bound. *Dalt.*

Above the age of ten years, any person may be bound by his own agreement by indenture, *&c.* and if above twelve he may be compelled by justice. 15 *Eliz. Cap.* 4.

If an apprentice do not his duty, the master may complain to one justice, who may reconcile them, if he can; and if the fault shall by him be judged in the apprentice, then the said justice may send him to the house of correction.

'Tis true, there is no express authority given to the justice to send a disorderly apprentice thither; but it seems to be warranted upon the preamble of the statute 7. *Jac. Cap.* 4. made for erecting such houses to punish idle and disorderly persons: But the safest way is to bind him over to the sessions, and from thence he may be sent to the house of correction.

Neither have the justices any express power to discharge an apprentice, if the fault is in him, as they have if the fault is in the master; but it hath been held, and so is the law now, that the clause in the act, which gives the justices in their sessions power to inflict a corporal punishment on a bad apprentice, is rather an enlargement than a restraint of their authority, for they cannot punish a bad master, but may discharge the apprentice; but they may either punish or discharge a bad apprentice, as they shall think fit. *Dalt.* 190.

If the fault be found in the master, then the justice may bind him over to the sessions, and four justices there may discharge the apprentice, which discharge is to be enrolled by the clerk of the peace.

But the master and apprentice may agree to leave each other; and in case the master give leave under his hand to depart, then one justice out of sessions may discharge him, by allowing the cause of putting him away. 5 *Eliz. cap.* 4.

It shall be a cause of departure on the master's side.

Not allowing meat, drink, or wages agreed on; this is a good cause to be allowed by the justice, *&c. F. N. B.* 168. *I.* so is beating him unreasonably. *F. N. B.* 168. *Let.* Q.

On the apprentices side.] Any departing from his service whatsoever, refusing to do any reasonable service, is a departure in law; but as to that part of the act which says, an apprentice departing without testimonial, shall be whipped as a vagabond; it must be an

apprentice

apprentice in husbandry, and one of full age, for otherwise an infant who is the son of a gentleman, may be punished as a rogue. *Winch.* 25.

No person shall be bound to enter into any apprenticeship, other than such as be under the age of twenty-one years. 5 *El. c.* 4. *f.* 36.

One cannot be bound an apprentice without deed. 1 *Salk.* 68.

And by the 5 *El. c.* 4. it must be by deed indented. *f.* 25.

M. 1. *G.* 2. *Smith* and *Birch.* An action was brought against the defendant, for enticing away and detaining the plaintiff's apprentice who had agreed by writing to serve the plaintiff for seven years. Upon evidence it appeared, that the style of the writing began *This indenture, &c.* but in fact the parchment was not indented, but was a deed pole. On exception taken to the deed, it was insisted the young man was not an apprentice, because he was not bound by indenture. An infant can be bound no otherway than as the statute of 5 *El.* directs, which is by indenture, and nothing can make this good. The deed cannot now be indented, for that would be a forgery. Therefore unless the plaintiff shews the apprentice to be of full age at the time of signing such deed, he cannot be accounted his apprentice, and by consequence no action can lie for detaining the apprentice; neither can the plaintiff prove him to be his servant by this deed, for he has declared for an apprentice, and must prove him so to be. Therefore the plaintiff was nonsuited. *Sess. Ca. V.* 1. 222.

And an apprentice must be retained by the name of an apprentice expressly, otherwise he is no apprentice, though he be bound. *Dalt. c.* 58.

And all indentures, covenants, promises, and bargains, for having or taking apprentices, otherwise than by the statute of 5 *El.* shall be clearly void in the law to all intents and purposes; and every person that shall take any apprentice contrary to the said act, shall forfeit 10*l.* half to the state, and half to him that shall sue in the sessions, or other court of record; or if it is in any town corporate, then to the use of such town as by the charter. 5 *El. c.* 4 *f.* 41.

The master is allowed by law with moderation to chastise his apprentice. *Dalt. c.* 58.

An apprentice cannot be discharged but by writing, for an apprentice cannot be but by writing: But the master and apprentice may, by agreement between themselves, leave each other; and if so, then the master may give leave under his hand for the apprentice to depart, and then one justice out of sessions may discharge him, allowing the cause of his departure. *Dal. c.* 58.

But it seemeth that this shall not extend to parish apprentices, for that there the overseers are parties to the contract, which cannot therefore be avoided by any agreement between the master and his apprentice.

By the 5 *El. c.* 4. 'If any such master shall misuse or evil intreat his 'apprentice, or the said apprentice shall have any just cause to com-'plain, or the apprentice do not his duty to his master, then the said

'master or apprentice being grieved, and having cause to complain, shall 'repair unto one justice of the county, or to the mayor or other head 'officer of the said city, town corporate, or market town, or other 'place where the master dwelleth; who shall by his wisdom and dis-'cretion take such order and direction between the master and his 'apprentice, as the equity of the cause shall require; and if for want 'of good conformity in the master, the said justice (or head officer) 'cannot compound and agree the matter, he shall take bond of the 'said master to appear at the next sessions; and on his appearance, 'and hearing of the matter there, if it be thought meet to discharge 'the said apprentice, then the justices, or four of them at the least, '(1 Q.) or the said mayor or other head officer, with the consent of 'three other of his brethren, or men of best reputation in such city, 'town corporate, or market town, shall have power in writing under 'their hands and seals, to pronounce and declare, that they have dis-'charged the said apprentice of his apprenticehood, and the cause 'thereof: And the said writing being enrolled by the clerk of the 'peace, or town-clerk, amongst the records, shall be a sufficient dis-'charge for the apprentice against his master, his executors and ad-'ministrators. And if the default shall be found to be in the appren-'tice, then the said justice, or the said mayor or other head officer, 'with the assistance aforesaid, shall cause such due correction and 'punishment to be administered unto him, as by their wisdom and 'discretions shall be thought meet.' f. 35.

Shall misuse or evil intreat his apprentice] *E.* 8 *G.* 2 *K.* and *Easman.* An apprentice was discharged, the master having *used him unkindly*, and refusing to provide for and entertain him: But by the court, this is not a good ground for the discharge; for their is a power to oblige the master to receive and entertain the apprentice, and *using him unkindly* is too loose. *Str.* 1014.

Or the apprentice do not his duty to his master] *T.* 4 *G. K.* and inhabitants of *Hales Owen.* An order reciting that *Joseph Higgin* was bound out by indenture, as the statute requires, to *John Parks*, and being lame, and having the king's evil, and in the opinion of surgeons incurable, the justices discharge the master from his apprentice. It was moved to confirm the order, because the master cannot now have the end of the binding, which was, the service of his apprentice. But it was answered, that the statute only impowers the justices to discharge for misbehaviour, and not for sickness. And quashed by the court; for the master takes the apprentice for better or worse, and is to provide for him in sickness and in health. *Str.* 99.

Shall repair unto one justice] Upon an order made at the sessions to discharge an apprentice, it did not appear, that he applied himself to a justice first. And *Holt* Ch. J. was of opinion, that the justice hath power to make an order, and if obeyed by the master, then the sessions can have no power; if disobeyed, then the justice upon complaint may bind the master to the sessions, and that the sessions have no power otherwise. 1 *Salk.* 67.

T. 13 *W.*

T. 13 *W. K.* and *Johnſon.* Exception was taken to an order for diſcharging an apprentice, that the complaint was made originally at ſeſſions, without any previous application to a ſingle juſtice out of ſeſſions: *Holt* Ch. J. delivered the opinion of the court, That the order was good; if it had been a new queſtion, he ſhould have held a prior application to ſome juſtice out of ſeſſions neceſſary; but after ſo many orders affirmed in this court, which have been otherwiſe, it is too late to unſettle that now. 1 *Salk.* 68.

So alſo, in the caſe of *K.* and *Gill*, *H.* 5 *G.* It was ſaid by the court,—It hath been ſo often reſolved, that the ſeſſions hath an original juriſdiction, that we will not ſuffer it now to be made a queſtion, though it might be doubtful upon the ſtatute itſelf. *Str.* 143.

And, *T.* 12 *G. K.* and *Davie.* The court agreed, that it is a point not now to be diſputed, that the ſeſſions hath an original juriſdiction to diſcharge apprentices. *Str.* 704.

On his appearance] *E.* 13 *W. Ditton's* caſe. It was moved to quaſh an order made for the diſcharge of an apprentice. The queſtion aroſe upon the clauſe of the ſtatute, which directs, that upon appearance of the maſter, the apprentice may be diſcharged by four juſtices, after one juſtice out of ſeſſions hath endeavoured to compoſe the matter in difference. And in this caſe, it was objected, that *Ditton* the maſter was bound over to appear, and did not; and the juſtices have but a limitted juriſdiction, and it is expreſly directed by the act, that the diſcharge is to be made on the appearance of the maſter; beſides, there is another remedy, to proceed on the recognizance, which is forfeited by not appearing. By the court: The act muſt have a reaſonable conſtruction, ſo as not to permit the maſter to take advantage of his own obſtinancy; and it would be very hard, that ſuppoſing the maſter is profligate, and runs away, the apprentice ſhall never be diſcharged. 2 *Salk.* 490.

H. 5 *G. K.* and *Gill.* An order of ſeſſions for diſcharging an apprentice was quaſhed, becauſe it did not ſet forth, that the maſter was ſummoned, or did appear. *Str.* 143.

So alſo, *E.* 8 *G.* 2 *K.* and *Eaſman.* The order was quaſhed, becauſe it did not appear that the maſter was preſent or ſummoned, which it is plain the act intended he ſhould be. *Str.* 1013.

By the 21 *H.* 8. *c.* 7. Servants going away with their maſter's goods, with intent to ſteal them, ſhall be guilty of felony; but not to extend to the apprentices.

And by 12 *An. ſt.* 1. *c.* 7. Perſons ſtealing to the value of 40*s.* being in a dwelling houſe out-houſe thereto belonging, tho' ſuch houſe be not broken, and though no perſon be therein, ſhall be guilty of felony without benefit of clergy, but this not to extend to apprentices under fifteen years of age.

But if they be fifteen years of age they ſhall be guilty as other perſons.

It hath been ſaid, that if the maſter dies, the apprentice goes to the executor or adminiſtrator to be maintained, if there are aſſets; but

the

the executor or adminiſtrator may bind him to another maſter, for the remaining part of his time.

An indenture for putting out an apprentice by the Townſhip :

THIS indenture made the — day of —— in the — year of the independence of the ſtate of New-Jerſey, *anno domini* 1787. *Witneſſeth*, That *A B.* and *C. D.* overſeers of the poor of the townſhip of *Woodbridge*, in the county of *Middleſex*, and ſtate of *New-Jerſey*, by and with the conſent of *E. F.* and *G. H.* two of the people's juſtices of the peace of the ſaid county, whoſe names are hereunto ſubſcribed ; have put and placed, and by theſe preſents do put and place *J. K.* a poor child of the ſaid townſhip, apprentice to *L. M.* of the ſame, baker, with him to dwell and to ſerve, from the day of the date of theſe preſents, until the ſaid apprentice ſhall accompliſh the full age of *twenty-one* years, according to the laws in that caſe made and provided : During all which term the ſaid apprentice his ſaid maſter faithfully ſhall ſerve in all lawful buſineſſes, according to his power, wit and ability ; honeſtly, orderly and obediently, in all things demean and behave himſelf towards his ſaid maſter, and all his during the ſaid term. And the ſaid *L. M.* doth for himſelf, his executors and adminiſtrators, covenant and grant, to and with the ſaid overſeers, and every of them, their and every of their executors and adminiſtrators, and their and every of their ſucceſſors for the time being, by theſe preſents, that the ſaid *L. M.* the ſaid apprentice, in the art and myſtery of a baker, which he now uſeth, ſhall and will teach and inſtruct, or cauſe to be taught and inſtructed, in the beſt way and manner that he can : And ſhall and will, during all the term aforeſaid, find, provide and allow unto the ſaid apprentice, competent and ſufficient meat, drink, and apparel, lodging, waſhing and all other things neceſſary, and fit for an apprentice. And alſo ſhall and will provide for ſaid apprentice, that he be not any way a charge to the townſhip ; but of and from all charge, ſhall and will ſave the ſaid townſhip harmleſs, and indemnified, during the ſaid term : And at the end thereof, ſhall and will make, provide, allow and deliver unto the ſaid apprentice, double apparel of all ſorts, one ſuit of which to be new. *In witneſs* whereof, the parties aboveſaid to theſe preſent indentures, interchangeably have put their hands and ſeals the day and year firſt above-written.

Sealed and delivered in
the preſence of

We whoſe names are ſubſcribed, juſtices of the peace of the county aforeſaid, (*Quorum unus*) do, as much as in us lies, conſent to the putting forth the aboveſaid *J. K.* apprentice, according to the intent and meaning of the aboveſaid indenture.

A Warrant againſt a maſter for abuſing his apprentice.

New-York, } *To any of the conſtables of Rynbeck Precinct.*
Dutcheſs County. }

WHEREAS complaint hath been duly made unto me ——— one of the people's juſtices of the peace for the ſaid precinct, by *A. P.* apprentice to *A. M.* of ——— in the ſaid precinct, ſhoemaker, that the ſaid *A. M.* hath miſuſed and evil intreated him the ſaid *A. P.* by cruel puniſhment, and beating him the ſaid *A. P.* without juſt cauſe, and not allowing unto him ſufficient meat, drink, apparel, [*or as the caſe ſhall be*] theſe are therefore in the people's name to command you to cauſe the ſaid *A. M.* perſonally to appear before me at the houſe of ——— in the ſaid precinct, on ——— the ——— day of ——— at the hour of ——— in the afternoon of the ſame day, to anſwer unto the ſaid complaint, and alſo cauſe the ſaid apprentice to appear before me at the ſame time and place, to make good his ſaid complaint Herein fail not. Given under my hand and ſeal the —— day of, &c.

A Warrant againſt a diſorderly apprentice.

New-Jerſey, } *To any of the conſtables of the ſaid County.*
Eſſex County. }

WHEREAS complaint hath been duly made unto me ——— one of the people's juſtices of the peace in and for the ſaid county, by *A. M.* of ——— in the ſaid county, huſbandman, that *A. P.* now being an apprentice to him the ſaid *A M.* is negligent, ſtubborn, diſorderly, and doth not his duty to him the ſaid *A. M.* his maſter: Theſe are therefore to command you to bring the ſaid apprentice before me, and to give notice to the ſaid maſter that he appear before me at the ſame time, that ſuch order may be taken in the premiſes, as equity ſhall require. Herein fail not. Given under my hand and ſeal the —— day of, &c.

Order of diſcharge at the ſeſſions; on the 5 *El. c.* 4 *ſ.* 35.

New-Jerſey, } AT a general quarter ſeſſions of the peace, holden
Eſſex-County. } at ——— in and for the county aforeſaid, the ——— day of ——— in the ——— year of the independence of the ſtate of New Jerſey; before ——— juſtices of the people aſſigned to keep the peace in ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, and of the *quorum*, It is ordered as followeth:

Upon the petition of *A. P.* apprentice to *A. M.* of ——— in the ſaid county, huſbandman, to be relieved upon certain neglects of the ſaid maſter in inſtructing him in his trade, and in miſuſing and evil intreating the ſaid apprentice by cruel puniſhment [*or as the caſe ſhall be:*] And the

the ſaid maſter having likewiſe appeared upon his recognizance taken before *J. P.* eſquire, one of the ſaid juſtices, to anſwer to the complaint of the ſaid petition, and having proved nothing whereby to clear him of the ſaid complaint; but on the contrary, the ſaid *A. P.* having given full proof of the truth of the ſaid complaint to the ſatisfaction of the ſaid court: We therefore, whoſe hands and ſeals are hereunto ſet, being four of the juſtices and of the *quorum*, do hereby order, pronounce, and declare, that the ſaid apprentice ſhall be, and is hereby diſcharged and freed from his ſaid apprenticeſhip: And this to be a final order betwixt the ſaid maſter and apprentice, any thing contained in their indentures of apprenticeſhip, or otherwiſe to the contrary notwithſtanding. Given under our hands and ſeals the day and year above written.

A warrant againſt an apprentice for departing from his maſter.

New-Jerſey.
Hunterdon County. } *To any one of the conſtables of ſaid county.*

WHEREAS complaint upon oath hath been made unto me by *A. B.* of, *&c.* That *C. D.* his apprentice hath lately departed from him contrary to law: Theſe are therefore in the name of the people of the ſtate of New-Jerſey, to command you to take and bring the ſaid *C. D.* before me, or ſome other juſtice of the peace of the people of the ſtate of New-Jerſey, for this county, to anſwer the premiſes. Given, &c.

An action on the caſe lies againſt him who receives an apprentice by indenture; and an action of covenant againſt the apprentice himſelf.

The diſcharge of an apprentice by four juſtices.

New-Jerſey,
Eſſex County. WHEREAS *R. K. H. R. D. E.* and *G. H.* four of the juſtices of the peace of the people of the ſtate of New-Jerſey, (whereof one is of the *Quorum*) for the county aforeſaid, having heard and examined the matter in difference between *E. W.* an apprentice, and *N. L.* of, *&c.* And it appearing to us upon oath, that the ſaid *N. L.* hath not allowed his ſaid apprentice ſufficient meat, &c. and hath ſeveral times beaten him very immoderately without any juſt occaſion. We do therefore, for the cauſe aforeſaid, diſcharge the ſaid *E. W.* from his ſaid apprenticeſhip; and do hereby under our reſpective hands and ſeals, pronounce and declare, that the ſaid *E. W.* is diſcharged from being any longer an apprentice to his ſaid maſter. Witneſs our hands and ſeals, &c.

This diſcharge ſhould be enrolled by the clerk of the peace, or town clerk, which ſhall be good againſt the maſter, his executors and adminiſtrators.

A warrant for servants wages.

Pennsylvania, Bucks County. } *To any constable of said county.*

WHEREAS complaint upon oath hath been made unto me by *W. W.* late servant of *W. B.* of, *&c.* That the said *W. W.* being lawfully hired by his said master, did serve him for the space of, *&c.* and that the said *W. B.* doth now refuse to pay the wages which are justly due to his said servant for the time he hath served him: These are therefore to require you to bring the said *W. B.* before me, or some other of the justices of the peace of the people of the state of Pennsylvania for the said county, to answer the premises; and that you give notice to the said *W. W.* to be then and there present to make good his complaint. Given under my hand and seal, &c.

ARRAIGNMENT.

WHEN an offender comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the goaler of another prison; the first thing that follows thereupon, is his arraignment. 2 *H. H.* 216.

Now arraignment is nothing else but the calling the offender to the bar of the court, to answer the matter charged upon him. 2. *H. H.* 216.

And the word in Latin (lord *Hale* saith) is no other than *ad rationem ponere*, and in French *ad reson*, or abbreviated *a resin*; for as the ancient word *disrain* or *derayn* imports in Latin *disrationare* to disprove or evince the contrary of any thing that is or may be affirmed, so *arraigne* is *rationem ponere*, to call to account or answer. 2 *H. H.* 216. And this perhaps may be sufficient to shew the meaning of the word, altho' not to declare its derivation; for it seemeth to have flowed unto the French tongue, from its common origin with the Greek; of which we have little doubt, when we consider the verbs, as they are used in the classical remains of that language, and compare them with the terms *arraigne*, *adraine*, *disrayne*, *derayne*.

The prisoner on his arraignment, tho' under an indictment of the highest crime, must be brought to the bar without irons and all manner of shakels or bonds, unless there be a danger of escape, and then he may be brought with irons. 2 *H. H.* 219.

Also there is no necessity that a prisoner, at the time of his arraignment, hold up his hand at the bar, or be commanded so to do; for this is only a ceremony for making known the person of the offender to the court; and if he answers that he is the same person, it is all one. 2. *Haw.* 308.

ARREST.

ARREST.

THIS is to be underſtood of arreſts in criminal caſes only, and not in civil caſes.

The word *arreſt* is the ſame, with very little variation, in the *Engliſh*, *French*, *German*, *Belgic*, and other languages of the weſtern empire, heretofore ſubject to the *Roman* power; and probably may have been derived unto us through the channels both of *France* and *Saxony*: The *French arreſter* ſignifieth to ſtop or ſtay; and the *Saxon reſtan*, to reſt; and both perhaps have ſprung from the *Italian arreſto*, and that from the well known *Latin* verb *ſto*, to ſtand.

And, in law, an arreſt doth ſignify the reſtraint of a man's perſon, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: And it may be called the beginning of impriſonment. *Lamb.* 93.

I. Who may or may not be arreſted.
II. For what cauſes of ſuſpicion an arreſt may be.
III. By whom the arreſt ſhall be made.
IV. The manner of an arreſt.
V. What is to be done after the arreſt.

I. Who may or may not be arreſted.

1. Generally, a member of parliament ſhall have the privilege of parliament for himſelf and ſervants to be freed from arreſts: but for treaſon, felony, and breach of the peace, there can be no privilege. 4 *Inſt.* 24. 25.

2. In caſes of peers and corporations, the proceſs is a *diſtringas*, for they cannot be arreſted. 3 *Salk.* 46.

3. None ſhall arreſt prieſts or their clerks, or other perſon of holy church, whilſt they attend to divine ſervice, in churches, churchyards, or other places dedicated to God; on pain of impriſonment and ranſom at the people's will, and he ſhall alſo make gree to the parties arreſted. 50 *Ed.* 3. *c.* 5. 2 *R.* 2. *c.* 15.

Alſo a warrant executed againſt any perſon whatſoever, on the Lord's day, is void; and the perſon ſerving the ſame ſhall ſuffer damages, as if they had done the ſame without warrant, except in caſes of treaſon, felony, and breach of the peace. 29 *C.* 2 *c.* 7 *ſ* 6.

II. For what cauſes of ſuſpicion an arreſt may be.

By the ſtatute of 34 *Ed c.* 1. Power is given to the juſtices of the peace, to arreſt all thoſe, whom they find by indictment, or by *ſuſpicion*, and to put them in priſon.

And the cauſes of ſuſpicion, which are generally agreed to juſtify the arreſt of an innocent perſon for felony, are theſe that follow:

1. The

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 *Haw.* 76.

2. The being found in such circumstances as induce a strong presumption of guilt; as coming out of a house wherein murder hath been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. 2 *Haw.* 76.

3. The behaving one's self 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, doth abscond. 2 *Haw.* 76.

But the party who flies from an arrest for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods when such flight is found against him 2 *Haw.* 122.

4. The being 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 2. *Haw.* 76. 2 *Inst.* 52.

5. The living an idle, vagrant, and disorderly life, without having any visible means to support it. 2 *Haw.* 76.

6. The being pursued by hue and cry. 2 *Haw.* 76.

For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted; he may be attached and imprisoned by the law of the land. 2 *Inst.* 52.

But generally no such cause of suspicion, as any of the above-mentioned, will justify an arrest, where in truth no such crime hath been committed; unless it be in the case of hue and cry. 2 *Haw.* 76.

III. By whom the arrest shall be made.

In criminal cases, a person may be apprehended and restrained of his liberty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept.

Thus all persons, who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect. 2 *Haw.* 74.

Also, every private person is bound to assist an officer demanding his help, for the taking of a felon, or the suppressing of an affray. 2 *Haw.* 75.

A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice. 1 *H. H.* 587.

Or any person whatsoever, if an affray be made to the breach of the peace, may without any warrant from a magistrate, restrain any of the offenders, to the end the peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52.

So much concerning an arrest without a warrant; next follows arresting with such warrant.

The warrant is ordinarily directed to a sheriff or constable, and they are indictable, and subject thereupon to a fine and imprisonment, if they neglect or refuse it 1 *H. H.* 581.

If it be directed to the sheriff, he may command his bailiff, undersheriff, or other sworn and known officer, to serve it without writing any precept. But if he will command another man, that is no such officer to serve it, he must give him a written precept, otherwise false imprisonment will lie. *Lamb.* 89.

But every other person, to whom it is directed, must personally execute it; yet it seems, that any one may lawfully assist him. 2 *Haw.* 85.

If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another; but if it be directed to a particular constable (Mr. *Hawkins* says, to a particular constable *by name*) he may execute it any where within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. Lord *Raym.* 546. 1 *H. H.* 581. 2 *H. H.* 110. 2 *Haw.* 86.

The justice that issues the warrant, may direct it to a private person if he pleaseth and it is good; but he is not compellable to execute it, unless he be a proper officer. 1 *H. H.* 581.

But by the justices oath, the warrant ought not to be directed to the party, but to some indifferent person, to execute it.

If a warrant is directed to two or more jointly, yet any one of them alone may execute it. *Dalt. c.* 169.

IV. The manner of an arrest.

The officer to whom a warrant is directed and delivered, ought with all speed and secrecy find out the party, and then to execute the warrant. *Dalt. c.* 169.

It is certainly an offence of a very high nature, to oppose one who lawfully endeavours to arrest another for treason or felony: And it seems, that the person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessary to the felony. 2 *Haw.* 121.

An arrest in the night is good, both at the suit of the people and of the subject, else the party may escape. 9 *Co.* 66.

By the 24 *G.* 2. *c.* 55. Constables and others may, on having the warrant endorsed by a justice in another county, into which an offender shall have escaped, arrest an offender in such other county and carry him before a justice in such other county, if the offence is bailable, to find bail; or else shall carry him back again before a justice in the county from whence the warrant did first issue.

A private person cannot raise power to arrest or detain a felon. 1 *H. H.* 601.

But

But any juſtice or the ſheriff may take of the county any number that he ſhall think meet, to purſue, arreſt, and impriſon traitors, murderers, robbers and other felons; or ſuch as do break or go about to break, or diſturb the king's peace: and every man being required, ought to aſſiſt and aid them, on pain of fine and impriſonment. *Dalt. c.* 171.

But it is not juſtifiable for a juſtice, ſheriff, or other officer, to aſſemble the *poſſe comitatus*, or raiſe a power or aſſembly of people, upon their own heads, without juſt cauſe. *Dalt. c.* 171.

But where a juſtice, ſheriff, or other officer, is enabled to take the power of the county, it ſeemeth they may command, and ought to have the aid and attendants of all knights, gentlemen, yeomen, huſbandmen, labourers, tradeſmen, ſervants, and apprentices, and of all other perſons being above the age of fifteen years, and able to travel. *Dalt c.* 171. Becauſe by the ſtatute of *Wincheſter*, all of that age are bound to have harneſs.

But women, eccleſiaſtical perſons, and ſuch as be decrepit, or diſeaſed, ſhall not be compelled to attend them. *Dalt. c.* 171.

And in ſuch caſe it is referred to the diſcretion of the juſtice, ſheriff, or other officer, what number they will have to attend on them, and how and after what manner they ſhall be armed or otherwiſe furniſhed. *Dalt. c.* 171.

As to the caſe of breaking open doors, in order to apprehend offenders, it is to be obſerved that the law doth never allow of ſuch extremities, but in caſes of neceſſity; and therefore, that no one can juſtify the breaking open of another's door to make an arreſt, unleſs he firſt ſignify to thoſe in the houſe the cauſe of his coming, and them to give him admittance. 2 *Haw.* 86.

But where a perſon authoriſed to arreſt another, who is ſheltered in a houſe, is denied quietly to enter into it, in order to take him, it ſeems generally to be agreed, that he may juſtify breaking open the doors in the following inſtances:

1. Upon a *capias* grounded on an indictment for any crime whatſoever, or upon any *capias* from the chancery or king's bench, to compel a man to find ſureties for the peace or good behaviour. 2 *Haw* 16.

2. Where one known to have committed a treaſon or felony, or to have given another a dangerous wound, is purſued either with or without a warrant, by a conſtable or private perſon; but where one lies under a probable ſuſpicion only, and is not indicted, it ſeems the better opinion at this day (Mr. *Hawkins* ſays) that no one can juſtify the breaking open of doors in order to apprehend him:—(And this opinion he founds on *Coke's 4 Inſt.* 177. and *Hale's pleas of the crown* 91) 2 *Haw.* 87.

But lord *Hale*, in his hiſtory of the pleas of crown, ſays, that upon a warrant for probable cauſe of ſuſpicion of felony, the perſon to whom ſuch warrant is directed, may break open doors to take the perſon ſuſpected, if upon demand he will not ſurrender himſelf,

as well as if there had been an expreſs and poſitive charge againſt him; and ſo (he ſays) hath the common practice obtained, notwithſtanding the contrary opinion of lord *Coke*; for in ſuch caſe the general proceſs is for the king, and therefore a *non omittas* is implied. 1 *H. H.* 580, 583. 2 *H. H.* 117.

And as he may break open ſuch perſon's own houſe, ſo much more may he break open the houſe of another to take him, for ſo the ſheriff may do upon a civil proceſs: But then he muſt at his peril ſee that the felon be there; for if the felon be not there, he is a treſſpaſſer to the ſtranger whoſe houſe it is. 2 *H. H* 117

But it ſeems that he that arreſts as a *private man* barely upon ſuſpicion of felony, cannot juſtify the breaking open of doors to arreſt the party ſuſpected, but he doth it at his peril, that is if in truth he be a felon, then it is juſtifiable, but if he be innocent, but upon a reaſonable cauſe ſuſpected, it is not juſtifiable 1 *H. H.* 82.

But a *conſtable* in ſuch caſe may juſtify, and the reaſon of the difference is this: becauſe that in the former caſe it is but a thing permitted to private perſons to arreſt for ſuſpicion, and they are not puniſhable if they omit it, and therefore they cannot break open doors; but in caſe of a conſtable, he is puniſhable if he omit it upon complaint. 2 *H. H.* 92.

3. Upon a warrant from the juſtice of the peace, to find ſureties for the peace or good behaviour. 2 *Haw.* 86. 1 *H. H* 582. 2 *H. H.* 117.

And in general, Mr. *Dalton* ſays, an officer upon any warrant from a juſtice, either for the peace or good behaviour, or in any caſe where the king is a party, may by force break open a man's houſe, to arreſt the offender. *Dalt. c.* 169

4. On a warrant to ſearch for ſtolen goods, the doors may be broken open, if the goods are there; and if they are not there, the conſtable ſeems indemniſied, but he that made the ſuggeſtion, is puniſhable. 1 *H. H.* 151.

5. Where forcible entry or detainer is found by inquiſition before juſtices of the peace, or appears on their view. 2 *Haw.* 86.

6. On a *capias ut lagatum*, or *capias pro fine*. 2 *Haw.* 86.

7. On the warrant of a juſtice of the peace for levying of a forfeiture, in execution of a judgment or conviction for it, grounded on any ſtatute, which gives the whole or any part of ſuch forfeiture to the king. 2 *Haw.* 86.

8. Where an affray is made in an houſe, in the view or hearing of the conſtable, he may break open the doors to take them. 1 *Haw.* 137. 2 *Haw.* 87.

9. If there be diſorderly drinking or noiſe in a houſe, at an unſeaſonable time of night, eſpecially in inns, taverns, or ale houſes, the conſtable or his watch, demanding entrance, and being refuſed, may break open the doors, to ſee and ſuppreſs the diſorder. 2 *H. H.* 96.

10. Wherever a perſon is lawfully arreſted for any cauſe, and afterwards

afterwards escapes, and shelters himself in an house. 2 *Haw.* 87.

But upon a general warrant, without expressing any felony, or treason, or surety of the peace, the officer cannot break open a door. 1 *H. H.* 584.

Neither ought doors to be broken open to take a person, who is required to take certain oaths by virtue of a statute, because in such case the warrant is not grounded on a precedent offence. 2 *Haw.* 87. 12 *Co.* 121.

But if an officer, to serve any warrant, enters into a house, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty. 2 *Haw.* 87.

If there be a warrant against a person, for a trespass or breach of the peace, and he flies and will not yield to the arrest, or being taken makes his escape; if the officer kills him, it is murder.

But if such person, either upon the attempt to arrest, or after the arrest, assault the officer, to the intent to make his escape from him, and the officer standing on his guard, kills him, this is no felony: for he is not bound to go back to the wall, as in common cases of *se defendendo*, for the law is his protection. 2 *H. H.* 118.

But where a warrant issueth against a person for felony, and either before arrest or after, he flies and defends himself with stones or weapons, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kill him it is no felony. And the same law is, for a constable that doth it by virtue of his office, or on hue and cry. 2 *H. H.* 118.

But then there must be these cautions: 1. He must be a lawful officer; or there must be a lawful warrant. 2. The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. 3. It must be a case of necessity, and that not such necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely, that he cannot otherwise be taken. 2 *H. H.* 119.

But tho' a private person may arrest a felon, and if he fly so as he cannot be taken without he be killed, it is excuseable in this case for the necessity; yet it is at his peril, that the party be a felon; for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter; for an innocent person is not bound to take notice of a private person's suspicion. 2 *H. H.* 119.

A person sworn and commonly known, and acting within his own precinct, need not shew his warrant; but he ought to acquaint the party with the substance of it. 2 *Haw.* 85.

And an officer giveth sufficient notice what he is, when he saith to the party, I arrest you in the king's name; and in such case, the party at his peril ought to obey him, tho' he knoweth him not to be an officer; and if he have no lawful warrant, the party grieved may have his action of false imprisonment. *Dalt. c.* 169.

But the learned editor of *Hale*'s history observes hereupon, that the books referred to do intend the general warrant constituting such person

perſon an officer, as a bailiff, or the like, in a civil action; tho' it may be otherwiſe in caſe of felony, becauſe in ſuch caſe a private perſon may arreſt a felon without any warrant at all. 2 *H. H.* 116.

But if he acts out of his precinct, or is not ſworn and commonly known, he muſt ſhew his warrant if demanded. 2 *Haw.* 85, 86. Otherwiſe the party may make reſiſtance, and needs not to obey it. *Dalt. c.* 169.

But if the conſtable has no warrant, but doth it by virtue of his office, as conſtable, it is ſufficient to notify that he is conſtable, or that he arreſts in the king's name, 1 *H. H.* 583.

If the conſtable come unto the party, and require him to go before the juſtice, this is no arreſt or impriſonment. *Dalt. c.* 170.

For bare words will not make an arreſt, without laying hold on the perſon. 1 *Salk.* 79. 2 *Haw.* 129.

It hath been holden, that if a conſtable, after he hath arreſted the party by force of a warrant, ſuffer him to go at large, upon his promiſe to come again and find ſureties, he cannot afterwards arreſt him by force of the ſame warrant: However if the party return, and put himſelf again under the cuſtody of the conſtable, it ſeems that it may be probably argued, that the conſtable may lawfully detain him, and bring him before the juſtice, in purſuance of ſuch warrant; but in this the law doth not ſeem to be clearly ſettled. 2 *Haw.* 81.

But if the party arreſted do eſcape, the officer upon freſh ſuit may take him again and again, ſo often as he eſcapeth, although he were out of view, or that he ſhall fly into another town or county. *Dalt. c.* 169.

V. What is to be done after the arreſt.

When a private perſon hath arreſted a felon, or one ſuſpected of felony, he may detain him in cuſtody till he can reaſonably diſmiſs himſelf of him; but with as much ſpeed as conveniently he can, he may do any of theſe three things:

1. He may carry him to the common goal; but that is now rarely done. 1 *H. H.* 589. 2 *H. H.* 77.

2. He may deliver him to the conſtable, who may either carry him to goal, or to a juſtice of the peace. 1 *H. H.* 589.

3. He may carry him immediately to a juſtice of the peace. 1 *H. H.* 589.

If the conſtable, or his watch, hath arreſted affrayers, or perſons drinking in an ale-houſe diſorderly at an unſeaſonable time of night, he may put the perſons in the ſtocks, or in a priſon if there be one in the vill, till the heat of their paſſion or intemperance is over, tho' he deliver them afterwards; or till he can bring them before a juſtice. 2 H. *H.* 95.

If the arreſt is by virtue of a warrant, when the officer hath made

made the arreſt, he is forthwith to bring the party according to the direction of the warrant: If it be to bring the party before the juſtice who granted the warrant ſpecially, then the officer is bound to bring him before the ſame juſtice; but if the warrant be to bring him before any juſtice of the county, then it is in the election of the officer, to bring him before what juſtice he thinks fit, and not in the election of the priſoner. 1 *H. H.* 582. 1 *H.* 112.

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 preſent reſcue, or if the party be ſick, he may ſecure him in the ſtocks, or in an houſe till the next day, or ſuch time as it may be reaſonable to bring him. 2 *H. H.* 120.

And when he hath brought him to the juſtice, yet he is in law ſtill in his cuſtody, till the juſtice diſcharge, or bail, or commit him. 2 *H. H* 120.

But it is ſaid, the conſtable is not obliged to return the warrant itſelf, but may keep it for his own juſtification, in caſe he ſhould be queſtioned for what he has done; but only to return what he has done upon it.

ASSAULT and BATTERY.

I. Aſſault, what.
II. Battery, what.
III. In what caſes they may be juſtified.
IV. How puniſhed.

I. Aſſault, what.

ASSAULT, *aſſultus*, from the French *aſſayler*, is an attempt or offer, with force and violence, to do a corporal hurt to another; as by ſtriking at him with or without a weapon; or preſenting a gun at him, at ſuch a diſtance to which the gun will carry; or pointing a pitchfork at him, ſtanding within the reach of it; or by holding up one's fiſt at him; or by any other ſuch like act, done in an angry, threatening manner. 1 *Haw.* 133.

And from hence it clearly follows, that one charged with an aſſault and battery, may be found guilty of the aſſault, and yet acquitted of the battery: But every battery includes an aſſault: therefore on an indictment of aſſault and battery, in which the aſſault is ill laid, if the defendant be found guilty of the battery, it is ſufficient. 1 *Haw.* 134.

Notwithſtanding the many ancient opinions to the contrary, it ſeems agreed at this day, that no words whatſoever can amount to an aſſault. 1 *Haw.* 133.

II. Battery, what.

Battery (from the Saxon *batte*, a club or *beattan*, to beat, from whence

whence cometh also the word *battle*) seemeth to be when any injury whatsoever, be it never so small, is actually done to the person of a man, in an angry, or revengeful, or rude or insolent manner, as by spitting in his face, or any way touching him in anger, or violently justling him out of the way, and the like. 1 *Haw.* 130.

III. *In what cases they may be justified.*

A person may justify an assault, in defence of his person, or of his wife, or master, or parent, or child within age; and even a *wounding* may be justified in defence of his person, but not of his possessions. 2 *Salk.* 46.

Also if an officer having a lawful warrant lay hands on another to arrest him, or if a parent in a reasonable manner chastise his child, a master his servant, a schoolmaster his scholar, a gealer his prisoner, and even a husband his wife as some say; or if one confine a friend who is mad, and bind and beat him in such a manner as is proper in his circumstances; or if a man force a sword from one who offers to kill another therewith; in all these cases, and such like, it is justifiable 1 *Haw.* 130.

Likewise a person may justify an assault and battery of another, who doth menace or assault him, and attempt to beat him from his lawful watercourse, or highway. *Pult.* 42.

Likewise, if a person comes into my house and will not go out, I may justify laying hold of him, and turning him out. *Nelf. Assault.*

And where a man in his own defence beats another who first assaults him, he may take advantage thereof, both upon an indictment, and upon an action; but with this difference, that on an indictment he may give it in evidence upon the plea of not guilty, but on an action he must plead it specially. 1 *Haw.* 134.

IV. *How punished.*

There is no doubt but that the wrong doer is subject both to an action at the suit of the party, wherein he shall render damages; and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 *Haw.* 134.

Warrant for an assault.

New York, King's County. } *To any of the constables of Brooklyn.*

WHEREAS complaint hath been made before me *J. P.* esquire, one of the people's justices of the peace in and for the said county, upon the oath of *A. I.* of ——— in the said county, taylor, that *A. O.* of ——— aforesaid, butcher, did on the —— day of —— violently assault and beat him the said *A. I* at ——— aforesaid in the county aforesaid: These are therefore in the people's name, to command you forthwith to apprehend the said *A. O.* and bring him before me to answer unto the said complaint, and to be further dealt withal

withal according to law. Given under my hand and seal the ——— day of, &c.

Indictment for an assault.

THE jurors for the people upon their oath present, that *A. O.* of ——— in the said county, butcher, on the —— day of —— in the ——— year of the independence of the state of New-York, at ——— aforesaid, in the county aforesaid, in and upon *A. I.* taylor, then and there being in the peace of God and of the people, with force and arms, an assault did make, and him the said *A. I.* then and there did beat, wound, and evil entreat, and then and there to him other enormous things did, to the great damage and hurt of him the said *A. I.* and to the evil example of all others offending the like kind, and against the peace and dignity of the people.

ASSIZES.

ASSIZE *(assisio)* anciently signified in general, a court where the judges or assessors heard and determined causes; and more particularly upon writs of *assize* brought before them, by such as were wrongfully put out of their possessions. Which writs heretofore were very frequent; but now men's possessions are more easily recovered by ejectments. and the like. Yet still the judges in their circuits have a commission of *assize*, directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs.

To which commission of *assize*, four other commissions are now superadded; to wit,

1. A commission of *general goal delivery*, directed to the judges and the clerk of assize associate; which gives them power to try every prisoner in the goal, committed for any offence whatsoever, but none but prisoners in the gaol.

2. A commission of *oyer and terminer*, directed to the judges and many other gentlemen of the county; by which they are impowered to hear and determine treasons, felonies, and other misdemeanors by whomsoever committed, whether the persons to be tried be in goal or not in goal.

3. A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

4. A commission of the *peace* in every county of their circuit.

By the precept for the general gaol delivery abovementioned, the sheriff is commanded to attend there in person, with his under-sheriff; and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of

hundreds and liberties, that they be then and there in their own perſons with their rolls, records, indictments, and other remembrances, to do thoſe things which to their offices in that behalf appertain to be done.

By virtue whereof, all juſtices of the peace, mayors and others abovementioned, of that county where the judges have their aſſizes, are bound to be preſent; and if they make default, without lawful impediment, the judges may ſet a fine upon them for their neglect. *Cr. Circ.* 4.

ATTACHMENT.

THIS word, as a law term, we have immediately from the French *attacher*, to tye, or make faſt. The Italian word is *attacare*; the Spaniſh *attacar*; and the Saxon *tæcan*, to take:

It ſignifieth the taking of a man's body by commandment of a writ or precept; and is properly grantable in caſes of contempts, againſt which for the moſt part all courts of record generally, but more eſpecially thoſe of *Weſtminſter* hall, and above all the courts of king's bench, may proceed in a ſummary manner, according to their diſcretion. 2 *Haw.* 141.

ATTAINDER.

THE difference between a man attainted and convicted is, that a man is ſaid to be convicted before he hath judgment, as if a man be convicted by verdict or confeſſion; and when he hath his judgment upon the verdict or confeſſion, then he is ſaid to be attainted. 1 *Inſt.* 390.

That is to ſay, his blood is become *(attinctus)* *tainted*, ſtained, or corrupted: inſomuch that by the common law, in caſes of treaſon and felony, his children or other kindred cannot inherit his eſtate, nor his wife claim her dower; and the ſame cannot be reſtored or ſaved but by act of parliament: and therefore in divers inſtances, there is a ſpecial proviſion by act of parliament, that ſuch or ſuch an attainder ſhall not work corruption of blood, loſs of dower, nor diſheriſon of heirs.

ATTAINT.

ATTAINT is a writ that lieth, where a falſe verdict in a court of record, upon an iſſue joined by the parties, is given. 1 *Inſt.* 294. Which is treated of under the title JURORS.

AWARD,

AWARD,

IT is judged not foreign to the office of a keeper of the peace, to have some knowledge of the law contained under this title : concerning which we shall shew,

I. What things may be submitted to arbitration.
II. The several kinds of submission to arbitration.
III. The award ; and therein what shall be deemed a good award, and what not.

I. What things may be submitted to arbitration.

It is held clearly, that all matters of controversy, either of fact, or of a right in things and actions personal and uncertain, may be submitted to arbitration. 9 *Co.* 78.

All matters of freehold, or any right and title to a freehold, cannot be submitted to arbitrament ; for a freehold is not transferrable from one to another, without livery and seisin : Yet if there be a submission concerning the right, title, or possession of lands and tenements, and the parties enter into mutual bonds, to stand to the award made relating to them, they forfeit their bonds unless they obey it. 1 *Roll's Abr.* 242, 244. *Read. Abr. Wood b.* 4 *c.* 3.

A thing certain, as a debt due by bond or record, an annuity, and the like, cannot be submitted otherwise than by writing ; and it is most advisable that the parties enter into bonds, 1 *Roll's Abr.* 264. *Cro. El.* 422.

Criminal matters, as treasons, murders, felonies, and other offences indictable at the suit of the king, cannot be submitted to arbitrament ; for it is for the good of the common wealth, that such offenders be made known and punished : and the king in such cases is a party, for whom the other parties cannot undertake.

But if the party injured proceeds by way of action, as he may in assaults and batteries, libels, and the like, the damages he sustained, or expects to recover, may be submitted to arbitration : for in such case the action is for himself, and not for the king. *Compleat Arbitrator* 28.

Also matrimonial causes, or any thing concerning the contract or dissolution of marriage, cannot be submitted to arbitrament. 1 *Roll's Abr.* 252.

But the damages a person sustained by a promise of marriage, or any thing relating to a marriage portion, may be submitted. 16 *Ed.* 4. 2.

II. The several kinds of submission to arbitration.

A submission by *words* is good, and the party in whose favour the award is made, hath a remedy to enforce a performance of it : Yet it is

is not expedient that any ſubmiſſion ſhould be by parol, becauſe the party may revoke it at pleaſure, at any time before the award made, and that by word likewiſe; and the judges will rarely inforce the performance of an award, when either the ſubmiſſion or award is by parol, becauſe it lays ſo great a foundation for perjury. *Compl. Arb.* 21.

Submiſſion may alſo be by *covenant*; but this method is ſeldom uſed: for tho' it contains the ſame certainty with a bond, yet the method of ſuing on a covenant is different, and more difficult than in ſuing on a bond. *Compl. Arb.* 7. 46.

Submiſſion by *rule of court* is made in purſuance of the ſtatute 9 & 10 *W. c.* 15. which enacteth as follows:

It ſhall be lawful for all merchants and traders, and others deſiring to end any controverſy, ſuit, or quarrel (for which there is no other remedy but by perſonal action, or ſuit in equity) by arbitration, to agree that their ſubmiſſion to the award or umpirage be made a rule of any of his majeſty's courts of record, which the parties ſhall chuſe, and to inſert ſuch agreement in their ſubmiſſion, or the condition of the bond, or promiſe, whereby they ſubmit themſelves: Which agreement being ſo made, and inſerted in their ſubmiſſion or promiſe, or condition of their reſpective bonds, ſhall or may, on producing an affidavit thereof, made by the witneſſes thereunto, or any one of them, in the court of which the ſame is agreed to be made a rule, and reading and filing the ſaid affidavit in court, be entered of record in ſuch court; and a rule ſhall thereupon be made in the ſaid court, that the parties ſhall ſubmit to, and finally be concluded by ſuch arbitration or umpirage; and in caſe of diſobedience to ſuch arbitration or umpirage, the party neglecting or refuſing to perform the ſame, or any part thereof, ſhall be ſubject to all the penalties of contemning a rule of court; and the court on motion ſhall iſſue proceſs accordingly; which proceſs ſhall not be ſtopped or delayed in its execution, by any order of any other court of law, or equity, unleſs it ſhall be made appear on oath to ſuch court, that the arbitrators or umpire miſbehaved themſelves and that ſuch award was procured by corruption, or other undue means.

And this is allowed to be the moſt expeditious way; and the method is to get a counſel to move in any of the courts to have it made a rule, which in ſuch caſes is never denied; and then the party is liable to the ſame penalties that he would be for diſobeying any other rule of court. *Compl Arb.* 46. 47.

Or laſtly, the ſubmiſſion may be by bond. In which caſe each party muſt give to the other a bond; which bond and condition, muſt contain exactly the ſame words, only changing the names of the parties. And the penalty of the bond ſhall at leaſt be the value of the thing ſubmitted; ſo that the party may rather abide by the award, than forfeit his obligation. *Compl. Arb* 46.

And undoubtedly a ſubmiſſion by bond in ſome reſpects, exceeds a ſubmiſſion by rule of court; for an award made purſuant to bonds

of

of ſubmiſſion, may bind the parties executors ; but if the party, who refuſes to perform an award made purſuant to a rule of court, ſhall die, the act of parliament directing that the proſecution ſhall be carried on by attachment, the remedy being loſt, the award is loſt likewiſe. *Compl. Arb* 34.

Sometimes the ſubmiſſion is both by bond and rule of court, by adding the parties conſent at the bottom of the condition of the bond ; and this is ſtill the beſt way, for then the party may proceed which way he pleaſes : and it is ſaid, that he may proceed both ways ; that is to ſay, both on the bond, and have an attachment likewiſe for the contempt. 1 *Salk.* 73.

But in which way ſoever the ſubmiſſion is made, the ſame nevertheleſs may be revoked, tho' made irrevocable by the ſtrongeſt words ; for a man cannot by his own act, make ſuch authority or power not countermandable, which by the law and its own nature is countermandable. 8 *Co.* 82.

But if the ſubmiſſion be by bond, if the party revokes, he forfeits his obligation, for that he hath broken the words of the condition, which are, that he ſhall ſtand to and abide the award. And if he revokes, he muſt likewiſe give notice of the revocation ; and if the ſubmiſſion was by bond, the revocation muſt be in writing. 8 *Co.* 82.

And if the ſubmiſſion be made a rule of court, purſuant to the act of parliament ; if either of the parties revokes, the court will grant an attachment. *Compl. Arb.* 82.

But if the ſubmiſſion be by word, the party may revoke at pleaſure, and he forfeits nothing ; but he muſt in this caſe likewiſe give notice of the revocation, tho' it need not be in writing ; and the notice muſt be to the arbitrators themſelves. 8 *Co.* 82.

III. The award ; and therein what ſhall be deemed a good award, and what not.

The arbitrators cannot injoin an oath to the witneſſes, there being no law which gives them any ſuch power.

It is highly convenient that the award be in writing, and ſo to be mentioned in the ſubmiſſion, *Compl. Arb.* 34.

One thing eſſential to a good award is, that it be made, with reſpect to perſon, and things, according to the ſubmiſſion. *Wood. b.* 4. *c.* 3.

Upon which ground, as the arbitrators are, with reſpect to the things ſubmitted, circumſcribed and tied down to the ſubmiſſion ; ſo in ſeveral caſes it has been diſputed, whether their awarding releaſes to the time of the award, and not to the time of the ſubmiſſion, was good ; it is therefore moſt adviſable to award releaſes to the time of the ſubmiſſion ; though it is now clearly held, that general releaſes ſhall extend only to the time of the ſubmiſſion, and that if there be releaſes awarded to the time of the award, they ſhall be good, unleſs

unleſs it be ſhewn on the other ſide, that ſome new matter hath ariſen between the parties between the ſubmiſſion and award, 1 *Roll. Abr.* 242. 6 *Mod.* 34.

If the ſubmiſſion be, *ſo as the award be ready to be delivered to the parties or to ſuch of them as ſhall deſire the ſame*, the parties ſo bound are themſelves obliged to take notice of the award at their peril; but if the words of the ſubmiſſion be, *ſo that the award be delivered to each party by ſuch a day*, then it muſt be delivered to each party accordingly. *Read. Arb. Wood b.* 4 *c.* 3.

But tho' the words of the ſubmiſſion may be ſuch, as will oblige the parties to take notice of the award at their peril; yet if the arbitrators award that one of the parties ſhall do an act, which depends upon another firſt to be done of the other party, he muſt have notice of it; at leaſt the party who would take advantage of it, muſt ſhew that he hath done what was neceſſary on his part. *Compl. Arb.* 12.

Alſo, it is required, that the award be beneficial, and appoint ſomething advantageous to either party; for an award of one ſide only, is not good; ſo if an award be, that one of the parties ſhall go to *Rome*, when it appears that there is no advantage to the other party by his going, it is void. *Wood b.* 4 *c.* 3.

So if a man and woman ſubmit themſelves to an award, it is no good award that they ſhall *intermarry*, for this is not intended any advantage. 1 *Roll. Abr.* 252.

Alſo it is required in a good award, that it be poſſible and lawful, *Wood b.* 4. *c.* 3.

Thus, if an award be, that one of the parties ſhall kill, ſteal, forge a deed, or the like, it is void. 1 *Inſt.* 206.

In the like manner, if it be awarded, that money ſhall be paid to an infant, and that he ſhall make a releaſe, it is void: for the infant's releaſe is not good in law.

Alſo it is held, that where a thing is awarded to be done, which afterwards becomes impoſſible by the act of God, the party is excuſed; as if an award be, to deliver a horſe before ſuch a day, and he dies before that day. 21 *Ed.* 4. 70.

Alſo, it is required, that the award be certain and final. *Wood b.* 4 *c.* 3.

Upon which ground it hath been reſolved, that if the arbitrators award, that one of the parties beg the other's pardon before ſuch a mayor, or ſuch and ſuch perſons, it is good and certain enough; but if the award be, that he ſhall beg pardon in ſuch manner and in ſuch place as the other party ſhall appoint, it is not good: for the arbitrators are to determine, and not to make ſuch party his own judge in his own cauſe. And tho' the time and place be but circumſtances, yet in this ſort of ſatisfaction they make the moſt conſiderable part. 1 *Salk.* 71.

Upon which ground alſo, the arbitrators cannot regularly reſerve any thing for their future judgment, when the time allowed them is xpired;

expired; for then such their award is not certain and final. *Cro. Jac.* 585.

H. 13 *G. Dudley* and *Nettleford.* Upon a reference it was awarded that the plaintiff should pay the costs: and there being no body appointed to tax them, the court supplied it by ordering the master to do it. *Str.* 737.

But if these things are observed, the award shall be expounded according to the intent of the arbitrators, and not literally, and shall not be unravelled in a court of equity, unless their was corruption in the arbitrators. 10 *Co.* 57. *Wood b.* 4. *c.* 3. *Read Arb.*

But in case of corruption, or other unfair practice, it is enacted by the aforesaid statute of 9 *and* 10 *W. c.* 15. that any arbitration or umpirage procured by corruption or undue means, shall be deemed void, and accordingly be set aside by any court of law or equity, so as complaint thereof be made in the court where the rule is made, before the last day of the next term after publishing the arbitration. *s.* 2.

But generally, as the arbitrators are persons of the parties own chusing, and as the law presumes that every man will be so wise as to pitch upon a person whose understanding and honesty he can rely on: it hath seldom happened, that an award was held void when there appeared nothing else to vitiate it, especially in a court of law: yet awards have been, and are often set aside in a court of equity, for corruption and want of understanding in the arbitrators. *Compl. Arb.* 73.

Therefore it is the interest of both parties, to chuse men of honesty and understanding to be their arbitrators, and to acquaint them truly with the facts they are to go upon: for if they appear to be mistaken in a matter of fact, a court of equity will set aside the award. 2 *Vern.* 705.

But a bare suggestion of want of understanding, or want of honesty, will not be sufficient: the proof must be strong, and rather, because (as was said) they are of the party's own chusing, who by his choice of them, admitted them to be wise and honest enough for his purpose. *Compl Arb.* 74.

If a submission is to three arbitrators, or any two of them, and two of them by fraud or force will exclude the other: that alone is sufficient to vitiate the award: or if they have private meetings, and admit one of the parties, but give no notice to the other, but suffer the attorney of the party whom they admitted, to draw up the award: such award shall be set aside for partiality and unfairness. 2 *Vern.* 514.

It is a general rule in equity, than when it appears that any one of the arbitrators were any way *interested* in the matters in controversy, the award is to be set aside. *Compl. Arb.* 75.

And it is the strongest argument of partiality, to shew that the arbitrators received from either of the parties any considerable sum of money, or any other present which may be a temptation to act corruptly

ruptly: but the sum or present must be proved to be so exorbitant, as to induce the court to believe that it biassed their judgments: otherwise it will be of no effect. *Comp. Arb.* 76.

If the arbitrators award a thing to be done, it may be proper for them to appoint a time and place for the doing of it; and the party who would take advantage of it, must shew that he has done what was requisite on his part: but if a thing is to be done generally, without mentioning time and place, it shall be done immediately. 2 *Brown.* 311.

If the submission is by rule of court, it is necessary that there be a personal demand of the thing awarded: and the party must make affidavit of such demand, before he can have an attachment. 1 *Salk.* 83.

If a sum of money be awarded to one of the parties, and that upon the payment thereof they both shall give mutual releases: if he who is to receive the money, refuses it, yet upon a tender and refusal, he is as much obliged to sign a release as if he actually received it. 1 *Salk.* 75.

Form of a submission by rule of court.

WHEREAS divers disputes and controversies have arisen, and are now depending, between A. B. of ——in the county of——yeoman, of the one part, and C. D. of——in the said county, yeoman, of the other part, touching and concerning ——Now for the ending and deciding thereof, it is hereby mutually agreed by and between the said parties, that all matters in difference between them for, touching, and concerning all and every the matters and things herein above specified and particularly mentioned, shall be referred and submitted to the arbitrament, final end, and determination of A. A. of——in the said county, gentleman, B. A. of——in the said county, yeoman, and C. A. of ——in the said county, yeoman, or any two of them, arbitrators indifferently elected by the said parties, so as the said arbitrators, or any two of them, do make and publish their award in writing ready to be delivered to the said parties, or such of them as shall desire the same, on or before the——day of——next ensuing the date hereof: And it is hereby mutually agreed by and between the said parties, that this submission shall be made a rule of court. In witness whereof the said parties to these presents have hereunto set their hands this——day of——in the——year, &c.

Arbitration Bond

KNOW all men by these presents, that I *A. B.* of——in the county of——gentleman, am held and firmly bound to *C. D.* of——in the said county of——yeoman, in——pounds of good and lawful money of the State of New-York, to be paid to the said *C. D.*

C. D. or to his certain attorney, his executors, adminiſtrators, or aſſigns: To which payment well and truly to be made, I bind myſelf, my heirs, executors, and adminiſtrators, firmly by theſe preſents, ſealed with my ſeal, and dated the —— day of ——— in the —— year of the independence of the ſtate of New-York, and in the year of our Lord ———

Condition to ſtand to the award of two arbitrators, in common form:

THE condition of the above obligation is ſuch, that if the above bound *A. B.* his heirs, executors, and adminiſtrators, and every of them, for and on his and their parts and behalfs, do and ſhall well and truly ſtand to, obey, abide, perform, obſerve and keep the award, order, arbitrament, final end and determination of *A. A.* of ——— eſquire, and *B. A.* of ——— gentleman, arbitrators indifferently named, elected, and choſen, as well for and on the part and behalf of the above-bound *A. B.* as of the above-named *C. D.* to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions, cauſe and cauſes of action and actions, ſuits, bills, bonds, ſpecialties, judgments, executions, extents, accounts, debts, dues, ſum and ſums of money, quarrels, controverſies, treſpaſſes, damages and demands whatſoever, doth in law and equity or otherwiſe howſoever, which at any time or times heretofore have been had, made, moved, brought, commenced, ſued, proſecuted, committed, omitted, done or ſuffered by or between the ſaid parties, ſo as the ſaid award be made in writing, and ready to be delivered to the ſaid parties, on or before the —— day of ——— now next enſuing, then this obligation to be void, otherwiſe of force.

If the parties have a mind to make their ſubmiſſion a rule of court, then this may be added:

And the abovebound *A. B.* doth agree and deſire, that this his ſubmiſſion be made a rule of court.

Condition to ſtand to the award of three arbitrators, or any two of them, and an umpire appointed.

THE condition of this obligation is ſuch, that if the abovebound *A. B.* his heirs, executors, and adminiſtrators, for and on his and their parts and behalfs, ſhall and do well and truly ſtand to, obey, abide, obſerve, perform, fulfil, and keep the award, order, arbitrament, final end and determination of ——— or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the ſaid *A. B.* as by and on the part and behalf of the above named *C. D.* to arbitrate, award, order, judge and determine, of and concerning all and all manner of action and actions, cauſe and cauſes of action and actions, ſuits, bills, bonds, ſpecialties, covenants, contracts, promiſes, accounts, reckonings, ſums

of money, judgments, executions, extents quarrels, controverſies, treſpaſſes, damages and demands whatſoever, at any time heretofore had made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed, or depending between the ſaid parties; ſo as the award of the ſaid arbitrators, or any two of them, be made and ſet down in writing, under their or any two of their hands and ſeals, ready to be delivered to the ſaid parties in difference, on or before the —— day of ——— now next enſuing; then this obligation to be void, otherwiſe of force.

And if the ſaid arbitrators ſhall not make ſuch their award of and concerning the premiſes, within the time limited as aforeſaid, then if the ſaid *A. B.* his heirs, executors, and adminiſtrators, for and on his and their part and behalf, do and ſhall well and truly ſtand to, obſerve, perform, fulfil and keep the award, determination, and umpirage [*if the umpire be named*] of ——— being a perſon indifferently named and choſen between the ſaid parties, for umpire; [*if not named*] of ſuch perſon as the ſaid arbitrators ſhall indifferently chuſe for umpire in and concerning the premiſes; ſo as the ſaid umpire do make and ſet down his award and umpirage in writing, under his hand and ſeal, ready to be delivered to the ſaid parties in difference, on or before the —— day of ——— now next enſuing: Then this obligation to be void, otherwiſe of force.

Form of an award.

TO all to whom theſe preſents ſhall come, we *A. B.* of ——— and *C. D.* of ——— do ſend greeting.

Whereas there are ſeveral accounts depending, and divers controverſies have ariſen, between ——— of ——— yeoman, of the one part, and ——— of ——— yeoman, of the other part: And whereas, for the putting an end to the ſaid differences, they the ſaid ——— and ——— by their ſeveral bonds or obligations bearing date ——— laſt paſt, are reciprocally become bound each to the other, in the penal ſum of ——— to ſtand to, abide, perform, and keep the award, order, and final determination of us the ſaid ——— ſo as the ſaid award be made in writing and ready to be delivered to the parties in difference on or before ——— next enſuing, as by the ſaid obligations and conditions thereof may appear: Now know ye, that we the ſaid arbitrators, whoſe names are hereunto ſubſcribed, and ſeals affixed, taking upon us the burthen of the ſaid award, and having fully examined and duly conſidered the proofs and allegations of both the ſaid parties, do make and publiſh this our award between the ſaid parties in manner following; that is to ſay, Firſt, We do award and order, that all actions, ſuits, quarrels, and controverſies whatſoever, had, moved, ariſen, and depending between the ſaid parties in law or equity, for any manner of cauſe whatſoever touching the ſaid premiſes, to the day of the date hereof, ſhall ceaſe and be no further proſecuted; and that each of the ſaid parties ſhall pay

and

and bear his own coſts and charges in any wiſe relating to, or concerning the premiſes. And we do alſo award and order, that the the ſaid ——— ſhall deliver or cauſe to be delivered to the ſaid ——— at ——— within the ſpace of ——— &c. And further, we do hereby award and order, that the ſaid ——— ſhall on or before ——— pay or cauſe to be paid unto the ſaid ——— the ſum of ———. We do alſo award and order, &c And laſtly, We do award and order, that the ſaid ——— and ——— on payment of the ſaid ſum ——— ſhall in due form of law, execute each to the other of them, or to the other's uſe general releaſes, ſufficient in the law for the releaſing by each to the other of them, his heirs, executors, and adminiſtrators, of all actions ſuits, arreſts, quarrels, controverſies, and demands whatſoever, touching or concerning the premiſes aforeſaid, or any matter or thing thereunto relating, from the beginning of the world, until the —— day of ——— laſt paſt (viz. *the day of the date of the arbitration bonds.)* In witneſs whereof we have hereunto ſet our hands and ſeals the —— day of ———

Form of an umpirage.

(RECITE *the arbitration bonds as before)* Now know ye, that I ——— umpire indifferently choſen by ——— having deliberately heard and underſtood the griefs and allegations and proofs of both the ſaid parties, and willing (as much as in me lieth) to ſet the ſaid parties at unity and good accord, do by theſe preſents arbitrate, award, order, decree, and judge as followeth: That is to ſay, &c.

BAIL.

I. What it is.
II. Difference between bail and mainpriſe.
III. When a perſon may be diſcharged without bail.
IV. Who may or may not be bailed.
V. Who may bail, and the manner of it.
VI. Requiring exceſſive bail.
VII. Denying bail when it ought to be granted.
VIII. Granting bail where it ought to be denied.
IX. Of bail by writ of habeas corpus.

I. What it is.

BAIL (from the French *bailler*, to deliver) ſignifies the delivery of a man out of cuſtody, upon the undertaking of one or more perſons for him, that he ſhall appear at the day limited, to anſwer and be juſtified by the law. *Hale's Pl.* 96.

II.

II. *Difference between bail and mainprise.*

The difference between bail and mainprise is, that mainpernors are only surety, but bail is a custody; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him, and bring him before a justice, and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties. *Hale's Pl.* 96.

III. *Where a person may be discharged without bail.*

If a person be brought before a justice, if it appears that no felony is committed, he may discharge him; but if a felony be committed, tho' it appears not that the party accused is guilty, yet he cannot discharge him, but must commit or bail him. *Hale's Pl.* 98.

IV. *Who may or may not be bailed.*

At the common law, bail was allowed in all cases but homicide; but now the statute of the 3 *Ed.* 1 *c.* 15. directeth what offenders shall be bailed, and what not. *Hale's Pl.* 97.

It is true, the said statute only prescribeth, who shall or shall not be let to bail by the *sheriff*; but by the 1 & 2 *P. & M. c.* 3. it is enacted, that no justice or justices of the peace shall let to bail or mainprise any person not replevisable by the said statute of 3 *Ed.* 1 *c.* 15.

Which statute is as follows: 'Forasmuch as sheriffs and others, 'which have taken and kept in prison persons detected of felony, 'and incontinent have let out by replevin such as were not replevisa-'ble, and kept in prison such as were replevisable, because they 'would gain of the one party and grieve the other; and forasmuch 'as before this time it was not determined which persons were reple-'visable, and which not, but only those that were taken for the 'death of a man, or by commandment of the king, or of his jus-'tices, or for the forest: It is provided, that such prisoners as be-'fore were outlawed, and they which have abjured the realm, provers, 'and such as be taken with the manner, and those which have bro-'ken the king's prison, thieves openly defamed and known, and 'such as be appealed by provers so long as the provers be liv-'ing, (if they be not of good name,) and such as be taken for 'house burning feloniously done, or for false money, or for counter-'feiting the king's seal, or persons excommunicate taken at the re-'quest of the bishop, or for manifest offences, or for treason touch-'ing the king himself, shall be in no wise replevisable by the com-'mon writ, nor without writ. But such as be indicted of larceny 'by inquests taken before sheriffs or bailiffs by their office, or of 'light suspicion, or for petit larceny, that amounteth not above the 'value of 12d. if they were not guilty of some other larceny 'aforetime, or guilty of receipt of felons, or of commandment, or 'force, or of aid in felony done, or guilty of some other trespass for

'which

'which one ought not to lose his life nor member, and a man appealed by a prover, after the death of the prover (if he be no common thief or defamed) shall from henceforth be let out by sufficient surety, whereof the sheriff will be answerable, and that without giving ought of their goods.'

Sheriffs and others.] That is to say, sheriffs and goalers that have custody of goals; so that this act extends not to any of the king's justices or judges of any superior courts of justice. 2 *Inst.* 185. But by a subsequent statute (as hath been said) it is extended to justices of the peace.

But only those, &c.] Here are first set down four sorts of persons which before this act were not bailable by the common writ *de homine replegiando:*

Those that were taken for the death of a man] By the ancient law of the land, in all cases of felony, if the party accused could find sufficient sureties, he was not to be committed to prison; but afterwards it was provided by parliament, that in case of homicide the offender was not bailable. 2 *Inst.* 186.

And even if a person hath dangerously *wounded* another, the justice ought to be very cautious how he takes bail, till the year and day be past; for if the party die, and the offender appear not, he is in danger of being severely fined. 1 *Haw.* 138.

And this statute makes no distinction between such homicide as is malicious, and that which happens by misadventure or in self-defence: And it seems agreed, that justices of the peace, who have power to bail a man arrested for a *light suspicion* of homicide, cannot bail any such person for manslaughter, or even excusable homicide, if it manifestly appear that he was guilty of the fact, let it be ever so plain that it cannot amount to murder. 2 *Haw.* 95. 105.

Or by commandment of the king.] That is, by matter of record in one of his courts, according to law, and not an extrajudicial commandment. 2 *Inst.* 186, 187. So also it is provided in the petition of rights 3 *Car.* that no person shall be detained in prison by the king's special command, without cause certified.

And because some courts, as the king's bench, are before the king, and some before his justices, therefore the act saith, *by commandment of the king,* and the next words be, *or of his justices.* 2 Inst. 186.

Or of his justices.] That is, of any of the courts of *Westminster,* or justices of assize. 2 *Haw.* 96.

Or for the forest.] But as to imprisonment for offences in forests, the law hath been much mitigated by later statutes. 2 *Haw.* 98.

All these four are excepted out of the common writ *de homine replegiando* that the sheriff in his county court, which is not a court of record, shall not replevy any of these four that are committed, although it should be by an unlawful commmitment; but the superior courts at *Westminster,* upon an *habeas corpus,* shall do justice to the party in all these four cases. 2 *Inst.* 187.

Next,

Next, the act doth further provide, that these kinds of prisoners hereafter following (being 13 in number) shall not be repleviſable:

Such prisoners as before were outlawed] Persons outlawed are *attainted* in law, and therefore are not bailable; for the intendment of the law is, that the person standeth indifferent whether he be guilty or no, and not if he be convicted or attainted. 2 *Inst.* 188.

And they which have abjured the realm.] For these also are attainted upon their own confession, and therefore not bailable at all by law. 2 *Inst.* 188.

Provers.] A prover, or *approver*, is a person that confesseth the felony with which he is charged, and undertakes to *prove* another guilty of the same crime; which if he does, he saves his own life, otherwise he shall be immediately executed. And the reason why they are not bailable is, because they are guilty by their own confession, and therefore they do not stand indifferent. 2 *Inst.* 188.

But this concerns not justices of the peace, because no man can become an approver before them, for that they cannot assign a coronor. *Hale's Pl.* 102.

And such as be taken with the manner.] For in this case likewise, he standeth not indifferent whether he be guilty or no, being taken with the *mainer*, that is, with the thing stolen as it were in his *hand*, anciently called *handhabbend*, and the like was anciently called *backberend*, as a bundle or fardle at his *back*; which was used to signify manifest theft. 1 *Inst.* 188.

And those which have broken the king's prison.] Here are two offences; first, his breaking of the prison, for it is presumed that he who is innocent will never break prison; and secondly, his flying, because he confesseth the fact who flies from judgment. 2 *Inst.* 188.

Thieves openly defamed and known] Who, as it seems, ought not to be bailed for any fresh felony, whereof there is probable evidence against them But this seems in a great measure to be left to the discretion of the person who has power to bail them, who on consideration of the circumstances of the whole matter, and the probabilities on both sides, if he finds it reasonable strongly to presume them to be guilty, ought not to bail but commit them. 2 *Haw.* 99.

Such as be appealed by provers, so long as the provers be living, if they be not of good fame] The appeal of the prover is forcible against the appellee, because the approver confesseth himself guilty of the same felony, and therefore it serveth in nature of an indictment against the appellee so long as the approver liveth, unless the appellee be of good fame. 2 *Inst.* 188

And such as be taken for houseburning feloniously done] This was felony by the common law 2 *Inst.* 188.

Or for false money] This was treason by the common law. 2 *Inst.* 188.

Or for counterfeiting the king's seal.] This was also treason by the common law. 2 *Inst.* 188.

For manifest offences] Which seems to be understood of inferior crimes,

crimes of an enormous nature under the degree of felony: as dangerous riots, exorbitant reſcouſes, miſpriſion of treaſon, præmunire, and ſuch like heinous offences. Yet it ſeems to be in a great meaſures left to the diſcretion, to judge in what caſes their crime is ſo flagrant and enormous, that they ought not to have the benefit of it. 2 *Haw.* 99.

Or of treaſon touching the king himſelf] By the common law, a man accuſed or indicted of high treaſon, or of any felony whatſoever, was bailable upon good ſurety, until he were convicted; for at common law, the gaol was his pledge or ſurety, that could find none. 2 *Inſt.* 189.

Shall be in no wiſe replevyſable by the common writ, nor without writ] That is, the ſheriff ſhall not replevy them by the common writ *de homine replegiando*, or without writ, that is, *ex officio*: But all or any of theſe may be bailed in the king's bench. 2 *Inſt* 189.

Next the act ſetteth down ſeven kinds of offenders that may be bailed:

Such as be indicted of larceny by inqueſts taken before ſheriffs or bailiffs] That is, before ſheriffs in their torns, or lords in their leets, or thoſe that have *infangthief* and *outfangthief*. Yet this is expounded that they be of good fame. 2 *Inſt* 190.

Or of light ſuſpicion] But if the preſumption be ſtrong, or the defamation great, the juſtices may refuſe to bail him. *Hale's Pl.* 102. And thi is expounded alſo that they be of good fame. 2 *Inſt.* 190.

Or for petit larceny that amounteth not above the value of 12d. *if they were not guilty of ſome other larceny aforetime*] This act divideth larceny into two kinds; grand larceny, when the thing ſtolen is above the value of 12*d* and petit larceny, when it is of the value of 12*d*. or under 2 *Inſt.* 189.

And it ſeems to be agreed, that there is no neceſſity that ſuch perſons be of good fame; yet upon the conſtruction of the whole ſtatute, if ſuch perſons be taken with the manner, or confeſs the fact, or their crime be otherwiſe open and manifeſt, it ſeems that they ought not to be bailed; but if there be any colour of probability for their innocence, it ſeems moſt agreeable to the intention of the ſtatute to bail them. 2 *Hawk.* 101.

Or guilty of receipt of felons] Theſe are acceſſaries after the fact. 2 *H. H.* 100.

Or of commandment, or force, or aid in felony done] Theſe are acceſſaries before the fact. 2 *H. H.* 100.

But acceſſaries to felonies are not to be bailed, unleſs they be of good reputation: And it ſeems at this day to be ſettled, that where there are ſtrong preſumptions of guilt, ſuch acceſſaries are not bailable by this ſtatute. 2 *Haw.* 102.

Or guilty of ſome other treſpaſs, for which one ought not to loſe his life or member] But it ſeems reaſonable to qualify the generality of this expreſſion, with this limitation, that ſuch accuſation ought to be either on a light ſuſpicion, or elſe that the offence be inconſiderable, or that it be not excluded from bail by ſome ſpecial act of parliament. 2 *Haw.* 99. 2 *H. H.* 135.

And

And a man appealed by a prover, after the death of the prover, if he be no common thief nor defamed] And by parity of reaſon, he may be bailed, if the approver waive his appeal, or be vanquiſhed. 2 *Haw.* 98.

But let out by ſufficient ſurety] If a juſtice take inſufficient ſurety, and the party appear not, he is finable by the judge of aſſize. *H. Pl.* 97. But if the priſoner appear thereupon, the juſtice is ſafe. 2 *Haw.* 89

And if a perſon who has power to take bail, be ſo far impoſed upon, as to ſuffer a priſoner to be bailed by inſufficient perſons, it is ſaid that either he or any other perſon who hath power to bail him, may require the party to find better ſureties, and to enter into a new recognizance with them, and may commit him on his refuſal, for that inſufficient ſureties are no ſureties. 2 *Haw.* 89.

And the perſon who is to take the bail, may examine them on their oaths concerning their ſufficiency. 2 *Haw.* 89. 2 *H. H.* 125.

It is to be obſerved, that the abovemaid ſtatute extends only to bail in criminal offences, and therefore gives no power at all to juſtices of the peace to bail any perſons on proceſs in civil actions, or for contempts to ſuperior courts. 2 *Haw.* 106.

There are furthermore many ſtatutes, which prohibit bail and mainpriſe in very many caſes, and allow the ſame in many others, which are interſperſed among the ſeveral titles which treat of thoſe matters.

And where a ſtatute ordaineth, that an offender ſhall be impriſoned at the king's will or pleaſure, there the priſoner cannot be bailed, till he hath redeemed his liberty by ſuch fine or ranſom as ſhall be aſſeſſed by the king's juſtices in his courts. *Dalt. c.* 167.

Altho' a perſon be committed to be detained without bail or mainpriſe, yet if the offence be by law bailable, he that hath power of bailing may bail him, 2 *H. H.* 135.

V. Who may bail, and the manner of it.

By the common law, the ſheriff and every conſtable, being conſervators of the peace, might have bailed one ſuſpected of felony; but this authority is transferred from them to the juſtices of the peace by ſeveral ſtatutes. *Lamb.* 15.

And it ſeems to be a general rule, that ſo far as any perſons are judges of any crime, ſo far they have power of bailing a perſon indicted before them of ſuch crimes. And upon this ground it ſeems clear, that any two juſtices (1 Q.) may of common right bail perſons indicted at the ſeſſions, for that any two ſuch juſtices may hear and determine the indictment. Alſo it hath been holden, that any one juſtice hath the like power: and this ſeems to be implied by the ſtatute of 1 *R.* 3. *c.* 3. which giving one juſtice power of bailing perſons arreſted for felony *in like form as if ſuch perſons had been indicted at the ſeſſions*, clearly ſuppoſes, that if ſuch perſons had

had been indicted at the seſſions, they might have been bailed by any one juſtice. And if any one juſtice had ſuch power, before the ſtatutes ſpecially relating to the power of juſtices in granting bail, it ſeems that he hath ſtill the ſame power in relation to perſons ſo indicted of any bailable crime under the degree of *felony* becauſe the ſaid ſtatutes ſeem not to reſtrain him in any ſuch caſe, under the degree of felony, from any power which he lawfully might claim before. 2 *Haw.* 103.

But it ſeems difficult to maintain the power of one juſtice to bail a perſon, for any crime *before* indictment, unleſs by ſome ſtatute it be limited to the conuſance of one juſtice, or unleſs it be an offence directly tending to the breach of the peace, the bailing of perſons for which ſeems properly to come under their conuſance as conſervators of the peace. 2 *Haw.* 105.

And Mr. *Dalton* ſays, if it is not in caſe of felony, it ſeemeth that any one juſtice alone may bail a priſoner, except where it is otherwiſe ordered in particular inſtances by ſpecial ſtatutes. *Dalt. c.* 12.

And it ſeems to be agreed, that any one juſtice might always in his diſcretion either bail or impriſon one who has given another a dangerous wound, according as it ſhall appear from the whole circumſtances that the party is moſt likely to live or die; for that every ſuch juſtice being a principal conſervator of the peace, the offence at preſent being only an enormous breach thereof, and no felony, ſeems properly to come under his conuſance. 2 *Haw.* 103.

But by 1 & 2 *P. & M. c* 13. 'If a perſon be arreſted for *manſlaughter*, or *felony*, or *ſuſpicion thereof*, being bailable by law, he 'ſhall not be let to bail or mainpriſe by any juſtices, but in open 'ſeſſions, except it be by two juſtices at the leaſt, (1 Q.) and the 'ſame to be preſent together at the time of the ſaid bailment: 'Which bail they ſhall certify in writing, ſubſcribed or ſigned with 'their own hands, at the next general gaol delivery to be holden 'within the county where the perſon ſhall be arreſted or ſuſpected.

'And the ſaid juſtices, or any one of them, being of the quorum, 'when any ſuch priſoner is brought before them for any man-'ſlaughter or felony, before any bailment, ſhall take the examination 'of the ſaid priſoner, and information of them that bring him, of 'the fact and circumſtances thereof, and the ſame or as much thereof 'as ſhall be material to prove the felony, ſhall put in writing before 'they make the bailment. Which examination together with the 'bailment, the ſaid juſtices ſhall certify at the next general goal de-'livery to be holden within the limits of their commiſſion.

'And the ſaid juſtices ſhall have power to bind all ſuch by recog-'nizance as do declare any thing material, to prove the offence, to 'appear at the next general gaol delivery, to give evidence againſt 'the party on his trial: And ſhall certify the ſame in like manner.

'And any juſtice offending contrary to this act, ſhall on due proof 'by examination, be fined by the judges of aſſize.

'But in *London*, *Middlesex*, and in other cities and towns corporate, justices may let prisoners to bail, as they might before this act; but when they do bail, they are to take and certify the bail and examination as is here directed'.

VI. Requiring excessive bail.

By the declaration of rights 1 *W. sess.* 2. *c.* 2. Excessive bail ought not to be required.

VII. Denying bail where it ought to be granted.

To refuse bail where the party ought to be bailed (the party offering the same) is a misdemeanor punishable not only by the suit of the party, but also by indictment. 2 *Haw.* 90. *H. P.* 97.

VIII. Granting bail where it ought to be denied.

Admitting bail where it ought not, is punishable by the judges of assize by fine; or punishable as a negligent escape at common law. *H. P.* 97.

If the keeper of a prison bail any not bailable, he shall lose his fee and office; if another officer, he shall have three years imprisonment, and make fine at the king's pleasure. 3 *Ed.* 1. *c.* 15.

M. 18 *G.* 2. *K.* and *William Clarke*, esquire. He as a justice of *Surrey* committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill, but the party accused did not appear. And the court granted an information against the justice, declaring they should not have bailed the man themselves. *Str.* 1216.

IX. Of bail by writ of habeas corpus.

If bail cannot otherwise be obtained, the law hath provided a remedy in most cases by the *habeas corpus* act, 31 *C.* 2. *c.* 2. The substance of which is briefly thus:

'If the commitment is for treason or felony, plainly and specially expressed in the warrant of commitment; also if any person is committed and charged as accessary before the fact to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment: In such cases the person shall not be bailed on a writ of *habeas corpus*; otherwise he may be bailed.

'Also if a person is committed for treason or felony specially expressed, yet if he shall in open court the first week of the term, or first day of assize, petition to be tried, and shall not be indicted sometime in the next term or assize after the commitment, he shall upon motion the last day of the term or assize, be bailed, unless it

'shall

'shall appear to the judge upon oath that the king's witneſſes 'could not be produced within that time, and then if he is not tried 'in the ſecond term or aſſize, he ſhall be diſcharged.

'Previous to the aforeſaid bailment, the priſoner or ſome perſon 'on his behalf, ſhall demand of the officer or keeper, a true copy of 'the warrant of commitment, which he ſhall deliver in ſix hours, on 'pain of 100*l.* to the party grieved, for the firſt offence, and 200*l.* 'and forfeiture of his office for the ſecond.

'Then application is to be made in writing, by the priſoner or 'any perſon for him, atteſted and ſubſcribed by two witneſſes who 'were preſent at the delivery thereof, to the court of chancery, 'king's bench, common pleas, or exchequer, or if out of term time, 'to the lord chancellor or one of the judges; and a copy of the 'warrant of commitment ſhall be produced before them, or oath 'made that ſuch copy was denied.

'But if any perſon hath wilfully neglected by the ſpace of two 'terms to apply for his enlargement, he ſhall not have a *habeas cor-* 'pus granted in the vacation.

'This being done, the lord chancellor, or judges reſpectively, 'ſhall award an *habeas corpus* under the ſeal of the court, on pain 'of 500*l.* to be marked in this manner, *Per ſtatutum triceſimo pri-* 'mo Caroli ſecundo regis, and ſigned by theperſon that awards the 'ſame; and ſhall be directed to the officer or keeper, returnable 'immediate.

'And the charges of bringing the priſoner ſhall be aſcertained 'by the judge or court that awarded the writ, and endorſed 'thereon not exceeding 12*d.* a mile.

'Then the writ ſhall be ſerved on the keeper or left at the goal 'with any of the under officers; and the charges ſo endorſed, 'ſhall be paid or tendered to him, and the priſoner ſhall give bond 'to pay the charges of carrying him back if he ſhall be remanded, 'and that he will not make any eſcape by the way.

'This done, the officer ſhall within three days after ſervice (if it 'be within twenty miles) return the writ, and bring the body, and 'ſhall then likewiſe certify the true cauſe of the impriſonment; if 'above twenty miles and leſs than an hundred, then within ten days; 'if above an hundred then within twenty days; on like pain as 'before.

'But after the aſſizes are proclaimed for the county where the 'priſoner is detained he ſhall not be removed.

'Then if it ſhall appear to the ſaid lord chancellor or judges, 'that the priſoner is detained on a legal proceſs, order, or warrant, 'out of ſome court that hath juriſdiction of criminal matters, or 'by warrant of a judge or juſtice of the peace for matters for the 'which by law he is not bailable; in ſuch caſe the priſoner ſhall not 'be diſcharged.

'If he ſhall be diſcharged, he ſhall thereupon enter into re- 'cognizance to appear on his trial; and the writ, and return thereof,

'and

'and recognizance ſhall be certified into the court where the trial 'muſt be.

'But perſons charged in debt, or other action, or with proceſs 'in any civil cauſe, after their diſcharge for a criminal offence, 'ſhall be kept in cuſtody for ſuch other ſuit.

'And perſons ſo ſet at large, ſhall not be recommitted for the 'ſame offence, unleſs by order of court, on pain of 500*l.* to the 'party grieved.'

Two things I ſhall obſerve upon this ſtatute:

1. That altho' the conſtable by his own authority, without any warrant of commitment, may carry an offender to gaol, and this was the method of ſecuring priſoners, before that there were any juſtices of the peace; yet ſince the inſtitution of that magiſtrate, it is better that they be carried before him, to be ſent by him to gaol by warrant of commitment; otherwiſe they have a right to be bailed upon this act, whatever the offence may be.

2. That the warrant of commitment ought to ſet forth the cauſe ſpecially; that is to ſay, not for treaſon or felony in general, but treaſon *for counterfeiting the bills of the State* or felony *for ſtealing the goods of ſuch a one to ſuch a value*, and the like; that ſo the court may judge thereupon, whether or no the offence is ſuch, for which a priſoner ought to be admitted to bail.

Form of bail.

New Jerſey, Eſſex County, BE it remembered, that on the —— day of —— in the —— year of the independence of—— *A. O.* of —— yeoman, *A. B.* of —— yeoman and *B. B* of —— yeoman, came before us *John Moore*, eſquire, and *Richard Burn*, clerk, two of the juſtices of the peace in and for the ſaid county, one whereof is of the quorum, and ſeverally acknowledged themſelves to owe to the people of the ſaid ſtate, that is to ſay, the ſaid *A O.* 20*l.* and the ſaid *A B.* and *B. B.* 10*l.* each, to be reſpectively levied of their lands and tenements goods and chattles, if the ſaid *A O.* ſhall make default in the performance of the condition indorſed, [*or*, underwritten.]

John Moore,
Richard Burn.

The condition of this recognizance is ſuch, that if the within [above] bound A. O. ſhall perſonally appear before the juſtices of the people aſſigned to keep the peace within the ſaid county, and likewiſe to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, at the next general quarter ſeſſions of the peace (or, before the juſtices of goal delivery, at the next general goal delivery) to be holden in and for the ſaid county, then and there to anſwer to the juſtices of the people, for and concerning the felonious taking and ſtealing of —— the property of A. M. of —— yeoman, with the ſuſpicion whereof the ſaid A. O. ſtands charged before us the ſaid juſtices, and to do and

and receive what shall by the court be then and there enjoined him, and shall not depart the court without licence, then the above [within] written recognizance shall be void.

Or, if the party is in prison, and so absent, Lord Hale *says, this is the true form from* Lambard.

New Jersey, Essex-County. BE it remembered, that on the ——— day of——— in the ——— year of the independence of ——— before us John Moore, esquire, and Richard Burn, clerk, two of the justices of the people, assigned to keep the peace within the said county, and one of us of the quorum, at Newark, in the said county, did come A. B. and B. B. of ——— in the said county, yeoman and took in bail until the next goal delivery to be holden in the said county one A O. of ——— labourer, taken and detained in prison for suspicion of a certain felony in stealing ——— the property of———and took upon themselves each of the said A. B and B B. under the penalty of 20l. of good and lawful money of New-Jersey, of the goods and chattles, lands and tenements, of them and each of them, to the use of the people, to be levied, if the said A O. shall not personally appear at the said next general goal delivery before the justices of the people, assigned to deliver the said goal, to stand to right concerning the felony aforesaid according to the law and custom of New Jersey. Given under our seals, &c.

But the seal need not be, for they are judges of record; only it may be barely subscribed by them: or thus,

Taken and acknowledged the day and year above written, before us the abovesaid

John Moore,
Ri. Burn.

And hereupon a warrant issues for his deliverance, thus:

New Jersey, Essex County. JOHN Moore, esquire, and Richard Burn, clerk, two of the justices of ——— and one of us of the quorum, To the keeper of the gaol at ——— in the said county, greeting. Forasmuch as *A. O.* ——— labourer, hath before us found sufficient sureties to appear before the justices of gaol delivery at the next general goal delivery, to be holden in the said county to answer such things as shall be then on the behalf of the people of the state of New Jersey, objected against him, and namely to the felonious taking of ——— (for the suspicion whereof he was taken, and committed to our said gaol) We command you on the behalf of the people of the said state of New-Jersey, that if the said *A. O.* do remain in your said goal for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon

thereon enſue. Given under our hands and ſeals at —— in the ſaid county, the —— day of —— in the —— year ——

Lord *Hale* ſays the advantage of this latter kind of bail is this, that it is not only a recognizance in a ſum certain, but alſo a real bail, and they are his keepers, and may be puniſhed by fine beyond the ſum mentioned in the recognizance, if there be cauſe; and may reſeize him if they doubt his eſcape, and have him committed, and ſo be diſcharged of the recognizance.

BARRATRY.

I. What it is.
II. How puniſhed.

What it is.

THIS word *barratry*, we have received either from the *Danes* or *Normans*, or both: for *barratta* in the *Daniſh*, and *baret* in *Norman* do equally ſignify a quarrel or contention.

And a *barrator*, in legal acceptation, doth ſignify *a common mover, exciter, or maintainer of ſuits or quarrels, either in courts, or in the country.* 1 *Inſt.* 368. 1 *Haw.* 243.

A common mover] It ſeems clear, that no one can be a barrator in reſpect of one act only; for every indictment for ſuch crime muſt charge the defendant with being a *common barrator*. 1 *Haw.* 243, 4.

Mover, exciter, or maintainer] Yet it ſeemeth, that an attorney is in no danger of being judged guilty of an act of barratry, in reſpect of his maintaining another in a groundleſs action, to the commencing whereof he was no way privy. 1 *Haw.* 243.

Alſo, it hath been holden, that a man ſhall not be adjudged a barrator, in reſpect of any number of falſe actions brought by him in his own right: for in ſuch caſes he is liable to coſts. 1 *Haw.* 143.

In courts] Either courts of record; or not of record, as in the country, hundred, or other inferior courts. 1 *Inſt.* 368.

Or in the country] In three manners: 1. In diſturbance of the peace. 2. In taking or keeping of poſſeſſions of lands in controverſy, not only by force, but alſo by ſubtilty and deceit, and moſt commonly in ſuppreſſion of truth and right. 3. By falſe inventions, and ſowing of calumniations, rumors, and reports, whereby diſcord and diſquiet may grow between neighbours. 1 *Inſt.* 368.

II. How puniſhed.

By the ſtatute of 34 *Ed.* 3. *c.* 1. 'The juſtices of the peace ſhall 'have power to reſtrain all barrators, and to purſue, arreſt, take, and 'chaſtiſe them, according to their treſpaſs or offence.'

And altho' this ſtatute doth not create the offence, but ſuppoſes it

it at common law, and only appoints the punishment, yet an indictment of barratry, concluding *against the form of the statute*, is holden to be good, and agreeable to many precedents. *Cro. Eliz.* 148. 1 *Haw.* 244.

But it hath been resolved, that such indictment is not good, without also concluding *against the peace*; for this is an essential part of it, as being an offence by the common law. 1 *Haw.* 244.

And it hath been holden, that an indictment of this kind may be good, without alledging the offence at any certain *place*; because from the nature of the thing, consisting of the repetition of several acts, it must be intended to have happened in several places; for which cause it is said, that a trial ought to be by a jury from the body of the county. 1 *Haw.* 244.

Which case, and that of a common scold, seem to be the only offences for which a general indictment will lie, without shewing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath settled it to be sufficient to charge a man generally as a common barrator, and before the time to give the defendant a note of the particular matters which are intended to be proved against him; for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances: and therefore the court generally will not suffer the prosecution to go on in the trial of the indictment, without such note being given to the defendant. 1 *Haw.* 244. 2 *Haw.* 226. 7.

As to the kind and manner of punishment, it is said, that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behaviour; and if he be of any profession relating to the law, that he ought also to be farther punished, by being disabled to practice for the future. 1 *Haw.* 244.

Warrant for a Barrator.

New-York, Queen's County. } To any constable of said county.

WHEREAS complaint upon oath hath been made unto me ——one of the justices of the peace in and for the said county, that A. O. of——in the said county, yeoman, on the——day of——in the——year of the independence of——and on divers other days and times as well before as afterwards, at——aforesaid, in the county aforesaid, and at divers other places within the county aforesaid, was and yet is a common barrator, and daily disturber of the peace of the people of the State of New-York, and also a common brawler, wrangler, fighter, scandalizer, and sower of seditions, suits, and discords between his neighbours, and other the liege

liege citizens of the State of New-York, to the great damage and disturbance of the people of the said State, and against the peace of the people of the said State, and to the evil example of all others in the like case offending: These are therefore to command you forthwith to bring the said A. O. before me to answer unto the said complaint, and to find sureties for his personal appearance at the next general quarter sessions of the peace to be holden for the said county then and there to answer unto an indictment on the behalf of the people of the State of New-York, preferred against him for the said offences. Hereof fail not upon the peril that shall ensue thereon. Given under my hand and seal the ——— day of———

BASTARDS.

I. Who shall be deemed a bastard.

THE word *bastard* seemeth to have been brought unto us by the *Saxons*; and to be compounded of *base*, vile or ignoble, and *start* or *steort* signifying a rise or original. By the common people in the north (amongst whom is preserved much of the ancient *Saxon*) it is still pronounced *bastart*, denoting a person sprung from a vile or spurious origin; even as an *upstart* is a person suddenly risen from a mean extraction in general.

Lord *Coke* says, We term all by the name of bastards that are born out of lawful marriage. By the common law, if the husband be within the four seas, that is, within the jurisdiction of the king of *England*, if the wife hath issue, no proof is to be admitted to prove the child a bastard, unless the husband hath an apparent *impossibility* of procreation, as if the husband be but eight years old, or under the age of procreation, such issue is bastard, albeit he be born within marriage. But if the issue be born within a month, or a day, after marriage, between parties of full lawful age, the child is legitimate. 1 *Inst* 245.

M. 6 *G.* 2 *Lomax* and *Holmden*. In ejectment the question on a trial at bar was, whether the lessor was son and heir of *Caleb Lomax*, esquire, deceased: which depended on the question of his mother's marriage. And that being fully proved, and evidence given of the husband's being frequently at *London*, where the mother lived, so that access must be presumed; the defendants were admitted to give evidence of his inability from a bad habit of body. But their evidence not going to an *impossibility*, but an *improbability* only; that was not thought sufficient, and there was a verdict for the plaintiff. *Str.* 940.

And it is said, that formerly if the husband was within the four seas, no proof of *non access* to his wife was admitted, but the child was deemed to be his; but as the notion was built on no rational foundation

foundation, it is now intirely departed from; and though the husband and wife are both in *England*, if there is sufficient proof that he had no access to her, the child will be a bastard. And this was determined in the case of *Pendrell* and *Pendrell*, *M.* 5 *G* 2. which was an issue out of chancery, to try whether the plaintiff was the heir at law of one *Thomas Pendrell*. It was agreed that the plaintiff's father and mother were married, and cohabited for some months; that they parted, she staying in *London*, and he going into *Staffordshire*; that at the end of three years the plaintiff was born. And there being some doubt upon the evidence, whether the husband had not been in *London* within the last year, it was sent to be tried. And the plaintiff rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access. And it was agreed by court and counsel, on the trial at *Guildhall* before Lord Ch. J. *Raymond*, that the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider of the point of access, which they did, and found against the plaintiff. And the court of chancery acquiesced in the determination. *Str.* 925. *Andr.* 9.

M. 10. *W. K.* and *Abberton*. The case was, a feme covert, during the absence of her husband at *Cadiz*, was brought to bed of a bastard; and her husband was not in *England* from the time of her conception, till she was brought to bed. The question was, whether this child was a bastard, especially within the words of the statute of 18 *Eliz.* (hereafter following) which saith, *children begotten and born out of lawful matrimony*; which cannot be said of this case, the mother being married at the time of the birth of the child: and if such a mother should kill such a child, she could not be guilty of murder within the statute of the 21 *J. c.* 27. But by the court; He is a a bastard who is begotten and born of a feme covert, whilst the husband is beyond the four seas. And in a real action, if general bastardy was pleaded, the bishop ought to certify such a one a bastard. And where a man is a bastard, he is such to all purposes, and why not within the 18 *El.* For though the statute of 21 *J.* is a penal law, yet the act of 18 *El.* is a remedial law. L. *Raym.* 395. 396.

But this non-access of the husband ought to be proved otherwise than upon the wife's oath: as in the following case; *M.* 8 *G.* 2 K. and *Reading*. The defendant *Reading* was adjudged by an order of bastardy, to be the putative father of a bastard child, begotten of the wife of one *Almont* of *Sherborn*. The said woman, on the appeal, gave evidence, that the said *Reading* had carnal knowledge of her body in or about *August* 1732, and several times since; and that her husband had no access to her from *May* 1731, to the time of her examination in that court, being the 3d of *Oct.* 1733, and that the said *Reading* was the father of the said child. And the question on removal of the same into the king's bench was, whether the wife

in this case could be admitted as an evidence for or against her husband, and to bastardize her own child. And the whole court were of opinion, that the wife could be a witness to no other fact but that of incontinence, and that this she must be admitted to be a witness to and from the necessity of the thing; but not to the absence of her husband, which might properly be proved by other witnesses; and likened it to the case of hue and cry, where the person robbed shall be admitted a witness of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, because that may be proved by others. *Sess C V* 2. 175.

M. 5 *An St. George's* and *St. Margaret's Westminster.* Where a woman is separated from her husband by a divorce *a mensa & thoro*, the children she has during the separation are bastards; for a due obedience to the sentence shall be intended, unless the contrary be shewed; but if a husband and wife, without sentence, do part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved, for access shall be intended.—But if a special verdict find the man had no access, it is a bastard; and so was the opinion of Lord *Hale*, in the case of *Dickens* and *Collins*. 1 *Salk.* 123.

The law hath appointed no exact certain time, for the birth of legitimate issue, by the widow after the death of her husband. 1 *Danv* 762.

M 7 *J. Alsop* and *Bowtrell.* The question was, whether the woman being delivered of a child forty weeks and nine days after the death of her husband, such child shall be deemed a bastard. And it was proved, that her deceased husband's father did much abuse her, and caused her to lie in the streets: and three physicians (two of them being doctors of physick) made oath, that the child came in time convenient to be the child of the party who died: and that the usual time for a woman to go with child, is nine months and ten days, to wit, solar months, at thirty days to the month, and not lunar months: and that by reason of the want of strength in the woman or the child, or by reason of ill usage, she might be a longer time, *viz.* to the end of ten months or more. And the physicians further affirmed, that a perfect birth may be at seven months, according to the strength of the mother or child, which is as long before the time of the proper birth. And by the same reason it may be as long deferred by accident which is commonly occasioned by infirmities of the body, or passions of the mind. And the child was adjudged to be legitimate. *Lev. Ja.* 541.

By the 18 *El. c.* 3 it is enacted as follows: 'Concerning bastards begotten and born out of lawful matrimony, the said bastards being now left to be kept at the charges of the parish where they be born, to the burden of the same parish, and to the evil example and encouragement of lewd life, it is enacted, that two justices (1 Q.) in or next unto the limits where the parish church

church is, within which parish such bastard shall be born, upon examination of the cause and circumstance, shall and may by their discretion, take order, as well for the punishment of the mother and reputed father, as also for the better relief of such parish, in part or in all; and shall and may, by like discretion, take order for the keeping of every such bastard child, by charging such mother or reputed father, with the payment of money weekly, or other sustentation for the relief of such child, in such wise as they shall think meet and convenient: And if after the same order by them subscribed under their hands, the mother or reputed father, upon notice thereof, shall not for their part observe and perform the said order, that then every such party, so making default in not performing the said order, to be committed to ward to the common goal, there to remain without bail or mainprise, except he or she shall put in sufficient surety to perform the said order, or else personally to appear at the next general sessions of the peace, to be holden in that county where such order shall be taken: and also to abide such order as the said justices, or the more part of them, then and there shall take in that behalf (if they then and there shall take any): and that if at the said sessions, the said justices shall take no other order, then to abide and perform the order before made, as is abovesaid.'

Upon which statute, the form of an order of bastardy may be to this effect:

New-Jersey, Essex County. THE order of *J. P.* and *K. P.* esquires, two of the justices of the peace in and for the said county, one whereof is of the *quorum*, and both residing (in, or) next unto the limits of the township of ——— in the said county, made the ——— day of ——— in the ——— year ——— concerning a (male) bastard child, lately born in the township of ——— aforesaid, of the body of *A. M.* single woman:

Whereas it hath appeared unto us the said justices, as well upon the complaint of the overseers of the poor of the said township of ——— as upon the oath of the said *A. M.* that she the said *A. M.* on the ——— day of now last past, was delivered of a (male) bastard child at ——— in the said township of ——— in the said county and that the said bastard child is now chargeable to the said township of ——— and likely so to continue; and further that *A. F.* of ——— in the said county, yeoman, did beget the said bastard child on the body of her the said *A. M.* And whereas the said *A. F.* hath appeared before us, in pursuance of our summons for that purpose, but hath not shewed any sufficient cause why he the said *A. F.* shall not be the reputed father of the said bastard child: [Or, And whereas it hath been duly proved to us upon oath, that the said *A. F.* hath been duly summoned to appear before us the said justices, to the end we might examine into the cause and circumstances

cumſtances of the premiſes; and whereas he the ſaid *A. F.* hath neglected to appear before us, according to ſummons:] We therefore upon examination of the cauſe and circumſtance of the premiſes, as well upon the oath of the ſaid *A. M.* as otherwiſe, do hereby adjudge him the ſaid *A. F.* to be the reputed father of the ſaid baſtard child.

And thereupon we do order, as well for the better relief of the ſaid townſhip of ——— as for the ſuſtentation and relief of the ſaid baſtard child, that the ſaid *A. F.* ſhall and do forthwith, upon notice of this our order, pay or cauſe to be paid to the ſaid overſeers of the poor of the ſaid townſhip of ——— or to ſome or one of them, the ſum of ——— for and towards the lying-in of the ſaid *A. M.* and the maintenance of the ſaid baſtard child, to the time of making this our order.

And we do alſo hereby further order, that the ſaid *A F.* ſhall likewiſe pay or cauſe to be paid, to the overſeers of the poor of the ſaid townſhip of ——— for the time being, or to ſome or one of them, the ſum of ——— weekly and every week from this preſent time, for and towards the keeping, ſuſtentation, and maintenance of the ſaid baſtard child, for and during ſo long time as the ſaid baſtard child ſhall be chargeable to the townſhip of ——— in caſe ſhe ſhall not nurſe and take care of the ſaid child herſelf.

Given under our hands and ſeals the day and year firſt above written.

One whereof is of the quorum] Many orders formerly have been quaſhed, for want of ſetting forth that one of the juſtices was of the *quorum*; but now by the ſtatute of 26 *G.* 2. *c.* 27. no order ſhall be quaſhed for that defect only.

Whereas it hath appeared unto us] *K. and Beard.* The examination of the woman muſt be by two juſtices as well as the ordering part; for the examination is a judicial act, and ought to be by both; and it is not enough that one ſhould examine, and make report to the other; but if they are both preſent, and one only examine, it is well enough, for it is in fact the examination of both. 2 *Salk.* 478

As well upon the complaint of the overſeers] An order made without the complaint of the townſhip officers, is not good. *Black.* 44.

As upon the oath of the ſaid A. M.] It ſeemeth that the mother may be examined upon oath concerning the reputed father, and of the time and other circumſtances; for that in this caſe, the matter, and the trial thereon, dependeth chiefly upon the examination and teſtimony of the mother. *Dalt. c.* 11.

Was delivered of a (male) baſtard child.] *H.* 8 *G. K.* and *England.* An order was quaſhed, becauſe the ſex of the baſtard, or the name of it were not mentioned; only, a certain baſtard child born of the body of ſuch woman. *Str.* 503.

At ——— in the ſaid townſhip of ———] *M.* 11 *An. Q.* and *Caſh.* The order did not ſet forth that the child was born in the townſhip; and by the ſtatute the juſtices cannot make an order to compel

compel a man to contribute towards the maintenance of a baſtard child, but in caſe of that townſhip where the child was born: And quaſhed for this reaſon. *Caſ. of S.* 59.

And upon this head it is obſervable, that there is one caſe, which although it frequently happeneth, yet is not within the ſtatute and that is, where a baſtard is born in a townſhip where the mother hath no ſettlement. The child ſhall go with its mother for nurture, whilſt it is a nurſe child, to her place of ſettlement; and ſuch place can have no remedy upon this ſtatute, for that the child was not born there. And it ſeemeth that the townſhip where it was born, ſhall not be liable to maintain it, until the child ſhall be lawfully removed thither, as to its place of ſettlement.

Upon which ground alſo it ſeemeth not ſafe, to grant a certificate with a woman with child of a baſtard, thereby indemnifying the townſhip where it ſhall be born, and promiſing to receive and provide for the baſtard child when it ſhall become chargeable. For the townſhip granting ſuch certificate, can have no remedy againſt the mother or reputed father, but only the townſhip where the child was born; nor can that townſhip neither, becauſe it is indemnified.

Summons] If the order do not ſet forth, that the defendant was duly ſummoned to appear, and for what cauſe, it ought to be quaſhed. *K.* and *Glegg.* 10 *Mod* 4.

E. 8 *G.* 2 *K* v. *Taylor* and *Neale.* Motion in the king's bench for an information againſt the defendants two juſtices of *Devonſhire*, for making an order on one *Nicholas Mould*, adjudging him to be the putative father of a baſtard child, without ſummoning him, and alſo for refuſing to hear his witneſſes On ſhewing cauſe, it appeared that he was ſummoned by a third juſtice, which the court held to be ſufficient; but that the defendant not appearing himſelf, the juſtices would not hear his witneſſes. And by the court, ſuppoſing the man was ſummoned, and did not appear, the juſtices are not then bound to hear any evidence in behalf of a perſon, who ſhould attend here, and does not. *Seſſ C. V.* 2. 192.

Do hereby adjudge] *T.* 4 *Ann. Q.* and *Weſton.* The great objection which ſtuck long with the court, was, that it was ſaid in the order, we the the ſaid juſtices *doth* adjudge, inſtead of *do* adjudge: and after the caſe had depended two terms, and been ſeveral times ſtirred, the court for that exception, the laſt day of the term, quaſhed the order. L. *Raym* 1198.

Adjudge the ſaid A F *to be the reputed father*] *E.* 20 *C.* 2 *K* and *Perkaſſe* An order was quaſhed, becauſe, there was no adjudication that the perſon againſt whom the complaint was made, was the reputed father. 2 *Sid* 363

The ſum of —— for and towards the lying-in] *M.* 12 *An. Q.* and *Odam.* Order for maintenance of a baſtard child, was excepted to, becauſe the defendant is upon ſight of the order to pay 9*l.* in groſs, and after that, ſo much weekly. And by the court; by the ſtatute the juſtices are to take order for relief of the townſhip, and

and keeping of the child, by payment of money weekly, or other ſuſtentation; and this may be only indemnifying the townſhip for money laid out before the reputed father was found. 1 *Salk.* 124.

The ſum of —— weekly] *E.* 20 *C.* 2 *K* and *Perkiſſe.* It was moved in the court of king's bench, to quaſh an order for maintaining a baſtard child, made at the quarter ſeſſions, and the exception was, becauſe it was unreaſonable, in reſpect of the ſmallneſs of the ſum; namely, but 2*d.* a week for the maintenance of the child: And the court were of opinion that it ſhould be quaſhed, unleſs cauſe ſhewn: and they ſaid, that altho' none but the juſtices could declare the father, yet if they were unreaſonable in the ſum, the court might judge of that. 2 *Sid.* 363.

During ſo long time as the ſaid baſtard child ſhall be chargeable] *E.* 9 *W. K.* and *Barebaker.* Order to pay ſo much money by the week, till the child ſhall be fourteen years of age, is naught; for the juſtices have no power but to indemnify the townſhip; and that is only to oblige him to maintain the child, as long as it is or may be chargeable. 1 *Salk.* 121. 2 *Salk.* 478.

HAVING thus diſtinctly conſidered the form of an order of baſtardy as eſtabliſhed upon the ſtatutes aforegoing, I proceed to ſome other reſolutions upon the ſaid ſtatutes, concerning divers matters not relating to the form of ſuch order; Which are theſe 1. In what time the order ſhall be made. 2. Whether the juſtices can order ſecurity to be given to perform their order. 3. To what ſeſſions the appeal againſt the order ſhall be. 4. Whether the ſeſſions can proceed originally in the caſe of baſtardy. 5. Whether on appeal it is neceſſary that the reputed father ſhall be preſent in court. 6. In what caſe the order of ſeſſions ſhall be final.

1. *In what time the order ſhall be made.* There is no time limited by the ſtatute, in which the order ſhall be made; ſo that it may be made at any time after the birth of the child.

And in caſe of *K.* and *Miles M.* 1 *G.* On motion to quaſh an order of baſtardy, it was reſolved, that if the father run away, and return, tho' 14 years after, yet an order to fix the child on him is good; for there is no ſtatute of limitation in theſe caſes. *Seſſ. C. V.* 1. 77.

2. *Whether the juſtices can order ſecurity to be given to perform their order.* *E.* 2 *An.* 2. and *Chaffey.* Exception was taken that the order was, that the defendant ſhall give ſecurity for payment of the ſum by them impoſed for the maintenance of the child; when it did not appear, that the defendant had diſobeyed the order in point of payment. And for this reaſon, the order was quaſhed as to that part. L. *Raym* 858. 2 *Salk.* 66.

And ſo are the words of the ſtatute; viz. *if the party ſhall not perform the ſaid order,* he ſhall then (ſo making default) be committed, unleſs he ſhall put in ſurety to perform the ſame, or to appear at the ſeſſions.

3. *To what ſeſſions the appeal againſt the order ſhall be.* The ſtatute directs,

directs, that the appeal shall be *to the next general sessions of the peace to be holden in that county, where such order shall be taken.*

4. *Whether the sessions can proceed originally in the case of bastardy.* It hath been much disputed, whether the sessions may make an original order, in the case of bastardy, by the statute of the 3 *Car. c.* 4. in like manner as the two justices may do by the 18 *El.* If a conjecture may be allowed, after so long a space of time from the making the said acts, and after the opinions of so many learned men thereupon; it should be this: In the first place, as to those who hold the negative, namely that the sessions cannot proceed originally upon the said statute of 3 *Car.* it is clearly observable, albeit their opinion may be true, that it resteth upon a false foundation, namely, upon a supposition that the said statute of 3 *Car.* is expired: which is a palpable oversight committed by one author, and followed by others without examination (a thing not unusual in this kind of learning). Supposing therefore that the statute of the 3 *Car.* is of force, let us put the case, that the sessions may proceed originally thereupon, in like manner as the two justices may do by the 18 *El.* then there will appear this difficulty upon the face of it, that after the sessions shall have made such order, if the party shall make default in the performance thereof, then (according to the directions of the said statute of 18 *El.*) the party so making default shall put in surety to perform the said order, or else personally to appear at the next sessions, to abide such order as shall there be made in the premises, or shall be committed for his refusal. Which implies an appeal from one sessions to another; a thing which is unknown to our laws, an appeal always supposing a removing the cause from an inferior to an higher jurisdiction, and not from the same court to the same court. Now the obvious resolution of the matter perhaps may be this; the statute of the 18 *El.* which was a temporary act, doth require, that if the party doth make default in performance of the order of the two justices, they shall commit him to gaol, unless he shall put in surety to perform the said order, or else personally to appear at the next sessions, and to 'abide such order 'as the justices there shall take in that behalf (if they then and there 'shall take any) and that if at the said sessions they shall take no other 'order, than to perform the said order before made;' without any special power given to the sessions, either by that act or any other, to take any order therein at all. Then comes the statute of 3 *Car. c.* 4. which enacteth, that the said statute of 18 *El.* shall be continued, together with this supplementary clause, that 'the justices in 'sessions may do and execute all things concerning the said statute 'of 18 *El.* that by the justices of the several counties are by the 'said statute limited to be done.' And then the whole taken together will amount to no more than this; that the two justices out of sessions shall take order for the punishment of the mother and reputed father, and for the relief of the township, and that if upon appeal the matter shall come before the sessions, the sessions shall have

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power to determine thereupon, and to take such order therein, as the two justices may do out of sessions.

So that upon this supposition, the statute of the 3 *Car.* doth not give the sessions a power to proceed originally, and so deprive the party of the benefit of an appeal, but only explains the power intended by the 18 *El.* of the sessions upon an appeal to hear and determine the same.

5. *Whether on appeal it is necessary that the reputed father shall be present in court. H.* 8 *W. K.* and *Matthews.* The court will not quash an order of bastardy, unless the reputed father be present in court 2 *Salk* 475.

And the reason is, that if the cause shall go against him, he may be proceeded against, in case of contempt or disobedience.

6. *In what case the order of the sessions shall be final M.* 13. *G. K.* and *Tenant* The order of two justices being quashed upon the merits by the sessions on an appeal, the defendant is thereby legally acquitted, and cannot be drawn in question again for the same fact. *L. Raym* 1422 4. *Str.* 716.

If the two justices make an order, and the party appeals to the next sessions, and they alter or discharge, or confirm that order, any other sessions cannot order any thing contrary thereto, for the order upon the appeal is final. *Cro. Car.* 341, 350. *Pridgeon's* case.

[Sometimes bonds are given to the overseers of the poor, to save the township or precinct harmless in the case of a bastard child; but whether a bond ought to be made to the overseers and their successors, or to their executors or administrators, hath been questioned. Those who take upon them to direct such sureties, would do well to consider whether the overseers of the poor are such a corporation as can purchase sue, and be sued; and whether it may not be difficult for their successors in office to maintain an action, on a bond made to their predecessors. In these American states, the overseers of the poor are generally chosen or appointed pursuant to the laws of the several legislatures; by which laws they are positively to be ruled and guided, yet where they are silent in the matter, it would seem to me that the justices order is more convenient for the township, than a bond to the overseers, because the carrying the order into execution, is short and easy, compared to the course of suing a bond.]

By the 21 *J. c.* 27. 'If any woman be delivered of any issue 'of her body, male or female, which being born alive, should by 'the laws of this realm be a bastard, and she endeavour privately, 'either by drowning, or secret burying thereof, or any other ways, 'either by herself, or the procuring of others, so to conceal the 'death thereof, as that it may not come to light, whether it were 'born alive or not, but be concealed, she shall suffer death as in 'case of murder, except she can prove by one witness at the least, 'that the child was born dead.'

And it hath been adjudged, that in order to convict a woman by force of this statute, there is no need that the indictment be drawn specially

specially, or conclude against the form of the statute: for the statute doth not make a new offence, but only makes such concealment an undeniable evidence of murder. 2 *Haw.* 438.

Also, it hath been agreed, that where a woman appears to have endeavoured to conceal the death of such child within the statute, there is no need of any proof that the child was born alive, or that there were any signs of hurt upon the body, but it shall be undeniably taken that the child was born alive, and murdered by the mother. 2 *Haw.* 438.

But it hath been adjudged, that where a woman lay in a chamber by herself, and went to bed without pain, and waked in the night, and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it till the following night, yet she was not within the statute, because she knocked for help. 2 *Haw.* 438.

Also it hath been agreed, that if a woman confess herself with child beforehand, and afterwards be surprized and delivered, no body being with her, she is not within the statute, because there was no intent of concealment, and therefore in such cases it must appear by signs of hurt upon the body, or some other way, that the child was born alive. 2 *Haw.* 438.

If a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy her child within her; and therefore he that gives her a potion to this end, must take the hazard, and if he kills the mother, it is murder. 1 *H. H.* 429, 30.

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, tho' it be a great crime, yet it is not murder nor manslaughter by the laws of *England*, because it is not yet *in rerum natura*, nor can it legally be known, whether it were killed or not: So it is, if after such child were born alive, and after died of the stroke given to the mother, this is not homicide. 1 *H. H.* 433.

But if a man procure a women with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement kill the infant; this is murder in the mother, and the procurer is accessary. 1 *H. H.* 433.

A bastard can have no name of reputation as soon as he is born; but after he is born, and hath gained by time a name by reputation, he may purchase by his reputed name, to him and to his heirs; tho' he can have no heirs but of his body. 1 *Inst.* 3. 6 *Co.* 65.

A bastard is *terminus a quo*; he is the first of his family, for he hath no relation of which the law takes any notice; but this must be understood as to civil purposes, for there is a relation as to moral purposes; therefore he cannot marry his own mother, sister, or the like. 3 *Salk.* 66.

A woman shall not be sent to the house of correction, until after the child be born, and that it be living; for it must be such a child as may be chargeable to the township. *Dalt. c.* 11.

Also it seemeth, that such bastard child is not to be sent with the mother to the house of correction, but rather that the child should remain in the town where it was born (or settled with the mother) and there to be relieved by the work of the mother, or by relief from the reputed father; and yet the common opinion and practice is otherwise. *viz.* to send the child with the mother to the house of correction; and this may also seem reasonable, where the child sucketh on the mother. *Dalt. c.* 11.

But it seemeth much the best, to commit the mother only, and not the child, but leave it to her choice whether she will take it with her; and if she will not, then to send it to its lawful place of settlement.

Voluntary examination of a woman with child of a bastard.

New York, King's County, THE voluntary examination of *A. M.* of——— in the said county, single woman, taken on oath before me ——— one of the justices of the peace in and for the said county, this ——— day of ———

Who saith, that she is now with child, and that the said child is likely to be born a bastard, and be chargeable to the township of ———in the said county, and that A. F. of———in the said county weaver, is the father of the said child.

The mark of
* A. M.

Taken and signed the day and year above written before me

J. P.

Examination after the birth.

New-York, King's County. THE examination of *A. M.* of ———in the said county singlewoman, taken on oath before me ——— one of the justices of the peace in and for the said county, this ——— day of ———

Who saith, that on ——— the ——— day of———now last past, at———in the township of———in the county aforesaid, she the said *A. M.* was delivered of a (male) bastard child, and that the said bastard child is likely to become chargeable to the said township of ——— and that *A. F.* of———in the said county, weaver, did get her with child of the said bastard child.

The mark of
* A. M.

Taken and signed the day and year above written before me

J. P.

Warrant

Warrant for apprehending the reputed father, before the birth.

New-York, } To any conſtable of ſaid county.
King's County. }

WHEREAS *A. M.* of ——— in the ſaid county, ſinglewoman, hath by her voluntary examination, taken in writing upon oath, before me ——— one of the juſtices of the peace in and for the ſaid county, this preſent day declared herſelf to be with child, and that the ſaid child is likely to be born a baſtard, and to be chargeable to the townſhip of ——— in the ſaid county, and that *A. F.* of ——— in the ſaid county, weaver, is the father of the ſaid child: And whereas O. P. one of the overſeers of the poor of the townſhip of ——— aforeſaid, in order to indemnify the ſaid townſhip in the premiſes, hath applied to me, to iſſue out my warrant for the apprehending of the ſaid A. F. I do therefore hereby command you immediately to apprehend the ſaid A. F. and to bring him before me or ſome other of the people's juſtices of the peace for the ſaid county, to find ſufficient ſurety for his appearance at the next general quarter ſeſſions [*or*, next general ſeſſions] of the peace to be holden for the ſaid county, then and there to abide and perform ſuch order or orders as ſhall be made in the premiſes, and to be dealt with according to law. Given under my hand and ſeal the ——— day of &c.

The like after the birth.

New-York, } *To any conſtable of ſaid county.*
King's County. }

WHEREAS *A. M.* of ——— in the ſaid county, ſinglewoman, hath by her examination in writing, upon oath, before me ——— one of the juſtices of the peace in and for the ſaid county, declared, that on the ——— day of ——— now laſt paſt, at ——— in the townſhip of ——— and in the county aforeſaid, ſhe the ſaid *A. M.* was delivered of a (male) baſtard child, and that the ſaid baſtard child is likely to become chargeable to the ſaid townſhip of ——— and hath charged *A. F.* of ——— in the ſaid county, weaver, with having gotten her with child of the ſaid baſtard child: And whereas *O. P.* one of the overſeers of the poor [*and ſo on as in the aforegoing precedent to the end.*]

A recognizance to appear at the next ſeſſions.

THE condition of this recognizance is ſuch, that if the ſaid A. F. do and ſhall appear at the next general quarter ſeſſions (or the next general ſeſſions) of the peace to be holden for the ſaid county, and ſhall then and there abide and perform ſuch order or orders

orders shall be at the said sessions touching his being charged with begetting a child on the body of A. M. singlewoman, which child is likely to be born a bastard, and be chargeable to the said township of ———Then this recognizance to be void, otherwise of force.

If it be after the birth then say, For begetting a bastard child, born in the township of —— — in the said county on the body of A. M. singlewoman, which child is now chargeable (or, like to become chargeable) to the said township of ———Then this recognizance to be void.

Mittimus before the birth, for not finding sureties.

To the Keeper of *King's County* goal.

I HEREWITH send you the body of C. D. brought before me this present day, and charged upon the oath of A. B. &c. to have begotten her with child which child, when born, will be a bastard he the said C. D. having refused before me to find sufficient sureties for his good behaviour, and personal appearance, at the next general quarter sessions of the peace to be holden for the said county, to answer the said charge: These are therefore to require you, to receive the said C. D. into your custody, and him safely to keep, until he shall be thence delivered by due course of law; hereof fail not. Given under my hand and seal, at ———

A superfedeas in bastardy.

WHEREAS C. D. of ——— hath before me found sufficient sureties for his good behaviour, and personal appearance at the next sessions of the peace to be holden for the said county, after A. B. single woman, shall be delivered of a bastard child (or children) of which she is now pregnant, and upon her oath charges the said C. D. to be the father which when born, is likely to become chargeable to the said township, as the overseers thereof, have complained.

These are therefore to require you upon sight hereof, not to arrest, attach, or otherwise imprison him the said C. D. if for the cause aforesaid and no other, as you will answer the contrary; and for your so doing this shall be your sufficient warrant. Given under my hand and seal, the ——— day of, &c.

If he doth not find sureties, then he is to be committed.

A bond to the overseers of the poor.

KNOW all men by these presents, That we, D. E. and F. G. of *Amboy*, in the county of *Middlesex*, in the state of N. J. merchants, and H. I. of the same place carpenter, are held and firmly bound unto K. L. and M. N. overseers of the poor for the time being, in the just and full sum of *Fifty Pounds*, good and lawful money

money of the ſtate of N. J. aforeſaid; to be paid to the ſaid overſeers of the poor, or to either of them, or to either of their certain attornies, ſucceſſors or aſſigns. For the which payment well and truly to be made or done, we do bind ourſelves, our heirs, executors, and adminiſtrators, jointly and ſeverally, for and in the whole, firmly by theſe preſents. Sealed with our ſeals. Dated this 20th day of *July annoq. domini* 1787.

THE condition of this obligation is ſuch, That if the above bounden D. E. F. G. and H. I. or any of them, their or any of their executors or adminiſtrators do, or ſhall from time to time, and at all times hereafter, well and ſufficiently ſave, defend keep harmleſs and indemnify the above named K. L. and M. N. overſeers, of the poor for the time being, of the townſhip, &c. aboveſaid; and alſo all and every other the inhabitants which now are, or hereafter ſhall be of the townſhip, and every of them reſpectively, of and from the finding, keeping, educating, inſtructing, bringing up, and providing for ſuch child or children, as S. H. ſinglewoman late of the ſaid townſhip, now goeth withal. [or if born, ſay, a male child of which S. H. ſinglewoman was lately delivered of] whereof the ſaid D. E. is the reputed father, and of and from the charges of lying-in of the ſaid S. H. of ſuch child or children; and of and from all actions, ſuits, coſts, charges, troubles, expences, damages, and demands whatſoever, which they or any of them ſhall or may happen to incur, ſuſtain, or be put unto, for or in reſpect of ſuch child or children, or the lying-in of the ſaid S. H. as aforeſaid: That then this obligation to be void, or elſe to remain in full force and virtue.

A warrant for apprehending a woman on ſuſpicion of having murdered her baſtard child.

WHEREAS complaint upon oath hath been made unto me by C. D. That A. B. hath had a child born alive of her body, and is ſuſpected to have murdered, or elſe made away the ſaid child, ſince the birth thereof. Theſe are therefore, in the name of the people, to charge and command you, that immediately upon ſight hereof, you apprehend and bring the body of the ſaid A. B. before me, or ſome other of the people's juſtices of the peace for the ſaid county, to anſwer ſuch matters and things, as on the behalf of the people of the ſtate of New-York ſhall be objected againſt her, touching the premiſes; and alſo to make diligent ſearch, by all lawful means for the finding out the child aforeſaid; and to bring before me, or ſome other juſtice of the peace for the ſaid county, all ſuch perſons as can give any information on the behalf of the people, touching the ſame. And hereof fail not as you will anſwer the contrary. Given under my hand and ſeal, the ——— day of, &c.

[In moſt of the American ſtates, are particular laws of the legiſlature of the ſaid ſtates relating to baſtards, and fornication. And

thoſe

thoſe laws are the general guide for the proceedings, yet are they ſeldom ſo full, as not to need the aforegoing inſtructions. In New-Jerſey the law relating to baſtards is very conciſe,—and ſeems chiefly deſigned to puniſh the fornication or adultery in the begetting.—Upon that law, the following is the form and method of proceeding.]

The examination before the birth.

New-Jerſey, Middleſex County. } THE voluntary examination of *Sarah Collyer* ſinglewoman, of the townſhip of Woodbridge, in the county aforeſaid, taken on oath, before me ———, one of the juſtices of the peace for the ſaid county, the tenth day of April, 1787. Who ſaith;

That ſhe is now pregnant with child, which child is likely to be born a baſtard, and chargeable to the ſaid townſhip, and that *Ebenezer Ford*, of the ſaid townſhip, blackſmith, is the father of the ſaid child.

Warrant iſſued on the above examination.

New-Jerſey, Middleſex County. } *To any conſtable of the townſhip of Woodbridge.*

WHEREAS *Sarah Collyer*, of the ſaid townſhip, ſinglewoman, hath this day made oath before me, that ſhe is with child, which child is like to be born a baſtard, and that *Ebenezer Ford*, of the ſame townſhip, blackſmith, is the father of the ſaid child: Theſe are therefore to command you forthwith to apprehend the ſaid *Ebenezer Ford*, and bring him before me to anſwer the premiſes, and to find ſurety, for his appearance at the next general ſeſſions of the peace, to be held for the ſaid county at Perth Amboy, to be further dealt with according to law: Hereof fail not at your peril. Given under my hand and ſeal, the tenth day of April, 1787.

On appearance, the following recognizance.

N. Jerſey, Middleſex County, April 12, 1787. } *Ebenezer Ford, blackſmith*, 20*l.* proc. *Charles Ford, yeoman*, 20*l.* proc.

CONDITIONED, That if the ſaid *Ebenezer Ford*, ſhall appear at the next court of general ſeſſions of the peace, to be held for the ſaid county, at Perth-Amboy, then and there to anſwer what ſhall be objected againſt him, touching his being charged with fornication, in begetting a child on the body of *Sarah Collyer*, ſinglewoman, and ſhall not depart the ſaid court without leave, then this recognizance to be void, otherwiſe to remain in full force.

Taken and acknowledged before me the day and year above written.

It is not improper to bind the woman over to the ſaid court alſo, if

if her condition will bear it. Tho' the law does not seem to warrant demanding security of her, unless on her being called up to examination, she refuse to declare on oath, who is the father.

For the manner of taking recognizances in general. See the title RECOGNIZANCE.

BLASPHEMY and PROFANENESS.

ALL blasphemies against God, as denying his being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the holy scriptures, or exposing any part of them to contempt or ridicule; impostures in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgment; and all open lewdness grossly scandalous—are punishable by fine and imprisonment, and also to such corporal punishment as to the court shall seem meet, according to the heinousness of the crime. 1 *Haw.* 6, 7.

Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. 1 *Haw.* 7.

If a person having been educated in, or at any time having made profession of the christian religion in this realm, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be God; or shall affert or maintain there are more Gods than one; or shall deny the christian religion to be true, or the holy scriptures to be of divine authority; and shall be convicted thereof, in any of the courts at *Westminster*, or at the assizes, on the oaths of two witnesses, he shall for the first offence be incapable to have any office ecclesiastical, civil or military (unless he shall renounce such opinion in the court where he was convicted within four months after such conviction;) and for the second offence, he shall be disabled to be plaintiff, guardian, executor, or administrator, to take any gift or legacy, or to bear any office, and shall be imprisoned for three years. 9 & 10 *W. c.* 32.

But no person shall be prosecuted for any words spoken, unless the information be given to a justice of the peace, within four days after the words spoken, and the prosecution of such offence be within three months after such information. *id.*

M. 1. *G.* 2 *K.* and *Curl.* An information was exhibited by the attorney general, against *Edmund Curl*, for printing and publishing *(obscœnum libellum)* an obscene book, called *Venus in the cloister*, or *the nun in her smock*, setting out the several lewd passages, and concluding against the peace. And of this the defendant was found guilty. It was moved in arrest of judgment, that however the defendant may be punished for this in the spiritual court, as an offence against good manners; yet it cannot be a libel, for which he is punishable

punishable in the temporal courts. But after long debate and consideration, the court at last gave it as their unanimous opinion, that this was a temporal offence: and the defendant was set in the pillory. *Str.* 788.

E. 2 *G.* 2 *K.* and *Woolston.* He was convicted on four informations, for his blasphemous discourses on the miracles of our Saviour. And attempting to move in arrest of judgment, the court declared they would not suffer it to be debated, whether to write against christianity *in general* was not an offence punishable in the temporal courts at common law; They desired it might be taken notice of, that they laid their stress upon the word *general*, and not intend to include disputes between learned men upon particular controverted points. The next term he was brought up, and fined 25*l.* for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000*l.* and 2000*l.* by others. *Str.* 234.

BRIBERY.

BRIBERY in a strict sense is taken for a great misprision of one in a judicial place, taking any thing whatsoever, except meat and drink of small value of any one who has to do before him any way, for doing his office, or by colour of his office, but of the king only; and is punishable at the common law by fine and imprisonment. 1 *Haw. c.* 67.

BRIDGES.

(Bridges in these States are built by virtue of acts of the respective legislatures.)

THE justices, or four of them at the least (1 Q.) shall have power to enquire, hear and determine in the general sessions, of all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment, against such as ought to be charged to make or amend them, as the king's bench usually doth, or as it shall seem by their discretion to be necessary and convenient, for the speedy amendment of such bridges. 22 *H.* 8. *c.* 5. *s.* 1.

It hath been resolved, that it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves, by shewing either that they are not bound to repair the whole, or any part of the bridge, without shewing what other person is bound to repair the same; and it is said, that in such case the whole charge shall be laid upon such defendants, by reason of their ill plea. 1 *Haw.* 221.

BUGGERY.

BUGGERY (from the Italian *bugarone*, a buggerer, this vice being said to have been brought into *England*, out of *Italy*, by the *Lombards*) is a deteſtable and abominable ſin, amongſt chriſtians not to be named, committed by carnal knowledge, againſt the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beaſt, or by woman kind with brute beaſt. 3 *Inſt.* 58.

And by the ſtatute of 25 *H.* 8. *c.* 6. Buggery committed with mankind or beaſt is made felony without benefit of clergy. And the juſtices of the peace may hear and determine the ſame, as in caſes of other felonies.

Which ſaid ſtatute making it felony generally, there may be acceſſaries both before and after. But thoſe that are preſent, aiding and abetting, are all principals. And altho' none of the principals are admitted to their clergy, yet acceſſaries before and after are not excluded from clergy. 1 *H. H.* 670.

If the party buggered be within the age of diſcretion (which is generally reckoned the age of 14) it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of diſcretion, it is felony in them both. 3 *Inſt.* 49. 1 *H. H.* 670.

By the articles of the navy (22 *G.* 2. *c.* 33) if any perſon in the fleet ſhall commit the unnatural and deteſtable ſin of buggery or ſodomy, with man or beaſt; he ſhall be puniſhed with death by the ſentence of a court martial.

This crime is excepted out of the act of general pardon of the 20 *G.* 2. *c.* 52.

BURGLARY.

Offences againſt the houſe of another, which fall ſhort of burglary, belong to the title LARCENY, under the head LARCENY FROM THE HOUSE.

THE word *burglar* ſeemeth to have been brought unto us out of *Germany* by the *Saxons*, and to be derived of the German *burg*, a houſe, and *larron*, a thief, probably from the Latin *latro*, *latronis*.

Burglary is a felony at common law, in breaking and entering the manſion houſe of another, in the night, with intent to commit ſome felony within the ſame, whether the felonious intent be executed or not. *Hale's Pl.* 79.

Breaking] Every entrance into the houſe by a treſpaſſer is not a breaking in this caſe; but there muſt be an actual breaking. As if the door of a manſion houſe ſtand open, and the thief enter, this

is no breaking. So it is if the window of the houſe be open, and a thief with a hook or other engine draweth out ſome of the goods of the owner, this is no burglary, becauſe there is no actual breaking of the houſe. But if the thief breaketh the glaſs of the window, and with a hook or other engine draweth out ſome of the goods of the owner, this is burglary, for there was an actual breaking of the houſe. 3 *Inſt.* 64.

And Lord *Hale* ſays, theſe acts amount to an actual breaking; opening the caſement, breaking the glaſs window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *H. H.* 552.

M. 8 *G. K.* and *Gray.* One of the *ſervants* in the houſe opened his lady's chamber door (which was faſtened with a braſs bolt) with deſign to commit a rape; and it was ruled to be burglary, and the defendant was convicted and tranſported. *Str.* 481.

By the ſtatute of the 12 *An. c.* 7. If any perſon ſhall enter into the manſion houſe of another, by day or by night, without breaking the ſame, with an intent to commit felony, or being in ſuch houſe ſhall commit any felony, and ſhall in the night time break the ſaid houſe to get out, he ſhall be guilty of burglary, and ouſted of the benefit of clergy, in the ſame manner as if he had broken and entered the houſe in the night time, with intent to commit felony.

M. 4. *G.* 2. *Joſhua Cornwal's* caſe. He was indicted with another perſon for burglary. And upon the evidence it appeared, that he was a ſervant in the houſe, where the robbery was committed, and in the night time opened the ſtreet door, and let in the other priſoner, and ſhewed him the ſide board, from whence the other priſoner took the plate; then the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed. Upon the trial it was doubted, whether this was burglary in the ſervant, he not *going out* with the other. But afterwards at a meeting of all the judges at *Serjeant's inn*, they were all of opinion that it was burglary in both, and not to be diſtinguiſhed from the caſe where one watches at the ſtreet end, whilſt another goes in and commits the burglary, which hath been often ruled to be burglary in both; and upon report of this opinion the defendant was executed. *Str.* 881.

And entering.] It is deemed an entry, when the thief breaketh a houſe, and his body or any part thereof, as his foot or his arm, is within any part of the houſe; or when he putteth a gun into a window which he hath broken, or into a hole of the houſe which he hath made of intent to murder or kill; this is an entry and breaking of the houſe: but if he doth barely break the houſe, without any ſuch entry at all, this is no burglary. 3 *Inſt.* 64.

If divers come in the night to do a burglary, and only one of them break and enter, the reſt of them ſtanding to watch, at a diſtance, this is burglary in all. 3 *Inſt.* 64.

The

The manſion houſe.] This includes alſo churches, and the walls or gates of a walled town. 1 *Haw.* 103.

Mr. *Hawkins* ſays, all out buildings, as barns, ſtables, dairy houſes, adjoining to a houſe, are looked upon as part thereof: and conſequently burglary may be committed in them: but if they be removed at any diſtance from the houſe, it ſeems that it hath been not uſual of late, to proceed againſt offences therein as burglaries. 1 *Haw.* 104

And Lord *Hale* ſays more explicitly, the manſion houſe doth not only include the dwelling houſe, but alſo the out houſes that are parcel thereof, as barn, ſtable, cow-houſe, dairy-houſe, if they are parcel of the meſſuage, though they are not under the ſame roof, or joining contiguous to it: and ſo, he ſays it was agreed by all the judges: but if they be no parcel of the meſſuage, as if a man take a leaſe of a dwelling houſe from one, and of a barn from another: or if it be far remote from the dwelling houſe, and not ſo near to it as to be reaſonably eſteemed parcel thereof, as if it ſtand a bow-ſhot from the houſe, and not within or near the curtilage of the chief houſe, then the breaking of it is not burglary, for it is not a manſion houſe, nor any part thereof. 1 *H. H.* 558. 9.

To break and enter a *ſhop*, not parcel to the manſion houſe, in which the ſhopkeeper never lodges, but only works or trades there in the day time, is not burglary, but only larceny; but if he, or his ſervant uſually or often lodge in the ſhop at night, it is then a manſion houſe, in which a burglary may be committed. 1 *H. H.* 557. 8.

It is not neceſſary, to make it burglary, that any perſon be actually in the houſe, at the very time of the offence committed. 1 *Haw.* 103.

In the night] As long as the day continues, whereby a man's countenance may be diſcerned, it is called day: and when darkneſs comes, and day light is paſt, ſo as by the light of the day you cannot diſcern the countenance of a man, then it is called night. 3 *Inſt.* 63.

And this doth aggravate the offence; ſince the night is the time wherein man is at reſt, and wherein beaſts run about ſeeking their prey. Hence in ancient records, the twilight was ſignified, when it was ſaid, *inter canem & lupum* (between the dog and the wolf); for when the night begins, the dog ſleeps, and the wolf ſeeketh his prey. 3 *Inſt.* 63.

With intent to commit felony] There can be no burglary, but where the indictment both expreſly alledges, and the verdict alſo finds, an intention to commit ſome felony; for if it appear, that the offender meant only to commit a treſpaſs, as to beat the party, or the like, he is not guilty of burglary. 1 *Haw.* 105.

However, it ſeems the much better opinion, that an intention to commit a rape, or other ſuch crime, which is made felony by ſtatute, and was a treſpaſs only at common law, will make a man guilty of

burglary,

burglary, as much as if such offence were a felony at common law; because wherever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law. 1 *Haw.* 105.

Whether the felonious intent be executed or not] Thus they are burglars, who break any house, or church, in the night, altho' they take nothing away. And herein this offence differs from robbery, which requires that something be taken, tho' it is not material of what value.

Where a man commits burglary, at the same time steals goods out of the house, it is also larceny; and if he be acquitted of the burglary, he may notwithstanding be indicted of larceny; for they are several offences, tho' committed at the same time. And burglary may be, where there is no larceny; and larceny may be, where there is no burglary. 2 *H. H.* 246.

By the 18 *El. c.* 7. and 3 *W. c.* 9. Benefit of clergy is taken away in cases of burglary, both from the principal and the accessary before; but in all cases of burglary, accessaries after must have their clergy. 2 *H. H.* 364. 1 *Haw.* 357, 8.

It may be observed in this place, that it is provided by the 24 *H.* 8. *c.* 5. that there shall be no forfeiture of lands or goods, for killing any person that attempt to commit burglary.

Warrant to apprehend a burglar.

New-York, Queen's County. } *To any constable of said county.*

FORASMUCH as *A. I.* of ——— in the county of ———, yeoman, hath this day made information and complaint upon oath, before me I. P. esquire, one of the people's justices of the peace for the said county, that yesterday in the night the dwelling house of him the said *A. I.* at ——— aforesaid in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard of the value of 5*l.* of the goods and chattels of him the said *A. I.* feloniously and burglariously stolen, taken, and carried away from thence; and that he hath just cause to suspect, and doth suspect that *A. O.* late of ——— in the county of ——— labourer, the said felony and burglary did commit: These are therefore, in the name of the people of the state of New-York, to command you, that immediately upon sight hereof, you do apprehend the said *A. O.* and bring him before me, to answer the premises, and to be further dealt with according to law. Herein fail not. Given under my hand and seal the —— day of ——— in the year ———

Indictment for proper burglary.

New-York, Queen's County. THE jurors for the people upon their oath present, That *A. O.* late of ——— in the county of ——— labourer, on the ——— day of ———, in the ——— year of the

the independence of ——— at the hour of one in the night of the same day, with force and arms, at ——— in the county of ——— the dwelling house of *A. I.* feloniously and burglariously did break and enter, with intent him the said *A. I.* of his goods in the same dwelling house then being feloniously and burglariously to spoil and rob, and the same goods feloniously and burglariously to steal, take, and carry away; against the peace and dignity of the people.

BURNING.

MAliciously and voluntarily burning the house of another, by night or by day, is felony at the common law. 1 *Haw.* 105.

Maliciously and voluntarily] For if it be done by mischance, or negligence, it is no felony. 3 *Inst.* 67.

Yet if a man maliciously intending only to burn one person's house, happens thereby to burn the house of another, it is certain that he may be indicted as having maliciously burned the house of that other, for where a felonious design against one man misseth its aim, and takes effect upon another, it shall have the like construction as if it had been levelled against him who suffers by it. 1 *Haw.* 106

Burning] Neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to a part of a house, will amount to felony, if no part of it be burned; but if any part of the house be burnt, the offender is guilty of felony, notwithstanding the fire afterwards be put out, or go out of itself. 1 *Haw* 106.

The house] Not only a mantion house, and the principal parts thereof, but also any other house, and the out buildings, as barns and stables adjoining thereto; and also barns full of corn, whether they be adjoining to any house or not, are so far secured by law, that the malicious burning of them is felony at common law. 1 *Haw.* 105.

Of another] A person seised in fee, or but possessed for years, of a house standing by itself at a distance from all others, cannot commit felony in burning the same. Also it seems the much stronger opinion, that a man so seised or possessed of a house in a town who burns his own with an intent to burn his neighbour's, but in event burns his own only, is not guilty of felony: But however it is certainly an offence highly punishable, in regard of the malice thereof, and the great danger to the public which attends it; and the offender may be severely fined, and imprisoned during the king's pleasure, and set on the pillory, and bound to his good behaviour during life. 1 *Haw.* 106.

By the statutes of 23 *H.* 8. *c.* 1. and 25 *H.* 8. *c.* 3. No person who shall be found guilty for wilfully burning of any dwelling house, or barn wherein any corn shall be, nor persons abetting, procuring, helping, maintaining, or counselling the same, shall be admitted to the benefit of clergy.

There

There hath been much learned debate, how far these statutes which are repealed by 1 *Ed.* 6 *c.* 12 are revived by 5 & 6 *Ed.* 6, *c.* 10. But as the same is enacted in effect by other subsequent statutes it is now not very material.

By the 4 & 5 *P.* & *M c.* 4. Every person who shall maliciously command, hire, or counsel any person wilfully to burn any dwelling house, or any part thereof, or any barn then having corn or grain in the same, shall not have the benefit of his clergy.

But accessaries after shall have their clergy. 1 *H. H.* 573.

If any person shall in the night time maliciously, unlawfully, and willingly burn, or cause to be burned or destroyed, any ricks or stacks of corn, hay, or grain, barns, or other houses or buildings, or kilns; he shall be guilty of felony, but without corruption of blood, or disinheritance of heirs.

And the judges of assize, or three justices of the peace (1 Q.) may determine the same, so that the prosecution be within six months.

And the said justices on the request of the party injured, shall issue their warrant for apprehending all such persons as shall be suspected thereof, and take their examination.

And shall cause all others who to them shall seem likely to make discovery to appear before them, and give information on oath; yet so, as no person to be examined shall be proceeded against for any offence, concerning which he shall be examined as a witness, and shall upon his examination make a true discovery.

And if such witness, being duly summoned, shall refuse to appear, or to be examined, they may commit him to the common goal, till he submit to be examined upon oath.

Such as be taken for houseburning feloniously done, are not bailable by justices of the peace. 3 *Ed.* 1. *c.* 15. 2 *Inst.* 189.

By the commission of the peace, any justice may cause to come before him, all those who to any of the people concerning the firing of their houses have used threats, to find sufficient security for the peace or their good behaviour towards the people; and if they shall refuse to find such security, may safely cause them to be kept in prisons, until they shall find such security.

BUYING of TITLES.

I. By the common law.
II. By statute.

I. By the common law.

IT seemeth to be a high offence at common law, to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it

it worth his while to do, and on that consideration sells his pretensions at an under rate; and it seemeth not to be material, whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested; for all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary. 1 *Haw.* 161.

II. By statute.

By the statute of 13 *Ed.* 1. *c.* 49. 'No person of the king's 'house shall buy any title whilst the thing is in dispute; on pain of 'both buyer and seller being punished at the king's pleasure.'

And by 32 *H.* 8 *c.* 9. 'None shall buy any pretended right in any 'land, unless the seller hath taken the profit thereof one year be- 'fore; on pain that the seller shall forfeit the land, and the buyer 'the value, half to the king, and half to him that shall sue within 'one year. *s.* 2. 6.

Pretended title] But he who is in lawful possession may purchase the pretended title of any others. 32 *H.* 8. *c.* 9. *s.* 4.

One year before] But no conveyance made by one who hath the uncontested possession, and undisputed absolute propriety of lands, is any way within the meaning of this statute. 1 *Haw.* 265.

And the offence of buying titles may be laid in any county, at the pleasure of the informer. 31 *El. c.* 5. *s.* 4.

CARRIERS.

ALL persons carrying goods for hire, as masters and owners of ships, lightermen, stage waggoners, and the like, come under the denomination of common carriers; and are chargeable on the general custom of the realm, for their faults or miscarriages. 1 *Bac Abr.* 342.

By the 3 *W. c.* 12. The justices in Easter sessions yearly, shall rate the prices of all land carriage of goods to be brought *into* any place within their jurisdiction, by any common waggoner or carrier; and shall certify the rates so made to the mayors or other chief officers of the several market towns within their jurisdiction, to be hung up in some public place to which all persons may resort: And no such common waggoner or carrier shall take for carriage above the rates so set, on pain of 5 *l.* by distress, by warrant of two justices where such waggoner or carrier shall reside, to the use of the party grieved. *s.* 24.

If a common carrier, who is offered his hire, and who hath convenience, refuses to carry goods, he is liable to an action in the same manner

manner as an innkeeper who refuſes to entertain a gueſt, or a ſmith who refuſeth to ſhoe a horſe. 1 *Bac. Abr.* 344.

So an action will lie againſt a common ferryman, who refuſeth to carry paſſengers. *id.*

But if the porter puts up the box of a paſſenger behind a ſtage coach, and the maſter as ſoon as he knows it, ſays that he is already full, and refuſes to take the charge of it, the maſter ſhall not be liable. For this is the ſame with an hoſt who refuſeth his gueſt, his houſe being full, and yet the party ſays he will ſhift, or the like, if he be robbed, the hoſt is diſcharged. *id.*

So a carrier may refuſe to admit goods into his warehouſe at an unſeaſonable time, or before he is ready to take his journey; but he cannot refuſe to do the duty incumbent upon him by virtue of his public employment. L. *Raym.* 652.

It hath been holden that a carrier imbezzelling goods which he has received to carry to a certain place, is not guilty of felony, becauſe there was not a felonious *taking*; but is liable only to a civil action. 1 *Haw* 89, 90.

But it hath been reſolved, that if a carrier open a pack, and take out part of the goods, with intent to ſteal it, he may be guilty of felony, in which caſe it may be ſaid, not only that ſuch poſſeſſion of a part diſtinct from the whole, was gained by wrong, and not delivered by the owner, but alſo that it was obtained baſely, fraudulently and clandeſtinely, in hopes to prevent its being diſcovered at all, or fixed upon any one when diſcovered. 1 *Haw.* 90.

Alſo it ſeems clear, that if a carrier, after he has brought the goods to the place appointed, take them away again ſecretly, with intent to ſteal them, he is guilty of felony; becauſe the poſſeſſion which he received from the owner, being determined, his ſecond taking is in all reſpects the ſame, as if he were a mere ſtranger. 1 *Haw.* 90.

Alſo it hath been reſolved, that if goods be delivered to a carrier, to be carried to a certain place, and he carries them to another place, and diſpoſeth of them to his own uſe, that this is felony; becauſe this declareth that his intention originally was not to take the goods, upon the agreement and contract of the party, but only with a deſign of ſtealing them. *Kelynge* 32.

Where goods are delivered to a carrier, and he is robbed of them, he ſhall be charged, and anſwer for them, by reaſon of the hire — And this was at the common law, before the hundred was anſwerable over to him; becauſe ſuch robbery might be by conſent and combination, carried on in ſuch a manner, that no proof could be had of it. 1 *Salk.* 143.

And although it may be thought a hard caſe, that a poor carrier who is robbed on the road, without any manner of default in him, ſhould be anſwerable for all the goods he takes, yet the inconveniency would be far more intolerable, if he were not ſo: for it would be in his power to combine with robbers, or to pretend a robbery, or ſome other

other accident, without a poſſibility of remedy to the party; and the law will not expoſe him to ſo great a temptation, but he muſt be honeſt at his peril. 12 *Mod.* 482.

And generally, if a man delivers goods to a common carrier, to carry to a certain place; if he loſes or damages them, an action upon the caſe lies againſt him; for by the cuſtom of the realm, he ought to carry them ſafely. 1 *Arb. Bac* 343.

And if he be a common carrier, tho' there be no agreement, or rate ſettled, or promiſe of payment: yet he ſhall recover his hire on a *quantum meruit*, and therefore ſhall be liable for loſs and damages. *id.*

Alſo if a perſon, who is no common carrier, takes upon himſelf to carry my goods, tho' I promiſe him no reward, yet if my goods are loſt or damaged by his default, I ſhall have an action againſt him. *id.*

For the very taking of the goods is a general conſideration, tho' he be not a common carrier: and the acceptance of the goods makes him liable. *Show.* 104.

A delivery to the carrier's ſervant, is a delivery to the carrier; and if goods are delivered to a carrier's porter, and loſt, an action will lie againſt the carriers. *Read. Car.*

If a box is delivered generally to a carrier, and he accepts it; he is anſwerable, though the party did not tell him there is money in it. But if the carrier aſks, and the other ſays no, or if he accepts it conditionally, provided there is no money in it, in either of theſe caſes the carrier is not liable. *Str* 145.

If a man delivers a box to a carrier to carry, and he aſks what is in it, and the man tells him a book and tobacco (as the caſe was) and in truth there is 100l. beſides; yet if the carrier is robbed, he ſhall anſwer for the money; for the other was not bound to tell him all the particulars in the box, and it was the buſineſs of the carrier to have made a ſpecial acceptance. 1 *Bac. Abr.* 345.

But if a perſon, being a common carrier, receives by his book-keeper from another man's ſervant, two bags of money ſealed up, containing as was told him 200l. and the book-keeper gives a receipt for his maſter to this effect, Received of ſuch a one two bags of money ſealed up, ſaid to contain 200l. which I promiſe to deliver on ſuch a day, at ſuch a place, unto ſuch a perſon, he to pay 10s. per cent. for carriage and riſk; though the bags contain 400l. and the carrier is robbed, he ſhall be anſwerable only for 200l. for this is a particular undertaking; and as it is by reaſon of the reward that the carrier is liable, when the plaintiff endeavours to defraud him of it, it is but reaſonable he ſhould be barred of the remedy, which is only founded on the reward. 1 *Bac. Abr.* 346.

A man took a place in a ſtage coach, and in the journey the defendant by negligence loſt the plaintiff's trunk; upon not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man that drove the coach, who promiſed to take care of it, but loſt

it. *Holt*, chief juſtice, held that the maſter was not chargeable, and that a ſtage-coachman is not within the cuſtom as a carrier is, unleſs the maſter takes a diſtinct price for the carriage of the goods as well as of the perſons. 1 *Salk.* 282.

But by the cuſtom and uſage of ſtage coaches, every paſſenger uſes to pay for the carriage of goods above ſuch a weight; and in ſuch caſe the coachman ſhall be charged for the loſs of goods beyond ſuch weight. *Comyn.* 25.

Where goods are ſtolen from a carrier, he may prefer an indictment againſt the felon, as for his own goods: for though he has not the abſolute property, yet he has ſuch a poſſeſſory property, that he may maintain an action of treſpaſs againſt any one who takes them from him, and ſo may indict a thief for taking them: and the indictment were good alſo, if it had been brought by the real owner. *Kelynge* 39.

And there is a ſpecial caſe, wherein it is ſaid, that a man may commit larceny by ſtealing his own goods delivered to the carrier, with intent to make him anſwer for them: for the carrier had a ſpecial kind of property in the goods, in reſpect whereof, if a ſtranger had ſtolen them, he might have been indicted generally as having ſtolen the ſaid carrier's goods, and the injury is altogether as great, and the fraud as baſe, where they are taken away by the very owner. 1 *Haw.* 94.

CERTIORARI.

A Juſtice of the peace may deliver or ſend into the king's bench, an indictment found before him, or a recognizance of the peace taken by him, or a force recorded by him, without any *certiorari*. *Dalt. c.* 95.

Concerning which writ of *certiorari*, I will ſhew,

I. In what caſes it is grantable.
II. How to be granted and allowed.
III. The effect of it.
IV. The return of it.

I. In what caſes it is grantable.

A *certiorari* lies in all judicial proceedings, in which a writ of error does not lie: and it is a conſequence of all inferior juriſdictions erected by act of parliament to have their proceedings returnable in the king's bench. L. *Raym.* 469, 580.

And therefore a *certiorari* lies to juſtices of the peace, even in ſuch caſes which they are impowered by ſtatute finally to hear and determine:

determine; and the ſuperintendency of the court of the king's bench is not taken away without expreſs words. 2 *Haw.* 286.

But it ſeems agreed, that a *certiorari* ſhall never be granted to remove an indictment after a conviction, unleſs for ſome ſpecial cauſe; as where the judge below is doubtful what judgment to give. 2 *Haw.* 288.

And, *E.* 18 *G.* 2. *K.* and *Nicolls.* An indictment was removed into the court of king's bench by *certiorari*, after conviction, and before judgment. Upon which a doubt aroſe what the court could do, the *certiorari* being brought before judgment; and this court not being apprized with the circumſtances of the offence, could not tell what judgment to give: and in *Carth.* 6. it is ſaid, they cannot give judgment. A rule therefore was made, to ſhew cauſe why the *certiorari* ſhould not be quaſhed, ſo as to remit it back to the ſeſſions; which was afterwards made abſolute. *St.* 1227.

Alſo, it ſeems a good objection againſt the granting a *certiorari*, that iſſue is joined in the court below, and a *venire* awarded for the trial of it. 2 *Haw.* 228.

It hath been adjudged, that wherever a *certiorari* is by law grantable for an indictment, the court is bound of right to award it at the inſtance of the king, becauſe every indictment is the ſuit of the king, and he has a prerogative of ſuing in what court he pleaſes. But it ſeems to be agreed, that it is left to the diſcretion of the court, either to grant or deny it at the prayer of the defendant. 2 *Haw.* 287.

And it ſeems that the court will not ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment of perjury, or forgery, or other heinous miſdemeanor: for ſuch crimes deſerve all poſſible diſcountenance, and the *certiorari* might delay, if not wholly diſcourage the proſecution. 2 *Haw.* 287.

II. How to be granted and allowed.

On *indictment or preſentment:* By the 5 *W. c.* 11. and 8 & 9 *W. c.* 33. it is enacted, 'that *in term time*, no writ of *certiorari*, at the 'proſecution of any party indicted, ſhall be granted out of the 'king's bench, to remove any indictment or preſentment of treſpaſs 'or miſdemeanor, before trial had, from before the juſtices, in ſeſ'ſions; unleſs ſuch *certiorari* ſhall be awarded upon motion of 'counſel, and by rule of court made for the granting thereof.

'But in the vacation, writs of *certiorari* may be granted by any 'juſtice of the king's bench, whoſe name ſhall be indorſed on the 'writ, and alſo the name of the perſon at whoſe inſtance it is 'granted.

'And all the parties indicted, proſecuting ſuch *certiorari*, ſhall 'before the allowance thereof, find two ſufficient mainpaptors who 'ſhall enter into a recognizance before a juſtice of the king's bench '(who ſhall endorſe the ſame on the writ) or before a juſtice of

'the

'the peace of the county or place, in the ſum of 20*l.* with condi-
'tion, at the return of the writ, to appear and plead to the ſaid in-
'dictment or preſentment, in the ſaid court of king's bench, and at
'his own coſts and charges to cauſe and procure the iſſue that ſhall
'be joined thereupon, or any plea relating thereunto, to be tried at
'the next aſſize for the county wherein the indictment or preſent-
'ment was found, after ſuch *certiorari* ſhall be returned, or the next
'term, if in *London*, *Weſtminſter*, or *Middleſex*, unleſs the court ſhall
'appoint another time, and if ſo, then at ſuch other time; and to
'give due notice of ſuch trial, to the proſecutor or his clerk in
'court; and alſo that the party proſecuting the writ of *certiorari*,
'ſhall appear from day to day, in the ſaid court of king's bench,
'and not depart until he ſhall be diſcharged by the court.

'And the ſaid recognizance ſhall be certified into the king's
'bench, with the *certiorari* and indictment, to be there filed, and
'the name of the proſecutor (if he ſhall be the party grieved) or
'ſome public officer, ſhall be indorſed on the indictment.

'And if the defendant proſecuting the writ of *certiorari*, be con-
'victed of the offence for which he was indicted, then the court of
'king's bench ſhall give reaſonable coſts to the proſecutor, to be
'taxed according to the courſe of the ſaid court, who ſhall, for the
'recovery thereof, within ten days after demand and refuſal of pay-
'ment, on oath, have an attachment awarded; and the recogni-
'zance not to be diſcharged till the coſts are paid.

'But if the perſon procuring the *certiorari*, being the defendant,
'ſhall not, before allowance thereof, procure ſuch mainucaptors to
'be bound as aforeſaid, the juſtices may proceed to the trial of the
'indictment in ſeſſions, notwithſtanding the writ of *certiorari*, de-
'livered.'

At the proſecution of any party indicted] This extends only to *certiorari's* procured by perſons indicted; from whence it follows, that thoſe which are procured by the proſecutor of an indictment, remain as they were at common law. 2 *Haw.* 292.

To be tried at the next aſſize] But the recognizance ſhall not be forfeited, unleſs the proſecutor give rules according to the courſe of the court. 2 *Haw.* 292.

Reaſonable coſts] The maſter of the crown office, in taxing the coſts, ought only to conſider thoſe which are ſubſequent to the *certiorari*. 2 *Haw.* 292.

May proceed to the trial] Nevertheleſs they muſt make a return to the *certiorari*, otherwiſe they will be in contempt to the court, for all writs muſt be obeyed, unleſs good cauſe be ſhewn to the contrary; and the proper way of ſhewing it, is to return it. 2 *Haw.* 292.

III. The effect of it.

After a *certiorari* is allowed by the inferior court, it makes all the ſubſequent proceedings on the record that is removed by it errone-
ous. 2 *Haw.* 293.

But

But it hath been adjudged, that if a *certiorari* for the removal of an indictment before juſtices of the peace be not delivered, before the jury be ſworn for the trial of it, the juſtices may proceed. 2 *Haw.* 294.

And the juſtices may ſet a fine to compleat their judgment, after a *certiorari* delivered. L. *Raym.* 1515.

A *certiorari* removes all things done between the teſte and return. L. *Raym.* 835, 1305.

A *certiorari* removes the record itſelf out of the inferior court; and therefore if it remove the record againſt a principal, the acceſſary cannot there be tried. 2 *Haw.* 325.

It hath been holden, that a *certiorari* for the removal of a recognizance for the good behaviour, or an appearance at ſeſſions, will ſupercede the obligation of it: But this would be highly inconvenient, and the contrary ſeems to be ſupported by the better authority. 2 *Haw.* 292.

If a *ſupercedeas* come out of a ſuperior court, to the juſtices, they ought to ſurceaſe, although the *ſupercedeas* be awarded againſt law; for they are not to diſpute the command of a ſuperior court, which is a warrant to them. *Crom.* 129.

IV. The return of it.

Every return of a *certiorari* ought to be under ſeal. 2 *Haw.* 394.

And altho' the *cuſtus rotulorum* keep the records, yet muſt the juſtices, to whom it is directed, return the *certiorari*; and therefore if it is directed to the juſtices of the peace, and the clerk of the peace only return it, nothing is thereby removed. 2 *Haw.* 294.

The *certiorari* may be ſometimes to remove and ſend up the record itſelf, and ſometimes but only the tenor of the record (as the words therein be) and it muſt be obeyed accordingly. *Dalt. c.* 195. 2 *Haw.* 295.

Upon a *certiorari* to remove an indictment of a riot, or forcible entry, or the like, the return muſt have theſe words, *as alſo to hear and determine divers felonies*, &c. according to the commiſſion; for if the return mentions only that they are juſtices of the peace without ſuch words, the return is inſufficient. *Dalt. c.* 195.

If the perſon to whom a *certiorari* is directed, do make a falſe return, yet the court will not ſtay filing it on affidavit of its being falſe, except in public caſes, as in caſes of commiſſioners of ſewers, or for not repairing highways, or for ſome ſuch ſpecial cauſes; becauſe the remedy for a falſe return is either an action on the caſe at the ſuit of the party grieved, or an information at the ſuit of the king. *Dalt. c.* 195.

If the perſon to whom the *certiorari* is directed, do not make a return, then an *alias*, that is, a ſecond writ; then a *pluries*, that is, a third writ, or *cauſam nobis ſignifices*, ſhall be awarded, and then an attachment. *Crom.* 116.

The return of a *certiorari* may be thus:

First,

First, on the back side of the writ indorse these or the like words: *The execution of this writ appears in a schedule to the same writ annexed.*

And that schedule may be thus, on a piece of parchment by itself, and filed to the writ:

New-Jersey, Essex County. I *Samuel Woodroof*, esquire, one of the keepers of the peace and justices of the people of the state of New-Jersey, assigned to keep the peace within the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, by virtue of this writ to me delivered, do under my seal certify unto the supreme court, the indictment of which mention is made in the same writ, together with all matters touching the same indictment. In witness whereof, I the said *S. W.* esq. have to these presents set my seal. Given at——— in the said county, the——— day of ———in the ——— year of independence of ———

Then take the record of the indictment, and close it within the schedule, and seal and send them up both together with the *certiorari*.

CHEAT.

Of cheats punishable by public prosecution, there are two kinds.

I. By the common law.
II. By statute.

I. By the common law.

CHEATS which are punishable by the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Haw.* 188.

It seemeth to be the better opinion, that the deceitful receiving of money from one man, to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which,

which, common prudence, and caution may be a ſufficient ſecurity. 1 *Haw.* 188.

A perſon for a counterfeit paſs, was adjudged to the pillory and fined. *Dalt. c.* 32.

On an indictment againſt the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn inſtead of it, it was moved to quaſh the ſame, becauſe it is only a private cheat, and not of a public nature. It was anſwered, that being a cheat in the way of trade, it concerned the public, and therefore was indictable. And the court unanimouſly agreed not to quaſh it. *T.* 16 *G.* 2 *K.* and *Wood. Seſſ. C. V.* 1, 217.

A perſon falſly pretending that he had power to diſcharge ſoldiers, took money of a ſoldier to diſcharge him; and being indicted for the ſame, the court held the indictment good. *T.* 3 *C. Serle-ſtead's caſe.* 1 *Latch.* 202.

As there are frauds which may be relieved civilly, and not puniſhed criminally (which the complaints whereof the courts of equity do generally abound) ſo there are other frauds, which in a ſpecial caſe may not be helped civilly, and yet ſhall be puniſhed criminally: Thus if a minor goes about town, and pretending to be of age, defrauds many perſons by taking credit for conſiderable quantities of goods, and then inſiſting on his non-age; the perſons injured cannot recover the value of their goods, but they may indict and puniſh him for a common cheat. *Barl.* 100.

II. By ſtatute.

By the 33 *H.* 8. *c.* 1. 'If any perſon ſhall falſly and deceitfully 'obtain or get into his hand or poſſeſſion, any money, goods, chattles, jewels or other things, of any perſon, by colour and means 'of any falſe privy token, or counterfeit letter made in another 'man's name: and ſhall be convicted thereof, by examination of 'witneſſes, or confeſſion, at the aſſizes or ſeſſions, or by action in 'any court of record; he ſhall have ſuch puniſhment by impriſonment, pillory, or other corporal pain (except death) as the court 'ſhall appoint. Saving to the party grieved ſuch remedy by action 'or otherwiſe, for the goods ſo obtained, as he might have had 'by common law.

'And two juſtices (1 Q.) may call and convent by proceſs or 'otherwiſe, to the aſſizes or ſeſſions, any perſon ſuſpected, and commit or bail him to the next aſſizes or ſeſſions.'

Get into his hands or poſſeſſion] A perſon endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on ſuſpicion of ſuch fraud, before he hath got the goods into his poſſeſſion, ſeems not to be within this ſtatute. *E.* 3 *G.* 2 *K.* and *Brain, Seſſ. C. V.* 2. 27.

Falſe privy token] On motion to quaſh an indictment, which was, that the defendant came pretending that ſuch a perſon ſent him to receive 20l, and received it, whereas ſuch perſon did not ſend him:

By

By the court, It is not indictable, unless he came with *false tokens*; for we are not to indict one man for making a fool of another. *Black.* 79.

H. 13. *G.* 2 *K.* and *Munoz.* It was adjudged, that an indictment averring the offence to be by false tokens, without shewing what those false tokens are, is not sufficient; and that the fraudulently procuring a note from a person, by falsly affirming that there was one in the next room that would pay the money due upon it, whereas in fact there was no such person in the next room, is not a *false token*, but a false affirmation. *Sess. C. V.* 2. 201. *Str.* 1127.

Note; The statute says a false *privy* token.

Corporal pain] Lord *Coke* observes hereupon, that for this offence the offender cannot be fined, but corporal pain only inflicted. 3 *Inst.* 133.

But Mr. *Hawkins* observes, that there is a precedent in *Cro. Car.* 564. by which it appears, that one convicted on such a prosecution hath been adjudged not only to stand on the pillory, but also to pay a fine of 500l. and to be bound with good sureties to the good behaviour. 1 *Haw.* 188.

Commit or bail him] In this case the justices shall do well to take examination of the offence, and to certify the same to the sessions or gaol delivery, and withal to bind over the informers and witnesses to give evidence therein. *Dalt. c.* 32.

Warrant of two justices to apprehend an offender.

New-York, Queen's-County. } *To any constable of said county.*

WHEREAS complaint hath been made unto us whose names and seals are hereunto set, two of the justices of the peace for the said county, and one of us of the *quorum*, upon the oath of A. I. of ——— yeoman, and B. I. of ——— yeoman, that on the ——— day of ——— A. O. of ——— yeoman, did by a false privy token [*or* counterfeit letter] that is to say, by [*here particularize the offence*] falsly obtain and get into his hands and possession [*here mention the things*] from C. I. of ——— contrary to the statute in that case made: These are therefore to command you, upon sight hereof, forthwith to bring the said A. O. before us at ——— in the ——— day of ——— to answer the said complaint, and farther to be dealt withal according to law. Given under our hands and seals the ——— day of ———.

II. Benefit of Clergy.

I. Original of the benefit of clergy.
II. By what perſons it may be demanded.
III. In what caſes it may be demanded.
IV. At what time it muſt be demanded.
V. Effect of clergy allowed.

I. Original of the benefit of clergy.

ANCIENTLY princes and ſtates converted to chriſtianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be ſo much intangled in ſuits, did grant to the clergy very bountiful privileges and exemptions, and particularly, an exemption of their perſons from criminal proceedings, in ſome capital caſes before ſecular judges, which was the true original benefit of clergy.

The clergy increaſing in wealth, power, honour, number, and intereſt, afterwards ſet up for themſelves; and that which they obtained by the favour of princes and ſtates at firſt, they now began to claim as their right, and a right of the higheſt nature, namely, by the law of God; and by their canons and conſtitutions endeavoured, and in ſome places obtained, vaſt extentions of theſe exemptions both with regard to the perſons concerned, to wit, not only to perſons in holy orders, but alſo all that had any kind of ſubordinate miniſtration relative to the church; and likewiſe in reſpect of the cauſes, exempting as far as they could all cauſes of clergymen, as well civil as criminal, from the juriſdiction of the ſecular power, and wholly ſubordinating them immediately and only to the eccleſiaſtical juriſdiction, which they ſuppoſed to be lodged firſt in the pope by divine right and inveſtiture from Chriſt, and from the pope ſhed abroad into all ſubordinate and eccleſiaſtical juriſdiction.

And by this means they endeavoured, and in ſome kingdoms and for ſome ages obtained, that there was a double ſupreme power in every kingdom: the one eccleſiaſtical, abſolute and independent upon any but the pope, over eccleſiaſtical men and cauſes; and the other ſecular, of the king or civil magiſtrate.

But this claim of exemption, altho' it obtained much in this kingdom, yet grew ſo burdenſome, that it was from time to time qualified and abridged by the civil power, ſometimes by acts of parliament taking it away in ſome caſes, ſometimes by the interpretation and conſtruction of the judges, and ſometimes by the contrary uſage of the kingdom: for eccleſiaſtical canons never bound in England farther than they were received, and ſo had not their authority from their own ſtrength and obligation, but from the uſages and cuſtoms

of the kingdom that admitted them, only ſo far forth as they were ſo admitted.

And therefore if they were indicted in caſes criminal, but not capital, nor wherein they were to loſe life or limb, there the privilege of clergy was not allowed: and therefore not in indictments of treſpaſs or petit larceny.

Alſo it was not allowed them in high treaſon.

But, at the common law, in all caſes of felony or petit treaſon, clergy was allowable, excepting two, *inſidiatores viarum*, & *arſon*. 2 H. H. 323—330.

II. By what perſons it may be demanded.

By a favourable interpretation of the ſtatutes relating to the benefit of clergy, not only thoſe actually admitted into ſome inferior order of the clergy, but alſo thoſe who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verſe) have been taken to have a right to this privilege, as much as perſons in holy orders. 2 *Haw.* 338.

But by the common law, a woman could not have the benefit of clergy; but now by the ſtatute of 3 *W.* c. 8. a woman convicted or outlawed for a felony, for which a man might have his clergy, ſhall upon praying the benefit of that ſtatute, be ſubject only to ſuch puniſhment as a man would be in the like caſe.

A perſon convicted of herely, a Jew, or a Turk, ſhall not have their clergy; but a perſon excommunicate ſhall have his clergy. 2 *H. H.* 373.

Alſo every perſon (not being within orders) who hath been once admitted to his clergy, ſhall not be admitted to the ſame a ſecond time. 4 *H.* 7. c. 13.

And if he is convicted of murder, he ſhall be marked (unleſs he is a peer, 2 *H H.* 376) with an M, on the brawn of the left thumb; and if for any other felony, with a T. 4 *H.* 7. c. 12.

But he ſhall not be ouſted of his clergy, by the bare mark in his hand, or by a parol averment, without the record teſtifying it, or a tranſcript thereof, according to the following ſtatutes. 2 *H. H.* 373.

By 24 & 25 *H.* 8 c. 14. The clerk of the crown, or of the peace, or of aſſize, ſhall certify a tranſcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the king's bench in 40 days: And the clerk of the crown, when the judges of aſſize, or juſtices of the peace write to him for the names of ſuch perſons ſhall certify the ſame with the cauſes of conviction or attainder.

Alſo it ſeems, that if the party deny that he is the ſame perſon, iſſue muſt be joined upon it, and muſt be found upon trial that he is the ſame perſon, before he can be ouſted of clergy. 2 *H. H.* 373.

III.

III. In what cases it may be demanded.

By the 25. *Ed.* 3 *ſt.* 3 *c.* 4. All manner of clerks, who ſhall be convicted before the ſecular judges, for any treaſons or felonies, touching other perſons than the king himſelf, ſhall have the privilege of holy church.

Clergy was never allowed in this nation in caſes of high treaſon, nor is it allowed on indictments of petit larceny or treſpaſs; but by the above recited act, clergy was allowed in all treaſons and felonies, except treaſon againſt the king: So that after this ſtatute, the benefit of clergy might be pleaded and allowed in all other treaſons and felonies. *Hale's Pl.* 230. 2 *H. H.* 326.

Conſequently, wherever clergy is not allowable in any other caſes, it is taken away by ſome ſubſequent act of parliament. *Hale's Pl.* 230.

Conſequently, where a new felony is made by an act of parliament, clergy is to be allowed, unleſs expreſsly taken away by ſuch ſtatute. *Hale's Pl.* 230.

And if it maketh a new felony, and takes away the clergy not generally, but in ſuch or ſuch caſes, regularly in other caſes, clergy is allowable; as if it take away clergy in caſe the party be convicted by verdict, yet he ſhall have his clergy, if he ſtand mute. 2 *H. H.* 335.

But this is in part remedied by the 3 *W. c.* 9. which enacts, that if any perſon be *indicted* of any offence, for which by virtue of any *former* ſtatute he is excluded from clergy, if he had been convicted by verdict or confeſſion; if he ſtand mute, or will not anſwer directly, or challenge peremptorily above 20 of the jury, or be outlawed, he ſhall not be admitted to his clergy. *ſ.* 2. But this extends not to *appeals*, nor to offences made felonies by ſubſequent ſtatutes. 2 *Haw.* 348.

But if the ſtatute enacts generally, that it ſhall be felony without benefit of clergy, or that he ſhall ſuffer as in caſe of felony without benefit of clergy, this excludes it in all circumſtances, and to all intents. 2 *H. H.* 335.

It follows further, from what hath been ſaid, that in all caſes where an act of parliament ouſteth clergy, in caſe of any felony, the indictment muſt preciſely bring the party within the caſe of the ſtatute; otherwiſe, altho' poſſibly the fact itſelf be within the ſtatute, and it may ſo appear upon the evidence, yet if it be not ſo alledged in the indictment, the party, tho' convicted, ſhall have his clergy. 2 *H. H.* 336.

But altho' the caſe be ſo laid in the indictment, that it comes within the ſtatute, to exempt the priſoner from clergy, yet if upon the evidence it fall out, that tho' it be a felony, yet it is not ſo qualified as laid in the indictment, the jury ought to find him guilty of the felony ſimply, but not as to the matter laid in the indictment, and thereupon

thereupon the prisoner shall be admitted to his clergy; and this is commonly done 2 *H. H.* 336.

But if the offence was capital at the common law, and a statute only excludes it from clergy; the indictment in such case need not conclude *against the form of the statute*, because the statute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a personal privilege of exemption from such judgment. 2 *Haw.* 342.

Furthermore, from what hath been observed above, it follows, that where an act taketh away clergy from the principal, and saith nothing of the accessary; the accessaries as well before, as after, shall have their clergy. 11 *Co.* 37. *Poulter's case.*

IV. At what time it must be demanded.

By the ancient common law, the benefit of clergy was demanded as soon as the prisoner was brought to the bar, before any indictment or other proceeding against him; but this was found a great inconvenience to the prisoner, because possibly he might have been acquitted of the felony; or if not, yet in case of an inquest of office, he lost his challenges to such inquest, and yet upon such inquest found, he forfeited his goods, and the profits of his lands; and therefore *Prisot* Ch. J. with the advice of the other judges, in the reign of *H.* 6. for the safety of the innocent, would not allow the prisoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted thereof; which course hath been generally observed ever since. 2 *Inst.* 164. 2 *H. H.* 378.

And this benefit of clergy may be allowed by the court in discretion, tho' the party challenge it not. *Hale's Pl.* 239.

V. Effect of clergy allowed.

Persons admitted to their clergy, may be continued in prison as a further punishment, not exceeding one year. 18 *El. c.* 7.

A person admitted to his clergy, forfeits all his goods that he hath at the time of the conviction. 2 *H. H.* 388.

But presently upon his burning in the hand, he ought to be restored to the possession of his lands, and from thenceforth to enjoy the profits thereof. 2 *H. H.* 388.

Also, it restores him to his credit; and consequently enables him to be a good witness. 2 *Haw.* 364.

And it is holden that after a man is admitted to his clergy, it is actionable to call him a felon; because his offence being pardoned by the statute, all the infamy and other consequences of it are discharged. 2 *Haw.* 365.

COIN.

For matters common to this with other treasons, see title TREASON.

COIN, in *French*, signifieth a corner, and from thence hath its name (according to Lord *Coke*) because in ancient time money was square with corners, as it is in some countries at this day. 1 *Inst.* 207.

The legitimation of money, and the giving it its denominated value, is one special part of the king's prerogative. 1 *H. H.* 188.

And the king may by his proclamation legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation. 1 *H. H.* 162.

And therefore both *English* money, coined by the king's authority, and foreign coin made current by proclamation, are within the denomination of lawful money of *England*. 1 *Inst.* 207.

But only gold or silver coin, and not brass or copper, are within this denomination. 1 *Haw.* 42.

By the statute of 25 *Ed.* 3 *st.* 5 *c.* 2. it is made treason to counterfeit the coin of this realm: That it is to say, whether the person utter it or not. 3 *Inst.* 16. 1 *Haw.* 42.

And if any person shall falsely forge and counterfeit any such kind of coin of gold or silver, as is not the proper coin of the realm, and shall be current therein by the king's consent; he, his counsellors, procurers, aiders and abettors, shall be guilty of high treason. 1 *Mar. sess.* 2. *c.* 6.

By the 5. *El. c.* 11. Clipping, washing, rounding, or filing, for lucre or gain, any the proper coin of this realm or the dominions thereof, or of any other realm current within this realm by proclamation, shall be adjudged treason in the offenders, their counsellors, consenters and aiders.

And by the 18 *El. c.* 1. If any person shall, for lucre or gain, by any art, ways, or means, impair, diminish, falsify, scale, or lighten the proper coin of this realm, or any the dominions thereof, or the coin of this realm, allowed to be current at the time of the offence committed, by the king's proclamation; he, his counsellors, consenters, and aiders shall be guilty of treason.

Lord *Hale*, speaking of copper half pence and farthings, makes it a query, whether the counterfeiting of them be not treason within the statute of 25 *Ed.* 3. but inclines to the negative. 1 *H. H.* 195, 211, 212.

If any person shall falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, nor permitted to be current within this realm; he, his procurers, aiders, and abetters shall be guilty of misprision of high treason. 14 *El. c.* 3.

If any person shall bring false money into the realm, counterfeit

to

to the money of *England*, knowing the ſame to be falſe, to merchandiſe or make payment, in deceit of the king and his people; he ſhall be guilty of high treaſon. 25 *Ed.* 3. *ſt.* 5. *c.* 2.

If one perſon counterfeits, and by agreement before the counterfeiting, another perſon is to take off and vent the counterfeit money, ſuch other is an aider and abettor, and conſequently a principal traitor (for in high treaſon there are no acceſſaries.) 1 *H. H.* 214.

If one perſon counterfeit, and another (knowing that he did ſo) puts it off, but without any ſuch previous agreement; ſuch other perſon ſeems to be all one with a receiver of him, becauſe he maintains him. 1 *H. H.* 214.

If one perſon counterfeit, and another perſon know that he did ſo, and doth neither receive, maintain, or abet him, but conceals his knowledge; this is miſpriſion of treaſon. 1 *H. H.* 214.

If falſe or clipt money be found in a man's hands; if he be ſuſpicious, he may be arreſted till he have found his warrant. 3 *Inſt.* 18. *Hale's Pl.* 21. 1 *Haw.* 43.

By the 3 *Ed.* 1 *c.* 15. Perſons taken for falſe money are not bailable by juſtices of the peace.

But they muſt take the examinations and informations, and bind over the witneſſes to the proper court, and commit the perſons accuſed. 1 *H. H.* 372.

It is not neceſſary here ſhould be two witneſſes in caſes of counterfeiting the coin, as it is in other high treaſons: but perſons may be convicted according to the courſe of the common law, by one witneſs only, 1 *H. H.* 318, 328.

The judgment for high treaſon, relating to the coin, is, to be drawn to the place of execution, and there hanged by the neck till he be dead. 2 *Haw.* 444.

But it is generally provided by the ſeveral ſtatutes, that this ſhall work no corruption of blood, nor loſs of dower.

A Warrant to apprehend a perſon for coining money, and to ſeize his inſtruments, &c.

WHEREAS *A. B.* of, *&c.* hath this day made oath before me, that on, *&c.* laſt paſt, at the houſe of *C. D.* ſituate in, *&c.* he being in the next room to a private ſhop or ware houſe of the ſaid *C. D.* (who is by trade a ſilverſmith) through a hole or cranny in the partition, wall, or door, ſaw the ſaid *C. D.* buſy with many tools and inſtruments in making and moulding ſome white pieces of metal of a round form, and about the ſize of ſhillings and half-crowns, which he took to be the coining of money: Theſe are therefore in the name of the people of the ſtate of New-Jerſey, to command you to apprehend the ſaid *C. D.* and ſeize all the tools and inſtruments, and money, which you can find in the ſhop or houſe of him the ſaid *C. D.* and that you do bring him, together with the ſaid tools and inſtruments and money (if any ſuch you can find) before

before me or ſome other of the juſtices of the peace for this county, to be examined concerning the premiſes, and to be dealt with according to law. Given, &c.

A Warrant for one that hath melted Money.

Eſſex, ſs. *To the conſtables, &c.*

FORASMUCH as I am credibly informed, that *A. B.* of, &c. gold-ſmith, hath melted the ſilver money of this ſtate, contrary to the ſtatutes in that caſe made and provided. Theſe are therefore in the name of the people of the ſtate of New Jerſey, to command you, that you, ſome or one of you, do apprehend the ſaid *A. B.* and bring him before me, or ſome other of the juſtices of the peace of the ſaid county, to be examined touching the premiſes, and to be farther dealt with according to law. Hereof fail not at your perils. Given under my hand and ſeal, the, &c.

A VVarrant to commit a perſon for melting Bullion, not lawful Silver, but ſuppoſed to be Clippings.

Eſſex, ſſ. *To the conſtable of, &c. and to the keeper of, &c.*

WHEREAS a large quantity of bullion hath been lately found and ſeized in the poſſeſſion of C. D. of, &c. gold ſmith, which before the melting thereof was ſuſpected to be unlawful ſilver, and the clippings of money: And whereas upon the examination of the ſaid C. D. taken before us upon oath this preſent day, he hath not been able to make ſufficient proof that the ſaid bullion before the melting thereof, was not current coin, or clippings of ſuch coin, according to the ſtatute in that caſe made and provided: Theſe are therefore to command you to convey the ſaid C. D. to the common gaol of, &c. aforeſaid, and to deliver him to the keeper thereof; hereby alſo requiring you the ſaid keeper to receive the ſaid C. D. into your cuſtody and gaol aforeſaid, and him there ſafely to keep, until he ſhall be from thence delivered by due courſe of law. Given, &c.

[In moſt of the United States, there is paper money, or bills of credit made current by the acts of the legiſlative powers of each ſtate, to counterfeit which in ſeveral of them, is by thoſe acts, made felony, without benefit of clergy, but in ſome others only corporal puniſhment; and thoſe acts muſt and ought to be the proper guide for juſtices and others, in their ſeveral juriſdictions, on matters relating thereto: However the following precedents may not be amiſs here.]

Information againſt a perſon counterfeiting bills of credit, &c.

Eſſex, ſs. THE information of N. Q. of R. in the county of E. yeoman, taken upon oath before me I. R. eſq. one of the juſtices of the peace for the county aforeſaid, the third day of —— in the year, &c. This

This informant on his oath, depoſeth and ſaith, that on the —— day of ——— laſt paſt, at the houſe of K. L. ſituate in *Aſh Swamp*, I. L. had in his poſſeſſion ſeveral ſtamps, plates or types, proper for counterfeiting the public current bills of the ſtate of ——— and that he, this informant, ſaw the ſaid I. L. make or print, two ten ſhilling bills, in imitation of the public current bills of credit of the ſaid ſtate; and further, That he ſaw the ſaid I. L. offer one bill thereof in payment to W. A. of R. in the ſaid county, who refuſed the ſame, as juſtly fearing it was counterfeited.

Taken before me the day and year above written,

I. R.

Warrant to apprehend a perſon for counterfeiting bills, &c.

Middleſex, ſſ. *To the conſtable of* B. *in the ſaid county.*

WHEREAS M. A. of Q. in the county aforeſaid, yeoman, hath this day made oath before me S. W. eſq: one of the juſtices of the peace for the county aforeſaid, That on the 10th day of *May* laſt, J. M. of A. aforeſaid, did print and make ſeveral bills, viz. One of ten ſhillings, and two of fourteen ſhillings, at the houſe of E. E. ſituate in A. aforeſaid, in imitation of the current bills of credit of the ſtate of N. J. contrary to law: Theſe are therefore in the name of the peop'e of the ſtate of New-Jerſey, to require and authorize you, to apprehend the ſaid J. M and bring him forthwith before me, or ſome other of the juſtices of the peace for this county, to be examined in the premiſes, and to be dealt with according to law. Given under my hand, &c.

Examination of a perſon apprehended for counterfeiting, &c.

Eſſex, ſſ. THE examination of E. G. of R. in the ſaid county of E. taken before me I. R. eſq; one of the juſtices of the peace for the county aforeſaid, the 3d day of *March*, 1787. The ſaid examinant being duly ſworn, depoſeth and ſaith, that as to what he is charged with by S. T. of E. in the county aforeſaid, relating to the counterfeiting of bills of credit of N. J. he knoweth nothing thereof, but is entirely innocent, tho' he confeſſeth, that on the 27th of *March* laſt, he was at the houſe of R. K. in E. aforeſaid, as ſet forth in the ſaid S. T's information, and that he was handling bills of credit, and holding them near the candle, to try to diſcover whether they were good or not, they being bills he had received that evening by candle light; but that he made any of them, or uſed any paper or types, as the ſaid S. T. depoſes, he denies the ſame, or that he ever had any hand in ſuch act.

Taken by me the day and year aboveſaid. I. R.

Warrant

Warrant to commit a ſuſpected perſon, &c.

Eſſex, ſſ. *To the conſtables, &c. and to the keeper of, &c.*

WHEREAS a certain quantity of printed paper, cut, &c. and printed in imitation of public bills, &c. types, &c. (as the caſe may be) were lately found and ſeized in the poſſeſſion of L. M. of, &c. of which paper, and with which ſaid types, &c. it is ſuſpected he the ſaid L. M. has forged and counterfeited the public bills of credit of, &c. And whereas upon examination of the ſaid L. M. taken before us this preſent day upon oath, he hath not made ſufficient proof that he was uſing the paper, &c. aforeſaid, on any lawful occaſion; nor giving any reaſon to think he was not forging and counterfeiting as aforeſaid, contrary to the law of this, &c. in that caſe made and provided. Theſe are therefore to command you, to convey the ſaid L. M. to the common gaol at, &c. aforeſaid, and to deliver him there to the keeper thereof, together with this precept; commanding alſo you the ſaid keeper, to receive the ſaid L. M. into your cuſtody and gaol aforeſaid, and him there ſafely to keep, until he ſhall be from thence delivered by due courſe of law. Hereof fail not. *Given under our hands and ſeals this*, &c.

COMMITMENT.

ANCIENTLY there were more felons committed to gaol without mittimus in writing, than were with it: ſuch were all the commitments by conſtables, watchmen, and private perſons arreſting for felony, and bringing to the common gaol long before there were any juſtices of the peace; and yet mittimus's are not of ſo ancient a date even as they. 1 *H. H.* 610.

But now, ſince the *habeas corpus* act, a commitment in writing ſeems more neceſſary than it was in former times; otherwiſe the priſoner may be admitted to bail upon that act, whatſoever his offence may have been.

When a ſtatute appoints impriſonment, but limits no time when, it is to be underſtood that he ſhall be impriſoned preſently. *alt.* *c.* 170.

Concerning which I will ſet forth,

I. Who may be committed.
II. To what place.
III. The form of the commitment.
IV. Charges of the commitment.
V. That the goaler ſhall receive the priſoner.
VI. Shall certify the commitment.
VI. Commitment diſcharged.

I. Who

I. *Who may be committed.*

There is no doubt, but that perſons apprehended for offences which are not bailable, and alſo all perſons who neglect to offer bail for offences which are bailable, muſt be committed. 2 *Haw.* 116.

And it is ſaid, that whereſoever a juſtice is impowered by any ſtatute to bind a perſon over, or to cauſe him to do a certain thing, and ſuch perſon being in his preſence ſhall refuſe to be bound, or to do ſuch thing, the juſtice may commit him to the gaol, to remain there till he ſhall comply. 2 *Haw.* 116.

If a priſoner be brought before a juſtice, expreſsly charged with felony upon oath, the juſtice cannot diſcharge him, but muſt bail, or commit him. 2 *H. H.* 121.

But if he be charged with ſuſpicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the juſtice may diſcharge him; as if a man be charged with felony for ſtealing a parcel of the freehold, or for carrying away what was delivered to him, and ſuch like, for which tho' there may be cauſe to bind him over as for a treſpaſs, the juſtice may diſcharge him as to felony, becauſe it is not felony. But if a man be killed by another, tho' it be by miſadventure, or ſelf defence (which is not properly felony) or in making an aſſault upon a miniſter of juſtice in execution of his office (which is not at all felony) yet the juſtice ought not to diſcharge him, for he muſt undergo his trial for it; and therefore he muſt be committed, or at leaſt bailed. 2. *H. H.* 121.

But commitment by the juſtices of the peace almoſt in all caſes (except for the peace, good behaviour, felony, or higher offences) is, but to retain the party till he hath made fine to the people; and therefore if he offer to pay it, or find ſureties by recognizance to pay it, he ought not to be committed, but to be delivered preſently. *Dalt. c.* 170.

II. *To what place.*

All felons ſhall be committed to the common gaol, and not elſewhere. 5 *H.* 4. *c.* 10.

But vagrants and other criminals, offenders, and perſons charged with ſmall offences, may for ſuch offences, or for want of ſureties, be committed either to the common gaol, or houſe of correction, as the juſtices in their judgment ſhall think proper. 6 *G. c.* 19.

And they may commit other offenders to the ſtocks, or other cuſtody, by particular ſtatutes.

Generally, if a man commit felony in one county, and be arreſted for the ſame in another county, he ſhall be committed to gaol in that county where he is taken. *Dalt. c.* 170.

Yet if he eſcapes, and is taken on freſh ſuit, in another county, he may be carried back to the county where he was firſt taken. *Dalt. c.* 170.

III. Form

III. Form of the commitment.

It muſt be in writing either in the name of the people, and only veſted by the perſon who makes it, or it may be made by ſuch perſon in his own name, expreſſing his office, or authority, and muſt be directed to the gaoler, or keeper of the priſon. 2 *Haw.* 119.

Yet the mention of the name and authority of the juſtice, in the beginning of the mittimus, is not always neceſſary, for the ſeal and ſubſcription of the juſtice to the mittimus, is ſufficient warrant to the gaoler; for it may be ſupplied by averment, that it was done by the juſtice. 2 *H. H.* 122.

It ſhould contain the name and ſurname of the party committed, if known; if not known, then it may be ſufficient to deſcribe the perſon by his age, ſtature, complexion, colour of his hair, and the like, and to add that he refuſeth to tell his name. 1 *H. H.* 577.

It is ſafe, but not neceſſary, to ſet forth, that the party is charged upon oath. 2 *Haw.* 120.

It ought to contain the cauſe, as for treaſon, or felony, or ſuſpicion thereof; otherwiſe if it contain no cauſe at all, if the priſoner eſcape it is no offence at all; whereas if the mittimus contained the cauſe, the eſcape were treaſon or felony, tho' he were not guilty of the offence; and therefore for the people's benefit, and that the priſoner may be the more ſafely kept, the mittimus ought to contain the cauſe. 2 *Inſt.* 52.

And hereupon it appeareth, that a warrant or mittimus to anſwer to ſuch things as ſhall be objected againſt him, is utterly againſt law. 2 *Inſt.* 591.

Alſo, it ought to contain the certainty of the cauſe; and therefore if it be for felony, it ought not to be generally for felony, but it muſt contain the ſpecial nature of the felony, briefly, as for felony *for the death of ſuch an one*, or for burglary, *in breaking the houſe of ſuch an one*; and the reaſon is, becauſe it may appear to the judges upon an *habeas corpus*, whether it be felony or not. 2 *H. H.* 122.

But the want hereof ſeems to make the commitment abſolutely void, ſo as to ſubject the gaoler to a falſe impriſonment, but it lies in averment to excuſe the gaoler or officer, that the matter was for felony. 1 *H. H.* 584.

It muſt have an apt concluſion; as if it is for felony, to detain him till he be thence delivered by law, or by order of law, or by due courſe of law. 2 *Haw.* 120. 2 *H. H.* 124.

But if the concluſion be irregular, it doth not ſeem to make the warrant void, but the law will reject that which is ſurpluſage, and the reſt ſhall ſtand; ſo that if the matter appear to be ſuch, for which he is to remain in cuſtody, or be bailed, he ſhall be bailed or committed as the caſe requires, and not diſcharged, but the wrong concluſion ſhall be rejected. 1 *H. H.* 584.

Where a ſtatute appoints impriſonment, but limits no time how long,

long, in such case the prisoner must remain at the discretion of the court. *Dalt. c.* 170.

It must be under seal; and without this, the commitment is unlawful, the gaoler is liable to a false imprisonment, and the wilful escape by the gaoler, or breach of prison by the felon, makes no felony. 1 *H. H.* 583.

But this must not be intended of a commitment by the sessions, or other court of record, for there the record itself, or the memorial thereof, which may at any time be entered of record, are a sufficient warrant, without any warrant under seal. 1 *H. H.* 584.

It should also set forth the place at which it was made. 2 *Haw.* 119.

It must also have a certain date, of the year and day. 2 *H. H.* 123.

IV. Charges of the commitment.

By the 3 *J. c.* 10. Every person who shall be committed to the common or usual gaol, within any county or liberty, by any justice of the peace, for any offence or misdemeanor, the said person so to be committed, having means or ability thereunto, shall bear his own reasonable charges for so conveying or sending him to the said gaol, and the charges also of such as shall be appointed to guard him to such gaol, and shall so guard him thither: And if any such person so to be committed, shall refuse at the time of his commitment and sending to the said gaol, to defray the said charges, or shall not then pay or bear the same; then such justice shall by writing under his hand and seal, give warrant to the constable of the hundred, or township where such person shall be dwelling and inhabit, or from whence he shall be committed, or where he shall have any goods within the county or liberty, to sell such and so much of the goods and chattles of the said person so to be committed, as by the discretion of the said justice shall satisfy and pay the charges of such his conveying and sending to the said gaol, the appraisement to be made by four of the honest inhabitants of the township where such goods shall be; the overplus to be delivered to the party.

Note; by the *habeas corpus* act, the charges of conveying an offender is limited not to exceed 12*d.* a mile; which may be an argument for allowing as much in this case, especially as security is to be given before a man is removed on that act by *habeas corpus*, that he shall not escape by the way, which renders guards in that case not so necessary.

V. Gaoler shall receive the prisoner.

If a gaoler shall refuse to receive a felon, or take any thing for receiving him, he shall be punished for the same, by the justices of gaol delivery. 4 *Ed.* 3. *c.* 10. *Dalt. c.* 170.

But if a man be committed for felony, and the gaoler will not receive him, the constable must bring him back to the town where he

he was taken: and that town shall be charged with the keeping of him, until the next gaol delivery: Or the person that arrested him, may in such case keep the prisoner in his own house, as it seemeth. *Dalt. c.* 170.

But in other cases it seems, that regularly no one can justify the detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as if the party be so dangerously sick, that it would apparently hazard his life to send him to the gaol, or there be evident danger of a *rescous* from rebels, or the like. 2 *Haw.* 118.

VI. The gaoler shall certify the commitment.

By the 3 *H.* 7. *c.* 3. The sheriff or gaoler shall certify the commitments, to the next gaol delivery.

VII. Commitment discharged.

It seems that a person legally committed for a crime, certainly appearing to have been done by some one or other, cannot be lawfully discharged by any one till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose by the justices of goal delivery. But if a person be committed on a bare suspicion, without an indictment for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive: it hath been holden, that he may be safely dismissed without any further proceeding, for that he who suffers him to escape is properly punishable only as an accessary to his supposed offence; and it is impossible that there should be an accessary where there can be no principal; and it would be hard to punish one for a contempt, in disregarding a commitment founded on a suspicion appearing in so uncontested a manner to be groundless. 2 *Haw.* 121.

Mittimus for felony.

New-Jersey, Essex County. SAMUEL WOODRUFF, esquire, one of the justices of the people, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed: To the keeper of the goal of the state of New-Jersey, in the said county, or to his deputy there, and to each of them greeting:—Whereas *A. O.* late of ——— in the said county, labourer, hath been arrested by the constable of ——— in the said county, for suspicion of a felony by him, as it is said, committed, in stealing a black mare, of the value of 40*s* the property of A. P. of ——— in the said county, yoeman: Therefore on the behalf of the people of the said state, I command you and each of you, that you, or one of

of you receive the said A. O. into your custody in the said goal, there to remain till he be delivered from your custody by due course of law. Given under my hand and seal at ——— in the said county, the ——— day of ——— in the ——— year of the independence of, &c.

Another.

New-Jersey, Essex-County. } P. esquire, &c. To the keeper of the common goal at ——— in the said county, or to his deputy there: These are in the name of the people of the state of New-Jersey, to charge and command you, that you receive into your said goal, the body of A. O. late of ——— in the said county, yoeman, taken by A. C constable of ——— in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing ——— And that you safely keep the said A. O. in your said goal, until the next general goal delivery for the said county [if he be not bailable; or if he be bailable, then thus] until he shall thence be delivered by the due course of law. And hereof fail you not, &c.

General Warrant of commitment.

New-Jersey, Essex-County. } P. esquire, one of the justices assigned to keep the peace within the said county To the constable of ——— in the said county, and to the keeper of ——— at ——— in the said county.

These are to command you the said constable, in the name of the people of the state of New-Jersey, forthwith to convey and deliver into the custody of the said keeper of the said ——— the body of A. O. &c. And you the said keeper are hereby required to receive the said A. O. into your custody in the said ——— and him there safely to keep, &c. Given under my hand and seal, the ——— day of ——— in the ——— year of the independence of, &c.

CONFESSION.

CONFESSION is twofold, either *express, or implied.*

An *express* confession is, where a person directly confesses the crime with which he is charged; which is the highest conviction that can be 2 *Haw.* 33.

But it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 2 *H. H.* 225.

An *implied* confession is, where a defendant in a case not capital, doth not directly own himself guilty, but in a manner admits it by yielding to mercy, and desiring to submit to a small fine; which submission

submission the court may accept of if they think fit, without putting him to direct confession. 2 *Haw* 233.

It seems that the confession of the defendant taken upon an examination before justices of the peace, or in discourse with private persons, may be given in evidence against the party confessing, but not against others. 2 *Haw* 429.

All those who on their examination own themselves guilty of a felony alledged against them, and are charged in their *mittimus* with the felony confessed, seem to be excluded from bail; for bail is only proper where it stands indifferent whether the party be guilty or innocent. 2 *Haw.* 97.

CONSPIRACY.

I. What it is.
II. How punished.

I. What it is.

BY the common law there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false. 1 *Haw.* 190.

And conspiracy by statute is as follows: 'Conspirators are they 'that do confederate or bind themselves by oath, covenant, or other 'alliance, that every of them shall aid and bear the other falsly and 'maliciously to indict, or cause to indict, or falsly to move or main-'tain pleas; and such as retain men in the country, with liveries or 'fees to maintain their malicious enterprises, and this extendeth as 'well to the takers as to the givers: And stewards and bailiffs of great 'lords, who by their office or power, undertake to bear or maintain 'quarrels, pleas, or debates, that concern other parties than such as 'touch the estate of their lords or themselves' 33 *Ed.* 1 *st.* 2.

From this definition of conspirators, it seems clearly to follow, contrary to the opinion of Lord *Coke*, that not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsly and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 *Haw.* 189. L. *Raym.* 1169.

But an *action* will not lie for the conspiracy, unless it be put in execution; for in such case, the *damage* is the ground of the action. L. *Raym.* 378.

Also

Alſo it plainly appears from the words of the ſtatute, that one perſon alone cannot be guilty of conſpiracy, within the purport of it; from whence it follows, that if all the defendants who are proſecuted for ſuch conſpiracy be acquitted but one, the acquittal of the reſt, is the acquittal of that one alſo: And upon the ſame ground it hath been holden, that no ſuch proſecution is maintainable againſt a huſband and wife only, becauſe they are eſteemed but as one perſon in law: But it is certain, that an action on the caſe, in the nature of a conſpiracy, may be brought againſt one only: Alſo, it hath been reſolved, that if ſuch an action be brought againſt ſeveral perſons, and all but one be acquitted, yet judgment may be given againſt that one only. 1 *Haw.* 192.

Alſo in the caſe of *K.* againſt *Kinnerſly* and *Moore*, *T.* 5 *G.* An information was brought, ſetting forth that the defendants, being evil diſpoſed perſons, in order to extort money from my lord *Sunderland*, did conſpire together to charge my lord with endeavouring to commit ſodomy with the ſaid *Moore*. The defendant *Kinnerſly* only appears, and pleads to iſſue, and is found guilty. And now exception was taken in arreſt of judgment, that to every conſpiracy there muſt be two perſons at leaſt, whereas here is only one brought in and found guilty, and the other poſſibly may be acquitted. But it was anſwered, that this is arguing from what has not happened, and probably never will; for tho' *Moore* may have an opportunity to acquit himſelf, and is not concluded by the verdict as *Kinnerſly* is, yet as the matter now ſtands, *Moore* himſelf is found guilty, for the conſpiracy is found as it is laid, and therefore judgment may be give againſt one, before the trial of the other. And a caſe was quoted, where ſeveral were indicted for a riot, *with many others*, and two only were found guilty; and it was objected, that there muſt be three to make a riot: but upon the words, *with many others*, judgment was given againſt the defendants. And the court over ruled the exception. And the defendant had ſentence. And in the *Eaſter* term following, *Moore* alſo was convicted and had judgment. *Str.* 193.

II. How puniſhed.

It is clear, that thoſe who are convicted of conſpiracy at the ſuit of the party, ſhall have judgment of fine and impriſonment, and to render the plaintiff his damages. 1 *Haw.* 193.

Alſo it is certain, that he who is convicted at the ſuit of the people, of a conſpiracy to accuſe another of a matter which may touch his life, ſhall have judgment that he ſhall loſe the freedom and franchiſe of the law (whereby he is diſabled from being put upon any jury, or to be ſworn as a witneſs, or even to appear in perſon in any of the courts) and alſo that his houſes, lands and goods ſhall be ſeiſed, and his houſes and lands ſtripped and waſted, his trees rooted up, and his body impriſoned. And this is commonly called *villainous*

eus judgment, and is given by the common law, and not by any statute, and is said generally in some books to be the proper judgment upon every conviction of conspiracy at the suit of the people, without any restriction to such as endangered the life of the party; but this point doth not seem to be any where settled. 1 *Haw.* 193.

In the case of *Kinnersley* and *Moore* above mentioned, *Kinnersley* was sentenced to be fined 500*l.* to suffer a year's imprisonment, and to find sureties for his good behaviour for seven years. *Moore* was sentenced to stand in the pillory, suffer a year's imprisonment, and to find sureties in like manner for seven years. *Str.* 196.

CONSTABLE.

THE office of a constable, in executing of warrants, is treated of under the titles *ARREST* and *WARRANT*; and in like manner the other particulars of his duty may be found under the respective titles throughout the book; this title treating only of the office of a constable in general.

I. Of the antiquity and original of constables.
II. Who shall be a constable.
III. How chosen and sworn.
IV. His power as a conservator of the peace.
V. His duty as a subordinate officer to justices of the peace.
VI. His indemnity and protection in his office.

I. Of the antiquity and original of constables.

The word *constable* hath afforded matter of much disquisition to the learned. It is evidently a compound; but from what two original words it hath sprung, hath been variously conjectured. History traceth it from its arrival in *England*, backwards through *France* and *Germany*, and *Greece*, to the imperial seat at *Constantinople* in the days of *Constantine* the Great. From whence we ascend further still towards the east, where we find the word *cone* or *cune* in *Palestine*, which signified in the times of the old testament a stability, strength, or stay. Of which word there seem to be some traces in the mongrel name of *Laocoon* at *Troy*; and more especially of this same *Constantine*, who was himself of oriental extraction, having sprung from *Dardania*, a country of the upper *Moesia*, and was said by his flatterers to have been descended from *Dardanus* and the *Trojans*. And perhaps this appellation of the emperor might give occasion to the adopting of the word into the *Roman* language at that time. For it was then that the word *count* (the genuine offspring of *cone* or *cune*) first became a name of dignity, and from thence travelled

weſtwards (with a little variation according to the genius of each language) throughout the provinces. Amongſt the *Saxons*, the word was *koning* or *kyninge*, from whence undoubtedly we received our *Engliſh* word *king*. Again, the word *ſtole*, *ſtalle*, *ſtaſſe*, *ſtable*, by an eaſy tranſmutation of thoſe letters frequent in almoſt all languages, (and which ſeemeth the other conſtituent of the word *conſtable*) is likewiſe common to thoſe languages of the middle ages, and ſignifieth a ſtanding place, diviſion, or department, called by the *Romans*, *ſtatio*; and all of them probably from the ſame origin with the *Latin ſto*. So that according to this etymology, the word *conſtable* will properly ſignify the ſtability or ſtay of the place, or the ſtrong man of the diviſion. The *German* word is *conneſtaffe*; the *French conneſtable*; *the Italian coneſtabile*; the *Spaniſh condeſtable*, from the word *conde* which they uſe for *count*.

By the ſtatute of *Winchester*, *in every hundred and franchiſe two conſtables ſhall be choſen to make the view of armour*; *and they ſhall preſent defaults of armour and of ſuits of towns*, *and of highways*, *and ſuch as lodge ſtrangers in uplandiſh towns*, *for whom they will not anſwer*. 13 Ed. 1. ſt 2. c. 6.

And from hence, Lord *Coke*, and others, will have it, that high conſtables are no ancienter than this ſtatute: But Mr. *Hawkins* (agreeably with *Lambard*, *Dalton*, and other authorities) ſays, that it ſeems to be the better opinion, that both conſtables of hundreds, which are commonly called high conſtables, and alſo conſtables of tythings, which are at this day commonly called petty conſtables, or tythingmen, were by the common law, and not firſt ordained by the ſaid ſtatute of *Winchester*; for that ſtatute doth not ſay, that there ſhall be ſuch officers conſtituted, but clearly ſeems to ſuppoſe that there were ſuch before the making of it. 2 *Haw.* 61.

II. Who ſhall be a conſtable.

It hath been ſaid, that a cuſtom in a town, that the inhabitants ſhall ſerve the office of conſtable by turns, according to the ſituation of their ſeveral houſes, is not good; for that by ſuch a courſe, it may come to a woman's turn to be conſtable, as inhabitant of one of thoſe houſes; yet we find ſuch cuſtoms allowed to be good in latter books; and it ſeems, that the conſequence of the reaſoning abovementioned may well be denied, ſince a woman in ſuch caſe may procure another to ſerve for her. 2 *Haw.* 63.

Alſo it ſeems certain, that if a ſworn attorney, or other officer of the courts at *Weſtminſter*, be choſen into this office, he may have a writ of privilege for his diſcharge, by reaſon of his neceſſary attendance in thoſe courts: And it hath been reſolved, that ſuch officers ſhall have this privilege, not only where there is no ſpecial cuſtom concerning the election of conſtables, but alſo where they are choſen by a particular cuſtom, in reſpect of their eſtates, or otherwiſe; for that no ſuch cuſtom ſhall be intended to be more ancient than the uſages of thoſe courts, and therefore ſhall give way to them. 2 *Haw.* 63.

And

And upon the like reasons, it is taken for granted, that practising barristers at law, and the servants of members of parliament, have the same privilege; but there seem to have been no resolutions to this purpose. 2 *Haw.* 63.

But it hath been holden, that a captain of the king's guards, being presented to serve as constable, in pursuance of a custom in respect of his lands in a town, cannot claim this privilege; for that notwithstanding he is bound by his office to personal attendance on the king's person, yet such office being of late institution, shall not prevail against an ancient custom. 2 *Haw.* 63.

[Altho' by the laws of *New-Jersey*, no militia officer is there exempted from serving as constable, and the inhabitants are generally chosen by turns; yet a militia captain in *Woodbridge*, who had never served in that office, being nominated and appointed constable, he refused to serve; and on a hearing at the next sessions, he was discharged; consequently Mr. *Hawkins*'s opinion was over-ruled. But this may be the less wondered at, if it be considered that Mr. *Attorney*, who pleaded the cause, was the colonel of the regiment to which the captain belonged; it is asserted, that the same practice prevails in other parts of that state.]

Also, it seems, that a practising physician, being chosen constable in pursuance of such custom, has no remedy for his discharge; for that there are no precedents of this kind, and his calling is private. 2 *Haw.* 63.

Yet if such an officer as before-mentioned, or a gentleman of quality who hath no such office, or a practising physician, be chosen constable of a town, which hath sufficient persons besides to execute this office, and no special custom concerning it; perhaps he may be relieved by the king's bench: but it seems that even a custom cannot exempt fitting persons from serving the office of constable, where there are not sufficient besides them to execute it. But these points seem not to be settled. 2 *Haw.* 63.

By the 1 *W. c.* 18. *s.* 11. Every teacher or preacher in holy orders, or pretended holy orders, in a congregation tolerated by law, shall from the time of his subscription and taking the oaths, be exempted from the office of constable.

III. How chosen and sworn.

It being said in some books, that both high and petit constables are to be chosen and appointed by the sheriff in his torn (or by the lord of the leet); and by others, that they are to be chosen by the decennary, it seems difficult to determine, to whether of them the power of chusing doth of right belong. 2 *Haw.* 62.

But now the usual manner is, that the high constables of hundreds be chosen either at the sessions, or by the great number of the justices of the division; and likewise that they be sworn at sessions, or by warrant from the sessions; which course hath been often allowed and commended by the justices of assize. *Dalt. c.* 28.

And

And the reaſon thereof may be this, as hath been intimated above; namely, that their office at preſent doth not ſo much conſiſt in executing the office of high conſtable as ſuch, as in executing the juſtices precepts, which they may do for the moſt part, whether they be indeed high conſtables or not.

And moreover, every petty conſtable, being a principal peace officer, and it being neceſſary for the preſervation of the peace, that every vill ſhould be furniſhed with one; the juſtices of the peace have ever ſince the inſtitution of their office, taken upon them as conſervators of the peace, not only to ſwear the petty conſtables, which have been choſen at a torn or leet, but alſo to nominate and ſwear thoſe who have not been choſen at any ſuch court, on the neglect of the ſheriffs or lords to hold their courts, or to take care that ſuch officers are appointed in them. And this power of juſtices of the peace having been confirmed by the uninterrupted uſage of many ages, ſhall not now be diſputed, but ſhall be preſumed to have been grounded on ſufficient authority. And ſome have carried this point ſo far, as to allow the juſtices at their ſeſſions, to ſwear one who was choſen at the leet, and unduly rejected by the ſteward, who had ſworn another in his place. 2 *Haw.* 65.

However, it is certain, that juſtices of the peace had power to nominate and ſwear conſtables, on the default of the torn or leet, before the ſtatute of 1 & 14 *C.* 2 *c.* 12. and therefore, that they have ſuch authority in ſome caſes not mentioned in that ſtatute; which enacts, that if a conſtable ſhall die, or go out of the pariſh, or continue above a year in his office, any two juſtices may make and ſwear a new one, until the lord ſhall hold a leet, or till the next ſeſſions, who ſhall approve of the officer ſo made and ſworn, or appoint another. 2 *Haw.* 65.

Conſtables lawfully choſen, if they ſhall refuſe to be ſworn, a juſtice of the peace may bind them over to the aſſizes or ſeſſions. *Dalt. c.* 28.

IV. His power as a conſervator of the peace.

Every high and petty conſtable are by the common law conſervators of the peace. 2 *Haw* 33. *Crom.* 6. *Dalt. c.* 1.

And therefore if any man ſhall make an affray or aſſault upon another in the preſence of the conſtable, or ſhall threaten to kill, beat, or hurt another, or ſhall be in a fury ready to break the peace; the conſtable may commit him to the ſtocks, or other ſafe cuſtody for the preſent, and after may carry him before a juſtice, or to goal, until he ſhall find ſurety for the peace, which ſurety the conſtable himſelf may alſo take by obligation, to be ſealed and delivered to the king's uſe, and if the party will not find ſurety to the conſtable, he may impriſon the party until he ſhall do it. *Dalt. c.* 1.

But he may not require ſurety of the peace, unleſs the offence be upon his own view, and not if it be committed out of his ſight; for he cannot take any man's oath that he is afraid of death, becauſe he

is not a judge of record; which is the reason that an obligation taken by him, shall be in his own name, and not in the king's name: and the same shall be certified at the sessions of the peace. *Cro. Eliz.* 375, 376.

V. His duty as a subordinate officer to justices of the peace.

It hath been always holden, that the constable is the proper officer to a justice of the peace, and bound to execute his warrants; and therefore it hath been resolved, that where a statute authorizes a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress, without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to serve such warrant, and indictable for disobeying it. 2 *Haw.* 62.

VI. His indemnity and protection in his office.

If an action is brought against a constable, for any thing done by virtue of his office, he, and also all others which in his aid, or by his command, shall do any thing concerning his office, may plead the general issue, and give the special matter in evidence, and if he recovers, he shall have double costs. 7 *J. c.* 5.

Constable's oath.

YOU shall well and truly serve the people of the state of New-York, in the office of constable, for the towship of ——— for the year ensuing, or until you shall be lawfully discharged therefrom, or until another shall be sworn in your place: You shall well and truly do and execute all things belonging to the said office, according to the best of your skill and knowledge. So help you God.

[*Thus far from Burn's.*]

Extract of an ESSAY on the office of CONSTABLE, with rules and cautions for the more safe and effectual discharge of that duty. By SAUNDERS WELCH, late high-constable of *Holborn Division*; one of his majesty's justices of the peace for the county of *Middlesex*, and for the city and liberty of *Westminster*.

NEITHER vanity nor avarice, the common motives of authors, have the least share in the publication of this essay; my sole intention being to render the office of constable better understood, and more respected, by communicating, in the plainest manner, that knowledge which I drew from nine years experience, in the execution

tion of my late office of high conſtable of *Holborn* diviſion. Whilſt I held this place, I obſerved many inconveniencies and frequent diſtreſſes to ariſe from want of proper knowledge, not only of a conſtable's power, but the manner of executing that power; I have therefore been at ſome pains to collect what may be uſeful, in the moſt material parts of the duty, for a body of men, enjoined and even compelled by the conſtitution of their country, to perform a very troubleſome, ſometimes fatiguing, and often dangerous office; or in other words, to give them a juſt tranſcript of the manner in which I executed the office I held, which in itſelf was little more than the office of conſtable extended to many pariſhes, as that is confined to one pariſh, precinct, ward, or liberty. And I flatter myſelf that if conſtables will attentively read and practiſe the rules here laid down for their conduct, moſt of them will be better able to diſcharge their duty to the public, and to defend themſelves from the enemies to their power, I mean thoſe low practitioners of the law, who are a ſcandal to their profeſſion, and are conſtantly watching the behaviour of conſtables, in order to take advantage of their raſhneſs or their ignorance.

And for the encouragement of the conſtables to purſue their duty upon the following plan, I do aſſure them (and I hope it will not be imputed to vanity) that in nine years moſt active and faithful diſcharge of the duty of chief conſtable, ſurrounded with difficulties from the moſt artful as well as the moſt daring villains, my name or my actions were never queſtioned, during the whole time, before my lords the judges, by law ſuit of any kind, nor any complaint made againſt me to the magiſtrates from whom I received my power, nor indeed any reproach or cenſure paſſed upon me by thoſe whoſe crimes had rendered them the objects of the puniſhment of the laws they had violated.

In writing upon this office, it may be expected that ſomething ſhould be ſaid concerning its origin, and the derivation of the word *Conſtable*: but as many learned men have employed their time in tracing that word, and as their labours have ended in mere conjectures, it would be affectation in me to attempt the ſubject. The learned and ingenious Mr. *Burn*, after ſcrutinizing the Saxon, French, German, Italian, Spaniſh, Latin, and Greek languages, concludes from the etymology he produces, that the word *conſtable* properly ſignifies *the ſtability or ſtay of the place, or the ſtrong man of the diviſion*; and this agrees well with the nature of the office, which is to protect the innocent from the hand of violence, and to ſeize and bring to juſtice, offenders againſt the public peace. Nor is the origin of this office ſettled with more certainty than the etymology of its title. From the ſtatute of *Winchoſter, that in every hundred and franchiſe two conſtables ſhall be choſen*, &c. it is inferred by lord *Coke*, and others, that conſtables are not more ancient than that ſtatute. But Mr. Serjeant *Hawkins* from great authority queſtions this, and ſays, it ſeems to be the better opinion that high and petty

petty conſtables were by the common law, and not firſt ordained by the ſtatute of *Wincheſter*: ſeeing that ſtatute doth not ſay that ſuch officers ſhall be conſtituted, but clearly ſeems to ſuppoſe there were ſuch *before* the making of it. To ſtrengthen Mr. *Hawkins*'s opinion, it may be added, that the great increaſe of people in this kingdom, by the flood of Normans, &c. from the origin of the office of conſtable to 13 *Edw.* I. made it neceſſary to increaſe the number of civil officers; and probably this, and an enlargement of their power, was the intention and deſign of that ſtatute, and not a creation of the office. I hope a conjecture upon this ſubject, with a view to fix the time when this office firſt began in *England*, will not be imputed to affectation.

We are informed by the *Engliſh* hiſtorians, that after the great *Alfred* had recovered his dominions from the *Danes* in the year 886. he turned his thoughts towards the reſtoration of learning, then at the loweſt ebb, and to the reformation of the civil polity of his kingdom. To effect this great purpoſe he invited ſeveral learned men from abroad; and as many ſpoils and rapines had been committed during the courſe of the war, as well by his own ſubjects as by the *Danes*; to remedy thoſe diſorders, and effectually to prevent all future exceſſes of that kind, this excellent prince divided *England* into diſtinct counties, and thoſe again into hundreds, pariſhes, and tythings. Over theſe he conſtituted two officers, the judge and the ſheriff. And although hiſtorians do not deſcend to the names of the ſubordinate officers, there can be no doubt but ſuch officers were inſtituted, as well for the preſervation of peace and order in the ſeveral diſtricts, as for the apprehending and conveying to priſon thoſe whoſe crimes merited puniſhment: For without the aſſiſtance of ſuch officers the power delegated to the judge and the ſheriff could have little effect. But whether *Alfred* introduced this office into *England* from the *Saxon* conſtitution, or whether the *Saxons* incorporated this office, on account of its utility, into the civil polity of their own country hiſtory is ſilent. However the former is moſt probable. This at leaſt is certain, that the *Conneſtaſle* of *Saxony* is at this time veſted with the very ſame power, as conſervator of the peace, which the conſtables in *England* now legally exerciſe.

But the ſucceſs of king *Alfred*'s conſtitution ought not to be paſſed over in ſilence, as it may afford a proper leſſon to the magiſtrates and peace officers of our days. Hiſtorians inform us, the king extended his provident vigilance over the judges and other officers in the moſt effectual manner; puniſhing all ſuch magiſtrates as miſbehaved, either through bribery, or by making their own arbitrary wills the meaſure of the law, and removing thoſe whom ignorance or indolence rendered unfit to be intruſted with power; whereby juſtice came to be ſo excellently adminiſtered, that bags of money might have been left in the common high ways, or gold bracelets hung upon the hedges, without danger of their being touched by any perſon. And although in theſe times, the declenſion of our morals,

morals, and the debauchery of our manners, are too great, to hope that reformation can be carried to so high a pitch, yet it cannot be doubted, that public spirit in the civil power might prevent that fatal negligence in the peace officers, to which many glaring crimes and enormities unknown to our fore-fathers, owe, if not their existence, at least their continuance with a kind of impunity.

Every sensible and good man must have reflected with concern upon the low ebb to which the civil power has of late years been reduced. The swearing in improper persons has greatly contributed to the duty being so ill executed, and brought contempt upon the office. Poverty and gross ignorance are too often united in the person of a constable: The first prevents the necessary attendance on his duty, and too often subjects him to temptations; and the latter exposes both him and his office to ridicule; whilst the opulent tradesman screens himself by interest from this most necessary and important duty to his country, and meanly throws it upon the indigent and ignorant. Nor has the office suffered less in its credit from another set of men, who from mercenary views and other unworthy motives, make interest to get themselves elected into it.

The public is greatly concerned in the faithful and active discharge of the office of constable and head-borough. For, notwithstanding the contempt in which inconsiderate men may hold the office, and the severe treatment the officer may meet with from others, who ought rather to protect him, than take advantage of the law upon the least slip in the discharge of a duty so difficult, and which the law forces him to undertake: I would ask, what must become of the civil policy of this country, if men called upon to execute this office are brought to be either ashamed, or afraid, of doing their duty? The legislature may enact laws, magistrates may issue their processes; but the execution, the effect of all this, depends wholly upon the integrity and activity of the officers under them. And I wish it were better considered that every intimidation of the constable in his duty necessarily weakens the power of the magistrate, and reduces the very best constitution to a mere dead letter, and must soon produce that intolerable anarchy which can alone make the honest part of mankind fly to a military force, as to a miserable refuge from a still worse evil. The idea of power necessarily implies the execution of it by some hands or other or else it is a mere chimerical notion; is it not therefore to the shame of our policy, that we see justices of the peace and their officers made the joke of counsellors at law in open court, and introduced upon our stage as the constant objects of contempt and ridicule?

To the Constables.

The just discharge of the office you are to execute doth indeed require a greater share of knowledge in the common and statute law, than men in your station can be supposed endued with; and I pre-

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tend not to critical knowledge of this sort: my present intention is to point out to you some general rules for your conduct, whereby I hope the public may be benefited, and yourselves better enabled to execute your office with credit and safety.

Whatever power is annexed to your office, regard always the intention of it. It was ordained for the glorious purpose of doing good: to secure and protect the innocent from the hands of violence; to preserve the public peace, and to bring the disturbers of it to condign punishment: This is briefly your duty. Let then the service of the public be the great end of all those actions which regard your office: This properly attended to, will keep you from all officious wanton acts of power; this will banish from your minds all your own little resentments; this will prevent all false imprisonments against law and conscience, and render you the objects of general esteem: for, while you act in this manner, and from such motives, your prisoners themselves must respect you, nor will it be in the power of malice to rob you of the just applause of the public, the reward of the faithful execution of a public trust.

Let me recommend to you a perfect union among yourselves; a ready and chearful assistance of one another. As this will be a great support to you in the difficult parts of your duty, so it will render you formidable to those to whom you should be always objects of terror, and a valuable safe guard to those whom it is your duty to protect. Were the civil officers properly united and connected, did they properly correspond with each other, and had fixed times and places of meeting, not for sotting and drinking *(we presume he chiefly means city constables here)* but for consulting the peace and good order of their respective parishes, it would not be possible for any bawdy-houses, gaming-houses, or gangs of villains to exist: for the immediate danger consequent upon acts of violence would be so great to the actors of them, that such houses would, wherever they arose, be instantly suppressed, and peace and safety restored to our streets.

Next to union I earnestly recommend to you temper and sedateness in the execution of your office. Coolly and well consider the nature of every service you are called upon; what you ought to do, and the best method and manner of doing it with effect. It ill becomes an officer called upon and acting in the king's name, to quell the unruly passions of others, instantly to fall into a passion himself, and a constable deserves to be, and truly is, the object of contempt and ridicule, who will venture to execute his office when intoxicated with liquor. Indeed, this is a fatal error, and hath afforded many opportunities to some unworthy members of the law, to stir up expensive and vexatious suits against civil officers.

Be not therefore easily provoked by the ill manners or scurrilous language of those about you. Behaviour of this sort will unavoidably lead you into absurdities and a neglect of the duty you are called

to execute. I have seen an officer totally forget the service of his warrant, upon being called fool or puppy by some silly fellow, and justify the reflection by neglecting the real prisoner, and apprehending the offender against himself, under the mistaken notion of being insulted or obstructed in the execution of his office; and so as an abuse of this sort cannot justify him render himself liable to an action of false imprisonment, and an indictment for neglect of duty in suffering his prisoner to escape.

Having mentioned these few general cautions, that I may be clear in what I offer to you, I shall speak to the two parts of your office separately, viz. What you may, and ought to do, as conservators of the peace, *upon view* And what concerns you as officers and ministers of the sessions, sheriff, coroner, and justices of the peace. In a word, what you may and ought to do with a warrant, and what without one.

1. *As conservators of the peace.* You have power, within your respective parishes and divisions, to quell all affrays, riots, routs, and actual assaults, by commanding the parties in the king's name to keep the peace, and quietly to depart about their respective businesses; and to apprehend all persons who shall in your *view* break the peace, by assaulting, striking or by fighting, though with mutual consent, if either party appear wounded, and to carry such persons directly before some justice of the peace; or if it be night, to imprison them until the next morning. And all persons within view of an affray, riot, rout or assault, being required by you in the king's name to aid and assist, may be indicted if they neglect or refuse so to do, not having a lawful excuse; and the courts of justice have a power to fine and imprison them for their contempt. And as this necessary power of demanding aid is lodged in you, and the execution of it has of late years been treated with contempt by the commonalty; and as your safety is greatly concerned in a ready assistance, you will do well to fix your charge of aid upon some known person or persons; and upon his or their refusal, if the party to be apprehended escape, or you are struck, or even resisted, in pursuance of your duty, indict them for the contempt; and I dare promise you the sessions will support your authority. But though, as conservators of the peace, you have power to apprehend without process, you cannot legally discharge your prisoners upon your own authority, the intention of such an arrest being the delivery of the party to the magistrate to be dealt with according to law; and you not being officers of record, have power only in the first instance. If at any time you should forget this caution, you will be subject to an indictment, or action of false imprisonment, for your discharging amounts to a confession that you had no lawful power to arrest.

Having told you that you have power to arrest persons committing breaches of the peace in your *view*, within the limits of your divisions or parishes; it is necessary to tell you, that it is extremely dangerous for you to intermeddle after the affray or assault is over.

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In fuch cafes the injured perfon ought to apply to a magiſtrate for his warrant; yet here common prudence will direct you, that, upon coming in after an affray or aſſault is over, if upon your *view* any perſon appears to be dangerouſly wounded and the party wounded charges any perſon preſent, you certainly ought to detain him, as the delay of a warrant may be the eſcape of a murderer: but where there has been a bare affray only, though accompanied with blows, and the conſtable has interfered by way of prevention only, no real miſchief having happened or charge been given, and no danger of any future miſchief doth appear, the conſtable, having firſt ſeparated the parties, may depart himſelf: for in truth he has never had any one lawfully in his cuſtody, and conſequently will have no impriſonment to juſtify.

What hath been ſaid, will ſufficiently caution you againſt interfering in ale houſe quarrels, upon charges given you of perſons refuſing to pay their reckonings, or giving verbal abuſes very common with people heated by liquor: theſe have nothing to do with your office: and many conſtables, who have at the requeſt of publicans, taken ſuch rioters (as they deemed them to be) into cuſtody, have anſwered the conſequence in a law ſuit in which they have been left to extricate themſelves by the very people to whoſe aſſiſtance they came.

It is ſaid by great authorities in the law, that in the ſuppreſſion of affrays and riots, the conſtable, firſt commanding the peace in the king's name, may, if reſiſted juſtify beating the parties, and putting them into the ſtocks: and that if the conſtable in beating ſhould kill, it is juſtifiable in him, but murder in all the rioters if he be killed.——This may be law—but it is a part of it which you are not obliged to execute, and reaſon is ſtrong againſt it. If a conſtable coming with the appearance of authority to a riotous mob, and charging them, with a reſolution becoming his office, and in the king's name, to keep the peace and depart quietly to their reſpective buſineſſes, and with good nature warning them of the danger and trouble they will involve themſelves in if they commit acts of violence, or continue together.—I ſay, if this will not avail, what can he rationally expect to obtain by blows, but his own hurt or murder? And what ſatisfaction will this afford, that the parties who kill him will be executed for a murder which his own indiſcretion produced? I adviſe never to ſtrike, except it be abſolutely in your own defence: but ſtriking at all, if poſſible, ſhould be avoided; for the ſword of juſtice, not the arm of the conſtable, was intended for puniſhment. Indeed the law itſelf conveys this caution to officers inclined to violent exertion of power, by telling them *the parties will be hanged who kill them.* If therefore any riot ſhould be too violent for you to quell, and it may endanger the public peace, give direct notice of it to the two next magiſtrates, and call to their aſſiſtance as many of your brother officers as you can collect together. As to putting into the ſtocks people guilty of riots and affrays, it might be the uſe of conſtables

ſtables a century ago; but the long diſuſe of it is a reaſon ſufficient to prevent any of you from reviving it, as we have juſtices at hand, and other proper places of ſecurity. I only mentioned this to introduce a caution how you implicitly follow opinions you happen to meet with in law-books; for theſe except you have knowledge in the law, and a very good underſtanding will rather miſlead than inſtruct you. Carry this maxim along with you in every branch of your duty—*Do not do all you may do, but always do what you ought to do.*

The apprehending felons and bringing them to juſtice, is of ſo great conſequence to the public, that the common law authorizes private perſons to perform that ſervice: But it is your immediate and indiſpenſible duty, who are ſelected by the conſtitution of your country, and bound by a ſolemn oath, to exert yourſelves in this important truſt, of preſerving the lives and properties of your fellow-ſubjects: The law hath armed you with all neceſſary power to do this duty with ſafety to yourſelves: You have power to raiſe a hue and cry, with horſe and foot, to ſearch all ſuſpected places, and break open doors in the purſuit of felons; and to extend this purſuit to every pariſh round you, by giving notice to their reſpective conſtables. The ſtatute of the 8th of G. II. cap. 16 provides, that if any conſtable or headborough, within the hundred wherein any robbery ſhall happen, ſhall refuſe or neglect to make hue and cry after felons, with the utmoſt expedition, as ſoon as he ſhall receive notice thereof, he ſhall, for every ſuch refuſal or neglect, forfeit the ſum of five pounds. The wiſdom of the law hath here provided a ſtrong check upon rogues; but the ignorance or inactivity of ſubordinate officers renders it ineffectual. A purſuit ſo immediate would be very dreadful to rogues, as the being once well deſcribed would render their eſcape next to impoſſible. Secrecy in committing, and eaſy means of eſcaping, are the great incentives to robberies: and one may venture to aſſert, that if this ſtatute were executed with a vigilance equal to the wiſdom of its formation, highway robberies, the depredations of foot-pads, and burglaries, in the country eſpecially, would ceaſe. For detection would follow the heels of villainy ſo cloſely, that to rob and be taken would be almoſt the ſame thing: perhaps moſt of the felonies in this kingdom are owing to the non-execution of this excellent law. The law has very prudently rendered warrants to apprehend felons unneceſſary, as ſuch a delay might be the eſcape of the offenders. Your conſideration extends only to two things, firſt, that a felony has been really committed; and, ſecondly, that the perſon you arreſt is properly ſuſpected. The firſt of theſe is abſolutely neceſſary to juſtify an arreſt; a miſtake here is fatal; but an error in the ſecond is excuſable in the law. In order to keep yourſelves as clear as poſſible in the diſcharge of this part of your office, whatever perſon brings you an account of a robbery, and where the felon is, examine well if he informs upon his own knowledge, or on the report of another: if upon his own knowledge,

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charge him in the king's name to aid and assist you; if upon the report of another extend your enquiry to him, and act in the same manner: by this means you produce to the magistrate your prisoner and his accuser at the same time. But in all cases of suspicion, not from your own knowledge, the safest way is to refer the parties to a justice of the peace, and act upon his warrant. And this is the advice of my lord chief justice Hales, founded perhaps upon this reason, that the suspicion of one man cannot properly be transferred to another without the circumstance of an oath, which the constable has no power to administer.

As the law will severely punish, by indictments and heavy fines, your neglect or refusal to pursue and apprehend felons; so it will be infinitely more severe, if after you have apprehended them, you suffer them to escape. To do this wilfully is felony, and to do it through negligence may produce a prosecution that shall end in your ruin. Indeed a constable is inexcusable in suffering an escape, as the law has given him power to secure his prisoner, by calling in such help as he deems sufficient, and to disarm and bind his prisoner. I have already observed that a thorough search of the felon is of the utmost consequence to your own safety, and the benefit of the public, as by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him, of which, if he has either time or opportunity allowed him, he will be sure to find some means to get rid of: of this I have known many instances.

After the apprehending of a felon, be as expeditious as possible in delivering him over to a magistrate, and take care not to lose sight of him. I have known officers trust too much to the integrity and care of persons charged to assist them; and others make a temporary prison of their own houses for the little consideration of taking a few dirty shillings, if they were in the public way: this has given a gang an opportunity of assembling, and if not of effecting a rescue, at least of preparing an artful defence. After commitment, take care to see your prisoner safely delivered to the gaoler, nor trust a felon to the care of a runner to a prison: for as the law requires him at your hands, discretion will dictate the rest.

Profane swearing and cursing is a great nuisance, and a scandal it is to a christian country. This is a vice for which no plea can be made; it is as unprofitable as it is wicked, and were the law put into vigorous execution, the fear of immediate punishment would produce that reformation, which alas! the commands of the Supreme Being are too weak to effect. Upon you this duty lies; religion requires this of you; the law commands it under severe penalties; and a due exertion of your office in this respect would soon banish swearing and horrid imprecations from our streets. One caution you are to observe, viz. that if the party swearing be known to you, a warrant is absolutely necessary, if the party be not known to you, then you may directly apprehend him without process. The

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penalty upon offenders is, for every oath of a gentleman five shillings, if under the degree of a gentleman two shillings, and for every labourer and servant one shilling, or ten days imprisonment in Bridewell with hard labour, and a penalty of forty shillings upon the constable, who hearing any person swear, refuses or neglects to apprehend him. These penalties go wholly to the poor of the parish where the offence is committed, except the forty shillings, half of which goes to the informer.

Amongst other almost intolerable nuisances are the swarms of beggars under various disguises of wretchedness artfully put on to excite compassion in weak minds. These are burthens to our minds as well as purses, and although generally complained of, are almost as generally relieved. Our laws are amply sufficient to cure this evil, and your duty well executed in this respect will be at least a great check to it: the law has given you not only power to apprehend them without process, but also assigned you, in order to quicken your diligence, a reward upon the commitment of every vagabond, and inflicts a penalty of ten shillings upon you for every neglect of this kind. I shall only add this caution, be careful when you apprehend such vagrants, that they have either begged in your own view, or that you have evidence of their being beggars.

Having cautioned you in those parts of your duty which do not require warrant or process, I shall now mention some necessary hints for your behaviour to those from whom you derive the rest of your power. Those are,

The sessions,
The sheriff, and coroner,
The justice of the peace, and
Your high constable.

These, in their respective stations, and jurisdictions, you are by law bound to obey.

But whatever power the sessions, sheriff, coronor, and justice hath over you, their respective commands are signified by warrants under their hands and seals (except the justice be with you) as a careful perusal of every warrant will be a good directory, this part of your office is less liable to error, than where your own discretion is the only guide.

The justices of the peace, assembled in their sessions, may, with great propriety, be deemed the council of the county for the preservation of the peace and good order of it: and if it be your duty to pay strict obedience to the warrants and orders of every particular magistrate; how much more is it incumbent upon you to exert yourselves in the execution of such warrants and orders as come from them in a collective body?

The right discharge of your duty in obeying the warrants of the sheriff, is of no less consequence to the public than advantage to yourselves; for at the same time that it impresses upon the minds of the common people a true sense of the strength and consequence

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of the civil power, it will alſo render the execution of your office more ſafe and eaſy.

The coroner's warrants you are obliged to execute, as well in ſummoning juries, as apprehending perſons charged with, or ſuſpected of murder.

Let your demeanor to the magiſtrates in general be reſpectful and obedient, and teach the common people ſubordination to yourſelves, by the example of your own behaviour to your ſuperiors. Never officiouſly make yourſelves parties in any complaint you bring before the magiſtrate; and, unleſs you are called upon, be ſilent. When you are called upon, ſpeak impartially. Officious behaviour, in intereſting yourſelves in the diſputes of others, muſt bring their reſentment upon you, and if you judge ill, leſſen your conſequence, where you ought to preſerve it, in the eye of the juſtice.

Be careful to execute every warrant you receive with all poſſible expedition; and bring the offenders, as ſoon as you can, to anſwer the complaint. If you act as you ought to do, you will acquire reſpect and eſteem with thoſe you principally have to deal with; and this will give you opportunities to do great good. Little offences, viewed by perſons of fiery ſpirits, through the medium of paſſion and reſentment, are generally productive of warrants, the moſt burthenſome part of your office; but by gentleneſs and perſuaſion, you may moderate ſuch ſpirits, and ſend thoſe away friends, who met almoſt mortal enemies. It is, indeed, a cheap way of venting paſſion; for if the common people had not this method of diſſipating their ſpleen, abſolute ruin would ſucceed to thouſands of families from expenſive law ſuits; whereas warrants, their ſervice and diſcharge, are eaſy methods of reconciliation. But after you have arreſted any perſon upon a warrant, be careful, though the parties ſhould agree, how you diſcharge your priſoner upon that preſumption; for the law requires you to make a return to your warrant: and ſuch warrant is liable to be called for as evidence in the courts above: your ſafety therefore requires you to carry the parties before a magiſtrate, that the diſcharge may be regularly indorſed on the back of the warrant.

In the ſervice of warrants, as you are ſworn officers, the law does not require you to ſhew your warrant, when you act in your reſpective pariſhes and places, although it be demanded by the perſon you arreſt; but you ought to acquaint the party with the contents of it, eſpecially if it be a bailable offence, that he may have opportunity of ſending for and producing bail before the juſtice.

But if you act out of your pariſh, you muſt ſhew your warrant, if it be demanded. You will alſo obſerve, that if you arreſt any perſon before a warrant be iſſued, though the accuſer afterwards procure one, yet this will not juſtify you, nor prevent an action of falſe impriſonment. In your arreſting any perſon upon a warrant, it is a ſufficient notice to him, to tell him that you arreſt him in the king's

king's name, and ſhew him your pocket ſtaff or truncheon, as the unqueſtionable mark of the office you bear.

You will alſo obſerve, that if after ſuch arreſt, you ſuffer the party to go at large, either upon your knowledge of the perſon, or any promiſe from others that he ſhall appear, and he fails therein, you cannot legally arreſt him upon the ſame warrant; whereas, on the contrary, if the party eſcape from you by his own act, or is reſcued by the violence of others, you may purſue him, even into another county, and apprehend him on the ſame warrant.

As the law formerly ſtood, the conſtable was anſwerable for falſe impriſonment, if he executed a warrant in caſes where the juſtice had no juriſdiction; and yet at the ſame time was indictable for refuſing to obey; and, in determining both theſe inſtances, the law was much too ambiguous and uncertain, conſidering the riſk the conſtable was to run. But this abſurdity not only of placing the judgment of the inferior over the ſuperior, but alſo of puniſhing the party for obeying and for diſobeying, is by a late ſtatute removed; and now you are concerned only in the execution of warrants: but be careful to have your warrants properly diſcharged, and preſerve them with care when they are; for the defendant, or his attorney, has a right to demand a copy and peruſal of ſuch warrant; which if you refuſe, an action of falſe impriſonment, if the warrant be illegal, will lie againſt you; whereas, upon your giving ſuch copy within ſix days after demand, and permitting the peruſal thereof, the juſtice muſt abide by the conſequence of his warrant, and you are diſcharged.

In warrants of common aſſaults, occaſioned by petty quarrels amongſt neighbours of credit and fortune, your good ſenſe will tell you that you are to hold a different conduct from what you are to obſerve if the warrants were againſt vagabonds: for tho' the law makes no diſtinction of perſons, prudence doth; and as the intention of the law is the bringing the party before the magiſtrate to anſwer the complaint, this will be as effectual, and much more genteelly done by a meſſage, ſignifying the complaint, and appointing a time for the party to appear to anſwer it, than by forcible means.

Great prudence is neceſſary in the execution of ſearch warrants. Theſe muſt be executed between the riſing and ſetting of the ſun, at moſt by viſible day light. As theſe warrants often proceed from the miſtakes and miſapprehenſions of people, and ſometimes from worſe motives, they may happen to be executed in the houſes of the innocent, and therefore caution and tenderneſs ſhould always be uſed. With good nature acquaint the parties upon whom the warrant is to be executed, of the occaſion; that ſuſpicion has ariſen that part of the goods are lodged with them, for which reaſon you are obliged by your warrant to ſearch, adviſing them, if any of the things ſtolen are in their cuſtody, to produce them voluntarily, and give evidence againſt the felon: for if they deny the knowledge of them, and ſuch things ſhould upon ſearch be found, or evidence afterwards appear that they were in their cuſtody, the law may conſtrue their denial

and

and secreting the goods, into a felonious intent, the consequence of which may be transportation for fourteen years. After such admonition be extremely careful in your search, and that in proportion to the bulk or minuteness of the things lost. Your warrant tells you, if you find the things stolen, or any part of them, you are to bring them and the parties, in whose custody they were found, to answer before the justice. And that no mistake may happen in ascertaining the property, always take with you a person able to swear it. Never break open locks until the parties have first refused to open them.

Be extremely careful to keep in your custody whatever things you take upon felons: the same caution is to be observed in respect to such stolen goods as you take in the execution of search warrants. The law strictly requires this of you, in order that they may be produced in evidence upon the trial of the prisoner: for remember that the identity of such things is to be proved upon your oath, as well as the time when taken, and place where; if therefore you suffer goods even out of your sight, you weaken your evidence, if you do not destroy it; and should the goods be by accident, or otherwise lost, you are not only answerable to the court for acting wrong, which may defeat the prosecution, but also to the prosecutor for the value of the goods: nor will it be a sufficient plea to the court, that you left them in the hands of the justice even by his command; for as they were taken by you, the law requires them at your hands: and it is a new practice, and embarrasses evidence, to make the justice's office the warehouse for stolen goods. And as the goods you take upon persons charged with felony, or by search warrants are, as the law terms it, *in abeyance*: after the jury have returned their verdict, if the prisoner be convicted, you are to deliver such goods to the prosecutor: on the contrary, if the prisoner be acquitted, such goods revert to him, the cause of seizure being discharged. But if any difficulty should arise concerning the restitution, I advise you to pray the direction of the court. Your duty does indeed absolutely oblige you to produce such goods at the trial; but after that is over, be careful how you bring them out of court, lest you suffer by actions at law from both parties.

I shall here mention one general rule for the breaking open doors, as this may happen in assisting the officers of the revenue, as well as in executing search warrants, and apprehending felons. Where the law gives that power to your office, you are, upon finding the doors fast, to call with an audible voice to the persons within, demanding entrance in the king's name, as constable: and if upon this the parties refuse to answer, or answering refuse to open the door, you are then justifiable in using force, which you will not be, before such demand is made.

Be careful not to execute warrants, or to do any act as constable, out of your respective parishes and places, except you are specially appointed

appointed by a warrant. Magiſtrates may empower any perſon to execute their warrants within their juriſdiction.

When you receive warrants directed generally to bring the offenders before the juſtice who grants, or ſome other of his Majeſty's juſtices of the peace, you are at liberty to convey your priſoner to any juſtice of the peace; but if it be ſpecial to bring the party before the juſtice who granted the warrant, you muſt obey it: but this, though the warrant is good, is rarely done, except in caſes where ſome particular information is with the juſtice, or for a purpoſe too mean to be mentioned. Under this head, as common ſenſe will ſufficiently diſtinguiſh a good magiſtrate from a bad one, if ſuch ſhould ever ariſe; ſo common honeſty will dictate to you, that you do not faithfully diſcharge the truſt repoſed in you, if, ſeduced by a bribe from the party, or from any other mean or unworthy motive, you prefer the latter to the former.

If you have had any diſpute or animoſity with any perſon, I adviſe you to decline ſerving any warrant upon him, or taking him into cuſtody, if poſſible; but rather refer it to a brother officer; ſince if any perſonal prejudice ſhould get the better of your underſtanding, or provoking language ſhould make you tranſgreſs your duty, and an action be the conſequence, the former grudge would prove a great enhancement of damages.

When you arreſt upon a warrant, and the party produces a *ſuperſedeas*, you are to compare ſuch *ſuperſedeas* with the contents of your warrant; and if you find that the names of the plaintiff and defendant, and the offence complained of, agree, you muſt directly diſcharge your priſoner: if they do not agree, either in the names or the offence, you are then to carry the party before the juſtice. But if the offence be felony upon your warrant, the *ſuperſedeas* muſt be ſigned by two juſtices of the peace; for one juſtice of peace cannot by law, bail felony. And as the conſtables may not be acquainted with the nature of a *ſuperſedeas*, the following is nearly the form they generally run in.

MIDDLESEX. To the conſtables, &c.

Whereas Thomas Roe hath appeared before me, one of his majeſty's juſtices of the peace for the county aforeſaid, and entered into ſureties for his perſonal appearance at the next general quarter ſeſſions of the peace to be holden at Hick's hall, in St. John-ſtreet, in and for the county aforeſaid, then and there to anſwer the complaint of John Doe, for aſſaulting and beating the ſaid John againſt the peace. Theſe are therefore in his majeſty's name, to will and require you, on ſight hereof, to forbear to arreſt, impriſon, or otherwiſe moleſt, the ſaid John Doe on account of the ſaid complaint, as you will anſwer the contrary at your peril. Given under my hand and ſeal this

In the execution of warrants of diſtreſs, firſt demand the ſum to be levied. If that be denied, then you are to ſeize ſo many of the goods

goods as will be sufficient to pay the contents of your warrant, and the necessary expence consequent thereupon: but to do this, with as little hurt to the parties as possible, let your seizure be rather of superfluities, than necessaries: which goods so distrained you are to make sale of after four days: and within eight days, deducting the sum mentioned in your warrant and reasonable charges, render the overplus upon demand to the party whose goods you distrained; except the penalty, together with the reasonable charges, be sooner paid. Observe that in this case you are obliged to shew your warrant if the party demand it: and be careful not to exact unreasonable charges: for this point being left by the law to your discretion, if you are guilty of oppression the injured person may have redress by an action against you.

When called upon by landlords to assist in seizing goods for rent, your duty is to preserve the peace, without intermeddling otherwise, except as to swearing the appraisers, if the rent be not paid in due time: a copy of which oath follows, as taken from Shaw's justice.

'You do swear that you will faithfully appraise and value the 'goods now taken in distress, and mentioned in the inventory to 'you shewn, as between buyer and seller, according to the best of 'your skill and understanding: you shall not through partiality, 'interest, or otherwise, over or under estimate the said goods, but 'impartially do your duty herein. *So help you God.*'

I have already cautioned you against passion and resentment in the execution of your office: I shall farther add, avoid that impertinent imperiousness of behaviour too frequently seen in constables, and which may be called the drunkenness of power. This breaks out into personal invective and reproachful language upon them whose actions have rendered them objects of lawful punishment. And, perhaps, this conduct leaves deeper wounds in the mind of the delinquent than the punishment of the law does upon the body. This imprudent, I may say, foolish, and cruel execution of the law, creates an implacable enmity in every prisoner; and, which is shameful, makes the apprehender, in many cases, the greater criminal. I therefore conjure you to treat your prisoners as unhappy fellow-creatures, and while your minds rise indignant against their offences, remember, with the tenderness of humanity, that they are men. Do every thing you can to secure them, but let the law punish them.

The last part of your office I shall speak to, is your connection with, and obedience to the precepts of your high constable. Indeed he has not, by virtue of his office, any positive authority over you, and is only to command you, by virtue of such warrants and orders as he receives from the sessions, sheriff, and justices. These you are obliged to obey under penalties of the law; and by his immediate connection with you, he will much better explain them as the incidents arise, than, considering the variety of circumstances, they can be here: To him therefore I must leave that task. And I hope it is needless to exhort you to pay a chearful obedience to

his

his precepts, and give him your ready assistance in his duty when called upon.

I have now, I think, laid before you the most essential parts of your duty, and the best methods for the execution of it. It remains that I exhort you most earnestly to give the strictest attention to both in every particular and on all occasions. To this you are bound by your oath, and by all the ties of society. The safety of your neighbours, the confidence placed in you, the laws of your country, honour in the eye of man, and conscience towards God, all join to require it of you. If a robbery or murder should be the consequence of your neglect, and more especially if frequent robberies and murders should be the consequence, can you hope to be forgiven either in this world, or the next, by God, or by man? Can you ever forgive yourselves for abusing the trust reposed in you, and for not making a due and honest use of the power with which the laws of the land have invested you and only you? Put this question home to yourselves, and if you have in your breasts the least spark of public or private virtue it will warm them both into action. Indeed, common prudence and a regard to your private interests will make you resolve on doing your utmost for the public good, if you consider the matter rightly. For, put the laws vigorously in execution during your time which is but for one year, and you will leave a much easier task to your successors, who will be thereby not only better enabled, but strongly incited and encouraged to follow your example, and so on, till at last, or rather very soon every man, and yourselves among the rest, may go about his business or to bed in perfect security. Besides, this will also give a dignity to your office while you hold it, and procure respect to your persons from all good men ever after.

By all these ties therefore I adjure you, as you value the peace and safety, the lives and properties of your fellow subjects, as you respect the laws of your country, if you have either honour or conscience, if you wish to live respected, and when you die to meet with that solemn approbation, *Well done, good and faithful servant:* If you care for any of these things, be diligent, steady, active and honest in the discharge of your duty. I have done mine, and if you will not do your's, the shame and the guilt be upon your own heads.

[The foregoing essay is universally approved of in *England*, for its plainness and usefulness:—There are some other matters in it which seem peculiar to the cities of *London*, &c. which are omitted, but all that can be of any use in *America*, are here inserted.]

CONVICTION.

THE power of a justice of the peace is in restraint of the common law and in abundance of instances is a tacit repeal of that famous clause in the great charter, that a man should be tried by

by his equals: which also was the common law of the land long before the great charter, even for time immemorial, beyond the date of histories and records. Therefore generally nothing shall be presumed in favour of the office of a justice of the peace; but the intendment will be against it. Therefore where a special power is given to a justice of the peace by act of parliament, to convict an offender in a summary manner, without a trial by jury, it must appear that he hath strictly pursued that power; otherwise the common law will break in upon him, and level all his proceedings. Therefore where a trial by jury is dispensed withal, yet he must proceed nevertheless according to the course of the common law, in trials by juries, and consider himself only as constituted in the place both of judge and jury. Therefore there must be an information or charge against a person; then he must be summoned or have notice of such charge, and have an opportunity to make his defence; and the evidence against him must be such as the common law approves of, unless the statute specially directeth otherwise; then, if the person is found guilty, there must be a conviction, judgment, and execution, all according to the course of the common law, directed and influenced by the special authority given by statute; and in the conclusion, there must be a *record* of the whole proceedings, wherein the justice must set forth the particular manner and circumstances, so as if he shall be called to an account for the same by a superior court, it may appear that he hath conformed to the law, and not exceeded the bounds prescribed to his jurisdiction.

The difficulty of drawing up a conviction in due form, hath induced the legislature to institute a more apt and compendious method in divers instances; and it were to be wished, in case of the justices, that this provision might be made more general. The summary forms of conviction, which are specially directed by act of parliament, are interspersed throughout this book under the titles to which they do respectively belong.

Other forms of convictions, which are left at large according to the course of the common law (having no prescriptive form of words directed by act of parliament) are likewise drawn forth at length under divers titles: particularly, concerning such matters as have been often controverted in the courts above, occasioned either by the largeness of the penalties, or sometimes by the greatness of the offenders: as in cases of riots, forcible entries, deer stealing, and such like.

It remaineth, under this title, to insert one general precedent or form of conviction for the whole; which may be to the effect following:

General form of conviction.

New-Jersey, Essex County. BE it remembered, that on the ——day of —— in the ——year of the independence of —— at —— in the county of —— aforesaid, A. I. of —— cometh

——— cometh before me, J. P. eſquire, one of the juſtices of the people, aſſigned to keep the peace in the ſaid county and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed [reſiding near to the place where the offence herein after mentioned was committed, or as the ſtatute requires] and giveth me the ſaid juſtice to underſtand and be informed that one A. O. of ——— in the ſaid county, yeoman, on the ——— day of ——— now laſt paſt, at ——— in the ſaid county, did [here ſet forth the fact, in the words of the ſtatute as near as may be] againſt the form of the ſtatute in ſuch caſe made and provided; and afterwards upon the aforeſaid ——— day of——— in the year aforeſaid, at ——— aforeſaid, in the county aforeſaid, he the ſaid A. O. after being duly ſummoned in this behalf before me the juſtice aforeſaid appeareth and is preſent, in order to make his defence againſt the ſaid charge contained in the ſaid information, and having heard the ſame, he the ſaid A. O. is aſked by me the ſaid juſtice, if he can ſay any thing for himſelf, why he the ſaid A. O. ſhould not be convicted of the premiſes above charged upon him in form aforeſaid, who pleadeth that he is not guilty of the ſaid offence. Nevertheleſs, on the day aforeſaid, in the year aforeſaid, at ——— aforeſaid, in the county aforeſaid, one credible witneſs, to wit, A. W. of ——— yeoman, cometh before me the juſtice aforeſaid, and before me the ſame juſtice upon his oath on the holy goſpel to him then and there by me the ſaid juſtice aforeſaid adminiſtered, depoſeth, ſweareth, and on his oath aforeſaid affirmeth and ſaith, that the aforeſaid A. O. on the ——— day of ——— aforeſaid, in the year aforeſaid, at ——— aforeſaid, in the county aforeſaid, did [here again ſet forth the fact, or ſo much thereof as is ſufficient to convict the offender.] And thereupon the aforeſaid A. O the ———day of ——— aforeſaid, in the year aforeſaid, before me the juſtice aforeſaid, by the oath of one credible witneſs aforeſaid, according to the form of the ſtatute aforeſaid, is convicted, and for his offence aforeſaid hath forfeited the ſum of ——— of lawful money of the ſtate of New-Jerſey, to be diſtributed as the ſtatute aforeſaid doth direct. In witneſs whereof, I the ſaid juſtice to this preſent record of the conviction as aforeſaid, have ſet my hand and ſeal at ——— aforeſaid, in the county aforeſaid, the day and year firſt above-written.

If he confeſſes the fact then ſay, ———And becauſe the ſaid A. O. hath nothing to ſay, nor can ſay any thing in his own defence touching and concerning the premiſes aforeſaid, but doth of his own accord freely and voluntarily acknowledge and confeſs all and ſingular the ſaid premiſes to be true, in manner and form as the ſame are charged upon him in the ſaid information; and becauſe all and ſingular the premiſes being heard and fully underſtood by me the ſaid juſtice, it manifeſtly appears to me ———*Or, if the party hath been ſummoned, and doth not appear, then ſay,* ——— Whereupon, on the ſaid ——— day of ——— in the year aforeſaid, at ——— aforeſaid,

ſaid, in the county aforeſaid, he the ſaid A. O. was duly ſummoned in this behalf, to appear before me, in order to make his defence againſt the ſaid charge contained in the ſaid information, but the ſaid A. O. doth neglect to appear before me, and doth not appear, nor make any defence againſt the ſaid charge as aforeſaid: Therefore I the ſaid juſtice, on the ſaid ——— day of ——— in the year aforeſaid, at ——— aforeſaid, in the county aforeſaid, do proceed to examine into the truth of the ſaid complaint: And A. W. of ——— a credible witneſs, cometh before me the juſtice aforeſaid, and before me the ſame juſtice upon his oath, &c.

Cometh before me] A conviction ought to be in the preſent tenſe, and not in the time paſt. L. *Raym.* 1376 *Str.* 608. *Robert's* caſe.

And giveth me to underſtand and be informed] A conviction ought to be on an information or complaint precedent. *M.* 11. *W. K.* and *Fuller.* L. *Raym.* 510.

That one A. O. of ——— in the ſaid county, yeoman, &c.] All acts which ſubject men to new and other trials, than thoſe by which they ought to be tried by the common law, being contrary to the rights and liberties of Engliſhmen, as they were ſettled by *magna charta*, ought to be taken ſtrictly; and the court of king's bench will require, that it do appear upon the face of ſuch proceedings, that the fact was an offence within the act, and that the juſtices have proceeded accordingly. *M.* 1 *An. K.* and *Chandler.* 1 *Salk.* 378. L. *Raym.* 581.

Being duly ſummoned.] *T.* 11 *G. K.* and *Venables.* The court were unanimouſly of opinion, that the party ought to be heard, and for that purpoſe ought to be ſummoned in fact, and that if the juſtices proceeded againſt a perſon without ſummoning him, it would be a miſdemeanor in them, for which an information would lie. L. *Raym.* 1406.

And in the caſe of *K.* and *Allington, H.* 12 *G.* On affidavit that no ſummons was had, the court granted an information againſt the juſtice who made the conviction. *Str.* 678.

One credible witneſs, to wit, A. O. *of ———yeoman*] It is requiſite to name the witneſs, that it may appear he is not the ſame perſon who was the informer: for an informer who hath a ſhare of the penalty, is never allowed to be a witneſs, unleſs in caſe where a ſtatute ſhall ſpecially ſo direct it.

On his oath aforeſaid affirmeth and ſaith] In all convictions, being in the nature of judgments, the whole evidence ought to be ſet forth, or at leaſt ſo much thereof as is ſufficient to warrant the conviction; that the court of king's bench may judge of the ſufficiency thereof; but otherwiſe it is in orders, which are authoritative.

And for his offence aforeſaid hath forfeited] *H.* 3. *G.* 2. *K.* and *Hawks.* A conviction for killing a deer was quaſhed, becauſe it was only ——*he is convicted*, without any judgment of forfeiture. *Str.* 858.

Note:

Note: On a ſuggeſtion that the defendant hath a title to the thing in queſtion, a prohibition will be granted by the king's bench, before or after conviction, to ſtay the juſtice from proceeding; for without doubt if the defendant have but a colour of title, the juſtices have no juriſdiction in the cauſe as where the defendant was convicted for cutting trees, where he had a right of common. L. *Raym.* 901.

CORONER.

CORONERS are ancient officers by the common law, ſo called becauſe they deal principally with the pleas of the crown, and were of old time the principal conſervators of the peace. 2 *Haw.* 42.

Concerning whom I ſhall ſhew,

I. Who may be a Coroner.
II. How choſen.
III. His power and duty in taking an inquiſition of death.
IV. His power and duty in other matters.
V. His fees.
VI. Puniſhment for not doing his duty.

I. Who may be a Coroner.

Of ancient time this office was of great eſtimation, for none could have it under the degree of a knight 3 *Ed.* 1. *c.* 10. 4 *Inſt.* 271. And by the 14 *Ed.* 3. *ſt.* 1. *c.* 8. No coroner ſhall be choſen unleſs he have land in fee, ſufficient in the ſame county, whereof he may anſwer to all manner of people.

II. How choſen.

The coroner (as of ancient time the ſheriffs and conſervators of the peace) ſhall be choſen in full county, that is, in the county court, by the commons of the ſame county. 28 *Ed.* 3 *c.* 6.

And this muſt be in purſuance of the king's writ for that purpoſe, iſſuing out of, and returnable into the chancery: and none but freeholders have a voice at ſuch election, for they only are ſuitors to the county court. 2 *Haw.* 43, 44.

And being elected by the county, if he be inſufficient, and not able to anſwer ſuch fines and other duties in reſpect of his office, as he ought, the county, as his ſuperior, ſhall anſwer for him. 2 *Inſt.* 175.

And being choſen by the county, his office continues, notwithſtanding the demiſe of the king. 4 *Inſt.* 271.

And after he is choſen, he ſhall be ſworn by the ſheriff, for the execution of his office. 2 *Hale's H.* 55.

Re-

But in the ſtatute of 28 *Ed.* 3 which enacts that they ſhall be choſen by the county, there is a ſaving to the king and other lords, who ought to make coroners, their franchiſes.

The lord chief juſtice of the king's bench, by virtue of his office, is the chief coroner of *England*. 2 *H. H.* 53.

III. His power and duty in taking an inquiſition of death.

When it happens that any perſon comes to an unnatural death, the townſhip ſhall give notice thereof to the coroner. Otherwiſe, if the body be interred before he come, the townſhip ſhall be amerced. *Hale's Pl.* 170.

And by *Holt*, Ch J. It is a matter indictable to bury a man that dies a violent death, before the coroner's inqueſt hath ſat upon him. 2 *Haw. Not.* 8.

And if the townſhip ſhall ſuffer the body to lie till putrefaction, without ſending for him, they ſhall be amerced. *Hale's Pl.* 170. 2 *Haw.* 48.

When notice is given to the coroner, he is to iſſue a precept to the conſtables of the four, five, or ſix next townſhips, to return a competent number of good and lawful men of their townſhips, to appear before him in ſuch a place, to make an inquiſition touching that matter. 4 *Ed.* 1. 2 *H. H.* 59. Or he may ſend his precept to the conſtable of the hundred. *Wood. b.* 4. *c.* 1.

But the aforeſaid ſtatute being wholly directory, and in affirmance of the common law, doth neither reſtrain the coroner from any branch of his power, nor excuſe him from the execution of any part of his duty not mentioned in it, which was incident to his office before: Upon which ground it hath been holden, that there is no neceſſity that it appear in a coroner's inqueſt, that it was taken by the oaths of perſons of the next adjacent towns, but that it is ſufficient to ſay, that it was taken by the oaths of lawful perſons of the county; inaſmuch as ſuch inquiſitions being good before the ſtatute, which is wholly declaratory, muſt needs be ſo ſtill. But it ſeems that it ought to appear in every ſuch inquiſition, at what place and by what jurors by name it was taken, and that ſuch jurors were ſworn. 2 *Haw.* 47.

Theſe are to be at leaſt 12: and it is ſaid, that all perſons of the neighbouring towns, above the age of 12 years, are bound to attend at the taking the inquiſition, unleſs they have a reaſonable excuſe to the contrary. 2 *Inſt.* 148. 2 *Haw.* 54.

If the conſtables make not a return, or the jurors returned appear not, their defaults are to be returned to the coroner; and the conſtables or jurors in default ſhall be amerced before the judges of aſſize. 2 *H. H.* 59.

The jury appearing is to be ſworn and charged by the coroner to inquire, upon the view of the body, how the party came by his death. 2 *H. H.* 60.

For he can take indictments of death, only upon view of the body, and not otherwise, therefore if the body be interred before he come, he must dig it up. And this he may do lawfully within any convenient time as in 14 days. *Hale's Pl.* 170 *Haw.* 48

If the body cannot be viewed, the coroner can do nothing; but the justices of the peace shall inquire thereof. *Hale's Pl.* 170. 2 *Haw.* 48

The jury being sworn, and the body upon view, he shall inquire, upon the oaths of them, in this manner, by the statute of 4 *Ed.* 1. *st.* 2. called the statute *de officio coronatoris*; *viz*

If they know where the person was slain, whether it were in any house, field, bed, tavern, or company:

Who are culpable, either of the act, or of the force: and who were present, either men or women and of what age soever they be, if they can speak or have any discretion:

And how many soever be found culpable, they shall be taken and delivered to the sheriff, and shall be committed to the gaol;

And such as be found, and be not culpable, shall be attached until the coming of the judges of assize.

And, by the same statute, if it fortune any such man be slain, which is found in the fields, or in the woods, first it is to be inquired, whether he were slain in the same place or not:

And if he were brought and laid there, they shall do so much as they can to follow their steps that brought the body thither, whether he were brought upon a horse, or in a cart:

It shall be also inquired, if the dead person were known, or else a stranger, and where he lay the night before.

Also, by the same statute all wounds ought to be viewed, the length, breadth, and deepness; and with what weapons; and in what part of the body the wound or hurt is; and how many be culpable; and how many wounds there be; and who gave the wound.

And they must hear evidence on all hands; if it be offered to them, and that upon oath, because it is not so much an accusation or an indictment, as an inquisition or inquest of office. 2 *H. H.* 157.

And by the aforesaid statute, if they be found culpable of the murder, the coroner shall immediately go to his house, and shall inquire what goods he hath, and what corn he hath in his graunge: and if he be a freeman, they shall inquire how much land he hath, and what it is worth yearly, and further, what corn he hath upon the ground: and likewise of his freehold how much it is worth yearly, over and above the service due to the lord of the fee; and the land shall remain in the king's hands, until the lords of the fee have made fine for it:

And when they have thus enquired upon every thing, they shall cause all the land, corn, and goods to be valued, in like manner as if they should be sold immediately: and thereupon they shall be delivered to the whole township, which shall be answerable before the judges for all.

In

In like manner, by the ſaid ſtatute, it is to be inquired of them that be drowned, or ſuddenly dead, whether they were ſo drowned, or ſlain, or ſtrangled by the ſign of a cord tied ſtreight about their necks, or about any of their members, or upon any other hurt found upon their bodies. And if they were not ſlain, then ought the coroner to attach the finders, and all other in the company.

He ſhall alſo enquire, whether the perſons found guilty, fled; for which flight they forfeit goods and chattels 2 *Haw.* 48. 53.

And it hath been formerly held, that if a perſon were ſlain, and upon the coroner's inqueſt on view of the body, it were found that ſuch a perſon fled, tho' the ſaid perſon were afterwards acquitted both of the felony and flight, yet he forfeited his goods; for the coroner's inqueſt is ſo ſolemn, that it is not traverſable; alſo when the goods are once lawfully veſted in the king, by that inqueſt the property of them cannot be diveſted. But this opinion ſeemeth harſh and unreaſonable, that a man ſhall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inqueſt taken in his abſence, without either hearing him, or giving him an opportunity of defending himſelf. 1 *Bac. Abr.* Coroner. *D.* 2 *Haw.* 54.

Alſo it is ſtrongly holden in ſome books, that an inqueſt of ſelf-murder, found before a coroner, cannot be traverſed: but the contrary opinion being alſo holden by books of as great authority, and ſeeming alſo to be more agreeable to the general tenor of the law in other caſes it ſeems to be the better opinion that ſuch inqueſt by being removed into the king's bench by *certiorari*, may be there traverſed by the executor or adminiſtrator of the perſon deceaſed: or in caſe the coroner's inqueſt find him to have been a lunatic, by the king or lord of the manor. 1 *Bac. Abr.* Coron. D. 2 *Haw.* 54.

And if any perſon be ſlain or murdered in the day time, and the murderer eſcape untaken, the townſhip ſhall be amerced. 2 *H.* 7. *c.* 1.

Concerning horſes, boats, carts, and the like, whereby any are ſlain, which properly are called deodands, they alſo ſhall be valued and delivered unto the towns as before 4 *Ed.* 1 *ſt.* 2.

All which things muſt be enrolled in the rolls of the coroner. 4 *Ed.* 1 *ſt.* 2.

And the ſheriffs ſhall have counter rolls with the coroner, of things belonging to their office. 3 *Ed.* 1 *c.* 10.

But it is not neceſſary that the inquiſition be taken in the very ſame place where the body was viewed; but they may adjourn to a place more convenient. 2 *Haw.* 48.

Immediately upon theſe things being inquired, the bodies of ſuch perſons being dead, or ſlain, ſhall be buried. 4 *Ed.* 1. *ſt.* 2.

By the 1 & 2 *P & M. c.* 13. *ſ.* 5. Every coroner, upon any inquiſition before him found, whereby any perſon ſhall be indicted for murder or manſlaughter, or as acceſſary before the offence

fence committed, shall put in writing the effect of the evidence given to the jury before him, being material; and shall bind over the witnesses to the next general goal delivery to give evidence; and shall certify the evidence, the recognizance, and the inquisition or indictment before him taken and found, at or before the trial, on pain of being fined by the court.

By the express words of which statute, he may enquire of *accessaries before the fact*; but he cannot enquire of accessaries *after* the fact. 2 *Haw.* 48.

He ought also to enquire of the death of all persons who die in prison; that it may be known, whether they died by violence, or any unreasonable hardships; for if a prisoner by the duress of the goaler, comes to an untimely death, it is murder in the goaler, and the law implies malice in respect of the cruelty. 3 *Inst.* 52, 91.

And this inquest upon prisoners ought to consist of a party jury, that is six of the prisoners and six of the next vill or township, not prisoners. *Umfreville's Coroner* 212.

If the inquisition shall be quashed in the court of king's bench, the coroner by leave of the court may take up the body again, and take a new inquisition. *E.* 5 *G. K.* and *Saunders. Str.* 167. *M.* 9 *G.* Case of the coroner of *Wenlock. Str.* 533.

And if a coroner appear to have been corrupt in taking an inquest it seems that a *melius inquirendum* shall go to special commissioners, who shall proceed not on view, but upon testimony; and the coroner shall have nothing to do with such inquest: But where the inquest is quashed for want of form only, he shall take a new one in like manner, as if he had taken none before. 1 *Bac. Abr.* Coron. D.

IV. His power and duty in other matters.

He ought to inquire of treasure that is found; who were the finders, and likewise who is suspected thereof; and that may well be perceived, where one liveth riotously, haunting taverns, and hath done so of long time; hereupon he may be attached for suspicion, by four, or six, or more pledges, if he may be found. 4 *Ed.* 1. *st.* 2.

Besides his judicial place, he hath also an authority ministerial as a sheriff; namely when there is just exception taken to the sheriff, judicial process shall be awarded to the coroner, for the execution of the king's writs; and in some special cases, the king's original writ shall be immediately directed to him. 4 *Inst.* 271.

He is bound to be present in the county court, to pronounce judgment of outlawry upon the exigent, after *quinto exactus*, at the fifth court, if the defendant doth not appear. *Wood. b.* 4. *c.* 1.

V. His fees.

By the statute of 3 *H.* 7. *c.* 1. The coroner shall have for his fee, upon every inquisition taken upon the view of the body slain,

13*s.*

1 *s.* 4 *d.* of the goods and chattels of him that is the slayer and murderer if he have any goods: and if not, he shall have for his said fee, of such amerciaments as shall fortune any township to be amerced for escape of such murderer.

VI. His punishment for not doing his duty.

Coroners concealing felonies or not doing their duty thro' favour to the misdoers, shall be imprisoned a year, and fined at the king's pleasure. 3 *Ed.* 1. *c.* 9.

And by the 3 *H.* 7. *c.* 1. If any coroner be remiss, and make not inquisitions upon the view of the body dead, and certify the same to the goal delivery: he shall forfeit to the king an hundred shillings.

And he ought to execute his office in person, and not by deputy: for he is a judicial officer. *Wood b.* 4. *c.* 1. Otherwise it seemeth that he shall incur the aforesaid penalties, for remissness or neglect of duty.

The coroner's precept to summon a jury.

New-York, King's County } *To any constable of said county.*

THESE are in the name of the people of the state of New-York, to require you immediately upon sight hereof, to summon and warn 24 good and lawful men of the four next townships to——in the said county, to be and appear before me A. C. gentleman, one of the coroners of the county aforesaid, at——aforesaid in the said county, on the———day of———then and there to inquire of, do, and execute all such things as on the behalf of the people of the State of New-York, shall be lawfully given them in charge, touching the death of A. D. And be you then there to certify what you should have done in the premises, and further to do and execute what in behalf of the said people, shall be then and there injoined you. Given under my hand and seal, the———day of———.

When you come to the place appointed, call the constable or bailiff to make return of their warrants.

Then command three proclamations to be made, *O yes, silence is commanded.* Then call the jury after this manner:

You good men that are returned to appear here this present time, to enquire for the people of the state of New-York, answer to your names, as you shall be called, every man at the first call, upon pain and peril that shall fall thereon.

And such of the jury who shall fail to appear, shall be fined *forty shillings.*

The jury appearing, swear fourteen or fifteen of them, and give the foreman his oath, thus:

YOU shall diligently inquire, and true presentment make, on the behalf of the people of the state of New-York, how and in what manner

manner A. D. (*or*, a perſon unknown, *as the caſe is*) here lying dead, came to his death; and of ſuch other matters relating to the ſame as ſhall be lawfully required of you, according to your evidence: So help you God.

After the foreman is ſworn, the reſt may be ſworn, three or four together, as follows;

Such oath as A. F. the foreman of this inqueſt hath for his part taken, you and every of you ſhall well and truly obſerve and keep on your parts reſpectively: So help you God.

If the evidence be not ready, you may adjourn until another day and place to receive their evidence, binding the jury by recognizance in twenty pound each for their appearance.

Then ſend out your warrant for the witneſſes, commanding them to come to be examined before you, and to deliver their knowledge touching the matter in queſtion. And when they appear, take their examinations in writing under their hands.

If it be about the trial of a man's life, then muſt the witneſſes be all bound over in twenty pound a piece, at the leaſt, perſonally to appear at the next aſſizes, to deliver their knowledge therein.

The recognizance muſt be in this manner, viz.

THE 22d day of *Auguſt*, in the year of our Lord ——— A. B. of C. came before me D. E. one of the coroners of the people of the ſtate of New-York, &c. and acknowledged himſelf to be indebted to the people of ſaid ſtate, &c.

THE Condition of this recognizance is ſuch, That if the above-bounden A. B. do perſonally appear before the juſtices of aſſize and goal delivery, at the next aſſizes to be holden at ——— for the ſaid county, and then and there deliver and ſet forth his knowledge, touching the death of A. D. and do not depart thence without licence of the ſaid court, that then this recognizance to be void and of none effect, or elſe to be and remain in full force and virtue. *Acknowledged before me the day and year above written.* D. E.

Then command three proclamations to be made, thus,

O yes, O yes, O yes, If any man can give evidence on the behalf of the people of the ſtate of New-York, how and in what manner A. D. here lying dead, came to his death, draw near and you ſhall be heard.

The evidence appearing, give him, her or them the oath, viz.

THE evidence which you ſhall give to this inqueſt, on the behalf of the people of the ſtate of New-York, touching the death of A. D. ſhall be the truth, the whole truth, and nothing but the truth: So help you God.

The

The jury being sworn, command them to stand together and hear their charge, which the coroner must give, viz.

Gentlemen,

YOU that are sworn, you shall by your oath declare of the death of this man, whether he died of felony, or by misehance; and if of felony, whether of his own, or of another's; and if by mischance, whether by the act of God or man: And if of famine, whether of poverty or of common pestilence; and from whence he came, and who he was. And if he died of another's felony, who were principals and who were accessaries; and if hue-and cry were made or not, and whether the man fled or not: you are also to inquire, whether he died of long imprisonment and hard usage there, or not; and who threatened him of his life or members, and so of all prevailing circumstances that come by presumption.

And in case he died by hurt or fall, then you shall enquire the names of the finders, of his next neighbours, and who were his parents, and if he was killed there, or elsewhere; and if elsewhere, by whom and how he was brought: So also you are to inquire, if there was any *deodand*, and to whose hand it came.

And in case he died of another's felony, then you are to enquire, who were the felons, from whence they came, and where they now are.

And if he died of his own felony, then you are to enquire of the manner, and how he came to make away with himself; and of the value of his goods, and where they are. All which you are to inquire of, and endeavour to find out. *So far the charge to the jury.*

Inquisition of murder.

New-Jersey, Essex County. AN inquisition indented, taken at ——— in the county of ——— aforesaid, the —— day of ——— in the year of our Lord ——— before me A. C. gentleman, one of the coroners of the people of the state of New Jersey, for the county aforesaid, upon the view of the body of A. D. then and there lying dead, upon the oaths of A. B. C. D. E. F. &c. good and lawful men of ——— aforesaid, and of three other of the next towns, to wit, K. L. and M. in the said county, who being sworn and charged to inquire on the part of the said people, when, where, how, and after what manner, the said A. D. came to his death, do say, upon their oath, that one A. M. late of ——— aforesaid, gentleman, not having God before his eyes, but being moved and seduced by the instigation of the devil, on the —— day of ——— in the —— year of ——— aforesaid, at the first hour in the night of the same day, with force and arms, at ——— in the county aforesaid, in and upon the aforesaid A. D. then and there being in the peace of God and of the people of the said state, feloniously, voluntarily, and of his malice forethought, made an assault; and that the aforesaid A. M. then and there with a certain sword made of iron and steel, of the value

value of 5s. which he the said A. M. then and there held in his right hand, the aforesaid A. D. in and upon the left part of the belly of the said A. D. a little above the navel of the said A. D. then and there violently, feloniously, voluntarily, and of his malice forethought, struck and pierced; and gave to the said A. D. then and there with the sword aforesaid, in and upon the aforesaid left part of the belly of the said A. D. a little above the navel of the said A. D. one mortal wound of the breadth of half an inch, and of the depth of three inches, of which said mortal wound the aforesaid A. D. then and there instantly died; and so the said A. M. then and there feloniously killed and murdered the said A. D. against the peace of the people of the said state of New Jersey, and their dignity.

And the said jurors further say, upon their oath aforesaid, that A. A. of ——— yeoman, and B. A. of ——— yeoman, were feloniously present with drawn swords, at the time of the felony and murder aforesaid, in form aforesaid committed, that is to say, on the said ——— day of ——— in the ——— year aforesaid, at ——— aforesaid, in the county aforesaid, at the first hour in the night of the said day, then and there comforting, abetting, and aiding the said A. M. to do and commit the felony and murder aforesaid in manner aforesaid, against the peace of the people of the state of New-Jersey, and their dignity.

And moreover, the jurors aforesaid, upon their oath aforesaid, do say, that the said A. M. A. A. and B. A. had not, nor any of them had, nor as yet have or hath any goods or chattels, lands or tenements, within the county aforesaid, or elsewhere, to the knowledge of the said jurors. [Or, And the jurors aforesaid, upon their oath aforesaid, do say that the said A. M. at the time of the doing and committing of the felony and murder aforesaid, had goods and chattels, contained in the inventory to this inquisition annexed, which remain in the custody of B. C.]

In witness whereof, as well the aforesaid coroner, as the jurors aforesaid, have to this inquisition put their seals, on the day and year aforesaid, and at the place aforesaid.

A. B.

A. C. *Coroner.* C. D.

E. F. *&c. jurors.*

Note: In manslaughter only, malice forethought is omitted: but say that A. B. in manner and form aforesaid, then and there feloniously and in the fury of his mind, did kill and slay, &c. against the peace, &c.

Inquisition for murder by shooting with a pistol, and against the aiders and assisters.

———*As above*———did make an assault, and that the said R. S. a certain pistol of the value of five shillings, then and there charged with gun powder, and one leaden bullet, which pistol, he the

the said R. S. in his right hand then and there had and held to, against, and upon the said A. B. then and there feloniously, wilfully and of his malice forethought, did shoot and discharge, and that the said R. S. with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of gunpowder, shot and sent forth as aforesaid, the aforesaid A. B. in and upon the left breast of him the said A. B. a little above the left pap of him the said A. B. then and there with the leaden bullet aforesaid, out of the pistol aforesaid, by the said R. S. so as aforesaid shot, discharged, and sent forth, feloniously, wilfully, and of his malice forethought, did strike, penetrate and wound. Giving to the said A. B. then and there, with the leaden bullet aforesaid, so as aforesaid shot, discharged and sent forth out of the pistol aforesaid, by the said R. S. in and upon the said left breast of him the said A. B. a little above the left pap of him the said A. B. one mortal wound of the breadth of half an inch, and of the depth of ten inches; of which said mortal wound, the aforesaid A. B. from the said tenth day of August, in the year aforesaid, until the twentieth day of the same month of August, in the year aforesaid, in the county aforesaid, did languish, and languishing lived: on which said twentieth day of August, in the year aforesaid, the aforesaid A. B. in the ward aforesaid, in the county aforesaid, of the aforesaid mortal wound died; and that the aforesaid S. D. R. S. and S. T. then and there feloniously, wilfully, and of their malice forethought were present, helping, aiding, abetting, comforting, assisting and maintaining the said R. S. the felony and murder aforesaid, in manner and form aforesaid to do and commit. And so the jurors aforesaid, upon their oath aforesaid, do say, That the said R. S. S. D. and S. T. the said A. B. then and there in manner and form aforesaid, feloniously, wilfully, and of their malice forethought, did kill and murder against the peace, &c.

An inquisition where one hangs himself.

———*As above*———not having God before his eyes, but being seduced and moved by the instigation of the devil, at ——— aforesaid, in a certain wood at ——— aforesaid, standing and being the said A. D. being then and there alone, with a certain hempen cord, of the value of *d.* which he then and there had and held in his hands, and one end thereof then and there put about his neck, and the other end thereof tied about a bough of a certain oak tree, himself then and there, with the cord aforesaid, voluntarily and feloniously, and of his malice forethought, hanged and suffocated; and so the jurors aforesaid, upon their oaths aforesaid say, that the said A. D. then and there in manner and form aforesaid, as a felon of himself, feloniously, voluntarily, and of his malice forethought, himself killed, strangled, and murdered, against the peace, &c.

An inquisition where one drowns himself.

——— at ——— aforesaid, in the county aforesaid, then and there being alone, in a common river there called ——— himself voluntarily and feloniously drowned: And so the jurors aforesaid, upon their oath aforesaid say, that the aforesaid A D. in manner and form aforesaid, then and there himself voluntarily and feloniously as a felon of himself killed and murdered, against the peace ———.

An inquisition upon one who dies in goal.

———who say upon their oath, that the aforesaid A D. on the day of the taking of this inquisition, being a prisoner in the goal at ——— in the county aforesaid, then and there in the manner and form aforesaid came to his death, and not otherwise. In witness, &c

An inquisition on one non compos mentis.

——— who say upon their oath that the aforesaid A D. on the day and year aforesaid, and at the time of his death, to wit, from the ——— day of ——— to the time of his death, and at the time of his death aforesaid, was a lunatic, and a person of insane mind; and that the said A. D. being a lunatic and a person of insane mind, as aforesaid, did on the ——— day of ——— come alone to a certain river, called ——— in the said county, and did then and there cast himself into the said river, and drowned himself in the water of the said river. And so the jurors aforesaid upon their oath aforesaid say, that the aforesaid A D. from the cause aforesaid, in manner and form aforesaid came to his death, and not otherwise. In witness, &c.

An inquisition on one for cutting his throat.

——— by the instigation of the devil, at ——— aforesaid in the county aforesaid, in and upon himself then and there being in the peace of God and of the people of the said state, feloniously, and voluntarily and of his malice forethought, made an assault, and that the aforesaid A. D. then and there with a certain knife, of the value of one penny, which he the said A. D. then and there held in his right hand, himself upon his throat then and there feloniously, voluntarily, and of his malice forethought did strike and gave to himself then and there with the knife aforesaid, upon his throat aforesaid one mortal wound of the breadth of four inches and the depth of one inch, of which said mortal wound the said A. D. at ——— aforesaid in the county aforesaid languished, and languishing lived from the said ——— day of ——— in the ——— year aforesaid, to the ——— day of ——— and that the said A D. on the ——— day of ——— aforesaid, in the ——— year aforesaid, at ——— aforesaid, in the county aforesaid, of that mortal wound died. And so the jurors aforesaid, &c.

For

For killing another in his own defence.

——upon their oaths say, that A. K. late of —— gentleman, at —— aforesaid in the said county, on the —— day of —— in the —— year of —— in the peace of God and of the people of the state of New York, then being, A. M. late of —— in the county of —— at the hour of —— in the afternoon of the same day, did come, and upon him the said A. K. then and there of his malice forethought did make an assault, and him the said A. K. did then and there endeavour to beat and kill, by continuing the assault aforesaid, from the house of one W. H. in —— aforesaid to a certain place called —— in the county aforesaid and the said A. K. seeing that the said A. M. was so maliciously disposed to a certain wall in the said place, called —— did flee, and from thence for fear of death could not escape, and so the said A. K. himself, in preservation of his life, against the said A. M. continued to defend, and in his own defence him the said A. M. upon the right part of the breast of him the said A. M. with a certain sword of the price of one shilling, which the said A. K. then and there held in his right hand, did strike, then and there giving to the same A. M. one mortal wound, of the breadth of one inch and of the depth of three inches, of which said mortal wound the said A. M. at —— aforesaid, in the county aforesaid languished, and languishing lived from the said —— day of —— to the —— day of —— from thence next ensuing, and that the said A. M. on the said —— day of —— in the —— year aforesaid, at —— aforesaid in the said county, of that mortal wound died: And so the said A. K. did then and there kill him the said A. M. in his own defence.

An inquisition where the murderer is unknown.

——*The same as before, only say,*——that a certain person unknown, &c. *and and* —— And the said jurors upon their oath aforesaid further say that the said person unknown, after he had committed the said felony and murder in manner aforesaid, did fly away: Against the peace, &c.

DEMURRER.

A *Demurrer* (from *demorari*) signifies an *abiding* in point of law, upon which the defendant joins issue, allowing the fact to be true as laid in the indictment. *Wood. b. 4. c. 5.*

In criminal cases not capital, if the defendant demur to an indictment, the court will not give judgment against him to answer over, but final judgment. *2 Haw. 334.*

But regularly in all cases of felony, where a man pleads a special matter, tho' he conclude his plea with not guilty to the felony, or

do

do not conclude it so, yet if his plea be tried, or found, or ruled against him, he shall be put to his plea of not guilty, and be tried for the felony, for tho' a man shall lose his land in some cases, for misspleading, yet he shall not lose his life for misspleading. 2 *H. H.* 257.

DEODAND.

DEODAND is, when any moveable thing inanimate, or beast animate, doth move to or cause the untimely death of any reasonable creature, by mischance, without the will or fault of himself, or of any person. 3 *Inst.* 57.

This, altho' it be not properly homicide, nor punishable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise the greater abhorrence of murder: And the unhappy instrument or occasion of such death, is called a *deodand (deo dandum)* and forfeited to the king, to be disposed of to pious uses, by the king's almoner; as also are all such weapons whereby one man kills another. 3 *Inst.* 57. 1 *Haw.* 66.

It seems clearly settled, contrary to the former opinions, that a horse, or the like, killing an *infant* within the age of discretion, is as much forfeited as if he were of age. 1 *Haw.* 66.

Also, it was anciently holden, that things *fixed to a freehold*, as the wheel of a mill, or a bell hanging in the steeple, may be deodands; but by the latter resolutions they cannot, unless they were severed before the accident happened. 1 *Haw.* 66.

It is agreed by all, that a *ship* in salt water, from which a man falls and is drowned, is not forfeited, because persons at sea are continually exposed to so many perils, that the law imputes not such misfortunes to the ship. Also it seems clear, that when a man riding on a horse over a river, is drowned thro' the violence of the stream the horse is not forfeited, because not that, but the water caused his death. But it is said, that a ship, by a fall from which a man is drowned, in the fresh water, shall be forfeited, but not the merchandize therein; because they no ways contributed to his death. And by the same reason it seems, that if a man riding on the shafts of a waggon, fall to the ground and break his neck, the horses and waggon, only are forfeited, and not the loading, because it no way contributed to his death; for which cause, where a thing not in motion causes a man's death, that part thereof only, which is the immediate cause, is forfeited. As where one climbing upon the wheel of a cart, while it stands still, falls from it, and dies of the fall, the wheel only is forfeited: But if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater: and it is a general rule, that whenever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof

thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited alſo. 1 *Haw.* 66.

Thus a cart met a waggon loaded upon the road and the cart endeavouring to paſs by the waggon, was driven upon a high bank and overturned, and threw a perſon that was in the cart, juſt before the wheels of the waggon and the waggon ran over him and killed him; it was reſolved in this caſe, that the cart, waggon, loading, and all the horſes were deodands, becauſe they all moved to the death. 1 *Salk* 220.

If a weight of earth fall upon a worker in a mine, and kill him; the weight of earth is forfeit, and not the whole mine. 2 *H. H.* 420.

In all theſe caſes, if the party wounded die not of his wound, within a year and a day after he received it, there ſhall be nothing forfeited, for the law doth not look on ſuch a wound as the cauſe of a man's death, after which he lives ſo long; but if the party die within that time, the forfeiture ſhall have relation to the wound given, and cannot be ſaved by any alienation or other act whatſoever in the mean time. 1 *Haw.* 67.

However nothing can be forfeited as a deodand, nor ſeized as ſuch till it be found by the coroner's inqueſt to have cauſed a man's death, but after ſuch inquiſition, the ſheriff is anſwerable for the value of it, and may levy the ſame on the town where it fell, and therefore the inqueſt ought to find the value of it. 1 *Haw.* 67.

And if the coroner omits his duty in this caſe, the inquiſition may be made by the commiſſioners of goal delivery, oyer and terminer, or of the peace. 1 *H. H.* 419.

DISTRESS.

THE remedy for recovering rent by way of diſtreſs ſeems firſt to have come over to us from the civil law. For anciently in the feudal law, the not paying attendance at the lord's courts, or not doing the feudal ſervice was a forfeiture of the eſtate: But theſe feudal forfeitures were afterwards turned into diſtreſſes, according to the pignorary method of the civil law; that is, the land that is let out to the tenant is hypothecated, or as a pledge in his hands, to anſwer the rent agreed to be paid to the landlord, and the whole profits ariſing from the land are liable to the lord's ſeizure for the payment and ſatisfaction thereof.

Concerning which, we will ſhew,

I. For what cauſe a diſtreſs ſhall be.

II. What goods may be diſtrained, and what not.

III. At

III. At what time the diſtreſs ſhall be taken.
IV. Where the diſtreſs ſhall be made.
V. What reaſonable diſtreſs ſhall be taken.
VI. Manner of making diſtreſs.
VII. Diſtreſs how to be demeaned.
VIII. Of reſcous and pound breach.
IX. Replevying the diſtreſs.
X. Sale of the diſtreſs.
XI. Irregularity in the proceedings.
XII. Landlord re entering on non-payment.
XIII. Caſe of tenant holding over.
XIV. Rent in caſe of an execution.
XV. Rent how far recoverable by executors or adminiſtrators.
XVI. Of diſtreſs by warrant of juſtices of the peace.

I. For what cauſes a diſtreſs ſhall be.

Diſtreſs for rent muſt be, for rent in arrear; therefore it may not be made on the ſame day on which the rent becomes due; for if the rent is paid in any part of that day, whilſt a man can ſee to count money, the payment is good.

It muſt not be after tender of payment; for if the landlord come to diſtrain the goods of his tenant for rent behind before the diſtreſs, the tenant may upon the land tender the arrearages, and if after that a diſtreſs be taken, it is wrongful: And if the landlord have diſtrained; if the tenant, before the impounding thereof, tender the arrearages, the landlord ought to deliver the diſtreſs, and if he doth not, the detainer is unlawful. Even ſo it is, in caſe of a diſtreſs for damage feaſant (or damage done by cattle treſpaſſing) the tender of amends before the diſtreſs, maketh the diſtreſs unlawful; and after the diſtreſs, and before the impounding, the detainer unlawful. 2 *Inſt.* 107.

But in this caſe, altho' the owner tender ſufficient amends, yet he cannot take his beaſts out of the pound, if the amends be refuſed; but he muſt replevy; and if it be found at the trial that the amends was not ſufficient, the perſon on whom they treſpaſſed ſhall have damages; if the amends tendered were ſufficient, then the owner of the beaſts ſhall have damages. *Dr. & St.* 112.

Note, there are three kinds of rents: rent *ſervice*, rent *charge*, and rent *ſeck*.

Rent *ſervice* is, where the tenant holdeth his land of his lord, by fealty and certain rent; or by homage, fealty, and certain rent; or by other ſervice, and certain rent. And it is called a rent ſervice, becauſe it hath ſome corporal ſervice incident to it, which at the leaſt is fealty. 1 *Inſt.* 142. 2.

Rent

Rent *charge* is so called, because the land for payment thereof, is charged with a distress; but before this act such distress could not be sold, but only detained till the rent should be paid. 4 *G.* 2. *c.* 28.

If the rent be reserved, without any clause put in the deed of distress for the same, then it was called a rent *seck*, *redditus siccus*, or dry rent: and the difference between a rent charge and a rent seck is, that there is a clause of distress annexed to one, and no such clause to the other; and therefore the one is a charge upon the land, but for the other the grantee had formerly no remedy but to charge the person of the grantor in a writ of annuity. 1 *Inst.* 143.

Rents of *assize* are the certain rents of freeholders and ancient copyholders, so called because they are assized and certain, and thereby distinguished from *redditus mobiles*, farm rents for life, years, or at will, which are variable and uncertain. 2 *Inst.* 19.

Where the agreement is not by deed, the landlord may recover a reasonable satisfaction in an action on the case. 11 *G* 2. *c.* 19 *s.* 14.

So an action of debt may be brought against a tenant for life, in pursuance of the statute of the 8 *An. c.* 14. which enacteth that whereas before the said statute no action of debt did lie against a tenant for life or lives, for any arrears of rent during the continuance of such estate for life or lives; it shall be lawful for any person having any rent in arrear or due upon any lease or demise for life or lives, to bring an action of debt for such arrears, in like manner as he might have done in case such rent were reserved upon a lease for years. *s.* 4.

Persons having rent in arrear, upon any lease determined, may distrain for such arrears after the determination of the lease, in the same manner as if it had not been determined; provided that such distress be made in six months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from which such arrear became due. 8 *An. c.* 14. *s.* 6, 7.

Before the statute of the 17 *C.* 2. *c.* 7. in case a distress was too little where sufficient distress was to be had, a man could not distrain again, be the demand never so great; for it was his folly that at first he distrained no more. *Mo.* 7. *Comb* 546.

But now by the said statute, in all cases where the value of the cattle distrained shall not be found to be to the full value of the arrears distrained for: the party to whom such arrears were due, his executors or administrators, may distrain again for the residue of the said arrears. *s.* 4.

If any distress and sale shall be made, for rent in arrear and due, when none is in truth due, the owner shall recover double value with full costs. 2 *W. Sess.* 1. *c.* 5. *s.* 5.

And if the distress be taken of goods without cause, the owner may make *rescous*; but if they be distrained without cause and impounded, the owner cannot break the pound and take them out, because they are in the custody of the law. 1 *Inst.* 47.

II.

II. What goods may be diſtrained, and what not.

Diſtreſs for rent muſt be of a thing whereof a valuable property is in ſomebody; and therefore dogs, bucks, does, conies, and the like, that are *feræ naturæ*, cannot be diſtrained. 1 *Inſt.* 47.

Although it be of valuable property, as a horſe; yet when a man or woman is riding on him, or an ax in a man's hand, cutting of wood, and the like, they are for that time privileged, and cannot be diſtrained. 1 *Inſt* 47.

But it is ſaid that if one be riding upon a horſe damage feaſant, the horſe may be led to the pound with the rider upon him. 1 *Sid.* 422, 440.

And it hath been held, that horſes joined to a cart, with a man upon it, cannot be diſtrained for rent (although they may for damage feaſant) but both cart and horſes may, if the man be not upon the cart. 1 *Vent.* 36.

Valuable things ſhall not be diſtrained for rent, for benefit and maintainance of trades, which by conſequent are for the commonwealth, and are there by authority of law: as a horſe in a ſmith's ſhop ſhall not be diſtrained for the rent iſſuing out of the ſhop, nor a horſe in a hoſtry, nor the materials in a weaver's ſhop for making of cloth, nor cloth or garments in a taylor's ſhop, nor ſacks of corn or meal in a mill, nor any thing diſtrained for damage feaſant, for it is in cuſtody of the law; and the like. 1 *Inſt.* 47.

Beaſts belonging to the plough ſhall not be diſtrained (which is the ancient common law of *England*, for no man ſhall be diſtrained by the utenſils or inſtruments of his trade or profeſſion, as the ax of the carpenter, or the books of a ſcholar) while goods or other beaſts may be diſtrained. 1 *Inſt.* 47.

But this rule holds only in diſtreſſes for rent arrear, amerciaments and the like; but doth not extend to caſes where a diſtreſs is given, in the nature of an execution, by any particular ſtatute, as for poor rates, and the like. 3 *Salk* 136.

Furnaces, cauldrons, or other things fixed to the freehold, or the doors or windows of a houſe, or the like, cannot be diſtrained. 1 *Inſt.* 47.

Things for which a replevin will not lie, ſo as to be known again, as money out of a bag, cannot be diſtrained. 2 *Bac. Abr.* 109.

But money in a bag ſealed may be diſtrained, for that the bag ſealed may be known again.

By the 2 *W. ſeſſ.* 1. *c.* 5. Perſons having rent arrear on any demiſe, leaſe, or contract, may ſeize and ſecure any ſheaves or cocks of corn, or corn looſe or in the ſtraw, or hay being in any barn or granary, or upon any hovel, ſtack, or rick, or otherwiſe upon any part of the land charged with the rent, and may lock up or detain the ſame in the place where found, in the nature of a diſtreſs ſo as the ſame be not removed to the damage of the other, out of the place where found and ſeized, but be kept there (as impound) till replevied or ſold. *ſ.* 3.

Where

Where a ſtranger's beaſts eſcape into the land, they may be diſtrained for rent, though they have not been levant and couchant (that is, though they have not been in the ground for a good ſpace of time, or ſo long as to have laid down and roſe up again to feed) provided they are treſpaſſers; but if the tenant of the land is in default, in not repairing his fences, whereby the beaſts came into the land, the leſſor cannot diſtrain ſuch beaſts, though they have been levant and couchant, unleſs he have given notice to the owner, and he ſuffer them to remain there afterwards. *Lutw.* 364.

In caſe of rent reſerved upon a leaſe for years, the leſſor cannot diſtrain ſuch cattle until they be levant and couchant; for if the leſſor had had the lands in his own hands, he ought to have repaired the fences; and when he puts in a leſſee, he ought by covenant to oblige him to repair: and therefore in that caſe, if the law would allow the leſſor to diſtrain the catttle of a ſtranger which came in by eſcape, before that they be levant and couchant, it would be in effect to allow a man to take advantage of his own wrong. Therefore if the cattle come in by default of the owner of the cattle, then they may be diſtrained before they be levant and couchant; but if in default of the tenant of the land, there they cannot be diſtrained until they have been levant and couchant, that is to ſay, for rent upon leaſes for years. And in ſuch caſe, the leſſor ſhall not take the cattle before that he has given notice to the owner, that they are upon the land liable to his diſtreſs; and if he doth not come to take them away, then they become diſtrainable. And by *Treby* chief juſtice; Where the cattle eſcape accidentally, there they are not diſtrainable, until they have been levant and couchant but if they eſcape by default of their owner, they are diſtrainable the firſt minute. L. *Raym.* 168, 9.

If ten head of cattle are doing damage, a man cannot take one of them and keep it till he be ſatisfied for the whole damage, but he may bring an action of treſpaſs for the reſt. 12 *Mod.* 660. H. 13 W. Vaſper and Edwards.

If a man hath common for ten cattle, and he puts in more, the ſurpluſage above ten may be taken damage feaſant. 1 *Roll's Abr.* 665.

If a man come to diſtrain, and ſee the beaſts in his ground, and the owner chace them out, of purpoſe before the diſtreſs taken yet the owner of the ſoil cannot diſtrain them, and if he doth the owner of the cattle may reſcue them, for the beaſts muſt be damage feaſant at the time of the diſtreſs. 1 *Inſt.* 161.

For diſtreſs damage feaſant is the ſtricteſt diſtreſs that is, and the thing diſtrained muſt be taken in the very act: for if the goods are once off, though on freſh purſuit, the owner of the ground cannot take them. 12 *Mod.* 661.

III.

III. At what time the diſtreſs ſhall be taken.

For a rent or ſervice the lord cannot diſtrain in the night, but in the day time; and ſo it is of a rent charge: but for damage feaſant one may diſtrain in the night, otherwiſe it may be, the beaſts will be gone before he can take them. 1 *Inſt.* 142.

For before ſun riſing, or after ſun ſet, no man may diſtrain but for damage feaſant. *Mirrour c.* 2. *ſ.* 26.

IV. Where the diſtreſs ſhall be made.

The king's officers, as ſheriffs and others, ſhall not take diſtreſſes in the fees wherewith churches in times paſt have been endowed; but diſtreſſes may be taken in poſſeſſions of the church newly purchaſed. 9 *Ed.* 2 *c.* 9.

A man may diſtrain in places or lands within the fee, liable to diſtreſs, and not elſewhere. 52 *H.* 3. *c.* 15. 2 *Inſt.* 131. *Mir. c.* 2. *ſ.* 26.

And by the 11 *G.* 2. *c.* 19. The landlord may diſtrain any cattle or ſtock of the tenant, depaſturing on any common appendant or appurtenant, or any ways belonging to the premiſes demiſed. *ſ.* 8.

No perſon (except the king's officers) ſhall take diſtreſſes in the king's highway. 52 *H.* 3. *c.* 15.

And the reaſon is, becauſe the king's ſubjects ought to have free paſſage, as well to fairs and markets, as about their other affairs. But yet this ſhall not be taken, to make the diſtreſs utterly unlawful, ſo as to take advantage thereof in bar to an avowry, but to this purpoſe that if the lord diſtrain in the highway, the tenant may have an action againſt him upon this ſtatute. 2 *Inſt.* 131, 132.

But by the 11 *G.* 2. *c.* 19. If any tenant for life, years, at will, ſufferance, or otherwiſe, ſhall fraudulently or clandeſtinely convey off the premiſes his goods or chattels, to prevent the landlord from diſtraining; ſuch landlord, or any perſon by him lawfully empowered, may in 30 days next after ſuch conveying away, ſeize the ſame wherever they ſhall be found, and diſpoſe of them in ſuch manner, as if they had been diſtrained on the premiſes. *ſ.* 1.

But no landlord ſhall diſtrain any goods ſold *bona fide*, and for a valuable conſideration, before ſuch ſeizure made, to any perſon not privy to ſuch fraud. *ſ.* 2.

And if any tenant ſhall ſo fraudulently remove and convey away his goods or chattels, or if any perſon or perſons ſhall wilfully and knowingly aid or aſſiſt him in ſuch fradulent conveying away or carrying off of any part of his goods or chattels, or in concealing the ſame; every perſon ſo offending, ſhall forfeit to the landlord double the value of ſuch goods, to be recovered in any court of record at *Weſtminſter*. *ſ.* 3.

But if the goods and chattels ſo fraudulently carried off or concealed ſhall not exceed the value of 50*l.* the landlord or his agent may exhibit a complaint in writing before two juſtices of the peace of the ſame county

county or diviſion, reſiding near the place whence ſuch goods and chattels were removed, or near the place where the ſame were found, not being intereſted in the lands or tenements whence ſuch goods were removed; who may ſummon the parties concerned, examine the fact, and all proper witneſſes upon oath (or if it is a quaker, upon affirmation required by law;) and in a ſummary way determine whether ſuch perſon or perſons be guilty of the offence, with which he or they are charged, and to inquire in like manner of the value of ſuch goods and chattels; and upon full proof of the offence by order under their hands and ſeals the ſaid juſtices ſhall adjudge the offender or offenders to pay double the value of the ſaid goods and chattels, to ſuch landlord, his bailiff, ſervant or agent, at ſuch time as the ſaid juſtices ſhall appoint: And if the offender or offenders having notice of ſuch order, ſhall refuſe or neglect ſo to do, they ſhall by their warrant levy the ſame by diſtreſs; and for want of ſuch diſtreſs may commit the offender or offenders to the houſe of correction there to be kept to hard labour, without bail or mainprize, for the ſpace of ſix months, unleſs the money ſo ordered to be paid as aforeſaid ſhall be ſooner ſatisfied. *ſ.* 4.

Perſons aggrieved by order of ſuch juſtices, may appeal to the next general or quarter ſeſſions; who may give coſts to either party. *ſ.* 5.

And where the party appealing ſhall enter into recognizance, with one or two ſureties, in double the ſum ſo ordered to be paid, with condition to appear at ſuch ſeſſions: the order of the juſtices ſhall not be executed againſt him in the mean time. *ſ.* 6.

V. That reaſonable diſtreſs ſhall be taken.

Diſtreſſes ſhall be reaſonable, and not too great; and he that taketh great and unreaſonable diſtreſſes, ſhall be greviouſly amerced. 52 *H.* 3. *c.* 4. For example, if the lord diſtrain two or three oxen for 12d. or the like ſmall ſum, and the owner bring a replevy of the oxen, and the lord avow the taking of them for the 12d, of his own ſhewing, he ſhall make fine: or the party may have his action upon this ſtatute. 2 *Inſt.* 107.

If the lord diſtrain an ox, or horſe, for a penny; if there were no other diſtreſs upon the land holden, the diſtreſs is not exceſſive: but if there were a ſheep, or a ſwine, or the like, then the taking of the ox or horſe is exceſſive, becauſe he might have taken a beaſt of leſs value. 2 *Inſt.* 107.

VI. Manner of making diſtreſs.

Gates or incloſures may not be broken open, nor thrown down, to make diſtreſs. 1 *Inſt.* 161.

Nor may the leſſor enter into the tenant's houſe, unleſs the doors are open. *Read.* Diſtr. 2 *Bac. Abr.* 111.

Upon a queſtion about taking a diſtreſs, it was held by the lord chief

chief juſtice *Hardwicke*, at the ſummer aſſizes at *Exeter*, 1735, that a padlock put on a barn door could not he opened by force, to take the corn by way of diſtreſs. *Vin.* Diſtr. (E. 2.) 6.

Where any goods or chattels fraudently or clandeſtinely conveyed or carried away, ſhall be put, placed, or kept in any houſe, barn, ſtable, outhouſe, yard, cloſe, or place, locked up, faſtened, or otherwiſe ſecured ſo as to prevent ſuch goods or chattels from being taken and ſeized as a diſtreſs for arrears of rent; it ſhall be lawful for the landlord, or his ſteward, bailiff, receiver, or other perſon or perſons impowered, to take and ſeize, as a diſtreſs for rent, ſuch goods and chattels (firſt calling to his aſſiſtance the conſtable, of the diſtrict, or place, where the ſame ſhall be ſuſpected to be concealed, and in caſe of a dwelling houſe, oath being alſo firſt made before a juſtice of the peace, of a reaſonable ground to ſuſpect that ſuch goods or chattels are therein) in the day time to break open and enter into ſuch houſe, barn, ſtable, outhouſe, yard, cloſe, and place; and to take and ſeize ſuch goods and chattels for the ſaid arrears of rent, as he might have done if they had been in any open place. 11 *G.* 2. *c.* 19. *ſ.* 7.

But except it be in this caſe where the goods are clandeſtinely conveyed, it may ſeem from what hath been ſaid, that the landlord hath no mean to come at the goods in order to make diſtreſs, if the tenant ſhall think fit to lock up his gates, and ſhut the doors: And the like may be obſerved in cates of diſtreſs for the levying a penalty, by warrant of juſtices of the peace. Which matter ſeem to require ſome conſideration.

If a landlord comes into a houſe, and ſeizes upon ſome goods as a diſtreſs, in the name of all the goods of the houſe; that will be a good ſeizure of all. 6 *Mod.* 215.

VII. Diſtreſs how to be demeaned.

By the 52 *H.* 3 *c.* 4. 'None ſhall cauſe any diſtreſs that he hath 'taken, to be driven out of the county where it was taken; and if 'one neighbour do ſo to another of his own authority *(as for damage feaſant, or rent charge,* 2 *Inſt.* 106) he ſhall make fine as for 'a thing done againſt the peace: and if the lord ſo preſume to do 'againſt his tenant he ſhall be grievouſly puniſhed by amerciament'.

Before this act, at the common law, a man might have driven the diſtreſs to what county he pleaſed: which was miſchievous, for two cauſes: 1. Becauſe the tenant was bound to give the beaſts being impounded in an open pound ſuſtenance, and being carried into another county, by common intendment he could have no knowledge where they were. 2 He could not know where to have a replevy: but the party was, before this ſtatute, driven to his action upon the caſe. 2 *Inſt.* 106.

And albeit this ſtatute be in the negative, yet if the tenancy be

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in one county, and the manor in another county, the lord may derive the diſtreſs which he taketh in the tenancy to his manor in the other county; for that the tenant is out of both the ſaid miſchiefs: for the tenant by doing of ſuit and ſervice to the manor, by common intendment may know what is done there, and therefore may give his beaſts ſuſtenance. And to know where to have his replevy, the bailiff of the manor uſually drives the cattle diſtrained to the pound of the manor. And hereby it is to be noted, that a caſe out of the miſchief, is out of the meaning of the law, tho' it be within the letter. 2 *Inſt.* 106.

And by the 1 & 2 *P. & M. c.* 12. it is further enacted, that 'no diſtreſs of cattle ſhall be driven out of the hundred, rape, wapentake, or lathe, where ſuch diſtreſs ſhall be taken, except it be 'to a pound overt within the ſame ſhire, not above three miles diſ-'tant from the place where the ſaid diſtreſs was taken; and no 'cattle or other goods diſtrained for any cauſe at one time, ſhall be 'impounded in ſeveral places, whereby the owner may be con-'ſtrained to ſue ſeveral replevies; on pain of 100*s.* to the party 'grieved and treble damages.' *ſ.* 1.

T. 21 *G.* 2. *Gimbart* and *Pelah.* The defendant juſtified impounding cattle damage feaſant. And on evidence it appeared, he put them in the next pound, though it happened to be in another county. And *Lee* Ch. J held, it did not make him a treſpaſſer, though it ſubjected him to the penalty of the ſtatute of the 1 & 2 *P. & M. Str.* 1272.

Note, a pound is either *overt* or open, as in a pinfold made for ſuch purpoſes, or in his own cloſe, or in the cloſe of another by his conſent; and it is therefore called open, becauſe the owner may give his cattle meat and drink, without treſpaſs to any other, and then the cattle muſt be ſuſtained at the peril of the owner: Or it is a pound *covert* or cloſe, as to impound the cattle in ſome part of his houſe; and then the cattle muſt be ſuſtained with meat and drink at the peril of him that diſtraineth, and he ſhall not have any ſatisfaction therefor. 1 *Inſt.* 47.

But if the diſtreſs be of utenſils of houſhold, or ſuch like dead goods, which may take harm by wet or weather, or be ſtolen away; there he muſt impound them in a houſe, or other pound *covert*, within three miles in the ſame county; for if he impound them in a pound *overt*, he muſt anſwer for them. 1 *Inſt.* 47.

Cattle diſtrained may not be worked or uſed, unleſs for the owner's benefit, as a cow milked, or the like; much leſs may they be abuſed or hurt. *Cro. Jac.* 148.

And it hath been ſaid in this caſe, that even a cow may not be milked; for tho' the cow be better for this, yet he who took the diſtreſs ought not to do good to the owner without his conſent, and perhaps the owner would have come before any damage came by this to the cow; and if it periſh by this, yet he who took the diſtreſs may diſtrain again. 2 *Bac. Abr.* 112.

So if the diſtreſs be loſt by the act of God; as if the diſtreſs dies in

in the pound, without any default in the diſtrainer; in ſuch caſe, he who made the diſtreſs may diſtrain again. 1 *Salk.* 248.

It is the diſtrainer's own fault, if he puts the diſtreſs in a pound which will not hold it; but he cannot juſtify the tying of cattle in the pound; and if he ties a beaſt, and it is ſtrangled, he muſt pay damages. 1 *Salk.* 248.

VIII. Of reſcous and pound breach.

By the common law, if a man break the pound, or the lock of it, or part of it, he greatly offendeth againſt the peace, and doth treſpaſs to the king, and to the lord of the fee, and to the ſheriffs, and hundredors, in breach of the peace, and to the party, and to the delaying of juſtice; and therefore hue and cry is to be levied againſt him, as againſt thoſe who break the peace. *Mir. c.* 2 *ſ.* 26.

And by ſtatute, on any pound-breach or reſcous, of goods diſtrained for rent, the perſon grieved thereby, ſhall in a ſpecial action upon the caſe, recover treble damages and coſts againſt the offender, or againſt the owner of the goods, if they be afterwards found to have come to his uſe or poſſeſſion. 2 *W. ſeſſ.* 2. *c.* 5. *ſ.* 4.

Treble damages and coſts.] In the caſe of Sir *Wilfred Lawſon* v. *Storey*, *M.* 6 *W.* It was adjudged, that the coſts ſhall be trebled as well as damages. L. *Raym.* 20.

When a man hath taken diſtreſs, and the cattle diſtrained, as he is driving them to the pound, go into the houſe of the owner; if he that took the diſtreſs demand them of the owner, and he deliver them not, this is a reſcous in law. 1 *Inſt.* 161.

IX. Replevying the diſtreſs.

It is worthy of obſervation, how provident the law is, that mens beaſts, cattle, or other goods be not unjuſtly or exceſſively diſtrained; and if they be, that deliverance be ſpeedily made of them by replevy: otherwiſe the huſbandry of the realm, and mens other trades, might be overthrown or hindered. 2 *Inſt* 106.

And the ſheriff, or other officer having authority to grant replevins, ſhall in every replevin of a diſtreſs for rent, take in his own name, from the plaintiff and two ſureties, a bond in double the value of the goods diſtrained, to be aſcertained on the oath of one witneſs, and conditioned for proſecuting the ſuit with effect, and without delay, and for duly returning the goods diſtrained, in caſe a return ſhall be awarded; before any deliverance be made of the diſtreſs: and the ſheriff ſhall aſſign ſuch bond to the *avowant*, or perſon making *conuſance*. 11 G. 2 c. 19. ſ. 23.

Note, *avowry* is, where one takes a diſtreſs, and the perſon diſtrained ſues a replevin; then he that took the diſtreſs muſt *avow* and juſtify in his plea, for what cauſe he took it, if he took it in his own right; and this is called an *avowry*: If he took it in the right of another, then, when he hath ſhewed the cauſe, he muſt make *conu-*

ſance

fance of the taking, as bailiff or ſervant to him, in whoſe right he took it. *Terms of the L.*

X. Sale of the diſtreſs.

Diſtreſs taken for an offence preſented in the leet, may of common right be ſold, becauſe it is a court of record; but otherwiſe it is, of diſtreſſes in courts that are not of record. 12 *Mod.* 330.

So a diſtreſs for an amercement in a court baron cannot be ſold; but in ſuch caſe a diſtreſs infinite ſhall go. 2 *Bulſt.* 52, 53.

In like manner before the ſtatute of the 2 *W. ſſ.* 1 *c.* 5. diſtreſs for rent in arrear could not be ſold, but only detained till payment of the rent: But by the ſaid ſtatute it is enacted, that 'whereas the 'moſt ordinary and ready way for recovery of arrears of rent is 'by diſtreſs, yet ſuch diſtreſſes not being to be ſold, but only de-'tained as pledges for enforcing the payment of ſuch rent, the per-'ſons diſtraining have little benefit thereby; therefore from hence-'forth, where any goods ſhall be diſtrained for rent reſerved and 'due upon any demiſe, leaſe or contract whatſoever, and the tenant 'or owner of the goods diſtrained, ſhall not within five days next 'after ſuch diſtreſs taken, and notice thereof (with the cauſe of 'ſuch taking) left at the chief manſion houſe, or other moſt noto-'rious place on the premiſes, replevy the ſame; in ſuch caſe the 'perſon diſtraining ſhall, with the ſheriff or under-ſheriff of the 'county, or with the conſtable of the hundred, pariſh or place, 'where ſuch diſtreſs ſhall be taken, cauſe the goods and chattels ſo 'diſtrained to be appraiſed by two ſworn appraiſers (whom ſuch 'ſheriff, under-ſheriff, or conſtable ſhall ſwear) to appraiſe the ſame 'truly, according to the beſt of their underſtandings: and after 'ſuch appraiſement, ſhall ſell the ſame for the beſt price can be 'gotten for them, for ſatisfaction of the rent, and charges of the 'diſtreſs, appraiſement and ſale; leaving the overplus (if any) with 'the ſheriff, under-ſheriff, or conſtable, for the owner's uſe. 2 *W. ſeſſ.* 1. *c.* 5. *ſ.* 2.

XI. Irregularity in the proceedings.

Where any diſtreſs ſhall be made, for any kind of rent juſtly due, and any irregularity ſhall be afterwards done by the party diſtraining, or his agent; the diſtreſs ſhall not be deemed unlawful, nor the diſtrainer a treſpaſſer *ab initio*, but the party aggrieved may recover ſatisfaction for the ſpecial damage, in an action of treſpaſs, or on the caſe; and if he recover, he ſhall have full coſts. 11 *G.* 2. *c.* 19. *ſ.* 19.

But no tenant ſhall recover on ſuch action, if tender of amends hath been made before the action brought. *ſ.* 20.

XII. Landlord

XII. Landlord re-entering on non-payment.

In caſe where half a year's rent ſhall be in arrear, and the landlord or leſſor hath right by law to re-enter for non payment thereof; he may, without any formal demand or re entry, ſerve a declaration in ejectment: and on recovering judgment and execution, ſhall hold the premiſes diſcharged from the leaſe. But this not to bar the right of any mortgagee. And if the defendant files a bill in equity, he ſhall not have an injunction againſt the proceedings at law, unleſs he ſhall bring the arrears into court, and alſo the coſts taxed in the ſaid ſuit. Provided, that if the tenant ſhall before the trial in ejectment, pay all the arrears and coſts, the proceedings on the ejectment ſhall thenceforth ceaſe. 4 *G.* 2 *c.* 28. *ſ.* 2, 3, 4.

XIII. Caſe of tenant holding over.

If any tenant for life or years, or other perſon who ſhall come into poſſeſſion by, from, or under him, ſhall wilfully hold over any lands, after the determination of ſuch term, and after demand made, and notice in writing given for delivering the poſſeſſion thereof; he ſhall, from the time that he ſhall ſo hold over, pay double the yearly value thereof, to be recovered by action of debt, in any court of record. 4 *G.* 2 *c.* 28. *ſ.* 1.

But this remedy ſeemeth not altogether adequate to the evil: for three reaſons. 1. Becauſe ſuch action is certainly tedious and expenſive. 2. It is uncertain, when the action is over, whether the tenant will be able to pay. 3. What is chiefly wanted, namely, putting the landlord into poſſeſſion, is not obtained by ſuch action, but for that he ſhall be ſtill to ſeek. A more ſhort and eaſy method of ouſting the tenant of his poſſeſſion, ſeemeth more eligible in the like caſes.

If any tenant ſhall give notice of his intention to quit the premiſes, at a time mentioned in ſuch notice, and ſhall not accordingly deliver up the poſſeſſion thereof at a time: he ſhall from thenceforth pay double rent, to be recovered in like manner as the ſingle rent. 11 *G.* 2. *c.* 19. *ſ.* 8.

This clauſe alſo proceedeth upon a ſuppoſition, which perhaps may not be true, namely, that the tenant is a man of ſubſtance. It is more likely, that if he were able to live elſewhere, he would not chuſe to hold over under ſuch circumſtances, nor perhaps would the landlord want to be rid of him. The putting him out of poſſeſſion, by ſome expeditious and eaſy method, ſeemeth the more adequate remedy in this caſe alſo, in like manner as is provided in the caſe where the tenant deſerteth the premiſes.

XIV. Rent in caſe of execution.

No goods being on any meſſuage, lands or tenements, leaſed for life, term of years, at will, or otherwiſe, ſhall be liable to be taken by

by execution, unleſs the party, at whoſe ſuit the execution is ſued out, ſhall before the removal of ſuch goods from off the premiſes, pay to the landlord or his bailiff all ſuch rents as ſhall be then due for the premiſes, provided that it amount not to more than one year's rent: and if the ſaid arrears ſhall exceed one year's rent, then the party paying ſuch landlord one year's rent, may proceed to execute his judgment. 8 *An. c.* 14. *ſ.* 1.

XV. Rent how far recoverable by executors or adminiſtrators.

By the 32 *H.* 8. *c.* 37. Foraſmuch as by the order of the common law, the executors or adminiſtrators of tenants in fee ſimple, fee tail, and for term of life, of rent ſervices, rent charges, rents ſecks, and fee farms, have no remedy to recover ſuch arrearages of the ſaid rents or fee farms as were due to their teſtators in their lives, nor yet the heirs of ſuch teſtator, nor any perſon having the reverſion of his eſtate after his deceaſe, may diſtrain or have action to levy the ſame: it is enacted, that the executors and adminiſtrators of every ſuch perſon to whom any ſuch rent or fee farm ſhall be due and not paid at the time of his death, may have an action of debt for the ſame, againſt the tenant who ought to have paid the ſame, or againſt his executors and adminiſtrators; or may diſtrain upon the premiſes, ſo long as they continue in the poſſeſſion of ſuch tenant in demeſne who ought immediately to have paid the ſame to the teſtator in his life, or of any other perſon claiming the ſame only from or by ſuch tenant, by purchaſe, gift or deſcent. *ſ.* 1.

In like manner the huſband may have action, or diſtrain for arrears due in the life time and in the right of his wife. *ſ.* 3.

XVI. Of diſtreſs by warrant of juſtices of the peace.

By the 27 *G.* 2. *c.* 20. It is enacted as follows: 'In all caſes 'where any juſtice of the peace is or ſhall be required or impowered 'by any act of parliament, to iſſue a warrant of diſtreſs, for the levying of any penalty inflicted, or any ſum of money directed to 'be paid by ſuch act; it ſhall be lawful for the juſtice granting ſuch 'warrant, therein to order and direct the goods and chattels ſo to 'be diſtrained, to be ſold and diſpoſed of, within a certain time to 'be limited in ſuch warrant, ſo as ſuch time be not leſs than four 'days, nor more than eight days, unleſs the penalty or ſum of 'money, for which ſuch diſtreſs ſhall be made, together with the 'reaſonable charges of taking and keeping ſuch diſtreſs, be ſooner 'paid.

'And the officer making ſuch diſtreſs, ſhall and may deduct the 'reaſonable charges of taking, keeping, and ſelling ſuch diſtreſs, 'out of the money ariſing by ſuch ſale; and the overplus (if any) 'after ſuch charges, and alſo the ſaid penalty or the ſum of money, 'ſhall be ſatisfied and paid, ſhall be returned on demand, to the

owner of the goods so distrained: and the officer executing such warrant, if required, shall shew the same to the person whose goods are distrained, and shall suffer a copy thereof to be taken'.

Officer may deduct the reasonable charges] But here is no power given to the justices, to ascertain such charges, therefore it seemeth, that the officer executing the warrant shall be the sole judge thereof in the first instance, and afterwards, if the owner of the goods distrained shall be dissatisfied, the reasonableness thereof shall be determined by a judge and jury upon an action brought.

Form of a complaint and oath to be made before a justice, in case of a dwelling-house, where goods and chattels are fraudulently and clandestinely removed and conveyed away, and secured, so as to prevent them from being taken and seized as a distress for arrears of rent.

New-Jersey, Middlesex County. BE it remembered, that this ——day of ——A. I. of——yeoman, complaineth and maketh oath, that certain goods and chattels of A. O. of—— yeoman have been fraudulently and clandestinely conveyed and carried away from—— by the said A. O. his servant or servants, agent or agents, or other person or persons, aiding or assisting therein, to prevent——from distraning the said goods and chattels for arrears of rent due to the said——for the said——; And that the said goods and chattels are put, placed, or kept, in the house, barn, stable, out house, yard, close or other place of——at ——locked up, fastened or otherwise secured, so as to prevent the said goods and chattels from being taken and seized as a distress for arrears of rent; and that the said A. I. hath a reasonable ground to suspect, and doth suspect, that the said goods and chattels are in the dwelling house of the said——at—— A. I.

Taken and sworn at——the—— day of——before the——

Warrant upon the preceding complaint and oath.

New-Jersey, Middlesex County. } *To any constable of said county.*

WHEREAS A. I. of——yeoman, hath this——day of——exhibited his complaint and made oath, before ——justice of the peace of——that certain goods and chattels of A. O. of —— yeoman, have been fraudulently and clandestinely conveyed and carried away from——by the said A. O. his servant or servants, agent or agents, or other person or persons, aiding or assisting therein, to prevent——from distraining the said goods and chattels for arrears of rent due to the said——for the said——: And that the said goods and chattels are put, placed, or kept in the house, barn, stable, out house, yard, close, or other place

place of———at———locked up, fastened, or otherwise secured, so as to prevent the said goods and chattels from being taken and seized as a distress for arrears of rent: And that the said A. I. hath a reasonable ground to suspect, that the said goods and chattels are in the dwelling house of———at———; These are therefore to command you, to aid and assist———his steward, bailiff, receiver, or other person or persons impowered to take and seize, as a distress for rent, the said goods and chattles, in the day time, to break open and enter into the said dwelling house, barn, stable, outhouse, yard, close, or other place of the said———at——— —and to take and seize the said goods and chattels for the said arrears of rent, according to law. Given under my hand and seal at———the———day of———

The form of the inventory of the goods distrained may be this.

AN inventory of the several goods and chattels, distrained by us whose names are underwritten, the———day of——in the year——in the houses, out-houses, and lands, of A. T. in——by the authority and on the behalf of A. L. of ——— for ——— pounds arrear of rent due to him the said A. L.

In the dwelling-house:
One table,
Six chairs, &c.
In the cow house:
Six cows,
Twelve calves, &c.

Notice.

A. T.

TAKE notice, that by the authority and on the behalf of your landlord A. L. I have this———day of———in the year of our Lord———distrained the several goods and chattels specified in the schedule hereunto annexed, in your houses, out-houses, and grounds, at———for———pounds arrear of rent due to him the said A. L. And if you shall not pay the said rent so due and in arrear as aforesaid, or replevy the said goods and chattels, I shall after the expiration of five days from the date hereof, cause the said goods and chattels to be appraised and sold, according to the statute in that case made and provided. Given under my hand the day and year first above written,

A. D:

Witness that a copy hereof was
this day delivered to the said A. T.
(Or, left at the chief mansion-house
of the said A. T.) A. W. Appraisers

Appraisers oath.

YOU and each of you shall well and truly appraise the goods and chattels mentioned in this inventory, according to the best of your understanding: So help you God.

Form of the appraisement.

THE appraisement may be in the form of the inventory, specifying the particulars, and their respective valuations: And then add at the end,

Appraisement by us, this ——— day of ——— in the year ———

A. P. }
B. P. } sworn appraisers.

Distringas. See *PROCESS.*
Dogs mischievous. See *NUISANCE.*
Door breaking open. See *ARREST.*
Drunkenness. See *ALEHOUSES.*
Duelling. See *HOMICIDE.*

ESCAPE.

THIS is to be understood of escapes in *criminal* cases: and not in *civil* cases, as for debt, or the like.

An escape is, where one that is arrested gaineth his liberty, before he is delivered by course of law. *Terms de la ley.*

Escapes are of three kinds. 1. By a person who hath the offender in his custody; this is properly called an *escape.* 2. Caused by a stranger: this is commonly called a *rescue.* 3. By the party himself; either without force, which is simply an escape, or with force, which is *prison breaking.* *Rescous* and *prison breaking* are treated of under their respective titles; and this title treats only of escapes properly so called. Concerning which we will treat in the following order:

I. Of escape by the party himself.
II. Escape suffered by a private person.
III. Escape suffered by an officer.
IV. What is a voluntary, and what a negligent escape.
V. Concerning the retaking of a person escaped.
VI. Indictment for an escape.
VII. Trial and conviction for an escape.
VIII. Punishment of an escape.
IX. Aiding in attempting to escape.

I. Of

I. Of escape by the party himself.

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it: whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of law, is guilty of a high contempt, punishable with fine and imprisonment. 2 *Haw.* 122.

But escape committed by the party himself, belongs more properly to the title *Prison breaking*.

II. Escape suffered by a private person.

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large, before he hath discharged himself of him, by delivering him over to some other who by law ought to have the custody of him. 2 *Haw.* 138.

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. 2 *Haw.* 138.

III. Escape suffered by an officer.

In order to make it an escape, there must be an actual arrest; and therefore, if an officer having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 *Haw.* 129.

And as there must be an actual arrest, such arrest must be also justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. 2 *Haw.* 129.

And as the imprisonment must be justifiable, so it must be also for a criminal offence. 2 *Haw.* 129.

Also if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, tho' the judgment were, that *he be discharged paying his fees*, so that till they be paid, the first imprisonment continued lawful as before; for inasmuch as he is detained, not as a criminal, but only as a debtor, his escape cannot be more criminal than that of any other debtor: yet if a person convicted of a crime, be condemned to imprisonment for a certain time, and also *till he pay his fees*, and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, for that it was part of the punishment that the imprisonment be continued till the fees should be paid; but it seems, that this is to be intended

where

where the fees are due to others as well as to the gaoler, for otherwise the gaoler will be the only sufferer by the escape, and it will be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release. 2 *Haw* 129, 130.

Also it is an escape in some cases, to suffer a prisoner to have greater liberty, than by the law he ought to have; as to admit a person to bail, who by the law ought not to be bailed, but to be kept in close custody. 2 *Haw.* 130.

So if a gaoler, or other officer, shall license his prisoner to go abroad for a time, and to come again; this is an escape, because the prisoner is found out of the bounds of his prison, tho' the prisoner return again, according as he shall be prescribed. *Dalt. c.* 159.

If the gaoler so closely pursue the prisoner who flies from him, that he retakes him, without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount to an escape; but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape. And if he kill him in the pursuit, he is in like manner guilty of an escape, tho' he never lost sight of him, and could not otherwise take him, not only because the king loses the benefit he might have had by the forfeiture on his attainder, but also because the public justice is not so well satisfied by the killing him in such an extrajudicial manner. 2 *Haw.* 130.

IV. What is a voluntary, and what a negligent escape.

Wherever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him from his trial or execution, this is a voluntary escape. 2 *Haw.* 130.

A negligent escape is, when the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again, before he hath lost the sight of him. *Dalt. c.* 159.

If the constable or other officer, shall voluntarily suffer a thief, being in his custody to go into the water to drown himself, this escape is felony in the constable, and the drowning is felony in the thief: Otherwise if the thief shall suddenly without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. *Dalt. c.* 159.

V. Concerning the retaking of a person escaped.

If any officer hath arrested a man by virtue of a warrant, and then taketh his promise that he will come again, and so letteth him go; the officer cannot after arrest or take him again by force of his former warrant, for that this was by consent of the officer: But if he return, and put himself again under the custody of the officer, it seems that it may be probably argued, that the officer may lawfully detain

detain him, and bring him before the justice in pursuance of the warrant. *Dalt. c.* 169. 1 *Haw.* 81.

But if the party arrested had escaped of his own wrong, without the consent of the officer, now upon fresh suit, the officer may take him again and again, so often as he escapeth, altho' he were out of view, or that he shall fly into another town or county, and bring him before the justice upon whose warrant he was first arrested. *Dalt. c.* 169.

And it is said generally in some books, that an officer who hath negligently suffered a prisoner to escape, may retake him wherever he finds him, without mentioning any fresh pursuit; and indeed since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. 2 *Haw.* 131, 132.

And wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters him in a house, the doors may be broke open to take him, on refusal of admittance. 2 *Haw.* 87.

It is perhaps the better opinion, that wherever a prisoner, by the negligence of his keeper, gets so far out of his power, that the keeper loses sight of him, the keeper is punishable for the escape, notwithstanding he re-took him immediately after: And it is clear that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, though he could not possibly retake him; but must in such case be content to submit to such punishment as his negligence shall appear to deserve. 2 *Haw.* 132.

VI. Indictment for an escape.

It seems clear, that every indictment for an escape, whether negligent or voluntary, must expressly shew, that the prisoner was actually in the defendant's custody, for such a crime; and that he went at large: And if for a voluntary escape, that the defendant feloniously and voluntarily suffered him to go at large; and must set forth, not the felony in general, but the particular kind of felony: But it seems questionable, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; for that it is not material in this case, whether the person who escaped were guilty or not. 2 *Haw.* 133, 229.

VII. Trial and conviction for an escape.

If the prisoner be of record in a court, and the gaoler being called, cannot give an account where he is, this is a conviction of an escape; but seems not a conviction of a voluntary escape, unless the gaoler confesseth it: And the gaoler may be fined in such a case, but not convicted of felony, without indictment or presentment. 1 *H. H.* 599, 603.

And it seems to be clear, that a keeper who voluntarily suffers another to escape, who was in his custody for felony, cannot be arraigned

arraigned for such escape as for felony, until the principal be attainted, for that the felony of the prisoner shall not be tried between the king and the keeper, because the prisoner is a stranger thereunto; yet he may be indicted and tried for it as a misprision before the attainder of the principal offender. 2 *Haw.* 135. 2 *Inst.* 591, 592.

VIII. Punishment of an escape.

If a felon escapes before arrest, it is not punishable in him as felony; but for the flight he forfeits his goods when presented. *Hale's Pl.* 111.

If a private person arrest a felon, and he escape by force from him, the township shall be amerced, but it seems it excuseth the party, because he cannot raise power to assist him: but if a constable, or other officer, hath the custody of a prisoner, bringing him to the gaol, it seems that a simple escape by the rescue of the prisoner himself, doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 *H. H.* 601.

Wherever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence. 2 *Haw.* 136, 139. 1 *H. H.* 600, 604.

And it seems to be the better opinion, that a sheriff is as much liable to answer for a negligent escape suffered by his bailiff, as if he had actually suffered it himself, and that the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 *Haw.* 135.

Note: Mr. *Hawkins*, although he is one of the most accurate of all writers, yet hath inserted in this place certain penalties for escapes, which were expired above 200 years before. 2 *Haw.* 137.

If a prisoner for felony break the gaol, this seems to be a negligent escape in the gaoler, because there wanted either that due strength in the gaol, that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it; and therefore it is lawful for the gaoler to hamper them with irons, to prevent their escape; for if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to retake them that escape. 1 *H. H.* 601.

It seems to be generally agreed, that a voluntary escape suffered by an officer, amounts to the same kind of crime, and is punishable in the same degree, as the offence of which the party was guilty, and for which he was in custody, whether it be treason, felony, or trespass. 2 *Haw.* 134.

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. *Dalt. c.* 159.

Also,

Alſo, a voluntary eſcape ſuffered by one who wrongfully takes upon him the keeping of a gaol, ſeems to be puniſhable in the ſame manner, as if he was never ſo rightfully intitled to ſuch cuſtody; for that the crime is in both caſes of the ſame ill conſequence to the public; and there ſeems to be no reaſon that a wrongful officer ſhould have greater favour than a rightful, and that for no other reaſon but becauſe he is a wrongful one. 2 *Haw.* 124.

But it ſeemeth to be clear, that no one is puniſhable as for felony, for the voluntary eſcape of a felon, but the perſon only who is actually guilty of it; and therefore that the principal gaoler is only fineable for a voluntary eſcape ſuffered by his deputy; for that no one ſhall ſuffer capitally for the crime of another. 2 *Haw.* 135.

And therefore, although in all civil cauſes, the ſheriff is to be reſponſible, or the gaoler, at election, yet if the gaoler do voluntarily ſuffer a felon in his cuſtody to eſcape, this, inaſmuch as it reacheth to life, is felony only in the gaoler, that was immediately truſted with the cuſtody, and not in the ſheriff. 1 *H. H.* 597.

For the eſcape muſt be voluntarily permitted in him that permitted it, which could not be in the high ſheriff, tho' it were ſuch in the gaoler, for he was not privy to it, and therefore could not do it feloniouſly; but it was a negligent eſcape in him, in truſting ſuch a perſon with the cuſtody of his priſoners, that would be falſe to his truſt, and therefore the ſheriff ſhall pay, but not corporally ſuffer for the miſcarriage of his gaoler. 1 *H. H.* 597, 598.

But altho' the felony for which a man is committed, be not within clergy; yet the perſon who voluntarily ſuffers him to eſcape, ſhall have the benefit of clergy. 1 *H. H.* 599.

IX. Aiding in attempting to eſcape.

By the 16 *G.* 2. *c.* 31. If any perſon ſhall aſſiſt any priſoner to *attempt* his eſcape from any gaol, though no eſcape be actually made, if ſuch priſoner was then attainted or convicted of treaſon or felony (except petty larceny) or lawfully committed to, or detained in any gaol, for treaſon or felony (except petty larceny) expreſſed in the warrant of commitment; he ſhall be guilty of felony, and be tranſported for ſeven years: And if ſuch priſoner was then convicted of, or detained in gaol for petty larceny, or any other crime not being treaſon or felony, expreſſed in the warrant or commitment, or was then in goal for debt amounting to 100*l.* he ſhall be guilty of a miſdemeanor, and be liable to fine and impriſonment.

And if any perſon ſhall convey, or cauſe to be conveyed any *diſguiſe, inſtrument, or arms* to any priſoner in goal, or to any other perſon there for his uſe, without the conſent of the keeper; ſuch perſon, although *no eſcape or attempt* be actually made, ſhall be deemed to have delivered ſuch diſguiſe, inſtrument or arms, with an intent to aſſiſt ſuch priſoner to eſcape or attempt to eſcape; and if ſuch priſoner then was attainted or convicted of treaſon or felony (except petty

larceny) or lawfully detained in gaol, for treason or felony (except petty larceny) expressed in the warrant of commitment—he shall be guilty of felony, and be transported for seven years: But if the prisoner was then convicted or detained for petty larceny, or any other crime not being treason or felony, expressed in the warrant of commitment, or for debt amounting to 100 *l.* he shall be guilty of a misdemeanor, and liable to fine and imprisonment.

And if any person shall assist any prisoner to attempt to escape *from any constable*, or other person, who shall have the lawful charge of him, in order to carry him to goal, by virtue of a warrant of commitment for treason or felony (except petty larceny); or if any person shall assist any felon to attempt his escape from on board any *boat or vessel carrying felons for transportation*, or from the *contractor* for the transportation of such felons, or his agents, he shall be guilty of felony, and be transported for seven years.

All prosecutions on this act to be commenced within a year after the offence committed.

Indictment against a constable for an escape.

New-York, Ulster County. THE jurors for the people of the state of New-York, upon their oath present, That on the ——day of——the year of——at——in the county aforesaid, one A. I. of——came before J. P. esquire, then and yet one of the justices, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; and the said A. I. did, then and there, on his oath before the same justice, charge, accuse, and give information against one A. O. of——aforesaid, yeoman, for a certain misdemeanor, in taking fish out of the pond of——at——in the said county [*or, as the offence shall be:*] Whereupon he the said J. P. the justice aforesaid, did then and there, to wit, at——aforesaid, in the county aforesaid, make a certain warrant, under his hand and seal, in due form of law directed to the constable of——aforesaid, in the county aforesaid, thereby requiring him the said constable to take the body of the said A. O. and bring him before the said J. P. the justice aforesaid, to answer to such matters and things as should be alledged against him, touching the said misdemeanor: Which said warrant, afterwards, to wit, on the same day and year aforementioned, at—— aforesaid in the county aforesaid, was delivered to one A. C. then being constable of——aforesaid, in due form of law, to be executed, by virtue of which said warrant the said A. C afterwards, to wit, on the said——day of—— —— in the year aforesaid, at———aforesaid, in the said county did take and arrest the body of the said A. O. and him the said A. O. in his custody for the cause aforesaid, had: Nevertheless, the said A. C. of———aforesaid, in the county aforesaid, yeoman, afterward, to wit, on the said———day of———in the year

year aforesaid, the duty of his office, in that part not regarding, at ——— aforesaid, in the county aforesaid, unlawfully and negligently did permit the said A. O. to escape, and go at large, out of the custody of him the said A. C. to the great hindrance of justice, in contempt of the people of the state of New-York, and of their laws, and against the peace of the people of the said state, and their dignity.

ESTRAY.

And herein also of goods waived.

ESTRAY *is, where any horses, sheep, hogs beasts or swans, do come into a lordship, and are not owned by any man.* Kitch. 23.

Where any horses, sheep, hogs, beasts or swans] *Bees*, and other creatures of a wild nature, are not within this description, and therefore not to be reckoned amongst stray goods; nevertheless it seemeth that a swarm of bees, of which the owner hath lost sight, and consequently can make out no property, may be seized for the use of the king, or of the lord of the manor; for it is a maxim of the common law, that such goods whereof no one can claim property do belong to the king: and that which the king hath he may grant to another, and consequently another may prescribe to have the same, within such precinct or lordship. And therefore it is said, that if any take honey or swarms of bees within the demesnes of the lord, it is inquireable in the court baron. *Kitch.* 114.

[*Note*, There are particular laws relating to ESTRAYS in almost all the states, passed by the respective legislatures thereof, which are always esteemed to be the guides to the several inhabitants thereof, in respect to those matters.]

Waif is, where a felon in pursuit waiveth the goods; or where the felon, for fear of being apprehended, thinking that a pursuit was made, having them with him in his possession, fleeth, and waiveth, casteth away or goeth from the goods: in these cases, they shall be said to be waived in law. But if he hath not the goods with him, when he fleeth being pursued, or for fear to be apprehended, they are not waived nor forfeited, but the owner may take them when he will, without any fresh suit. 5 *Co.* 109. *Sher.* 78.

But if the thief in his flight waive them, there the goods are forfeited to the king or lord of the liberty by the common law, if the felon upon fresh suit was not attainted at the suit of the owner of the goods: And the reason why waif is given to the king, and that the party shall lose his property in such case, is for default in the owner, that he pursued not freshly to apprehend the felon; for it concerneth the public that crimes do not remain unpunished, and impunity always encourageth to that which is worse. And there-

fore

fore the law hath impoſed this penalty upon the owner, that if the thief by his induſtry and freſh ſuit be not attainted at his ſuit, in an appeal of the ſame felony, he ſhall loſe for his default all his goods which the thief at the time of his flight waived. But if the thief had them not with him when he fled, having peradventure hid them, there no default can be in the party; and therefore they ſhall not be forfeited, for if he maketh freſh ſuit after notice of the felony it ſufficeth. 5 *Co.* 109.

Heretofore waifs and ſtrays were the finder's, by the law of nature; and afterwards the king's by the law of nations. *Dalt. Sher.* 79.

In the caſe of goods waived; the owner may ſeize them twenty years after, if the lord of the frenchiſe, nor the king ſeize before: but if they are ſeized, then they become forfeited to the king or lord of the liberty. *Kitch* 82.

And this forfeiture is not like a ſtray, where tho' the lord may ſeize, yet the party who is the owner, may retake them within the year and day; but here the true owner cannot ſeize his own goods, though upon freſh ſuit within the year and day. 1 *H. H.* 541.

But this is not an abſolute loſs of the owner's goods, but rather an expedient ſettled by law, to drive the owner to convict the felon by proſecuting his appeal; and therefore if he make freſh ſuit, and proſecute his appeal, and the felon be thereupon convict or attaint, and the freſh ſuit be enquired and found by verdict or inqueſt of office, he ſhall have reſtitution of the goods ſo waived. 1 *H. H.* 541.

EVIDENCE.

I. Of evidence in general.
II. Of written evidence.
III. Of the evidence of witneſſes.
IV. Of proceſs to cauſe witneſſes to appear.
V. Of the manner of giving evidence.

I. Of evidence in general.

EVIDENCE in legal underſtanding, doth not only contain matters of record, as letters patents, fines, recoveries, inrollments and the like, and writings under ſeal, as charters and deeds, and other writings without ſeal, as court rolls, accounts and the like; but in a larger ſenſe it containeth alſo the teſtimony of witneſſes, and other proofs to be produced and given, for the finding of any iſſue joined between the parties. And it is called evidence, becauſe

cauſe thereby the point in iſſue is to be made evident to the jury. 1 *Inſt.* 283.

It is a general rule in all caſes, civil and criminal, that the beſt evidence that may be had, or that the nature of the thing will bear, is to be given; and it is upon this reaſon, that a copy of the record is admitted, becauſe one cannot have the record itſelf; but a copy of a copy will not do. *Law of Evid.* 286.

Many times juries, together with other matter, are much induced by preſumptions; whereof there are three ſorts, violent, probable, and light or temerary. Violent preſumption many times amounts to full proof; as if one be run through the body with a ſword in a houſe, whereof he inſtantly dieth, and a man is ſeen to come out of that houſe with a bloody ſword, and no other man was at that time in the houſe. Probable preſumption moveth little. But light or temerary preſumption moveth not at all. 1 *Inſt.* 6.

If all the witneſſes to a deed be dead (as no man can keep his witneſſes alive, and time weareth out all men) then violent preſumption, which ſtands for a proof, is continnal and quiet poſſeſſion; although the deed may receive credit from a comparing of ſeals, writing, and the like. 1 *Inſt.* 6.

The common law did not require any certain number of witneſſes, for the trial of any crime whatſoever. 2 *Haw.* 428.

And before a juſtice of the peace in divers caſes, one witneſs is ſufficient to convict an offender; the ſame being directed by ſpecial ſtatutes.

But in caſe of high treaſon, whereby corruption of blood ſhall be made, no perſon ſhall be attainted, but upon the oaths of two witneſſes, either both to the ſame overt act, or one of them to one, and the other of them to another overt act of the ſame treaſon. 7 *W.* c. 3. *f.* 2.

By 29 *C.* 2. *c.* 3. *f.* 5. Deviſes of lands ſhall be atteſted by three witneſſes at the leaſt.

II. Of written evidence.

A *private* act of parliament, that concerned *Rocheſter* bridge, tho' printed by *Raſtal*, was not allowed in evidence, not being examined by the record. Otherwiſe of general ſtatutes; there the printed book is good evidence. *Tr. per pais* 348.

And there are very many of the old ſtatutes, which are admitted and obtain as ſuch, tho' there be no record at this day extant thereof, nor yet any other written evidence of the ſame, but what is in a manner only traditional as namely, ancient copies, tranſcripts, books, pleadings, and the common received opinion and reputation, and the approbation of the judges learned in the laws. For the judges and courts of juſtice are *ex officio* bound to take notice of public acts of parliament, and whether they are truly pleaded or not, and therefore they are the triers of them. But it is otherwiſe

of

of private acts of parliaments, for they may be put in iſſue, and tried by the record upon *non tiel record* pleaded. *Hale's Hiſt. Com. L.* 15, 16.

Records prove themſelves, and cannot be proved by witneſſes. But copies of them muſt be proved by witneſſes, and then they are good evidence. No razure or interlining ſhall be intended in them. But the ſureſt way is, to exemplify a record under the great ſeal, or at leaſt under the ſeal of the court. 10 *Co.* 92.

And nothing ſhall be admitted as evidence of what was done at another trial, till the record of that trial be produced. *Read.* Evid.

A record of the ſeſſions was allowed in evidence, to prove that a perſon had not taken the oaths. 1 *Salk.* 284.

The entry of the names and titles of perſons in a church book either for marriages or births is evidence, but not concluſive evidence of the marriage or birth of any perſons, unleſs the identity of the perſons (by ſuch entries intended) is fully proved, and alſo ſtrengthened with circumſtances, as cohabitation, the allowance of the parties themſelves, and the like. *Vin.* Evid. A. b. 15. 11.

By the 7. *J. c.* 12. No tradeſman nor handicraftſman ſhall be allowed to give his ſhop book in evidence, on an action for money due for wares delivered, or for work done, above one year before the action brought. But this not to extend to any trading between merchant and merchant, merchant and tradeſman, or between tradeſman and tradeſman, for any thing directly falling within the compaſs of their mutual trades and merchandize.

In the caſe of *Pitman* and *Maddox*, 11 *W.* A ſhop book was allowed for evidence, it being proved that the ſervant that writ the book was dead, and this was his hand, and he accuſtomed to make the entries, and no proof was required of the delivery of the goods; and *Holt* C. J. ſaid, it was as good evidence as the proof of a witneſs's hand to an obligation: and he held, that tho' the ſtatute of the 7 *J.* ſays a ſhop book ſhall not be evidence after the year, yet it is not of itſelf evidence within the year. 2 *Salk.* 690.

A man's book of accounts is no evidence for the owner of the book, but for the adverſe party: for his book cannot be of better credit than his oath, which would not ſerve in his own caſe. *Tr. per pais* 348.

Upon a trial at bar, a deed was offered in evidence, executed 36 years ago, without proving the hands: which was oppoſed by the other ſide; but admitted by the court, who ſaid, there was no fixed rule about it, but that it had often been allowed, where a deed was but 25 or 30 years old. *Vin. Evid. Q. a.* 9. *E.* 11 *G.* 2. *Porter & Gordon.*

In caſes where writings have been loſt by burning of houſes, by rebellion, or when robbers have deſtroyed them, or the like; the law, in ſuch caſes of neceſſity, allows them to be proved by witneſſes. *Jenk.* 19. *Wood b.* 4. *c.* 4.

If a man deſtroys a thing that is deſigned to be evidence againſt himſelf,

himself, a small matter will supply it; and therefore the defendant having torn his own note signed by him, a copy sworn was admitted to be good evidence to prove it. L. *Raym.* 731.

And it was holden for law, by Vernon judge of assize, that where the defendant himself hath the deed which concerns the land in question, and will not produce it; in such a case, the copy thereof will be permitted to be given in evidence; and so it was, and the witness swore it once in his hand, and that the copy produced was a true copy of the deed, and himself did examine it. *Clayt.* 15.

And the counterpart of an ancient deed which is lost, may be good evidence with other circumstances: but not of itself, without other circumstances. 6 *Mod.* 225.

An indenture to guide the uses of the common recovery, was offered in evidence, but the seals were torn off; yet it being proved to have been done by a little boy, it was allowed to be read. *Palm.* 402.

If upon collateral issue it is to be proved, that such a one was justice of the peace, baronet, or the like; common reputation is sufficient proof, without shewing the commission, or letters patent of the creation. *Tr. per pais* 347.

The copy of the probate of a will is good evidence, where the will itself is of chattels; for there the probate is an original taken by authority, and of a public nature: otherwise, where the will is of things in the realty; because in such case the ecclesiastical courts have authority to take probates; therefore such probate is but a copy, and a copy of it is no more than the copy of a copy. 3 *Salk.* 154.

For the copy of an original is evidence, wherever the original is evidence, if proved a true copy; but the copy of the probate of a will of lands is no evidence, because the probate in such case is not an original taken by authority, and therefore is only a copy of a copy. *Comb.* 337.

So the copy of a court roll of a manor, is good evidence; as also the copy of a church register, the copies of town books, and the like; for where the original itself is good evidence, the immediate copy thereof is also good evidence. *Skin.* 584. L. *Raym.* 154.

And generally, wherever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence, as a copy of a bargain and sale, of a deed enrolled, and the like; but where an original is of a private nature, a copy is not evidence, unless the original is lost or destroyed. 3 *Salk.* 154. *H.* 8. *W. Lynch* and *Clarke.*

On a warrant to a constable to distrain goods by virtue of an act of Parliament, the constable makes distress, and returns the overplus to the offender, but keeps the warrant. Resolved, that a copy of the warrant in this case will be good evidence. 6 *Mod.* 83. *M.* 2 *An. Morley* and *Staker.*

M. 11 *G. Serle* and Lord *Barrington.* The indorsement on a bond by the obligee, of payment of interest, was allowed to be given in

in evidence by his adminiſtrator, to take off the preſumption from the length of time. L. *Raym.* 1371.

It ſeems ſettled, that the examination of an informer taken upon oath, and ſubſcribed by him, either before a coroner upon an inquiſition of death, or before juſtices of the peace, in purſuance of the ſtatutes of *Ph. & M.* upon a bailment or commitment for any felony, may be given in evidence at the trial, if it be made out by oath to the ſatisfaction of the court, that ſuch informer was dead, or unable to travel, or kept away by the means or procurement of the priſoner, and that the examination offered in evidence is the very ſame that was ſworn before the coroner or juſtice, without any alteration whatſoever. 2 *Haw.* 429.

But it hath been adjudged, that it is not ſufficient to authoriſe the reading of ſuch examination, to make oath that the proſecutors have uſed all their endeavours to find the witneſs, but cannot find him. 2 *Haw.* 430.

But it is ſaid to have been adjudged, by the court of king's bench, in the 7 *W.* (1 *Salk.* 281.) upon advice with the juſtices of the common pleas, on an indictment for a *libel*, that depoſitions taken before a juſtice of the peace, relating to the fact, could not be given in evidence, though the deponent were dead: and that the reaſon why ſuch depoſitions may be given in evidence in *felony*, depends upon the ſtatutes of *P. & M.* and that this cannot be extended farther than the particular caſe of felony. But in the report of this caſe, 5 *Mod.* 165. it is ſaid, that the reaſon why ſuch depoſitions could not be read, was becauſe the defendant was not preſent when they were taken, and therefore had not the benefit of a croſs examination. 2 *Haw.* 430.

Depoſitions *in perpetuam rei memoriam*, are not evidence, ſo long as the witneſſes live. 1 *Salk.* 286.

A copy of an inſcription on a grave ſtone, has been allowed to be given in evidence.

The examination of an almanack, that ſuch a day of the month was *Sunday*, was ruled to be ſufficient; and that a trial of this by a jury is not neceſſary, altho' it is a matter of fact. *Cro. El.* 227.

And the reaſon why the kalender in an almanack is allowed as evidence ſeemeth to be, becauſe the ſaid kalender is part of the book of common prayer, and conſequently eſtabliſhed by act of Parliament.

And an almanack wherein the father had writ the day of the nativity of his ſon, was allowed as evidence to prove the nonage of the ſon. *Raym.* 84.

Generally, it is ſaid, that ſimilitude of hands is no evidence; but ſaying that he was well acquainted with his writing, and knew it to be the party's, is evidence. *Vin. Evid.* (T. b. 48.) 14.

Tho' one conſent to have a letter read, yet the jury, on pain of attaint, are not bound to find it. 1 *Keb.* 249.

III. Of

III. Of the evidence of witneſſes.

It ſeems that the confeſſion of the defendant, whether taken on an examination before juſtices of the peace, in purſuance of the 1 & 2 *P. & M. c.* 13. or 2 & 3 *P. & M. c.* 10. upon a bailment or commitment for felony, or taken by the common law upon an examination for other crimes not within thoſe ſtatutes, or in diſcourſe with private perſons, hath always been allowed to be given in evidence againſt the party confeſſing, but not againſt others. 2 *Haw.* 429.

But wherever a man's confeſſion is made uſe of againſt him, it muſt be all taken together, and not by parcels. 1 *Haw.* 429.

It may be obſerved, that there may be many circumſtances that diſable a juror, that are not ſufficient exceptions againſt a witneſs: Thus the exception of kindred, is a good cauſe of challenge againſt a juror, but not againſt a witneſs; therefore the father may be a competent witneſs for or againſt his ſon, or the ſon for or againſt his father. Theſe and the like exceptions may be to the credit or credibility of the witneſs, but are not exceptions againſt his competency. 2 *H. H.* 276.

For, that I may obſerve it once for all, the exceptions to a witneſs are of two kinds: 1. Exceptions to the credit of the witneſs, which do not at all diſable him from being ſworn, but yet may blemiſh the credibility of his teſtimony; and in ſuch caſe the witneſs is to be allowed, but the credit of his teſtimony is left to the jury. 2. Exceptions to the competency of the witneſs which do exclude him from giving his teſtimony, and of theſe exceptions the court is the judge. 2 *H. H.* 276, 277.

It ſeems agreed, that an attainder, judgment, or conviction of treaſon, felony, piracy, præmunire, perjury, or forgery on the 5 *El.* and alſo a judgment in attaint for giving a falſe verdict, or in conſpiracy at the ſuit of the king; and alſo judgment for any crime whatſoever to ſtand in the pillory, or to whipped or branded, are cauſes of exception againſt a witneſs, while they continue in force. 2 *Haw.* 432.

But it is agreed, that no ſuch conviction or judgment can be made uſe of to this purpoſe, unleſs the record be actually produced in court. 2 *Haw.* 433.

Alſo, it is a general rule, that a witneſs ſhall not be aſked any queſtion, the anſwering to which might oblige him to accuſe himſelf of a crime; and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, whereof he was never convicted. 2 *Haw.* 433.

And a man ſhall not be permitted to ſwear, that he was ſuborned and perjured. *St. Tr. V.* 3. 427.

And lord *Coke* ſays, a witneſs alledging his own infamy or turpitude, is not be heard. 4 *Inſt.* 279.

Thus a wife was diſallowed to be a witneſs, to prove her huſband had no acceſs to her in a caſe of baſtardy. *Seſſ. Caſes. V.* 2. 175. *K.* and *Reading, M.* 8. *G.* 2.

It seems clear at this day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror. 2 *Haw.* 433.

A person convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witness. 2 *Haw.* 433.

And it seems agreed, that the king's pardon of treason or felony, after a conviction or attainder restores the party to his credit. 2 *Haw.* 433.

It seems agreed to be a good exception, that a witness is an infidel: that is, as it seemeth, that he believes neither the old nor new testament to be the word of God, on one of which our laws require the oath should be administered. 2 *Haw.* 434.

Want of discretion is a good exception against a witness; on which account alone it seems, that an infant may be excepted against. 2 *Haw.* 434.

But if an infant be of the age of 14 years, he is as to this purpose of the age of discretion, to be sworn as a witness; but if under that age, yet if it appear that he hath a competent discretion, he may be sworn. 2 *H. H.* 278.

And in many cases an infant of tender years may be examined without oath, where the exigence of the case requires it; which possibly, being fortified with concurrent evidences, may be of some weight; especially in cases of rape, buggery, and such crimes as are practised upon children. 2 *H. H.* 279 284. *Str.* 700.

It seems an uncontested rule in all cases, that it is a good exception against a witness, that he is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only. 2 *Haw.* 433.

Thus in an information upon a statute of usury, the party to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be witness in his own cause and should avoid his own bonds and assurances, and discharge himself of the money borrowed. 1 *Inst.* 6.

Thus also an attorney ought not to be examined against his client, because he is obliged to keep his secrets; but of his own knowledge, before retainer, he may be examined as a witness, if served with a subpœna. *Wood. b.* 4. *c.* 4.

But upon an indictment for battery or the like, the party grieved may be a witness against the defendant, because the prosecution is at the suit of the king. *Wood. b.* 4. *c.* 5.

And in many criminal cases, from the necessity of the thing, interested persons are allowed as witnesses. As where the owner prosecutes an indictment of felony for stolen goods, he is concerned in interest; for he will be intitled to restitution; and yet his evidence is admitted. So in removing an indictment by certiorari from the sessions to the king's bench; though the prosecutor in that case, if the defendant be convicted, is intitled to his costs, yet he

he is allowed as a witneſs. So where a man, in caſe of conviction of the offender, will be intitled to a 40 l. reward; yet his evidence ſhall be received. And by *Parker* chief juſtice: As to the caſes where a 40 l. reward is given, they admit of this anſwer: that the intention of thoſe acts would be quite defeated, if ſo be the reward ſhould take off the evidence. The ſame anſwer may ſerve to the caſes put upon an indictment of felony for ſtolen goods; and where the indictment is removed by certiorari; for none in the firſt caſe but the owner can prove the property of the goods; and in the ſecond, if the giving of coſts ſhould take off the evidence of the proſecutor, the act of parliament deſigned to diſcountenance the removing of ſuits by certiorari, would give the greateſt encouragement to them that is poſſible. 10 *Mod.* 193. *M.* 12 *An.* 2. and *Muſcott.*

Alſo it ſeems agreed, that it is no good exception againſt a witneſs, that he has a maintenance from the king; for every one may maintain his own witneſs. 2 *Haw.* 434.

A truſtee may be a witneſs, if he hath releaſed his truſt; but not if he hath conveyed it over. *Sid.* 315. *M.* 18 *C.* 2. *Stephens* and *Cerrard.*

An heir at law may be a witneſs concerning the title to the land, but the remainder man cannot, for he hath a preſent intereſt, but the heirſhip is a mere contingency. 1 *Salk.* 283. *M.* 10 *W. Smith* and *Blackham.*

A witneſs's laying a wager in the cauſe, is no hindrance to his being a witneſs; for the other has an intereſt in his evidence, which he cannot deprive him of. *Farſt.* 31 *Str.* 652.

If a perſon *apprehends* himſelf to be intereſted, though in ſtrictneſs of law he is not, yet he ought not to be ſworn: as where the witneſs for the plaintiff apprehended that if the plaintiff ſhould recover, he would remit a claim of ſome money which he (the plaintiff) had upon this witneſs; but if he ſhould not recover, he would not remit it, although in ſtrictneſs of law, his recovering or not recovering in that caſe would not alter the claim: or as in caſe where the witneſs owned himſelf to be under an honorary, though not under a binding engagement, to pay the coſts. *Str.* 129.

It ſeems agreed, that the huſband and wife being as one and the ſame perſon in affection and intereſt, can no more give evidence for one another, in any caſe whatſoever, than for themſelves; and that regularly the one ſhall not be admitted to give evidence againſt the other, nor the examination of the one be made uſe of againſt the other, by reaſon of the implacable diſſenſion which might be cauſed by it, and the great danger of perjury from taking the oaths of perſons under ſo great a bias, and the extreme hardſhip of the caſe.—Yet ſome exceptions have been allowed in caſes of evident neceſſity, as in lord *Audley's* caſe, who held his wife, while his ſervant by his command raviſhed her; or where a man is indicted for a forcible marriage on the ſtatute of the 3 *H.* 7. or where either a huſband or wife

wife have cauſe to demand ſureties of the peace againſt the other. 2 *Haw.* 431, 432.

It ſeems agreed, that it is no exception againſt a perſon's giving either for or againſt a priſoner, that he is one of the judges or jurors who are to try him. 2 *Haw.* 432.

But where a juror is called upon to give his evidence, he ought to give it upon oath openly in court, and not be examined privately by his companions. *Bac. Abr.* Evid. A. 2.

It hath been long ſettled, that it is no exception againſt a witneſs, that he hath confeſſed himſelf guilty of the ſame crime, if he hath not been indicted for it: for if no accomplices were to be admitted as witneſſes, it would be generally impoſſible to find evidence to convict the greateſt offenders 2 *Haw.* 432.

Alſo it hath been often ruled, that accomplices who are indicted, are good witneſſes for the king, until they be convicted. 2 *Haw.* 432.

Alſo it hath been often adjudged, that ſuch of the defendants in an information againſt whom no evidence is given, may be witneſſes for the others. 2 *Haw.* 432.

It hath been alſo adjudged, that where three perſons are ſued in three ſeveral actions on the ſtatute for a ſuppoſed perjury, in their evidence concerning the ſame thing, they may be good witneſſes in ſuch actions for one another. 2 *Haw.* 432.

It ſeems agreed, that it is no good exception againſt a witneſs, that he is an alien, or villain, or bondman. 2 *Haw.* 434.

There were two witneſſes to a deed, and one of them was blind.—It was ruled by *Holt* chief juſtice, that ſuch deed might be proved by the other witneſs, and read; or might be proved without proving that this blind witneſs is dead; or without having him at the trial proving only his hand. L. *Raym.* 734. Wood and Drury. Warwick aſſiz. 1699.

If a witneſs is beyond the ſea, it is uſual to prove his hand, and that he is beyond the ſea. *Vin.* Evid. [T. b. 48.] 13.

There were two witneſſes to a bond, one in Africa, and the other in bedlam, mad: On an order to prove an exhibit *viva voce* in chancery, a witneſs proved theſe facts, and their hands to the bond as if dead. *T.* 5 & 6 *G.* 2. Vin. *Evid.* [T. b. 48.] 12.

If a witneſs to a deed is dead, it is ſufficient to prove the witneſs's hand, without proving the hand of the party. By *Pratt*, chief juſtice. T. Vac. 1719. *Vin.* Evid. [T. b. 48.] 10.

The ſayings of a dead man are not to be given in evidence to prove a particular fact; they are only to be admitted in proof of general uſages and cuſtoms; but as for a particular fact, lying in the knowledge of a particular perſon, by his death the evidence is loſt. *St. Tr. V.* 5. 456.

And it hath been agreed, that the evidence given by a witneſs at one trial, cannot in the ordinary courſe of juſtice, be made uſe of againſt

gainſt a defendant, on the death of ſuch witneſs at another trial. 2 *Haw.* 430.

In the caſe of murder, what the deceaſed declared after the wound given, may be given in evidence. *Vin.* Evid. [A. b. 38.] 11.

But where ſuch declaration is reduced into writing, the writing itſelf muſt be produced, and not evidence thereof given *viva voce*. *id.* 12.

It ſeems agreed, that what a ſtranger has been heard to ſay, is in ſtrictneſs no manner of evidence, either for or againſt a priſoner, not only becauſe it is not upon oath, but alſo becauſe the other ſide hath no opportunity of a croſs examination: and therefore it ſeems a ſettled rule, that it ſhall never be made uſe of, but only by way of inducement or illuſtration of what is properly evidence: yet it ſeems, that what the priſoner has been heard to ſay at another time, may be given in evidence, either to invalidate or confirm the teſtimony which he gives in court. 2 *Haw.* 431.

IV. Of proceſs to cauſe witneſſes to appear.

The compulſory means to bring in witneſſes, are of two kinds — 1. By proceſs of *fulpœna* iſſued in the king's name, by the juſtices, or others, where the trial is to be. 2. Which is the more ordinary and more effectual means (in criminal caſes) the juſtices that take the examination of the perſon accuſed, and the information of the witneſſes, may at that time, or at any time after, and before the trial, bind over the witneſſes to appear at the ſeſſions, and in caſe of their refuſal, either to come, or to be bound over, may commit them for their contempt in ſuch refuſal. 2 *H. H.* 282.

But that which is a great defect in this part of judicial adminiſtration, is, that there is no power to allow witneſſes their charges in criminal caſes; whereby many times poor perſons grow weary of attendance, or bear their own charges therein, to their great hindrance and loſs. 2 *H. H.* 282.

Where a witneſs is a priſoner in execution for debt, he muſt be brought up by *habeas corpus ad teſtificandum*, to give his evidence. *St. Tr. V.* 2. 580. *V.* 4. 37.

One was ſubpœnaed *ad teſtificandum*, and prayed a privilege from being arreſted, which was granted: and by the court it will ſuperſede an arreſt upon mean proceſs, but not upon an execution: yet the ſheriff in that caſe may be committed for his contempt. *Nevil's* caſe, 15 *C.* 2. *Tr. per p.* 310.

By the 5 *El. c.* 9. *ſ.* 12. If any perſon, upon whom any proceſs out of any of the courts of record within this realm ſhall be ſerved, to teſtify or depoſe concerning any matter depending therein, and having tendered unto him, according to his countenance or calling, ſuch reaſonable ſum for his coſts and charges as (having regard to the diſtance of places) is neceſſary to be allowed in that behalf, do not appear according to the tenor of the proceſs, having

not

not a lawful and reaſonable impediment, he ſhall forfeit 10 l. and ſhall yield ſuch further recompence to the party grieved, as to the judge of the court, out of which the proceſs was awarded, ſhall ſeem meet, according to the loſs that the party which procured the proceſs ſhall ſuſtain; to be recovered by the party grieved, in any court of record.

In criminal caſes, if a witneſs hath been bound over, and do not appear; he ſhall forfeit his recognizance.

V. Of the manner of giving evidence.

He who affirms the matter in iſſue, whether plaintiff or defendant, ought to begin to give evidence. *Litt.* 35.

The evidence both for and againſt a priſoner ought to be upon oath.

And if a peer is produced as a witneſs, he ought to be ſworn. 3 *Keb.* 61.

Lord *Preſton* was committed by the court of quarter ſeſſions, for refuſing to be ſworn to give evidence to the grand jury, on an indictment of high treaſon; and on his being brought by *habeas corpus* into the king's bench, *Holt* Ch. J. ſaid it was a great contempt, and that had he been there, he would have fined him and committed him till he paid the fine: but being otherwiſe, he was bailed. 1 *Salk.* 278.

But a quaker's affirmation in all caſes not being criminal, ſhall be allowed as evidence, without an oath; but in criminal caſes his affirmation ſhall not be allowed. 7 & 8 *W. c.* 4.

The court may indulge a priſoner in examining the witneſſes apart, but cannot demand it of right. *St. Tr. V.* 4. 9.

In caſes of life, no evidence is to be given againſt a priſoner, but in his preſence. 2 *Haw.* 428.

Witneſſes cannot teſtify a negative, but only an affirmative.—*Wood. b.* 4. *c.* 4.

A priſoner may not call witneſſes to diſprove what his own witneſſes have ſworn. *St. Tr. V.* 2. 764, 792.

A witneſs ſhall not be permitted to read his evidence, but he may look upon his notes to refreſh his memory. *St. Tr. V* 2 792.

A witneſs ſhall not be croſs-examined, till he has gone through the evidence for the party on whoſe ſide he was procured. *St. Tr. V.* 2. 792.

It hath been admitted, that in order to ſhew a variance in the evidence, a depoſition taken by a witneſs before a juſtice of the peace may at the priſoner's deſire be read at the trial, in order to take off the credit of the witneſs, by ſhewing a variance between ſuch depoſitions, and the evidence given in court. And for the ſame reaſon in ſeems agreed, that where a witneſs at one trial varies from his own evidence at another, in relation to the ſame matter, ſuch variance may

may also be given in evidence to invalidate his testimony at a second trial 2 *Haw.* 430.

The counsel of that party which doth begin to maintain the issue, ought to conclude. *Tr. p. pais* 220.

Subpoena to give evidence.

THE people of the state of New York, by the grace of God free and independent. To A. B C. D and E F greeting: We command you, and every of you, that all business being laid aside, and all excuses whatsoever ceasing, you do in your proper persons appear before our justices assigned to keep the peace in our county of——and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the general quarter sessions of the peace, to be holden at——in and for the said county, on——the——day of——at the hour of ten in the forenoon of the same day, to testify the truth, and give evidence on behalf of the inhabitants of the parish of—— in the said county, against A O. in a case of bastardy. And this you are in no wise to omit, nor any of you to omit, on pain of one hundred pounds. Witness *Richard Smith*, esq. the——day of—— in the——year of our Independence. *C.*

Note; There may be four witnesses put in one subpœna.

A subpoena ticket.

To Mr. A. W.

BY virtue of a writ of subpœna to you directed, and herewith shewn to you, you are personally to be before the justices of the peace for the county of——at the general quarter sessions of the peace to be holden for the said county, at——in the said county, on——the——day of——next, to testify the truth, and give evidence on behalf of the inhabitants of the township of ——in the said county, against A. O. in a case of bastardy. And this you are not to omit, on pain of one hundred pounds. Dated this——day of——1787. By the court.

C.

Condition of a recognizance to appear and give evidence.

THE condition of this recognizance is such, that if the above-bound A. W. shall personally appear at the next general quarter sessions of the peace to be holden at——in and for the said county, and then and there give such evidence as he knoweth, upon a bill of indictment to be exhibited by A. I. of—— yeoman, to the grand jury, against A. O. late of——in the said county, yeoman, for feloniously taking and carrying away——the property of—— and in case the said bill be found a true bill, then if the said A. W. shall then and there give evidence to the jurors that shall pass on the trial of the said A. O. upon the said bill of indictment, and not

not depart thence without leave of the court, then this recognizance to be void, otherwise of force.

EXAMINATION.

IF a felony is committed, and one is brought before a justice upon suspicion thereof, and the justice finds upon examination that the prisoner is not guilty, yet the justice shall not discharge him, but he must either be bailed or committed: for it is not fit that a man once arrested and charged with felony, or suspicion thereof, should be delivered upon any man's discretion, without farther trial. *Dalt. c.* 164.

In order to which bail or commitment, the examination and information of the parties must first be taken, according to the following statutes:

'Two or more justices (1 Q.) or one of the said justices, before 'they bail a person apprehended for felony (if the offence is bailable) 'shall take his examination and the information of them that bring 'him, of the fact and circumstances thereof, and the same, or as 'much thereof as shall be material to prove the felony, shall put in 'writing; which examination they shall certify (together with the 'bailment) at the next general gaol delivery to be holden within the 'limits of their commission, 1 & 2 *P. & M. c.* 13. *f.* 4.

'And they shall have power to bind by recognizance all such as 'do declare any thing material to prove the offence, to appear at the 'next general gaol delivery, to be holden within the county where 'the trial shall be, then and there to give evidence against the party, 'and shall certify such recognizance in like manner. *f.* 5.

'And if they offend in any thing therein, they shall be fined by the 'justices of gaol delivery. *id.*

'In like manner, where the person is not bailed, but committed 'to ward, the justice or justices who commit him, shall before such 'commitment, take the like examination and information, and shall 'put the same in writing within two days after the said examination, 'and shall in like manner bind over the witnesses; and certify the 'whole as above.' 2 & 3 *P. & M. c.* 10.

Shall take his examination] And in order thereunto, if by some reasonable occasion, the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice, for farther examination. And this detainer is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. 1 *H. H.* 585.

But the time of the detainer must be no longer than is necessary for such purpose; for which it is said, that the space of three days is a reasonable time. 2 *Haw.* 119.

But

But the examination of the perſon accuſed, ought not to be upon oath. 1 *H. H* 585.

But if upon his examination he ſhall confeſs the matter, it ſhall not be amiſs that he ſubſcribe his name, or mark to it *Dalt. c.* 164.

Which examination being voluntary, and ſworn by the juſtice or his clerk to be truly taken, may be given in evidence againſt the party confeſſing, but not againſt others. 1 *H. H* 585. 2 *Haw.* 429.

Information of them that bring him.] Or of other witneſſes; whom the juſtice may bring before him by his warrant for that purpoſe 1 *H. H.* 586. *Dalt. c.* 164.

And this information muſt be upon oath. *Dalt. c.* 164. 1 *H. H.* 586.

And therefore if a quaker is a witneſs, his affirmation muſt not be taken in this caſe; for by the 7 & 8 *W. c.* 34. *ſ.* 36. it is provided, that no quaker ſhall be examined for or againſt any perſon in any criminal cauſe, unleſs it be upon oath.

And the ſaid information being upon the trial ſworn to be truly taken, by the juſtice or his clerk, may be given in evidence againſt the priſoner, if the witneſſes be dead and not able to travel 1 *H. H.* 586.

Or as much thereof as ſhall be material to prove the felony] Yet it ſeemeth alſo juſt and right, that the juſtices who take information againſt a felon, or perſon ſuſpected of felony, ſhould take and certify as well ſuch information, proof and evidence, as goeth to the acquittal or clearing of the priſoner, as ſuch as maketh againſt the priſoner: for ſuch information, evidence or proof ſo taken, is only to inform the king and his juſtices of the truth of the matter. *Dalt. c.* 165.

Shall certify at the next goal delivery] And yet for petty larcenies, and ſmall felonies, the offenders may be tried at the quarter ſeſſions, and the examinations and informations may be certified thither. *Dalt. c.* 164.

To be holden within the limits of their commiſſion] And yet examinations taken by juſtices of the peace in one county may be by them certified in another county, and there read, and given in evidence againſt the priſoner. *Dalt. c.* 164.

To bind by recognizance.] And upon refuſal, may commit the perſon refuſing. 1 *H. H.* 586.

And the parties grieved ought to be bound, not only to give evidence, but alſo to prefer a bill of indictment againſt the priſoner.—*Dalt. c.* 164.

Examination of a felon.

New-York, Suffolk County. THE examination of A. O. of——yeoman, taken before me William Hicks, eſq; one of the juſtices of the peace for the ſaid county [or, in the caſe of bail——

taken before us——two of the juſtices of the peace for the ſaid county, and one of us of the quorum] the——day of——in the——year of the independence of——

The ſaid A. O. being charged before me [or us] by A. I. of——yeoman, with the felonious ſtealing out of the houſe of the ſaid A. I. at——on the——day of——the following goods, to wit,——to the value of——he the ſaid A. O. upon his examination now taken before me [or us] confeſſeth that——[or, denieth that——] &c.

Information of a witneſs.

New York, THE information of A. I. of——yeoman,
Suffolk County, taken upon oath before me [as before]

Recognizance to give evidence.

New York, BE it remembered, that on the——day of
Suffolk County. ——in the——year of the independence of——A. I. of——in the ſaid county, yeoman, did come before me William Hicks, eſq; one of the juſtices aſſigned to keep the peace in the ſaid county, and did acknowledge himſelf to owe to the people of the ſtate of New-York, ten pounds of lawful money of ſaid ſtate, under condition, that if he ſhall perſonally appear before the juſtices of the peace of the ſtate of New-York, at the next general quarter ſeſſions of the peace (or, gaol delivery) to be holden in and for the ſaid county, then and there to give evidence in behalf of the people of the ſtate of New-York, againſt A. O. late of——who being attached and ſuſpected of felony, is now committed to the gaol in the ſaid county, then his recognizance to be void, otherwiſe of force.

EXECUTION.

WHERE a perſon attained hath been at large after his attainder, and afterwards is brought into court and demanded why execution ſhould not be awarded againſt him: if he deny that he is the ſame perſon, it ſhall be immediately tried by a jury returned for that purpoſe. 2 *Haw.* 463.

The court may command execution to be done, without any writ. 2 *Haw.* 465.

In fixed and ſtated judgments, the law makes no diſtinction between a peer and a commoner, or between a common and ordinary caſe, and one attended with extraordinary circumſtances; for which reaſon it was adjudged in Felton's caſe, who murdered the duke of Buckingham, that the court could not order his hand to be cut off, nor make it part of the ſentence that his body ſhould be hanged in chains, but the body after the execution being at the king's diſpoſal, might be hanged in chains, or otherwiſe ordered as the king ſhould think fit. 2 *Haw.* 443.

But

But the king may pardon part of the judgment; as where the judgment is hanging, beheading, imbowelling and the like, the king may pardon all but the beheading; whereby the judgment is not altered, but part of it remitted. 2 *H. H.* 412.

It is clear, that if a man condemned to be hanged, come to life after he is hanged, he ought to be hanged again; for the judgment was not executed till he was dead. 2 *Haw.* 463.

EXTORTION.

IT is said, that extortion, in a large sense, signifies any oppression under colour of right; but that, in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. 1 *Haw.* 170.

And by the statute of the 3 *Ed.* 1. *c.* 26. (which is only in affirmance of the common law) 'No sheriff, nor other the king's officer, 'shall take any reward to do his office, but shall be paid of that which 'they take of the king; and he that so doth, shall yield twice as 'much, and shall be punished at the king's pleasure.'

No sheriff nor other the king's officer.] Under these words, the law beginning with the sheriffs, are understood escheators coroners, bailiffs, gaolers, and other inferior officers of the king, whose offices were instituted before the making of this act, which do any way concern the administration or execution of justices, or the common good of the subject, or for the king's service. 2 *Inst.* 209.

Also the justices of the peace, whose office was instituted after this act, are bound by their oath of office, to take nothing for their office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute.

And generally, no public officer shall take any other fees or rewards, for doing any thing relating to his office, than some statute in force gives him, or else as hath been anciently and accustomably taken; and if he do otherwise, he is guilty of extortion. *Dalt. c.* 41.

Shall take any reward] Therefore by this statute, they can at this day take no more for doing their office, than hath been since allowed to them by authority of parliament. 2 *Inst.* 210.

And it hath been resolved, that a promise to pay them money for doing of a thing which the law will not suffer them to take any thing for, is merely void. 1 *Haw.* 171.

To do his office] It is not said that he shall take no reward generally, but no reward to do his office.

It cannot be intended to be the meaning of the statute to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers: for the chief danger of oppression is from

from officers being left at their liberty to set their own rates on their labour, and make their own demands; but there cannot be so much fear of these abuses, while they are restrained to known and stated fees, settled by the discretion of the courts, which will not suffer them to be exceeded without a proper resentment. 1 *Haw.* 171.

The fees in sessions, for traversing, trying, or discharging indictments discharging recognizances, and the like do vary according to the different customs in different places. *Dalt. c.* 41.

Shall yield twice as much] At the common law this offence is severely punishable at the king's suit, by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed. And this statute doth add a greater penalty than the common law did give: for hereby the plaintiff shall recover his double damages. 2 *Inst.* 210. 1 *Haw.* 171

And by the 31 *El. c.* 5. Actions for extortion may be laid in any county.

At the king's pleasure] That is, by the king's justices, before whom the cause depends. 2 *Inst.* 210.

Indictment for extortion in a gaoler.

THE jurors for the people of the state of New-York, upon their oath present, that A O. late of——in the said county, yeoman, on the—— day of——in the —— year of——was taken upon suspicion of having committed a certain felony, by——constable of——in the said county, by virtue of a warrant directed to the said——under the hand and seal of esquire, then and yet one of the justices assigned to keep the peace in the said county, and was on the same day and year committed by him the said to A. G. keeper of the gaol at——in the said county, under the custody of him the said A. G. to be safely kept, upon suspicion of the felony aforesaid, and the said A. O. was detained in that prison, under the custody of the said A. G. from the time that he was committed to the said prison for one month from thence next ensuing, upon suspicion of the said felony: nevertheless the said A. G. in no wise regarding the statute in that case made, and the penalty therein contained, did on the—— day of——at——aforesaid, in the said county, demand and receive——pounds of lawful money of the state of New York, of and from the said A. O. for ease and favour in the said gaol for the said time, in contempt of the people of the state of New-York, and against the form of the statute aforesaid, and against the peace of the said state, and their dignity.

Felony,

Felony, Miſpriſion of Felony and Theftbote.

I. Felony.

FELONY is generally ſuppoſed to come from the Saxon *fell*, which ſignifieth fierce or cruel; of which the word *fell* ſignifieth to throw down or demoliſh; and the ſubſtantive of that name is uſed to ſignify a mountain rough and uncultivated. But the ſame word, with a little variation runneth through moſt of the *European* languages, and ſignifieth more generally an offence at large; and the Saxon word *fællan* ſignifieth to offend, and *fælniſſe* an offence or *failure*: and although *felony*, as it is now become a technical term, ſignifieth in a more reſtrained ſenſe an offence of an high nature, yet it is not limited to *capital* offences only, but ſtill retaineth ſomewhat of this larger acceptation; for petit larceny is felony, although it is not capital.

It would ſwell this title near to the bigneſs of half the book, to ſet down every thing which may be comprehended under this word *felony*: therefore it is neceſſary to refer the conſideration of the ſeveral particular kinds of felonies to their reſpective titles; as for inſtance *Homicide*, *Robbery*, *Burglary*, *Rape*, *Coin*, *Forgery*, and many others; and eſpecially the law relating to ſtolen goods of all kinds belongeth to the title of *Larceny*.

The method of bringing a felon to juſtice from the firſt commiſſion of the felony, to his condemnation and execution, is treated of under the ſeveral titles of *Hue and cry*, *Arreſt*, *Examination*, *Bail*, *Commitment*, *Gaol*, *Arraignment*, *Appeal*, *Indictment*, *Mute*, *Confeſſion*, *Jurors*, *Evidence*, *Clergy*, *Judgment*, *Attainder*, *Forfeiture*, *Execution*. And the courſe and whole procedure of trying the offender, is treated of under title *Seſſions*.

So that there is nothing left for this place, but to take notice of one circumſtance which is common to all felonies in general, and that is concerning the charges of proſecution.

By the 3 *J. c* 10. The felon ſhall pay the charges of his carrying to gaol if able; to be levied by diſtreſs by warrant of one juſtice.

By the ſtatute of the 27 *G.* 2 *c.* 3. if he is not able, the ſame ſhall be paid, by order of ſuch juſtice, by the treaſurer, out of the county rates.

II. Miſpriſion of felony.

Miſpriſion of felony (from the *French* word *meſpris*, a neglect or contempt, 3 *Inſt.* 36) is the concealing of a felony which a man knows, but never conſented to: for if he conſented, he is either principal or acceſſary in the felony, and conſequently guilty of miſpriſion of felony and more. 1 *H. H.* 374.

For it is ſaid, every felony includes miſpriſion of felony, and may be proceeded againſt as a miſpriſion only, if the king pleaſes. 1 *Haw.* 125.

The

The punishment of misprision of felony in a common person, is fine and imprisonment; in an officer, as sheriff or bailiff of liberties, imprisonment for a year, and ransom at the king's pleasure by the statute of 3 *Ed.* 1. *c.* 9.

If any person will save himself from the crime of misprision, he must discover the offence to a magistrate with all speed that he can. 3 *Inst.* 140.

Misprision, in a larger sense, is used to signify every considerable misdemeanor, which hath not a certain name given to it in the law.

III. Theftbote.

Theftbote (from the *Saxon* words *theft*, and *bote*, boot or amends) is, where one not only knows of a felony, but takes his goods again, or other amends not to prosecute. 1 *Haw.* 125.

But the bare taking of one's own goods again, which have been stolen, is no offence, unless some favour be shewn to the thief. 1 *Haw.* 125.

This offence is very nearly allied to felony, and is said to have been anciently punished as such; but at this day it is punishable only with ransom and imprisonment, unless it were accompanied with some degree of maintainance given to the felon, which makes the party an accessary after the fact. 1 *Haw.* 125.

Warrant for Felony.

New Jersey, Middlesex-County. } *To the constable of——*

FORASMUCH as A. I. of ——in the county of——yeoman, hath this day made information and complaint upon oath, before me —— one of the justices of the peace for the said county, that this present day divers goods of him the said A. I. to wit,—— have feloniously been stolen, taken, and carried away from the house of him the said A. I. at —— aforesaid in the county aforesaid, and that he hath just cause to suspect, and doth suspect, that A. O. late of——yeoman, feloniously did steal, take and carry away the same [*Or otherwise as the case shall be:*] These are therefore to command you forthwith to apprehend him the said A. O. and to bring him before me to answer unto the said information and complaint, and to be farther dealt withal according to law. Herein fail you not. Given under my hand and seal the——day of——in the year

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Forcible Entry and Detainer.

FORCE, in the common law, is most commonly taken in ill part, for unlawful violence. 1 *Inst.* 161.

It seems that at the common law, a man disseised of any lands or tenements, if he could not prevail by fair means, might lawfully regain

gain the poſſeſſion thereof by force, unleſs he were put to a neceſſity of bringing his action, by having neglected to re-enter in due time: And it ſeems certain, that even at this day, he who is wrongfully diſpoſſeſſed of his *goods*, may juſtify the retaking of them by force from the wrong doer, if he refuſe to re-deliver them; for the violence which happens thro' the reſiſtance of the wrongful poſſeſſor, being originally owing to his own fault, gives him no juſt cauſe of complaint, inaſmuch as he might have prevented it by doing as he ought. 1 *Haw.* 140.

But this indulgence of the common law, in ſuffering perſons to regain the lands they were unlawfully deprived of, having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men under the pretence of feigned titles, forcibly to eject their weaker neighbours, and alſo by force to retain their wrongful poſſeſſions, it was thought neceſſary by many ſevere laws to reſtrain all perſons from the uſe of ſuch violent methods of doing themſelves juſtice. 1 *Haw.* 141.

However even at this day, in an action of forcible entry grounded on thoſe laws, if the defendant make himſelf a title which is found for him, he ſhall be diſmiſſed without any inquiry concerning the force; for howſoever he may be puniſhable at the king's ſuit, for doing what is prohibited by ſtatute, as a contemner of the laws, and diſturber of the peace, yet he ſhall not be liable to pay any damages for it to the plaintiff, whoſe injuſtice gave him the provocation in that manner to right himſelf. 1 *Haw.* 141.

Since therefore offences of this nature are made ſuch, not by the common law, but by ſtatute (after having premiſed, that 'they who keep 'poſſeſſion with force, in lands and tenements, whereof they or their 'anceſtors, or they whoſe eſtate they have in the ſame, have continued their poſſeſſion in the ſame, by three whole years next before 'without interruption, ſhall not be indamaged by force of any of the 'ſtatutes concerning forcible entry.' 8 *H.* 6. *c.* 9. *ſ.* 7. 1 *Haw.* 152) I ſhall conſider thoſe ſeveral ſtatutes, with the interpretation that hath been put upon them, under the following heads:

I. What is a forcible entry.
II. What is a forcible detainer.
III. How the ſame are puniſhable by action at law.
IV. How puniſhable at the general ſeſſions.
V. How puniſhable by one juſtice.
VI. How puniſhable on a certiorari.
VII. How puniſhable as a riot.

I. What is a forcible entry.

By the 5 *R.* 2. *c.* 8. None ſhall make any entry into any lands or tenements (or benefices of holy church, 15 *R.* 2. *c.* 2. or other poſſeſſion

poſſeſſion, 8 *H.* 6. *c.* 9. *ſ.* 2.) but where entry is given by the law; and in ſuch caſe not with ſtrong hand, nor with multitude of people, but only in peaceable and eaſy manner; on pain of impriſonment and ranſom at the king's will.

Or other poſſeſſions] It ſeems clear that no one can come within the danger of theſe ſtatutes, by a violence offered to another in reſpect of a *way*, or ſuch like eaſement, which is no poſſeſſion. And there ſeems to be no good authorities that an indictment will lie in this caſe for a *common*, or *office*. 1 *Haw.* 146.

Not with ſtrong hand, nor with multitude of people] It ſeems certain, that if one who pretends a title to lands, barely to go over them, either with or without a great number of attendants, armed or unarmed, in his way to church or market, or for ſuch like purpoſe, without doing any act, which either expreſsly or impliedly amounts to a claim of ſuch lands, he cannot be ſaid to make an entry thereinto. 1 *Haw.* 144.

But it ſeemeth, that if a perſon enter into another man's houſe, or ground, either with apparent violence offered to the perſon of any other, or furniſhed with weapons, or company, which may offer fear, tho' it be to cut, or take away another man's corn, graſs, or other goods, or to fell a crop of wood, or do any other like treſpaſs, and tho' he do not put the party out of his poſſeſſion, yet it ſeemeth to be a forcible entry. *Dalt. c.* 126.

But if the entry were peaceable, and after ſuch entry made, they cut or take away any other man's corn, graſs, wood, or other goods, without apparent violence or force; tho' ſuch acts are counted a diſſeiſin with force, yet they are not puniſhable as forcible entries. *Dalt. c.* 126.

But if he enter peaceably, and there ſhall by force or violence cut or take away corn, graſs, or wood, or ſhall forcibly or wrongfully carry away any other goods there being; this ſeemeth to be a forcible entry puniſhable by theſe ſtatutes. *Dalt. c.* 126.

So alſo ſhall thoſe be guilty of a forcible entry, who having an eſtate in land, by a defeaſible title, continue with force in the poſſeſſion thereof, after a claim made by one who had a right of entry thereto. 1 *Haw.* 145.

But he who barely agrees to a forcible entry made to his uſe, without his knowledge or privity, ſhall not be adjudged to make an entry within theſe ſtatutes, becauſe he no way concurred in, or promoted the force. 1 *Haw.* 145.

And, in general, it ſeemeth clear, that to denominate the entry forcible, it ought to be accompanied with ſome circumſtances of actual *violence or terror*; and therefore that an entry which hath no other force than ſuch as is implied by the law, in every treſpaſs whatſoever, is not within theſe ſtatutes. 1 *Haw.* 145.

As to the matter of *violence*: it ſeems to be agreed, that an entry may be forcible, not only in reſpect of a violence actually done to the perſon

perſon of a man, as by beating him if he refuſe to relinquiſh his poſſeſſion, but alſo in reſpect of any other kind of violence in the manner of the entry, as by breaking open the doors of a houſe, whether any perſon be in it or not, eſpecially if it be a dwelling houſe, and perhaps alſo by any act of outrage after the entry, as by carrying away the party's goods; but it ſeems that an entry is not forcible by the bare drawing up a latch, or pulling back the bolt of a door, there being no appearance therein of being done by ſtrong hand or multitude of people; and it hath been holden, that an entry into a houſe through a window, or by opening a door with a key, is not forcible. 1 *Haw.* 145.

In reſpect of the circumſtances of terror; it is to be obſerved, that wherever a man, either by his behaviour or ſpeech, at the time of his entry, gives thoſe who are in poſſeſſion juſt cauſe to fear that he will do them ſome bodily hurt, if they will not give way to him, his entry is eſteemed forcible, whether he cauſe ſuch a terror by carrying with him ſuch an unuſual number of attendants, or by arming himſelf in ſuch a manner as plainly intimates a deſign, or by actually threatning to kill, maim, or beat thoſe who ſhall continue in poſſeſſion, or by giving out ſuch ſpeeches as plainly imply a purpoſe of uſing force, as if one ſay that he will keep his poſſeſſion in ſpite of all men, or the like. 1 *Haw.* 145.

But it ſeems that no entry ſhall be judged forcible, from any threatning to ſpoil another's goods, or to deſtroy his cattle, or to do him any other ſuch like damage, which is not perſonal. 1 *Haw.* 146.

However it is clear, that it may be committed by a ſingle perſon as well as by twenty. 1 *Haw.* 146.

But nevertheleſs all thoſe who accompany a man, when he makes a forcible entry, ſhall be adjudged to enter with him, whether they actually come upon the lands or not. 1 *Haw.* 144.

II. *What is a forcible detainer.*

It ſeemeth certain, that the ſame circumſtances of violence or terror which will make an entry forcible, will make a detainer forcible alſo. And a detainer may be forcible, whether the entry were forcible or not. 1 *Haw.* 146.

III. *How they are puniſhable by action at law.*

If any perſon be put out or diſſeiſed of any lands or tenements in forcible manner, or put out peaceably, and after holden out with ſtrong hand, the party grieved ſhall have aſſize of novel diſſeiſin, or a writ of treſpaſs againſt the diſſeiſor; and if he recovers, he ſhall have treble damages, and the defendant moreover ſhall make fine and ranſom to the king. 8 *H.* 6. *c.* 9. *ſ.* 6.

The party grieved ſhall have aſſize, &c.] But this action, being at the ſuit of the party, and only for the right, is only where the

entry of the defendant was not lawful; for if a man entereth with force, where his entry is lawful, he shall not be punished by way of action, but yet he may be indicted upon the statute, for the indictment is for the force, and for the king, and he shall make fine to the king, although his right be never so good. *Dalt. c.* 129.

Treble damages.] And this he shall recover, as well for the main occupation, as for the first entry: And albeit he shall recover treble damages, yet he shall recover costs, which shall be trebled also; for the word damages includeth costs of suit. 1 *Inst.* 257.

IV. How punishable at the general sessions.

The party grieved, if he will lose the benefit of his treble damages and costs, may be aided and have the assistance of the justices at the general sessions, by way of indictment on the statute of 8 *H.* 6.—Which being found there, he shall be restored to his possession, by a writ of restitution granted out of the same court to the sheriff. *Dalt. c.* 129.

In the caption of which indictment, it will be sufficient to say, *justices assigned to keep the peace of our lord the king*, without shewing that they have authority to hear and determine felonies and trespasses; for the statute enables all justices of the peace, as such, to take such indictments. 1 *Haw.* 147.

And the tenement in which the force was made, must be described with convenient certainty; and must set forth that the defendant actually entered; and ousted the party grieved; and continueth his possession at the time of finding the indictment; otherwise he cannot have restitution, because it doth not appear that he needeth it. 1 *Haw.* 147, 149, 150.

But if a man's wife, children or servants do continue in the house or upon the land, he is not ousted of his possession: but his cattle being upon the ground, do not preserve his possession. *Dalt. c.* 132.

An indictment for forcible entry was quashed, for not setting forth that the party was seised or disseised, or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid, into the freehold of A. in the possession of B. 3 *Salk.* 169.

V. How punishable by one justice.

For a more speedy remedy, the party grieved may complain to any one justice; or to a mayor, sheriff, or bailiff, within their liberties. 8 *H.* 6 *c.* 9.

But although one justice alone may proceed in such cases, yet it may be adviseable for him, if the time for viewing the force will suffer it, to take to his assistance one or two more justices.

Concerning which power of one justice, it is enacted as follows: After complaint made to such justice, by the party grieved, of

a forcible entry made into lands, tenements, or other poſſeſſions, or forcible holding thereof, he ſhall within a convenient time, at the coſts of the party grieved (without any examining or ſtanding upon the right or title of either party) take ſufficient power of the county, and go to the place where ſuch force is made. 15 *R.* 2 *c.* 2. 8 *H.* 6. *c.* 9. *f.* 2. *Dalt.* c. 44.

Complaint——————by the party grieved] Yet theſe words do not inforce any neceſſity of ſuch a complaint; for it is holden, that the juſtice may and ought to proceed, upon any information or knowledge thereof whatſoever, though no complaint at all be brought unto him, by any party grieved thereby. *Lamb.* 147.

Power of the County] All people of the county, as well the ſheriff's as others, ſhall be attendant on the juſtices, to arreſt the offenders, on pain of impriſonment and fine to the king. 15 *R.* 2. *c.* 2.

And if the doors be ſhut, and they within the houſe ſhall deny the juſtice to enter, it ſeems he may break open the houſe, to remove the force. *Dalt. c.* 44.

And if after ſuch entry made, the juſtice ſhall find ſuch force, he ſhall cauſe ſuch offenders to be arreſted. 15 *R.* 2. *c.* 2. 8 *H.* 6 *c.* 9 *f.* 2.

He ſhall alſo take away their weapons aud armour, and cauſe them to be appraiſed, and after to be anſwered to the king as forfeited, or the value thereof. 2 *Ed.* 3. *c.* 3.

Alſo ſuch juſtice ought to make a record of ſuch force by him viewed; which record ſhall be ſufficient conviction of the offenders, and the parties ſhall not be allowed to traverſe it: And this record being made out of the ſeſſions, by a particular juſtice, may be kept by him; or he may make it indented, and certify the one part into the king's bench, or leave it with the clerk of the peace; and the other part he may keep himſelf. For this view of the force by the juſtice, being a judge of record, maketh his record thereof, in the judgment of the law, as ſtrong and effectual, as if the offenders had confeſſed the force before him; and touching the reſtraining of traverſe, more effectual, than if the force had been found by a jury, upon the evidence of others. (That is, as to the fine aud impriſonment, but not as to reſtitution) 15 *R.* 2 *c.* 2. *Dalt. c.* 44.

And the offenders, being arreſted (as before is ſaid) ſhall be put to the next goal there to abide conviƈt by the record of the ſame juſtice, until they have made fine and ranſom to the king. 15 *R.* 2 *c.* 2.

Shall be put in the next Gaol] It is ſaid, that the juſtice hath no power to commit the offender to gaol, unleſs he do it upon his own view of the faƈt, and not upon the jury finding the ſame afterwards. *Dalt. c.* 44. 1 *Haw.* 142.

And if ſuch offenders, being in the houſe at the coming of the juſtice, ſhall make no reſiſtance, nor make ſhew of any force, then the

the juſtice cannot arreſt or remove them at all upon ſuch view.—*Dalt. c.* 44.

But howſoever, if the force be found afterwards, by the inquiry of the jury, the juſtice may bind the offenders to the peace; and if they be gone, he may make his warrant to take them, and may after ſend them to the gaol, until they have found ſureties for the peace. *Dalt. c.* 44.

Note; Mr. *Dalton* in this place ſays good behaviour, which I have preſumed to alter to the peace, as deeming it much the ſafer; and not being ſufficiently ſatisfied concerning the power of a juſtice of the peace to bind to the good behaviour in the like caſes, which power Mr. *Dalton* hath enlarged more than all other authors, without any aſſiſtance from the commiſſion of peace, or any act of parliament, other than had been for above 200 years before.

Until they have made fine] *H.* 1. *G.* 2 *K.* and Sir *Edm. Elleweil.* He was brought up upon a *habeas corpus*, with a return of the cauſe of his commitment, which was upon a conviction of forcible entry and detainer. And it being moved to diſcharge him upon exceptions to the commitment, the court refuſed to enter into the conſideration of them, till the conviction was likewiſe regularly removed before them. But by conſent he was bailed in the mean time. And this term the conviction being before the court, it appeared that there was no fine ſet by the juſtices, and it was therefore moved to be quaſhed. It was agreed on both ſides, that there ſhould be a fine; it was inſiſted, that it being now before the king's bench by a certiorari, they might ſet the fine. But by the court, we are not to execute the judgment of an inferior court. The conviction is to be upon view, and they who view the nature of the force are the propereſt judges what fine to ſet; and though a certiorari ſhould come before the fine is ſet, yet it would be no contempt in the juſtices to compleat their judgment by ſetting one. *Lambard* indeed was of opinion, that the juſtices could not ſet the fine at all; but upon what foundation we can never imagine. The juſtices are not bound to do it upon ſthe pot, but may take a reaſonable time to conſider of the fine; becauſe by the words of the act, the commitment is to be till he has paid the fine. The conviction muſt be quaſhed, and the defendant diſcharged. *Sar.* 794. L. *Raym.* 1515 *Sel. C. V.* 1. 289.

And the ſame was likewiſe ſolemnly reſolved in *Leighton's* caſe; and that the juſtice may aſſeſs the fame, either before the conviction or after. 1 *Hawk.* 142.

And the fine muſt be aſſeſſed upon every offender ſeverally, and not upon them jointly; and the juſtice ought to eſtreat the fine, and to ſend the eſtreat into the exchequer, and from thence the ſheriff may be commanded to levy it for his majeſty's uſe. *Dalt. c.* 44.

But upon payment of the fine to the ſheriff, or upon ſureties found (by recognizance) for the payment thereof, it ſeemeth that the juſtice

tice may deliver the offenders out of prison again at his pleasure. *Dalt. c.* 44.

And so much concerning removing the force: But the party ousted cannot be restored to his possession by the justice's view of the force, nor unless the same force be found by the inquiry of a jury.

Concerning which it is enacted as follows; 'And though that 'the persons making such entry be present, or else departed before 'the coming of the justice; he may notwithstanding in some good 'town, next to the tenements so entered, or in some other convenient place by his discretion (and that though he go not to see the 'place where the force is; *Dalt. c.* 44) have power to enquire by 'the people of the county, as well as of them that make such forcible entry, as of them which hold the same with force. 8 *H.* '6 *c.* 9. *s.* 3.'

In order to which, the justice shall make his precept to the sheriff, commanding him in the king's behalf, to cause to come before him sufficient and indifferent persons, dwelling next about the lands so entered, to enquire of such entries; whereof every man shall have lands or tenements of 40s. a year, above reprizes. And the sheriff shall return issues on every of them, at the day of the first precept returnable 20s. and at the second day 40s. and at the third day 100s. and at every day after double. And the sheriff making default, shall on conviction before the same justice, or before the judge of assize, forfeit 20l. half to the king, and half to him who shall sue, with costs; and moreover shall make fine and ransom to the king. 8 *H.* 6. *c.* 9. *s.* 4. 5.

Before the same justice.] And the justice may proceed against the sheriff for this default, either by bill at the suit of the party, or by indictment at the suit of the king. *Dalt. c.* 44.

And the defendant also, if he is not present, ought to be called to answer for himself; for it is implied by natural justice, in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself. 1 *Haw.* 154.

And it seems to be settled at this day, that if the defendant tender a *traverse* of the force, the justice ought not to make any restitution till the traverse be tried. 1 *Haw.* 154.

The defendant may also by the 31 *El. c.* 11. plead three year's possession; whereby it is enacted, that 'no restitution upon an in-'dictment of forcible entry, or holding with force, shall be made, 'if the person indicted have had the occupation, or been in quiet 'possession for three years together next before the indictment found, 'and his estate therein not determined; and restitution shall stay 'till that be tried; and if it is found against the party indicted, he 'shall pay such costs and damages as the judges or justices shall 'assess: to be recovered as costs and damages in judgments on other 'actions.'

And

And it hath been holden, that the plea of such possession is good, without shewing under what title, or of what estate such possession was; because it is not the title, but the possession only, which is material in this case. 1 *Haw.* 152.

And it was holden by the court in *Leighton*'s case, that if the defendant shall either traverse the entry or the force, or plead that he has been three years in possession, the justice may summon a jury for the trial of such traverse, for it is impossible to determine it upon view: and if the justice have no power to try it, it would be easy for any one to elude the statute by the tender of such a traverse, and therefore by a necessary construction the justices must needs have this power as incidental to what is expressly given them. 1 *Haw.* 242.

And this traverse must be tendered in writing, and not by a bare denial of the fact in words; for thereupon a *venire facias* must be awarded, a jury returned, the issue tried, a verdict found, and judgment given, and costs and damages awarded; and there must be a record, which must be in writing, to do all this, and not a verbal plea. *Dalt. c.* 133. 1 *Haw.* 154.

Upon which traverse tendered, the justice shall cause a new jury to be returned by the sheriff, to try the traverse; which may be done the next day, but not the same day. *Dalt. c.* 133.

And it seemeth, that he who tendereth the traverse, shall bear all the charges of the trial; and not the king, or the party prosecuting. *Dalt. c.* 133.

And if such forcible entry or detainer be found before such justice, then the said justice shall cause to resceise the lands and tenements so entered or holden, and shall restore the party put out, to the full possession of the same. 8 *H. 6. c. 9. f.* 3.

The said justice] It seems to be agreed, that no other justice of the peace, except those before whom the indictment shall be found, shall have any power either at the sessions or out of it, to make any award of restitution. 1 *Haw.* 152.

Shall cause to resceise] And the justice may break open the house by force, to resceise the same; and so may the sheriff do, having the justice's warrant. *Dalt. c.* 44.

Resceise] That is, shall remove the force, by putting out all such offenders as shall be found in the house, or upon the lands, that entered or held with force. *Dalt. c.* 120.

And shall restore the party put out] And this he may do in his own proper person; or he may make his warrant to the sheriff to do it. *Dalt. c.* 44. 1 *Haw.* 151, 2.

VI. How punishable on a certiorari.

Although regularly the justices only who were present at the inquiry and when the indictment was found, ought to award restitution; yet if the record of the presentment or indictment shall be certified

tified by the juſtice or juſtices into the king's bench, or the ſame preſentment or indictment be removed and certified thither by certiorari, the juſtices of that court may award a writ of reſtitution to the ſheriff, to reſtore poſſeſſion to the party expelled: for the juſtices of the king's bench have a ſupreme authority, in all caſes of the crown. *Dalt. c.* 44.

Alſo where upon a removal of the proceedings into the king's bench the conviction ſhall be quaſhed, the court will order reſtitution to the party injured. As in the caſe of *K.* and *Jones M.* 8 *G.* A conviction of forcible entry was quaſhed for the old exception of *meſſuage* or *tenement*, by reaſon of the uncertainty; but the reſtitution was oppoſed, on an affidavit that the party's title (which was by leaſe) was expired ſince the conviction. But the court ſaid, they had no diſcretionary power in the caſe, but were bound to award reſtitution on quaſhing the conviction. *Str.* 474.

VII. How puniſhable as a riot.

If a forcible entry or detainer ſhall be made by three perſons or more, it is alſo a riot, and may be proceeded againſt as ſuch, if no enquiry hath before been made of the force. *Dalt. c.* 44.

Indictment for a forcible entry and detainer at common law.

New-Jerſey, THE jurors for the people of the ſtate of New-
Morris-County. Jerſey, upon their oath preſent, that A. O. late of———in the county aforeſaid, gentleman, and B. O. late of the ſame, yeoman, together with divers other malefactors and diſturbers of the peace of the people of the ſtate of New-Jerſey (whoſe names to the jurors aforeſaid are yet unknown) on the———day of——— in the———— year of———with force and arms, at———aforeſaid, in the county aforeſaid, unlawfully and injuriouſly did enter into a certain barn and a certain orchard, then and there being in poſſeſſion of one A. I. and that the ſaid A. O. and B. O. together with the ſaid other malefactors, then and there, with force and arms, unlawfully and injuriouſly did expel, amove, and put out the ſaid A. I. from the poſſeſſion of the ſaid barn and orchard, and the ſaid A. I. ſo as aforeſaid expelled, amoved, and put out from the poſſeſſion of the ſaid barn and orchard, then and there with force and arms, unlawfully and injuriouſly did keep out, and ſtill do keep out, to the great damage of him the ſaid A. I. and againſt the peace of the people of the ſtate of New-Jerſey, and their dignity.

Record of a forcible detainer upon view.

Note: That the books upon the office of a juſtice of the peace do generally ſet forth, that the record ought to be in the preſent tenſe, and not in the time paſt (and herewith do accord the adjudged caſes

caſes in the court of king's bench, *Str.* 443.) yet nevertheleſs they do all exhibit the form of a record in the time paſt, and not in the preſent: Therefore I have taken the liberty to alter the ſame, from the record in L. *Raymond* of the conviction of Sir *Edm. Elwell* aforeſaid, and others, adding the fine thereunto, for the want of which that conviction was quaſhed. And I have given the form of a record of a forcible *detainer*, rather than of a forcible *entry*, becauſe the juſtice for the moſt part cannot be ſuppoſed to be preſent at the entry, as not having knowledge thereof until after the entry is made.

Eſſex, to wit. BE it remembered that on the day of in the year of the Independence of at in the county of Eſſex aforeſaid, complained to us three of the juſtices aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, that late of and late of into the meſſuage of her the ſaid being the manſion houſe of her the ſaid ſituate within the townſhip of aforeſaid, did enter, and her the ſaid of the meſſuage aforeſaid, whereof the ſame at the time of the entry aforeſaid, was ſeiſed as of the freehold of her the ſaid for the term of her life, unlawfully ejected, expelled, and amoved and the ſaid meſſuage from her the ſaid unlawfully, with ſtrong hand and armed power, do yet hold and from her detain, againſt the form of the ſtatute in ſuch caſe made and provided; whereupon the ſame then, to wit, on the ſaid day of at the townſhip of aforeſaid, prayeth of us, ſo as aforeſaid being juſtices, to her in this behalf that a due remedy be provided, according to the form of the ſtatute aforeſaid: Which complaint and prayer by us the aforeſaid juſtices being heard, we the aforeſaid eſquires, juſtices aforeſaid, to the meſſuage aforeſaid perſonally have come, and do then and there find and ſee the aforeſaid and the aforeſaid meſſuage, with force and arms, unlawfully, with ſtrong hand and armed power, detaining, againſt the form of the ſtatute in ſuch caſe made and provided, according as ſhe the ſame ſo as is aforeſaid hath unto us complained: Therefore it is conſidered by us the aforeſaid juſtices, that the aforeſaid and of the detaining aforeſaid with ſtrong hand, by our own proper view then and there as is aforeſaid had, are convicted, and every of them is convicted, according to the form of the ſtatute aforeſaid: Whereupon we the juſtices aforeſaid, upon every of the aforeſaid and do ſet and impoſe ſeverally a fine of 10l. of good and lawful money of New-Jerſey, to be paid by them and every of them ſeverally, to the people of the ſtate of New Jerſey, for the ſaid offences; and do cauſe them, and every of them, then and there to be arreſted; and the ſame and being convicted, and every of them being convicted upon our own proper view, of the detaining aforeſaid, with ſtrong hand as is aforeſaid, by

us

us the aforesaid justices are committed, and every of them is committed, to the gaol of the people of the state of New-Jersey, at in the county of Essex aforesaid, being the next gaol to the messuage aforesaid, there to abide respectively, until they shall have paid their said several fines respectively, to the people of the state of New-Jersey, for their respective offences aforesaid. Concerning which the premises aforesaid, we do make this our record. In witness whereof we the aforesaid esquires, the justices aforesaid, to this record our hands and seals do set, at the township of aforesaid, in the county of Essex aforesaid, on the day of in the year of the Independence of, &c.

Mittimus for forcible detainer.

New-Jersey, Middlesex County. JOHN Nevill, esquire, one of the justices assigned to keep the peace within the said county, of M. and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed: To the keeper of the gaol at——in the said county, and to his deputy, and deputies there, and to every of them, greeting. Whereas upon complaint made unto me this present day, by A. I of——in the said county yeoman, I went immediately to the dwelling house of the said A. I. at——aforesaid, in the said county, and there found A. O. late of——labourer, B. O. late of the same, weaver, and C. O. late of——butcher, forcibly, with strong hand and armed power, holden the said house, against the peace of the people of the state of New-Jersey, and against the form of the statute in such case made and provided: Therefore I send you, by the bringers hereof, the bodies of the said A. O. B. O. and C. O. convicted of the said forcible holding, by mine own view, testimony and record; commanding you in the name of the people to receive them in your said gaol, and there safely to keep them, and every of them respectively, until they shall have respectively paid the several sums of 10l. of good and lawful money of the state of New-Jersey, to the people of the state of New Jersey, which I have set and imposed upon every of them separately, for a fine and ransom for their said trespasses respectively. Herein fail you not, at the peril that may follow hereof. Given at aforesaid, in the county aforesaid, under my seal, the day of in the year

Note: By the forms in all the books, all the offenders stand committed until all have paid, so as that the first shall not be discharged on payment of his own fine, but continue until all the rest have paid likewise; which seems unreasonable, and is not warranted by the statute.

Precept to the sheriff to return a jury.

New-Jersey, Essex-County. SAMUEL WOODRUFF, esquire, one of the justices assigned to keep the peace within the said county, and also to hear and determine divers felonies, tres- sses and

other misdemeanors within the said county committed: To the sheriff of the said county, greeting: On behalf of the people of the state of New Jersey, I command you, that you cause to come before me at in the county aforesaid, on the day of next ensuing, twenty-four sufficient and indifferent men, of the neighbourhood of aforesaid, in the county aforesaid, every of whom shall have lands or tenements of 40s. yearly at the least, above reprizes, to enquire upon their oaths for the people, of a certain entry made with strong hand (as it is said) into the messuage of one A. I. at aforesaid in the county aforesaid, against the form of the statute in such case made and provided. And you are to return upon every of the jurors by you in this behalf to be impanelled, 20s. of the issues at the aforesaid day: And have you then and there this precept. And this you shall in no wise omit, upon the peril that shall thereof ensue. Witness the said S. W. at in the county aforesaid, the day of in the year of

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The jurors oath.

YOU shall true inquiry and presentment make of all such things as shall come before you, concerning a forcible entry [*or detainer*] said to have been lately committed in the dwelling house of ——yeoman, at——in this county; you shall spare no one for favor or affection, nor grieve any one for hatred or ill-will, but proceed herein according to the best of your knowledge, and according to the evidence that shall be given to you: So help you God.

The oath that A. F. your foreman hath taken on his part, you and every of you shall truly observe and keep on your parts: So help you God.

The inquisition, indictment, or finding of the jury.

New-Jersey, Essex County. AN inquisition for the people of the state of New-Jersey indented and taken at in the said county, the day of in the year of by the oaths of good and lawful men of the said county, before S. W. esquire, one of the justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, who say upon their oaths aforesaid, that A. I. of aforesaid, yeoman, long since lawfully, and peaceably was seised in his demesne as of fee [*if it is not freehold, then say,* possessed] of and in one messuage, with the appurtenances, in aforesaid, in the county aforesaid, and his said possession [and seisin] so continued until A. O. late of yeoman, B. O. late of the same, yeoman, and C. O. late of the same, yeoman, and other malefactors unknown, the day of of now last past, with strong hand and armed power, into the messuage aforesaid, with the appurtenances aforesaid, did enter, and him the said A. I. thereof disseised, and with strong hand expelled; and

and him the said A. I so disseised and expelled from the said messuage with the appurtenances aforesaid, from the said day of until the day of the taking of this inquisition, with like strong hand and armed power did keep out, and do yet keep out, to the great disturbance of the peace of the people of the state of New-Jersey, and against the form of the statute in such case made and provided.

We whose names are hereunto set, being the jurors abovesaid, do upon the evidence now produced before us, find the inquisition aforesaid true.

A. B.
C. D. &c.

Warrant to the sheriff for restitution.

New-Jersey, Essex County. JOHN OGDEN, esquire, one of the justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; To the sheriff of the said county, greeting: Whereas by an inquisition taken before me the justice aforesaid, at ——— in the county aforesaid, on this present ——— day of ——— in the ——— year of ——— upon the oaths of ——— and by virtue of the statutes made and provided in cases of forcible entry and detainer, it is found that A. O. late of ——— yeoman and B. O. late of ——— yeoman, on the ——— day of ——— now last past, into a certain messuage with the appurtenances, of A. I of ——— aforesaid, in the county aforesaid, gentleman, situate, lying, and being at ——— aforesaid, in the county aforesaid, with force and arms did enter, and him the said A. I. thereof then with strong hand, did disseise and drive out, and him the said A. I. thus driven out from the aforesaid messuage with the appurtenances, from the ——— day of ——— aforesaid, to this present day of the taking of the said inquisition, with strong hand and armed force did keep out, and do yet keep out, as by the inquisition aforesaid more fully appeareth of record: Therefore on the behalf of the people of the state of New Jersey, I charge and command you, that taking with you the power of the county (if it be needful) you go to the said messuage and other the premises, and the same with the appurtenances, you cause to be reseised, and that you cause the said A. I. to be restored and put into his full possession thereof, according as he, before the entry aforesaid was seised, according to the form of the said statutes. And this you shall in no wise omit, on the penalty thereon incumbent. Given under my hand and seal at ——— in the said county, the ——— day of ——— in the ——— year of the independence of, &c.

Forestalling,

Foreſtalling, Ingroſſing, and Regrating.

FORESTALLING *(foreſtællan* or *foreſtallan)* in the Engliſh Saxon ſignifieth properly to *market before the public*, or to *prevent the public market*; and metaphorically, to *intercept* in general: and ſeemeth to be derived from *fore*, which is the ſame as *before*, and *ſtalle* a ſtanding place or department; from whence ſprang the ancient word *ſtallage*, which ſignifieth money paid for erecting a ſtall or ſtand for the ſelling of goods in a fair or market:

Ingroſſing is from *in*, and *groſs*, great or whole.

And *regrating*, from *re*, again, and the French *grater*, to *grate* or ſcrape; and ſignifieth the ſcraping or dreſſing of cloth or other goods, in order for ſelling the ſame again.

I ſhall treat, firſt, concerning theſe offences at the common law; and, ſecondly, concerning the ſame by ſtatute.

I. Concerning theſe offences at common law.

At the common law, all endeavours whatſoever to inhance the common price of any merchandiſe, and all kinds of practices which have an apparent tendency thereto, whether by ſpreading falſe rumours, or by buying things in a market before the accuſtomed hour or by buying and ſelling again the ſame thing in the ſame market, or by any other ſuch like devices, are highly criminal, and puniſhable by fine and impriſonment. 8 *Haw.* 234, 5.

By the common law, a merchant bringing victuals into the realm, may ſell the ſame in groſs; but no perſon can lawfully buy within the realm any merchandize in groſs, and ſell the ſame in groſs again, without being liable to be indicted for the ſame. 3 *Inſt.* 196.

And the bare ingroſſing of a whole commodity, with an intent to ſell it at an unreaſonable price, is an offence indictable at common law, whether any part thereof be ſold by the ingroſſer or not. 1 *Haw.* 235.

And ſo jealous is the common law of all practices of this kind, that it will not ſuffer corn to be ſold in the ſheaf; perhaps for this reaſon, becauſe by ſuch means the market is in effect foreſtalled. 1 *Haw.* 235.

Anciently the ingroſſer and regrater were comprehended under the word foreſtaller; but now they are diſtinguiſhed by the following ſtatute.

II Concerning theſe offences by ſtatute.

Whoſoever ſhall buy, or cauſe to be bought, any merchandize, victual, or any other thing whatſoever, coming by land or by water toward any market or fair, to be ſold in the ſame, or coming toward any city, port, haven, creek or road, from any parts beyond the ſea to be ſold; or make any bargain, contract or promiſe, for the

the having or buying the same, or any part thereof so coming as is aforesaid, before the said merchandize, victuals or other things shall be in the market, fair, city, port, haven, creek or road, ready to be sold; or shall make any motion by word, letter, message or otherwise, to any person for the inhancing of the price, or dearer selling of any thing abovementioned, or else dissuade, move or stir any person coming to the market or fair, to abstain or forbear to bring or convey any of the things above rehearsed, to any market, fair, city, port, haven, creek or road to be sold, as aforesaid, shall be deemed a forestaller. 5 & 6 *Ed.* 6. *c.* 14. *s.* 1.

Whosoever shall ingross, or get into his hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land or tythe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, to the intent to sell the same again, shall be deemed an unlawful ingrosser. 5 & 6 *Ed.* 6 *c* 14 *s.* 3.

And it is said not to be sufficient in an indictment or information, to say that the defendant bought so much goods, but the words of the statute, are to be pursued, which are—*shall ingross or get into his hands by buying.* But it is not necessary to set forth, that the defendant did not come by it, by a demise of land, or the like; but the defendant, if he have any such matter to alledge, must give it in evidence. 1 *Haw.* 237, 238.

Whosoever shall by any means regrate, obtain, or get into his hands or possession, in a fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victuals whatsoever, that shall be brought to any fair or market to be sold, and do sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be deemed a regrator. 5 & 6 *Ed.* 6. *c.* 14 *s.* 2.

Any if any shall be guilty of any the said offences, he shall for the first offence be imprisoned two months, and forfeit the value of the goods; for the second offence, be imprisoned half a year, and forfeit double value; and for the third offence, shall be set on the pillory, forfeit all his goods, and be imprisoned during the king's pleasure. 5 & 9 *Ed.* 6. *c.* 14. *s.* 4, 5, 6.

Half the said forfeitures to go to the king, and half to him that will sue, in two years after the offence. *id. s.* 9. 14.

And the sessions may hear and determine the same, by inquisition, presentment, bill, or information, and by examination of two witnesses, and may make process thereupon, as though they were indicted; and estreat the king's moiety, and award execution of the other moiety for the party, by *fieri facias*, or *capias*, as the courts at Westminster may do: And if any conviction or attainder shall be at the king's suit only, then the whole forfeitures shall be levied to the king's use. *s.* 10.

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From hence it seems clearly to follow, as well as from the general rules of law, that no information for any of the said offences against the said statute can be good, without shewing in certain the quantity of the thing for which the penalty is supposed to be incurred, not only because otherwise the judgment to be given on such an information can never be pleaded in bar of any other, because it cannot appear that both of them were brought for the same thing; but also, because it cannot appear to the court what forfeiture the defendant ought to incur, unless the extent of the offence be specially set forth. 1 *Haw.* 238.

By 31 *El. c.* 5, which ordains that informations for offences against penal statutes, must be laid in the proper county, it is provided, that nevertheless an information on the said statute of *Ed.* 6. against forestalling, ingrossing, or regrating, where the penalty shall appear to be 20l. or above, may be laid out of the proper county, and in any other county at the pleasure of the informer.

Indictment for forestalling.

New-York, Queen's County. THE jurors for the people of the state of New-York, upon their oath present, that A. O. late of the township of ——— in the county aforesaid, yeoman, on the ——— day of ——— in the ——— year of the independence of ——— at the township aforesaid, in the county aforesaid, did buy and cause to be bought of and from one A. S. twenty oxen, for the sum of 200l. of current money of New-York, as he the said A. S. then and there was driving the said twenty oxen, to the market of ——— to sell the said twenty oxen in the said market, and before the said twenty oxen were brought into the said market, where the same should be sold, in contempt of the people of the state of New-York, and their laws: to the evil example of all others in the like case offending, against the peace of the people of the state of New-York, and their dignity, and against the form of the statute in that case made and provided.

FORFEITURE.

The forfeitures for particular offences may be found under their respective titles; here it is treated of forfeitures in general.

I. Of forfeiture of lands and goods.
II. Of loss of dower.

I. Of forfeiture of lands and goods.

IT seems agreed, that by the common law, all lands of inheritance, whereof the offender was seised in his own right, and also all rights of entry to lands in the hands of a wrong doer, are forfeited

forfeited to the king, by an attainder of high treaſon, and to the lord of whom they are immediately holden, by an attainder of petit treaſon or felony. 2 *Haw.* 448.

But it ſeems clear, that the lord cannot enter into the lands holden of him, upon an eſcheat for petit treaſon or felony, without a ſpecial grant, till it appear by due proceſs that the king hath had his prerogative of the year, day and waſte. 2 *Haw.* 448.

Concerning which year, day and waſte, it is enacted by the 17 *Ed.* 2 *c.* 16. 'that the king ſhall have the goods of all felons attainted, and fugitives, whereſoever they be found. And if they have freehold, it ſhall be forthwith taken into the king's hands, and the king ſhall have all profits of the ſame by one year and one day; and the land ſhall be waſted and deſtroyed in the houſes, woods and gardens, and in all manner of things belonging to the ſame land. And after the king hath had the year, day and waſte, the land ſhall be reſtored to the chief lord of the fee, unleſs that he fine before the king, for the year, day and waſte.'

As to forfeiture of goods, it ſeems agreed, that all things whatſoever, which are comprehended under the notion of a perſonal eſtate, whether they be in action or poſſeſſion, which the party hath, or is intitled to, in his own right, and not as executor or adminiſtrator to another, are liable to ſuch forfeiture, in the following caſes:

1. Upon a conviction of treaſon or felony. 2 *Haw.* 450.

2. Upon a flight found before the coroner, upon view of a dead body. *id.*

3. Upon an acquittal of a capital felony, if the party is found to have fled. *id.*

4. Alſo a perſon indicted of petit larceny, and acquitted, yet if it be found he fled for it, forfeits his goods, as in caſe of grand larceny. 1 *H. H.* 530. 2 *Haw.* 451.

But it is certain that the party may in all caſes, except that of the coroner's inqueſt, tarverſe the finding of the flight. Alſo it ſeems agreed, that the particulars of the goods found to be forfeited may be alſo traverſed. 2 *Haw.* 451.

5. Upon a preſentment by the oath of 12 men, that a perſon arreſted for treaſon or felony, fled from, or reſiſted thoſe who had him in cuſtody, and was killed by them in the purſuit or ſcuffle. 2 *Haw.* 451.

6. By being waived or left by a felon in his flight, whereby he forfeits the goods ſo waived, whether they be his own, or the goods of others ſtolen by him, which ſhall not be reſtored to the right owners but upon a proper proſecution. 2 *Haw.* 451.

7. Alſo, a convict within clergy, forfeits all his goods, tho' he be burnt in the hand; yet thereby he becomes capable of purchaſing other goods. 2 *H. H.* 388, 389.

But on burning in the hand he ought to be immediately reſtored to poſſeſſion of his lands. 1 *H. H.* 389.

Upon

Upon outlawry in treaſon or felony, the offender ſhall loſe and forfeit as much as if he had appeared, and judgment had been given againſt him, as long as the outlawry is in force. *Wood b.* 4. *c.* 5.

And thoſe that tarry till the exigent, in treaſon, felony, or petit larceny, forfeit their goods, tho' they render themſelves to juſtice, and are acquitted; for it was a flight in law. *Wood b.* 4. *c.* 5.

But where the killing a man in his own defence is in the law no felony, there is no forfeiture, unleſs he fled; for that is a diſtinct forfeiture, altho' the party be not guilty of the fact. 1 *H. H.* 493.

It ſeems agreed, that the forfeiture, upon an attainder either of treaſon or felony, ſhall have relation to the time of the offence, for the avoiding of all ſubſequent alienations of the lands; but to the time of the conviction or flight found only, as to chattels; unleſs the party were killed in flying or reſiſting, in which caſe it is ſaid, that the forfeiture of the chattels ſhall relate to the time of the offence. 2 *Haw.* 454.

But tho' the goods of an offender be not forfeited till the conviction, or flight found by inqueſt, yet whether they may be ſeized upon the offence committed, hath been controverted; concerning which lord Hale ſaith thus:

It ſeemeth clear, that at common law, if a man had committed felony or treaſon, or tho' poſſibly he had committed none, yet if he had been indicted, the ſheriff, coroner, or other officer, could not ſeize and carry away the goods of the offender or party accuſed.

Again, he could not in that caſe have removed the goods out of the cuſtody of the offender or party accuſed, and deliver them over to the conſtables or to the *villata*, to anſwer for them.

But if the party were indicted, the ſheriff or other officer might make a ſimple ſeizure of them only to inventory and appraiſe them, and leave them to the cuſtody of the ſervants or bailiff of the party indicted, in caſe he would give ſecurity againſt their being embezzelled, or in default thereof he might deliver them to the conſtable or vill to be anſwerable for them, but yet ſo that the party accuſed and his family have ſufficient out of them for their livelihood and maintenance.

And poſſibly the ſame law was, tho' he were not indicted, but *de facto* had committed a felony, but with this difference, if he had been indicted, this kind of ſeizure might have been made, whether he committed the felony or not.

But in caſe there were no indictment, then it is at the peril of him that ſeizeth, if he committed not the felony.

And then as to the ſtatute of 1 *R.* 3. *c.* 3. it is as follows: 'No 'ſheriff or other perſon ſhall take or ſeize the goods of any perſon 'arreſted or impriſoned for ſuſpicion of felony, before he be con-'victed or attainted, or before the goods be otherwiſe forfeited; on 'pain of double value to the party grieved.'

Mr. Stamford thinks this is but in affirmance of the common law, only that it gives a penalty; but it ſeems to be ſomewhat more than ſo,

ſo, for this prohibits the ſeizure of the goods of a party impriſoned, tho' he were alſo indicted, but not yet convicted, where unqueſtionably the common law allows ſuch a ſeizure, if the party or his friends did not ſecure the forthcoming of the goods where the party was indicted.

But upon this ſtatute theſe things are conſiderable: 1. As to perſons at large, it ſeems to me (ſays he) that if they flie not, there can be no ſeizure at all made, whether they are indicted or not; for the ſtatute did not intend a greater privilege to a party impriſoned, than to him that is at large. 2. That if he be at large, and *fly* for it, yet his goods cannot be ſeized and removed, whether he be indicted or not indicted. 3. That if he be indicted, and at large, yet the goods cannot be removed, but only viewed, appraiſed, and inventoried, in the houſe or place where they lie:

And yet I know not how it comes to paſs, ſays he, the uſe of ſeizing the goods of perſons accuſed of felony, tho' impriſoned or not impriſoned, hath ſo far obtained notwithſtanding this ſtatute, that it paſſeth for law and common practice, as well by conſtables, ſheriffs, and other officers, as by lords of franchiſes, that there is nothing more uſual.

Upon the whole, he ſays, that the opinion of my Lord Coke, in his 3 *Inſt.* 228. hath truly ſtated the law, at leaſt as it ſtands upon the ſtatute of 1 *R.* 3. *viz.* 1. That *before* the indictment, the goods of any perſon cannot be ſearched, inventoried, or in any ſort ſeized. 2. That *after* the indictment, they cannot be ſeized and removed, or taken away, before conviction or attainder:

But then it may be ſaid, to what purpoſe may they be ſearched and inventoried after indictment, if they may not be removed, but are equally liable to embezzelling as before;

I think (he ſays) he is not bound to find ſureties, neither hath the officer at this day any power to remove them in default of ſureties, and commit them to the vill, but only to inventory them, and leave them where he found them (unleſs in caſe of a ſecond *capias* on the 25 *Ed.* 3 *c.* 14.) for the priſoner or the party indicted may ſell them *bona fide*; and if he may do ſo, the vendee may take them, and the *villata* cannot refuſe the delivering of them to the vendee, though the goods had been delivered to them:

But there is this advantage by the viewing and appraiſing, that thereby the king is aſcertained what the goods are, and may purſue them that take or embezzle them, by information (if the party happen to be convicted) and try the property with them, whether they are really ſold, or ſold only fraudulently without valuable conſideration, to prevent the forfeiture. 1 *H. H.* 363, 4, 5, 6, 7.

II. Of loſs of dower.

Albeit a perſon ſhall be attainted of felony, yet his wife ſhall not forfeit her dower. 1 *Ed.* 6. *c.* 12. *f.* 17.

But on his attainder of any treaſon, ſhe ſhall forfeit her dower. 5 & 6 *Ed.* 6. 11. *f.* 13. But in ſome kinds of treaſon (particularly with regard to the coin) there is a ſpecial ſaving of the wife's dower by ſtatute.

FORGERY.

FORGERY is an offence at common law, and an offence alſo by ſtatute.

Forgery at the common law, is an offence in falſly and fraudulently making or altering any manner of record, or any other authentic matter of a public nature; as a pariſh regiſter, or any deed, will, privy ſeal, certificate of holy orders, protection of a parliament man, or the like. 1 *Haw.* 182, 184.

As for writings of an inferior nature, as private letters and ſuch like, the counterfeiting of them is not properly forgery; therefore in ſome caſes it may be more ſafe to proſecute ſuch offenders for a miſdemeanor, as cheats. For by reaſon of the uncertainty of opinions, concerning proper forgeries at common law, indictments are generally brought upon ſome of the following ſtatutes, and very few at common law. But if the indictment is at common law, and the offender is convicted, he may be pilloried, fined and impriſoned. *Wood. b. 3. c. 3.* 1 *Haw.* 184.

But as to the power of juſtices of the peace in this matter, Mr. *Hawkins* ſays, it hath been ſettled of late, that they have no juriſdiction over forgery at the common law; the principal reaſon of which reſolution (he ſays) as he apprehended, was, that inaſmuch as the chief end of the inſtitution of the office of theſe juſtices was for the preſervation of the peace againſt perſonal wrongs and open violence, and the word *treſpaſs* in its moſt proper and natural ſenſe, is taken for ſuch kind of injuries, it ſhall be underſtood in that ſenſe only in the commiſſion, or at the moſt to extend to ſuch other offences only as have a direct and immediate tendency to cauſe ſuch breaches of the peace, as libels, and ſuch like, which on this account have been adjudged indictable before juſtices of the peace. 2 *Haw.* 40. 1 *Salk.* 406.

But Mr. *Barlow* ſays nevertheleſs, that it ſeemeth clear, that a juſtice of the peace may take an information thereof, bind over the informers, examine the offender, certify his examination to the proper judges, and commit him to priſon in order to abide his trial. *Barl.* 244.

The ſtatutes that makes forgery an offence are theſe that follow:

The firſt is that famous ſtatute of the 5 *El. c.* 14. which by an example worthy to be imitated, doth (in order to prevent confuſion) repeal all former ſtatutes againſt forgery. By this it is enacted, that 'if any perſon upon his own head and imagination, or by falſe 'conſpiracy and fraud with others, ſhall wittingly ſubtilly, and falſly 'forge or make, or ſubtilly cauſe, or willingly aſſent to be forged 'or made, any falſe deed, charter, or writing ſealed, court roll, 'or the will of any perſon in writing, to the intent that the eſtate 'of freehold, or inheritance of any perſon, of any lands, tene'ments, or hereditaments, freehold or copyhold, or the right, ti-

tle,

'tle, or intereſt of any perſon in the ſame may be moleſted, troubled, defeated, recovered, or charged; or ſhall pronounce, publiſh, or ſhew forth in evidence the ſame as true, knowing the ſame to be falſe or forged, to the intent as above (except lawyers or attornies, for their clients, not being privy to the forgery) and ſhall be thereof convicted, either upon action at the ſuit of the party, or otherwiſe according to the order and due courſe of the laws of this realm, he ſhall pay to the party double coſts and damages, and be ſet in the pillory, and have both his ears cut off, and his noſtrils ſlit and ſeared with a hot iron, and ſhall forfeit the profits of his lands for life and be impriſoned alſo during life.' *ſ.* 2.

And all juſtices of oyer and terminer, and juſtices of aſſize, ſhall have power to inquire of, hear and determine all offences in this act. *ſ.* 10.

Forge or make] Making a ſecond deed, or antedating it, with intent to make it take place of a former deed, is forgery within this ſtatute. 3 *Inſt.* 167.

Or ſubtilly cauſe or willingly aſſent] To *cauſe*, is to procure or counſel one to forge; to *aſſent*, is to give his aſſent or agreement afterwards, to the procurement or counſel of another; to *conſent*, is to agree at the time of the procurement or counſel, and ſuch is in law a procurer. 3 *Inſt.* 169.

But lord *Hale* ſays, that an *aſſent* after the fact is committed, makes not the party aſſenting guilty or principal in the forging;—but it muſt be a precedent or concomitant aſſent. 1 *H. H.* 684.

Falſe deed, charter or writing] It ſeems to be no way material, whether a forged inſtrument be made in ſuch a manner, that if it were in truth ſuch as it is counterfeited for, it would be of validity or not; and upon this ground it hath been adjudged, that the forgery of a protection in the name of a member of parliament, who in truth at the time was not a member, is as much a crime as if he were. 1 *Haw.* 184.

Writing ſealed] Theſe are large words; and the making of a falſe cuſtomary of a manor in writing under ſeal, containing divers falſe cuſtoms, to the diſheriſon of the lord of the manor, and that the ſame had been allowed and permitted by the lord of the manor, which was alſo falſe, was reſolved to be within theſe words *a falſe writing ſealed.* 3 *Inſt.* 171.

Sealed] It is required that the deed, charter, or writing muſt be ſealed, that is have ſome impreſſion upon the wax; for wax, without an impreſſion is not a ſeal. 3 *Inſt.* 169.

Court roll, or will] Here are two writings which need not be ſealed, becauſe they may take effect without any ſeal, for that they be no deeds and no writing can have the force of a deed, without a ſeal. 3 *Inſt.* 170.

Will] If any perſon which writeth the will of a ſick man, inſerteth a clauſe therein concerning the deviſe of land, without any direction of the deviſor, this is forgery, although he did not forge the whole will. 3 *Inſt.* 170.

To

To the intent that the ſtate of freehold or inheritance of any perſon, of any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or intereſt of any perſon in the ſame may be moleſted, troubled, defeated, recovered, or charged] *E.* 4 *G.* 2. *K.* and *Japhet Crooke.* The defendant was convicted on this ſtatute for forging a leaſe and releaſe. And the indictment ſets forth, that *Garbut* and his wife were ſeized in fee of certain meſſuages, lands, and tenements called *Jawick* in the pariſh of *Clackton* in *Eſſex*, and that the defendant intending to moleſt them and their intereſt in the premiſes, forged a leaſe and releaſe as from *Garbut*, and his wife, whereby they are ſuppoſed for a valuable conſideration, to convey to him 'all that 'park called *Jawick* park in the pariſh of *Clackton* in *Eſſex*, containing eight miles in circumference, with all the deer, woods, &c. 'thereto belonging'. It was moved in arreſt of judgment, that the premiſes ſuppoſed to be conveyed, were ſo materially different from thoſe which were really the eſtate of *Garbut* and his wife, which was houſes, lands and tenements; that it was impoſſible this conveyance ever could moleſt or diſturb them: if it was a true deed, it could not paſs their lands at law, for want of a proper deſcription: and though where lands are improperly deſcribed, a court of equity will oblige the vendor to convey them by proper words, yet that is only where there is a previous contract for a ſale, and they do it as carrying that contract into execution. The court for ſeveral terms inclined ſtrongly with the objection: but this term *Raymond* Ch. J. declared that they were all of opinion to over-rule it; for by the words of the act, it is not neceſſary that there ſhould be charge or poſſibility of a charge; it is ſufficient that it be done with that intent, and the jury have found that it was done with intent to moleſt *Garbut* and his wife in the poſſeſſion of their lands. Accordingly judgment was given for the king, and the defendant had ſentence to undergo the puniſhment appointed by the act for forging a deed, and the ſame was executed upon him at Charing-croſs. *Str.* 901.

Pronounce or publiſh] That is, when one by words, or writing pronounceth or publiſheth the deed to any other as true. 3 *Inſt.* 171.

Knowing the ſame to be forged] This knowledge may come by two means; either of his own knowledge, or of the relation of another; for if another tell him it is forged, and he publiſh it afterwards as true, and it prove to be forged indeed, he is in danger of this ſtatute. 3 *Inſt.* 171. 1 *Haw.* 187.

But lord *Hale* ſays, that tho' ſuch a relation may be an evidence of fact to prove his knowledge, yet it is not concluſive; for perchance there might be circumſtances of fact, that might make the perſon relating it, or his relation, not credible: So that the *knowing* muſt be upon the whole matter left to the jury, upon the circumſtances of the caſe. 1 *H. H.* 685.

Juſtices of oyer and terminer] Albeit juſtices of the peace, by their commiſſion, have power to hear and determine felonies and treſpaſſes, yet they are not included under the name of juſtices of oyer and terminer;

terminer; for justices of oyer and terminer are known by one distinct name, and justices of the peace by another. 3 *Inst.* 103.

And by the same statute it is further enacted, that 'if any person, upon his own head or imagination, or by false conspiration or 'fraud with any other, shall wittingly, subtilly, and falsly forge or 'make, or cause or assent to be made and forged any false charter, 'deed or writing, to the intent that any person may have or claim 'any estate or interest for term of years in any manors, lands, tene-'ments, or hereditaments, not being copyhold, or any annuity of 'fee simple, fee tail, or for term of life, lives, or years; or any 'obligation, or bill obligatory, or any acquittance, release, or other 'discharge of any debt, account, action, suit, demand, or other 'thing personal; or shall pronounce, publish, or give the same in 'evidence as true, knowing the same to be false and forged, he 'shall, on conviction in like manner, pay the party double costs and 'damages, and be set on the pillory, and have one of his ears cut 'off, and be imprisoned for a year'. *s.* 3.

Obligation or bill obligatory] The forgery of a deed of gift of mere personal chattels, is not within this statute. 1 *Haw.* 186.

And 'if after verdict, the plaintiff shall release the judgment or 'execution, or suffer a discontinuance, it shall only discharge his own 'costs and damages, and not the other punishments'. *s.* 6.

And by the same statute it is further enacted, that 'if any person 'shall after conviction offend again in any of the ways abovemen-'tioned, he shall be guilty of felony without benefit of clergy.' 7, 8.

And by the 7 *G.* 2. *c.* 22. it is further enacted, by way of addition to the foregoing, that 'if any person shall falsly make, alter, 'forge, or counterfeit, or willingly act or assist in the false making, 'altering, forging, or counterfeiting any acceptance of any bill of 'exchange, or the number or principal sum of any accountable re-'cept for any note, bill, or other security for payment of money, 'or any warrant or order for payment of money, or delivery of 'goods, with intent to defraud any person; or shall utter or pub-'lish the same as true, with intent to defraud any person, knowing 'the same to be false;—he shall be guilty of felony without benefit 'of clergy: and this, without any saving of the corruption of blood 'or disherison of heirs'.

Forgery is excepted out of the act of general pardon; 20 *G.* 2.

GAMING.

MR. *Dalton* says, that playing at cards and dice, and the like are not prohibited by the common law; neither are they, *malum in se*, of their own nature, but only prohibited by statute. *Dalt. c.* 46.

But

But it hath been ſaid, that all common gaming houſes are nuiſances in the eye of the law, as being great temptations to idleneſs, and apt to draw together numbers of diſorderly perſons. 1 *Haw.* 198.

By the ſtatute of the 33 *H.* 8. *c.* 9. No perſon ſhall for his gain, lucre, or living, keep any common houſe, alley, or the place of bowling, coyting, cloyſh cayls, half bowl, tennis, dicing table, or carding, or any unlawful game; on pain of 40s. a day. *ſ.* 11.

GAOL and GAOLER.

I. Building and repairing of gaols.
II. Who ſhall have the keeping of gaols.
III. Gaoler ſhall receive criminals.
IV. How they ſhall be maintained.
V. How they ſhall be reſtrained and kept.
VI. How they ſhall be delivered.
VII. Of gaolers permitting eſcapes.
VIII. Concerning debtors.

I. Building and repairing of gaols.

[THE building and repairing of gaols in the United States, are generally done purſuant to the acts of the ſeveral legiſlatures made for that purpoſe.]

II. Who ſhall have the keeping of gaols.

The gaol itſelf is the peoples', but the keeping thereof is incident to the office of the ſheriff, and inſeparable from it; except ſuch gaols whereof any perſons have the keeping by inheritance or ſucceſſion. 14 *Ed.* 3. *ſt.* 1. *c.* 20. 19 *H.* 7. *c.* 10. 2 *Inſt.* 589.

And therefore the ſheriffs ſhall put in ſuch keepers for whom they will anſwer. 14 *Ed.* 3. *ſt.* 1. *c.* 10.

And a gaoler in fact, is as much puniſhable for a miſdemeanor in his office, as if he were a rightful gaoler. 2 *Haw.* 134.

III. Gaoler ſhall receive criminals.

All felons ſhall be impriſoned in the common gaol, and not elſewhere. 5 *H.* 4. *c.* 10.

And if the gaoler refuſes to receive a felon, or take any thing for receiving him, he ſhall be puniſhed for the ſame by the juſtices of gaol delivery. 4 *Ed.* 3. *c.* 10. *Dalt. c.* 170.

IV. How they ſhall be maintained.

The gaoler cannot refuſe the priſoner victuals, for he ought not to ſuffer him to die for want of ſuſtenance, 1 *Inſt.* 295.

Which

Which shall be provided for, by a sum to be paid out of the general county rate. 14 *El. c.* 5.

V. How they shall be restrained and kept.

If any person shall be committed to any prison, for any criminal or supposed criminal offence, he shall not be removed from thence, unless it be by *habeas corpus* or some other legal writ; or where he is removed from one prison or place to another, within the same county, in order to his trial or discharge; or in case of sudden fire or infection, or other necessity: on pain that the person signing any warrant for such removal, and the person executing the same, shall forfeit for the first offence 100*l.* and for the second 200*l.* to the party grieved. 31 *C.* 2. *c.* 2. *s.* 9.

But on emergent occasions, as in case of infectious diseases, the sheriff or gaoler, with the advice and consent of three or more justices (1 Q.) may, if they shall find it needful, provide other safe places (with the owners consent) for the removal of sick or other persons out of the usual gaol. 19 *C.* 2. *c.* 4. *s.* 2.

It seemeth generally in all cases where a man is committed to prison, especially if it be for felony, or upon an execution, or but for a trespass or other offence, every gaolor ought to keep such prisoner in safe and close custody; safe, that he cannot escape: close, without conference with others or intelligence of things abroad. *Dalt. c.* 170.

And therefore if the gaoler shall license his prisoner to go abroad for a time, and then to come again, or to go abroad with a keeper tho' he come again, yet these are escapes. *Dalt. c.* 170.

And hereupon it is lawful for the gaoler to hamper a felon with irons to prevent his escape. 1 *H. H.* 601. *Dalt. c.* 170.

But the learned editor of *Hale's History* observes, that this liberty can only be intended, where the officer has just reason to fear an escape; as where the prisoner is unruly, or makes any attempt to that purpose; but otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbidden to put their prisoners to any pain or torment.—And lord Coke, 2 *Inst.* 381, is express, that by the common law it might not be done. 1 *H. H.* 601.

And if the goaler keep the prisoner more strictly than he ought of right, whereof the prisoner dieth, this is felony in the gaoler by the common law; and this is the cause, that if a prisoner die in gaol, the coroner ought to sit upon him. 3 *Inst.* 91.

But if a criminal, endeavouring to break the goal, assault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw.* 71. 1 *H. H.* 496.

VI. How

VI. How they shall be delivered.

By the 3 *H.* 7. *c.* 3. Those that have the custody of gaols, must certify the names of all prisoners, to the justices of gaol delivery, in order to their trial or discharge; on pain of 5l.

And if a gaoler detains a prisoner in gaol after his acquittal, unless it be for his fees (not for meat, drink or lodging) this is an unlawful imprisonment. 2 *Inst.* 52.

And a gaoler must not disobey a writ of *habeas corpus*, for want of his fees; but the court will not turn the prisoner over, till the gaoler be paid his fees. 2 *Haw.* 151.

VII. Of gaolers permitting escapes.

If the gaoler voluntarily suffer a prisoner to escape, he shall be punished in the same manner as the prisoner ought to have been who escaped: and if he negligently permit him to escape, he shall be punished by fine and imprisonment. And the sheriff shall answer for him. 2 *Haw.* 134, 5. 6.

But the principal gaoler is only fineable for a voluntary escape of a felon suffered by his deputy; for no one shall suffer capitally for any crime, but he who is actually guilty of it. 2 *Haw.* 135.

But for a negligent escape suffered by his bailiff, the sheriff is as much liable to answer, as if he had actually suffered it himself; and the court may charge either the sheriff or bailiff for it: and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 *Haw.* 135.

VIII. Concerning debtors.

The county gaol is the prison for malefactors, but prisoners for debt, where escape lies against the sheriff for their escaping, may be kept in what place the sheriff pleases. L. *Raym.* 146.

But he shall not put, keep, or lodge prisoners for debt and felons together in one room or chamber; but they shall be put, kept, and lodged separate and apart from one another in distinct rooms; on pain of forfeiting his office, and treble damages to the party grieved. 22 & 23 *C.* 2. *c.* 20 *s.* 13.

But it is said, that a gaoler is no way punishable for keeping a debtor in irons. 2 *Haw.* 152. But it seemeth that this must at least be understood with the qualification above mentioned.

Good Behaviour. See SURETY.

HIGHWAYS.

MOST of the books are remarkably confused under this title; occasioned by a multiplicity of statutes standing unrepealed, and yet altered perhaps five or six times, or oftner, by succeeding statutes:

ſtatutes: [And it does not appear that any of the ſtatutes about highways and bridges are properly extended to *America*, as every legiſlature in the ſeveral ſtates, have paſſed laws for laying out and regulating highways in their reſpective governments; nevertheleſs it will be neceſſary here to conſider,]

I. What is a highway.

There are three kinds of ways; 1. A foot way. 2. A foot and horſe way, which is alſo a pack or drift way. 3. A foot, horſe and cart way. 1 *Inſt.* 56.

It ſeemeth that any one of the ſaid ways, which is common to all the people, whether it leads directly to a market town, or only from town to town, and does not terminate there, but is alſo a thoroughfare to other towns, may properly be called a highway. And therefore the diſtinction which is taken in ſome books concerning this matter, ſeems to be very reaſonable; that every way from town to town may be called a highway, becauſe it is common to all citizens; and conſequently that a nuiſance therein is a common nuiſance, and puniſhable by indictment: but that a way to a pariſh church, or to the common fields of a town, or to a private houſe, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of ſuch pariſh houſe or village only, may be called a private way, but not a highway, becauſe it belongeth not to all the citizens, but only to ſome particular perſons, each of which, as it ſeems, may have an action on the caſe for a nuiſance therein. 1 *Haw.* 201.

It hath been holden, that if there be an highway in an open field, and the people have uſed it time out of mind, when the ways are bad, to go by outlets on the land adjoining, ſuch outlets are parcel of the way; for the citizens ought to have a good paſſage, and the good paſſage is the way, and not only the beaten track; from whence it follows, that if ſuch outlets be ſown with corn, and the beaten track be foundrous, the citizens may juſtify going upon the corn. 1 *Haw.* 201.

In books of the beſt authority, a river common to all men is called a highway. 1 *Haw.* 201.

II. Of annoyances in general.

There is no doubt, but that all injuries whatſoever to any highway, as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act, which will render it leſs commodious to the people, are public nuiſances at common law. 1 *Haw.* 212.

And by the common law any one may abate a nuiſance, to a highway, and remove the materials, but not convert them to his own uſe, 1 *Haw.* 214.

Alſo it ſeemeth, that an heir may be indicted for continuing an incroachment, or other nuiſance to a highway, begun by his anceſtor: becauſe ſuch a continuance thereof amounts in the judgment of law to a nuiſance. 2 *Haw.* 214.

A gate erected in a highway, is a common nuiſance, becauſe it interrupts the people in that free and open paſſage which they before enjoyed, and were lawfully intitled to; but where a gate has continued time out of mind, it ſhall be intended that it was ſet up at firſt by conſent, on a compoſition with the owner of the land on the laying out the road, in which caſe the people had never any right to a freer paſſage than what they ſtill enjoy. 1 *Haw.* 199.

III. Preſentment of a juſtice on his own view.

By the 5 *El. c.* 13. Every juſtice of the peace ſhall have authority on his own proper knowledge, in the open general ſeſſions, to make preſentment of any highway not well and ſufficiently repaired, or of any other default contrary to the ſtatute of the 2 & 3 *P. & M.* And every ſuch preſentment made by a juſtice upon his own knowledge ſhall be as good, and of the ſame force, ſtrength and effect in the law, as if the ſame had been preſented, found, and adjudged by the oath of 12 men: And for every ſuch default ſo preſented, the juſtices ſhall immediately at the ſaid general ſeſſions, have authority to aſſeſs ſuch fines as to them ſhall be thought meet: Saving every perſon that ſhall be touched by any ſuch preſentment, to have his lawful traverſe to the ſame preſentment, as they may have upon any indictment of treſpaſs or forcible entry. *ſ.* 9.

Hereupon it hath been obſerved by Mr. *Dalton*, and others, that the juſtices at the ſaid ſeſſions may aſſeſs the fine upon ſuch offenders, and that in the abſence of the party, without calling him to anſwer by any proceſs: Which opinion ſeeming contrary to natural juſtice, and to the privilege of an *Engliſhman* as eſtabliſhed by the great charter, perhaps hath not been ſufficiently weighed by all the authors who have adopted it; and there ſeems to be the more ground for this ſuſpicion, in that moſt of them do quote Mr. *Crompton* for this opinion, one after another, in a wrong page; and in fact Mr. *Crompton* ſaith no ſuch thing, but rather ſeems to incline to the contrary opinion; his words are theſe——A preſentment at the ſeſſions by a juſtice of the peace, upon his own knowledge, of ſuch a highway not repaired, is as a preſentment of 12 men, upon which the juſtices may aſſeſs a fine by 5 *El. c.* 13. and 3 *P. & M. c.* 8. but the party may have a traverſe to the preſentment by the ſaid ſtatute of 5 *El. Cromp.* 110.

And Mr. *Hawkins*, obſerving upon this opinion, ſaith thus: It hath been holden, in the expoſition of this clauſe, that the party againſt whom ſuch preſentment ſhall be made, cannot take any traverſe to the want of repair of ſuch highway; but it is agreed, that he may plead that ſome other perſon ought to repair the ſame, and traverſe

traverſe his own obligation to do it. Neither can I ſee upon what reaſon the former opinion is grounded, that he cannot traverſe the want of repair of ſuch highway; for ſince the ſtatute expreſsly ſaves to every perſon who ſhall be touched by any ſuch preſentment, his lawful traverſe to the ſame, as he might have to an indictment of treſpaſs or forcible entry; and ſince it ſeems clear, that every defendant to any ſuch indictment (*viz.* of treſpaſs or forcible entry) may traverſe the whole matter alledged againſt him; why may he not as well have the ſame benefit in the preſent caſe? And tho' the record of a juſtice of the peace, acting by force of any ſtatute, as a judge be not traverſable, yet it ſeems hard by ſuch a general rule, to make any record not traverſable, which by the expreſs words of the ſtatute which authorizes the making of it is allowed to be traverſable. 1 *Haw.* 217.

To which may be added, that the ſtatute doth not ſay, that ſuch preſentment ſhall be of like force as if found by the oaths of both juries (that is to ſay, both of the grand and traverſe jury) but only that it ſhall be of the like force as if it had been preſented, found and adjudged, by the oath of 12 men; which can only intend, that it ſhall be of equal force with the preſentment of a grand jury.

So that the ſenſe of the ſtatute perhaps may be no more than this; that if the party is preſent in court, and ſubmits to the preſentment, the juſtices may immediately aſſeſs a fine: but he may traverſe the preſentment if he will; and if upon the traverſe he ſhall be acquitted, then there can be no foundation for fining him. But if he is abſent, it is reaſonable that he be firſt ſummoned to anſwer for himſelf; and if he ſhall afterwards be convicted either by confeſſion, or by verdict, then will be the time to ſet the fine. Otherwiſe the aſſeſſing of a fine, in this and the like caſes, ſeemeth to be premature, beginning where the court ſhould end; being in effect the giving of judgment before they have heard the parties; and it is poſſible the defendant may be acquitted, and then the fining of him is ridiculous.——Beſides, that the court cannot ſo well judge beforehand of the quantum of the fine, which ought to be proportioned according to the demerits of the offence; of which they can by no means judge, until the matter hath come before them in a legal courſe of proceeding.

IV. Certiorari.

By the 22 *C.* 2. *c.* 12. it is provided that no preſentment or indictment for the defect of repairs of high ways, ſhall be removed by certiorari or otherwiſe, till after traverſe and judgment. *ſ.* 4.

And by the ſtatute of the 3 *W. c.* 12. No preſentment, indictment, or order made upon that act, ſhall be removed at all by certiorari, into any other court. *ſ.* 23.

But by the 5 *W. c.* 11. If the right or title to repair come in queſtion, a certiorari (upon affidavit made of the truth thereof) may

may be granted to remove the ſame into the king's bench; provided that the party proſecuting the certiorari, ſhall (before the allowance thereof) find two manucaptors, who ſhall enter into recognizance of 20*l.* before a juſtice of the peace, that he ſhall at his own coſts and charges procure the iſſue to be tried at the next aſſizes, as in the caſe of other certioraries. *ſ.* 6.

And it hath been reſolved, that if the quarter ſeſſions, under pretence of the juriſdiction given them by theſe ſtatutes, take upon them to do a thing manifeſtly exceeding their authority, as to make an order on ſurveyors to make up their accounts before a ſpecial ſeſſions, their proceedings may be removed by certiorari into the king's bench, and there quaſhed; for the quarter ſeſſions have no manner of power given them, to intermeddle originally with ſuch accounts, but only by way of appeal. 1 *Haw.* 218.

Indictment for incroaching upon a highway, by building thereupon.

New-York, Queen's County. THE jurors for the people of the State of New-York, upon their oath preſent, that A. O. late of ——— carpenter, the ——— day of ——— in the ——— year ——— with force and arms, at ——— in and upon a common highway, in a certain place commonly called ——— there leading from ——— to ——— by a certain building there, containing in length ——— feet, and in breadth ——— feet, by him the ſaid A. O. erected and built, hath unlawfully and unjuſtly incroached, and doth yet incroach, and the building aforeſaid, ſo as is aforeſaid erected and built by him the ſaid A. O. from the aforeſaid ——— day of ——— in the year aforeſaid, unto the day of exhibiting this information, at ——— aforeſaid, in the county aforeſaid, with force and arms, unlawfully and unjuſtly hath continued and doth yet continue, by reaſon whereof the common highway aforeſaid hath become and is greatly ſtraitned, ſo that the people of the ſtate of New-York upon and through the ſaid common highway aforeſaid, with their horſes, carts, and carriages cannot go, paſs, ride, and labour as they ought and were wont to do, to the great and common nuiſance of all the people of the ſaid ſtate, and through the ſaid common highway going, paſſing, riding, and labouring, and againſt the peace of the people of the ſtate of New-York. *Trem.* 196.

Indictment for laying timber or other obſtructions in the highway.

New-York, Orange-County. THE jurors for the people of the ſtate of New-York, upon their oath preſent, that A. O. late of ——— in the county aforeſaid, yeoman, on the ——— day of ——— in the ——— year of the independence of ——— and on divers other days and times, as well before as afterwards, with force

force and arms, at———in the said county, in and upon the common highway there, leading from———unto the town of ———divers great pieces of timber put and placed and caused to be put and placed, and the same great pieces of timber so as aforesaid put and placed, from the aforesaid———day of———in the ———year aforesaid, until the day of exhibiting this information, in and upon the common highway aforesaid, to be, lie and remain, hath permitted, and doth still permit, to the grievous and common nuisance of all the people of the said state, upon and thro' the common highway aforesaid going, passing, riding and travelling and against the peace of the people of the said state, and their dignity. *Trem.* 197.

Or——great quantity of dung, and other filth, by reason whereof, divers hurtful and unwholesome smells from the said dung and other filth did then and there arise, and thereby the air there became, was, and is corrupted and infected—

Or——cart loads of rubbish—by reason whereof the said highway for the whole time aforesaid was straitned and obstructed, so that the liege people of the state of New-York, could not so freely pass and repass about their lawful business, through the said common highway there, as they ought and have been accustomed——

HOMICIDE.

HOMICIDE in law signifies the killing of a man by a man.— 1 *Haw.* 66.

And it includes in it, not only petit treason, concerning which see title *TREASON*; but also the several offences which are treated in the following sections.

There is also another kind of untimely death of a man, not properly homicide; when he is killed by a horse, a cart, a tree, or the like, and not by a man: which is called Casual death: for which see title *DEODAND.*

I. Justifiable homicide.
II. Homicide by misadventure.
III. Homicide by self-defence.
IV. Manslaughter.
V. Murder.
VI. Self murder.

I. Justifiable homicide.

To make homicide justifiable, it must be owing to some unavoidable necessity, to which the person who kills another must be reduced, without any manner of fault in himself. 1 *Haw.* 69.

And there must be no malice coloured under pretence of necessity;

ty; for wherever a perſon who kills another, acts in truth upon malice, and takes occaſion from the appearance of neceſſity to execute his own private revenge, he is guilty of murder. 1 *Haw.* 69.

If any evil diſpoſed perſon ſhall attempt feloniouſly to rob or murder any perſon in any dwelling houſe or highway, or feloniouſly attempt to break any dwelling houſe in the night time, and ſhall happen in ſuch felonious intent to be ſlain: the ſlayer ſhall be diſcharged, and ſhall forfeit no lands nor goods. 24 *H.* 8. *c.* 5.

If treſpaſſers in a foreſt, chaſe, park, or warren, or any incloſed ground wherein deer are kept, will not render themſelves to the keepers, upon a hue and cry made to ſtand to the king's peace, but fly from, or defend themſelves againſt them, they may be ſlain by them. 1 *Haw.* 71.

If rioters, or forcible enterers or detainers, ſtand in oppoſition to the juſtices lawful warrant, and any of them is ſlain, it is no felony. *Hale's Pl.* 37.

If a man come to burn my houſe, and I ſhoot out of my houſe, or iſſue out of my houſe, and kill him, it is no felony. *id.* 39.

If a woman kill him that aſſaulteth to raviſh her, it is no felony. *id.* 39.

If a perſon having actually committed a felony, will not ſuffer himſelf to be arreſted, but ſtand on his own defence, or fly, ſo that he cannot poſſibly be apprehended alive by thoſe who purſue him, whether private perſons, or public officers, with or without a warrant from a magiſtrate; he may be lawfully ſlain by them. 1 *Haw.* 70.

So if a felony hath actually been committed, and an officer or miniſter of juſtice, having lawful warrant ſo to do, arreſt an innocent perſon, and ſuch perſon aſſault the officer or miniſter of juſtice; the officer is not bound by law to give back, but to carry him away; and if in execution of his office, he cannot otherwiſe avoid it, but in ſtriving kill him, it is no felony. And in that caſe, the officer or miniſter of juſtice ſhall forfeit nothing; but the party ſo aſſaulting, or offering to fly away, and is killed, ſhall forfeit his goods. 3 *Inſt.* 56.

And if a perſon arreſted for felony, break away from his conductors to gaol, they may kill him, if they cannot otherwiſe take him. But in this caſe likewiſe, there muſt have been a felony actually committed. *Hale's Pl.* 36, 37.

Alſo if a criminal endeavouring to break the gaol, aſſault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw.* 71.

In civil cauſes; Altho' the ſheriff cannot kill a man who flies from the execution of a civil proceſs; yet if he reſiſt the arreſt, the ſheriff or his officer need not give back, but may kill the aſſailant. *Hale's Pl.* 37.

So if in the arreſt and ſtriving together, the officer kill him, it is no felony. *Hale's Pl.* 37.

In

In all these cases the party upon arraignment having pleaded not guilty, the special matter must be found; whereupon the party shall be dismissed, without any forfeiture, or pardon purchased. *Hale's Pl.* 38.

II. Homicide by misadventure.

I have purposely avoided the word *chancemedly* in this place, because authors do not seem to be agreed whether it is to be applied to homicide *by misadventure*, or to *manslaughter*. Ld. *Coke* and Mr. *Hawkins* seem to understand it of *manslaughter*; Lord *Hale*, and others of homicide *by misadventure*. The original meaning of the word seems to favour the former opinion, as it signifies a sudden or casual meddling or contention; whereas homicide *by misadventure* supposeth no previous meddling or falling out. But the same author sometimes, in different places, applies it to both of them promiscuously.

Homicide by misadventure is, where a man is doing a lawful act, without intent of hurt to another, and death casually ensues. *Hale's Pl.* 51.

As where a labourer being at work with a hatchet, the head flies off, and kills one who stands by. 1 *Haw.* 73.

Or where a third person whips a horse, on which a man is riding, whereupon he springs out, and runs over a child, and kills him; in which case the rider is guilty of homicide by misadventure, and he who gave the blow of manslaughter. 1 *Haw.* 73.

But if a person, riding in the street, whip his horse to put him into speed, and run over a child and kill him, it is homicide and not by misadventure; and if he ride so, in a press of people, with intent to do hurt, and the horse killeth another, it is murder in the rider. 1 *H. H.* 476.

If a person drives his cart carelessly, and it runs over a child in the street, if he have seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run cross the way, and the cart ran over the child before it was possible for the carter to make a stop, it is by misadventure. 1 *H. H.* 476.

It is said before, that this homicide is only when it happeneth upon a man's doing a lawful act; for if the act be unlawful, it is murder. As if a person meaning to steal a deer, in another man's park, shooteth at the deer, and by the glance of the arrow killeth a boy, that is hidden in a bush; this is murder, for that the act was unlawful altho' he had no intent to hurt the boy, nor knew of him. But if the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure and no felony. 3 *Inst.* 56.

So if any one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is by misadventure; for it was not unlawful to shoot at the wild

wild fowl: But if he had ſhot at a cock or a hen, or any tame fowl of another man's, and the arrow by miſchance had killed a man, this had been murder: for the act was unlawful. 3 *Inſt.* 56.

Alſo, if there be an evil intent, it is murder. Thus, if a man, knowing that many people are in the ſtreet, throw a ſtone over a wall intending only to fright them, or to give them a little hurt, and thereupon one is killed, this is murder: for he had an ill intent, tho' that intent extended not to death, and tho' he knew not the party ſlain. 3 *Inſt.* 57.

And it is a general rule, in caſe of all felonies, that wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Haw* 74.

But in all the caſes above, if it doth only hurt a man, by ſuch an accident, it is nevertheleſs a treſpaſs: and the perſon hurt ſhall recover his damages; for tho' the chance excuſe from felony, yet it excuſeth not from treſpaſs. 1 *H. H.* 472.

If a perſon eſcape that hath killed another by miſadventure, the town ſhall be amerced. 2 *Inſt.* 149.

This homicide is not felony, becauſe it is not accompanied with a felonious intent, which is neceſſary in every felony. 1 *Haw.* 75.

But yet a perſon guilty thereof is not bailable by juſtices of the peace, but muſt be committed to the aſſizes. 1 *Haw.* 75.

But if he is taken only on a ſlight ſuſpicion, the juſtices of the peace may bail him. 2 *Haw.* 105.

Although this homicide is not properly a man's crime, but his misfortune, yet becauſe the king hath loſt his ſubject, and in reſpect of the great favour the law hath to the life of a man, and to the end that men ſhould uſe all care, diligence, and circumſpection in all they do, that no hurt ſhall come of their actions, a perſon convicted hereof ſhall forfeit his goods, and ſhall not preſently be diſcharged of his impriſonment, but bailed, that he may ſue out his pardon, which he ſhall have out of the chancery of courſe. 1 *H. H.* 477, 492. 1 *Haw.* 76.

III. Homicide by ſelf defence

Homicide in a man's own defence ſeems to be, where one who hath no other poſſible means of preſerving his life from one who combats with him on a ſudden quarrel, kills the perſon by whom he is reduced to ſuch an inevitable neceſſity. 1 *Haw.* 75.

And not only he, who upon an aſſault retreats to a wall, or ſome ſuch ſtrait, beyond which he can go no farther, before he kills the other, is judged by law to act upon unavoidable neceſſity; but alſo he, who being aſſaulted in ſuch a manner, and in ſuch a place, that he cannot go back without manifeſtly indangering his life, kills the other without retreating at all. 1 *Haw.* 75.

And notwithſtanding a perſon who retreats from an aſſault to the wall, give the other wounds in his retreat, yet if he give him no mortal

mortal one till he get thither, and then kill him, he is guilty of homicide *se defendendo* only. 1 *Haw.* 75.

But if the mortal wound was firſt given, then it is manſlaughter. *Hales Pl.* 42.

And an officer who kills one that reſiſts him in the execution of his office, and even a private perſon that kills one who felonioufly aſſaults him in the highway, may juſtify the fact, without ever giving back at all. 1 *Haw.* 75.

But if a perſon upon malice *prepenſe* ſtrike another, and then fly to the wall, and there in his own defence kills the other, this is murder. *Hales Pl.* 42.

Hereof there can be no acceſſaries either before or after the fact; becauſe it is not done with a felonious intent, but upon inevitable neceſſity. 3 *Inſt.* 56.

If a man eſcape, that hath killed another in his own defence, the town ſhall be amerced. 2 *Inſt.* 315.

A perſon guilty thereof is not bailable by juſtices of the peace; but they muſt commit him till the aſſizes. 1 *Haw* 76.

But otherwiſe it is, if he is taken only on light ſuſpicion. 2 *Haw.* 105.

Lord Coke (2 *Inſt.* 316.) ſays, that the juſtices of the peace cannot take an indictment of killing a man *ſe defendendo*; becauſe their commiſſion is not general, as is that of the juſtices of gaol delivery, but limited: But lord Hale (2 H. H. 46.) holds the contrary.

A perſon convicted hereof, ſhall not be diſcharged out of priſon but upon bail, and ſhall forfeit all his goods, altho' the cauſe was inevitable. And this, becauſe of the great regard which the law hath for the life of man; and alſo, by reaſon that the law intends it had a beginning upon an unlawful cauſe: for quarrels are not preſumed to grow without ſome wrongs in words or deeds, and ſo malice on both ſides. But he ſhall have his pardon out of the chancery of courſe. 3 *Inſt.* 56. 1 *Haw* 76.

If a man be indicted for homicide *ſe defendendo*, and is found not guilty, yet if it be found that he fled for the ſame, he ſhall forfeit his goods for ſuch flight, in not ſtanding to the law of the land. 1 *H. H.* 193.

IV. Manſlaughter.

By manſlaughter is to be underſtood ſuch killing of a man as happens either on a ſudden quarrel, or in the commiſſion of an unlawful act, without any deliberate intention of doing any miſchief at all. 1 *Haw.* 76.

There is no difference between murder and manſlaughter, but that murder is upon malice forethought, and manſlaughter upon a ſudden occaſion. As if two meet together, and ſtriving for the wall, the one kill the other, this is manſlaughter and felony. And ſo it is, if they had upon that ſudden occaſion gone into the field and fought, and the one had killed the other, this had been but manſlaughter,

and no murder: becauſe all that followed was but a continuance of the firſt ſudden occaſion, and the blood was never cooled, till the blow was given. 3 *Inſt.* 55.

There can be no acceſſaries to this offence before the fact, becauſe it muſt be done without premeditation. 1 *Haw.* 76.

But there may be acceſſaries after the fact. 3 *Inſt.* 55.

This offence is not bailable by juſtices of the peace. 3 *Ed.* 1. *c.* 15.

It is within the benefit of clergy; but the offender ſhall forfeit as in other felonies. 2 *H. H.* 344.

But there is one kind of manſlaughter, which by the ſtatute of the 1 *J. c.* 8. is excluded the benefit of clergy; *viz.* He who ſhall ſtab or thruſt any perſon that hath not then any weapon drawn, or hath not then ſtricken firſt, ſo as the perſon ſo ſtabbed or thruſt ſhall die thereof in ſix months, altho' it cannot be proved that the ſame was done of malice forethought, ſhall be guilty of felony without benefit of clergy.

V. Murder.

Murder is, when a man of ſound memory, and of the age of diſcretion, unlawfully killeth any perſon on the king's peace, with malice forethought, either expreſſed by the party, or implied by law; ſo as the party wounded or hurt, die of the wound or hurt, within a year and a day. 3 *Inſt* 47.

By *malice expreſſed*, is meant a deliberate intention of doing any bodily harm to another, whereunto by law a perſon is not authorized. 1 *H. H.* 451.

And the evidence of ſuch a malice muſt ariſe from external circumſtances diſcovering that inward intention; as laying in wait, menacings antecedent, former grudges, deliberate compaſſings, and the like; which are various, according to the variety of circumſtances. *id.*

Malice implied is in ſeveral caſes: as when one voluntarily kills another, without any provocation; for in this caſe the law preſumes it to be malicious, and that he is a public enemy of mankind. *id.* 455, 456.

Poiſoning alſo implies malice, becauſe it is an act of deliberation. *id.* 455.

Alſo when an officer is killed in the execution of his office, it is murder, and the law implies malice. *id.* 457.

—Alſo where a priſoner dieth by dureſs of the gaoler, the law implies malice, by reaſon of the cruelty. 3 *Inſt.* 52.

And in general, any formed deſign of doing miſchief may be called malice, and therefore not ſuch killing only as proceeds from premeditated hatred or revenge againſt the perſon killed but alſo in many other caſes, ſuch as is accompanied with thoſe circumſtances that ſhew the heart to be perverſely wicked, is adjudged to be of

malice

malice *prepenſe*, and conſequently murder. 2 *Haw.* 80. *Strange* 766. *Oneby's* caſe.

And wherever it appears that a man killed another, it ſhall be intended *prima facie* that he did it maliciouſly, unleſs he can make out the contrary, by ſhewing that he did it on a ſudden provocation, or the like. 1 *Haw.* 82.

Alſo wherever a perſon in cool blood, by way of revenge, beats another in ſuch a manner, that he afterwards dies thereof, he is guilty of murder however unwilling he might have been to have gone ſo far. 1 *Haw.* 83.

And it ſeems to be agreed, that no breach of a man's word or promiſe, no treſpaſs either to lands or goods, no affront by bare words or geſtures, however falſe or malicious it may be, and aggravated with the moſt provoking circumſtances, will excuſe him from being guilty of murder, who is ſo far tranſported thereby, as immediately to attack the perſon who offends him, in ſuch a manner as manifeſtly endangers his life, without giving him time to put himſelf upon his guard, if he kills him in purſuance of ſuch aſſault, whether the perſon ſlain did at all fight in his own defence or not. 1 *Haw.* 82.

If a man by harſh and unkind uſage put another into ſuch a paſſion of grief or fear, that the party either die ſuddenly, or contract ſome diſeaſe whereof he dies, though this may be murder or manſlaughter in the ſight of God, yet in a human judicature it cannot come under the judgment of felony, becauſe no external act of violence was offered, whereof the law can take notice. 1 *H. H.* 429.

If two fall out upon a ſudden occaſion, and agree to fight in ſuch a field, and each of them go and fetch their weapon, and go in to the field, and therein fight, and the one killeth the other, this is no malice prepenſe; for the fetching of the weapons, and the going into the field, is but a continuance of the ſudden falling out, and the blood was never cooled. But if there were deliberation, as that they meet the next day, nay though it were the ſame day if there were ſuch a competent diſtance of time, that in common preſumption, they had time of deliberation, it is murder. 3 *Inſt.* 51. 1 *H. H.* 453.

And the law ſo far abhors all duelling in cold blood, that not only the principal who actually kills the other, but alſo his ſeconds, are guilty of murder, whether they fought or not. And it is holden, that the ſeconds of the party ſlain are likewiſe guilty as acceſſaries. 1 *Haw.* 82.

If a phyſician or ſurgeon gives a perſon a potion, without any intent of doing him any bodily harm, but with intent to cure or prevent a diſeaſe, and contrary to the phyſician or ſurgeon's expectation it kills him, this is no homicide. And lord Hale ſays, he holds their opinion to be erroneous, who think that if he be no licenſed ſurgeon or phyſician, that occaſioneth this miſchance, that then it is felony. Theſe opinions (he ſays) may caution ignorant people not

not to be too busy in this kind with tampering with physic, but are no safe rule for a judge or jury to go by. 1 *H. H.* 429.

But if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly that it kills her, this is murder; for it was not given to cure her of a disease, but unlawfully to destroy the child within her; and therefore he that gives her a potion to this end, must take the hazard, and if it kills the mother it is murder. 1 *H. H.* 430.

Also if a woman be quick with child, and by a potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, but no murder: but if the child be born alive, and dieth of the potion, battery, or other cause, this is murder. 3 *Inst.* 50.

Lord Hale says, that in this case it cannot legally be known, whether the child were killed or not; and that if the child die after it is born and baptized, of the stroke given to the mother, yet it is not homicide. 1 *H. H.* 433. And Mr. Dalton says, whether it die within her body, or shortly after her delivery, it maketh no difference. *Dalt.* 332. But Mr. Hawkins says, that (in this latter case) it seems clearly to be murder, notwithstanding some opinions to the contrary. 1 *Haw.* 80.

Also it seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards doth kill in pursuance of such advice, he is an accessary to the murder.—1 *Haw.* 80.

By the 21 *J. c.* 27. If a woman be delivered of a bastard child, and she endeavour privately, either by drowning or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, she shall suffer death as in case of murder, except she can prove by one witness that it was born dead.

Lord Hale says, if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, and he hath notice thereof, and it doth hurt any body, he is chargeable with an action for it.

If he have no particular notice that it did any such thing before, yet if it is *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or a monkey, if it get lose and do harm to any person, the owner is liable to an action for the damage:

If he have notice of the quality of any such his beast, and use all due diligence to keep him up, yet he breaks lose and kills a man, this is no felony in the owner, but the beast is a deodand:

But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of his condition, and kills a man, he thinks it is manslaughter in the owner:

But if he did purposely let him lose or wander abroad, with design to do mischief, nay though it were with design only to fright

fright people and make ſport, and it kills a man, it is murder in the owner. 1 *H. H.* 4 1.

They that are preſent when any man is ſlain, and do not their beſt endeavour to apprehend the murderer or manſlayer, ſhall be fined and impriſoned. 3 *Inſt.* 53.

If a murder be committed in the day time, in a town not incloſed, and the murderer eſcape, the townſhip ſhall be amerced: but if incloſed, whether the murder be in the night or day, the town ſhall be amerced. 3 *Inſt.* 53.

Where any perſon ſhall be feloniouſly ſtriken or poiſoned in one county, and die in another county, the offender may be indicted in the county where the party dies, before the coroner, juſtices of the peace or other juſtices. 2 & 3 *Ed.* 6 *c.* 24. *ſ.* 2.

Where a murder is committed in one county, and a perſon is acceſſary in another county, he may be indicted in the county where he was acceſſary, on certificate of the conviction of the principal in the county where he committed the murder. 2 & 3 *Ed.* 6. *c.* 24.

If a man be ſlain or murdered, and the ſlayers, murderers, and acceſſaries be indicted, they might be tried at any time within the year, and not tarry the year and day for an appeal; but if upon trial they are acquitted, they ſhall not be ſuffered to go at large, but be committed or bailed, till the year and day be paſt; and an appeal may be brought notwithſtanding ſuch acquittal on indictment, if he hath not had his clergy. 3 *H.* 7 *c.* 1.

The principal in murder is ouſted of clergy in all caſes, and the acceſſary before is alſo ouſted of clergy in all caſes, but the acceſſary after is in no caſe ouſted of clergy. 2 *H. H.* 344.

VI. Self Murder.

A *felo de ſe*, or felon of himſelf, is a perſon, who being of ſound mind, and of the age of diſcretion, voluntarily killeth himſelf. 3 *Inſt.* 54. 1 *H. H* 411.

If a man give himſelf a wound, intending to be *felo de ſe*, and dieth not within the year and day after the wound, he is not *felo de ſe*. 3 *Inſt.* 54.

Mr. Hawkins ſpeaks with ſome warmth againſt an unaccountable notion (as he calls it) which hath prevailed of late, that every one who kills himſelf muſt be *non compos* of courſe; becauſe it is ſaid to be impoſſible that a man in his ſenſes ſhould do a thing ſo contrary to nature, and all ſenſe and reaſon. But he argues, that if this doctrine were allowable, it might be applied in excuſe of many other crimes as well as this: as for inſtance that of a mother murdering her child, which is alſo againſt nature and reaſon, and this conſideration, inſtead of being the higheſt aggravation of a crime would make it no crime at all: for it is certain a perſon *non compos mentis* can be guilty of no crime. 1 *Haw.* 67.

And

And Lord Hale says, it is not every melancholy or hypochondriacal distemper, that denominates a man *non compos*: for there are few who commit this offence, but are under such infirmities; but it must be such an alienation of mind, as renders a person to be a madman, or frantic, or destitute of the use of reason, which will denominate him *non compos*. 1 *H. H.* 412.

The offender herein doth incur a forfeiture of goods and chattels but not of lands; for no man can forfeit his land without an attainder by course of law. 3 *Inst.* 54.

Nor shall his goods be forfeited, until it be lawfully found by the oath of twelve men; and this belongs to the coroner to inquire of, upon view of the body. And if the body cannot be viewed, the justices in sessions may inquire thereof; for they have power by their commission to inquire of all felonies: and a presentment thereof found before them, intitles the king to the forfeiture. 3 *Inst.* 54 55. *Dalt. c.* 144.

But nevertheless, the forfeiture shall relate to the time of the wound given, and not to the time of the death, or inquisition. 3 *Inst.* 55. *Dalt. c.* 144. 1 *Hale's Pl.* 29. 1 *Haw.* 68.

But lord Hale, in his history of the pleas of the crown seemeth to doubt whether it shall not relate to the time of the death only, and not to the time of the wound given. 1 *H. H.* 414.

Nor doth the offence work any corruption of blood, or loss of dower. 1 *Haw.* 68.

HUE and CRY.

LORD Coke saith, that hue and cry (called in ancient records *hutesium & clamor*) do mean the same thing; for that *huer* in French is to hoot or shout, in English to cry. 2 *Inst.* 137. 3 *Inst.* 116.

But since it appeareth by the old books (of which also lord Coke maketh observation, 2 *Inst.* 173.) that hue and cry was anciently both by horn and by voice, it may seem that these two words are not synonimous, but that this *hutesium* or hooting is by the horn, and crying by the voice; with which also accordeth the French word *huchet*, which signifieth a huntsman's horn: So that hue and cry in this sense will properly signify a pursuit by horn and by voice. Which kind of pursuit of robbers by blowing a horn, and by making an outcry is said to be practised also in Scotland.

And this blowing of a horn, by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very ancient time; for amongst the laws of Wihtred king of Kent, in the year 696, this is one; that 'if a stranger go out of 'the road, and neither shout nor blow a horn, he shall be taken for 'a thief.'

Hue

Hue and cry is the old common law proceſs after felons, and ſuch as have dangerouſly wounded any perſon: and this hath received great countenance and authority by ſeveral acts of parliament. 2*H. H.* 98.

To prevent felonies: In walled towns the gates ſhall be ſhut from ſun ſetting to ſun riſing: and none ſhall lodge without the town, from nine of the clock till day, unleſs his hoſt will anſwer for him. In other towns watches ſhall be kept; and if a watchman arreſt a night walker, and he diſobey and fly, the watchman may make hue and cry. 13 *Ed.* 1. *ſt.* 2. *c.* 4.

When any felony is committed, or any perſon is grievouſly and dangerouſly wounded, or any perſon aſſaulted and offered to be robbed, either in the day or night; the party grieved, or any other, may reſort to the conſtable of the vill; and, 1. Give him ſuch reaſonable aſſurance thereof, as the nature of the caſe will bear. 2. If he knows the name of him that did it, he muſt tell the conſtable the ſame. 3. If he know it not, but can deſcribe him, he muſt deſcribe his perſon, or his habit, or his horſe, or ſuch circumſtances as he knows, which may conduce to his diſcovery. 4. If the thing be done in the night, ſo that he knows none of theſe circumſtances, he muſt mention the number of perſons, or the way they took. 5. If none of all theſe can be diſcovered, as where a robbery, or burglary, or felony is committed in the night, yet they are to acquaint the conſtable with the fact, and deſire him to ſearch in his town for ſuſpected perſons, and to make hue and cry after ſuch as may be probably ſuſpected, as being perſons vagrant in the ſame night; for many circumſtances may *ex poſt facto*, be uſeful for diſcovering a malefactor, which cannot be at firſt found. 2 *H. H.* 100, 101. 3 *Inſt.* 116.

For levying hue and cry, altho' it is a good courſe to have the warrant of a juſtice of the peace, when time will permit, in order to prevent cauſeleſs hue and cry; yet by the frame of the ſtatutes it is by no means neceſſary, nor is it always convenient; for the felon may eſcape before the warrant be obtained: and hue and cry was part of the law, before juſtices of the peace were firſt inſtituted. 2 *H. H.* 99.

And the duty of the conſtable is, to raiſe the power of the town, as well in the night as in the day, for the proſecution of the offender. 3 *Inſt.* 116.

And upon hue and cry levied againſt any perſon, or where any hue and cry comes to a conſtable, whether the perſon be certain or uncertain, the conſtable may ſearch ſuſpected places within his vill, for the apprehending of the felons. 2 *H. H.* 103.

But tho' he may ſearch ſuſpected places or houſes, yet his entry muſt be by the doors being open; for he cannot break open doors barely to ſearch, unleſs the perſon againſt whom the hue and cry is levied be there, and then it is true he may; therefore in caſe of ſuch a ſearch, the breaking open the door is at his peril, namely, juſtifiable, if he be there; not juſtifiable, if he be not there: But it muſt be always remembered, that in caſe of breaking open a door, there

muſt

must be first a notice given to them within of his business, and a demand of entrance, and a refusal, before the doors can be broken. 2 *H. H.* 103. 2 *Haw.* 86.

If the person, against whom the hue and cry is raised, be not found in the constablewick, then the constable shall give notice to the next constable, and he to the next, until the offender be found, or till they come to the sea side. And this was the law before the conquest. 3 *Inst.* 116.

And the officer of the town where the felony was done, as also every officer to whom the hue and cry shall afterwards come, ought to send to every other town round about him, and not to the next town only. And in such cases it is needful to give notice in writing (to the pursuers) of the things stolen, and of the colour and marks thereof, as also to describe the person of the felon, his apparel, horse, and the like, and which way he is gone, if it may be. *Dalt. c* 54.

But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such a hue and cry is good, as hath been said, and must be pursued, though no person certain be named or described. 2 *H. H.* 103.

And therefore in this case, all that can be done is, for those that pursue the hue and cry, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like. *id.*

By the statute of the 3 *Ed.* 1. *c.* 9. All shall be ready, and apparelled, at the commandment and summons of sheriffs (or constables, 2 *Inst.* 171.) and at the cry of the county, to sue and arrest felons; on pain of a grievous fine. And if default be found in the lord of the franchise, the king shall take the franchise to himself; and if in the sheriff or other officer, they shall have one year's imprisonment, and shall make a grievous fine.

And by the statute of the 13 *Ed.* 1. *st.* 2. *c.* 1. it is likewise, enacted, that immediately upon robberies and felonies committed, fresh suit shall be made, from town to town, and from county to county.

And no hue and cry shall be lawful, except it be by horsemen and footmen. 27 *El. c* 13. *s.* 10.

And the life of hue and cry is fresh suit. 3 *Inst.* 117.

If the person pursued by hue and cry be in a house, and the doors are shut, and refused to be opened on demand of the constable, and notification of his business, he may break open the doors; and this he may do in any case, where he may arrest, though it be only a suspicion of felony; for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case: and the same law is, upon a dangerous wound given, and hue and cry levied upon the offender. 2 *H. H.* 102.

And it seems in this case, that if he cannot be otherwise taken, he

he may be killed; and the neceſſity excuſeth the conſtable. 2 *H.H.* 102.

If hue and cry be raiſed againſt a perſon certain for felony, though poſſibly he is innocent; yet the conſtables, and thoſe that follow the hue and cry, may arreſt and impriſon him in the common gaol, or carry him to a juſtice of the peace, to be examined where he was at the time of the felony committed, and the like. 2 *H.H.* 102.

If the hue and cry be not againſt a perſon certain, but by deſcription of his ſtature, perſon, clothes, horſe, and the like; yet the hue and cry doth juſtify the conſtable, or other perſon following it, in apprehending the perſon ſo deſcribed, whether innocent or guilty: for that is his warrant; it is a kind of proceſs that the law allows of, not uſual in other caſes, namely, to arreſt a perſon by deſcription. 2 *H. H.* 103.

In caſe of hue and cry once raiſed and levied, on ſuppoſal of a felony committed, though in truth there was no felony committed, yet thoſe that purſue hue and cry may arreſt and proceed, as if ſo be a felony had been really committed.

And therefore the juſtification of an impriſonment by a perſon upon ſuſpicion, and by a perſon (eſpecially a conſtable) upon hue and cry levied, do extremely differ; for in the former caſe there muſt be a felony averred to be done, and it is iſſuable; but in the latter, to wit, upon hue and cry, it need not be averred, but the hue and cry levied upon information of a felony is ſufficient, though perchance the information were falſe.

And the reaſons hereof are theſe: 1. Becauſe the conſtable cannot examine the truth or falſhood of the ſuggeſtion of him that firſt levied it, for he cannot adminiſter to him an oath; and if he ſhould forbear his purſuit of the hue and cry till it be examined by a juſtice of the peace, the felon might eſcape, and the purſuit would be loſt and fruitleſs. 2. Becauſe the conſtable is by the ſeveral acts of parliament compellable to purſue hue and cry; and he is puniſhable, and ſo are thoſe of the vill, if they do it not. 3. Becauſe he that firſt raiſeth a hue and cry, where no felony is committed, that is, he who giveth the falſe information, is ſeverely puniſhable by fine and impriſonment, if the information be falſe.

And therefore if he raiſe hue and cry upon a perſon that is innocent, yet they that purſue the hue and cry may juſtify the impriſonment of that innocent perſon; and the raiſer is puniſhable; and by the ſame reaſon, if he give notice of a felony committed, where there was in truth none.

And here the juſtification of the impriſonment is mixed, partly upon the hue and cry, and partly upon their own ſuſpicion; and therefore, 1. In reſpect that it is upon hue and cry, there needs no averment, that the felony was done, if the arreſt be by that conſtable that firſt received the information, and ſo raiſed the hue and cry; or if the arreſt were made by that conſtable, or thoſe vills, to whom the

hue and cry came at the second hand, it must be averred, that such a hue and cry came to them, purporting such a felony to be done. 2. But also inasmuch as the hue and cry neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person, is left to the suspicion and discretion of the constable, or of the people of the second or third vill, he that arrests any person upon such general hue and cry, must aver that he suspected, and shew a reasonable cause of suspicion.

But now by the statute of 7 *J. c.* 5. the constable, or any that come to his assistance, even in this case of hue and cry, may plead the general issue, and give the whole matter of the justification in evidence; for the pursuit of hue and cry, though performed by others as well as the constable, is principally the act of the constable of the vill, and the others are but his deputies or assistants, within the precincts of their constablewick. 2 *H. H.* 101, 2, 3, 4.

It seems that they who are taken upon fresh hue and cry, are not bailable, as being to be accounted amongst those persons, who are under a violent presumption of guilt. 2 *Haw.* 98.

By the 13 *Ed.* 1. *st.* 2. *c.* 6. Constables of hundreds shall be chosen, who shall present before justices assigned, defaults of the suits of towns, and all such as lodge strangers in uplandish towns, for whom they will not answer.

And they which levy not hue and cry, or pursue not upon hue and cry, may be indicted, fined, and imprisoned. 3 *Inst.* 117.

A warrant to levy hue and cry on a robbery having been committed.

New-York
Ulster County } *To all constables of said county or elsewhere.*

WHEREAS A. I. of ——— in the county of ——— yeoman, hath this day made information upon oath, before me J. P. esq. one of the justices of the peace in and for the said county, of U. that on this present ——— day of ——— in the ——— year of ——— betwixt the hours of three and four in the afternoon of the same day, at a place called ——— in the said county of U. in the highway there, two malefactors and felons, to him the said A. I. unknown, in and upon him the said A. I. then and there being in the peace of God and of the people of the state of New-York, feloniously did make an assault, and him the said A. I. then and there feloniously did put in great fear and danger of his life, and the sum of ——— of lawful money of New-York, of the goods and chattels of him the said A. I. from the person, and against the will of him the said A. I. then and there violently and feloniously did steal, take, and carry away; and that one of the said malefactors and felons, to him the said A. I. unknown, is a tall, strong man, and seemeth to be about the age of ——— years, is pitted in the face with the small pox, and hath the fear of a wound under his left eye, and had then on a dark brown riding coat, &c. and did ride upon a bay

bay gelding, with a ſtar on his forehead ; and the other, &c. And that after the ſaid felony and robbery committed, they the ſaid malefactors and felons to him the ſaid A. I. unknown, did fly, and withdraw themſelves to places unknown, and are not yet apprehended : Theſe are therefore to command you, forthwith to raiſe the power of the towns within your ſeveral precincts, and to make diligent ſearch therein, for the perſons above deſcribed, and to make freſh purſuit and hue and cry after them from town to town, and from county to county, as well by horſemen as by footmen ; and to give due notice hereof in writing, deſcribing in ſuch notice the perſons and the offence aforeſaid, unto every next conſtable on every ſide, until they ſhall come to the ſea ſhore, or until the ſaid malefactors and felons ſhall be apprehended ; and all perſons whom you or any of you ſhall, as well upon ſuch ſearch and purſuit, as otherwiſe, apprehend or cauſe to be apprehended, as juſtly ſuſpected for having committed the ſaid robbery and felony, that you do carry forthwith before ſome one of the juſtices of the peace in and for the county where he or they ſhall be ſo apprehended, to be by ſuch juſtice examined, and dealt withal according to law. And hereof fail not reſpectively, upon the peril that ſhall enſue thereon. Given under my hand and ſeal, at————in the county of U. the————day of ————aforeſaid, in the year aforeſaid.

INDICTMENT.

I. Indictment what.
II. What offences are indictable.
III. Within what time an indictment ſhall be brought.
IV. How far ſeveral offenders or ſeveral offences may be joined in one indictment.
V. Whether the grand jury may examine witneſſes againſt the king.
VI. How many witneſſes are requiſite to an indictment.
VII. Whether a grand jury may find an indictment ſpecially.
VIII. Indictment to be in Engliſh.
IX. Form of an indictment.
X. Charges of an indictment.

I. Indictment what.

INDICTMENT cometh from the French word *enditor*, and ſignifieth in law, an accuſation found by an inqueſt of twelve or more upon their oath. And as the *appeal* is ever the ſuit of the party,

ty, ſo the indictment is always the ſuit of the king, and as it were his declaration; and the party who proſecutes it is a good witneſs to prove it. And when ſuch accuſation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a *preſentment*; and when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an *inquiſition*. 1 *Inſt.* 126. 2 *Haw.* 209.

II. What offences are indictable.

There can be no doubt, but that all capital crimes whatſoever and alſo all kinds of inferior crimes of a public nature, as miſpriſions, contempts, diſturbances of the peace, oppreſſions and all other miſdemeanors whatſoever of a public evil example againſt the *common law*, may be indicted; but no injuries of a private nature, unleſs they ſome way concern the king. 2 *Haw.* 210.

Alſo it ſeems to be a good general ground, that wherever a ſtatute prohibits a matter of public grievance to the liberties and ſecurity of a ſubject; or commands a matter of public convenience, as the repairing of the common ſtreets of a town; an offender againſt ſuch ſtatute is puniſhable, not only at the ſuit of the party grieved, but alſo by way of indictment for his contempt of the ſtatute, unleſs ſuch method of proceeding do manifeſtly appear to be excluded by it. Yet if the party offending hath been fined to the king, in the action brought by the party (as it is ſaid that he may in every action for doing a thing prohibited by ſtatute) it ſeems queſtionable whether he may afterwards be indicted, becauſe that would make him liable to a ſecond fine for the ſame offence. 2 *Haw.* 210.

But if a ſtatute extends only to private perſons, or if it extends to all perſons in general, but chiefly concern diſputes of a private nature, as thoſe relating to diſtreſſes made by lords on their tenants, it is ſaid that offences againſt ſuch ſtatute will hardly bear an indictment 2 *Haw.* 211.

Alſo where a ſtatute makes a new offence, and appoints a particular method of proceeding, without mentioning an indictment, it ſeemeth to be ſettled at this day, that it will not maintain an indictment. 2 *Haw.* 211. *Str.* 69.

But lord Hale diſtinguiſhes upon this, and ſays, that if a ſtatute prohibit any act to be done, and by a ſubſtantive clauſe, gives a recovery by action of debt, bill, plaint, or information, but mentions not an indictment; the party may be indicted upon the prohibitory clauſe, and thereupon fined, but not to recover the penalty: but then it ſeems the fine ought not to exceed the penalty; but if the act be not prohibitory, but only that if any perſon ſhall do ſuch a thing, he ſhall forfeit ſo much, to be recovered by action of debt, bill, plaint, or information; then he cannot be indicted for it, but the proceeding muſt be by action, bill, plaint, or information. 2 *H. H.* 171.

Alſo,

Alſo, where a ſtatute adds a farther penalty to an offence prohibited by the common law; there can be no doubt but that the offender may be ſtill indicted, if the proſecutor thinks fit, at the common law. And if the indictment for ſuch offence conclude *againſt the form of the ſtatute*, and cannot be made good as an indictment upon the ſtatute, it ſeems to be now ſettled, that it may be maintained as an indictment at common law. 2 *Haw.* 211.

A fact amounting to a felony, is not indictable as a treſpaſs. L. *Raym.* 712.

III. Within what time an indictment ſhall be brought.

By the 31 *El. c.* 5. All indictments upon any ſtatute penal, whereby the forfeiture is limited to the king, ſhall be ſued within two years after the offence committed: if the forfeiture is limited to the king and proſecutor, the ſuit ſhall be in one year; and in default thereof, the ſame ſhall be ſued for the king, within two years after that year ended. But where a ſtatute limits a ſhorter time, the ſuit ſhall be brought within ſuch time limited.

IV. How far ſeveral offenders or ſeveral offences may be joined in one indictment.

If there be *one offender*, and *ſeveral offences* committed by him, as burglary and larceny, they may be contained in one indictment. 2 *H. H.* 173.

But in the caſe of *K.* and *Clenden*, *T.* 4 *G.* 2. There was an indictment ſetting forth, that the defendant made an aſſault upon *Sarah Beatniff* and *Elizabeth Cooper*, and did them beat, wound, and evil intreat. After verdict for the king, it was moved in arreſt of judgment, that theſe were two diſtinct offences, and therefore could not be laid in the ſame indictment; and of that opinion was the court, and the judgment was arreſted. *Str.* 870.

If there be *ſeveral offenders* that commit the *ſame offence*, though in law they are ſeveral offences in relation to the ſeveral offenders, yet they may be joined in one indictment; as if ſeveral commit a robbery, or burglary, or murder. 2 *H. H.* 173.

And ſo it is, though the offences are of *ſeveral degrees*, but dependant one upon another, as the principal in the firſt degree, and the principal in the ſecond degree, to wit, preſent, aiding and abetting the principal, and acceſſary before or after. 2 *H. H.* 173.

Alſo ſeveral perſons may be indicted in the ſame indictment for *ſeveral offences of the ſame nature*, as for keeping diſorderly houſes; but the indictment ought to ſet forth that they ſeverally did ſo. 2 *H. H.* 173.

And this is only to be underſtood where the offences may be joint, as in extortion, maintenance, receiving ſtolen goods, and the like, and not where the offence is a ſeparate act in each, as in the caſe of K. and

K. againſt Phillips and others, *M.* 5 *G.* 2. Six were indicted in one indictment for *perjury*, and four of them pleading, were convicted. It was moved in arreſt of judgment, that the crime of perjury is in its nature ſeveral, and two cannot be indicted together. And by the court, there may be great inconveniences if this is allowed; one may be deſirous to have a certiorari, and the other not; the jury on the trial of all may apply evidence to all, that is but evidence againſt one: And they cited a caſe, *T.* 7. *An* Q. againſt Hodgſon and others, where two were indicted for being ſcolds, and compared to barratry, and it was held not to lie. And in the principal caſe judgment was arreſted. *Str.* 921.

Larcenies committed of ſeveral things, though *at ſeveral times*, and *from ſeveral perſons*, may be joined in one indictment. 2 *H. H.* 173.

V. Whether the grand jury may examine witneſſes againſt the king.

Lord Hale ſays, that the grand jury at the aſſizes or ſeſſions ought only to hear the evidence for the king, and in caſe there be probable evidence, they ought to find the bill, becauſe it is but an accuſation, and the party is to be put on his trial afterwards. 2 *H. H* 157.

Which doctrine is alſo laid down by chief juſtice Pemberton in the caſe of the earl of Shaftſbury. *Str. Tr. V.* 3. *p.* 415.

But the learned Editor of Hale's hiſtory obſerves upon this, that Sir John Hawles in his remarks on the ſaid caſe, *St. Tr. V.* 4 *p.* 183, unanſwerably ſhews, that a grand jury ought to have the ſame perſuaſion of the truth of the indictment as a petty jury, or a coroner's inqueſt; for they are ſworn to preſent the truth, and nothing but the truth.

And lord Coke ſays, that ſeeing indictments are the foundation of all, and are commonly found in the abſence of the party accuſed, it is neceſſary there ſhould be ſubſtantial proof. 3 *Inſt.* 25.

VI. How many witneſſes are requiſite to an indictment.

An indictment may be found upon the oath of one witneſs only, unleſs it be for high treaſon, which requires two witneſſes. 2 *Haw.* 256.

VII. Whether the grand jury may find an indictment ſpecially.

It ſeems to be generally agreed, that the grand jury may not find part of an indictment to be true, and part falſe; but muſt either find a true bill or *ignoramus* for the whole; and that if they take upon them to find it ſpecially, or conditionally, or to be true for part only, and not for the reſt, the whole is void, and the party cannot be tried upon it, but ought to be indicted anew. 2 *Haw.* 210.

VIII.

VIII. Indictment to be in English.

All indictments, informations, inquisitions and presentments, shall be in English, and be written in a common legible hand, and not court hand; on pain of 50l. to him that shall sue in three months. 4 *G.* 2 *c.* 26. 6 *G.* 2. *c.* 14.

IX. Form of an indictment.

In order to understand this matter rightly, it is judged requisite first to insert the intire form of an indictment, and then to take it to pieces, and explain the several parts of it in their order.

The instance which is chosen is on the statute of stabbing. 1 *J.* *c.* 8.

The *caption* of the indictment is no part of the indictment itself, but is the style or preamble, or return that is made from an inferior court to a superior, from whence a certiorari issues to remove; or when the whole record is made up in form; for whereas the record of the indictment, as it stands upon the file in the court where it is taken, is only thus, *The jurors for our lord the king upon their oath present:* when this comes to be returned upon a certiorari, it is more full and explicit, as follows: *H. H.* 166.

Pennsylvania, Bucks County. AT the general quarter sessions of the peace holden at New Town, in and for the county aforesaid, the seventh day of April, the ——— year of the independence of ———before J. P. and K. P. esquires, and others their associates, justices of the people of the state of Pennsylvania, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, by the oath of———good and lawful men of the county aforesaid, sworn and charged to inquire for the people of the said state, and for the body of the county aforesaid, it is presented:

That John Armstrong late of New-Town, in the county aforesaid, yeoman, not having God before his eyes but being moved and seduced by the instigation of the devil, on the thirtieth day of March, in the———year of the independence of———at the hour of nine in the afternoon of the same day, with force and arms, at New-Town aforesaid, in the county aforesaid, in and upon one George Harrison in the peace of God, and of the people of the said state, then and there being (the aforesaid George Harrison not having any weapon then drawn, nor the aforesaid George Harrison having first stricken the said John Armstrong) feloniously did make an assault; and that the aforesaid John Armstrong, with a certain drawn sword, of the value of five shillings, which he the said John Armstrong in his right hand then and there had and held the said George Harrison in and upon the right side of the belly near the short ribs of him the said George Harrison (the aforesaid

George

George Harrifon as is aforefaid then and there not having any weapon drawn, nor the aforefaid George Harrifon then and there having firft ftricken the faid John Armftrong) then and there feloniouſly did ſtab and thruſt, giving unto the ſaid George Harrifon, then and there with the ſword aforefaid, in form aforefaid, in and upon the right ſide of the belly near the ſhort ribs of him the ſaid George Harrifon, one mortal wound of the breadth of one inch, and of the depth of nine inches; of which ſaid mortal wound, he the ſaid George Harrifon then and there inſtantly died: And ſo the jurors aforeſaid upon their oath aforeſaid do ſay, that the ſaid John Armſtrong him the ſaid George Harrifon on the aforeſaid thirtieth day of March in the year aforeſaid, at New-Town aforeſaid in the county aforeſaid, in manner and form aforeſaid, feloniouſly did kill; againſt the peace of the people of the ſtate of Pennſylvania and againſt the form of the ſtatute in ſuch caſe made and provided.

Bucks County] The name of the county muſt be in the margin, or repeated in the body of the caption. 2 *H. H.* 166.

At the general quarter ſeſſions of the peace] The court where the indictment is made, muſt be expreſſed; otherwiſe the caption is erroneous. *id.* 2 *Haw.* 252.

Holden at New Town in and for the county aforeſaid] It muſt appear where the ſeſſions was held; and that the place where it was held, is within the extent of the commiſſion. 2 *H. H.* 166.

The ſeventh day of April, the ——— year of the independence of ———] It hath been adjudged, that if the caption of the indictment deſcribe the ſeſſions holden in time paſt, and not in the time preſent; or as holden on ſuch a day in ſuch a year of the king, without aſcertaining what king, it is inſufficient. But it ſeems to be agreed, that it is ſufficient to expreſs the year of the king, without adding that of our lord. 2 *Haw.* 255.

The ſeventh day] Figures to expreſs numbers are not allowable in an indictment; but numbers muſt be expreſſed in words. 2 *H. H.* 170. *Cr. Cir.* 169. *Andr.* 137. *H.* 11 *G.* 2 *K.* and Haddock. Or at leaſt in *Roman* numerals. *Str.* 261 *H.* 6 *G. K.* and Philips.

Before J. P. and K. P. eſquires, and others their aſſociates] It is not neceſſary to name all the juſtices, but only ſo many as are enabled to hold a ſeſſions, and the reſt may be ſupplied by the words *and others their aſſociates*. 2 *H. H* 166.

And altho' no ſeſſions can be held without one of the juſtices being of the *quorum*, yet in the caption there need not be any mention which of them, or whether any of them, are of the *quorum*, for it is ſufficient if *de facto* the ſeſſions be held before him or them that are of the *quorum*, altho' not ſo mentioned, and ſo is the uſual courſe. 2 *H. H.* 167.

And alſo to hear and determine, &c.] Theſe words are neceſſary, becauſe without this clauſe (by the commiſſion) they cannot proceed by indictment. 2 *H. H.* 166. *Str.* 442.

By the oath] If the caption concludes that *it is preſented*, without ſaying

ſaying *on their oath*, it ſhall be quaſhed; for their preſentment muſt be upon oath, and ſo returned. 2 *H. H.* 168.

By the oath of——] It muſt name the jurors that preſented the offence; and therefore by the oath of A. B. C. D. and others, is not good: for it may be the preſentment was by a leſs number than 12, or that ſome one of them was incapacitated who might influence all the reſt, as for inſtance a perſon outlawed; in which caſe the indictment may be quaſhed by plea. *id.* 167.

Good and lawful men of the county aforeſaid] Theſe words alſo, lord Hale ſaith, are neceſſary. *id.* 167. But Mr. Hawkins ſays, they have been often over-ruled; becauſe all men ſhall be intended to be honeſt and lawful, till the contrary appear. 2 *Haw.* 215.

Sworn and charged to inquire for the people of the ſaid ſtate, and for the body of the county aforeſaid] Theſe words alſo ſeem requiſite to be inſerted. 2 *H. H.* 167. But yet do not ſeem to be abſolutely neceſſary. L. *Raym.* 710.

It is preſented, that John Armſtrong, late of New-Town in the county aforeſaid, yeoman] The name of the party indicted regularly ought to be inſerted truly in every indictment. 2 *H. H.* 175.

But the inhabitants of a pariſh, may be indicted for not repairing the highway, although no perſon is particularly named. *Wood. b.* 4. *c.* 5.

It is ſaid that no perſon indicted can take any advantage of a miſtaken ſurname in the indictment, notwithſtanding ſuch ſurname hath no manner of affinity with his true one, and he was never known by it. 2 *Haw* 230, 1, 2, 3. 2 *H. H.* 176.

But the miſtake of the chriſtian name is pleadable, and the party ſhall be diſmiſſed from that indictment. *id.*

But the ſafeſt way is to allow his plea of *miſnomer*, both as to his ſurname and to his chriſtian name, for he that pleads *miſnomer* of either, muſt in the ſame plea ſet forth what his true name is, and then he concludes himſelf, and if the grand jury be not diſcharged, the indictment may preſently be amended by the grand jury, and returned according to the name he gives himſelf. *id.*

Alſo an indictment naming the defendant by two chriſtian names is not good. L. *Raym.* 562.

If the *county* is in the margin, and the indictment ſets forth the fact to be done at ſuch a place *in the county aforeſaid*, it is good, for it refers to the county in the margin; but if there be two counties named, one in the margin, and another in the addition of any party, or in the recital of an act of parliament, the fact laid at ſuch a place in the county aforeſaid, vitiates the indictment, becauſe two counties are named before, and therefore it is uncertain to which it refers. *Crown Cir.* 115, 116.

By the 1 *H.* 5. *c.* 5. In all indictments on which proceſs of outlawry lieth, to the names of the defendants *additions* ſhall be made of their eſtate, or degree, or myſtery, and of the towns, or hamlets, or places, and counties where they were uſed to be converſant.

But altho' the defendant be indicted by a wrong name or addition, or with no addition, yet if he appear, and plead not guilty, without taking advantage of that defect, he shall never alledge the *misnomer* or want of addition to stop his trial or judgment; for by such his appearance, and pleading to issue, the indictment is affirmed, and the *misnomer* or want of addition salved. 2 *H. H.* 176.

And if several persons be indicted for one offence, *misnomer* or the want of one, quasheth the indictment only against him, and the rest shall be put to answer; for they are in the law as several indictments. *id.* 177.

And it is the common practice, where an indictment is insufficient, while the grand jury is before the court, to amend it by their consent, is a matter of form, as the name or addition of the party, or the like. 2 *Haw.* 245.

Not having God before his eyes, but being moved and seduced by the instigation of the devil.] I do not find it asserted by any authority, that these words are necessary in an indictment.

On the thirtieth day of March *in the* ——— *year of* ——— *&c.*] No indictment can be good, without precisely shewing a certain *day* of the material facts alledged in it. 2 *Haw.* 235.

And if the offence be done in the night, before midnight, the indictment shall suppose it to be done in the day before: and if it happen after midnight, then it must say, it was done that day after. *Lamb.* 492.

And although the day be inserted, yet if the *year* is not likewise inserted, the indictment is sufficient. 2 *H. H.* 177.

But where an indictment charges a man with a bare omission, as the not scouring such a ditch, it is said, that it needs not shew any time 2 *Haw.* 236.

It is most regular to set forth the year, by shewing the year of the king: yet this may be dispensed with for special reasons, if the very year be otherwise sufficiently expressed. 2 *Haw.* 236.

And if it say, on such a day last past, without shewing in what year, that is good enough; for the certainty may be found out by the stile of the sessions. *Lamb.* 491.

But tho' the day or year be mistaken in the indictment, yet if the offence were committed in the same county, tho' at another time, the offender ought to be found guilty; but then it may be requisite, if any escheat or forfeiture of land be conceived in the case, for the petit jury to find the true time of the offence committed; and therefore it is best in the indictments to set down the times as truly as can be, tho' it be not of absolute necessity to the defendant's conviction. 2 *H. H.* 179.

And this the rather, because the jury are to find the indictment upon their oaths *Dalt c.* 184.

Upon which ground, namely, because the jury are sworn to present the truth, it is best to lay all the facts in the indictment as near to

to the truth as may be; and not to say, in an indictment for a small assault (for instance) wherein the person assaulted received little or no bodily hurt, that such a one *with swords, staves, and pistols, beat, bruised, and wounded him, so that his life was greatly despaired of*; nor to say in an indictment for an highway being obstructed, that the king's subjects cannot go thereon, *without manifest danger of their lives*; and the like. Which kind of words as they are not at all necessary, so they may stagger an honest man upon his oath, to find the fact as so laid.

At the hour of nine in the afternoon of the same day] It is not necessary to mention the *hour*, in an indictment. 2 *Haw.* 235.

With force and arms] By the 37 *H.* 8. *c.* 8. it is enacted, that whereas it hath been commonly used in indictments, to put in the same words, *vi & armis*, and in divers of the same indictments to declare the manner of the force and arms, *viz. baculis, cultellis, arculus, & sagittis*, or such like, where in truth the parties had no manner of such weapons at the time of the offence committed: therefore for the future these words, or such like, shall not of necessity be put in any inquisition or indictment.

But yet where such words are proper and pertinent, it is safe and advisable to insert them, if it be to no other purpose than to aggravate the offence. 2 *Haw.* 242.

At New-town *aforesaid, in the county aforesaid*] No indictment can be good, without expressly shewing some *place* wherein the offence was committed, which must appear to have been within the jurisdiction of the court. 2 *Haw.* 236.

But a mistake of a place will not be material upon the evidence, on not guilty pleaded, if the fact be proved at some other place in the same county. 2 *Haw.* 237.

And it is not sufficient that the county be expressed in the margin, but the vill where the offence was committed must be alledged to be in the county named in the margin, or, *in the county aforesaid*, which seems to be sufficient where but one county is named before, but to be uncertain where the county is named in the body of the indictment different from that in the margin. 2 *Haw.* 220. 2 *H. H.* 180.

In and upon one George Harrison] Wherever the person injured is known to the jurors, his name ought to be put in the indictment. 2 *Haw.* 232.

But if they know not his name, an indictment for the murder of a person unknown, or for stealing the goods of a person unknown, is good. 2 *H. H.* 181.

Also there is no need of an addition of the person upon whom the offence is committed, unless there be a plurality of persons of the same name; neither then is it essential to the indictment, tho' some times it may be convenient for distinction sake to add it. 2 *H. H.* 182.

In the peace of God and of the people of the said state then and there being]

&c

It is usual to alledge this, but not necessary, and possibly not true, for he might be breaking the peace at the time. 2 H. H. 186.

The aforesaid George Harrison *not having any weapon then drawn, nor the aforesaid* George Harrison *having first striken the said* John Armstrong] An indictment grounded upon an offence made by act of parliament, must by express words bring the offence within the substantial description made in the act of parliament; and those circumstances mentioned in the statute to make up the offence, shall not be supplied by the general conclusion *against the form of the statute.* 2 H. H. 170

And so it is if an act of parliament ousts clergy in certain cases, as murder *of malice forethought*, robbery *in or near the highway*, though the offences themselves were at common law, yet because at common law within clergy, they shall not be ousted of clergy, though convicted, unless those circumstances, as *of malice forethought*, or *near the highway*, be expressed in the indictment. 2 H. H. 170.

But there is no necessity in an indictment on a public statute, to recite such statute; for the judges are bound *ex officio* to take notice of all public statutes. 2 *Haw.* 245.

Yet if the prosecutor take upon him to recite it, and materially vary from a substantial part of the purview of the statute, and conclude *against the form of the statute aforesaid*, he vitiates the indictment. 2 *Haw.* 246.

Also it seems to be generally agreed, that a misrecital of the place or day at which the parliament was holden, vitiates an indictment. 2 *Haw.* 264.

But there is no need to alledge in an indictment, that the defendant is not within the benefit of the provisoes of the statute: although the same may be necessary in a conviction: for since no plea can be admitted to a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty. 2 *Haw* 250. 2 H. H. 170, 1.

Feloniously did make an assault] There are several words of art which the law hath appropriated for the description of the offence, which no circumlocution will supply, as feloniously, in the indictment of any felony; burglariously, in an indictment of burglary, and the like. 2 H. H. 184.

And if a man be indicted that he stole, and it is not said feloniously, this indictment imports but a trespass. 2 H. H. 172.

With a certain drawn sword] Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as poisoning, or strangling, it doth not maintain the indictment upon evidence. 2 H. H. 185.

Of the value of five shillings] Regularly it ought to set forth the price of the sword or weapon, or else say of no value; for the weapon is a deodand forfeited to the king, and the township shall be

be charged for the value, if delivered to them; but this seems not to be essential to the indictment. 2 *H H.* 185.

Which the said John Armstrong *in his right hand then and there had and held*] It must shew in what hand he held his sword. 2 H.H. 185.

In and upon the right side of the belly near the short ribs of him the said George Harrison] There must be a certainty of the offence committed, and nothing material shall be taken by intendment or implication; but the special manner of the whole fact ought to be set forth with certainty. 2 *Haw.* 225, 227.

And therefore in case of murder, it ought to shew in what part of the body the person was wounded; and therefore if it be on his arm, or hand, or side, without saying whether right or left, it is not good. 2 H.H. 185.

If theft be alleged in any thing, the indictment must set forth the value of the thing stolen; that it may appear, whether it be grand or petty larceny. 2 H. H. 183.

In like manner an indictment that the defendant took and carried away such a person's goods and chattels, without shewing what in certain, as one horse, one cow, is not good. 2 *H. H* 182.

An indictment that the defendant is a common highway man, a common defamer, a common disturber of the peace, and the like, is not good; because it is too general, and contains not the particular matter wherein the offence was committed 2 H H. 182.

In like manner an indictment for divers scandalous threatning, and contemptuous words, spoken of a justice of the peace, is not good, but ought to set forth the words in special. *Str.* 699.

An indictment for disobeying an order of justices, must find positively, that such an order was made, and not by way of recital, *that whereas* ——L. Raym. 1363.

But in an indictment on a conviction, it is not necessary to set forth the conviction at large, but only shortly, that such a one was before such and such justices convicted, according to the form of the statute, and thereupon a warrant was issued, &c. L. Raym. 1196.

Then and there feloniously did stab and thrust] In an indictment it is best, and often necessary, to repeat the time and place, to the several parts of the fact. 2 H. H. 178.

Thus in an indictment of murder and manslaughter, as well the day and place of the stroke, or other act done, as of the death, must be expressed: the former, because the escheat or forfeiture of lands relates thereto; the latter, because it must appear, that the death was within the year and day after the stroke. 2 H.H 179.

One mortal wound of the breadth of one inch, and of the depth of nine inches] Regularly the length and depth of the wound is to be shewed; but this is not necessary in all cases, as namely, where a limb is cut off; so it may be also a dry blow. 2 H. H. 186.

But though the manner and place of the hurt and its nature be requisite

requiſite, as to the formality of the indictment, and it is fit to be done as near the truth as may be; yet if upon evidence it appear to be another kind of wound in another place, if the party died of it, it is ſufficient to maintain the indictment. *id.* 186.

Againſt the peace of the people of the ſaid ſtate] An indictment without concluding againſt the peace, is inſufficient, though it be but for uſing a trade not having been an apprentice: for every offence againſt a ſtatute is againſt the peace, and ought ſo to be laid. *id.* 188.

Alſo an indictment that concludes againſt the peace, and ſaith not of *our Lord the king*, is inſufficient. *id.*

And their dignity.] An indictment need not conclude againſt *his crown and dignity*, though it be uſual in many indictments. *id.*

And againſt the form of the ſtatute in ſuch caſe made and provided] Regularly, if a ſtatute only make an offence, or alter an offence from one crime to another, as making a bare miſdemeanor to become a felony, the indictment for ſuch new made offence, or new made felony, muſt conclude againſt the form of the ſtatute, or otherwiſe it is inſufficient. 2 *H. H.* 192.

But if a man be indicted for an offence, which was at common law, and concludes againſt the form of the ſtatute, but in truth it is not brought by the indictment within the ſtatute, it ſhall be quaſhed, and the party ſhall not be put to anſwer it as an offence at common law. *id.* 171.

And if an offence were felony at common law, but a ſpecial act of parliament ouſts the offender of ſome benefit that the common law allowed him, when certain circumſtances are in the fact; though the body of ſuch indictment muſt expreſs thoſe circumſtances, according as they are preſcribed in the ſtatute, yet the indictment need not conclude againſt the form of the ſtatute: Thus on the ſtatute of the *El. c.* 4. in caſe of pick pockets, the body of the indictment muſt bring them within the expreſs purview of the ſtatute, or otherwiſe they ſhall have the benefit of clergy; but it need not conclude againſt the form of the ſtatute, neither is it uſual in ſuch caſes, for it was felony before, and the ſtatute doth not give a new puniſhment, nor make it to be a crime of another nature, but only takes away clergy. But yet if it ſhould conclude in ſuch caſe againſt the form of the ſtatute, it would not vitiate the indictment, but would be only ſurpluſage. *id.* 190.

If an act of parliament, making an offence, be but temporary, and made perpetual by another ſtatute, the indictment concluding againſt the form of the ſtatute, is good. *id* 173.

If the former ſtatute be diſcontinued, and revived by another ſtatute, the beſt way is to conclude againſt the form of the ſtatutes; though there is good opinion, that it is good enough to conclude againſt the form of the firſt ſtatue. *id.*

If one ſtatute be relative to another, as where the former makes the offence, the latter adds a penalty; the indictment ought to conclude againſt the form of the ſtatutes. *id.*

X. Charges of an indictment.

By the 10 & 11 *W. c.* 23. No clerk of aſſize, clerk of the peace, or other perſon, ſhall take any fee of any perſon bound over to give evidence againſt a traitor or felon, for the diſcharge of his recognizance, nor ſhall take more than 2s. for drawing any bill of indictment againſt any ſuch felon: on pain of 5l. to the party grieved, with full coſts. And if he draw a bill defective, he ſhall draw a new one *gratis*, on the like pain.

For the drawing of indictments for other miſdemeanors, not being treaſon or felony, no fee is limited by any ſtatute: and therefore the ſame dependeth upon cuſtom and ancient uſage.

Condition of a recognizance to prefer a bill of indictment.

THE condition of the recognizance is ſuch, That if the above-bound, A. I ſhall perſonally appear at the next general quarter ſeſſions of the peace to be holden at —— in and for the ſaid county, and then and there prefer a bill of indictment againſt A. O. late of ———yeoman for felonioufly taking and carrying away of——— the property of——and ſhall then and there give evidence concerning the ſame, to the jurors who ſhall inquire thereof on the part of the people of the ſtate of New York: And in caſe the ſame be found a true bill, then if the ſaid A. I. ſhall perſonally appear before the jurors who ſhall paſs upon the trial of the ſaid A. O. and give evidence upon the ſame indictment, and not depart without leave of the court, then this recognizance to be void.

Condition of a recognizance to anſwer to an indictment.

THE condition of this recognizance is ſuch, that if the above-bound A. O ſhall perſonally appear at the next general quarter ſeſſions of the peace to be holden at———in and for the ſaid county, then and there to anſwer to an indictment, to be preferred againſt him by A I. of———yeoman, for aſſaulting and beating him the ſaid A. I. and not depart without leave of court, Then this recognizance to be void.

INFANTS.

BY an infant, or minor, is meant any one who is under the age of 21 years. 1 *Inſt.* 2.

Thoſe who are under a natural diſability of diſtinguiſhing between good and evil, as infants under the age of 14 years, which is called the age of diſcretion, are not puniſhable by any criminal proſecution whatſoever. But this muſt be underſtood with ſome allowance; for if it appear by the circumſtences, that an infant under the age of diſcretion, could diſtinguiſh between good and evil, as if one of the age of nine or ten years, kill another and hide the body, or make excuſes, or hide himſelf, he may be convicted and condemned, and forfeit

forfeit as much as if he were of full age: but in such case, the judges will in prudence respite the execution, in order to get a pardon; and it is said, that if an infant apparently wanting discretion, be indicted and found guilty of felony, the justices themselves may dismiss him, without a pardon. And in general it must be left to the discretion of the judge, upon the circumstances of the case, how far an infant, under that age, is *capax doli*, or hath knowledge to discern betwixt good and evil. *Hale's Pl.* 43. 1 *Haw.* 2. 1 H H. 18.

But within seven years of age, there can be no guilt whatsoever of any capital offence; the infant may be chastized by his parents or tutors, but cannot be capitally punished, because he cannot be guilty; and if he be indicted for such an offence as is in its nature capital, he must be acquitted. 1 H. H. 19, 20.

An infant under 14, is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it; and though in other felonies *malitia supplet ætatem* in some cases, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion. 1 H. H. 630.

An infant may be guilty of forcible entry, in respect of personal actual violence. 1 *Haw.* 147. And the justices may fine him therefor: But yet it shall be good discretion in the justices of the peace to forbear the imprisonment of such infant. *Dalt c.* 126.

Because it is said, that he shall not be subject to corporal punishment, by force of the general words of any statute, wherein he is not expressly named. 1 *Haw.* 147.

But if one, who wants discretion, commit a trespass, against the person or possession of another, he shall nevertheless be compelled in a civil action to give satisfaction for the damage. 1 *Haw.* 2. 1 *H. H* 15. 16.

And an infant may bring an appeal, although it take from the defendant the benefit of waging the battle; but he must prosecute such appeal by a guardian. 2 *Haw.* 161, 162.

An appeal likewise may be brought against him. 2 *Haw* 168.

An Infant under the age of discretion cannot be an approver; because he cannot take the oath requisite in that case. 2 *Haw.* 205.

In case of rape, committed upon a child of 12 years old, such child may be sworn as evidence: yea if she be under that age, if it appear to the court that she knows and considers the obligation of an oath, she may be sworn. And in a case of evidence against witches, an infant of nine years old was sworn. 1 *H. H.* 634. *Dalt.* 378.

An infant before 21 years of age, shall not be sworn in an inquest. 7 *W. c.* 32. *f.* 4. 1 *Inst.* 172.

A woman at 9 years of age may have dower: at 12 may consent to marriage; and at 14 is of the age of discretion, and may chuse a guardian. 1 *Inst* 78.

A man is of the age of 12 years to take the oath of allegiance in the torn or leet: and at 14 is of age of discretion, may consent to marriage, and chuse his guardian. 1 *Inst.* 78.

At

At 21, and not before, persons may bind themselves by any deed, and aliene lands, goods and chattels. 1 *Inst.* 171.

Upon which ground, infants may not enter into a recognizance to keep the peace, or to be of good behaviour, but their sureties only.

But an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such like; and also for his good teaching or instruction, whereby he may profit himself afterwards: but if he binds himself in an obligation, or other writing, with a penalty for the payment of any of these, that obligation will not bind him. 1 *Inst.* 172.

And in *Earl's* case, 1 *Salk.* 387. it is said, that an infant may buy necessaries, but cannot borrow money to buy; for he may misapply the money, and therefore the law will not trust him, but at the peril of the lender, who must lay it out for him, or see it laid out.

Also, an infant hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and at his full age he may either agree thereunto, and perfect it, or without any cause to be alledged, waive, or disagree to the purchase: and so may his heirs after him, if he agree not thereunto after his full age. 1 *Inst.* 2.

The common law seems not to have determined precisely, at what age one may make a testament of a personal estate; it is generally allowed, that it may be made at the age of 18, and some say under, for the common law will not prohibit the spiritual court in such cases. 1 *Inst.* 89. 1 H. H. 17.

A person is of age to be an executor at 17; and an administration of any one during the minority of an infant, ceaseth when the infant comes to that age. 5 *Co. Pigot's* case. 1 H. H. 17.

Any person having child or children, under 21 years of age, and not married, may by deed or will attested by two witnesses, dispose of the custody and tuition of such child or children, until they shall be of the age of 21, or for a lesser time; and this, whether such parent be within or above the age of 21. 12 *C.* 2. *c* 24. *s.* 8.

An infant cannot answer but by guardian; but he may sue either by his next friend or by guardian. 3 *Salk.* 196.

If an infant of the age of 17 years release a debt, this is void; but if an infant make the debtor his executor, that is a good release in law of the action. 1 *Inst.* 264.

By the 5 *El. c.* 4. Persons above the age of 10 years, by their own consent and agreement, may be bound apprentices.

And by the 5 *El. c.* 5. Any person, above seven years old, may be bound apprentice to the sea service.

By the 43 *El.* c. 2. No age is limited for the binding of parish apprentices; so that it seemeth they may be bound at the age of seven, when they cease to be nurse children, and consequently may be taken from the mother.

It shall be felony without benefit of clergy, to steal goods to the value of 40s. out of an house, though the house be not broken open;

but this shall not extend to apprentices under 15 years of age. 12 *An. st* 1. *c.* 7.

Servants above the age of 18, embezzelling their master's goods to the value of 40s. shall be punished as felons. 21 H. 8. c. 7.

INFORMATION.

INFORMATIONS are of two kinds; 1. Such as are merely at the suit of the king: And, 2. such as are partly the suit of the king, and partly the suit of the party; which are commonly called informations *qui tam*, for those words in the information when the proceedings were in *latin*, *qui tam pro domino rege quam pro seipso, &c.* 2 Haw. 259.

Of near affinity to an information *qui tam*, is an action upon a statute: which is either a *private* action, which is, when an action is given upon a statute to the king, and to the party grieved only; or a *popular* action, which is, where the action is given to the king, or to any one that will sue for the king and himself. *Wood b.* 4. *c.* 4.

Where a matter concerns the public government, and no particular person is entitled to action, there an information will lie. 18 *El. c.* 5. *s.* 1. *Salk.* 274.

An information lies at the common law, for a great variety of crimes less than capital, as batteries, cheats, perjuries, riots, extortions, nuisances, contempts, and such like: and also it lies in very many cases by statute, wherein the offender is liable to a fine or other penalty. *Finch* 340. 2 *Haw.* 260.

And in general, it seems that of common right an information *at the suit of the king*, or an action in the nature thereof, may be brought for offences against statutes, whether they be mentioned by such statutes or not, unless other methods of proceeding be particularly appointed, by which all others are impliedly excluded. 2 *Haw.* 260.

But an information or action *qui tam* will not lie on any statute, which prohibits a thing as being an immediate offence against the public good in general, under a certain penalty, unless the whole or part of such penalty be expressly given to him who will sue for it, because otherwise it goes to the king, and nothing can be demanded by the party: But where such statute gives any part of such penalty to him who will sue for it by action or information, any one may bring such action or information, and lay his demand as well for our lord the king, as for himself. 2 *Haw.* 265.

Also where a statute prohibits or commands a thing, the doing or omission whereof is an immediate danger to the party, and also highly concerns the peace, safety, or good government of the public, or the honor of the king, or of his supreme courts of justice, it seems

seems to be the general opinion, that the party grieved may bring his action *qui tam* on such statute. 2 *Haw* 275.

By the 31 *El.* c. 5. 'All actions, suits, bills, indictments, or informations on any penal statute, whereby the forfeiture is limited 'to the king, shall be brought within two years after the offence 'committed; if limited to the king, and to any other who shall 'prosecute, then within one year; and in default of such prosecution then to be brought for the king, in two years after that 'year ended. Provided, that if they are limited by statute to be 'brought within shorter time, then they shall be brought within 'such time limited'. *s.* 5, 6.

On any penal statute] But if an offence prohibited by a penal statute be also an offence at common law, the prosecution of it, as of an offence at common law, is no way restrained hereby. 2 *Haw.* 272.

To any other who shall prosecute] This is, to a common informer; and therefore the *party grieved* is not within the restraint of this statute, but may sue in the same manner as before. 2 *Haw.* 272.

If two informations be exhibited on the same day, for the same offence, they mutually abate one another. 2 *Haw.* 275.

Form of an information qui tam.

New-York, Queen's-County. BE it remembered, that A. I. of——in the county of——gentleman, who as well for the people of the state of New-York, as for himself doth prosecute, cometh before the justices assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, and their general quarter sessions of the peace holden at——in and for the said county, the——day of——in the——year of——in his proper person; and as well for the people of said state as for himself, giveth the court here to understand and be informed, That A. O. late of——in the county aforesaid, yeoman, on the——day of——in the year aforesaid, at——aforesaid, in the county aforesaid, not regarding the laws and statutes of said state, but intending to——with force and arms [Here insert the offence, with the same precision as in an indictment] against the form of the statute in that case made and provided: Whereupon the aforesaid A. I. as well for the people as for himself, prayeth the advice of this court in the premises: and that the aforesaid A. O. may forfeit the sum of——according to the form of the statute aforesaid: and that he the same A. I. may have one moiety thereof, according to the form of the statute aforesaid: and also that the aforesaid A. O. may come here into this court, to answer concerning the premises: and there are pledges of prosecuting, *John Doe* and *Richard Roe*. And hereupon it is commanded to the said A. O. that all other things omitted, and all excuses laid aside, he be in his proper person at the next general

general quarter ſeſſions of the peace to be holden for the ſaid county, to anſwer as well to the people of the ſaid ſtate, as to the ſaid A. I. who as well for the ſaid people as for himſelf, doth proſecute, of and concerning the premiſes, and further to do and receive what the ſaid court ſhall conſider in this behalf.

JUDGMENT.

OF judgments, ſome are fixed and ſtated; as in caſes of treaſon, felony, præmunire, and miſpriſions: the particular form of which may be ſeen under their reſpective titles.

Others are diſcretionary and variable, according to the different circumſtances of each caſe: Thus for crimes of an infamous nature, ſuch as petit larceny, perjury, or forgery at common law, groſs cheats, conſpiracy not requiring a villanous judgment, keeping a bawdy houſe, bribing witneſſes to ſtifle their evidence, and other offences of the like nature: it ſeems to be in a great meaſure left to the prudence of the court to inflict ſuch corporal puniſhment and alſo ſuch fine, and binding to the good behaviour for a certain time, as ſhall ſeem moſt proper and adequate to the offence. 2 *Haw.* 445.

The court may aſſeſs a fine, but cannot award any corporal puniſhment againſt a defendant, unleſs he be actually preſent in court. *id.* 446.

Where there are ſeveral defendants, a joint award of one fine againſt them all is erroneous; for it ought to be ſeverally againſt each defendant: for otherwiſe, one who hath paid his proportionable part might be continued in priſon till all the others have alſo paid theirs, which would be in effect to puniſh him for the offence of another. *id.*

A fine is under the power of the court, during the term in which it is ſet; and may be mitigated as ſhall be thought proper; but after the term it admits of no alteration. *id.*

A judgment contrary to the verdict is void. *Read.* Judgm.

By many ſtatutes, peculiar puniſhments are appointed for ſeveral offences, as pillory, ſtocks, impriſonment and the like; and in all theſe caſes, no room is left for the juſtices diſcretion, for they ought to give judgment, and to inflict the puniſhment in all the circumſtances thereof, as ſuch ſtatute doth direct. *Dalt. c.* 188.

JURORS.

TRIAL by juries is the Engliſhman's birth right, and is that happy way of trial, which notwithſtanding all revolutions of times, hath been continued beyond all memory to this preſent day; the beginning whereof no hiſtory ſpecifies, it being contemporary

porary with the foundation of this ſtate, and one of the pillars of it, both as to age and conſequence. *Tr. p. pais* 3. *Dalt. c.* 186.

Concerning which, I will treat in the order following:

I. Who may or may not be jurors.
II. Of the returning jurors.
III. Of the challenge of jurors.
IV. Of the demeanor of jurors in giving their verdict.
V. Of the indemnity and puniſhment of jurors.

I. Who may or may not be jurors.

Mr. Hawkins ſays, it doth not ſeem to be any where holden that none but freeholders ought to be returned on a grand jury. 2 *Haw.* 216, 217.

But in another place he ſays that, by the common law, every grand juryman ought to be a freeman. 1 *Haw.* 215.

And L. Hale ſays, touching the yearly value of the eſtate of a grand juryman, he doth not find any thing determined; but freeholders they ought to be. 2 *H. H.* 155,

Alſo a grand juryman muſt be a lawful liege ſubject; and conſequently, neither under an attainder of any treaſon or felony, nor an alien, nor outlawed, whether for a criminal matter, or as ſome ſay, in a perſonal action; and from hence it ſeems, that any one who is under a proſecution for any crime, may by the common law, before he is indicted, challenge any of the perſons returned on the grand jury, for the defect of any of the qualifications aboveſaid. 1 Haw. 215.

It is is enacted by the 28 *Ed.* 3. *c.* 13. that in inqueſts to be taken amongſt aliens and denizens, before any judges, one half of the inqueſt ſhall be denizens and the other half aliens, if ſo many there be in the place who are not parties: if not then ſo many as there are.

And by the 27 *Ed.* 3. *ſt.* 2. *c.* 8. Before the mayor of the ſtaple, if both parties be ſtrangers, the inqueſt ſhall be taken by ſtrangers; if both be denizens, by denizens; if one party be denizen and the other alien, half the jury ſhall be denizens, and half aliens.

And theſe aliens need not have any qualification by their eſtate. H. 6. *c.* 29.

But it ſeems that the Engliſh half of the jury ought to have eſtates of the ſame value as in other caſes. 2 *Haw.* 419.

But by the 13 & 14 *C.* 2. *c.* 11. *ſ.* 11. In actions concerning tonnage and poundage, or ſhips or goods to be forfeited by reaſon of unlawful importation or exportation, there ſhall not be any party jury, but ſuch only as are natural born ſubjects.

The coroner's jury upon inqueſts taken before him, are to be of the neighbouring town's; but no qualification by eſtate is required by any ſtatute. 2 *H. H.* 152.

Young

Young men, under 21 years of age shall not serve upon juries. 7 *W. c.* 32 *s.* 4.

Old men above 70, persons continually sick, or being diseased at the time of the summons, or not dwelling in the county, shall not be put in juries of petit assizes; on pain of the sheriff paying damages to the party grieved, and being amerced to the king. 13 *Ed.* 1. *st.* 1. *c.* 38.

And the equity of this statute, and also the reason of the thing, seem plainly so far to extend to grand juries, that if it shall appear that any of the persons abovementioned be returned on a grand jury, the court will easily excuse their non-appearance. But it seems clear, that any such persons being returned on a grand jury, may lawfully serve upon it if they think fit. 2 *Haw* 216.

The jury ought to be men; yet there shall be a jury of women, to try if a woman be ensient, upon the writ *de ventre inspiciendo*. *Tr. p. pais* 86.

Clergymen cannot be impanelled upon juries *Lamb.* 496.

Dissenting teachers qualified under the toleration act, are exempted from serving on juries. 1 *W. c.* 18. *s.* 11.

II. Of the returning jurors.

By a clause in the commission of the peace, it is said,—We command our sheriff, that at certain days, which you (the justices) shall make known to him, he cause to come before you, so many and such good and lawful men of his bailiwick (as well within liberties as without) by whom the truth shall be the better known and inquired into.

It seems that justices of the peace may not order a jury to be returned immediately, nor on the same day, for the trial of a prisoner arraigned before them, as justices of goal delivery may, unless the crime amount to felony, or the party consent to be tried immediately. 2 *Haw.* 406.

Also it seems that a jury may not regularly be returned before justices of the peace in their sessions, by a bare award of the court, as before justices of gaol delivery; but that there ought to be a particular precept to the sheriff for that purpose. 2 *Haw.* 405, 406.

But in cases of felony, it is agreed (4 *Inst.* 164) and is the usual practice, after the prisoners are arraigned, and have pleaded to the country, for the justices to issue a precept to the sheriff, in nature of a *venire facias*, which may bear the teste the same day that the prisoners plead, commanding the sheriff to return 24 jurors, to try the issue upon such a day; or they may make it returnable the same day that the prisoner pleads, as at one of the clock in the afternoon, or the like: and this precept must be in the name, and under the seals of the justices, or two of them (1 Q) and not barely by an award upon the roll. 2 *H H* 261, 262.

The writ of *venire facias* by the statute of the 4 & 5 *W. c.* 24. shall be

be after this form: 'The king, &c. We command, &c. that 'you cause to come before, &c. twelve free and lawful men of the 'vicinage of A. every of whom shall have 10l. of lands, tenements, 'or rents, by the year, at least; by whom, &c. and who neither, &c.' f. 15.

The reason why they are required to come from the vicinage is, for that the neighbours are presumed to know what is done in the neighbourhood. 1 *Inst.* 158.

But yet this is not necessarily required; for they of one side of the county, are by the law of the neighbourhood, to try an offence of the other side of the county. 2 *H. H.* 264.

Although the words of the writ be twelve, yet by the ancient course, the sheriff must return 24, for the expedition of justice; for if 12 only shall be returned, a man would seldom have a full jury appear; and in this case usage and custom makes the law. 2 *H. H.* 263. *Read. Jur.*

But the general precept that issues before a sessions is, to return 24, and commonly the sheriff returns upon that precept 48. 2 *H. H.* 263.

But in issues of *nisi prius*, the sheriff shall, upon his return of the writ of *venire facias juratores* (unless in causes intended to be tried at bar, or where a special jury shall be appointed) annex a panel to the said writ, containing the christian and surname, additions, and places of abode, of a competent number of jurors, the names of the same persons to be inserted in the panel annexed to every *venire facias*, for the trial of all issues at the same assizes; which number of jurors shall not be less than 48 in any county, nor more than 72, unless the judges shall order otherwise. And the writs of *habeas corpora juratorum*, or *distringas*, subsequent to such writ of *venire facias juratores*, need not have inserted in the bodies of such writs the names of all the persons contained in such panel, but it shall be sufficient to insert in the mandatory parts of such writs respectively, *the several bodies of the persons named in the panel annexed to this writ*, or words of the like import, and to annex to such writs respectively panels, containing the same names as were returned in the panel to such *venire facias*, with their additions and places of abode that the parties concerned in any such trials may have timely notice of the jurors who are to serve at the next assizes, in order to make their challenges to them, if there be cause; and the persons named in such panels shall be summoned at the next assize, and no other. 3 *G. 2. c.* 35. *f.* 8. It is true, this gives them an opportunity of knowing how to make their challenges; but it also gives them an opportunity to another purpose, namely, of labouring the jurors,—— a practice which cannot be too much discouraged.

Upon the grand jury; there may be, and usually are, more than 12: but if there be 12 assenting, tho' others dissent, it is not necessary for the rest to agree. 2 *H. H.* 161.

But

But upon trial by a petit jury; it can be by no more nor less than 12, and all assenting to the verdict. 2 *H. H.* 161.

In any actions brought in the courts at Westminster, where it shall appear to the court, that it is necessary that the jurors should have the view of the place in question, they may order special writs of *distringas* or *habeas corpora* to issue, by which the sheriff shall be commanded, to have six out of the first 12 of the jurors, or some greater number of them, at the place in question at some convenient time before the trial: who shall have the matters in question shewn to them by two persons in the said writs named; and the sheriff by a special return upon the same, shall certify that the view hath been had according to command of the said writ. 4 *Ann. c.* 16. *s.* 8.

And by the 3 *G.* 2. *c.* 25. *s.* 14. Where a view shall be allowed, six or more of the jurors in the pannel, who shall be consented to by the parties on both sides, or their agents, or if they cannot agree, by the proper officer or judges of the court,——shall have the view, and shall be first sworn, or such of them as appear, before any drawing, and others shall be drawn to make up the number.

Tr. 8 *W.* A rule was made, that when the master is to strike a jury, viz. 48 out of the freeholders book he shall give notice to the attornies of both sides to be present; and if the one comes, and the other does not, he that appears shall according to the ancient course strike out 12, and the master shall strike out other 12 for him that is absent. 1 *Salk.* 405.

Where a full jury at *nisi prius* (or on indictments, informations, or other actions on penal statutes, 4 & 5 *P. & M. c.* 7.) shall not appear, or shall be reduced below the number by challenge, the judges on request of the plaintiff (or defendant, 14 *El. c.* 9.) may command the sheriff to appoint so many other able persons of the county then present at the assizes, as shall make up a full jury; whose names shall be annexed to the panel. 35 *H.* 8. *c.* 6. *s.* 6.

No sheriff shall return any juror, without the addition of his dwelling, or some other addition by which he may be known; and no extract of issues shall be delivered out, without such addition; on pain of five marks to the king, and five marks to the party grieved; to be recovered in sessions, or elsewhere. 27 *El. c.* 7.

By the common law, jurors returned, and not appearing, shall lose and forfeit the issues returned upon them. 35 *H.* 1. *c.* 6.

And if a juryman be called, and (being present) refuse to appear; or, having appeared, withdraw himself before he be sworn, the court may set a fine upon him at their discretion. 2 *H. H.* 309. 35 *H.* 8. c. 6. *s.* 9.

IV. Of the challenge of jurors.

And herein,

I. Of the several kinds of challenge.
II. When the challenge is to be taken.

III. How

III. How the challenge shall be tried.

IV. How panels may be reformed by the court, without challenge.

I. Of the several kinds of challenge.

There are two kinds of challenge; either to the *array*, by which is meant the whole jury as it stands *arrayed* in *panel*, or little square *pane* of parchment on which the jurors names are written: or to the *polls*, by which are meant the several particular persons or *heads* in the array. 1 *Inst.* 156, 158.

Challenge to the *array*, is in respect of the partiality or default of the sheriff, coroner, or other officer that made the return: and this is two fold:

1. Principal challenge to the array; which if it is made good, is a sufficient cause of exception, without leaving any thing to the judgment of the triers.

Causes of challenge of this sort, are such as these: If the sheriff, or other officer, be of kindred or affinity to the plaintiff or defendant, if the affinity continue. If any one or more of the jury be returned at the denomination of the party plaintiff or defendant, the whole array shall be quashed. If the plaintiff or defendant have an action of battery against the sheriff, or the sheriff against either party, this is a good cause of challenge. So if the plaintiff or defendant have an action of debt against the sheriff; but otherwise it is, if the sheriff have an action of debt against either party. Or if the sheriff have parcel of the land depending upon the same title. Or if the sheriff, or his bailiff which returned the jury be under the distress of either party. Or if the sheriff or his bailiff, be either of counsel, attorney, officer, or servant of either party, gossip; or arbitrator in the same matter, and treated thereof. 1 *Inst.* 156.

And the subject may challenge the array against the king; as in traverse of an office, he that traverseth may challenge the array: And so it is in case of life. 1 *Inst.* 156.

And where a subject may challenge the array, for unindifferency, there the king, being a party may also challenge for the same cause. 1 *Inst.* 156.

The array challenged on both sides shall be quashed. 1 *Inst.* 156.

2. Challenge to the array, for favour. He that taketh this must shew in certain the name of him that made it, and in whose time, and all in certainty. This kind of challenge, being no principal challenge, must be left to the discretion and conscience of the triers. As if the plaintiff or defendant be tenant to the sheriff, this is no principal challenge, but he may challenge for favour, and leave it to trial. So affinity between the son of the sheriff, and the daughter of the party, or the like, is no principal challenge, but to the favour; but if the sheriff marry the daughter of either party, or the like, this (as hath been said) is a principal challenge. 1 *Inst.* 156.

But where the king is party, one ſhall not challenge the array for favour, becauſe in reſpect of his allegiance, he ought to favour the king more: but if the ſheriff be a menial ſervant to the king, there the challenge is good 1 *Inſt.* 156. By which ſeems to be meant that ſuch challenge is not good, without ſhewing ſome actual partiality in the ſheriff. 2 *Haw.* 419.

But the king may challenge the array for favour. 1 *Inſt.* 156.

Challenge to the polls is threefold:

1. Peremptory. This is ſo called becauſe a perſon may challenge peremptorily, upon his own diſlike, without ſhewing of any cauſe.

This peremptory challenge ſhall not be allowed to the king; for it is provided by the 33 *Ed.* 1. *ſt.* 4. that he who challengeth a juror for the king, ſhall ſhew cauſe, and the truth thereof ſhall be inquired of. And this extends as well to criminal as civil cauſes. However, if the king challenge a juror, he need not ſhew any cauſe of his challenge, till the whole penal be gone through, and it appear that there will not be a full jury without the perſon challenged.—And if the defendant in order to oblige the king to ſhew cauſe, preſently challenge all the reſt, yet it hath been adjudged, that the defendant ſhall be firſt put to ſhew all his cauſes of challenge, before the king need to ſhew any. 2 *Haw.* 413.

And this peremptory challenge is not allowable to the party againſt the king, but only in the caſe of treaſon or felony, in favour of life. 1 *Inſt.* 156.

But in caſe of treaſon and felony, the priſoner by the common law might peremptorily challenge 35, which was under the number of three juries; but by the ſtatute of the 22 H. 8. c. 14. ſ. 6. the number is reduced to twenty, in petit treaſon, murder and felony: and in caſe of high treaſon, and miſpriſion of high treaſon, it was taken away by the ſtatute of the 33 H. c. 23. but by the ſtatute of the 1 & 2 P. & M. c. 10 the common law was again revived for any treaſon, and therein the priſoner ſhall have his peremptory challenge to the number of 35. 1 *Inſt.* 156.

But as to all murders and other felonies, the ſtatute of the 22 H. 8. c. 14 taking away the peremptory challenge of above twenty ſtands in force 2 H. H. 269. But if the party challenge above that number, he ſhall not have judgment of death, but his challenge ſhall be over ruled, and he ſhall be put upon his trial. *H. Pl.* 259. 2 *H. H.* 270.

2. Principal challenge to the polls: where cauſe is ſhewn, but which if found true, ſtands ſufficient of itſelf, without leaving any thing to the triers.

Cauſes of principal challenge to the polls, are ſuch as theſe:

A peer is not to be ſworn on juries, and he may be challenged by either party, or may bring a writ of privilege for his diſcharge. 1 *Inſt.* 156. 2 *Haw* 415.

Want of freehold, is a good cauſe of challenge. 1 *Inſt.* 156.

Alſo,

Alſo, if a perſon is an alien. 1 *Inſt.* 156.

If the juror is above the age of 70, or is ſick, or is non reſident in the county, he may ſue out a writ of privilege for his diſcharge: but if he be returned and appear, he can neither be challenged by the party, nor excuſe himſelf from not ſerving, if there be not enough without him. 2 *Haw.* 418.

If the juror be of blood or kindred to either party, this is a principal challenge: for that the law preſumeth that one kinſman doth favour another, before a ſtranger; and how far remote ſoever he is of kindred, yet the challenge is good 1 *Inſt.* 157.

Affinity, or alliance by marriage, is a principal challenge if the ſame continues, or iſſue be had: otherwiſe, it is but to the favour. 1 *Inſt.* 157.

If the juror be godfather to the child of the plaintiff or defendant, or they to his child, this is allowed to be a good challenge in our books. 1 *Inſt.* 157.

If the juror have part of the land that dependeth upon the ſame title, it is a principal challenge. 1 *Inſt.* 157.

It hath been allowed a good cauſe of challenge, on the part of the priſoner, that the juror hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. 2 *Haw.* 418.

Likewiſe if the juror gave a verdict before, for the ſame cauſe, or upon the ſame title or matter, though between other perſons. 1 *Inſt.* 157.

So likewiſe one may be challenged, that he was indictor of the plaintiff or defendant in the ſame cauſe; for ſuch a one, it may be thought, will not falſify his former oath. *Lamb.* 534 And if a grand juryman, who was one of the indictors of the ſame cauſe, be returned upon the petit jury, and do not challenge himſelf, he ſhall be fined. 2 H. H. 309.

If a juror hath been an arbitrator, choſen by the plaintiff or defendant in the ſame cauſe; and hath been informed thereof, or treated of the matter, this is a principal challenge; otherwiſe, if he were choſen indifferently by either of the parties. 1 *Inſt.* 157.

If he be of counſel, ſervant, or of fee, of either party, it is a principal challenge. 1 *Inſt.* 157.

Alſo, if a juryman, before he be ſworn, take information of the caſe, this is cauſe of challenge. 2 H. H. 306.

If any, after he be returned, do eat and drink at the charge of either party, it is a principal cauſe of challenge. 1 *Inſt.* 157

But it is not a principal challenge to a juror, but only to the favour, that the proſecutor was lately entertained at his houſe. 3 *Salk.* 31.

Actions brought either by the juror againſt either of the parties, or by either of the parties againſt him, which imply malice or diſpleaſure, are cauſes of principal challenge; to her actions, which do not imply malice or diſpleaſure, are but to the favour. 1 *Inſt.* 157.

In

In a cauſe where the parſon of a pariſh is party, and the right of the church cometh in debate, a pariſhoner is a principal challenge. 1 *Inſt.* 157.

If either party labour the juror, and give him any thing to give his verdict, this is a principal challenge; but if either party labour the juror to appear, and to do his conſcience, this is no challenge at all, but lawful for him to do it. 1 *Inſt.* 157.

That the juror is a fellow ſervant with either party, is no principal challenge, but to the favour. 1 *Inſt* 157.

If the juror be attainted or convicted of treaſon or felony, or for any offence to life or member, or in attaint for a falſe verdict, or for perjury as a witneſs, or in a conſpiracy at the ſuit of the king, or in any ſuit (either for the king or for any ſubject) be adjudged to the pillory, tumbrel, or the like, or to be branded or ſtigmatized, or to have any other corporal puniſhment, whereby he becometh infamous: theſe and the like, are principal cauſes of challenge. 1 *Inſt.* 158.

So it is if a man be outlawed in treſpaſs, debt, or any other action, for he is *ex lex*, and therefore not a lawful man. 1 *Inſt.* 158.

And old books have ſaid, that if he be excommunicated, he could not be of a jury. 1 *Inſt.* 158.

Challenge to the polls for favour. This is, when either party cannot take any principal challenge, but ſheweth cauſes of favour, which muſt be left to the conſcience and diſcretion of the triers, upon hearing their evidence, to find him favourable or not favourable. And the cauſes of favour are infinite. For all which, the rule of law is, that he muſt ſtand indifferent, as he ſtands unſworn. 1 *Inſt.* 157.

II. When the challenge is to be taken.

No challenge can be taken either to the array, or to the polls, till a full jury have appeared. 2 *Haw* 412.

He that hath divers challenges, muſt take them all at once. 1 *Inſt.* 158.

If a juror be challenged by one party, and after, be tried indifferent, it is time enough for the other party to challenge him. 1 *Inſt.* 158.

After challenge to the array, and trial duly returned, if the ſame party take a challenge to the polls, he muſt ſhew cauſe preſently. 1 *Inſt.* 158.

When the king is party, the defendant that challengeth for cauſe, muſt ſhew his cauſe preſently. 1 *Inſt* 158.

But if a juror be challenged between party and party, and there be enough of the panel beſides; the cauſe of challenge needeth not to be ſhewed unleſs the other ſide challenges *touts peravail. Tr. p. pais* 143.

If a man, in caſe of treaſon or felony, challenge for cauſe, and he

he be tried indifferent, yet he may challenge him peremptorily. 1 *Inst.* 158.

The prisoner must take all peremptory challenges himself, even in cases wherein he may have counsel. 2 *Haw.* 413.

The challenge to the array, must be in writing, but where the challenge is to the polls, it is a short way by a verbal challenge. *Tr. p. pais.* 172.

III. How the challenges shall be tried.

The challenge of him who first challenged shall be first tried. *Tr. p. pais* 144.

If the array be challenged, it lies in the discretion of the court how it shall be tried; sometimes it is done by two coroners, and sometimes by two of the jury, with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two assigned thereunto by the court. 2 *H. H* 275.

When any challenge is made to the polls, if it be before any jurors are sworn, the court shall chuse the triers; if two are sworn, they shall try; and if they try one indifferent, and he be sworn, then he and the two triers shal try another: and if another be tried indifferent, and he be sworn, then the two triers cease, and the two that be sworn on the jury shall try the rest: If the plaintiff challenge ten, and the defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the plaintiff, and another by the defendant. *Finch.* 112. 1 *Inst.* 158.

The triers oath is, 'You shall well and truly try, whether A. B. (the juryman challenged) stand indifferent between the parties to this issue: so help you God.' 1 *Salk.* 152.

If the cause of challenge touch the dishonour or discredit of the juror, he shall not be examined on his oath: but in other cases, he shall be examined on his oath, to inform the triers. 1 *Inst.* 158. 1 *Salk.* 153.

If the array be quashed against the sheriff, the process of *venire facias juratores* shall be directed to the coroners: if against any of the coroners, then process shall be awarded to the rest: if against all of them, then the court shall appoint certain elisors (so named *ab eligendo*) against whose return no challenge shall be taken to the array, because they were appointed by the court; but he may have his challenge to the polls. 1 *Inst.* 158.

IV. How panels may be reformed by the court without challenge.

Besides the challenges which may be taken by the plaintiff or defendant, it is enacted by the 3 *H.* 8. *c.* 12. that in cases where the king

king is party, the juſtices of aſſize, or of the peace in ſeſſions, may reform the panels of jurors, by putting to and taking out of the names of the perſons impanelled by their diſcretion: and if the ſheriff do not return the panel ſo reformed, he ſhall forfeit 20*l.* half to the king, and half to him that ſhall ſue.

And this extends both to grand and petit juries. 2 *H. H.* 156.

And hence it is, that if a priſoner be arraigned before the judge that ſits upon the crown ſide, it is uſual for the judge to ſend for a jury to the judge *niſi prius*, and when the jury is brought, the ſheriff returns them between the king and the priſoner; which is by virtue of this ſtatute. 2 *H. H.* 265.

V. Of the demeanor of jurors in giving their verdict.

By the law of England, a jury after their evidence given upon the iſſue, ought to be kept together in ſome convenient place, without meat or drink, fire or candle, and without ſpeech with any, unleſs it be the bailiff, and with him only except they be agreed. 1 *Inſt.* 227.

And the bailiff ought to be ſworn to keep them together, and not ſuffer any to ſpeak with them. 2 *H. H.* 293.

And if the jury after their evidence given to them at the bar, do at their own charges eat or drink, either before or after they be agreed on their verdict, it is finable, but it ſhall not avoid the verdict; but if before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it ſhall void the verdict; but if it be given for the defendant, it ſhall not void it, and ſo on the contrary. But if after they be agreed on their verdict, they eat or drink at the charge of him for whom they do paſs, it ſhall not void the verdict. 1 *Inſt.* 227.

But with the aſſent of the juſtices they may both eat and drink; as if any of the jurors fall ſick before they be agreed on their verdict, then by the aſſent of the juſtices he may have meat and drink, and alſo ſuch other things as be neceſſary for him and his fellows alſo, at their own coſts, or at the indifferent coſts of the parties, if they ſo agree: and if they cannot agree, the juſtices may in ſuch caſe ſuffer the jury to have both meat and drink for a time, to ſee whether they will agree. *Dr. & St.* 158.

After their departure they may deſire to hear one of the witneſſes again, and it ſhall be granted, ſo he deliver his teſtimony in open court; and alſo they may deſire to propound queſtions to the court for their ſatisfaction, and it ſhall be granted, ſo it be in open court. 2 *H. H.* 296.

But if the plaintiff after evidence given, and the jury departed from the bar, or any for him, do deliver any letter from the plaintiff to any of the jury concerning the matter in iſſue, or any evidence, or any writing touching the matter in iſſue, which was not given in evidence, it ſhall avoid the verdict, if it be found for the plaintiff, but not if it be found for the defendant, and ſo on the contrary.—But if the jury carry away any writing unſealed, which was given in evidence

evidence in open court, this ſhall not avoid their verdict, albiet they ſhould not have carried it with them. 1 *Inſt.* 227.

A jury ſworn and charged in a capital caſe, cannot be diſcharged (without the priſoner's conſent) till they have given a verdict. 2 *Haw* 419.

And the king cannot be nonſuit, for he is in judgment of law ever preſent in court. 1 *Inſt.* 227.

If a jury ſay they are agreed, and it being aſked who ſhall ſay for them, they ſay their foreman, but upon further inquiry they are not agreed, they may be fined. 2 *H. H.* 301.

If a jury caſt lots for their verdict, it ſhall be ſet aſide and they ſhall be fined for their contempt. 3 *Keb.* 805. 2 *Lev.* 140, 205.

M. 12 *G. Hale & Cove.* The jury having ſat up all night, agreed in the morning to put two papers into a hat, marked plaintiff and defendant, and ſo drew lots; plaintiff came out, and they found for the plaintiff, which happened to be according to the evidence, and the opinion of the judge. Upon motion for a new trial, it was agreed that the verdict muſt be ſet aſide; but the queſtion was, whether the defendant ſhould pay coſts: the court inclined to give the plaintiff coſts, comparing it to the caſe of a verdict againſt evidence: but at laſt it was agreed, that the coſts ſhould wait the event of the trial. *Str.* 642.

The jury may give a verdict without teſtimony, when they themſelves have conuſance of the fact. *Tr. p. pais* 209. 1 *Ventr.* 97.

But if they give a verdict on their own knowledge, they ought to tell the court ſo; but they may be ſworn as witneſſes; and the fair way is to tell the court before they are ſworn that they have evidence to give. 1 *Salk.* 405.

For certainly it is of dangerous conſequence, to receive a verdict againſt evidence given, on ſuppoſal that ſome of the jury knew otherwiſe, or on private information given by any juryman to the reſt, where he cannot be croſs examined. *Tr. p. pias*, 209.

After they be agreed, they may in cauſes between party and party, if the court be riſen, give a private verdict, before any of the judges of the court; and then they may eat and drink; and the next morning in open court they may either affirm or alter their private verdict: and that which is given in court ſhall ſtand. 1 *Inſt.* 227.

But in criminal caſes of life or member, the jury can give no private verdict, but they muſt give it openly in court. 1 *Inſt.* 227.

In all cauſes, and in all actions, the jury may give either a general or ſpecial verdict, as well in cauſes criminal as civil, and the court ought to receive a ſpecial verdict, if pertinent to the point in iſſue, 3 *Salk.* 373.

Thus if one be indicted for grand larceny, that is, for ſtealing goods above the value of 12d. yet the jury may find ſpecially, that he is guilty, but that the goods are not above the value of 12d. In which caſe he ſhall only have judgment of petit larceny. 1 *Haw.* 95.

Jurors are to try the fact, and the judges ought to judge according to the law that ariſeth upon the fact. 1 *Inſt.* 226. But

But if they will take upon them the knowledge of the law upon the matter, they may, yet it is dangerous, for if they miſtake the law, they run into the danger of an attaint; therefore to find the ſpecial matter is the ſafeſt way, where the caſe is doubtful. 1 *Inſt.* 228.

But if the jury find according to the direction of the judge, in matter of law, altho' the judge be miſtaken, yet the jury ſhall not be liable to attaint. L. *Raym.* 470.

It hath been adjudged, that if the jury acquit a priſoner of an indictment of felony againſt manifeſt evidence, the court may, before the verdict is recorded, but not after, order them to go out again, and re-conſider the matter; but this by many is thought hard, and ſeems not of late years to have been ſo frequently practiſed as formerly. However it is ſettled, that the court cannot ſet aſide a verdict which acquits a defendant, of a proſecution properly criminal, as it ſeems that they may a verdict that convicts him for having been given contrary to evidence and the directions of the judge, or any verdict whatſoever for a miſtrial. 2 *Hawk.* 442.

After the verdict recorded, the jury cannot vary from it; but before it be recorded, they may vary from the firſt offer of their verdict, and that verdict which is recorded ſhall ſtand. 1 *Inſt* 227.

A verdict finding an impoſſible matter ſhall not be void, if at the ſame time it find the ſubſtance of the indictment; but the ſurplus ſhall be rejected. 1 *Hawk.* 77.

Verdicts ſhall not be taken ſo ſtrictly as pleadings; but the ſubſtance of the thing in iſſue ought to be always found. 3 *Salk.* 363.

It is ſaid, that if the jurors agree not, before the departure of the juſtices of gaol delivery into another county, the ſheriff muſt ſend them along in carts, and the judge may take and record their verdicts in a foreign county. 2 *H. H.* 297. *Tr. p. pais*, 274, 285. 1 *Vent.* 97.

But if the caſe ſo happen, that the jury can in no wiſe agree, as if one of the jurors knoweth in his own conſcience, the thing to be falſe, which the other jurors affirm to be true, and ſo he will not agree with them in giving a falſe verdict, and this appeareth to the juſtices by examination; the juſtices (as it ſeemeth) in ſuch caſe may take ſuch order in the matter, as ſhall ſeem to them by their diſcretion to ſtand with reaſon and conſcience, by awarding a new inqueſt, or otherwiſe, as they ſhall think beſt by their diſcretion, like as they may do, if one of the jury die before the verdict. *Dr. & Stud.* 158.

VI. Of the indemnity and puniſhment of jurors.

If a man aſſault or threaten a juror, for giving a verdict againſt him, he is highly puniſhable by fine and impriſonment; and if he ſtrikes him in the court, in the preſence of the judge of aſſize, he ſhall loſe his hand, and his goods, and profits of his lands during life, and ſuffer perpetual impriſonment. 1 *Haw.* 57, 58.

Where

Where more than one of the perſons returned on a jury do appear, but not a ſufficient number to take an inqueſt, and ſome of the others come within view of the court, or into the ſame town in which the court is holden, but refuſe to come into the court to be ſworn; upon proof of ſuch matter, the court may, at the prayer of the parties order the jurors who appeared, to inquire what is the yearly value of ſuch defaulter's lands, and after ſuch inquiry made, either ſummon them to appear, on pain of forfeiting ſuch ſums as their lands have been found to be worth by the year or ſome leſſer ſum, or impoſe a fine of the like ſum upon them, without any farther proceeding. But it ſeems, that ſuch juror ſhall be liable to loſe his iſſues only for ſuch default, and not the yearly value of his lands, unleſs the party pray it: But a juror who hath actually appeared, and after makes default, is ſaid to be ſubject to ſuch forfeiture of the yearly value of his lands, whether the party pray it or not: becauſe his contempt appears to the court by its own record; yet even in this caſe, the court in diſcretion will ſometimes only impoſe a ſmall fine. Alſo it ſeems, that a juror who makes default without ever coming into the town wherein the court is holden, is liable only to loſe his iſſues, or to be amerced, but not to be fined. 2 *Hawk.* 146.

And by the 3 *G.* 2. *c.* 25. *ſ.* 13. In caſes of *niſi prius*, every perſon whoſe name ſhall be drawn, and who ſhall not appear, after being openly called three times, ſhall on oath made of his having been lawfully ſummoned, forfeit not exceeding 5l. nor leſs than 40s. unleſs ſome reaſonable cauſe be proved, by oath or affidavit, to the ſatisfaction of the judge.

If the grand jury at the aſſizes or ſeſſions will not find a bill, the court may impanel another inqueſt (by the 3 *H.* 7. c. 1.) to inquire of their concealments, and thereupon ſet fines upon them: But it ſeemeth that fines ſet upon grand inqueſts in any other manner, are not warrantable by law; for the privilege of an Engliſhman is, that his life ſhall not be drawn in danger without due preſentment or indictment, and this would be but a ſlender ſcreen or ſafeguard, if every juſtice of the peace, or judge of aſſize, may make the grand jury preſent what he pleaſes, or otherwiſe fine them. 2 *H. H.* 160, 1.

If any juror do take of either party to give his verdict, he ſhall on conviction by bill or plaint, before the court where the verdict ſhall paſs, forfeit ten times as much as he hath taken, half to the king, and half to him that ſhall ſue. 5 *Ed.* 3. *c.* 10.

It ſeems to be certain, that no one is liable to any proſecution whatſoever, in reſpect of any verdict given by him in a *criminal* matter, either upon a grand or petit jury; for ſince the ſafety of the innocent, and puniſhment of the guilty, doth ſo much depend upon the fair and upright proceedings of jurors, it is of the utmoſt conſequence, that they ſhould be as little as poſſible under the influence of any paſſion whatſoever. And therefore, leſt they ſhould be biaſ-

fed with the fear of being harraſſed by a vexatious ſuit, for acting according to their conſciences, the law will not leave any poſſibility for a proſecution of this kind. And as to the objection, that an attaint lie againſt a jury for a falſe verdict in a civil cauſe, and that there is as much reaſon to allow of it in a criminal one; it may be anſwered, that in an attaint in a civil cauſe, a man's property is only brought into queſtion a ſecond time, and not his liberty or life. 1 *Haw.* 191. L. *Raym.* 469

But where the jurors give a falſe verdict upon an iſſue joined in any court of record, and judgment thereupon, the party grieved may bring his writ of attaint in the king's bench or common pleas, upon which 24 of the beſt men of the county are to be jurors, who are to hear the ſame evidence which was given to the petty jury, and as much as can be brought in affirmance of the verdict, but no other againſt it. And if theſe 24 who are called the grand jury, find it a falſe verdict, then followeth this terrible judgment at the common law upon the petit jury; that the party ſhall be infamous, ſo as never to be received to be a witneſs, or a juror; ſhall forfeit his goods and chattels; and his lands and tenements ſhall be taken into the king's hands; his wife and children caſt out of doors; his houſes proſtrated; his trees rooted up; his meadows ploughed up; and his body impriſoned. And ſeeing all trials of real, perſonal, and mixt actions depend upon the oath of 12 men, prudent antiquity inflicted a ſevere and ſtrange puniſhment upon them, if they were attainted of perjury. 1 *Inſt.* 294. *Read.* Jur.

But now by the ſtatute of 23 *H.* 8 *c.* 2. The ſeverity of this puniſhment is moderated, if the writ of attaint be grounded upon that ſtatute: but nevertheleſs, the party grieved may at his election, either bring his writ of attaint upon that ſtatute, or at the common law. *Tr. p. pais.* 222.

But this proceeding ſeems to be entirely diſuſed at this day; and in the place of attaint, motions are now uſually made for new trials, when a verdict is againſt evidence *Wood. b. c.* 4. *Read.* Jur.

But there can be no new trial for or againſt the king. *Tr. p. pais.* 219.

It ſeems to be the current opinion of the old books, that jurors are not ſubject to any proſecution for a falſe verdict, except by way of attaint: and there ſeems to be very few ancient precedents for the puniſhment either of grand or petit jury, merely for giving a verdict againſt evidence, or the direction of the court, either in a capital or civil matter. 2 *Haw.* 147.

And the fining and impriſoning of jurors for giving their verdict hath ſeveral times been declared in parliament an illegal and arbitrary innovation, and of dangerous conſequence to the government, and the lives and liberties of the ſubject. 2 *Keb.* 180. *Read.* Jur.

And in *Buſhel's* caſe, it was reſolved by all the judges, upon a full conference together, that a jury is not fineable for going againſt their evidence, where an attaint lies. And where an attaint doth not

not lie, L. *Vaughan* says thus; "That the court could not fine a "juryman at the common law, where attaint did not lie, I think "to be the cleareſt poſition that ever I conſidered, either for autho- "rity, or reaſon of law." And one reaſon for this is, becauſe the judge cannot fully know upon what evidence the jury give their verdict; for they may have other evidence, than what is ſhewed in court; they are of the vicinage, the judge is a ſtranger; they may have evidence from their own perſonal knowledge that the witneſſes ſpeak falſe, which the judge knows not of; they may know the witneſſes to be ſtigmatized and infamous, which may be unknown to the parties or court. And if the jury knew no more than what they heard in court, and ſo the judge knew as much as they, yet they might make different concluſions, as oftentimes two judges do; and therefore as it would be a ſtrange and abſurd thing, to puniſh one judge for differing with another in opinion or judgment, ſo it would be worſe for the jury, who are judges of the fact, to be puniſhed for finding againſt the direction of him who is not judge of the fact. *Tr. per pais* 224. L. *Vaugh.* 135.

And to ſay the truth, ſays Lord *Hale*, it would be the moſt unhappy caſe that could be to the judge, if he at his peril muſt take upon him the guilt or innocence of the priſoner: and if the judge's opinion muſt rule the matter of fact, the trial by jury would be uſeleſs. 2 *H. H.* 315.

But what if a jury gave a verdict againſt all reaſon, convicting or acquitting a perſon indicted of felony, what ſhall be done? If the jury *convict* a man, againſt or without evidence, and againſt the direction of the court, the court may reprieve him before judgment, and acquaint the king, and certify for his pardon: if the jury *acquit* him in like manner, the court may ſend them back again (and ſo in the former caſe) to conſider better of it, before they record the verdict; but if they are peremptory in it, and ſtand to their verdict the court muſt take their verdict and record it. 2 *H. H.* 309, 310.

The form of a writ to the ſheriff to ſummon jurors, for the trial of an iſſue joined.

THE people of the ſtate of New-York, *&c.* To the ſheriff of ——— greeting. We command you, that you do not omit by reaſon of any liberty within your county, but that you enter therein, and cauſe to come before ——— twelve good and lawful men of the *vicinage* of ——— whereof every one hath ſuch lands, tenements, or rents, as will qualify them to ſerve upon juries, and who *are neither of affinity to* ——— *(the plaintiff) nor to* ——— (the *defendant)*; to hear and do theſe things, which on our behalf ſhall be then and there enjoined them: And have you then there this precept. Witneſs A. B. and C. D. at ——— the ——— day of ——— 4 & 5 *W. c.* 24. *ſ.* 15.

Note:

Note: The general precept for ſummoning jurors to the ſeſſions is contained in the precept for ſummoning the ſeſſions, in the title SESSIONS.

Challenge to the array, becauſe the ſheriff is of kindred to one of the parties; from Coke's *entries.*

AND now at this day to wit——came the aforeſaid A. the plaintiff, and B. the defendant, by their attornies, and the jurors were impanelled and demanded, and came, and thereupon the aforeſaid B. challengeth the array of the panel aforeſaid, becauſe he ſaid that that panel was arrayed by one John Zouch, knight, now and at the time of making the array aforeſaid, ſheriff of the county of Derby, which ſaid ſheriff is a kinſman of the aforeſaid John Manners (the plaintiff) to wit, the ſon of George Zouch, eſquire, the ſon of John Zouch, knight, the ſon of John Zouch, eſquire, the ſon of William Lord Zouch, the ſon of Alan Lord Zouch, the ſon of William Lord Zouch, the ſon of Elizabeth daughter of William Lord Roos, the father of William Lord Roos, the father of Thomas Lord Roos, the father of Eleaner mother of George Manners, knight, the father of Thomas Earl of Rutland, the father of the aforeſaid John Manners. And this he is ready to verify, whereupon he prayeth judgment, and that the ſaid panel may be quaſhed.—Which ſaid challenge by ——— and by ——— triers, to this choſen and ſworn, is found true. And therefore let the panel aforeſaid be quaſhed and amoved, &c. *Tr. per p.* 160.

Challenge becauſe the panel was returned at the inſtance of the party.

And upon this, the ſaid———challenges the array of the ſaid panel becauſe he ſays, that that panel was arrayed by one J. S. eſq. late ſheriff of the county of———aforeſaid, at the nomination of the ſaid———and in his favour: which ſaid challenge, by triers thereof ſworn, is found true.

For other forms of challenges, and proceedings thereupon, ſee *Tr. per pais* 159—184.

JUSTICES of the PEACE.

JUSTICES of the peace are judges of record, appointed by the king, to be juſtices within certain limits, for the conſervation of the peace, and for the execution of divers things comprehended within their commiſſion, and within divers ſtatutes committed to their charge. *Dalt. c.* 2.

And a record or memorial made by a juſtice of the peace, of things done before him judicially in the execution of his office, ſhall be of ſuch credit, that it ſhall not be gainſaid. One man may affirm

affirm a thing, and another man may deny it: but if a record once ſay the word, no man ſhall be received to aver or ſpeak againſt it; for if men ſhould be admitted to deny the ſame, there would never be any end of controverſies. And therefore to avoid all contention while one ſaith one thing and another ſaith another thing, the law repoſeth itſelf wholly and ſolely in the report of the judge.—And hereof it cometh, that he cannot make a ſubſtitute or deputy in his office, ſeeing that he may not put over the confidence that is put in him. Great cauſe therefore have the juſtices to take heed that they abuſe not this credit: either to the oppreſſing of the ſubject by making an untrue record, or the defrauding of the king by ſuppreſſing the record that is true and lawful. *Lamb.* 63—66.

Hereof alſo it cometh, that if a juſtice of the peace certify to the king's bench, that any perſon hath broken the peace in his preſence, upon this certificate ſuch perſon ſhall be there fined, without allowing him any traverſe thereto. *Dalt. c.* 70.

And that I may treat intelligibly concerning this office (of which lord *Coke* ſays the whole chriſtian world hath not the like, if it be duly executed, 4 *Inſt.* 170) I will ſet forth

I. The office of conſervators of the peace at the common law, before the inſtitution of juſtices of the peace.
II. The commiſſion of the juſtices of the peace founded on the ſtatute law.
III. The juſtice of the peace his oath of office.
IV. Of fees to be taken by juſtices of the peace.
V. Some general directions relating to juſtices of the peace, not falling under any particular title of this book.
VI. Their indemnity and protection by the law, in the right execution of their office, and their puniſhment for the ommiſſion of it.

I. The office of conſervators of the peace at the common law, before the inſtitution of juſtices of the peace.

Of ancient time ſuch officers or miniſters, as were inſtituted either for preſervation of the peace of the county, or for execution of juſtice, becauſe it concerned all the ſubjects of that county, and they had a great intereſt in the juſt and due exerciſes of their ſeveral places, were by force of the king's writ in every ſeveral county, choſen in full or open county by the freeholders of that county: as before the inſtitution of juſtices of the peace, there were conſervators of the peace in every county, whoſe office (according to their names) was to conſerve the king's peace, and to protect the obedient and innocent ſubjects from force and violence. Theſe conſervators, by the ancient common law, were by force of the king's writ choſen

by

by the freeholders in the county court, out of the principal men of the county: after which election so made and returned, then in that case the king directed, a writ to the party so elected, to take upon him and execute the office, until the king should order otherwise. And thus the coroners still continue to be chosen in full county; as also the knights of the shire for the parliament. 2 *Inst.* 558, 559.

Besides these conservators of the peace properly so called, there were and are other conservators of the peace by virtue of certain offices: as for instance:

1. The lord chancellor, and every justice of the king's bench, have, as incident to their offices, a general authority to keep the peace throughout all the realm, and to award process for the surety of the peace, and to take recognizance for it. 2 *Haw.* 32.

2. Also, every court of record, as such, have power to keep the peace within its own precinct. 2 *Haw.* 32.

3. Also, every justice of the peace is a conservator of the peace. *Crom.* 6.

4. Also, every sheriff is a principal conservator of the peace, and may without doubt *ex officio* award process of the peace, and take surety for it. And it seems the better opinion, that the security so taken by him is by the common law looked on as a recognizance or matter of record, and not as a common obligation. 2 *Haw.* 33.

5. Also, every coroner is another principal conservator of the peace, and may certainly bind any person to the peace who makes an affray in his presence. But it seems the better opinion, that he has no authority to grant process for the peace; and it seems clear that the security taken by him for the keeping the peace (except only where it is taken by him as judge of his own court for an affray done in such court) is not to be looked on as a recognizance, but as an obligation. 2 *Haw.* 33.

6. Also, every high and petit constable are by the common law conservators of the peace. 2 *Haw.* 33.

And it is said, that if a constable see persons engaged in an affray, or upon the very point of entering upon it, as where one shall threaten to kill, wound, or beat another, he may imprison the offender of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find surety of the peace by obligation. 1 *Haw.* 137.

But it is said, that a constable hath no power to arrest a man for an affray done out of his own view; for it is the proper business of a constable to preserve the peace, not to punish the breach of it; nor doth it follow from his having power to compel those to find sureties who break the peace in his presence, that he hath the same power over those who break it in his absence. 1 *Haw.* 137.

The general duty of the conservators of the peace by the common law, is to employ their own, and to command the help of others, to arrest and pacify all such who in their presence and within their

their jurisdiction and limits, by word or deed, shall go about to break the peace. *Dalt. c.* 1.

And if a conservator of the peace, being required to see the peace kept, shall be negligent therein, he may be indicted and fined. *Dalt. c.* 1.

And if the conservators of the peace have committed or bound over any offenders, they are then to send to, or be present at, the next sessions of the peace, or gaol delivery, there to object against them. *Dalt. c.* 1.

II. Of the commission of justices of the peace.

Justices of the peace at this day are of three sorts: 1. By act of parliament; as the bishop of *Ely* and his successors, and the archbishop of *York*, and bishop of *Durham*, 27 H. 8. c. 4. 2. By charter, or grant made by the king under the great seal; as mayors and the chief officers in divers corporate towns. 3. By commission.

At the first, by the statute of the 1 *Ed.* 3. which is the first statute that ordains the assignment of justices of the peace by the king's commission, those justices had no other power but only to keep the peace. But the very next year, the form of the commission was enlarged, and continued still further to be enlarged both in that king's reign, and in the reign of almost every other succeeding prince, until the 30th year of the reign of Q. *Elizabeth*, when by the number of the statutes particularly given in charge therein to the justices, many of which nevertheless had been a good while before repealed, and by much vain repetition, and other corruptions that had crept into it, partly by the miswriting of clerks, and partly by the untoward huddling of things together, it was become so cumbersome and foully blemished, that of necessity it ought to be redressed. Which imperfections being made known to sir *Chr. Wrey*, then Lord Ch. Justice of the king's bench, he communicated the same with the other judges and barons, so as by a general conference had amongst them, the commission was carefully refined in the *Michaelmas* term 1590, and being then also presented to the lord chancellor, he accepted thereof, and commanded the same to be used: Which continues with very little alteration to this day. *Lamb. c.* 9.

Which is as follows:

THE people of the state of New-York, by the grace of God, free and independent. To A. B. C. D. *&c.* greeting.

Know ye, that we have assigned you, jointly and severally, and every one of you, our justices to keep our peace in our county of ——— And to keep and cause to be kept all ordinances and statutes, for the good of the peace, and for preservation of the same, and for the quiet rule and government of our people, made, in all and singular their articles in our said county (as well within liberties as without) according to the force, form, and effect of the same:

And

And to chaſtiſe and puniſh all perſons that offend againſt the form of thoſe ordinances or ſtatutes, or any one of them in the aforeſaid county, as it ought to be done according to the form of ordinances and ſtatutes; And to cauſe to come before you, or any of you, all thoſe who to any one or more of our people concerning their bodies or the firing of their houſes have uſed threats, to find ſufficient ſecurity for the peace, or their good behavionr, towards us: and if they ſhall refuſe to find ſuch ſecurity, then them in our priſons until they ſhall find ſuch ſecurity to cauſe to be ſafely kept.

We have alſo aſſigned you, and every two or more of you (of whom any one of you the aforeſaid A. B. C. D. &c. we will ſhall be one) our juſtices to enquire the truth more fully, by the oath of good and lawful men of the aforeſaid county, by whom the truth of the matter ſhall be the better known, of all and all manner of felonies, poiſonings, inchantments, ſorceries, art magick, treſpaſſes foreſtallings, regratings, ingroſſings, and extortions whatſoever; and of all and ſingular other crimes and offences, of which the juſtices of our peace may or ought lawfully to inquire, by whomſoever and after what manner ſoever in the ſaid county done or perpetrated, or which ſhall happen to be there done or attempted: And alſo of all thoſe who in the aforeſaid county in companies againſt our peace, in diſturbance of our people, with armed force have gone or rode, or hereafter ſhall preſume to go or ride: And alſo of all thoſe who have there lain in wait, or hereafter ſhall preſume to lay in wait, to maim or cut or kill our people: And alſo of all victuallers, and all and ſingular other perſons, who in the abuſe of weights or meaſures, or in ſelling victuals, againſt the form of the ordinances and ſtatutes, or one of them therefore made for the common benefit of our ſtate of New-York and people thereof, have offended or attempted, or hereafter ſhall preſume in the ſaid county to offend or attempt: And alſo of all ſheriffs, bailiffs, ſtewards, conſtables, keepers of goals and other officers, who in the execution of their offices about the premiſes, or any of them, have unduly behaved themſelves, or hereafter ſhall preſume to behave themſelves unduly, or have been, or ſhall happen hereafter to be careleſs, remiſs, or negligent in our aforeſaid county: And of all and ſingular articles, and circumſtances, and all other things whatſoever, that concern the premiſes or any of them, by whomſoever, and after what manner ſoever, in our aforeſaid county done or perpetrated, or which hereafter ſhall there happen to be done or attempted, in what manner ſoever: And to inſpect all indictments whatſoever ſo before you or any of you taken or to be taken, or before others late our juſtices of the peace, in the aforeſaid county made or taken, and not yet determined; and to make and continue proceſſes thereupon, againſt all and ſingular the perſons ſo indicted, or who before you hereafter ſhall happen to be indicted; until they can be taken, ſurrender themſelves, or be outlawed: And to hear and determine all and ſingular the felonies, poiſonings, inchantments, ſorceries, arts magick, treſpaſſes, foreſtallings, regratings,

regratings, ingroſſings, extortions, unlawful aſſemblies, indictments aforeſaid, and all and ſingular other the premiſes, according to the laws and ſtatutes of our ſaid ſtate, as in the like caſe it has been accuſtomed, or ought to be done: And the ſame offenders, and every of them, for their offences, by fines, ranſoms, amerciaments, forfeitures, and other means as according to the law and cuſtom of the ſtate of New-York, or form of the ordinances and ſtatutes aforeſaid, it has been accuſtomed, or ought to be done, to chaſtiſe and puniſh.

Provided always, that if a caſe of difficulty, upon the determination of any of the premiſes before you, or any two or more of you, ſhall happen to ariſe; then let judgment in no wiſe be given thereon, before you, or any two or more of you, unleſs in the preſence of one of our juſtices of the one or other bench, or of one of our juſtices appointed to hold the aſſize in the aforeſaid county.

And therefore we command you and every of you, that to keeping the peace, ordinances, ſtatutes, and all and ſingular other the premiſes, you diligently apply yourſelves; and that at certain days and places, which you, or any ſuch two or more of you as is aforeſaid, ſhall appoint for theſe purpoſes, into the premiſes ye make inquiries: and all and ſingular the premiſes hear and determine, and perform and fulfil them in the aforeſaid form, doing therein what to juſtice appertains, according to the law and cuſtom of our ſtate of New York: Saving to us the amerciaments, and other things to us therefrom belonging.

And we command, by the tenor of theſe preſents, our ſheriff of ——— that at certain days and places, which you, or any ſuch two or more of you as is aforeſaid, ſhall make known unto him, he cauſe to come before you, or ſuch two or more of you as aforeſaid, ſo many and ſuch good and lawful men of his bailiwick (as well within liberties as without) by whom the truth of the matter in the premiſes ſhall be the better known and inquired into.

In witneſs whereof we have cauſed theſe our letters to be made patent. Witneſs our beloved G. C. governor of our ſaid ſtate, &c.

The manner of iſſuing the commiſſion in the king's name, ſeems to be founded on the ſtatute of the 27 *H.* 8. c. 24. which enacts, that all juſtices of the peace ſhall be made by letters patent under the king's great ſeal, in the name and by authority of the king; but reſerves to all cities and towns corporate which have juſtices, the liberties which they have enjoyed in that behalf.

To A. B. C. D. &c. *greeting*] From the perſons here named in the commiſſion, it may be proper to conſider who may, or may not, be juſtices of the peace.

By the ſtatutes of the 13 *R.* 2. c. 7. and 2 *H.* 5. *ſt.* 2 c. 1. The juſtices ſhall be made within the counties of the moſt *ſufficient* knights, eſquires, and gentlemen of law.

By the 1 *K. jeſſ.* 2. c. 8. No *ſheriff* ſhall exerciſe the office of a

juſtice of the peace, during the time that he acts as ſheriff. And the reaſon ſeems to be, becauſe he cannot act at the ſame time both as judge and officer, for ſo he would command himſelf to execute his own precepts. *Dalt. c.* 2.

Alſo if he be made a *coroner*, this by ſome opinions is a diſcharge of his authority of juſtice. *Dalt.* c. 3.

But if he be created duke, archbiſhop, marquis, earl, viſcount, baron, biſhop, knight, judge, or ſerjeant at law, this taketh not away his authority of a juſtice of the peace. 1 *Ed. 6. c.* 7. *Dalt. c.* 3.

Alſo, no *attorney*, ſolicitor, or proctor, ſhall be a juſtice of the peace, during the time he ſhall continue in the practice of that buſineſs. 5 *G.* 2. *c.* 18. *ſ.* 2.

By Holt Ch. J. Though a man be a *mayor*, it doth not follow that he is a juſtice of the peace, for that muſt be a particular grant in the charter. L. *Raym.* 1030. But although he be not a juſtice of the peace by the charter, yet there are many caſes wherein he hath the ſame power as a juſtice of the peace given unto him by particular ſtatutes.

Know ye, that we have aſſigned you] This is founded on the ſtatute of the 1 *Ed.* 3. *c.* 16. viz. For the better keeping and maintenance of the peace, the king will, that in every county good men and lawful, which be no maintainers of evil, or barretors in the country, ſhall be aſſigned to keep the peace.

And from this act we are to date that great alteration in our conſtitution, whereby the election of conſervators of the peace was taken from the people, and tranſlated to the aſſignment of the king. *Lamb.* 20.

And here we may obſerve, that the commiſſion hath two parts; or conſiſteth of two different aſſignments: By the firſt aſſignment, any one or more juſtices have as well all the ancient power touching the peace, which the conſervators of the peace had at the common law, as alſo that whole authority which the ſtatutes have ſince added thereto. *Dalt. c.* 5.

Jointly and ſeverally, and every one of you] Whatſoever any one juſtice alone may do, the ſame alſo may lawfully be done by any two or more juſtices; but where the law giveth authority to two, there one alone cannot execute it. *Dalt. c.* 6.

And yet where a ſtatute appointeth a thing to be done by two juſtices or more, if the offence be any miſdemeanor or matter againſt the peace, there upon complaint made of the offence, to any one of thoſe juſtices, it ſeemeth that one of them may grant out his warrant to attach the offender, and to bring him before the ſame juſtice and the other juſtice ſo appointed (at ſome convenient place) and then they to hear and determine the ſame. *Dalt. c.* 6.

But it ſeemeth, that when a thing is appointed by any ſtatute to be done by or before one certain perſon, ſuch thing cannot be done by or before any other: and by ſuch expreſs deſignation of one, all others are excluded, and their proceedings therein are *coram non judice*. *Dalt. c.* 6.

Our

Our juſtices] In that the king calls them *our* juſtices, their authority determines of courſe by his death or demiſe: ſo that he being once dead, or having given over his crown, they are no more his juſtices, and the juſtices of the next prince they cannot be, unleſs it ſhall pleaſe him afterwards ſo to make them. *Dalt. c.* 3.

By the 1 *An. ſt.* 1. c. 8. *ſ.* 2. No patent or grant of any office or employment ſhall determine by the king's death or demiſe, but ſhall continue in force for ſix months after, unleſs in the mean time made void by the ſucceſſor.

Alſo, before his death or demiſe, the king may determine the commiſſion at his pleaſure: and that either expreſſed, as by writ under the great ſeal, or by implication, by making a new commiſſion, and leaving out the former juſtices names. But until notice, or publiſhing of the new commiſſion, the acts of the former juſtices are good in law. *Dalt.* c. 3.

But to mayors and chief officers in corporations, which have the authority of juſtices of the peace, or of conſervators of the peace, by grant under the king's letters patent to them and their ſucceſſors, the authority remaineth, notwithſtanding the king's death or demiſe, *Dalt.* c. 3.

Neither can the king diſcharge theſe again at his pleaſure; but yet ſuch grants and charters may for ſome great and general defect, or miſcarriage, in the execution of the powers therein granted, be repealed, and the liberties ſeized. *id.*

Juſtices to keep our peace] Although they are in no part of the commiſſion called *keepers of the peace*, yet inaſmuch as by the 18 *Ed.* 3. c. 2. they are expreſly called *keepers of the peace*, and the principal end of their office is for the keeping of the peace, and their uſual deſcription in certioraries is by the name of *keepers of the peace*; it hath been adjudged, that in the caption of an indictment, *keepers of the peace and juſtices of our lord the king*, is good, without expreſsly naming them *juſtices of the peace*. 2 *Haw.* 38.

To keep our peace] Theſe words ſeem to give them the authority which the conſervators of the peace had at common law: and all that follows in the commiſſion, ſeems an addition to the power of the ancient conſervators.

Our peace] It hath been reſolved, that the deſcription of juſtices of the peace, by the name of *juſtices of our lord the king to keep the peace*, is good, without ſaying, the *peace of our lord the king*; for that is neceſſarily implied. 2 *Haw.* 38.

Alſo, by theſe words *our peace*, when the king dies, the ſurety of the peace is diſcharged; for when he is dead, it is not *his* peace. *Crom.* 124.

In our county of—] Here are two conſiderations: One is, that the juſtice cannot act when he is out of the county; and the other is, that when he is in the county, he can act for that county only, and his power extendeth to no other. But both theſe are to be underſtood with ſome limitations.

As

As to the former case, when he is out of the county: It is said, that the justices have no coercive power when out of the county; and therefore that an order of bastardy, or for payment of labourers wages, made by them out of the county, is not binding. Yet it is said, that recognizances and informations voluntarily taken before them in any place, are good. 2 *Haw.* 37.

And L. Hale says, that a justice of the peace may do a ministerial act out of his county, as examining a party robbed whether he knows the felons; but that he cannot do a compulsory act, as committing a person for not giving recognizance. 2 *H. H.* 50, 51.

And to keep and cause to be kept all ordinances and statutes for the good of the peace] It seems certain, that by virtue hereof, they may execute all statutes whatsoever, made for the better keeping of the peace, and consequently those of Winchester and Westminster, and all others concerning the peace, made before the reign of Ed. 3 in whose time (as hath been said) justices of the peace were first instituted; for all those statutes were expressly mentioned in the ancient commissions of the peace, and have always been undoubtedly taken to be included in these general words of the present commission. And yet none of these statutes which ordain the office of justices of the peace, say any thing concerning the execution of the said former statutes; so that the power of justices of the peace in relation to those statutes, seems entirely to depend on the king's commission, and yet hath always been unquestionably allowed.—From whence it appears, that regularly the king, by his commission, may authorise whom he pleases to execute an act of parliament. 2 *Haw.* 37.

But if no power be expressly given in any such statute to any one justice alone, he cannot proceed upon it, but he may prefer the cause at the sessions, and work it to a presentment upon the statute. *Dalt c.* 5.

But besides the statutes relating to the peace, there are also many other statutes which are not specified in the commission, and yet are committed to the charge and care of the justices of the peace, by the express words of such statutes: and all such statutes are to them a sufficient warrant and commission of themselves, altho' they be not recited in the commission, and are to be executed by them, according as the same statutes themselves do severally prescribe and set down. *Dalt. c.* 5.

And for the quiet government of our people] Of our people;—yet it seemeth, that the subjects of a foreign prince coming into England, and living under the protection of our king, shall be subject to, and have the benefit of the laws, in respect of the local allegiance which they owe to him. 2 *Haw.* 35. 1 *H. H.* 93, 94.

Concerning their bodies] Lambard and Dalton both think it seems clear, that if a man is in fear that another will hurt his servants, or cattle, or other goods, the surety of the peace shall not be granted; but

but Mr. Dalton is of opinion, that if one threatens to hurt a man's wife, or child, he may crave the peace by virtue of these words.—*Lamb.* 82. *Dalt.* c. 116.

Have used threats] It should seem, from the many causes which from time to time have been adjudged sufficient to bind to the good behaviour, that this expression is not to be understood of words only, but of threatning actions likewise, or any thing whereby a man has just cause to apprehend the burning of his houses, or some bodily hurt to be done to him.

To find sufficient security] This is done by recognizance: by a reasonable intendment of law, more than by any especial law in that case provided. *Crom.* 125.

For the peace or their good behaviour] Lord Hale speaking of the statute of 34 *Ed.* 3. *c.* 1. (on which Mr. Crompton says the power of justices to bind to the good behaviour is grounded) says that this power of binding, though expressed generally, and without any time limited, yet is not intended to be perpetual, but in nature of bail, *viz.* to appear at such a day at their sessions, and in the mean time to be of good behaviour. 2 *H. H.* 136.

In our prisons] The king's prison is the common goal of the county: But by the statute of the 6 *G.* c. 19. the justices may commit vagrants and other criminals, and persons charged with small offences, either to the goal, or to the house of correction, by their discretion, for such offences, or for want of sureties.

We have also assigned you, and every two or more of you] Here beginneth the second part of the commission, or the second assignment: All the business within which assignment belongeth to the sessions of the peace. *Dalt.* c. 5.

And by this it appeareth, that two justices may hold a sessions, but that one justice cannot. *Crom.* 6, 7.

Of whom any one of you the aforesaid A. B. C. D. *&c.* we *will shall be one*] This clause, which gives power to two or more justices to hear and determine offences, requires that at least one of those justices be of that select number, which is commonly termed of *Quorum* (for that word in the *Latin* commissions, *Quorum—unum esse volumus*) For those of the *quorum* were wont to be chosen specially for their knowledge in the laws: And this was it which led the makers of several ancient statutes expressly to enact, that some learned in the laws should be put into the commission of the peace, and (to say the truth) all statutes that require the presence of the *quorum*, do secretly signify such a learned man. For albeit that a discreet person (not conversant in the study of the laws) may sufficiently follow sundry particular directions concerning this service of the peace; yet when the proceeding must be by way of presentment or indictment, upon the evidence of witnesses, and oaths of jurors, by the order of hearing and determining, according to the streight rule and course of the law, it must be confessed that learning in the laws is very necessary. *Lamb.* 48, 49.

But

But learning being now greatly advanced and improved since the first institution of this office, this distinction is not usually made in the commissions of late years, but all the justices are equally assigned to be of the *quorum*; and by the statute of 26 *G.* 2. *c.* 27. no act, order, adjudication, warrant, indenture of apprenticeship, or other instrument done or executed by two or more justices, which doth not express that one or more of them is of the *quorum* (although the statutes respectively do require it) shall be impeached, set aside or vacated for that defect only.

By the oath of good and lawful men] That is, by a jury sworn.

Of all and all manner of felonies] That is, either by the common law, or by statute. *Crom.* 8.

Felonies] Though the commission doth not mention *murders* and *manslaughters*, by express name, but only felonies generally, yet by these general words, they have power to hear and determine murder and manslaughter, and also may take an indictment of *se defendendo*, contrary to the opinions of *Fitzherbert* and *Stamford*. But though the justices have this power, yet they do not ordinarily proceed to hear and determine these offences, and rarely other offences without clergy, both because of the monition and clause in their commission, in cases of difficulty to expect the presence of the justices of assize; and also because of the direction of the statute of the 1 & 2 *P.* & *M.* *c.* 13. which directs justices of the peace, in case of manslaughter and other felonies, to take the examination of the prisoner, and the information of the fact, and put the same in writing; and then to bail the prisoner, if there be cause; and to certify the same with the bail at the next gaol delivery: And therefore in cases of great moment, they bind over the prosecutors, and bail the party if bailable, to the next gaol delivery. But in smaller matters, as petit larceny, and some cases within clergy, they bind over to the sessions; but this is only in point of discretion and convenience, not because they have not jurisdiction of the crime. 1 *H.* *H.* 46.

So also an inquisition of *self-murder*, if the body cannot be seen, and so not inquired of by the coroner, may be taken before justices of the peace; for it is a felony, and within the extent of their commission. 1 *H.* *H.* 414.

So also if a person hath committed *treason*, though the justices have no cognizance of it as treason, yet they have cognizance of it as a felony, and as a breach of the peace; and therefore a justice of the peace, upon information on oath, may issue his warrant to take the traitor, and may take his examination, and commit him to prison. 1 *H.* *H.* 580.

Trespasses] This is founded on the statute of the 34 *Ed.* 3. *c.* 1. which enacts, that the justices assigned shall have power to restrain the offenders, rioters, and all other barrators, and to chastise them according to their trespass or offence.

And

And upon this Mr. Hawkins obſerves, that the word *treſpaſs* is of a very general extent, and in a large ſenſe not only comprehends all inferior offences, which are properly and directly againſt the peace, as aſſaults and batteries, and ſuch like, but alſo all others which are ſo only by conſtruction; as all breaches of the law in general are ſaid to be. Yet it hath been of late ſettled, that juſtices of the peace have no juriſdiction over forgery or perjury at the common law; the principal reaſon of which reſolution, he ſays, as he apprehended was, that inaſmuch as the chief end of the inſtitution of the office of theſe juſtices was, for the preſervation of the peace againſt perſonal wrongs, and open violence; and the word *treſpaſs* in its moſt proper and natural ſenſe, is taken for ſuch kind of injuries, it ſhall be underſtood in that ſenſe only in the ſaid ſtatute and commiſſion, or at the moſt to extend to ſuch other offences only as have a direct and immediate tendency to cauſe ſuch breaches of the peace, as libels, and ſuch like, which on this account have been adjudged indictable before juſtices of the peace. 2 *Haw.* 40.

The word for treſpaſſes in the old Latin commiſſions, is *tranſgreſſiones.*

Foreſtallings, regratings, ingroſſings] Over theſe offences the juſtices in ſeſſions have a juriſdiction given them, by the ſtatute of the 5 & 6 *Ed.* 6. c. 14.

Extortions] The intent of this word is, to inquire of thoſe who have done exceſſive wrongs; for wrong done by any one is properly treſpaſs, but exceſſive wrong done by any one is called extortion; and this is more properly in officers, as ſheriffs, mayors, bailiffs, eſcheators, and other officers whatſoever (as well ſpiritual as temporal) who by colour of their office have done great oppreſſion and exceſſive wrong to the king's ſubjects, in taking exceſſive reward or fees, for doing their offices. *Crom.* 8.

The juſtices have no expreſs power given them over this offence by any ſtatute; upon which Mr. Hawkins obſerves, that juſtices of the peace have juriſdiction of all inferior crimes within their commiſſion, whether ſuch crimes be mentioned in any ſtatute concerning them or not; for that all ſuch crimes are either directly, or at leaſt by conſequence and judgment of law, againſt the peace: And upon this ground principally, he ſays, as he apprehended, it was lately reſolved, that they may take an indictment of *extortion.* 2 *Haw.* 40.

And of all and ſingular other crimes and offences of which the juſtices of our peace may or ought lawfully to inquire] Which general words ſeem to include the vaſt number of offences over which they have a juriſdiction given them by many ſtatutes, and which are not particularly mentioned in the commiſſion.

And alſo all thoſe who in companies againſt our peace in diſturbance of our people with armed force have gone or rode] By theſe words they are to inquire of riots, routs, and all unlawful aſſemblies.—*Crom.* 8.

Weights.

Weights or measures] This clause was first established by the 34 *Ed.* 3. c. 5. And they have further power given herein by several subsequent statutes, all which statutes must be strictly pursued in relation to the several offences.

Selling victuals] Over this they have a jurisdiction given them, by the 2 & 3 *Ed.* 6. c. 15. intitled, *The bill of conspiracies of victuallers and craftsmen.*

And to inspect all indictments so before you taken] But they cannot proceed upon indictments taken before coroners, or justices of oyer and terminer or gaol delivery; but on indictments taken before the sheriff in his turn they may proceed. *Hale's Pl.* 168.

Or before other late our justices] This is founded on the statute 11 *H.* 6. *c.* 6. which enacts, that no indictment, plea, suit, or process shall be discontinued by a new commission; but the justices in the new commission, after they shall have the record of the same pleas and processes before them, shall have power to continue the said pleas and processes, and to hear and finally to determine the same, as the former justices might have done.

And to make and continue processes] This is by *venire*, *distringas*, *capias* or *exigent*, as the case shall be. And it differs from a warrant, in that a warrant is only to attach and convene the party before indictment, and may be either in the name of the king or of the justice; but the process issues after indictment, and must be in the name of the king only. *Dalt* c. 193.

Until they can be taken, surrender themselves, or be outlawed] For the process is sent out to this end, that either the party shall come in, to answer and to be justified by the law; or else that he shall for his contumacy be deprived of the benefit of the law. *Lamb.* 521.

Or be outlawed] It is observable, that the power of the justices stops here, and goes no further; so that they cannot make out a *capias utlagatum*, but the outlawry must be certified into the king's bench. *Lamb.* 521. 2 *H. H.* 52.

But by the 12 *Co.* 103. they that have power to award process of outlawry, have also a power to award a *capias utlagatum*, as incident to their authority and jurisdiction.

Hear and determined] This power was first given to them by the statute of the 18 *Ed.* 3. *st.* 2. c. 2. and afterwards confirmed and enlarged by divers other statutes.

Yet this clause doth not in propriety make the justices of the peace justices of oyer and terminer, because that is a distinct commission; and therefore a statute limiting an offence to be heard and determined before justices of oyer and terminer, gives not the power therein to justices of the peace. *Hale's Pl.* 165.

And thereupon it is said, that although they have power to hear and determine felonies, yet they cannot deliver a person suspected thereof by proclamation (as justices of gaol delivery may) until an inquisition taken; but if an inquisition be taken, and an *ignoramus* found, they may deliver him as it seemeth. 2 *H. H.* 46, 47

Likewise

Likewise, although commissioners of oyer and terminer may indict and try at the same sessions, yet it hath been ruled otherwise in case of justices of the peace, unless by consent; but certainly constant usage and learned opinion must give that exposition upon those resolutions, that it must extend only to popular actions or indictments for misdemeanors, and not in cases of felony. 2 *H. H.* 48.

By fines, ransoms, amerciaments, forfeitures, and other means—to chastise and punish] Hereby the justices are now armed with far more ample authority and power, than the ancient conservators of the peace were; for they had no power to convene the offender before them, nor to examine, hear or determine the cause, nor to punish except in some few cases as mentioned before. *Dalt.* c. 6.

But the justices may not award any recompence to the party wronged, otherwise than by persuasion. *Dalt.* c. 5.

Nevertheless, these words are inserted, not as of necessity (for the punishment of all offenders is implied in the word *determine*) but for the plainer declaration of the justices power, and for the more assured terrifying of offenders. *Lamb.* 49.

If a case of difficulty shall happen to arise] That is, a difficulty in point of law. *Crom.* 6.

Then let judgment in no wise be given] But yet if they list to proceed without the judges advice, their judgment is not void; but it standeth good and effectual, until it be reversed by a writ of error. *Lamb.* 50.

At certain days and places] That is, when they hold their sessions; which they are impowered and required to do, by several statutes.

III. The justice of the peace his oath of office.

On renewing the commission of the peace (which generally happeneth as any person is newly brought into the same) there cometh a writ of *dedimus potestatem* directed out of chancery, to some ancient justice (or other) to take the oath of him which is newly inserted, which is usually in a schedule annexed; and to certify the same into that court, at such a day, as the writ commandeth. *Lamb* 53.

The form of which oath at this day is as followeth:

YE shall swear, that as justice of the peace in the county of W. in all articles in the commission to you directed, you shall do equal right to the poor and to the rich, after your cunning, wit, and power, and after the laws and customs of the state, and statutes thereof made: And ye shall not be of counsel of any quarrel hanging before you: And that ye hold your sessions after the form of the statutes thereof made: And the issues, fines, and amerciaments that shall happen to be made, and all forfeitures that shall fall before you, ye shall cause to be entered without any concealment (or embezzelling) and truly send them to the exchequer. Ye shall not let, for gift or other cause, but well and truly ye shall do your office of justice of

the peace in that behalf. And that you take nothing for your office of juſtice of the peace to be done, but of the ſtate, and fees accuſtomed, and coſts limited by ſtatute. And ye ſhall not direct, nor cauſe to be directed, any warrant (by you to be made) to the parties, but ye ſhall direct them to the bailiffs of the ſaid county, or other officers or miniſters of the people, or other different perſons, to do execution thereof. So help you God.

This oath ſeems to be founded on the ſtatute of the 13 *R.* 2. c. 7. which enacts, that the juſtices ſhall be ſworn, duly and without favour, to keep and put in execution all the ſtatutes and ordinances touching their offices.

IV. Of fees to be taken by juſtices of the peace.

In the oath of office abovementioned are theſe words: 'And 'that you take nothing for your office of juſtice of the peace to 'to be done, but of the ſtate, and fees accuſtomed, and coſts limited 'by ſtatute.'

V. Some general directions relating to juſtices of the peace, not falling under any particular title of this book.

Regularly, juſtices of the peace ought not to execute their office, in their own caſe; but cauſe the offenders to be convened or carried before ſome other juſtice, or deſire the aid of ſome other juſtice, being preſent. *Dalt* c. 173.

By Holt Ch. J. M. 10 W. The mayor of Hereford was laid by the heels, for ſitting in judgment in a cauſe where he himſelf was leſſor of the plaintiff in ejectment, though he by the charter was ſole judge of the court. *1 Salk.* 396.

And lord chief juſtice Raymond, who had an eſtate in the pariſh of Abbots Langley, went off the bench, when an order relating to a pauper there came before the court. *1 Str.* 1173.

And yet if the juſtice ſhall deal in his own caſe, it ſeems in ſome caſes juſtifiable; as when a juſtice ſhall be aſſaulted, or (in the doing his office eſpecially) ſhall be abuſed to his face, and no other juſtice preſent with him; then it ſeems he may commit ſuch offender until he ſhall find ſureties for the peace or good behaviour, as the caſe ſhall require: But if any other juſtice be preſent, it were fitting to deſire his aid. *Dalt.* c. 173. *Str.* 420, 421.

And as it is unjuſt in many caſes, for the magiſtrate to act in his own cauſe, ſo it is alſo imprudent; To which purpoſe the advice of lord Coke is applicable, who upon the occaſion of mentioning a certain judge, who made a ſettlement of his eſtate which was void in law, and brought an action in his own name, which all the other judges, of his own ſhewing in the court, were of opinion did not lie, makes this obſervation, that it is not ſafe for any man (be he never ſo learned) to be of counſel with himſelf in his own cauſe, but to take

advice

advice of other great and learned men; and the reaſon he gives is, for that men are generally more fooliſh in their own concerns, than in thoſe of other people. 1 *Inſt.* 377.

If a juſtice exceed his authority, in granting a warrant, yet the officer muſt execute it, and is indemnified for ſo doing; but if it be in a caſe where he hath no juriſdiction, or in a matter whereof he has no cognizance, the officer ought not to execute ſuch warrant; ſo that the officer is bound to take notice of the authority and juriſdiction of the juſtice. *Cro. Car.* 394. 10 *Co.* 76.

Thus if a juſtice ſend a warrant to a conſtable to take up one for ſlander, or the like, the juſtice hath no juriſdiction in ſuch caſes, and the conſtable ought to refuſe the execution of it. *Wood. b.* 1. c. 7.

In ſummary convictions, the party ought to be heard, and for that purpoſe ought to be ſummoned in fact; and if the juſtice proceed againſt a perſon without ſummoning him, it would be a miſdemeanor in him, for which an information would lie. 1 *Salk.* 181. L. *Raym.* 1407. *Str.* 678.

Where a ſpecial authority is given to juſtices out of ſeſſions, it ought to appear in their orders, that that authority was exactly purſued. 2 *Salk.* 475.

In all caſes where juſtices may hear and determine out of ſeſſions (*viz.* on their own view, or confeſſion, or oath of witneſſes) the juſtices ought to make a record in writing under their hands of all the matters and proofs; which record notwithſtanding in many caſes they may keep by them. *Dalt.* c. 115.

And if upon ſuch conviction, the offender is to be fined to the king, then the juſtices are to eſtreat ſuch fine, and to ſend the eſtreat into the exchequer, whereby the barons of the exchequer may cauſe the ſaid fine or forfeiture to be levied for the king's uſe. *Dalt.* c. 115.

Lord Hale ſays (contrary to the opinion of lord Coke) that the juſtices out of ſeſſions may iſſue their warrants for apprehending perſons charged of crimes within the cognizance of the ſeſſions, and bind them over to appear at the ſeſſions, although the offender be not yet indicted. 1 *H. H.* 579.

But in another place he ſays, this ſeemeth doubtful; and that one thing which ſeems to make againſt it is, that in moſt caſes of this nature, though the party were indicted, or an information preferred, yet a *capias* was not the firſt proceſs, but a *venire facias*, and *diſtringas*. 1 *H. H.* 113.

And Mr. Hawkins on this point ſaith thus: It ſeems that anciently no one juſtice could legally make out a warrant for an offence againſt a penal ſtatute, or other miſdemeanor, cognizable only by a ſeſſions of two or more juſtices: for that one ſingle juſtice hath no juriſdiction of ſuch offence, and regularly thoſe only who have juriſdiction over a cauſe can award proceſs concerning it: Yet the long, conſtant, univerſal and uncontrouled practice of juſtices of the peace, ſeems to have altered the law in this particular, and to have

given

given them an authority in relation to ſuch arreſts, not now to be diſputed. 2 *Haw.* 84.

Foraſmuch as moſt of the buſineſs of a juſtice of the peace, conſiſteth in the execution of divers ſtatutes, which cannot be ſufficiently abridged but that they will come ſhort of the body and ſubſtance thereof; therefore it ſhall be ſafeſt for the juſtices to have an eye to the ſtatutes at large, and thereby to take their further and better directions, for their whole proceedings: for (as lord Coke obſerveth) abridgments are of good and neceſſary uſe to ſerve as tables, but not to ground any opinion, much leſs to proceed judicially upon them. *Dalt.* c. 173.

VI Their indemnity and protection by the law in the right execution of their office; and their puniſhment for the omiſſion of it.

A juſtice of the peace is ſtrongly protected by the law, in the juſt execution of his office.

Thus in the firſt place, he is not to be ſlandered or abuſed; as appears by the following report: M. 11 G. Allton and Blagrave. The plaintiff declared that he was a juſtice of the peace, and that upon a *colloquium* of him and the execution of his office, the defendant ſaid, 'You are a raſcal, a villain and a liar.' After verdict for the plaintiff it was moved in arreſt of judgment, that theſe words are not actionable. It was urged by the plaintiff, there is a great difference between magiſtrates and common tradeſmen;—words of the latter muſt affect them in their particular way of dealing; but any thing that tends to impeach the credit of the former, is actionable: And although an indictment might not lie for theſe words, as perhaps not tending to a breach of the peace, yet nevertheleſs they are actionable; for in many caſes words are actionable, which are not indictable. After conſideration, Pratt, Ch. J. delivered the opinion of the court, That though raſcal and villain were uncertain, yet being joined with liar, and ſpoken of a juſtice of the peace, they did import a charge of acting corruptly and partially, and therefore there ought to be judgment for the plaintiff. *Str.* 617. *L. Raym.* 1369.

Afterwards, *T.* 15. G. 2. Kent and Pocock. Theſe words ſpoken of a juſtice of the peace in the execution of his office, and relating thereto, were held actionable, viz. Mr Kent is a rogue, according to the aforeſaid caſe of Alton and Blagrave. *Str.* 1168.

T 14 *G.* 2. *K.* and Pocock. An information was moved for againſt the defendant, on account of words ſpoken of Mr. Kent, a juſtice of the peace. And the affidavit ſtated, that in a converſation about a warrant granted by Mr. Kent, the defendant aſked, if Mr. Kent was a ſworn juſtice; and being anſwered, to be ſure he was, elſe he would not act, the defendant replied, 'If he is a ſworn juſtice, he is a rogue and a forſworn rogue.' To this it was objected,

ed, that the words were not ſpoken to him in the execution of his office, but only in relation to what he had formerly done: And by the court, There ought to be no information; it is not the ſame inſult and contempt, as if ſpoken to him in the execution of his office, which would make it a matter indictable. *Str.* 1157.

Nevertheleſs, according to the diſtinction in the aforeſaid caſe of Aſton and Blagrave, although an information or indictment might not lie, yet it doth not follow but that the words were actionable, and ſo it ſeemeth to have been held in the caſe laſt but one abovementioned, of Kent and Pocock, which ſeemeth to have been none other than an action brought for this very ſame offence, after it had been determined that an information would not lie.

In the next place, he is not puniſhable at the ſuit of the party, but only at the ſuit of the king, for what he doth as judge, in matters which he hath power by law to hear and determine without the concurrence of any other: for regularly no man is liable to an action for what he doth as judge; but in caſes wherein he proceeds miniſterially, rather than judicially, if he acts corruptly, he is liable to an action at the ſuit of the party, as well as to an information at the ſuit of the king. 2 *Haw.* 85.

In the next place, by the 7 *J.* c 5. it is enacted, 'that if any 'action ſhall be brought againſt a juſtice for any thing done by 'virtue of his office, he may plead the general iſſue, and give the 'ſpecial matter in evidence; and if he recovers, he ſhall have dou-'ble coſts.'

And by the 21 *J.* c. 12. ſuch action ſhall not be laid, but in the county where the fact was committed.

Moreover, if a juſtice will not, on complaint to him made, execute his office, the party grieved may complain to the judges of aſſize, or to the lord chancellor; and upon examination, if it appeareth that the complaint is true, the chancellor may put him out of commiſſion, and he ſhall be puniſhed moreover according to his deſert. *Crom.* 7.

But the moſt uſual way of compelling them to execute their office in any caſe, is by a writ of *mandamus* out of the king's bench.

And in actions brought againſt juſtices, they are obliged to ſhew the regularity of their convictions; and the informations laid before them, upon which the convictions are grounded, muſt be produced and proved in court. *Seſſ. Caſ. V. I. p.* 372. *Hill* and *Bateman.* 12 *G.*

LARCENY.

LARCENY comes from *latrocinium*, *latrocini*; and by contraction or rather abuſe, *larceny.* 3 *Inſt.* 107.

I. Of

I. Of grand larceny in general.
II. Of petit larceny.
III. Larceny from the perſon.
IV. Larceny from the houſe.
V. Larceny in a booth or tent.
VI. Receiving ſtolen goods.
VII. Offering goods ſuſpected to be ſtolen, to be pawned or ſold.

I. Of grand larceny in general.

Grand larceny is a felonious and fraudulent taking and carrying away, by any perſon, of the mere perſonal goods of another, above the value of 12d. 1 *Haw.* 89.

Felonious and fraudulent] Felony is always accompanied with an evil intention, and therefore ſhall not be imputed to a mere miſtake or miſanimadverſion; as where perſons break open a door, in order to execute a warrant, which will not juſtify ſuch a proceeding; for in ſuch caſe there is no felonious intention. 1 *Haw.* 65.

For it is the mind that makes the taking of another's goods to be felony, or a bare treſpaſs only; but becauſe the variety of circumſtances, is ſo great, and the complications thereof ſo mingled, that it is impoſſible to preſcribe all the circumſtances evidencing a felonious intent, or the contrary; the ſame muſt be left to the due and attentive conſideration of the judge and jury; wherein the beſt rule is, in doubtful matters rather to incline to acquittal than conviction. Only in general it may be obſerved, that the ordinary diſcovery of a felonious intent is, if the party doth it ſecretly, or being charged with the goods denies it. 1 *H. H.* 509.

Taking] All felony includes treſpaſs; and every indictment muſt have the words *feloniouſly took*, as well as *carried away*: from whence it follows, that if the party be guilty of no treſpaſs in taking the goods, he cannot be guilty of felony in carrying them away. 1 *Haw.* 89.

And from this ground it hath been holden, that one who finds the goods which I have loſt, and converts them to his own uſe, with intent to ſteal them, is no felon; and *a fortiori* therefore it muſt follow, that one who has the actual poſſeſſion of my goods by my delivery for a ſpecial purpoſe, as a carrier who receives them, in order to carry them to a certain place; or a taylor who has them in order to make me a ſuit of cloaths; or a friend who is intruſted with them to keep for my uſe, cannot be ſaid to ſteal them, by imbezzelling them afterwards. 1 *Haw.* 89.

But yet it hath been reſolved, that if a carrier open a pack, and take out part of the goods; or a weaver who has received ſilk to work, or a miller who has corn to grind, take out part thereof, with intent to ſteal it, it is felony. 1 *Haw.* 90.

So

So where a man's goods are in such a place, where ordinarily they are or may be lawfully placed, and a person takes them, with intent to steal them, it is felony; and the pretence of finding must not excuse. 1 *H. H.* 506.

So if a man's horse be going upon a common where he has a right to put him, and another take the horse with intent to steal him, it is no finding, but a felony. 1 *H. H.* 506.

So also, if the horse stray into a neighbour's ground or common, it is felony in him that so takes him. But if the owner of the ground takes him doing damage, or the lord seize him as a stray, though perchance he hath no title so to do, yet here is not a felonious intention, and therefore cannot be felony. 1 *H. H.* 509.

If one man's sheep stray into another man's flock, and that other person drives it along with his flock, or by bare mistake shears it, this taking is not felony; but if he knew it to be another's, and marks it with his mark, this is an evidence of felony. 1 *H. H.* 507.

Lord Hale says, If one man take another man's hay or corn, and mingles it with his own heap or stock; or take another man's cloth, and embroider it with silk or gold; such other person may retake the whole heap of corn, or cock of hay, or garment and embroidery also: and this retaking is no felony, nor so much as a trespass. 1 *H. H.* 513.

It seems generally agreed, that one who has the bare charge, or the special use of goods, but not the possession of them; as a shepherd who looks after my sheep, or a butler who takes care of my plate, or a servant who keeps a key of my chamber, or a guest who has a piece of plate set before him in an inn, may be guilty of felony in fraudulently taking away the same. 1 *Haw.* 90.

By the 21 *H.* 8. c. 7. Servants embezzelling their master's goods, to the value of 40*s.* or above (although his taking be no trespass) shall be punished as felons. But this shall not extend to any apprentice, nor to any person within 18 years of age. And by the 12 *An.* c. 7. If it is taken out of an house, or outhouse, it is felony without benefit of clergry.

Also by the 3 *W.* c. 9. If any person shall take away, with intent to steal, or embezzle any furniture out of his lodging, he shall be guilty of felony.

And carrying away] To make it come within this description, it seemeth that any the least removing of the thing taken, from the place it was before, is sufficient for this purpose, though it be not quite carried off: And upon this ground, the guest, who having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny: So also was he who having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. 1 *Haw.* 93.

By

By any perſon] A wife may be guilty thereof, by ſtealing the goods of a ſtranger: but not by ſtealing the goods of her huſband. 1 *Haw.* 93.

It is ſaid by Mr. Dalton and others, that it is no felony for one reduced to extreme neceſſity, to take ſo much of another's victuals, as will ſave him from ſtarving; but lord Hale ſays, that this rule by the law of England is falſe: and therefore that if a perſon, being under the neceſſity for want of victuals or cloaths, ſteals another man's goods, it is felony. 1 *H. H.* 54.

If one ſtealeth another man's goods, and afterwards another ſtealeth the ſame from him; the owner may charge the firſt or ſecond felon at his choice. *Dalt.* c. 162.

Of the mere perſonal goods) *Mere*; for if the perſonal goods favour any thing of the realty, it cannot be larceny. And therefore they ought to be no way annexed to the freehold: therefore it is no larceny, but a bare treſpaſs, to ſteal corn or graſs growing, or apples on a tree; but it is larceny to take them being ſevered from the freehold, as wood cut, graſs in cocks, ſtones digged out of the quarry: and this, whether they are ſevered by the owner, or even by the thief himſelf, if he ſever them at one time, and then come again at another time and take them. 1 *Haw.* 93. 1 *H. H.* 510.

But by the 4 *G.* 2. c. 32. Every perſon who ſhall ſteal, rip, cut or break, with intent to ſteal any lead, iron bar, iron gate, iron paliſadoe, or iron rail, fixed to any building or in any garden, orchard, court-yard, fence or outlet belonging to any building; he his aiders and abettors, and alſo all who ſhall knowingly buy or receive the ſame, ſhall be guilty of felony, and be tranſported for ſeven years.

Alſo the goods ought to have ſome worth in themſelves, and not to derive their whole value from the relation they bear to ſome other thing, which cannot be ſtolen; as paper or parchment, on which are written aſſurances concerning lands, or obligations, or covenants, or other ſecurities for a debt, or other choſe in action. 1 *Haw.* 93.

But by the 8 *H.* 6. c. 12. If any perſon ſhall ſteal any record or proceſs belonging to any of the courts at Weſtminſter, by reaſon whereof any judgment ſhall be reverſed, he ſhall be guilty of felony.

Of another] It ſeems agreed, that the taking of goods, whereof no one had a property at the time, cannot be felony; and therefore that he who takes any treaſure trove, or a wreck, waif or ſtray, before they have been ſeized by the perſons who have a right thereto, is not guilty of felony, but ſhall be puniſhed by fine—1 *Haw.* 94.

But yet the taking of theſe muſt be, where the party that takes them, really believes them to be ſuch, and colours not a felonious taking

taking under such a pretence; for then every felon would cover his felony under that pretence. 1 *H. H.* 506.

Neither shall he who takes fish in a river or other great water, wherein they are at their natural liberty, be guilty of felony: as he may be, who takes them out of a trunk or pond. 1 *Haw.* 94.

Upon the like ground it seems clear, that a man cannot commit felony, by taking hares or conies in a warren, or old pigeons being out of the house; but it is agreed, that one may commit larceny, in taking such or any other creatures, *feræ naturæ*, if they be fit for food, and reduced to tameness, and known by him to be so.—1 *Haw.* 94.

Also it is said, that there may be felony in taking goods, the owner whereof is unknown; in which case, the king shall have the goods, and the offender shall be indicted for taking the goods of a person unknown: and it seems that in some cases the law will rather feign a property, where in strictness there is none, than suffer an offender to escape. 1 *Haw.* 94.

Above the value of 12d] The learned editor of Hale's history of the pleas of the crown observes, that in former times, though the punishment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ransom; but in the 9 H. 1. it was enacted, that whoever was convicted of theft should be hanged, and the liberty of redemption was entirely taken away; which law continues to this day. But considering the alteration in the value of money, the severity of which is much greater now than it was then: for 12d would then purchase as much as 40s. will now: and yet a theft above the value of 12d. is still liable to the same punishment. Upon which Sir H. Spelman justly observes, that while all things else have risen in their value, and grow dearer, the life of man is become much cheaper: and from thence takes occasion to wish, that the ancient tenderness of life was again restored. 1 *H. H.* 12.

And lord Coke, observing, that when the statute of the 3 *Ed.* 1. was made, which makes stealing of goods above the value of 12d. to be grand larceny, the ounce of silver was at the value of 20d. and now it is at the value of 5s. and above, draws this conclusion, that the things stolen ought to be reasonably valued, that is, having respect to the great alteration in the value of money. 2 *Inst.* 189, 199. For 20s. were then a real pound weight: which name we still retain, although the weight is much diminished.

If two persons or more, together, steal goods above the value of 12d. every one of them is guilty of grand larceny: for each person is as much an offender as if he had been alone. 1 *Haw.* 95.

Also it seems the current opinion of all the old books, that if one at several times steal several parcels of goods, each under the value of 12d. but amounting in the whole to more, from the same person, and be found guilty thereof on the same indictment, he shall have

judgment of death for grand larceny: but this ſeverity is ſeldom practiſed. 1 *Haw.* 25.

II. *Of petit larceny.*

Petit larceny agrees with grand larceny in the ſeveral particulars abovementioned, except only the value of the goods (and except as hereafter followeth)——ſo that wherever an offence would amount to grand larceny, if the thing ſtolen were above the value of 12d. it is petit larceny, if it be but of that value or under—1 *Haw.* 95.

And if one be indicted for ſtealing goods to the value of 10s. and the jury find ſpecially, as they may, that he is guilty, but that the goods are worth but 10d. he ſhall not have judgment of death, but only as for petit larceny. 1 *Haw.* 95.

In petit larceny there can be no acceſſaries, neither before nor after. 1 H. H. 530.

By the 3 *Ed.* 1. c. 15. Perſons indicted of petit larceny, if they were not guilty of ſome other larceny aforetime, are bailable by juſtices of the peace. And it ſeems to be agreed, that there is no neceſſity, that ſuch perſons be of good reputation: but yet if the crime be open and manifeſt, it ſeems that they ought not to be bailed; but if there be any colour of probability for their innocence, it ſeems moſt agreeable to the intention of the ſtatute, to bail them. 2 *Haw.* 101.

For a juſtice of the peace, before whom an offender ſhall be brought for petit larceny out of ſeſſions, may not puniſh the ſaid offender by his diſcretion, and ſo let him go; but muſt have him committed or bailed, to the intent he may come to his trial, as in caſes of other felonies: and if upon his trial, the jury ſhall find the goods ſtolen to exceed 12*d.* in value, the offender ſhall have judgment to die for the fault. *Dalt* c. 154.

It ſeemeth that all petit larceny is felony, and conſequently requires the word *feloniouſly* in an indictment for it; yet it is certain that it is not puniſhable with the loſs of life, or lands but only with the forfeiture of goods, and whipping, tranſportation, or other corporal puniſhment. 1 *Haw.* 95.

If a man appear to be obſtinately mute, on an arraignment of petit larceny, he ſhall not have judgment of *pain fort et dure*, as in caſes of grand larceny: but he ſhall have the like judgment as if he had confeſſed the indictment. 2 *Haw.* 329.

III. *Larceny from the perſon.*

If the goods are taken from a man's perſon, the offence receives a farther degree of guilt: and if it is attended with putting him in fear, it is called robbery: for which ſee that title.

If it is without putting him in fear, then it is called barely *larceny from the perſon.* 1 *Haw.* 95. If

If it be done privily without his knowledge, by picking of pockets, or otherwise, it is excluded from the benefit of clergy by the 8 *El.* c. 4. (That is, if the thing ſtolen be above the value of 12*d.* 2 *H. H.* 366) But this ſtatute extendeth not to acceſſaries, either before or after. 2 *Haw.* 350.

If it be done openly and avowedly before his face, it is within the benefit of clergy, (1 *Haw* 97.) except where it is committed in a dwelling houſe, or outhouſe thereunto belonging, to the value of 40*s.* from which the benefit of clergy is taken away by the 12 *Ann. ſt.* 1. c. 7. hereafter following.

IV. Larceny from the houſe.

This muſt be underſtood where the offence falls ſhort of *burglary.*

By the 3 W. c. 9. Every perſon that ſhall feloniouſly take away any goods, being in any dwelling houſe, any perſon being therein, and put in fear: or ſhall rob any dwelling houſe in the day time, any perſon being therein: he, his comforters and abettors, ſhall be guilty of felony without benefit of clergy.

And by the 39 *El.* c. 15. Every perſon who ſhall be convicted of the feloniouſly taking away in the day time any money or goods of the value of 5*s.* in any dwelling houſe, or outhouſe, thereunto belonging, and uſed to and with the ſame altho no perſon be therein, ſhall be guilty of felony without benefit of clergy.

This requires an actual breaking, and not entering by the doors being open. 1 *H. H.* 548.

And by the 1 *Ed.* 6. c 12. *ſ.* 10. Every perſon who ſhall be convicted of breaking any houſe in the day time, any perſon being therein, and put in fear, ſhall be guilty of felony without benefit of clergy.

And this altho' nothing be actually taken: But it requires not only actual breaking, and putting in fear, but alſo an entry *with intent to commit* felony, and ſo to be laid in the indictment. 1 *H. H.* 548.

V. Larceny in a booth or tent.

Perſons found guilty of robbing any perſon in any booth or tent, in any fair or market, the owner, his wife, children, or ſervants being within, whether they be ſleeping or waking, ſhall ſuffer as felons without benefit of clergy. 5 & 6. *Ed.* 6. c. 9. *ſ.* 5.

VI. Receiving ſtolen goods.

By the 3 W. c. 2. If any perſon ſhall buy or receive any ſtolen goods, knowing the ſame to be ſtolen; he ſhall be deemed an acceſſary after the fact, and ſuffer accordingly. ſ. 4.

And by the 5 *An.* c. 31. If any perſon ſhall buy or receive any ſtolen goods, knowing them to be ſtolen, or ſhall receive, harbour, or

or conceal any felons or thieves, knowing them to be so; he shall be deemed accessary to the felony. and being convicted on the testimony of one witness, shall suffer death as a felon convict.

Warrant for larceny.

New-York, Queeen's County. } *To any constable of said county.*

FORASMUCH as A. I. of ——— in this county of ——— yeoman, hath this day made information and complaint upon oath, before me ——— one of the justices of the peace for the said county, that this present day divers goods of him the said A. I. to wit, ——— have feloniously been stolen, taken, and carried away from the house of him the said A. I. at ——— aforesaid in the county aforesaid, and that he hath just cause to suspect, and doth suspect that A. O. late of ——— yeoman, feloniously did steal, take, and carry away the same: These are therefore to command you forthwith to apprehend him the said A. O. and to bring him before me to answer unto the said information and complaint, and to be further dealt withal according to law: Herein fail you not. Given under my hand and seal the ——— day of ——— in the year ———.

Note: The form of a warrant to search for stolen goods is inserted under the title *Search Warrant*.

LEWDNESS.

ALTHO' lewdness be properly punishable by the ecclesiastical law, the offence of keeping a bawdy house cometh under the cognizance of the law temporal, as a common nuisance, not only in respect of its endangering the public peace by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes 3 *Inst.* 205. 1 *Haw.* 196.

And in general, all open lewdness grossly scandalous is punishable upon indictment at the common law. 1 *Haw.* 7.

And offenders of this kind are punishable not only with fine and imprisonment, but also with such infamous punishment as to the court in discretion shall seem proper. 1 *Haw.* 196.

And upon information given to a constable, that a man and woman are in adultery or fornication together, or that a man and woman of evil report are gone to a suspected house together in the night, the officer may take company with him, and if he find them so, he may carry them before a justice, to find sureties of the good behaviour. *Dalt.* c. 124. 2 *Haw.* 61.

For it seems always to have been the better opinion, that a man may be bound to his good behaviour, for haunting bawdy houses with

with women of bad fame, as also for keeping bad women in his own house. 1 *Haw.* 132.

And a wife may be indicted together with her husband, and condemned to the pillory with him, for keeping a bawdy house; for this is an offence as to the government of the house: in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. 1 *Haw.* 2.

And if a wife go away, and remain with an adulterer, without being reconciled to her husband, she shall lose her dower. 2 *Inst.* 435.

But if a person is indicted for frequenting a bawdy house, it must appear that he knew it to be such a house; and must be expressly alledged that it is a bawdy house, and not that it is suspected to be such a house. *Wood. b.* 3. c. 3.

On an indictment for keeping a disorderly house, a female witness swore, that she was a sailors wife, and during her husband's absence out of the realm, she had often prostituted herself there: Lord Raymond said it was an odious piece of evidence, and ought not to be heard. *Barl. bawdy-h.*

But it is said, a woman cannot be indicted for being a bawd generally, for that the bare solicitation of chastity is not indictable. 1 *Haw.* 196. 1 *Salk.* 382.

Adultery and fornication were anciently inquirable in the torn and leet. 2 *Inst.* 206. And this power doth not seem to have been taken away by any statute.

Indictment for keeping a disorderly house.

New-York, Queen's County. THE jurors for the people of the state of New-York, upon their oath present, that A. O. late of——in the said county, labourer, on the——day of——in the——year of the independence of——and at divers other times as well before as after, with force and arms, at——aforesaid in the county aforesaid, did keep and maintain, and yet doth keep and maintain a certain common, ill-governed, and disorderly house, and in his said house, for his own lucre and gain, certain evil and ill disposed persons, as well men as women, of evil name and fame, and of dishoneſt conversation, to frequent and come together then, and the said divers other times, there unlawfully and wilfully did cause and procure; and the said men and women in his said house, at unlawful times, as well in the night as in the day, then and the said other times, there to be and remain, drinking, tipling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuisance of all the people of the state of New-York, and against the peace of the people of said state and their dignity.

LIBEL.

I. What it is.
II. Who are punishable for it.
III. How punishable.

I. What it is.

A LIBEL is a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that is alive, or the memory of one that is dead. *Wood. b.* 3. c. 3.

A malicious defamation] And the scandal which is expressed in a scoffing and ironical manner, is as properly a malicious defamation, as that which is expressed in direct terms; as where a person proposes one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, and the like; which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so. 1 *Haw.* 194.

And from the same foundation it hath also been resolved, that a defamatory writing expressing only one or two letters of a name, in such a manner, that from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if restrained to any other meaning, is as properly a libel, as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions: And it is a ridiculous absurdity to say, that a writing which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury. 1 *Haw.* 194.

And it matters not whether the libel be true, or whether the party against whom it is made be of good or bad fame; for in a settled state of government the party grieved ought to complain, for any injury done to him, in the ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise. 5 *Co.* 125. But this is to be understood, when the prosecution is by information or indictment; but in an action on the case, one may justify that it is true. *Wood. b.* c. c. 3.

Of any person] Where a writing inveighs against mankind in general, or against a particular order of men, as for instance, men of the gown, this is no libel; but it must descend to particulars and individuals to make it a libel. 3 *Salk.* 224.

And it hath been agreed in the court of king's bench, that a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law;

law; yet it seems that the author may be bound to his good behaviour, as a scandalous person of evil fame. 1 *Haw.* 195.

But if the libel is only against a private person, yet it deserveth severe punishment; for albeit the libel be against one, yet it inciteth all those of the same family, kindred, or society, to revenge, and so tendeth by consequence to quarrels, and breach of the peace, and may be the cause of effusion of blood, and of great inconvenience: But if it be against a magistrate, or other public person, it is a greater offence: for it concerneth not only the breach of the peace, but the scandal of the government. 5 *Co.* 125.

Expressed either in printing or writing, signs or pictures] A libel is either in writing, or without writing: In writing, when an epigram, rhyme, or other writing is published to the contumely of another, by which his fame or dignity may be prejudiced: Without writing, may be by pictures, as to paint the party in any shameful and ignominious manner; or by signs, as to fix a gallows, or other reproachful and ignominious signs at a man's door. 5 *Co.* 125.

E. 7 *G.* Mayor of Northampton's case. He sent lord Halifax a licence to keep a public house, which the court said was a libel in the case of a person of his quality, and granted an information for it. *Str.* 422.

Or the memory of one that is dead] For the offence is the same, whether the person libelled be alive or dead. 5 *Co.* 125.

II. Who are punishable for it.

It is certain, that not only he who composes a libel, or procures another to compose it, but also he who publishes, or procures another to publish it, are in danger of being punished for it; and it is said not to be material, whether he who disperses a libel knew any thing of the contents or effect of it or not; for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher, would make him safe in dispersing them. 1 *Haw.* 195.

Also it hath been said, that if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it, in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. 1 *Haw.* 195.

Also it hath been holden that the copying of a libel shall be a conclusive evidence of the publication of it, unless the party can prove, that he delivered it to a magistrate to examine it. 1 *Haw.* 195.

And it hath been ruled, that the finding a libel on a bookseller's shelf, is a publication of it by the bookseller; and that it is no excuse to say, that the servant took it into the shop without the master's

maſter's knowledge; for the law preſumes the maſter to be acquainted with what the ſervant does. *Seſſ. C. V.* 1. *p.* 33. *K.* and *Dodd*, 10 *G.*

And it ſeems to be the better opinion, that he who firſt writes a libel dictated by another, is thereby guilty of making it, and conſequently puniſhable for the bare writing; for it was no libel, till it was reduced to writing: For the eſſence of a libel conſiſteth in the writing of it; for if a man ſpeaks ſuch words, unleſs the words be put in writing, it is not a libel. 2 *Salk.* 419. 1 *Haw.* 195.

Alſo it hath been reſolved, that the ſending of a letter full of provoking language to another, without publiſhing it, is highly puniſhable, as manifeſtly tending to a diſturbance of the peace. 1 *Haw.* 195.

But it hath been reſolved, that he who barely reads a libel in the preſence of another, without knowing it before to be a libel, or who is only proved to have had a libel in his cuſtody, ſhall not in reſpect of any ſuch act be adjudged the publiſher of it. But the having in one's cuſtody a written copy of a libel publicly known, is an evidence of the publication of it. 1 *Haw.* 196.

The way for a man to keep himſelf out of danger in ſuch caſes is, if he finds a libel, and it be compoſed againſt a private perſon, he either may burn it, or forthwith deliver it to a magiſtrate; but if it concern a magiſtrate, or other public perſon, he ought immediately to deliver it to a magiſtrate, to the intent that by examination and enquiry, the author may be found and puniſhed. 5 *Co.* 125.

III. How puniſhable.

There ſeemeth to be no doubt, but that the offenders may be condemned to pay ſuch fine, and alſo to ſuffer ſuch corporal puniſhment, as to the court in diſcretion ſhall ſeem proper, according to the heinouſneſs of the crime, and the circumſtances of the offender. 1 *Haw.* 196.

And it hath been adjudged, that libels, as having a direct and immediate tendency to a breach of the peace, are indictable before juſtices of the peace. 2 *Haw.* 40.

On an indictment ſetting forth the offence, according to the tenor and to the effect following, it was agreed to by the court, that to the effect following had been naught, being vague and uſeleſs words; for the court muſt judge of the words themſelves; but the words, according to the tenor, do correct the defect; for they import the very words themſelves, for the tenor of a thing is the tranſcript and true copy of it, to which it may be compared: and therefore of words ſpoken there can be no tenor before there is no written original. 2 *Salk.* 117. 3 *Salk.* 225.

And it muſt be proved to be written or publiſhed, in the county laid in the indictment: all matters of crime being local. *Read.* Lib. *State.* *T. V.* 3. 774, 775. *V.* 4. 672.

Indictment

Indictment for a libel.

THE jurors for the people of the ſtate of New-York, upon their oath preſent, that A. O. late of———in the county of ———gentleman, not having God before his eyes, but moved by the inſtigation of the devil, and falſly and maliciouſly contriving and intending to bring the people of the ſtate of New-York into hatred and infamy amongſt the citizens thereof, and to move ſedition amongſt the people of ſaid ſtate, did on the———day of——— in the———year of the independence of———with force and arms, at———aforeſaid, in the county aforeſaid, falſly, ſeditiouſly, and maliciouſly write and publiſh, and cauſe to be written and publiſhed, a certain falſe, ſeditious, and ſcandalous libel, intitled ———In which ſaid libel are contained, among other things divers falſe, ſeditious, ſcandalous, and malicious matters, according to the tenor following, to wit,———And in another part of the ſame libel are contained divers other falſe, ſeditious, ſcandalous and malicious matters, according to the tenor following ———to the evil example of all others in the like caſes offending, and againſt the peace of the people of the ſtate of New-York, and their dignity.

LORD's DAY.

ALL perſons not having reaſonable excuſe, ſhall reſort to their pariſh church or chapel (or to ſome congregation of religious worſhip allowed by the toleration act) on every Sunday, on pain of puniſhment by the cenſures of the church, or of forfeiting 1 *s.* to the poor for every offence. 1 *El.* c. 2. *ſ.* 14, 24. To be levied by the churchwardens by diſtreſs, by warrant of one juſtice. 3 *J.* c. 4. *ſ.* 27, 28.

By the 3 *C. c.* 1. No carrier with any horſe, nor waggonman with any waggon, nor wainman with any wain, nor drover with any cattle, ſhall by themſelves, or any other, travel on the Lord's day, on pain of 20s.—or if any butcher, by himſelf, or any other for him, with his privity and conſent, ſhall kill or ſell any victuals, on the Lord's day, he ſhall forfeit 6s. 8d. The conviction to be in ſix months, before one juſtice, or mayor, on view or confeſſion, or oath of two witneſſes; to be levied by the conſtable or churchwardens, by diſtreſs: or to be recovered in any court of record, in any city or town corporate, before the juſtices in the ſeſſions; to be applied to the uſe of the poor, except that the juſtice may reward the informer or proſecutor with part of the forfeiture, not exceeding one third part.

A juſtice iſſued a warrant to the conſtable, to make a perſon to find ſureties for his good behaviour; the conſtable executed the warrant on a Sunday, and he was juſtified by the court, who reſol-

ved, that a warrant for the good behaviour is a warrant for the peace and more; and that this ſtatute is to be favourably interpreted for the peace, *Raym.* 250.

Warrant on the 3 C. c 1. to levy 20s. on a carrier for travelling on the Lord's day.

Pennſylvania, Buck's County. } *To any conſtable of ſaid county.*

FORASMUCH as A. O. of——in the county of——carrier, is duly convicted before me, J. P. eſquire, one of the juſtices aſſigned to keep the peace in the ſaid county, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors in the ſaid county committed, for that he the ſaid A. O. on the——day of——in the——year of the independence of——being the Lord's day, commonly called Sunday, with his horſe, into and through your ſaid townſhip of——did travel, contrary to the ſtatutes in that caſe made and provided, whereby he hath forfeited the ſum of 20s. of lawful money of the ſtate of Pennſylvania: Theſe are therefore to command you forthwith to levy the ſaid ſum of 20s. by diſtraining the goods and chattels of him the ſaid A. O. And if within the ſpace of [five] days next after ſuch diſtreſs by you taken, the ſaid ſum ſhall not be paid, together with the reaſonable charges of taking and keeping the ſame, that then you do ſell the ſaid goods and chattels ſo by you diſtrained, and out of the money ariſing by ſuch ſale, that you do pay the ſum of 6s. 8d. part of the ſaid ſum of 20s. to A. I. of——yeoman, who informed me of the ſaid offence, and that you ſee the remaining ſum of 13s. 4d. employed to the uſe of the poor of your ſaid townſhip of——returning to him the ſaid A. O. the overplus upon demand, the reaſonable charges of taking, keeping, and ſelling the ſaid diſtreſs, being firſt deducted. And you are to certify to me, with the return of this precept, what you ſhall have done in the execution thereof. Herein fail you not. Given under my hand and ſeal at——in the ſaid county, the——day of

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LUNATICS.

NON *compos mentis* is of four kinds:

Firſt, ideots; who are of *non ſane* memory from their nativity, by a perpetual infirmity.

Secondly, Thoſe that loſe their memory and underſtanding by the viſitation of God, as by ſickneſs, or other accident.

Thirdly, Lunatics, who have ſometimes their underſtanding, and ſometimes not.

Fourthly, Drunkards; who by their own vicious act for a time deprive themſelves of their memory and underſtanding. 1 *Inſt.* 247.

He

He who incites a madman to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. 1 *Haw.* 2.

But ideots and lunatics, who are under a natural disability of distinguishing between good and evil, are not punishable by any criminal prosecution. 1 *Haw.* 2.

Yet drunkards shall have no privilege by their want of sound mind; but shall have the same judgment as if they were in their right senses. 1 *Inst.* 247. 1 *Haw.* 2. 1 *H. H.* 32.

But if a person, who wants discretion, commit a trespass, against a person or possession of another; he shall be compelled in a civil action to give satisfaction for the damage. 1 *Haw.* 2.

If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed. *Hale's Pl.* 10. 1 *Haw.* 2.

By the common law, if it be doubtful whether a criminal, who at his trial in appearance is a lunatic, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff, and if it be found by them, that the party only feigns himself mad, and still refuse to answer, he shall be dealt with as one that stands mute. 1 *Haw.* 2.

An ideot cannot bring an appeal. 1 *Haw.* 162.

Neither can he be an approver: because he can neither take the oath in that case required, nor wage battle. 3 *Inst.* 129.

Any person may justify confining and beating his friend being mad, in such manner as is proper in such circumstances. 1 *Haw.* 130.

MAIM.

MAIM is such a hurt of any part of a man's body, whereby he is rendered less able in fighting, either to defend himself, or annoy his adversary. 1 *Haw.* 111.

For the members of every subject are under the safeguard and protection of the law, to the end a man may serve his king and country when occasion shall be offered: and therefore a person who maims himself, that he may have the more colour to beg, may be indicted and fined. 1 *Inst.* 127.

And by the like reason a person who disables himself, that he may not be impressed for a soldier.

The cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye, or foretooth, or castrating him, are said to be maims, but the cutting off his ear, or nose, were not esteemed maims at the common law, because they do not weaken but only disfigure him. 1 *Haw.* 111, 112.

It is said, that anciently castration was punished with death; and other maims with the loss of member for member; but afterwards no

no maim was punished in any case with the loss of life or member, but only with fine and imprisonment. 1 *Haw.* 112.

But now by the 22 & 23 *C.* 2. *c.* 1. (which is called the *Coventry* act, because it was made on occasion of Sir *John Coventry's* being assaulted in the street and his nose slit) If any person on purpose, and of malice forethought, and by lying in wait, shall unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject, with intention in so doing to maim or disfigure him; the person so offending, his counsellors, aiders, and abettors (knowing of, and privy to the offence) shall be guilty of felony without benefit of clergy: but not to work corruption of blood.

If a man attack another with intent to murder him, and he does not murder, but only maim him; the offence is nevertheless within this statute. 1 *Haw.* 112.

If the maim comes not within any of the descriptions in the act, yet it is indictable at the common law, and may be punished by fine and imprisonment: Or an appeal may be brought for it at the common law; in which the party injured shall recover his damages: Or he may bring an action of trespass; which kind of action hath now generally succeeded into the place of appeals in smaller offences not capital. 2 *Haw.* 157—160.

It doth not seem, that in maiming there may be accessaries after the fact. 2 *Haw.* 311.

MAINTENANCE.

BUYING of titles belongeth not to this place, but is treated of under a title of its own.

I. Of maintenance in general.
II. Of champerty in particular.
III. Of embracery in particular.

I. Of maintenance in general.

Concerning which I will shew,

i. What it is.
ii How punishable by the common law.
iii. How by statute.

i. What it is.

Maintenance *(manu tenere)* is an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. 1 *Haw* 249.

And it is twofold;

One in the country, as where one assists another in his pretention

to

to certain lands, by taking or holding the poſſeſſion of them for him by force or ſubtilty; or where one ſtirs up quarrels and ſuits in the country, in relation to matters wherein he is no way concerned. And this kind of maintenance is puniſhable at the king's ſuit by fine and impriſonment, whether the matter in diſpute any way depended in plea or not; but it is ſaid not to be actionable. 1 *Haw.* 249.

Another in the courts of juſtice; where one officiouſly intermeddles in a ſuit depending in any ſuch court, which no way belongs to him, by aſſiſting either party with money or otherwiſe, in the proſecution or defence of any ſuch ſuit. *id.*

Of this ſecond kind of maintenance, there are three ſpecies:

Firſt, where one maintains another without any contract to have part of the thing in ſuit; which generally goes under the common name of *maintenance*:

Secondly, where one maintains one ſide, to have part of the thing in ſuit, which is called *champerty*:

Thirdly, where one laboureth a jury; which is called *embracery*. *id.*

But it ſeemeth to be agreed, that wherever any perſons claim a common intereſt in the ſame thing, as in a way, churchyard, or common, by the ſame title, they may maintain one another in a ſuit relating to the ſame. 1 *Haw.* 252.

Alſo, that whoever is any way of kin or affinity to the party, may counſel and aſſiſt him, but that he cannot juſtify the laying out any of his own money in the cauſe, unleſs he be either father or ſon, or heir apparent. *id.*

Alſo, that any one in charity may lawfully give money to a poor man, to enable him to carry on his ſuit. 1 *Haw.* 253.

ii. How puniſhable by the common law.

It ſeemeth that all maintenance is not only *malum prohibitum* by ſtatute, but is alſo *malum in ſe*, and ſtrictly prohibited by the common law, as having a manifeſt tendency to oppreſſion; and therefore it is ſaid, that all offenders of this kind are not only liable to an action of maintenance at the ſuit of the party grieved, wherein they ſhall render ſuch damages as ſhall be anſwerable to the injury done to the plaintiff, but alſo that they may be indicted as offenders againſt public juſtice, and adjudged thereupon to ſuch fine and impriſonment as ſhall be agreeable to the circumſtances of the offence. Alſo, it ſeemeth, that a court of record may commit a man for an act of maintenance done in the face of the court. 2 *Inſt.* 212. 1 *Haw.* 255.

iii. How by ſtatute.

By the 1 *Ed.* 3. *ſt.* 2. *c.* 14. 'No perſon ſhall take upon him to 'maintain quarrels nor parties in the country, to the diſturbance of 'the common law.' And

And by the 20 *Ed.* 3. *c.* 4. 'None shall take in hand quarrels, 'other than their own, nor the same maintain, by them nor by other, 'for gift, promise, amity, favour, doubt, fear, nor other cause, in 'disturbance of law, and hindrance of right.'

And by the 1 *R.* 2. *c.* 4. 'None shall take or sustain any quarrel 'by maintenance in the country, on pain, if he is a great officer, 'as the king, by advice of the lords, shall ordain; if he is a lesser 'officer, he shall forfeit his office, and be imprisoned and ransomed 'at the king's will; and all other persons, on pain of imprisonment 'and ransom, at the king's will.'

And by the 32 *H.* 8. *c.* 9. 'No person shall unlawfully main-'tain, or procure any unlawful maintenance, in any action, demand, 'or complaint, in any court having power to hold plea of lands; 'nor shall unlawfully retain any person for maintenance of any plea, 'to the disturbance or hindrance of justice, on pain of 10*l.* half to 'the king, and half to him that shall sue within one year.' *S.* 3. 6.

Unlawfully maintain] It seemeth that in an information on this statute, it is not sufficient to say, that the defendant maintained the party, without adding that he did it unlawfully. 1 *Haw.* 256.

Having power to hold plea of lands] It is said to have been adjudged, that maintenance of a suit in a spiritual court, is neither within this nor any other statute concerning maintenance. 1 *Haw.* 256.

To hold plea] It hath been holden that in an information on this statute, it is necessary to shew, that a plea was depending; and therefore that it is not sufficient to say that a bill was exhibited. 1 *Haw.* 256.

II. *Of champerty in particular.*

i. What it is.
ii. How punishable by the common law.
iii. How by the statute.

i. What it is.

Champerty (from *campi parte*) is 'the unlawful maintenance of a 'suit, in consideration of some bargain to have part of the lands or 'things in dispute, or part of the gains'. 1 *Haw.* 256. 33 *Ed.* 1. *St.* 2.

Every champerty is maintenance, but every maintenance is not champerty; for champerty is but a *species* of maintenance which is the *genus*. 2 *Inst.* 208.

ii. How punishable by the common law.

Champerty was an offence at the common law, and as such is punishable in like manner as hath been expressed in treating of maintenance in general. 2 *Inst.* 208.

iii. How

iii. How by ſtatute.

By the 3 *Ed.* 1. c. 25. 'No officer of the king, by himſelf, nor 'by other, ſhall maintain pleas, ſuits, or other matters hanging in 'the king's courts, for lands, tenements, or other things, for to 'have part or profit thereof, by covenant made between them; and 'he that doth, ſhall be puniſhed at the king's pleaſure'.

By covenant made] That is, by agreement either by word or writing; for albeit in the common ſenſe, a covenant is taken for an agreement by writing, yet in a larger ſenſe it is taken (as it is here) for an agreement by writing or by word. 2 *Inſt.* 209.

And by the 28 *Ed.* 1 c. 11. 'No perſon whatſoever, for to have 'part of the thing in plea, ſhall take upon him the buſineſs that is 'in ſuit, nor ſhall any upon ſuch covenant give up his right to ano-'ther; on pain that the taker ſhall forfeit to the king the value of 'the part he hath purchaſed for ſuch maintenance. But no perſon 'ſhall be prohibited hereby to have counſel of pleaders, or of men 'learned in the law, for their fee; or of his parents and next friends.'

And by the 33 *Ed.* 1. *ſt.* 3. 'Any perſon who ſhall take for 'maintenance, or the like bargain, any ſuit or plea againſt another; 'he, and alſo they who conſent thereto, ſhall be impriſoned three 'years, and make fine at the king's pleaſure.'

And by the 1 *R.* 2. *c.* 9. 'A feoffment of lands, or gift of goods, 'for maintenance, ſhall be void, and the perſon diſſeized ſhall recover 'the lands againſt the firſt diſſeizors, with double damages, without 'having any regard to ſuch alienations.'

Shall be void] But it is ſaid, that it ſhall only be void with regard to him that hath right, and not between the feoffer and feoffee. 1 *Inſt.* 369.

And by the 31 *El.* c. 5. 'The offence of champerty may be laid 'in any county, at the pleaſure of the informer'. *ſ.* 4.

III. Of embracery in particular.

i. What it is.
ii. How puniſhable by the common law.
iii. How by ſtatute.

i. What it is.

It ſeems clear, 'that any attempt whatſoever to corrupt, or influ-'ence, or inſtruct a jury, or any way to incline them to be more 'favourable to the one ſide than to the other, by money, promiſes, 'letters, threats, or perſuaſions, is a proper act of embracery,' whether the juror on whom ſuch attempt is made give in any verdict or not, or whether the verdict given be true or falſe. 1 *Haw.* 259.

And the law ſo far abhors all corruptions of this kind, that it prohibits every thing which has the leaſt tendency to it, what ſpecious pretence ſoever it may be covered with, and therefore it will not

not ſuffer a mere ſtranger ſo much as to labour a juror to appear and act according to his conſcience. 1 *Haw.* 259.

But any perſon who may juſtify any other act of maintenance, may ſafely labour a juror to appear and give a verdict according to his conſcience, but no one whatſoever can juſtify the labouring a juror not to appear. 1 *Haw.* 260.

ii. How puniſhable by a common law.

There is no doubt, but that offences of this kind, do ſubject the offender either to an indictment or action, in the ſame manner as all other kinds of unlawful maintenance do by the common law. 1 *Haw.* 260.

iii. How by ſtatute.

By the 32 H. 8. c. 9. 'No perſon ſhall embrace any jurors, on 'pain of 10l. half to the king, and half to him that ſhall ſue within 'the year.' ſ. 3. 6.

And by the 38 Ed. 1 ſt. 1. c. 12. 'If any juror ſhall take any 'thing to give his verdict; both he, and the embracer, ſhall forfeit 'ten times as much, half to the king, and half to him that ſhall ſue.'

Upon which ſtatute is founded the writ of *Decies tantum.*

Indictment for maintenance.

THE jurors for the people of the ſtate of New-York upon their oath preſent, that A O. late of ——— in the county aforeſaid, yeoman, on the ——— day of ——— in the ——— year of the independence of ——— with force and arms, at ——— aforeſaid, in the county aforeſaid, did unjuſtly and unlawfully maintain and uphold a certain ſuit, which was then depending in the court of the people of ſaid ſtate, before the people themſelves, between A. P. plaintiff, and A. D. defendant, in a plea of debt, on the behalf of the ſaid A. P. againſt the ſaid A. D. contrary to the form of the ſtatute in ſuch caſe made and provided, and to the manifeſt hindrance and diſturbance of juſtice, and in contempt of the ſaid people, and to the great damage of the ſaid A. D. and againſt the peace of the people of the ſaid ſtate, and their dignity.

MISDEMEANOR.

THIS word in its uſual acceptation is applied to all thoſe crimes and offences, for which the law has not provided a particular name, and they may be puniſhed according to the degrees of the offence, by fine, or impriſonment, or both. *Barl.*

Miſpriſion of felony. See *FELONY.*
Miſpriſion of treaſon. See *TREASON.*
Mittimus. See *COMMITMENT.*
Money, See *COIN.*
Murder, See *HOMICIDE.*

MUTE.

THE whole learning relating to this title, will be comprehended in the explication of the ſtatute of Weſtminſter, 1 *c.* 12. which is as follows:

'Notorious felons, and which openly be of evil name, and will 'not put themſelves in inqueſt of felonies that men ſhall charge 'them with before the juſtices at the king's ſuit, ſhall have ſtrong 'and hard impriſonment, as they which refuſe to ſtand to the com-'mon law of the land. But this is not to be underſtood of ſuch 'priſoners as be taken of light ſuſpicion.' 3 *Ed.* 1. *c.* 12.

Felons] This ſtatute extendeth not to treaſon, which is the higheſt offence; nor to petit larceny, which is of all felonies the loweſt; but if a man ſtand obſtinately mute upon an arraignment of treaſon or petit larceny, he ſhall have the like judgment as if he had confeſſed the indictment. 2 *Inſt.* 177. 2 *Haw.* 329.

This word *felons*, extendeth as well to women as to men. 2 *Inſt.* 177.

Notorious, openly and of evil fame] Therefore no perſon ſhall be put to this puniſhment, unleſs the matter be evident or probable, which it is the duty of the judge to look unto, and to examine the evidence which proves the priſoner guilty of the fact, before he proceed to the judgment of *pain fort & dure*. 2 Inſt. 177. 2 Haw. 330.

And will not put themſelves in inqueſts] This is called ſtanding mute. Now a man may ſtand mute two manner of ways:

Firſt, when he ſtands mute *without ſpeaking of any thing*; and then the court ſhall *ex officio* inquire by the oath of any twelve perſons that happen to be preſent, whether he do ſo of malice, or by act of God; and if it be found that it was by the act of God, then the judges of the court (who are always to be of counſel with the priſoner to give him law and juſtice) ought to inquire touching all thoſe points which he might poſſibly plead himſelf, as whether a felony were done, whether he be the ſame perſon that is indicted for it, whether he did it, and whether he hath any matter to alledge for his diſcharge; and ſuch inquiry ſhall be made, not by an inqueſt of office, but by a jury returned by the ſheriff, in the ſame manner as if the defendant had actually pleaded; for ſince it is his own fault that he did not ſo plead, there is no reaſon why his trial ſhould be in a more looſe and ſummary manner, or any way leſs regular or ſolemn, than if he had ſo pleaded. 2 *Inſt.* 178. 2 *Haw.* 327, 328, 2 *H. H.* 317.

But what if all this be found againſt the priſoner, what ſhall be done?—Whether judgment of death ſhall be given againſt him, though he never pleaded, ſeems yet undetermined. 2 *H. H.* 317.

But after a man hath confeſſed himſelf guilty, or pleaded and put himſelf upon his country, he ſhall not afterwards be deemed as one that ſtands mute, in reſpect of his ſubſequent ſilence; but the

jury ſhall be charged, and the trial ſhall proceed, and the like judgment ſhall be given as in common caſes. 2 *Haw.* 327.

Alſo if the perſon become mute, and not by the act of God, as by cutting out his own tongue, he ſhall forthwith be put to his penance. 2 *Inſt.* 178.

Another kind of mute is, when the priſoner can ſpeak and perhaps pleadeth not guilty, or pleadeth a plea in law, and will not conclude to the inqueſt according to this act, that is to be tried by God and the country; then this act is ſufficient warrant, if the cauſe be evident or probable, to put him to his penance: But if he demur in law, and it be adjudged againſt him, he ſhall have judgment to be hanged; and tho' by his demurrer he refuſe to put himſelf upon the inqueſt according to the letter of this act, yet foraſmuch as he is out of reaſon of this act, for that he refuſeth not the trial of the common law, the demurrer being allowed to him by law, and to be tried by the judges, he ſhall not be put to his penance, but ſhall have judgment to be hanged, and not have *pain fort & dure.* 2 *Inſt.* 178.

At the king's ſuit] This act ſpeaketh only of indictments at the ſuit of the king; but the judgment of *pain fort & dure* was at the common law, both in indictments and appeals 2 *Inſt.* 177.

Shall have ſtrong and hard imbriſonment] *Soient miſes en la priſon fort & dure*: The judgment in this caſe is, that the man or woman ſhall be remanded to priſon, and laid there in ſome low and dark room, where they ſhall lie naked on the bare earth without any litter, ruſhes, or other cloathing; and without any garment about them, but ſomething to cover their privy part, and that they ſhall lie on their backs, their head uncovered and their feet, and one arm ſhall be drawn to one quarter of the room with a cord, and the other arm to another quarter, and in the ſame manner ſhall be done with their legs, and there ſhall be laid upon their bodies iron and ſtone, ſo much as they may bear and more, and the next day following they ſhall have three morſels of barley bread without any drink, and the ſecond day they ſhall drink thrice of the water that is next to the houſe of the priſon (except running water) without any bread, and this ſhall be their diet until they be dead. So as upon the matter they ſhall die three manner of ways, by weight, by famine, and by cold. And the reaſon of this terrible judgment is, becauſe they *refuſe to ſtand to the common law of the land.* 2 *Inſt.* 178, 179.

Which puniſhment being ſo ſevere, lord Hale adviſes, that it be not given too haſtily, but that the priſoner be not only thrice admoniſhed, but alſo, have ſome convenient reſpite, as until the afternoon, to bethink himſelf, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon: and that the judgment itſelf be diſtinctly read to him, that he may know his danger before his final refuſal, with due admonition not to deſtroy himſelf. 2 H. H. 320.

And as to the other conſequences of ſtanding mute, it is obſervable,

able, that where a perſon ſtanding mute is adjudged to his penance, and thereby prevents that attainder which otherwiſe he might have incurred, he *forfeits his chattels* only, and not his *lands*; and for this reaſon ſome have indured this puniſhment. 2 *Haw.* 331.

It doth not appear that the proſecutor of an indictment for felony, where the defendant ſtandeth mute, is intitled to the reſtitution of his goods, either by the common law or by any ſtatute. 2 *Haw.* 332.

But this is not to be underſtood of ſuch priſoners as ſhall be taken on light ſuſpicion] But if they obſtinately ſtand mute, it ſeemeth that they may be ſeverely fined and impriſoned for the contempt. 2 *Haw.* 330.

NUISANCE.

I. What it is.
II. How it may be removed.
III. How puniſhed.

I. What it is.

A Common nuiſance ſeems to be, an offence againſt the public; either by doing a thing which tends to the annoyance of all the king's ſubjects, or by neglecting to do a thing which the common good requires. 1 *Haw.* 197.

Annoyances to the prejudice of particular perſons, are not puniſhable by a public proſecution as common nuiſances, but are left to be redreſſed by the private actions of the parties aggrieved by them. 1 *Haw.* 197.

Where note a diverſity between a *private* and a *public* nuiſance: If it is a *private* nuiſance, he ſhall have his action upon his caſe, and recover his damages; but if it is a *public* nuiſance, he ſhall not have an action upon his caſe, and this the law hath provided for avoiding of multiplicity of ſuits, for if any one might have an action, all men might have the like; but the law for this common nuiſance hath provided an apt remedy, by preſentment or indictment at the ſuit of the king, in the behalf of all his ſubjects; unleſs any man hath a particular damage, as if he and his horſe fall into a ditch made acroſs a highway, whereby he received hurt and loſs, there for this ſpecial damage which is not common to others, he ſhall have an action upon his caſe. 1 *Inſt.* 56.

And from hence it clearly follows, that no indictment, for a nuiſance can be good, which lays it to the damage of private perſons only: as where it accuſes a man of ſurcharging ſuch a common; or of incloſing ſuch a piece of ground, wherein the inhabitants of ſuch a town have a right of common, to the nuiſance of all the inhabitants of ſuch a town or of diſturbing a watercourſe running to ſuch a mill,

a mill, to the damage of such a person and his tenants, without saying *of all the liege subjects of the king*. 1 H. 197.

Yet it hath been said, that an indictment of a common scold is good, altho' it conclude to the common nuisance of *divers*, instead of *all*, the king's subjects; perhaps for this reason (says Mr. Hawkins) because a common scold cannot but be a common nuisance. 1 *Haw.* 1 8.

And if the law be so in this case, why should not an indictment setting forth a nuisance to a way, and expressly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude to the nuisance of *divers*, without saying *all* the king's subjects? And perhaps the authorities which seem to contradict this opinion, might go upon this reason, that in the body of the indictment, it did not appear with sufficient certainty, whether the way wherein the nuisance was alledged, were a highway, or only a private way, and therefore that it shall be intended from the conclusion of the indictment, that it was a private way. 1 *Haw.* 198.

There is no doubt, but that common bawdy houses are indictable as common nuisances; and it hath been said that all common stages for rope dancers, and also all common gaming houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also they are apt to draw great numbers of disorderly persons. 1 *Haw.* 198.

Also it hath been holden, that a common playhouse may be a nuisance, if it draw together such a number of coaches or people, as prove generally inconvenient to the places adjacent. 1 *Haw.* 198.

Erecting a shed so near a man's house that it stops up his lights, is not a nuisance for which an action will lie, unless the house is an ancient house, and the lights ancient lights. 2 *Salk.* 459.

Also stopping a prospect is not a nuisance. 3 *Salk.* 247.

A gate erected in a highway, where none had been before, is a common nuisance. 1 *Haw.* 199

A person was indicted for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood; and it was held by the court to be a nuisance. *T.* 12 *G. K.* and *Smith. Str.* 704.

II. *How it may be removed.*

It seemeth to be certain, that any one may pull down or otherwise destroy a common nuisance, as a new gate, or even a new house erected in a highway, or the like for if one whose estate is or may be prejudiced by a private nuisance actually erected, as a house hanging over his ground, or stopping his lights, may justify the entering into another's ground and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate, it cannot but follow *a fortiori*, that any one may lawfully destroy a common nuisance: And as the law is now holden, it seems that

that in a plea, justifying the removal of the nuisance, a man need not shew that he did as little damage as might be. 1 *Haw.* 199.

But although he may remove the nuisance, yet he cannot remove the materials, or convert them to his own use. *Dalt.* c. 50.

III. How punished.

It is said, that a common scold is punishable by being put into the cucking school. 1 *Haw.* 200.

Note: cuck or *guck* in the Saxon tongue (according to lord Coke) signifieth to scold or brawl; taken from the bird *cuckow* or *guck-haw:* and *ing* in that language signifieth water; because a scolding woman was for her punishment sowsed in the water. 3 *Inst.* 219. The common people in the northern parts of England, amongst whom the greatest remains of the ancient Saxon are to be found, pronounce it ducking stool; which perhaps may have sprung from the Belgic or Teutonic ducken, to dive under water; from whence also probably we denominate our duck the water fowl; or rather, it is more agreeable to the analogy and progression of languages, to assert, that the substantive duck is the original, and the verb made from thence; as much as to say, that to duck is to do as that fowl does.

And she may be convicted without setting forth the particulars in the indictment. 2 *Haw.* 227.

Nevertheless, the offence must be set forth with convenient certainty; and the indictment must conclude not only against the peace, but to the common nuisance of divers of his majesty's liege subjects. As in the case of K. and Margaret Cooper. H. 19 G. 2. She was convicted on an indictment, for being a common and turbulent brawler, and sower of discord amongst her honest and quiet neighbours, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes amongst his majesty's liege people, against the peace, &c. It was moved in arrest of judgment, that the charge was too general, and did not amount to being either a barrator or common scold, which are the only instances in which a general charge will be sufficient. It was likewise objected, that if the words did amount to a description of a scold, yet it should be laid to be to the common nuisance of her neighbours, for every degree of scolding is not indictable. And the court was of opinion, that the judgment ought to be arrested on both exceptions: for none of the words here used are the technical words, and it must be laid to be to the common nuisance. *Str.* 1246.

There is no doubt, but that whoever is convicted of another nuisance, may be fined and imprisoned; and it is said, that one convicted of a nuisance done to the king's highway, may be commanded by the judgment to remove the nuisance at his own costs: and it seemeth to be reasonable, that those who are convicted of any other common nuisance, shall also have the like judgment. 1 *Haw.* 200. *Str.* 686.

And

And the defendant shall not be allowed to make any objections against the indictment, until he hath pleaded to it. *Dalt.* c. 66.

And the court never admits a person convicted of a nuisance to a small fine, until proof is made of the nuisance being removed.—*Dalt.* c. 66.

A master is indictable for a nuisance done by his servant. L. *Raym* 264.

All common nuisances are indictable not only at the sessions, but also in the torn and leet. 2 *Haw.* 67.

There are many offences by particular statutes declared to be common nuisances, which are treated of under their respective titles.

General Indictment for a nuisance.

New-York, Queen's County. THE jurors for the people of the state of New-York, upon their oath present, that A. O. late of ——— in the county of ——yeoman, on the —— day of——— in the———year of the independence of ——— and on divers other days and times, as well before as afterwards, with force and arms, at——in the said county, [*here set forth the nuisance,*] and the same (*nuisance*) so as aforesaid done, doth yet continue and suffer to remain; to the common nuisance of all the people of the said state, to the evil example of all others in the like case offending, and against the peace of the people of the said state, and their dignity.

OATHS.

I. Of oaths in general.
II. The common form of oaths.
III. Quakers oaths.
IV. Oaths of infidels.

I. Of oaths in general.

OATH is a corruption of the Saxon word *toeh.* 3 *Inst.* 165.

It is called a corporal oath, because the person lays his hands upon some part of the scriptures when he takes it. *id.*

If the oath be taken on the common prayer book, which hath the epistles and gospels, it is good enough, and perjury upon the statute may be assigned upon this oath. 2 *Keb* 314.

The words. *So help me God,* in the common form of an oath, perhaps may have been first used in the very ancient manner of trial by battle in this kingdom, or at least are delivered with a peculiar empasis in that solemnity; wherein the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and swears to this effect: 'Hear this, thou who callest thyself John by the name of baptism, whom I hold by the hand, that falsly upon

upon me thou haſt lied; and for this thou lieſt, that I who call myſelf Thomas by the name of baptiſm, did not felonioufly murder thy father W. by name——So help me God—(and then he kiſſes the book, and ſays) and this I will defend againſt thee by my body, as this court ſhall award.' And ſo the appellant is ſworn in like manner.

No ancient oath can be altered, or new oath impoſed, without an act of parliament; nor can any oath be adminiſtred by any, that have not allowance by the common law time out of mind, or by an act of parliament. 2 *Inſt.* 497. 3 *Inſt.* 165.

And this is the reaſon why generally there is a clauſe inthe ſtatutes, giving power to the juſtices to this or the like effect [*which oath ſuch juſtice is hereby impowered to adminiſter*;] tho' it ſeems to be clear, that if an act impowers a juſtice, in a ſummary way to convict an offender by the oath of a witneſs, it doth (without any more) of neceſſity give him power to adminiſter the oath to that witneſs; and that it is ſufficiently implied in the words, and neceſſarily included in the power. For when the law grants any thing, that alſo is granted, without which the thing itſelf cannot be. 12 *Co.* 130, 131.

Where an oath is adminiſtered by a perſon that hath lawful authority to tender the ſame, and it be afterwards broken, yet if it be not in a judicial proceeding, it is no perjury, nor puniſhable by the common law. 3 *Inſt.* 166.

Therefore if one call another a *perjured* man, he may have an action on the caſe, becauſe it ſhall be intended to be contrary to his oath in a judicial proceeding; but for calling one a *forſworn* man, no action lies; becauſe the forſwearing may be extrajudicial, and conſequently no perjury in law. *id.*

Every layman, above the age of 12 years, was anciently obliged to take the oath of allegiance at the torn or leet, and it was a high contempt to refuſe it. 1 *Inſt.* 68.

Lord Hale, ſpeaking of the ancient oath of allegiance, which continued above 600 years ſays, that therein the prudence of the common law is obſervable, that it was ſhort and plain, not intangled with long and intricate clauſes or declarations, but that the ſenſe of it was obvious to the moſt common underſtanding, and yet withal comprehenſive of the whole duty of a ſubject to his prince. 1 *H. H.* 65. And from this the preſent form of the oath of allegiance hath not much varied.

III. Quakers oaths.

In all caſes wherein by any act of parliament an oath ſhall be allowed or required, the ſolemn affirmation of quakers ſhall be allowed inſtead of ſuch oath: and that, altho' no expreſs proviſion be made for that purpoſe in ſuch act. 22 G. 2. c. 46.

And if any perſon ſhall be lawfully convicted of wilful, falſe, and

and corrupt affirming or declaring any matter or thing, which if ſworn in the uſual form would have amounted to wilful and corrupt perjury, he ſhall ſuffer as in caſes of perjury. 8 G. c. 6. ſ. 2.

The quakers ſolemn affirmation, inſtead of an oath, as finally ſettled by the 8 G. c. 6 is as follows: viz.

"I *A. B.* do ſolemnly, ſincerely, and truly declare and affirm."

IV. Oaths of infidels.

A Jew is to be ſworn on the old teſtament, and perjury upon the ſtatute may be aſſigned upon this oath. 2 *Keb.* 314.

H. 2 *G.* 2. *Gomez Serra* and *Munez.* Upon error in debt upon a bond, the bail being both Jews, were ſuffered to put on their hats while they took the oath. *Str.* 821.

When the Jews take the oath of abjuration, the words [*on the true faith of a chriſtian*] ſhall be omitted. 10 *G. c.* 4. *ſ.* 18.

At the council, *Dec* 9, 1738. Preſent the two chief juſtices. On a complaint of *Jacob Fachina*, againſt general *Sabine*, as governor of *Gibraltar*; *Alderaman Ben Monſo*, a Moor, was produced as a witneſs, and ſworn upon the *Koran*. *Str.* 1104.

So in the caſe of *Omichund* againſt *Barker*, in the court of chancery, a Mahometan, was ſworn upon the *Koran*. *id.*

PARDON.

A Pardon is a work of mercy, whereby the king, either before the attainder, ſentence, or conviction, or after, forgiveth any crime, offence, puniſhment, execution, right, title, debt, or duty, temporal or eccleſiaſtical. 3 *Inſt.* 233.

Pardons are either *general* or *ſpecial*: *General*, are by act of parliament; of which, if they are without exceptions, the court muſt take notice *ex officio*; but if there are exceptions therein, the party muſt aver that he is none of the perſons excepted. *id. Hale's Pl.* 252.

Special pardons, are either *of courſe*, as to perſons convicted of manſlaughter, or *ſe defendendo*, and by divers ſtatutes to thoſe who ſhall diſcover their accomplices in ſeveral felonies; or, *of grace*, which are by the king's charter, of which the court cannot take notice *ex officio*, but they muſt be pleaded. 3 *Inſt.* 233.

By the 27 *Ed.* 3. *c.* 2. In every charter of the pardon of felony, the ſuggeſtion, and the name of him that maketh the ſuggeſtion, ſhall be comprized: and if it be found untrue, the charter ſhall be diſallowed

And by the 13 *R.* 2. *ſt.* 2 *c.* 1. No charter of pardon ſhall be allowed for murder, treaſon, or rape, unleſs the offence be ſpecified therein.

Lord Coke ſays, the intention of this act was not, that the king ſhould

ſhould grant a pardon of murder by expreſs name in the charter, but becauſe the whole parliament conceived that he would never pardon murder by ſpecial name. And he ſays, he hath never ſeen any pardon of murder by any king of England, by expreſs name. 3 *Inſt* 233, 236.

The king cannot pardon an offence before it is committed; but ſuch pardon is void. 2 *Haw.* 389.

As the releaſe of the party will not bar an indictment at the ſuit of the king; ſo neither will a pardon by the king be any bar to an appeal at the ſuit of the party. 2 *Haw.* 392.

And in ſome caſes even where the king is ſole party, ſome things there are which he cannot pardon; as for example, for all common nuiſances, as for not repairing of bridges or highways; the ſuit (for avoiding multiplicity of ſuits) is given to the king only for redreſs and reformation thereof; but the king cannot pardon or diſcharge either the nuiſance, or the ſuit for the ſame; becauſe ſuch pardon would take away the only means of compelling a redreſs of it. But it hath been holden by ſome, that a pardon of ſuch offence will ſave the party from any fine, for the time precedent to the pardon. 3 *Inſt* 237, 2 *Haw.* 391.

Thus alſo, if one be bound by recognizance to the king, to keep the peace againſt another by name, and generally all other lieges of the king; in this caſe, before the peace be broken, the king cannot pardon or releaſe the recognizance, altho' it be made only to him, becauſe it is for the benefit of his ſubjects. 3 *Inſt.* 238.

Likewiſe, after an action popular is brought, *as well for the king as for the informer*, according to any ſtatute, the king can but diſcharge his own part, and cannot diſcharge the informer's part, becauſe by bringing of the action, the informer hath an intereſt therein: but before the action brought, the king may diſcharge the whole (unleſs it be provided to the contrary by the act) becauſe the informer cannot bring an action or information originally for his part only, but muſt purſue the ſtatute. And if the action be given to the *party grieved*, the king cannot diſcharge the ſame. 3 *Inſt.* 238.

When a pardon is pleaded by any one for felony, the juſtices may at their diſcretion remand him to priſon, till he enter into recognizance, with two ſureties, for his good behaviour, for any time not exceeding ſeven years. 5 *W. c.* 13.

It ſeems to be a ſettled rule, that no pardon by the king, without expreſs words of reſtitution, ſhall diveſt, either from the king, or ſubject, an intereſt either in lands or goods, veſted in them, by an attainder or conviction precedent: Yet it ſeems agreed, that a pardon prior to a conviction, ſhall prevent any forfeiture either of lands or goods. 2 *Haw.* 396.

A pardon after the attainder, doth not reſtore the corruption of blood; for this cannot be reſtored but by act of parliament. 3 *Inſt.* 233.

But as to iſſue born after the pardon, it hath the effect of reſtitution of blood. 1 *H. H.* 358.

It ſeems to be ſettled at this day, that the pardon of a treaſon or felony, even after a conviction or attainder, doth ſo far clear the party from the infamy and all other conſequences of his crime, that he may not only have an action for a ſcandal, in calling him traitor or felon, after the time of the pardon, but may alſo be a good witneſs, notwithſtanding the attainder or conviction; becauſe the pardon makes him as it were a new man, and gives him a new capacity and credit. 2 *Haw.* 395.

But it ſeems to be the better opinion, that the pardon of a conviction of *perjury* doth not ſo reſtore the party to his credit, as to make him a good witneſs; becauſe it would be an injury to the people in general, to make them ſubject to ſuch a perſon's teſtimony. 1 *Vent.* 349.

PERJURY and SUBORNATION.

I. Of perjury and ſubornation by the common law.

II. Of perjury and ſubornation by the ſtatute of the 5 E.I.

I. Of perjury and ſubornation by the common law.

PERJURY by the common law, ſeemeth to be a 'wilful falſe 'oath, by one who being lawfully required to depoſe the truth 'in any judicial proceeding, ſwears abſolutely, in a matter material 'to the point in queſtion, whether he be believed or not.' 1 *Haw.* 172. 3 *Inſt* 164.

Wilful] The falſe oath alledged againſt him ſhould be proved to be taken with ſome degree of deliberation; for if upon the whole circumſtances of the caſe it ſhall appear probable, that it was owing rather to the weakneſs than perverſeneſs of the party, as where it was occaſioned by ſurpriſe, or inadvertency, or a miſtake of the true ſtate of the queſtion, it cannot but be hard to make it amount to voluntary and corrupt perjury. 1 *Haw.* 172.

Falſe] It is ſaid not to be material, whether the fact which is ſworn be in itſelf true or falſe; for however the thing ſworn may happen to prove agreeable to the truth, yet if it were not known to be ſo by him who ſwears to it, his offence is altogether as great as if it had been falſe, in aſmuch as he wilfully ſwears that he knows a thing to be true, which at the ſame time he knows nothing of, and impudently endeavours to induce thoſe before whom he ſwears, to proceed upon the credit of a depoſition, which any ſtranger might make as well as he. 2 *Haw.* 173.

Being lawfully required] It ſeemeth clear, that no oath whatſoever, taken before perſons acting merely in a private capacity; or before thoſe who take upon them to adminiſter oaths of a public nature, without

without legal authority; or before thoſe who are legally authoriſed to adminiſter ſome kinds of oaths, but not thoſe which happen to be taken before them; or even before thoſe who take upon them to adminiſter juſtice by virtue of an authority ſeemingly colourable, but in truth unwarranted and merely void,——can amount to perjuries, but are altogether idle and of no force. 1 *Haw.* 174.

In any judicial proceeding] For tho' an oath be given by him that hath lawful authority, and the ſame is broken, yet if it be not in a judicial proceeding, it is not perjury; becauſe ſuch oaths are general and extrajudicial: but it ſerves for aggravation of the offence. Such are, general oaths given to officers or miniſters of juſtice. the oath of fealty and allegiance, and ſuch like. Thus if an officer commit extortion, it is againſt his general oath, but yet not perjury, becauſe not in a judicial proceeding; but when he is charged with extortion, the breach of his oath may ſerve for aggravation. 3 *Inſt.* 166.

If a perſon calleth another perjured man, he may have his action upon this caſe, becauſe it muſt be intended contrary to his oath in a judicial proceeding: but for calling him a forſworn man, no action doth lie, becauſe the forſwearing may be extrajudicial. 3 *Inſt.* 166.

Swears abſolute] For the depoſition muſt be direct and abſolute, and not as he thinketh, or remembereth, or believeth, or the like. 3 *Inſt.* 166.

In a matter material to the point in queſtion] For if it be not material though it be falſe, yet it is no perjury, becauſe it concerneth not the point in iſſue, and therefore in effect it is extrajudicial. 3 *Inſt.* 167.

But it is not neceſſary that it appear to what degree the point in which a man is perjured, was material to the iſſue; for if it is but circumſtantially material, it will be perjury. L. *Raym* 258.

Much leſs is it neceſſary that the evidence be ſufficient, for the plaintiff to recover upon, for in the nature of the thing, an evidence may be very material, and yet it may not be full enough to prove directly the point in queſtion. L. *Raym.* 889.

Whether he be believed or not] It hath been holden, not to be material upon an indictment of perjury at common law, whether the falſe oath were at all credited, or whether the party in whoſe prejudice it was intended, were in the event any way aggrieved by it or not; inſomuch as this is not a proſecution grounded on the damage of the party, but on the abuſe of public juſtice. 1 *Haw.* 177.

Subornation of perjury, by the common law, ſeems to be an offence, in procuring a man to take a falſe oath, amounting to perjury, who actually taketh ſuch oath. 1 *Haw* 177.

But it ſeems clear, that if the perſon incited to take ſuch an oath, do not actually take it, the perſon by whom he was ſo incited is not guilty of ſubornation of perjury; yet it is certain, that he is liable to be puniſhed, not only by fine, but alſo by infamous corporal puniſhment. *id.*

The

The punishment of perjury, and the subornation of perjury, by the common law, is restrained by the statute of the 5 *El.* hereafter following; that it shall not be less than is inflicted by that statute.

Mr. Hawkins says, it hath been of late settled, that justices of the peace have no jurisdiction over perjury at the common law: the principal reason of which resolution, he says, as he apprehended, was, that inasmuch as the chief end of the institution of the office of these justices, was, for the preservation of the peace against personal wrongs and open violence, and the word trespass (in the commission) in its most proper and natural sense, is taken for such kind of injuries, it shall be understood in that sense only, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace: as libels, and such like, which on this account have been adjudged indictable before justices of the peace. 2 *Haw.* 40.

And in the case of *K.* and *Dainton*, *E.* 11. *G.* 2. An indictment at the quarter sessions for perjury at the common law, was quashed for want of jurisdiction; and was said to have been done so about three years before, in the case of *K* and *Wesliness*. *Str.* 1088.

II. Of perjury and subornation by the statute of the 5 El.

As to subornation of perjury, in the first place, "Every person who shall unlawfully and corruptly procure any witness to commit any wilful and corrupt perjury; in any matter or cause depending in suit and variance, by any writ, action, bill, complaint, or information, touching any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in chancery, or in any court of record, leet, ancient demesne court, hundred court, court baron, or court of chancery; or shall unlawfully and corruptly procure or suborn any witness which shall be to testify *in perpetuam rei memoriam*, shall forfeit 40*l* half to the king, and half to the party grieved, who shall sue for the same. And if he has not lands or goods worth 40*l*. he shall be imprisoned half a year and stand on the pillory an hour in open market. And he shall be disabled to be a witness in any court of record."

And as to perjury, "If any person, either by subornation or otherwise, shall wilfully and corruptly commit any wilful perjury, by his deposition in any the courts before mentioned, or being examined *in perpetuam rei memoriam*; he shall forfeit 20*l*. in like manner, and be imprisoned 6 months: and if he has not goods worth 20*l*. he shall be set on the pillory in the market place by the sheriff, and have both his ears nailed: And he shall be forever disabled to be a witness in any court of record."

"And the judge of the court where the perjury shall be, and the judges of assize, and justices of the peace in sessions may inquire, hear, and determine thereof, by inquisition, presentment, bill, or information or otherwise.

"But

'But this act shall not extend to any ecclesiastical court.'

'Also this statute shall not restrain the authority of any judge, having absolute power to punish perjury before the making thereof, but that every judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done, and used to do, to all purposes, so that they set not upon the offender less punishment than is contained in the said statute. 5 *El. c.* 9.

By any writ, action, bill, complaint, or information] It hath been resolved, that these words are to be extended to the latter clause concerning perjury, as well as to this concerning subornation; because it cannot well be intended that the makers of the act, who inflict a greater penalty on subornation of perjury, than on the perjury itself, should mean to extend the purview of the law in relation to what they esteemed the lesser crime, farther than in relation to that which they esteemed the greater. 1 *Haw.* 179. 5 *Co.* 99.

But it is to be observed, that perjury or subornation in an action depending by *indictment*, are not within this statute: but only in an action depending by *writ, action, bill, complaint or information.* 3 *Inst.* 164.

Half to the party grieved] It hath been collected from this clause, that no false oath is within the meaning of this statute, which doth not give some person a just cause of complaint: and upon this ground it hath been said, that he who swears a thing is true, but not known by him to be so, is not within this statute: because howsoever heinous his offence may be in its nature: yet when it proves in the event to be in maintenance of the truth, it cannot be said to give him a just cause of complaint, who would take advantage against another from his want of legal evidence to make out the justice of his cause. Also from the same ground it seemeth clearly to follow, that no false oath can be within the statute, unless the party against whom it was sworn suffered some kind of disadvantage by it; for otherwise it cannot be said, that any one was grieved by it: and therefore that in every prosecution upon this statute, it must appear upon the trial, that there was such a suit depending, wherein the party might be prejudiced in the manner supposed. 1 *Haw.* 181.

Either by subornation or otherwise] It is not necessary to set forth in the indictment, whether the party took the false oath thro' the subornation of another, or without any such subornation, these words being only superfluity. 1 *Hawk.* 179.

Wilfully and corruptly] These words are necessary in an indictment or action on this statute, and cannot be supplied by adding 'against 'the form of the statute,' or by concluding 'and so a wilful and 'corrupt perjury did commit.' 1 *Haw.* 178.

Justices in the sessions] And one justice may bind the offender over to the sessions. *Dalt. c.* 70.

But because the prosecution upon this statute is more difficult than by indictment at the common law, offenders are seldom prosecuted upon

upon this ſtatute, eſpecially at the ſeſſions; and it ſeems generally the ſafer way to proceed by indictment at the common law, at the aſſizes, or in the court of king's bench.

Shall not reſtrain] From this it ſeemeth undoubtedly to follow, that the court of king's bench &c proceeding upon an indictment or information of perjury, or ſubornation of perjury, at the common law, may not only ſet a diſcretionary fine on the offender, but alſo condemn him to the pillory, without making any inquiry concerning the value of his lands or goods. 1 *Haw.* 178.

PILLORY and TUMBREL.

PILLORY is derived from *pilaſtere*, a pillar; for it is a wooden pillar, wherein the neck of the offender is put and preſſed: which kind of puniſhment is very ancient, and was uſed by the Saxons. 3 *Inſt.* 219.

The tumbrel ſeemeth to have been the ſame anciently with the ducking ſtool, an engine for the puniſhment of ſcolding women, by ducking them over head and ears in water, and eſpecially in muddy or ſtinking water, according to the etymology of lord Coke, who tells us, that the word tumbrel ſignifieth a dung cart. *Lamb.* 61. 3 *Inſt* 219.

They that have been adjudged to the pillory or tumbrel, are ſo infamous, that they ſhall not be received to be jurors or witneſſes. *id.*

And for that the judgment to the pillory or tumbrel doth make the delinquent infamous, the juſtices of the peace ſhould be well adviſed before they give judgment of any perſon to the pillory or tumbrel, unleſs they have good warrant for their judgment therein. Fine and impriſonment, for offences fineable by them, is a fair and ſure way. 3 *Inſt.* 219.

POLYGAMY.

BIGAMY is, where a man has two wives ſucceſſively, Polygamy where he has ſeveral wives at the ſame time. 3 *Inſt.* 88. *Stam.* 134.

By the ſtatute of the 1 *J. c.* 11. 'If any perſon within his majeſty's dominions of England and Wales, being married, ſhall marry any perſon, the former huſband or wife being alive; ſuch offence ſhall be felony,' (but within clergy.)

If the firſt marriage was beyond ſea, and the latter in England, the party may be indicted here, becauſe the latter marriage makes the offence; but if the firſt marriage was in England, and the latter beyond ſea, it ſeemeth that the offender cannot be indicted here, becauſe the offence was not within the kingdom. *Kely.* 79, 80.

'But

'But this act shall not extend to any person, whose husband or wife 'shall be continually remaining beyond the seas, by the space of 'seven years together.' *id.*

And this, although the party in England hath notice, that such husband or wife is living. 1 *H H* 693.

Nor to any person whose husband or wife shall absent him or herself, the one from the other, by the space of seven years together, in any part of his majesty's dominions, the one of them not knowing the other to be living within that time. *id.*

Nor to any person who shall be, at the time of such marriage, divorced by sentence in the ecclesiastical court. *id.*

And this divorce is to be understood not only *a vinculo matrimonii*, as for precontract, consanguinity, or affinity, which dissolveth the marriage, and therefore needeth not this proviso; but also, and chiefly *a mensa & thoro*, as for adultery, which dissolveth not the marriage, yet in respect of the generality of the words, a person divorced only *a mensa & thoro* is privileged from being a felon in marrying again, although the second marriage is void. 3 *Inst.* 89. 1 *H. H.* 694.

Nor to any person whose former marriage hath been, by sentence in the ecclesiastical court, declared to be void and of none effect.—*id.*

Nor to any person, by reason of any former marriage made within age of consent. *id.* That is, either the woman being under 12, or the man under 14. 3 *Inst.* 89.

On a prosecution upon this statute, the first and true wife is not to be allowed as a witness against the husband; but it seems clear, that the second wife may be admitted to prove the second marriage, for she is not his wife so much as *de facto*. 1 H. H. 693.

POOR.

CONCERNING the binding and ordering of parish and other apprentices, see title Apprentices.

Concerning the filiation and maintenance of Bastard children, see title Bastards.

[In these United States, there are generally acts of the several legislatures, particularly relating to their poor, which must be the guide to the respective justices in these states, in whatever cases come under their cognizance: But inasmuch as those laws are not repugnant to the laws of England, and don't perhaps in all these states extend to every case, it cannot but be useful to treat of some matters, as they are enjoined by the laws of England, and in particular something relating to settlements.]

By the common law, a settlement did imply no more than a man's house and home and habitation; and at the common law a man

man might gain a ſettlement any where, and could not be removed, unleſs in the caſe of vagrancy. The ſtatute of the 39 *El.* is the firſt ſtatute that mentions the word ſettlement. The firſt day a man came into a pariſh he was a ſtranger, the ſecond day he was a gueſt, and the third he was an inhabitant. And until the diſſolution of monaſteries, the poor were in a great meaſure maintained by the religious houſes. *Caſ. of S.* 44.

Afterwards, when the ſtatute of the 43 *El.* was made, by which every pariſh was to maintain its own poor; ſuch perſons were held to be the poor of any pariſh, as were ſettled there a convenient time, which was judged to be a month: ſo that a month's abode made an inhabitant. 2 *Salk.* 492.

But there remaining ſome doubts upon the ſaid ſtatute, of the 43 *El.* the ſtatute of the 13 & 14 *C.* 2. was made, which ſtatute will often occur in the following ſections, being the foundation of all the ſettlements as they ſtand at this day; upon which ſingle act there have been more caſes adjudged, than upon any other fifty acts in the ſtatute book.

But that we may treat diſtinctly, and as clearly as may be, concerning this ſubject of ſettlements (after having firſt premiſed one general rule which controuls almoſt all the caſes of ſettlements, *viz.* That no ſettlement can be legal, which is brought about by practice or compulſion: *Read. Tit.* Poor) I ſhall proceed in the following method:

i. Of certificates.
ii. Of ſettlement by birth. viz. *of baſtards, and others.*
iii. Of the ſettlement of children with their parents.
iv. Of ſettlement by apprenticeſhip.
v. Of ſettlement by marriage.

i. Of certificates.

By the 13 & 14 *C.* 2. *c.* 12. Power is given, upon complaint of the church wardens or overſeers, within 40 days after a perſon is come to ſettle on any tenement under 10*l* a year, unto two juſtices (1 Q.) to remove ſuch perſon to the place where he was laſt legally ſettled, unleſs he give ſufficient ſecurity for diſcharge of the pariſh, to be allowed by the ſaid juſtices. *ſ.* 1.

And by the 8 & 9 *W.* *c.* 30. it is enacted as follows: Foraſmuch as many poor perſons chargeable to the place where they live, merely for want of work, would elſewhere maintain themſelves, but not being able to give ſuch ſecurity as may be expected, on their coming to ſettle in any other place, it is therefore enacted, "That if any perſon who ſhall come into any pariſh or place, there to reſide, ſhall at the ſame time procure, bring, and deliver to the church wardens, or overſeers of the pariſh or place where he ſhall come

come to inhabit, or to any of them, a certificate, under the hand, and ſeals of the church wardens and overſeers of any other pariſh, townſhip, or place, or the major part of them, or of the overſeers where there are no church wardens; to be atteſted by two or more credible witneſſes, thereby owning and acknowledging the perſon mentioned in the ſaid certificate, to be an inhabitant legally ſettled in that pariſh, townſhip, or place: Every ſuch certificate, having been allowed of and ſubſcribed by two juſtices of the place from whence the certificate ſhall come, ſhall oblige the ſaid pariſh or place, to receive and provide for the perſon mentioned in the ſaid certificate, together with his family, as inhabitants of that pariſh, whenever they ſhall happen to become chargeable to, or be forced to aſk relief of the pariſh, townſhip, or place, to which ſuch certificate was given: And then, and not before, it ſhall be lawful for ſuch perſon, and his children, though born in that pariſh, not having otherwiſe acquired a legal ſettlement there, to be removed conveyed, and ſettled in the pariſh or place from whence ſuch certificate was brought. *ſ.* 1.

A certificate] The form of which certificate may be this:

New-York, Dutcheſs County. WE the overſeers of the poor of the pariſh [or townſhip] of ——— in the ſaid county of Dutcheſs do hereby certify, own and acknowledge, that A. L. yeoman, is an inhabitant legally ſettled in our pariſh [or townſhip] of ——— aforeſaid. In witneſs whereof we have hereunto ſet our hands and ſeals, the ——— day of ——— in the year of our lord ———

Atteſted by A. W. B. W. — E. F. } Overſeers of the G. H. } poor.

We J.P. & K. P. eſq'rs. two of the juſtices of the peace in and for the county of Dutcheſs aforeſaid, do allow of the above written certificate. And we do alſo certify, that A. W. one of the witneſſes who atteſted the ſame, hath this day made oath before us the ſaid juſtices, that he the ſaid A. W. did ſee the overſeers of the poor of the ſaid pariſh, whoſe names and ſeals are thereunto ſubſcribed and ſet ſeverally ſign and ſeal the ſame; and that the names of A. W. and B. W. who are the witneſſes atteſting the ſaid certificate, are reſpectively of their own proper hand writing. Given under our hands this ——— day of ———.

Formerly it was held, that a certificate was only concluſive between the two pariſhes: but now it is held to be concluſive to all the world, as is determined in the following caſe: viz.

M. 9 *An. Honyton* and *St. Mary-Axe.* The queſtion was, Whether the pariſh granting the certificate was bound thereby as to the pariſh only to which the certificate was granted, or concluded as to all pariſhes whatſoever? Parker Ch. J. delivered the opinion of the whole court: Before the ſtatute a certificate was only the

evidence of a private undertaking between the parishes, in the nature of a contract; but now it is a solemn acknowledgment, like the cognizance of a fine, and thereby the party is owned to be legally settled there: and as all other parishes on this certificate are bound to receive him, so the parish that certifies is concluded as to all other parishes. 2 *Salk.* 535. *Foley* 177.

And the case is put yet even stronger in the following report *T.* 20 *G.* 2. *K.* and *Hedcron.* The parish of Maidstone gave a certificate to Hedcron, acknowledging Ric. Burden, and Mary his wife, and their four children, to be legally settled at Maidstone. Afterwards it appeared, that Mary was not his lawful wife, but that he had a former wife then living. Upon which Maidstone acknowledged the settlement of the real and true wife, but not of the said Mary and her children; and pleaded, that it would be hard that they should be forced to take two wives, and different children. But by the court, the parish that certifies must take care for whom they certify; and the certificate is conclusive. *Str.* 1233.

Whenever they shall happen to become chargeable] Yet a certificate to receive the persons whenever they become chargeable, is not binding against a subsequent settlement; for tho' it be according to the agreement between the parishes, yet a private agreement in this respect shall not alter the law. *Harrison* and *Lewis*, 3 *Salk.* 253.

ii. Of settlement by birth; viz. *of bastards, and others.*

I. Of bastards.

Note: It is not in this place questioned, who shall or shall not be deemed a bastard, but the settlement only is considered of such as are first supposed to be bastards: other matters relating to them, as concerning their filiation, and maintenance, and the like, are treated of under title BASTARDS.

A bastard child is prima facie *settled where born*: This is an uncontroverted rule, and is ancienter than the statute of 13 & 14 *C.* 2. concerning settlements: and ancienter than the 43 *El.* which requires the poor to be maintained within their respective parishes; for in the statute of the 18th of *Eliz.* which takes order for the mother and reputed father to contribute towards their maintenance, it is thus recited in the preamble, 'Concerning bastards begotten and born 'out of lawful matrimony, the said bastards being now left to be 'kept at the charges of the parish where they were born.'———

Nevertheless this rule admits of divers exceptions; which are as follows:

1. If a woman comes, into a place by privity and collusion of the officers where she belongs, and is there delivered of a bastard; such bastard gains no settlement, notwithstanding its birth. *Cas. of S.* 66.

And

And in the caſe of Maſters and Child, H. 10 W. It was ruled, that if a woman big with child of a baſtard, and ſettled in one pariſh, is perſuaded to go into another, and there be delivered; this fraud will make the pariſh chargeable where the mother was ſettled, tho' the child was not born there: But if a woman, with child of a baſtard, come accidentally into one pariſh, and is perſuaded by ſome of the pariſhoners to go into another pariſh, which ſhe doth, and there is delivered, this ſhall not charge that pariſh which perſuaded her. 3 *Salk.* 66.

2. Alſo, if a baſtard is born under an order of removal, and before the mother can be ſent to her place of ſettlement, being hindred by water or otherwiſe; ſuch baſtard ſhall not be ſettled where ſo born, but at the mother's ſettlement. *M.* 10 *An.* 2. and *Icrleford. Seſſ. C. V.* 1. 23.. *Caſ. of S.* 66.

3. So alſo, If the officers are carrying a woman by virtue of an order of removal, and ſhe be delivered on the road *in tranſitu*: the baſtard ſhall go with the mother where ſhe is going by virtue of the order, notwithſtanding the birth. *E.* 10. *An Jane Grey's* caſe. *Caſ. of S.* 66.

4. Again, in the caſe of Much-Waltham and Peram, *M.* 8 *W.* A woman big with a baſtard child, was removed by order of two juſtices, from Much-Waltham to Peram. Before the next ſeſſions, ſhe was delivered at Peram of a baſtard child. At the ſeſſions, Peram appealed, and the juſtices adjudged the woman to be laſt ſettled at Much-Waltham, and ordered her to be ſent back thither. After which, an order was made to ſettle the child at Peram; which it was moved to quaſh, becauſe though regularly baſtards muſt be maintained where born, yet in this caſe, where there ſeems to be a contrivance, it ſhall not be ſo. The court ſeemed to agree to this, and a rule was made to ſhew cauſe, but none was ſhewed. 2 *Salk.* 474.

And further, in the caſe of Weſtbury and Coſton, *H* 2 *An.* A woman big with child was removed by order of the juſtices, from Weſtbury to Coſton: And, pending the order, before next quarter ſeſſions, ſhe was delivered of a baſtard child. Coſton appealed, and thereupon the order of the two juſtices was reverſed, but the child was ſent back to Coſton, as the place of its birth. But by the court, the birth at Coſton, did not ſettle the child there, becauſe it was under an illegal order procured at Weſtbury, which order being reverſed, the matter is no more than this, that they unjuſtly procured the woman to go thither. And Holt, Ch. J ſaid, Tho' here be no fraud in this caſe, yet here is a wrongful removal, and the reverſal makes all void *ab initio*: Fraud or not fraud, is not material in this caſe; but the ſettlement of the child depends upon the removal, for if that was wrong, they ſhall not caſe themſelves by it. 1 *Salk.* 121. 2 *Salk.* 532.

5. So alſo by the ſtatute of the 17 *G.* 2. *c.* 5. Where any woman, wandering and begging, ſhall be delivered of a child, in any

pariſh

parish or place, to which she doth not belong, and thereby becometh chargeable to the same; the church wardens or overseers may detain her, till they can safely convey her to a justice of the peace. And if such woman shall be detained, and conveyed to a justice as aforesaid, the child of which she is delivered, if a bastard, shall not be settled in the place where so born, nor be sent thither by a vagrant pass; but the settlement of such woman, shall be deemed the settlement of such child. *S.* 25.

6. A child born in the house of correction, shall be sent to the place of its mother's settlement. 2 *Burr.* 258.

And in the case of Elling and county gaol of Herefordshire, *H.* 2 *G.* A bastard was born in the county gaol: Resolved that the settlement was with the mother. *Sess. C. V.* 1. 94.

7 *T.* 5 *G.* *New Windsor* and *White Waltham.* The parish of White Waltham, gave a certificate to a man and a woman supposed to be his wife, with which they went into the parish of New Windsor, and had there six children. Afterwards, the woman swearing they were never married, the question was, whether (upon that supposition) the children, as bastards, should be settled in the parish where they were born, or in the parish which gave the certificate with their father and mother. And by the court, there is no doubt but the bastard of a certificate person is settled in the place of his birth, for he is not such an issue as will follow the settlement of his father or mother, neither is such bastard *his* or *her* child within the intention of the statute, so as to be sent back with the parent. *Str.* 186.

But in this case the point turned chiefly upon the certificate's being conclusive (for as the parish had given a certificate with the man and woman, as husband and wife, the court held that they were not afterwards to be admitted to dispute the validity of such marriage, but adjudged the children to be settled in the parish granting the certificate). Therefore in the case of Hynton and Lydlinch, *T.* 15 *G.* 2. the matter came under debate again, which was thus: A single woman went into the parish of Lydlinch, with a certificate from Hinton: lived there a year, and then had a bastard child. The sole question was, whether the child should be settled in the parish where born, or in the parish giving the certificate. By the court; The certificate must be taken to be good, and all frauds to be laid out of this case, it being a year that she dwelt in the parish, before she was delivered of the child; and wherever this court, in determining a settlement, adjudges upon the point of fraud, that fraud must be expressly stated; for as fraud is odious, it is never to be presumed. The cases hitherto adjudged, as to this point, have either depended on point of fraud, or an illegal removal. So where the child is born in a gaol, he shall be settled in the parish where his mother is; for she shall be construed to be in the custody of the law, and in all other respects a parishoner. But the present case stands entirely on the 8 & 9 *W.* which for the encouragement

of

of labour and industry, gave power of removing persons by certificate, which certificate obliges the parish to whom given, to receive and continue them in that parish, till they become actually chargeable, and then such person is to be removed, together with his or her family, and in another place, with his or her children, to the place from whence the certificate was brought. The question then is, whether the bastard is included under the words family or children, and we take it he is not: for the law takes no notice of bastard children, they are *filii nullius*, *filii populi*, and are *prima facie* settled where born. *Neſſ. Baſt. Seſſ. C. V.* 2. 170. *Str.* 1168.

Hitherto concerning the settlement of a bastard child: But notwithstanding the child's settlement, yet nevertheless if the mother and the child have different settlements, it seemeth that the bastard child, even as all other children, shall go with the mother for nurture until the age of seven years, and be maintained at the charge of the parish where the mother is settled, as a necessary appendage of the mother, and inseparable from her; for there doth not seem to be any law to force the child from the mother, or to compel the parish where it was born to maintain it whilst it is out of their parish.

As to its being inseparable from the mother, the following case happened, *M.* 3*G.* 2. *Skeffreth* and *Walsoad*. The order was, to remove a woman to her settlement; and her bastard child, of two years of age, to another parish at a distance from the mother, being the place of its birth. It was objected, that the child being a nurse child, they cannot separate it from the mother, by reason of the care necessary to nurture so very young a child; which none can be supposed so fit to administer as the mother of it; and therefore it should have been sent with her to the place of her settlement. And it was quashed by the court for that reason. *Seſſ. C. V.* 2. 90.

But altho' the child may not be separated from the mother, yet if she voluntarily desert it, it seemeth that the cause of nurture then ceaseth, and that then it may be sent to its place of settlement.

2. *Of legitimate children.*

In the case of *Rickmansworth* and St. *Giles's*; A child was ordered to be removed from the parish of *Rickmansworth* to the parish of St. *Giles's*, as being the place of his birth, the place of his father's last legal settlement being not known: For where the father's place of last legal settlement of a legitimate child is not known, there the child may be sent to the place of its birth, as well as an illegitimate one. *Black.* 246.

H. 8. *An. Cripplegate* and *St. Saviour's*. A child of three years of age was removed from one of these parishes to the other, and it appeared in the order, that they removed him there, because he was born there, not having any other settlement. By the court; The father's settlement is the settlement of the children, when it can be found out; otherwise the birth of the child *prima facie* is the settlement of the child, until there is another settlement found out. So

a bastard

a baſtard child's ſettlement is its birth, becauſe it is *filius nullius*; ſo if they cannot find out the ſettlement of a legal father, the birth is a ſettlement of the child. If a child be dropt in a pariſh, they may remove him to the place of his birth, or where his father's ſettlement was; and the ſettlement by birth is only *quouſque* they find the father's ſettlement: and if they never can find that, it is abſolute upon them. *Foley* 265.

But here it is to be obſerved, that in the two caſes abovementioned, the point was not in queſtion, whether or no if the father had no ſettlement, yet if the *mother* had a ſettlement, ſuch children ſhould follow the mother's ſettlement, or ſhould be ſent to the place of their birth; and there will appear good opinions in the next courſe of ſettlements, that if the father had no ſettlement as being a foreigner, or if the father's ſettlement is not known, yet if the mother hath a ſettlement, the children in ſuch caſe ſhall not be ſent to the place of their birth, but to the place of their mother's ſettlement: But the rule intended to be drawn from theſe caſes, which is ſufficient for this place, and which the caſes will well bear, is no more than this, that the birth place of a legitimate child is the ſettlement of it, until another ſettlement be found out.

iii. Of the ſettlement of children with their parents.

The birth of legitimate children doth not give them a ſettlement, except where the ſettlement of their father and mother is not known and then only till it is known. *Foley* 269.

Formerly it was held, that a child ſhall continue with its parents as a nurſe child, until it ſhall be 8 years of age, during which time it ſhall not be deemed capable of gaining a ſettlement in its own right; but by the latter reſolutions it ſeems to be agreed, that a legitimate child ſhall neceſſarily follow the ſettlement of its parents as a nurſe child, or as part of the family, only until it ſhall be 7 years of age: and that after that age it ſhall not be removed as part of the father's family, but with an adjudication of the place of its own laſt legal ſettlement, as being deemed capable at that age of having gained a ſettlement of its own. But it ſeemeth not difficult to determine, with exact certainty, at what age a child may have acquired a ſettlement of its own, diſtinct from the parents ſettlement. For by the 5 *El. c.* 5 *ſ.* 12. A child of ſeven years of age may be bound apprentice to a ſhipwright, fiſherman, owner of a ſhip, or other perſon uſing the trade of the ſeas: and by the vagrant act of the 27 *G.* 2. a vagrant's child of that age may by the juſtices, be put out an apprentice: And ſo ſoon as he ſhall have reſided and lodged in a pariſh for 40 days under the indenture, he will have thereby gained a ſettlement. So that the preciſe time, when a perſon may have gained a ſettlement in his own right, is at the age of ſeven years and forty days.

E. 10 *An. Q.* and *St. Giles's*. Order to remove an infant to the pariſh of St. Giles's; becauſe it appeared, that tho' the father was ſettled

settled at another place, yet the child was born at St. Giles's. Quashed. by the court: for that the place of the settlement of the child is with the father, and not the place where the child was born. *Sess. C. V.* 1. 18.

H. 10 *G. St. Giles's Reading* and *Eversly Blackwater.* It was ruled by all the court upon an argument, that where a father gains a second settlement after the birth of his child, that settlement is immediately communicated to the child. And a child may be sent to the place of his father's settlement, without ever having been there before. *Sess. C. V.* 2. 112. *Str.* 580.

M. 12 *G.* 2. *Souton* and *Sidbury.* The question was, whether the children, being above the age of nurture, shall be removed with the father to the father's settlement, where the children had never inhabited? By Lee Ch. J. in the case of Eversly Blackwater, the court were of opinion, that a child might be sent to the settlement of his father, tho' it had never been there before, contrary to an opinion of L. Parker in a former case. And he said, the true distinction, I think is, that where children have gained no settlement, but continue part of their father's family, they shall follow their father's settlement. *Sess C. V.* 2. 150. *Andr.* 345.

T. 2 *An. Comner* and *Milton.* A man settled at *Comner*, and having several children born in that parish, afterwards removed to *Milton* with his children, and gained a settlement there; and becoming very poor, his children born in *Comner*, were by an order of two justices sent to *Comner*, viz. those that were under seven years old: the justices apprehending, that the place of their birth was the place of their lawful settlement. And this order being removed into the king's bench by *certiorari*, it was insisted to maintain the order, that the children had gained a settlement in *Comner* by birth, which was not altered or defeated by any subsequent act of their father in gaining a settlement at *Milton*; for his children were with him there only as nurse children, and his settlement shall not be the settlement of the children. But by *Holt* Ch. J. The place where a bastard is born, is the place of his settlement, unless there is some trick to charge the parish; but the place where legitimate children are not born, is not the place of their settlement, for let that be where it will, the children are settled where their parents are settled; as for instance, if the father is settled in the parish of H. but goes to work in the parish of B. and before he gains any settlement there, has a son born in the parish of B. and then dies; this child may be sent to the parish of H. for it is not the birth, but the settlement of the father that makes the settlement of his child: and if the father hath gained a new settlement for himself, he hath likewise gained a new settlement for his children, who do not go with him to his new settlement as nurse children, but as part of his family. 3 *Salk.* 259.

H. 10 *G. St. Giles's* and *Eversly Blackwater.* Though the place of

of the birth of a child, where the father hath no settlement, is the place of the settlement of the child; yet where the father hath gained a settlement, his children, though born in another parish, shall be looked on as settled at the place of their father's last legal settlement, and shall be removed thither, as well after the death of their father, if occasion requires, as in his life time, supposing they have gained no settlement of their own. L. *Raym.* 1332. *Str.* 580.

T. 8 *W. K.* and *Luckington.* Howel and his wife were settled at Luckington, and came to St. Austin's, and there a child was born. The father dies in the king's service: The question was, who shall keep the child? It was objected, that it was settled where born; for that they could not send it to the father, when he was dead. But by Holt. Ch. J. The death of the father doth not alter the child's settlement. *Comb.* 380.

M. 1 *G. St. George's* and *St. Katherine's.* A man settled in St. Katherine's, married, and had six children born there, and died. After his death, the widow goes into the parish of St. George, with her six children, and rents a house of 12l. a year, and lives in it with her children four months. The single question was, whether the children should be settled, where their father was last settled, or have a settlement with their mother in the parish of St. George? The whole court were of opinion, that the six children were settled in the parish of St. George, where the mother's last settlement was. And by Parker Ch. J. there is no distinction between the settlement of children with the father or mother: for they are as much hers as the father's, and nature obliges her, as much as the father, to provide for them: so does the law, and every argument that holds for their settlement with the father, holds as to their settlement with the mother. The reason why children shall not gain a settlement, where the widow gains a settlement only by intermarriage, is, because it is then not her family, but her husband's: and she cannot give the children any sustenance without her husband's leave. But in this case, since she is equally punishable with her husband for deserting her children, and therefore could not leave them behind her, they must gain a settlement with her. *Foley* 254. *Sess. C. V.* 1. 60.

H. 13 *G. Woodend* and *Paulespury.* John Buncher was settled at Woodend and died, leaving a widow and one daughter aged 14 years. The widow removed to Paulespury into a messuage and tenement of her own for life, and took her daughter with her, and the daughter lived with her there two years. And the question was, whether the daughter gained a settlement at Paulespury? And it was adjudged that she did; because the mother being a widow, having gained a new settlement after her husband's death, the daughter gained a settlement also as part of her family. And there is no difference between a father's gaining a settlement, and a mother's in such a case as this; for the mother is obliged to provide for her

her children after her husband's death, as the father was when living: and she could not leave this daughter behind her, neither could she be removed from her. L. *Raym.* 1473. *Fol.* 256. *Str.* 746.

The same is resolved in the case of *Burton Taff* and *Hopkinsburg*. *T.* 8 & 9 *G.* 2. *Sess C. V.* 1. 317.

If after a husband's death, the wife shall marry again, to a man settled in another parish: her children by her former husband must go with her for nurture, yet they are no part of her second husband's family: and therefore gain no settlement thereby, in the parish where the father in law is settled. L. *Raym.* 1473.

T. 2. *An. Comner* and *Milton*. 2 *Salk.* 482. *M.* 10 *W.* 3 *Salk.* 259. If after the death of the father, the mother marries again, to a husband who is settled in another parish, her children, such of them as are above seven years old, shall not be removed: those under, shall be removed, but that only for nurture, for they shall be kept at the charge of the other parish, where their father whilst living was settled; and to that parish they may be sent after seven years old, as to the place of their lawful settlement: for this accidental settlement of their mother, which was only by the marriage with a second husband, and as she is now become one person with him, shall not gain a settlement for her children.

Note: This authority is only produced here, to shew the *settlement*, as to which it may be good enough; but as to the *maintenance* (as hath been intimated before, and as will be considered more at large when we come to treat of the maintenance of the poor) it doth not seem sufficiently to appear, how one township may be compelled to to maintain their poor residing in another township, unless it be in the case of persons residing under a certificate.

E. 8. *G.* 2. *K.* and St. *Mary Berkhamstead*. The father ran away, and the mother went and resided on an estate devised to her: The question was, whether the children could gain a settlement, by residing with the mother on such estate, where the father had never lived? By Hardwick Ch. J. As it doth not appear, that the father is dead, we must suppose him to be living; and in such case, the children could gain no settlement but what is derived from the father. *Sess. C. V.* 2 182.

H. 12 *G. K. Westerham*. An Englishman, whose settlement was not known, married, had a child, and ran away: The child was then nine years of age. By the court, the mother and child ought to be settled, where the mother was settled before marriage. *Foley* 252.

M. 3 *G.* St *Giles*'s and St. *Margaret's*. Sarah Etherington, with Dorothy her daughter aged five years, was removed from St. Margaret's to St. Giles's, as being the place of Sarah's last legal settlement before her marriage, she having married an Irishman who had no settlement: And it was adjudged, that Dorothy her daughter

ſhall be ſettled with her mother in the pariſh of St. Giles's, where her ſaid mother's ſettlement was before marriage. *Fol.* 251.

T. 9 *G. K.* and St. *Paul's Shadwell.* Reſolved by Eyre and Forteſcue, that where the father being a foreigner had no ſettlement, the children ſhould have the benefit of their mother's ſettlement; for that the right ſhould deſcend to them, and they ſhould not be ſent to the place of their birth. *Seſſ. C. V.* 2. 113.

H. 10 *G.* 2. St. *John's Wapping* and St. *Botolph's Biſhopgate.* A child of an Iriſhman having no ſettlement in England, and ſuppoſed to be on board a man of war in the Weſt-Indies, and of his wife being an Engliſhwoman, was adjudged to go with the mother, to the mother's ſettlement which ſhe had before marriage.

A travelling woman, having a ſmall ſucking child upon her, was apprehended for felony, and ſent to the gaol, and was hanged: This child is to be ſent to the place of its birth, if it can be known; otherwiſe it muſt be ſent to the town where the mother was apprehended, becauſe that town ought not to have ſent the child to gaol, being no malefactor. *Read. Poor. Dalt.* 168.

And where a child is firſt known to be, that pariſh muſt provide for it, till they find another. *Comb* 364. 372.

iv. Of the ſettlement by apprenticeſhip.

The ſtatutes relating to the ſettlement of apprentices, are theſe following: which I will firſt exhibit together at one view, and then ſet forth the judgment of the court of king's bench upon ſeveral clauſes of the ſaid ſtatutes in their order.

By the 13 & 14 *C.* 2. *c.* 12. 'On complaint by the church-'wardens or overſeers, within 40 days after any perſon ſhall come 'to ſettle in any pariſh, on any tenement under 10*l.* a year; two 'juſtices (1 Q.) may remove him to the place where he was laſt 'legally ſettled, either as a native, houſholder, ſojourner, appren-'tice, or ſervant, for the ſpace of 40 days at leaſt.' By the 1 *J.* 2. *c.* 17. 'The ſaid 40 days ſhall be reckoned, not from the 'time of his coming to inhabit, but from the time of his delivering 'notice in writing.' And by the 3 *W.* *c.* 11. 'Not from the time 'of delivering ſuch notice, but from the time of the publication of 'ſuch notice in the church.'

But by the ſaid act of the 3 *W.* 'If any perſon ſhall be bound 'an apprentice by indenture, and inhabit in any town or pariſh, 'ſuch binding and inhabitation ſhall be adjudged a good ſettlement, 'tho' no ſuch notice in writing be delivered and publiſhed.' *ſ.* 8.

H. 4 *An.* St. *Bride's* and St. *Saviour's.* A woman who was ſettled at St. Saviour's, with her apprentice by indenture, came and took lodging in St. Bride's, and there continued above 40 days with her apprentice, who ſerved her there. This was held by the court, to be a ſettlement of the apprentice at St. Bride's. 2 *Salk.* 533.

M. 8 *G.* 2. *K.* St. *George Hanover Square.* Alice Wheeler was bound by indenture a pariſh apprentice, to George Liſter, in the pariſh

parish of St. George, where she lived above 40 days under the indenture, and gained a settlement: Afterwards, she was by parol agreement hired out by the said master to one Hall in the parish of St. Mary-le-bone, and there lived and lodged above 40 days, that is, for the space of one year and upwards, the said apprenticeship continuing; and the said George Lister her master received her wages, and found her cloaths: By the court, the apprentice is well settled in St. Mary le-bone. *Sess. C. V.* 2. 138. *Str.* 1091.

E. 3 G. St. *Olave's* and *All Hallows*. A person is bound apprentice to a master who lives in St. Olave's: Afterwards the apprentice by his master's consent lives with another person in All Hallows. By the court, he gains a settlement in the last place; for a person may serve his master in another parish or place; and altho' he serves another man, yet it is by consent of his master, and the benefit accrues to his master. *Cases of* S. 153. *Str.* 554.

E. 10 *G. Buckington* and *Shepton Beechamp*. The master ran away; The apprentice hired himself for half a year, and served the year. By the court, he gained no settlement, not being *sui juris* nor of a capacity to hire himself; otherwise, had it been by consent of his master, or had his indenture been cancelled. *Cases of* S. 155. L. *Raym.* 1352. *Str.* 584.

The son was bound apprentice to his father, who afterwards gave up the indentures of appenticeship, but did not cancel them: Then the son was hired into another parish for a year, and served the year; and being likely to be chargeable, he was sent by an order to the parish where he lived as an apprentice; because the indentures being not cancelled, he still continued an apprentice there. *Mod. Ca.* 190. *Dalt.* 180.

E. 9 *G.* St. *Olave* and *All Hallows*. If a master assigns over his apprentice, and the apprentice serves in pursuance of that assignment: he thereby gains a settlement, and it differs not whether he serves with one master or another; for he still serves by virtue of the first indenture. *Sess. C. V.* 1. 215.

13 *W. Castor* and *Aicles*. A poor child being bound at Castor, his master there assigned him over to another master, who lived in Aicles. And it was held, that the poor child should gain a settlement at Aicles, where his second master lived, for though the apprentice was not assignable, yet that assignment was not merely void, but amounted to a contract between the two masters, that the child should serve the latter. So that this assignment is good by way of covenant, though it be not an assignment to pass an interest—1 *Salk.* 68.

T. 12 *G.* 2 *K.* and *East-Bridgeford*. Upon a special order it was stated, that an apprentice upon the death of his master, was with his own consent turned over by the widow (who had taken an administration) to another master whom he served. And the court held it a good settlement in the last parish, where the apprentice was bound to one master, and served another all the while in another parish, and there gained a settlement. *Str.* 1115. An

An apprentice well ſettled, being with a maſter removeable, cannot be removed with him; but the maſter may complain on the covenant. *Caſes of S.* 211.

H. 3 *G.* 2. *Newbury and St Mary's in Reading.* A poor boy of 14, bound himſelf apprentice for ſeven years to a weaver. It was argued, that this was not binding according to the ſtatute, and therefore did not gain a ſettlement; and that the indenture was void, becauſe an infant could not bind himſelf. But by the whole court, It did gain him a ſettlement; for an infant may make an indenture for his own benefit. *Foley.* 154. *Anar.* 373.

v. Of ſettlement by marriage.

It ſeemeth to be a good general rule, that a woman marrying a huſband who hath a known ſettlement, ſhall follow the huſband's ſettlement. And although in the caſe of Uppoterce and Dunſwell, M. 1 G. it was held, that the wife ſhall not gain a ſettlement with the huſband, until ſhe hath lived with him 40 days unremoveable as part of his family: yet afterwards, in the caſe of K. and Pincehorton, M. 3 G. it was agreed by the court, that a wife is to be ſent to her huſband's ſettlement, though ſhe never lived with him there. And in the caſe of St. Giles's and Everſly Blackwater, H. 10 G. the widow was removed to the deceaſed huſband's ſettlement, though ſhe had never been there; and it was ruled by all the court, that the removal was good, and that ſhe muſt be ſent to the laſt legal ſettlement of her huſband, having acquired no other ſettlement ſince his death. *Caſ. of S.* 89. *Sſſ. C. V.* 1. 80, 105. *V.* 2. 142.

It ſeemeth alſo to be agreed, that a wife can gain no ſettlement ſeparate and diſtinct from her huſband, during the coverture. As in the caſe of Alta Roding and White Roding, M. 30 G. 2 — where the wife, after the huſband was run away, went to live upon a copyhold of her huſband's, where her huſband had never reſided: it was held, that although ſhe might not be removed from thence, yet (her huſband being living) ſhe could not thereby gain a ſettlement.

It ſeemeth alſo to be agreed, that a woman marrying a huſband that hath no known ſettlement, doth not loſe her former ſettlement which ſhe had before marriage. But the great point of difference hath been, whether ſuch ſettlement continues to her during the coverture, or it is ſuſpended during the coverture, and only revives after the huſband's death. Which point includes in it this queſtion, Whether the pariſh where the woman was laſt legally ſettled before marriage ſhall, by barely proving ſuch marriage, avoid the ſettlement with them during the huſband's life? or whether, in order to avoid ſuch ſettlement, it is not alſo neceſſary for them to prove, that ſuch woman had gained another ſettlement, that is to ſay, that the huſband hath a ſettlement, and where?

In relation to which caſe, where the huſband hath no known ſettlement, it hath been adjudged as follows: *E*,

E. 2 *G.* St. *Giles's and* St. *Margaret's.* A woman marries a foreigner, and her husband dies By the court——She must be sent to the place of her settlement before marriage. *Sess. C. V.* 1. 97.

H. 12 *G Westham and Chidding stone.* It was stated, that a single woman, settled at Chiddingstone, was married to a man who is since dead, but his settlement did not appear: And by the court, Her settlement before marriage stands. *Str.* 683.

M. 1 *G. Uppoterce and Dunswell.* A woman is settled in Dunswell, and afterwards marries a vagrant, whose settlement doth not appear. But he goes and lives in Uppoterce, and dies there. Two justices remove the widow to Dunswell, where she was settled before marriage. And by the court—Where it appears that the husband in his life time had no legal settlement as can be found, there the marriage shall not put her in a worse condition than she was before.

Hitherto the cases seem to be agreed, being that the husband is dead. But the difficulty is, where the husband is supposed to be living. And in relation to this point, the following strong cases have been adjudged.

M 12 *Ann. Dunsford and Willorough Green.* A woman who was settled at Wilborough, marries Archibald Player, a Scotchman, who had gained no settlement in England; Two justices remove her from Dunsford to Wilborough, the place of her settlement before marriage. Exception; this is a married woman, and by her marriage she ought to be settled where her husband was, and this cannot be right; for if the justices may send away a wife, it is making a divorce between husband and wife: and if he is a Scotchman, they ought to send her, as part of his family, to the bordering counties of Scotland, according to the act of the 39 *El. c.* 4. *f.* 6. The court held, though she was a married woman, yet if her husband had no settlement, she could not gain any other settlement than she had before marriage; and as for divorce it was none; for the husband might come to her as well at Wilborough Green as at Dunsford. *Foley* 249. *Cess.* of S. 31.

M. 3 *G.* St. *Giles's* and St *Margaret's.* Sarah Etherington was settled at St. Giles's: and marries an Irishman By the court; The marriage will not put her in a worse condition than she was before; and they held that she continued her settlement, notwithstanding her marriage. *Cas. of* S. 98.

H. 12 *G K.* and *Westerham.* The order specially stated by the sessions was this: It appeared to the court, by the testimony of Elizabeth Pinchen, that the said Elizabeth Pinchen was, at the time the said order was made, a married woman, and that her husband was one Thomas Pinchen, who was born in Wiltshire, but in what place or parish he never informed her, nor doth she know; but that he is run away, and still living for what she knows. By the court; She ought to be settled where her settlement was before marriage. *Foley* 252. *Sess. C. V.* 2. 110.

Although

Although it is generally true, that no ſettlement ſhall be good, which is brought about by fraud or practice; yet it ſeemeth that the rule faileth in this caſe, and that if the marriage take effect, the ſettlement is good: for the two following caſes do proceed upon ſuch ſuppoſition.

M. 11 *G. K.* and *Edwards.* The overſeers were indicted for a conſpiracy, in giving a ſmall ſum of money to a poor man of another pariſh, for marrying a poor lame woman of their own pariſh, and ſo by this contrivance conſpiring to ſettle the woman in the other pariſh, where her huſband was ſettled: By the court; If there is conſpiracy, to let lands of 10l. a year to a poor man in order to gain him a ſettlement, or to make a certificate man a pariſh officer, or to ſend a woman big of a baſtard child into another pariſh to be delivered there, and ſo to charge the pariſh with the child, theſe are certainly crimes indictable. But this indictment was quaſhed, for want of averment, that the woman was laſt legally ſettled in the pariſh relieved by her marriage. 8 *Mod.* 321. *Seſſ. G. V.* 1. 295.

H. 6 *G.* 2. *K. & Parkins.* A ſingle woman of Studley, big with child of a baſtard, was ſent back to Studley. Parkins overſeer of Studley, threatened with all the ſeverity of the law, to force her to marry a ſtranger of another pariſh, againſt both his and her conſent, he giving five guineas to the huſband, and keeping him in liquor. By the court; Shew cauſe why an information ſhould not go. *Seſſ. C V.* 1. 176.

[There are ſeveral other ſorts of ſettlements than thoſe here largely treated of, the gaining of which are generally ſomewhat different in the different American ſtates, ſome being acquired by leſs ſervices or leſs eſtates than others; all which are beſt adjudged by the ſeveral laws of theſe ſtates.—Yet we can't well diſmiſs this head without ſome farther extracts from the laws of England, relating to removals.]

i. Order of removal in general.

In treating of this ſubject, we will firſt ſet forth the ſtatutes: Then the eſtabliſhed form of an order of removal thereupon: And then take the ſame in pieces orderly and diſtinctly, thereby to diſcover the ſeveral ſhelves and rocks upon which numberleſs orders have been ſhipwrecked.

By the 13 & 14 *C.* 2. *c.* 12. it is enacted as follows: 'Whereas 'by reaſon of ſome defects in the law, poor people are not reſtrain'ed from going from one pariſh to another, and therefore endea'vour to ſettle themſelves in thoſe pariſhes where there is the beſt 'ſtock, the largeſt commons or waſtes to build cottages, and the 'moſt woods for them to burn and deſtroy, and when they have con'ſumed it, then to another pariſh, and at laſt become rogues and 'vagabonds, it is enacted, That it ſhall be lawful, upon complaint 'made by the churchwardens or overſeers of the poor of any pa'riſh, to any juſtice of the peace, within 40 days after any ſuch 'perſon,

'perſon coming ſo to ſettle in any tenement under the yearly value 'of 10l. for any two juſtices of the peace (one whereof is of the 'quorum) of the diviſion where any perſon that is likely to become 'chargeable to the pariſh ſhall come to inhabit, by their warrant 'to remove and convey ſuch perſon to ſuch pariſh where he was laſt 'legally ſettled, unleſs he give ſufficient ſecurity for the diſcharge 'of the ſaid pariſh, to be allowed by the ſaid juſtices. *ſ.* 1.

'And if ſuch perſon ſhall refuſe to go, or ſhall not remain in 'ſuch pariſh where he ought to be ſettled, but ſhall return of his 'own accord to the pariſh from whence he was removed, one juſ- 'tice may ſend him to the houſe of correction, there to be puniſhed 'as a vagabond. *ſ.* 3.

'And if the churchwardens and overſeers of the pariſh to which 'he ſhall be removed, refuſe to receive ſuch perſon, and to pro- 'vide work for him, as other inhabitants of the pariſh: any juſ- 'tice of that diviſion ſhall bind any ſuch officer in whom there ſhall 'be default, to the aſſize or ſeſſions, there to be indicted for his 'contempt in that behalf. 13 & 14 *C.* 2. *c.* 12 *ſ.* 3.

Upon complaint made by the churchwardens or overſeers of the poor of any pariſh to any juſtice of the peace] By theſe words one juſtice alone hath cognizance of the matter, ſo far as concerneth the complaint only, and by virtue thereof may iſſue his warrant to bring the party before him in order to his examination; or he may iſſue his warrant, to bring the party before himſelf and another juſtice, in order to hearing and determining the complaint; for he himſelf alone cannot hear and determine, but only bring the matter into the courſe of being heard and determined by two juſtices: and therefore it is moſt uſual for the two juſtices originally to iſſue their joint precept to bring the party before them for that purpoſe.—— Nevertheleſs, if the party is willing he may go voluntarily before the juſtices, at the requeſt of the overſeers, without any warrant at all.

The form of which warrants or precepts aforeſaid, where they are requiſite, may be to this effect:

Warrant of one juſtice for a perſon to be examined concerning his ſettlement.

New-York, Ulſter County. } *To any Conſtable of ſaid county.*

FORASMUCH as complaint hath been made before me ——— one of the juſtices of the peace, in and for the ſaid county, by the overſeers of the poor of the pariſh of ——— in the county aforeſaid, that C. P. hath come to inhabit in the ſaid pariſh, not having gained any legal ſettlement therein, nor produced any certificate owning him to be ſettled elſewhere, and that the ſaid C. P. is likely to become chargeable to the ſaid pariſh of ———. Theſe are therefore to require you to bring the ſaid C. P. before me, to be examined concerning the place of his laſt legal ſettlement.——

Herein

Herein fail you not. Given under my hand and seal the ——— day of———

Warrant of two justices in order to the adjudication.

New-York, } *To* ———————,
Ulster County, }

FORASMUCH as complaint hath been made before us ——— two of the justices of the peace in and for the said county, and one of us of the *quorum*, by the overseers of the poor of the parish of ——— in the said county, that C P. hath come to inhabit in the said parish, not having gained any legal settlement therein, nor produced any certificate owning him to be settled elsewhere, and that the said C. P. is likely to become chargeable to the said parish of ———. These are therefore to require you to bring the said C. P. before us, at the house of ——— in ——— in the said county, on ——— the —— day of —— at the hour of —— in the afternoon of the same day, to be examined concerning the place of his last legal settlement, and to be further dealt withal according to law. Given under our hands and seals, the —— day of———

It may also not be unfitting, especially in cases of doubt or difficulty, to give notice (if it may be) to the overseers of the parish or place where the settlement is supposed to be, that they may attend, if they think proper, when the adjudication is made; which probably might prevent appeals oftentimes from such adjudications and orders, which notice may be to the effect following:

Summons to shew cause against an order of removal.

New-Jersey, } TO the overseers of the poor of the parish of ——
Essex County, } in the county of ——— and to every of them.

This is to summon you, or some of you, to appear (if you shall so think proper) before ———, and such other justices of the peace for the said county of E. as shall be at the house of ——— in —— in the said county of E. on ——— the ——— day of——— at the hour of ——— in the afternoon of the same day, to shew cause why C. P. should not be removed from the parish of——— in the said county of E. to your said parish of———. Given under—— hand—and seal—this ——— day of—— in the year of our lord——

And then the general form of an order of removal, as grounded upon the statute of the 13 & 14 *C.* 2 above recited, may be thus:

The form of a general order of removal.

New-Jersey, } TO the overseers of the poor of the parish of——
Essex County, } in the said county of Essex, and to the overseers of the parish of ———in the county of———and to each and every of them.

Upon the complaint of the overseers of the poor of the parish of ——— aforesaid, in the said county of Essex, unto us whose names are hereunto set and seals affixed, being two of the justices of the peace

peace in and for the said county of Essex, and one of us of the *quorum*, that John Thomson, Mary his wife, Thomas their son, aged eight years, and Agnes their daughter aged four years, have come to inhabit in the said parish of ———, not having gained a legal settlement there, nor produced any certificate owning them or any of them to be settled elsewhere, and that the said John Thomson, Mary his wife, and Thomas and Agnes their children, are likely to be chargeable to the said parish of ——— ; we the said justices, upon due proof made thereof, as well upon the examination of the said John Thomson upon oath, as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true ; and we do likewise adjudge that the lawful settlement of them the said John Thomson, Mary his wife, and Thomas and Agnes their children, is in the said parish of ——— in the said county of ——— : We do therefore require you the said overseers of the poor of the parish of ——— or some or one of you, to convey the said John Thomson, Mary his wife, and Thomas and Agnes, their children, from and out of your said parish of ——— to the said parish of ——— and them to deliver to the overseers of the poor there, or some or one of them, together with this our order, or a true copy thereof, at the same time shewing to them the original; and we do also hereby require you the said overseers of the poor of the said parish of ———to receive and provide for them as inhabitants of your parish. Given under our hands and seals the———day of——— in the———year of the independence of

Upon the complaint] *H.* 12 *G.* 2. *K. and Harely.* It was moved to quash an order of removal, because it did not set forth any complaint made ; and by the court, the objection is fatal, for the complaint is the foundation of the justices jurisdiction. *Andr.* 361.

Upon the complaint of the churchwardens and overseers of the poor] *E.* 1 *An. Weston Rivers and* St. *Peters.* Exception to an order of removal, in that it was said to be upon complaint only, and not of the churchwardens or overseers. By the court—This exception is fatal : for no one can disturb a man coming into a parish, but they that have authority to do it : A complaint from one not concerned is nothing ; it may be the parish is willing to keep him.—2 *Salk.* 492.

[These parts of America not being divided into parishes as in England, but only into townships or precincts, there are no church wardens in the same capacity they bear in England, but only overseers of the poor, therefore though the usage of these parts is similar to what is here directed, yet we use not to mention church wardens, but only overseers of the poor, and use the words township or precinct, instead of parish.]

Upon the complaint of the churchwardens and overseers of the poor of the parish of Orton *aforesaid*] *M.* 9 *An. Spalding* and St. *John Baptist.* The order was, to the churchwardens and overseers of the poor of the parish of Spalding, and to the churchwardens and over-

ſeers of the poor of the pariſh of St. John Baptiſt: Whereas complaint hath been made by you ——— It was moved to quaſh the ſame for the uncertainty, becauſe it did not ſay by which: But by Parker, Ch. J. Sure, that is well enough, for it is upon complaint of the right, if both complain. *Foley* 267.

Unto us whoſe names are hereunto ſet and ſeals affixed, being two of his Majeſty's juſtices of the peace] An order was quaſhed, becauſe it did not appear that it was made by two juſtices: It was only, Whereas complaint hath been made unto us; without reciting their authority as juſtices. 5 *Mod.* 322.

Two of his Majeſty's Juſtices of the peace] *M.* 4 *G. K.* and *Weſtwoodhay.* On complaint to one juſtice, two juſtices adjudge and remove; and it was held to be well: Otherwiſe, where one juſtice ſets his hand to the order in the abſence of the other. *Caſes of* S. 107. *Str* 73.

T. 11 *G.* 2. *K* and *Wykes.* It was held, that though the complaint may be to one juſtice, yet the examination ought to be by two, and thoſe the ſame who ſign the order of removal. *Str* 1092.

Juſtices of the peace in and for the ſaid county] *M.* 12. *An.* & and *Uplin.* The order was quaſhed, becauſe it did not ſay that they were juſtices of the peace, but only juſtices of the county. *Caſes of* S. 27.

In and for the ſaid county] *M* 13 *G. K.* and *Owlton.* Exception was taken to an order, for ſaying ——— unto us, two of his majeſty's juſtices of the peace *in* the county aforeſaid; for that by this it appears only that they lived in the county, and not that they were juſtices *for* that county: And the court held this to be a fatal exception, and quaſhed the order for that cauſe *Seſſ. C. V.* 2, 70. 2 *Salk.* 474.

The ſaid county] *M.* 8 *W.* it was objected to an order, that it did not appear thereby that the juſtices were of the *diviſion*, which is required by the ſtatute: but this objection was over-ruled, for that the ſtatute therein is only directory. 2 *Salk.* 473.

That John Thomſon] *M.* 11 *An. Southwell* and *Needwell.* Whereas a certain woman hath intruded Theſe are therefore to require you to convey: Objection, It is not ſaid who this woman was. And by Parker Ch. J. you muſt either name her, or ſay a certain woman unknown. *Caſe of* S. 57.

T. 10. *An.* caſe of *Newington.* Whereas ſuch a perſon hath intruded into the pariſh. and is likely to become chargeable: Theſe are therefore to require you to remove him *with three children.* ——— Quaſhed as to the children, for they have removed more than is complained of. *Caſe of* S. 45.

Mary *his wife*, Thomas *their ſon*] *H.* 10 *W. Johnſon's* caſe. Order to remove a man and *his family*, not good becauſe too general: for ſome of the family might not be removeable. 2 *Salk.* 485.

M. 5 *K Beaton* and *Sitton* Order for removal of Thomas Block and his family: Upon the firſt reading, quaſhed as to the family, becauſe too general. *Str.* 114.

T. 9

T. 9 *W. Flixon* and *Roſton.* Order to remove Jane Smith and her five children; Quaſhed as to the children, for the uncertainty; becauſe it neither tells the names nor ages of the children: for ſhe might have more children than five, and ſome of thoſe five might have gained ſettlements. *Seſſ. C. V.* 1. 11. *Foley* 278.

T. 8 *G. Hobey* and *Kingſbury.* Two juſtices adjudging the ſettlement of the huſband to be at Kingſbury, and that he is likely to become chargeable to Hobey, ſent him, his wife, and ſon of one year old, to Kingſbury; and whether this was good as to the wife and child, was the queſtion: And it was held to be well enough, and the order was confirmed. *Str.* 527.

Thomas *their ſon aged* 8 *years, and* Agnes *their daughter aged* 4 *years*] *M.* 9 *An. Q.* and *Middleham.* Order to remove a child of ten years, to Middleham, becauſe Middleham was the place where his father was laſt legally ſettled. Quaſhed by the court; for that there was no adjudication that Middleham was the place of the child's laſt legal ſettlement, and at that age it might have gained a ſettlement. *Foley* 271.

T. 10 *An. Ringmore* and *Petworth.* The order was, Whereas ſuch a perſon and his 3 children are likely to become chargeable, and there laſt legal ſettlement was at Ringmore. It was moved to quaſh the ſame, becauſe the childrens ages were not ſet forth. But by the court; it is not neceſſary in this caſe, for the order ſays, they were laſt legally ſettled in Ringmore, and then no matter what their ages are. *Caſe of* S. 41.

H. 11 *G. K.* and *Trinity.* This rule was laid down; Every order that concerns the removal of a father and his children, ought to ſhew the ages of the children, for they may have gained a ſettlement in ſome other right, as by being apprentices or ſervants; therefore their ages ought to be ſet forth, that it may appear to the court, that by reaſon of their infancy they have not gained any ſettlement in their own right, but have only a relative ſettlement from their father. Seven years is an age that the court will preſume a child could gain a ſettlement at, in his own right; but if it appears upon the order that the child was above ſeven years old, the order muſt ſet forth, that ſuch child hath not gained a ſettlement in his own right. *Seſſ. C. V.* 274.

Have come to inhabit] *E.* 12 *An. Q.* and *Graffham.* The order ſets forth, that Henry Tate and his wife do endeavour to intrude into the pariſh. And quaſhed by the court; for that he cannot be removed out of the pariſh, unleſs he hath come into it. *Caſe of* S. 16.

Nor produced any certificate owning them or any of them to be ſettled elſewhere] For by the 8 & 9 *W. c.* 30. If they have a certificate, they cannot be removed for being likely to be chargeable, nor until they do actually become chargeable. But if the order ſet forth that they are actually become chargeable, then this clauſe therein, concerning the certificate, is ſuperfluous.

Likely to become chargeable] *Scrivenham* and St. *Nichols.* Order not

not saying that the party was likely to become chargeable; Quashed, 3 *Salk.* 255.

Note: It doth not appear from any adjudged case, that upon appeal it was ever controverted, whether the person was or was not likely to become chargeable. And in the case of *South Sydenham Lamerten*, *T.* 3 *G.* Mr. J. Eyre said, that by the words of the act, living on a tenement under 10l. a year, and likely to become chargeable, are controvertible terms. *Sess C. V.* 1. 115.

Nevertheless, complaint must first be made, that the party is likely to become chargeable, before the justices can remove. And, in the case of *K.* and *Wykes*, *T.* 11 *G.* 2. an information was granted against a justice, for taking the examination of a person in order for his removal, upon the officers complaining, that he endeavoured to gain a settlement in the parish contrary to law; without complaining at the same time, that he was likely to become chargeable. *Andr.* 238.

Upon due proof made thereof, as well upon the examination, &c.] *H.* 13 *G.* 2. *K. & Fisherton Dalemer.* Upon due consideration was held to be sufficient: for that due consideration implies a due examination. *Sess. C. V.* 2. 43.

Examination] *T.* 12. *W. Ware & Stanstead* and *Mount Fitchet.* Exception to an order, for that it was said, it appears upon examination 'before us or one of us.' By the court; The examination ought to be before both, because both are to make the judgment of removal. And Gould J. said, the statute directed, and the practice was, to make complaint to one justice, and he grants his warrant to bring the poor man before two justices, and then they two examine and remove. *Salk.* 488.

Examination of the said John Thomson] *T.* 11 & 12 *G.* 2. *K.* and *Wykes.* A person ought to have notice, and be heard before he be removed: for he may produce a certificate, or give other sufficient security, or shew cause otherwise why he ought not to be removed: especially as he himself perhaps, by the removal, is likely to be the greatest sufferer: and therefore natural justice requires, that he be not condemned unheard. *Andr.* 238.

Of the said John Thomson *upon oath*] In the case of K. and Wykes last abovementioned, one justice took the examination, and other two justices removed upon that sole examination, and in the order did set forth that the party was examined before themselves; for which, and for not summoning the party before them, an information was granted against the two justices. *Andr.* 238.

Upon oath] *H.* 10 *G. Munger-hunger* and *Warden.* Exception to an order, for that it is said to be made upon *due examination*, without saying *upon oath*: By the court, This is sufficient; for where it is said to be made upon due examination, it shall be intended to be upon oath. *Sess. C. V.* 2. 40.

Do adjudge the same to be true] *T.* 13 *W. Suddlescomb* and *Burcwash.* Order quashed, because it was only said to be complained by the officers,

officers, that the perſon removed was likely to become chargeable, but not adjudged ſo by the juſtices. 2 *Salk.* 491.

ii. Order of removal of a certificate perſon.

As it will appear from what hath been ſaid under the former head, concerning the removal of poor perſons having no certificate, that in moſt of the books there are many bad orders; ſo it will appear alſo from thence, and from what will be ſaid under this head, concerning the removal of certificate perſons, that as to this kind of removal there is ſcarce one good order (which is a little ſurpriſing in a matter of daily practice) yea ſcarce one which is capable of being amended even by the ſtatute of the 5 G. 2. for there are objections which go to the very eſſence and ſubſtance of the order, eſpecially the want of proper adjudications, either that the party is become chargeable, or of the place of his laſt legal ſettlement (for he may have gained one after the certificate) or both: for a judgment without adjudging, is a contradiction; and where there is no judgment, there is in ſtrictneſs nothing to appeal againſt, but only an order that the pariſh ſhall receive and provide for a perſon, who for aught appears doth not belong to them.

By the 8 & 9 *W. c* 30. 'If any perſon who ſhall come into any 'pariſh or place, there to reſide, ſhall deliver a certificate, to one of 'the churchwardens or overſeers of the poor there, ſuch certifi- 'cate ſhall oblige the pariſh or place granting the ſame, to receive 'and provide for the perſon mentioned in the ſaid certificate, toge- 'ther with his family, as inhabitants of that pariſh, whenever they 'ſhall happen to become chargeable to, or be forced to aſk relief 'of the pariſh, townſhip, or place, to which ſuch certificate was 'given; and then, and not before, it ſhall be lawful for any ſuch 'perſon, and his children, though born in that pariſh, not having 'otherwiſe acquired a legal ſettlement there, to be removed, con- 'veyed, and ſettled in the pariſh or place from whence ſuch certifi- 'cate was brought.' *ſ.* 1.

And by the 3 *G.* 2. *c.* 29. 'When any overſeer or other per- 'ſon ſhall remove back any perſons or their families, reſiding under 'a certificate, and becoming chargeable, to the pariſh or place to 'which they belong; ſuch overſeers or other perſon ſhall be reim- 'burſed ſuch reaſonable charges as they may have been put unto in 'maintaining and removing ſuch perſons, by the churchwardens or 'overſeers of the place to which ſuch perſons are removed; the ſaid 'charges being firſt aſcertained and allowed of by one or more juſ- 'tices for the county or place to which ſuch removal ſhall be made; 'which ſaid charges, ſo aſcertained and allowed, ſhall, in caſe of 'refuſal of payment, be levied by diſtreſs and ſale of the goods of 'the churchwardens and overſeers of the place to which ſuch certifi- 'cate perſon is removed, by warrant of ſuch juſtice or juſtices.' *ſ.* 9.

Form

Form of an order of removal of a certificate perſon.

Pennſylvania, Bucks County. } To the overſeers of the poor of the pariſh of in the ſaid county of Bucks, and to the overſeers of the poor of the pariſh of in the county of

WHEREAS complaint hath been made by the overſeers of the poor of the pariſh of aforeſaid, in the ſaid county of Bucks, unto us whoſe names are hereunto ſet, and ſeals affixed, being two of the juſtices of the peace in and for the ſaid county of Bucks, and one of us of the quorum, that John Thomſon, Mary his wife, Thomas their ſon aged eight years, and Agnes their daughter aged four years, having for ſome time laſt paſt dwelt in the pariſh of aforeſaid, being allowed ſo to do by reaſon of a certificate bearing date the day of in the year of our Lord under the hands and ſeals of A. C. and B. C. overſeers of the poor of the ſaid pariſh of , atteſted by A. W. and B. W. two credible witneſſes, and allowed by J. P. and K. P. eſquires, two of the juſtices of the peace for the ſaid county of , according to the directions of the ſeveral acts in ſuch caſe made and provided, are become chargeable to the ſaid pariſh of : And whereas it appears to us, as well upon the oath of the ſaid John Thomſon, as otherwiſe, that neither they the ſaid John Thonſon, Mary his wife, Thomas and Agnes their children, nor any of them, have gained any legal ſettlement ſince the date of the ſaid certificate: Whereby, and upon due conſideration had of the premiſes, it appears to us, and we do hereby adjudge, that the ſaid John Thomſon, Mary his wife, and Thomas and Agnes their children, are become chargeable to the ſaid pariſh of , and that the place of the laſt legal ſettlement of them is in the ſaid pariſh of in the ſaid county of : Theſe are therefore to require you the ſaid overſeers of the poor of the ſaid pariſh of , or ſome or one of you, to convey the ſaid John Thomſon, Mary his wife, and Thomas and Agnes their children, from and out of the ſaid pariſh of , to the ſaid pariſh of , and them to deliver to the overſeers of of the poor there, or to ſome or one of them, together with this our order, or a true copy thereof, at the ſame time ſhewing to them the original: And we do alſo hereby require you the ſaid overſeers of the poor of the ſaid pariſh of , to receive and provide for them as inhabitants of your pariſh. Given under our hands and ſeals the day of in the year of our Lord

Allowed by J. P. *and* K. P. *eſquires, two of the juſtices of the peace for the county of* ——] *H.* 9 *An K.* and *Newton.* Order for removing a certificate perſon, not ſetting forth that it was allowed by two juſtices, but adjudging the pariſh which granted the certificate to be the place of the laſt legal ſettlement. By Mr. J. Probyn: The order is good, for it ſets out that the *pauper* came by certificate, and adjudges that he was actually chargeable, and that Newton was the place of his laſt legal ſettlement, he having gained no ſettlement elſewhere ſince; which ſets out the whole reaſon of their judgment, and would make the ſettlement good, if there had been no certificate. *Saſſ. C. V.* 1. 149.

Are become chargeable] *E* 9 *An.* 2 and *Brumſtead.* An order of two juſtices for the removal of a man that came into a pariſh by a certificate, was quaſhed upon this exception: It was ſaid in the ord-

order, that they removed him, becauſe he was *likely to become chargeable*: And the whole court were of opinion, that the juſtices cannot remove a perſon that comes into a pariſh by certificate, till he is actually chargeable to the pariſh. 2 *Salk.* 530.

H. 4 *G. Teelby* and *Willerton.* The juſtices removed a certificate woman, being *likely* to become chargeable. But by the court: She is by the ſtatute not removeable, till ſhe actually becomes chargeable. And the order was quaſhed. *Str.* 77.

And we do hereby adjudge] *T.* 2 *An. Maldon* and *Fleetwick.* An order was made, reciting that whereas complaint hath been made unto us, that ſuch a perſon, who is lately come into the pariſh with a certificate, is actually chargeable to the pariſh; theſe are therefore to require you to remove: And quaſhed, for that there was no adjudication. 2 *Salk.* 530.

T. 15 *G.* 2. *K.* and *Great Bedwin.* Order of removal of a certificate perſon, in which there was no complaint of the churchwardens or overſeers, nor an adjudication that the certificate perſon is actually become chargeable. On appeal, the ſeſſions in purſuance of the 5 G. 2. amend the order in theſe particulars, as matter of form only, and inſert in the ſaid order ſuch complaint and adjudication. And now the queſtion was, whether theſe amendments went only to matter of form, or to the ſubſtance and merit of the order? By *Lee* Ch. J. There has been but one caſe in this court on this act ſince the making of it, and that was not determined: The preſent ſeems to be a very ſtrong caſe againſt the power of amending. For there muſt be a *complaint* from the overſeers, otherwiſe the juſtices have no power to remove; and a certificate perſon muſt be *adjudged* to be actually chargeable, otherwiſe he cannot be removed; And theſe amendments might be the real merits on which this caſe depended. And it would be a detrimental conſtruction of the act, to take it ſo largely; and would be giving the ſeſſions an original juriſdiction. And quaſhed by the whole court. *Seſſ. C. V.* 2. 142. *Str.* 1158.

But after all, it doth not appear, how it becomes neceſſary in the order of removal, to take any notice of the certificate at all, or to make any further uſe of it than as evidence to the juſtices of the ſettlement: And if it is not neceſſary to recite it, it is better to omit the ſame; becauſe a miſrecital, either in the date, or in the names of the perſons, or in any other material part, will be fatal, for that there will be no ſuch certificate as it is there recited, and the order muſt fall of courſe. And I do not ſee, why the form may not be much more plain and ſimple, by drawing the ſame very little varied from the common form of an order of removal of other perſons having no certificate. It is true, where the perſons are only *likely to be chargeable*, it is then requiſite to ſet forth in the order that they have no certificate: for if they have one, they cannot be removed till they actually be chargeable. But if the order do ſet forth that they are chargeable, in that caſe it is not at all material whether

they

they have a certificate or not: for in both cases alike, they are then equally removeable. And if so, then the form may be thus, both for a certificate person, and for a person having no certificate, who is actually become chargeable:

Pennsylvania, Buck's County. TO the overseers of the poor of the parish of in the said county of Bucks, and to the overseers of the poor of the parish of in the county of , and to each and every of them.

Upon the complaint of the overseers of the poor of the parish of aforesaid, in the said county of Bucks, unto us whose names are hereunto set and seals affixed, being two of the justices of the peace in and for the said county of Bucks, and one of us of the quorum, that John Thomson, Mary his wife, Thomas their son aged eight years, and Agnes their daughter aged four years, have come to inhabit in the said parish of , not having gained a legal settlement there, and that the said John Thomson, Mary his wife, and Thomas and Agnes their children are now chargeable to the said parish of : We the said justices, upon due proof made thereof, as well upon the examination of the said John Thomson upon oath, as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge, the lawful settlement of them the said John Thomson, Mary his wife, and Thomas and Agnes their children, is in the said parish of in the said county of : We do hereby require you the said overseers of the poor of the said parish of or some or one of you, to convey the said John Thomson, Mary his wife, and Thomas and Agnes their children, from and out of your said parish of , to the said parish of and them to deliver to the overseers of the poor there, or to some or one of them, together with this our order, or a true copy thereof, at the same time shewing to them the original; and we do also hereby require you the said overseers of the poor of the said parish of , to receive and provide for them as inhabitants of your parish. Given under our hands and seals the day of in the year of

ii. Appeal against the order of removal.

'All persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of the peace of the said county, at their next quarter sessions, who shall do them justice according to the merits of their cause.' 13 & 14 *C.* 2. *c.* 12 *s.* 2.

And by the 8 & 9 *W. c.* 30. 'The appeal against any order of removal of any poor person, shall be had, prosecuted, and determined, at the general or quarter sessions of the peace for the county, division, or riding, wherein the parish, township, or place, from whence such poor person shall be removed, doth lie, and not elsewhere.' *s.* 6.

All persons who think themselves aggrieved] *E.* 4 *W. K.* and *Hartfield* Two justices removed Nicholas Wells, from the parish of Hartfield, to the parish of Framfield; from which order, Wells the party himself, and not the parish, appealed: It was objected, that the party himself cannot appeal, because the appeal is given only to the parish aggrieved: But by the whole court, the party may appeal as well as the parish. *Carth.* 222.

T. 4 *G. K.* and *Almondbury*. An order of two juſtices is quaſhed at the ſeſſions upon appeal, without ſaying *at the appeal of the party grieved*. And the court inclined to quaſh the order for that fault, till they were informed the precedents were moſt of them ſo, and for that reaſon and that only, as Pratt Ch. J. declared, the order was confirmed. *Str.* 96.

At the next general or quarter ſeſſions] *E.* 2 *G.* 2. *K.* and *Norton*. Exception was taken to an order of ſeſſions, for diſcharging an order of removal, becauſe the juſtices order was dated June 21. and the ſeſſions order was not till Michaelmas ſeſſions following, ſo that Midſummer ſeſſions intervened. To this it was anſwered, that by the expreſs words of the ſtatute the appeal is to be to the next ſeſſions after the parties find themſelves aggrieved, which is not till the removal: and for aught appears Michaelmas ſeſſions might be the next ſeſſions after the grievance. And ſo it was held in the caſe of Milbrook and St. John's in Southampton, M. 1 G. To which the court agreed, and the ſeſſions order was affirmed. *Str.* 821

T. 11 *W. G. K.* and *Langley*. It was moved to quaſh an order of ſeſſions, becauſe the juſtices had adjourned the appeal from one ſeſſions to another, and ſo the determination upon the appeal was not at the next quarter ſeſſions. But by the court; The appeal muſt be lodged at the next quarter ſeſſions, but when it is lodged, the juſtices may adjourn it. 2 *Salk.* 605. *Comb.* 365.

'No appeal from any order of removal ſhall be proceeded upon, 'unleſs reaſonable notice be given by the churchwardens or overſeers 'of the pariſh or place appealing, unto the churchwardens or over-'ſeers of the pariſh or place, from which the removal ſhall be: the 'reaſonableneſs of which notice ſhall be determined by the juſtices 'at the quarter ſeſſions to which the appeal is made; and if it ſhall 'appear to them, that reaſonable time of notice was not given, then 'they ſhall adjourn the appeal to the next quarter ſeſſions, and then 'and there finally determine the ſame'. 9 *G. c.* 7 *ſ.* 8.

Reaſonable notice] It is not expreſſed in the act, that this notice ſhall be in writing; but the court will better judge of the reaſonableneſs of it, if it ſhall be in writing; And it may be thus:

TO the overſeers of the poor of the pariſh of in the county of . This is to give notice to you and every of you, that we the overſeers of the poor of the pariſh of in the county of do intend at the next quarter ſeſſions of the peace to be holden for the ſaid county of to commence and proſecute an appeal againſt an order of J. P. and K. P. eſquires, two of the juſtices of the peace for the ſaid county of for and concerning the removal of to our ſaid pariſh of Witneſs our hands this day of .

E. F.
G. H. } Overſeers of the poor.

H. 12 *An. Malendine* and *Hunſdon*. Two juſtices by an order ſent ſome poor perſons to Hunſdon. Two juſtices there by an order ſent

them back again. By the court; They ought to have appealed, and not ſent them back; and held the order of the firſt two juſtices to be good, becauſe there was no appeal againſt it. *Fol.* 273.

T. 12 *W. Chalbury* and *Chipping Farringdon.* A perſon was removed by order of two juſtices from a pariſh in Warwickſhire, to Chalbury in Oxfordſhire, from thence by order of two juſtices to Chipping Farringdon in Berkſhire: It was objected, That Chalbury ought to have appealed, and got the order upon them diſcharged. Which Holt Ch. J. agreed: For ſending the poor man to another place, is falſifying the firſt order, which cannot be done, but by appeal; for the order of two juſtices is a determination of the right againſt all perſons, till it be reverſed: Chalbury ſhould have appealed from the Warwickſhire order, and got that ſet aſide, and ſent the man back thither; and the juſtices there ſhould have ſent him to Chipping Farringdon. Therefore the latter order was naught. 2 *Salk.* 488.

E. 5 *G.* 2. *K.* and *Northfeatherton.* Two juſtices made an order by which they removed a man, his wife, and 4 children, naming them, to Featherton: And there was no appeal Afterwards Featherton finds out that this woman was not the wife, for that the man, tho' married to her, was married before to another woman, and conſequently the ſecond marriage totally void. And they remove the woman by her maiden name to Horſington, and the four children thither alſo as baſtards. Horſington appeals: and the ſeſſions upon hearing the matter ſtate the caſe ſpecially, that this woman and the 4 children were the ſame with the woman and the children removed by the firſt order, and gave judgment that the firſt order was concluſive, and thereupon quaſhed the ſaid ſecond order. And by the court: They have ſlipped their opportunity, and the firſt order not appealed againſt is concluſive. *Seſſ. C. V.* 1. 154.

M. 3 *An.* St. *Andrew's* and St. *Clement's Danes.* The ſeſſions made an order, on an appeal for an order of removal, and afterwards the ſame ſeſſions vacated it by a ſubſequent order; and a *certiorari* being brought, both orders of ſeſſions were returned thereon by *Holt* Ch. J. The ſeſſions is all as one day, and the juſtices may alter their judgment at any time, whilſt it continues; but they ſhould not have returned the vacated order, but only the latter; for the effect of the court's ſetting aſide the firſt order is, that it ceaſeth to be an order, and conſequently ought not to be returned as an order vacated by another order, but it ſhould have been annulled and made nothing. 2 *Salk.* 494, 606.

And for the more effectual preventing of vexatious removals and frivolous appeals, the juſtices in ſeſſions upon any appeal concerning the ſettlement of any poor perſon, or upon any proof before them there to be made, of notice of any ſuch appeal to have been given by the proper officer to the churchwardens or overſeers of any pariſh or place (though they did not afterwards proſecute ſuch appeal) ſhall at the ſame ſeſſions order to the party in whoſe behalf ſuch appeal

ſhall

shall be determined, or to whom such notice did appear to have been given, such costs and charges in the law, as by the said justices in their discretion shall be thought most reasonable and just; to be paid by the churchwardens, overseers or any other person, against whom such appeal shall be determined, or by the person that did give such notice; and if the person ordered to pay such costs, shall live out of the jurisdiction of the said court, any justice where such person shall inhabit, shall on request to him made, and a true copy of the order for the payment of such costs produced, and proved by some credible witness on oath, by his warrant cause the same to be levied by distress; and if no such distress can be had, shall commit such person to the common goal, there to remain by the space of 20 days. 8 & 9 *W.* *c.* 30. *s.* 3.

M. 5 *G.* 2 *K.* and *the county of Nottingham.* A mandamus was granted for the justices to give costs to the party in whose favour the appeal had been determined; yet upon their return of it, the court held it reasonable for them to have the power of judging whether costs shall be allowed or not, and thereupon quashed the writ of mandamus. *Nelf. Poor.*

For the preventing of vexatious removals, if the justices shall at their quarter sessions, upon an appeal before them there had, concerning the settlement of any poor person, determine in favour of the appellant, that such poor person was unduly removed, they shall at the same quarter sessions, order and award to such appellant, so much money, as shall appear to the said justices to have been reasonably paid by the parish or other place on whose behalf such appeal was made, towards the relief of such poor person, between the time of such undue removal, and the determination of such appeal; the said money so awarded, to be recovered in the same manner as costs and charges upon an appeal are to be recovered by the statute of the 8 & 9 *W.* 9 *G.* *c.* 7. *s.* 9.

E. 3 *G.* 2. *St. Mary's Nottingham and Kirklington.* Motion for a mandamus to the justices of the town and county of Nottingham, commanding them to allow the parish of Kirklington, the expence and charges their officers had been put to, in keeping a poor person from the time of his removal, till the order was discharged by the sessions upon appeal. And a mandamus was granted. *Sess. C. V.* 2. 67.

M. 13 *W.* *Mynton and Stony Stratford.* By Holt Ch. J. and the court:—If on appeal to the sessions an order be discharged, that judgment binds only between the parties: But when upon appeal an order is confirmed, that is conclusive to all persons as well as to the parties: for it is an adjudication that this is the place of the party's last legal settlement. 2 *Salk.* 527.

H. 10 *W.* St. *Michael's Bedingham and Kingston Bowsey.* Order reversed on the appeal is conclusive only as to the parish acquitted; but the first parish may remove again to any parish not party to the former removal. 2 *Salk.* 486.

An

An order of two juſtices, if quaſhed at the ſeſſions upon an appeal. for want of form only, is not concluſive between the two pariſhes. *Foley* 276.

It was moved for ſetting aſide an order of the ſeſſions confirming an order of two juſtices upon appeal. But the court would hear nothing of the merits of the cauſe, the order of ſeſſions being in that caſe final, unleſs there had been an error in form——1 *Ventr.* 310

M. 9 *An. South Cadbury and Bradden.* On appeal to the ſeſſions, the court diſcharged the firſt order. It was moved to ſet aſide the order of diſcharge, becauſe the juſtices do not ſay, whether they diſcharge it for form, or on the merits; for if it was for form, the pariſh is not bound, but if on the merits, the pariſh in conſequence is hereby diſcharged for ever. But by the court—The juſtices are not bound to expreſs the reaſon of their judgment, any more than other courts: but the reaſon of their judgment muſt be collected from the record. Particularly,

If the ſeſſions reverſe the firſt order, and that being removed appears to be good, this court will intend it was reverſed on the merits and affirm the order of ſeſſions.

If the ſeſſions reverſe the firſt order, and that being removed appears to be good, we muſt intend it was reverſed for form, and affirm the order of reverſal.

But if the ſeſſions affirm the firſt order, and that appears to be good, we muſt affirm the order of ſeſſions.

But if the order appears bad, and the ſeſſions affirm it, this court will reverſe it, becauſe it appears naught. 2 *Salk.* 607.

So that the caſe is this——If the ſeſſions by their order do barely affirm or quaſh the order of the two juſtices, and both the ſaid orders are removed into the king's bench, the court hath nothing properly before them to judge upon, but the validity of the firſt order of the two juſtices. And if that order appears good as to form, and is confirmed by the ſeſſions, the court will intend it was confirmed upon the merits: if it is *good as to form*, and *quaſhed* by the ſeſſions, the court will intend it was quaſhed upon the merits; if it is *bad as to form*, and is *confirmed* by the ſeſſions, the court will quaſh the confirmation becauſe it appears to be erroneous; if it is *bad as to form*, and is *quaſhed* by the ſeſſions, the court will intend it was quaſhed for form.

But if the ſeſſions, by their order, do not barely affirm or quaſh the order of the two juſtices, but do ſet forth the reaſons of their ſaid order, and ſtate the caſe ſpecially thereupon; then the court will judge upon the caſe ſo ſtated by the ſeſſions; that is to ſay, they will judge of the law as it ariſes upon thoſe facts ſtated, but not of the facts themſelves, for thoſe they will ſuppoſe to have appeared ſufficiently to the juſtices upon the evidence. And this is the method, when the juſtices are doubtful in point of law, whereby to obtain the opinion of that court, namely, in their order of

ſeſſions

ſeſſions which confirms or quaſhes the order of the two juſtices, to ſtate the caſe ſpecially; and then the party which is not ſatisfied, on procuring the ſame to be removed into the king's bench by *certiorari*, may have it determined there by the judgment of that court, who will quaſh or confirm the order of ſeſſions as they ſee cauſe.

How far parents and children are liable to maintain each other.

'The father and grandfather, mother and grandmother, and 'children of every poor, old, blind, lame, and impotent perſon, or 'other poor perſon not able to work, being of a ſufficient ability, 'ſhall at their own charges, relieve and maintain every ſuch poor 'perſon, in that manner, and according to that rate, as by the juſ-'tices of that county where ſuch ſufficient perſons dwell, in their 'ſeſſions ſhall be aſſeſſed; on pain of 20s. a month.' 43 *El. c.* 2. *ſ.* 7.

[With this, ſeveral of the American ſtates agree; but vary ſome times in the method or manner of it.]

Of the relief and ordering of the poor.

By the ſtatute of the 43 *El. c.* 2. the ſeveral pariſhes were required to maintain and employ their own poor, under the direction of two juſtices; in conſequence whereof, before the ſtatute of *C.* 2. the juſtices were wont to ſend the poor to their own pariſhes to be relieved and ordered: and there is no power given by either of thoſe ſtatutes, nor by any other (except in the caſe of certificate perſons, and in the caſe of contracting as is herein after mentioned) to the churchwardens or overſeers to relieve any perſons out of their own pariſh, much leſs any obligation upon them to exerciſe that part of their office out of their own juriſdiction.

By the 43 *El. c.* 2. 'The churchwardens and overſeers, with 'the conſent of two juſtices (1 Q.) ſhall take order from time to 'time, for ſetting to work the children of all ſuch whoſe parents 'ſhall not by the ſaid churchwardens and overſeers, or the greater 'part of them, be thought able to keep and maintain their children; 'and for ſetting to work all ſuch perſons, married or unmarried, 'having no means to maintain them, and uſing no ordinary and 'daily trade; and for the neceſſary relief of the lame, impotent, old, 'blind, and ſuch other among them being poor, and not able to 'work.' *ſ.* 1.

'And the ſaid juſtices, or one of them, ſhall ſend to the houſe of 'correction, or common gaol, ſuch as ſhall not employ themſelves 'to work being appointed thereunto as aforeſaid.' *ſ.* 4.

Poor, and not able to work] *M.* 3 *G. K.* and the inhabitants of *Highworth.* There was an order to pay 3s. weekly to a poor perſon, by the pariſh of Highworth, ſo long as he ſhall continue poor.

It

It was objected, that by the ſtatute it ought to appear that they are poor and impotent. *Parker* Ch. J. I favour theſe orders as much as I can, becauſe no body takes care to draw them up for the poor. But it muſt be quaſhed. *Str.* 10.

Oath of a poor perſon wanting maintenance.

A. P. of in the pariſh of in the county of maketh oath, that he is very poor and impotent, and not able to provide for himſelf and his family, and that his lawful ſettlement is in the ſaid pariſh of and that on laſt he did apply for relief to the pariſhoners of the ſaid pariſh at a veſtry (or other public) meeting [or, to two of the overſeers of the poor of the ſaid pariſh] and was by them refuſed to be relieved.

A. P.

Taken and made before me one of the juſtices of the peace for the ſaid county, the day of J. P.

Order for maintenance.

Pennſylvania, Bucks County. WHEREAS A. P. of in the pariſh of in the ſaid county of yeoman, hath made oath before me one of the juſtices of the peace for the ſaid county, that he the ſaid A. P. is very poor and impotent, and not able to work; and that he the ſaid A. P. did on laſt apply for relief to the pariſhoners of the ſaid pariſh of at a veſtry (or, public) meeting [or, to A. B. and C. D. two of the overſeers of the poor of the ſaid pariſh] and was by them refuſed to be relieved: And whereas A. B. and C. D. overſeers of the poor of the ſaid pariſh, have been duly ſummoned by me, to ſhew cauſe why relief ſhould not be given to the ſaid A. P. and have appeared before me in purſuance of ſuch ſummons, but have not made any ſufficient cauſe to appear as aforeſaid [or, but have made default to appear before me according to ſuch ſummons]: I do therefore hereby order the overſeers of the poor of the ſaid pariſh, or ſome of them, to pay unto the ſaid A. P. the ſum of weekly and every week, for and towards his ſupport and maintenance, until ſuch time as they ſhall be otherwiſe ordered according to law to forbear the ſaid allowance. Given under my hand and ſeal at in the ſaid county, the day of in the year

Of the overſeers account.

By the *El. c.* 2. 'The church wardens and overſeers ſhall, 'within four days after the end of their year, and other overſeers 'nominated, make and yield up to two juſtices (1 Q.) a true and 'perfect account of all ſums by them received, or rated and aſſeſſed 'and not received, and alſo of ſuch ſtock as ſhall be in their hands, 'or in the hands of any of the poor to work, and of all other things 'concerning their office: And ſuch ſums of money as ſhall be in 'their hands, ſhall pay and deliver over to their ſucceſſors: And 'the ſubſequent churchwardens or overſeers, by warrant from two 'ſuch juſtices, may levy by diſtreſs and ſale of the offenders goods, 'the ſaid ſums or ſtock which ſhall be behind on any account to be 'made;

made; and in defect of such distress, two such justices may commit him to the common gaol, there to remain without bail or mainprize, until payment of the said sum and stock: and also any such two justices may commit to the said prison, every one of the said churchwardens and overseers, which shall refuse to account, there to remain without bail or mainprize, until he have made a true account, and satisfied and paid so much as upon the said account shall be remaining in his hands. *f.* 2, 4.

Allowance of the account.

New York, Ulster County. PERUSED and allowed (having been first signed and verified on oath by A. B. and C. D. overseers of the poor) by me one of the justices of the peace of the people, in and for the said county, the ——— day of ———.

J. P.

(I do not find that any one or more justices of the peace may or can, in any case, licence a man to beg or ask relief at all; but only may make a testimonial, or licence in the two following cases, viz. 1. To such as suffer shipwreck; and 2. To soldiers or mariners coming from the seas to pass from place to place, and in these two cases only the law tolerateth them to ask, and receive necessary relief, as aforesaid.

Also justices of the peace upon request, may grant testimonials of loss by fire, towards repairing the damages sustained by the poor sufferers.

A licence and testimonial for such as have suffered shipwreck.

York, ff. to all constables, &c.

R. G. of W. in the said county, esq; one of the justices, &c. Forasmuch as the bearer hereof, L. M. aged about twenty-four years having lately been at sea in a ship called the, &c. and hath suffered shipwreck, and got to land at D. in the county of Y. upon the third day of, &c. last past, as I am credibly informed, as well by the report of the said L. M. as also by the testimonial of divers of the inhabitants of Y. aforesaid: And for that the said L. M. hath not wherewithal to relieve himself in his travels homewards to W. in the county of H. where he saith he was born (or hath a dwelling, &c.) these are therefore to pray you, and every of you to whom these presents shall come, not to molest or trouble the said L. M. in his travel to W. aforesaid, where he is limited to be within, &c. days next after the date hereof, but desiring you rather to relieve him in his necessity as to you shall seem meet; and withal, you the constables of every town where he shall come, to help him with lodging in a convenient time, so that he travelleth the direct way to W. aforesaid, not doing any thing contrary to the laws and statutes of this state. In witness, &c.

A licence or passport for a poor man to his friends, for relief.

York, ff. To all constables, &c.

R. G. and J. D. esquires, two of the justices of the peace for the said county, greeting: Forasmuch as A. B. of D. &c. the bearer hereof, being reduced to great poverty and necessity, hath desired a testimonial

teſtimonial or licence for his ſafe travel unto the city of Y. in the ſtate of Y. where he ſaith he was born, and hath ſome friends yet living, by whoſe means and friendſhip he hopeth to be fully relieved and holpen: In conſideration whereof, KNOW YE, that we the ſaid R. G. and J. D. (as far as in us lieth) hath licenced the ſaid A. B. to travel and paſs the direct way from D. unto the ſaid city of Y ſo that his journey be not for longer or farther continuation than twenty days next after the date hereof; praying you, and every of you, not to molest or trouble the ſaid poor man in his travel, but to permit and ſuffer him to paſs, ſo that he ſhew himſelf in no reſpect offenſive to the laws of the ſtate. In witneſs, &c.

Note: Theſe paſſports are often made to travel upon other occaſions, and the party ought to be particularly deſcribed therein.

A teſtimonial and charitable requeſt from juſtices of the peace, for poor men that have had loſs by fire.

York, ſſ. TO all chriſtian people to whom this preſent writing or teſtimonial ſhall come to be ſeen, heard, or read; A. B. D. E. and G. H. eſquires, three of the juſtices of the peace, within the ſaid county of Y. ſend greeting: Whereas it is both godly and conſonant to chriſtian charity, in matters doubtful and ambiguous, to certify and report the truth; we have thought it our duty (at the earneſt and lamentable ſuit of our loving neighbours, the bearers or bringers hereof, G. H. I. K. L. M. &c.) to publiſh and declare, That on the tenth of M. laſt paſt, between three and four of the clock in the morning, by caſualty and great miſchance by fire, as well their ſeveral dwelling-houſes, to the number of, &c. and all other edifices and buildings to every of the ſaid dwelling-houſes belonging; and alſo all their corn, and moſt of their ſeveral goods and houſhold ſtuff, were conſumed, waſted, and burnt, to the great danger of the bodies of them and their families, and their exceeding great loſs and impoveriſhment. And foraſmuch as it is a godly and charitable deed, to further, help, and relieve ſuch poor, needy and miſerable perſons (being of honeſt name, fame, and converſation) as they who have ſuffered this great loſs: And for that the bearers, in behalf of themſelves and their neighbours, are inforced, by reaſon of their loſſes to ſeek for help and ſuccour for their relief. And we knowing their eſtate to be ſuch as is premiſed, and moved with commiſeration of their ſaid eſtate and condition, have therefore, as much as in us lieth, given licence unto them, and every of them, to make their repair from pariſh church to pariſh church, and every pariſh church and chapel, town and place within the county of Y. to aſk, receive and take the charitable benevolence of all good and well diſpoſed people, towards the recovery of their ſaid great loſſes. And our requeſt further is, That you and every of you to whom they ſhall repair, do extend your loving favour and charity unto them, permitting them, without your denial, to execute the tenor of this our licence; deſiring all eccleſiaſtical perſons to whom theſe diſtreſſed perſons ſhall make their addreſs in this behalf, to declare the tenor hereof to their pariſhoners in every of their pariſh churches and chapels on Sunday or other feſtival days, exhorting them to extend their charity in behalf; and thoſe whom it concerns, to aid and aſſiſt them in the collection thereof. In witneſs whereof, &c.

A cer-

A certificate for obtaining a brief upon a loss by fire.

To his Excellency, the honorable, &c.

WE the justices of the peace for the county of M. do certify your excellency, that at the court of general quarter sessions of the peace, holden at N. for the said county of M. on Monday the 10th of March last past, it did then and there appear unto us the said justices, sitting in open court, as well upon the oaths of A. B. C. D. carpenters, and E. F. and G. H. bricklayers, as also upon the oaths of J. K. and L. M. two of the most substantial inhabitants of the town of W. within the said county of M. That on Monday the 24th day of February last past, between eight and nine of the clock in the evening of the same day, by casualty and great mischance, a sudden and terrible fire did break forth at the said town of W. which by reason of the fierceness thereof (within the space of six hours) burnt down and consumed the dwelling houses, barns, stables, cow-houses, and out-houses of the above ten of the inhabitants of the said town of W. together with their corn, hay, and most of their several goods and houshold stuff, to the great danger of the bodies of them and their families, and to their exceeding great loss and impoverishment: And that the whole loss sustained thereby, did amount to 5000*l.* and upwards; so that the said inhabitants, with their families, are totally impoverished, and are no ways able to subsist, but must necessarily perish unless, they shall be timely relieved by the charitable benevolence of well disposed people. And we do further certify, that we have taken bond of several of the inhabitants, that no part of the money collected shall be applied to the benefit of any landlords, or other persons of ability, either in re-building his house, or otherwise, nor that the said inhabitants shall assign over their collections to any other person or persons whatsoever. In witness whereof, &c.

PRESENTMENT.

A PRESENTMENT is that which the grand jury find and present to the court, without any indictment delivered to them; which is afterwards reduced into the form of an indictment, and in nothing else differs from an indictment

There are other presentments of churchwardens, constables, surveyors of the highways, and justices of the peace; all which may be seen under their proper titles.

PRISON-BREAKING.

IT seemeth that at the common law all prison breaches were felonies, if the party were lawfully in custody for any cause whatsoever. 2 *Haw.* 123.

But by the following statute, which is called the statute *de frangentibus prisonam*, the severity of the common law is moderated; in the explication of which statute, will be contained the whole learning relating to this subject.

The statute is this: 'Concerning prisoners which break prison, the

'king willeth and commandeth, that none that breaketh prison shall 'have judgment of life or member, for breaking of prison only, except the cause for which he was taken and imprisoned did require 'such judgment, if he had been convict thereupon, according to the 'law and custom of the realm. 1 *Ed.* 2. *st.* 2.

Concerning prisoners which break] Therefore if the prison be broken by a stranger, and not by the prisoner, or by his procurement, this is no felony in the prisoner. *Hale's Pl.* 108.

Which break prison] It seems clear, that any place whatsoever, wherein a person under a lawful arrest for a supposed crime, is restrained of his liberty, whether in the stocks, or street, or in the common gaol, or the house of a constable, or private person, is properly a prison within this statute; for imprisonment is nothing else but a restraint of liberty. 2 *Haw.* 124.

And therefore this extendeth as well to a prison in law, as to a prison in deed. 2 *Inst.* 589.

But there must be an actual breaking; for if the door be open and he goes out, it is not felony, but a misdemeanor only. 2 *Inst.* 589. 2 *Haw.* 125.

But if the prison be fired without the privity of the prisoner, he may lawfully break it to save his life. *Hale's Pl.* 108.

Also it seems that no breach of prison will amount to felony, unless the prisoner escape. 2 *Haw.* 125.

That none that breaketh prison shall have judgment of life or member] That is, shall not be guilty of felony. But nevertheless he is still punishable as for a high misprision, by fine and imprisonment; for it cannot be thought the meaning of the statute, in ordaining that such offences shall not be punished as capital ones, to intend that they shall not be punished at all. 2 *Haw.* 128.

Nevertheless, by the 3 *Ed.* 1. c. Those who have broken prison are not bailable by justices of the peace; and that for two reasons: 1. Because it carries a presumption of guilt. And, 2. Because it is a superadded offence to the former for which they stood committed. 2 *H. H.* 133.

Except the cause for which he was taken and imprisoned did require such judgment] This is to be intended of a lawful cause; and therefore false imprisonment is not within this act. 2 *Inst.* 590.

Imprisonment is a restraint of a man's liberty under the custody of another, by lawful warrant, in deed, or in law. Lawful warrant is, either when the offence appeareth by matter of record, as when the party is taken on an indictment; or when it doth not appear by matter of record, as when a felony is done, and the offender by a lawful *mittimus* is committed to gaol for the same: But between these two cases there is a great diversity; for in the first case, whether any felony were committed or no, if the offender be taken by force of a *capias* the warrant is lawful, and if he break prison it is felony, altho' no felony were committed; but in the other case, if no felony be done at all, and yet he is committed to prison for a supposed felony,

felony, and break prison, this is no felony, for there is no cause. 2 *Inst.* 590.

So that the cause must be just, and not feigned, for things feigned require no judgment: Thus if a man give another a mortal wound, for which he is committed to prison, and breaketh prison, and the other dieth of the wound within the year, this death hath relation to the stroke; but because relations are but fictions in law, and fictions are not here intended, this prison-breaking is not felony. 2 *Inst.* 591.

So that the offence for which the party was imprisoned, must be a capital one at the time of the offence, and not become such by a matter subsequent. 2 *Haw.* 126.

And the cause must be expressed in the *mittimus*, although not so certainly as in an indictment, yet with such convenient certainty as it may appear judicially that the offence requireth such judgment; as, not for felony generally, but for felony in stealing such a horse, and the like. 2 *Inst.* 591.

But if the offence for which the party is committed, be supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if in the event it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain, that the breaking of the prison, or a commitment for it, can be felony; for the words of the statute are, 'except the cause for which he was taken and imprisoned did require such judgment;' and here it appears, that the offence, which is the cause of his imprisonment doth not require such a judgment. 2 *Haw.* 126.

But if a man be committed by lawful warrant, for suspicion of felony done, if he break prison, he may be indicted for that escape, albeit the commitment be for suspicion of felony, and yet no judgment can be given against him for suspicion, but for the felony itself, whereof he is suspected. 2 *Inst.* 592.

And an indictment that such a person *feloniously broke the prison* generally, is not good; but it ought to re-hearse the specialty of the matter, that he being imprisoned for such or such a felony, broke the prison. 2 *Inst.* 591.

But if the party be only arrested for, and in his *mittimus* charged with a crime which doth not require judgment of life or member, as petit larceny, or homicide by self-defence or by misadventure, and the offence be in truth no greater than the *mittimus* doth suppose it to be, it is clear, from the express words of the statute, that a breaking of the prison cannot amount to felony. 2 *Haw.* 126.

But if a felony be made by a subsequent statute, and an offender is committed thereupon: if he breaks prison, it is felony. For since all breaches of prison were felonies by the common law, which is restrained by this statute in respect only of imprisonment for offences not capital; when an offence becomes capital, it is as much out of the benefit of the statute, as if it had always been so. *Hd. Pl.* 108. 2 *Haw.* 126.

Also

Alſo it is ſaid, that the party may be arraigned for priſon-breaking before he be convicted of the crime for which he was impriſoned: for that it is not material whether he were guilty of ſuch crime or not; for the words of the ſtatute are, *for which he was taken and impriſoned*. 2 *Haw.* 127.

But if he is firſt indicted and acquitted of the principal felony, he ſhall not be indicted for the breach of priſon afterwards; for it being cleared that he was not guilty of the felony, he is in law as a perſon never committed for felony, and ſo his breach of priſon is no felony. 1 *H. H.* 612.

But the gaoler ſhall not be puniſhed as a felon for the party's breach of priſon, unleſs he voluntarily conſented to it; but it ſeems to be a negligent eſcape in the goaler, for which he may be puniſhed by fine and impriſonment, becauſe there wanted either that due ſtrength in the gaol, or that due vigilance in the gaoler or his officers, that ſhould have prevented it: and if gaolers might not be puniſhed for this as a negligent eſcape, they would be careleſs either to ſecure their priſoners, or to retake them that eſcape. 1 *H. H.* 601.

And therefore if a criminal endeavouring to break the gaol, aſſault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw.* 71.

Indictment for breaking out of gaol.

THE jurors of the people of the ſtate of New-York upon their oath preſent, that A. O. late of in the county aforeſaid, labourer, on the day of in the year of the independence of at aforeſaid in the county aforeſaid, was arreſted, impriſoned, and detained in our goal, for a certain felony by him committed, that is to ſay, for the feloniouſly taking and carrying away one black gelding, the property of of the value of and that he the ſaid A. O. on the day of in the year aforeſaid, with force and arms, the aforeſaid gaol at aforeſaid in the county aforeſaid, feloniouſly did break and thereby did eſcape from and out of the ſaid gaol, againſt the peace of the people of the ſaid ſtate, and their dignity.

PROCESS.

BY the commiſſion of the peace, the juſtices in ſeſſions have power to 'make and continue proceſſes and indictments, againſt 'the perſons indicted, until they can be taken, ſurrender themſelves, 'or be outlawed.'

And by the ſtatute of the 1 *Ed. c.* 2. Indictments and preſentments taken in the ſheriff's tourn, ſhall be delivered to the next ſeſſions, who may award proceſs thereupon, in like form as if they had been taken before themſelves.

And the law alſo in ſeveral caſes in expreſs words directs proceſs to be made by juſtices out of ſeſſions; and in other caſes by neceſſary

fary implication: as where a ſtatute doth give power to juſtices out of ſeſſions to inquire, hear, and determine, there they may make proceſs to cauſe the party to come and anſwer, otherwiſe they cannot proceed to hear and determine; and this may be either before or after preſentment or indictment as the ſeveral ſtatutes do require: Before preſentment or indictment it is called a *warrant*; after preſentment or indictment it is properly called *proceſs*. *Dalt. c.* 193.

Commonly an indictment, being but an accuſation againſt a man, is of no force but only to put him to anſwer unto it. And hereof all proceſs hath the name, becauſe it *proceedeth* or goeth out upon former matter either original or judicial. *Lamb.* 519.

And it ſeemeth plain, from the nature of the thing, that there can be no need of proceſs where the defendant is preſent in court, but only where he is abſent. 2 *Haw.* 281.

The proceſs ought to be in the name of the king. And if it iſſue from the king's bench, it ought to be under the teſte of the chief juſtice; and if it iſſue from any other court, there ſeems to be the ſame reaſon, that it ought to be under the teſte of the firſt in the commiſſion. 2 *Haw* 283.

Upon an indictment in ſeſſions, there muſt be 15 days between the teſte and return of the *venire* but if the entry be by conſent of parties, the *venire* may be returnable *immediate*, and the trial be the ſame day. 3 *Salk* 371.

Proceſs on an indictment or appeal of death, is one *capias*, and then an exigent: But in the caſe of any other felony, then by the 25 *Ed.* 3. *c.* 14. two *capias's*, and then an exigent. *Hal. Pl.* 209. 2 *Haw.* 303. *Crown. Circ.* 21.

The ordinary proceſſes upon all indictments of treſpaſs againſt the peace, or of other offences againſt penal ſtatutes, not being felony, or a greater offence, are as follows: Firſt, if the offender be abſent, a *venire facias* which is but in nature of a ſummons to cauſe the party to appear, ſhall be awarded, except where other proceſs is directed by ſome ſtatute. 2 *Haw.* 283.

If it appear by the return to ſuch *venire*, that the party hath lands in the county, whereby he may be diſtrained, the *diſtreſs infinite* ſhall be awarded from time to time, till he do appear: and by force hereof he ſhall forfeit on every default ſo much as the ſheriff ſhall return upon him in iſſues. But if a *nihil* be returned on ſuch a venire, then three *capias's*, that is a *capias*, *alias* and *pluries* ſhall iſſue. 2 *Haw* 283.

Where the inhabitants of a pariſh are indicted or preſented, the proceſs is firſt a *venire*, then a *diſtringas*. *Crown Circ.* 21.

By the 21 *J. c.* 4. by which all popular actions on penal ſtatutes are reſtrained to their proper counties, the like proceſs in every popular action, bill, plaint, ſuit or information, on a penal ſtatute, before the quarter ſeſſions (or higher courts) ſhall be awarded as in an action of treſpaſs *vi & armis* at the common law.

And conſequently, the proceſs in all ſuch ſuits muſt be by attachment

ment or *pone per vadios*, and after by diſtreſs infinite, where by the return the party appears to be ſufficient, otherwiſe by capias. 2 *Haw.* 284.

If a defendant appear to an indictment of felony, and afterwards before iſſue joined made an eſcape, either from his bail, or from priſon; the common *capias*, *alias* and *pluries* ſhall be awarded againſt him, unleſs there had been an exigent before, in which caſe a new exigent ſhall be awarded. 2 *Haw.* 285.

The exigent ſhall not be awarded againſt acceſſaries until the principal ſhall be attainted. 3 *Ed.* 1. c. 14. 2 *Haw.* 306.

By the 8 *H.* 6. c. 10. 'On indictments for treaſon, felony, or 'treſpaſs, againſt perſons dwelling in other counties than where the 'indictment is taken, before any exigent awarded, preſently after 'the firſt writ of *capias* awarded and returned, another writ of *ca-* 'pias ſhall be awarded, directed to the ſheriff of the county whereof 'the perſon indicted was ſuppoſed to be converſant by the ſame in- 'dictment, returnable before the ſame juſtices or others before whom 'he is indicted, at a certain day, containing the ſpace of 3 months 'from the date of the ſaid laſt writ, where the counties are hold- 'en from month to month; and where they are holden from 6 'weeks to 6 weeks, he ſhall have four months, until the return of 'the ſame writ; by which writ of ſecond *capias* it ſhall be com- 'manded to the ſame ſheriff to take the perſon indicted by his body, 'if he can be found within his bailiwick, and if he cannot be found 'within his bailiwick, that the ſaid ſheriff ſhall make proclamation 'in two counties before the return of the ſame writ, that he which 'is ſo indicted, ſhall appear before the ſaid juſtices or others, in 'the county, liberty or franchiſe where he is indicted, at the day 'contained in the ſaid laſt writ of *capias*, to anſwer to the king of 'the felony, treaſon, or treſpaſs, whereof he is ſo indicted: After 'which ſecond writ of *capias* ſo ſerved and returned, if he which is 'ſo indicted come not at the day of the ſame writ of *capias* returned, 'the exigent ſhall be awarded. And every exigent and outlawry 'otherwiſe awarded or pronounced ſhall be void.

'And any ſuch indictment ſhall be removed by *certiorari*, then 'before the exigent awarded, preſently after ſuch firſt *capias* re- 'turned, another writ of *capias* ſhall be directed as before, return- 'able before the king in his bench.

'Alſo if any perſon be indicted of felony or treaſon, and at the 'time of the ſame felony or treaſon ſuppoſed was converſant within 'the county whereof the indictment maketh mention, the like pro- 'ceſs ſhall be made againſt the perſon ſo indicted, as hath former- 'ly been uſed; that is, without ſending proceſs into the other 'county.

'But every perſon indicted in the form aforeſaid, after he is duly 'acquitted by verdict, ſhall have an action upon his caſe, againſt 'the procurer of ſuch indictment; and if ſuch procurer be attaint- 'ed thereof, the plaintiff ſhall recover treble damages. Which 'ſeemeth to be upon account of the diſtance at which he is ſuppo-

'ſed

'fed to live, from the place where he is indicted, and consequently 'his extraordinary trouble in that behalf.'

Dwelling in other counties] If the defendant be named of B. and late of C. there is no need of any *capias* to the sheriff of the county where C. lies, because it appears that the defendant is at present conversant at B. But if a defendant be named of no certain place at present, but only late of B. and late of C. and late of D. being all of them in counties different from that wherein the prosecution is commenced, a *capias* shall go to the sheriff of every one of those counties. 2 *Haw.* 306.

Shall be void] Not utterly void, but only voidable by writ of error. 2 *Haw.* 306.

Mr. Marrow saith, that by the equity of this statute, if a person indicted in one county is imprisoned in another, the justices may award an *habeas corpus*, to remove him before themselves. *Lamb.* 526.

Concerning the execution of the process, it is laid down as a general rule, that wherever the king is a party to the suit (as he certainly is to all informations and indictments) the process ought to be executed by the sheriff himself, and not by the bailiff of any franchise, whether it have the clause *non omittas* or not, and whether the defendant be within a franchise or in the county at large, for the king's prerogative shall be preferred to any franchise: But it is said, that this is to be intended only where in the grant of the franchise no mention is made of causes to which the king is a party— 2 *Haw.* 284

And if the party be in a house, if the doors be shut, and the sheriff (having given notice of his process) demand admittance, and the doors be not opened, he may break open the doors and enter to take the offender. 2 H. H. 202.

But no person, on the Lord's Day shall serve or cause to be served any writ, process or warrant, order or judgment (except in cases of treason, felony or breach of the peace) but the service thereof shall be void, and the person serving the same shall be liable to answer damages to the party grieved, in the same manner as if he had done it without any writ, process, warrant, order or judgment at all. 29 *C.* 2. c. 7. *f.* 6.

It seems to be agreed, that every suit, whether civil or criminal, and also every process in such suit against jurors, ought to be properly continued from day to day, from its commencement to its conclusion, without any the least gap or chasm; and the suffering any such gap or chasm is properly called a *discontinuance*; and the continuing the suit by improper process (as by a *capias* instead of a *distringas*) or by giving the parties an illegal day, is properly called a *miscontinuance*; and if the justices, before whom the matter is depending, do not come on the day to which it is continued, it is said to be *put without day*, and cannot be revived without a re summons or re-attachment. 2 *Haw.* 298, 300.

Now

Now proceſs may be diſcontinued ſeveral ways. As, 1. Where the ſecond is not teſted on the very ſame day, on which the firſt is returnable. 2. Where there is a ſeſſions intervening between the teſte and the return of a *capias*, that the defendant may not be impriſoned an unreaſonable time. But it is no objection to an exigent that it is not returnable the next ſeſſions, becauſe it muſt allow time for five counties to be holden between its teſte and return. 3. Where after iſſue or demurrer, the court gives the party a day to a diſtant ſeſſions, without making any continuance to that immediately following. 4. Where the ſeſſions to which the ſuit is continued is adjourned, and the ſuit is not adjourned accordingly. 5. Where any of the parties are deſcribed in any continuance of the ſuit, whether on the roll, or by proceſs, by a name or addition variant from thoſe in the original, tho' only in one letter. 6. Where a *venire* or *diſtringas* are iſſued, without any award on the roll to warrant them. 2 *Haw.* 298, 299.

And it ſeems generally to be taken as an undoubted principle, That a diſcontinuance by ſuffering a total chaſm in the proceedings, whether on the roll, or in the proceſs, by not giving a freſh continuance inſtantly upon the determination of the precedent, ſhall never be aided by any appearance or pleading over: But it is holden by the greater number of authorities, that if the original be good, and the defendant preſent in court, he ſhall be compelled to anſwer to ſuch original, let the proceſs whereon he came in, or the execution of it, be never ſo erroneous or defective, ſo that it never were diſcontinued; for the end of proceſs is to compel an appearance, and the end being ſerved, and a legal charge appearing againſt the defendant no way diſcontinued, the law will not ſo far regard a ſlip in the proceſs, as to let the defendant out of court, in order only to have him brought in again in better form. 2 *Haw.* 300.

The proceſſes (as well of *capias* as of outlawry) may be ſtayed by a *ſuperſedeas* iſſuing from other juſtices (out of ſeſſions) teſtifying that the party hath come before them, and hath found ſureties for his appearance to anſwer to the indictment, or to pay his fine. *Dalt. c.* 193.

And it ſeemeth that even any one juſtice may bail perſons indicted at the ſeſſions, for any offence under the degree of felony; for that the ſtatutes relating ſpecially to the power of juſtices in granting bail, do not in this caſe ſeem to take away the power, which one juſtice had before the making of the ſaid ſtatutes. 2 *Haw.* 101.

Judgment of outlawry is given by the coroner, at the fifth county court, upon the party's not appearing, to the *exigent* (which is a writ commanding the ſheriff to cauſe the defendant *(exigi)* to be *demanded* from county court to county court, until he be outlawed.) And ſuch judgment is entered thus, 'Therefore by the judgment of 'the coroner of our lord the king, of the county aforeſaid, he is 'outlawed'. 2 *Haw.* 446.

The word *outlaw (utlaghe) utlagatus*, is not from the Latin *lex*, but

but from the Saxon *laga*, which ſignifies *law*. And a perſon out lawed ſignifies one that is out of the protection of the king, and out of the aid of the law.

And a man which is outlawed is called outlawed, but a woman which is outlawed is called weived, and not *utlagata*; for that women are not ſworn in leets or tornes, as men which are of the age of 12 or more are; and therefore men may be called *utlagatie*, that is *extra legem poſiti*, but women are *waviatæ*, that is *derelictæ*, left out or not regarded, becauſe they were not ſworn to the law: wherein it is to be noted, that of ancient time a man was not ſaid to be within the law, that was not ſworn to the law, which is intended of the oath of allegiance in the leet. 1 *Inſt.* 122.

And hence it is, that a man under the age of 12 years, cannot be outlawed. 1 *Inſt.* 128.

Proceſs of outlawry lies in all indictments of treaſon or felony, and on all returns of a reſcous; and alſo on all indictments of treſpaſs with force and arms; and it ſeems probable, that it lies on an indictment of conſpiracy, or deceit, or any other crime of a higher nature than a treſpaſs with force and arms; but not on any indictment for a crime of an inferior nature. And it ſeems agreed, that it lies not on any action on a ſtatute, unleſs it be given by ſuch ſtatute, either expreſly, as in the caſe of a *præmunire*, or impliedly, as where a recovery is given by an action wherein ſuch proceſs lay before, as on a writ of treſpaſs for a forcible entry, on the 8 *H.* 6. *c.* 9. becauſe the ſtatute expreſsly gives a recovery by ſuch writ, and ſuch proceſs lies in it by the common law. 2 *Haw.* 302, 303.

In every *action perſonal* wherein any exigent ſhall be awarded out of any court, one writ of proclamation ſhall be awarded out of the ſame court, having day of teſte and return as the writ of exigent ſhall have, directed and delivered of record to the ſheriff where the defendant dwells; which writ of proclamation ſhall contain the effect of the action: And the ſheriff ſhall make one proclamation in the open county court, and another at the general quarter ſeſſions where the defendant dwells, and another a month at leaſt before the *quinto exactus*, by virtue of the ſaid writ of exigent, at or near the moſt uſual door of the church or chapel where the defendant ſhall be dwelling at the time of the exigent awarded, upon a Sunday, immediately after divine ſervice. 31 *El.* *c.* 3.

Alſo, upon iſſuing any exigent out of any of the king's courts, againſt any perſon for a criminal matter, before judgment or conviction, there ſhall alſo iſſue a writ of proclamation, bearing the ſame teſte and return, where the perſon in the record of the proceeding is mentioned to inhabt, according to the form of the 31 *El.* *c.* 3. which writ of proclamation ſhall be delivered to the ſheriff three months before the return of the ſame. 4 & 5 *W.* *c.* 22. *ſ.* 4.

If there are two coroners in a county, or more, one may execute the writ, as in caſe of an exigent, but the return muſt be in the names of the coroners. 2 *H.* *H.* 56.

And the return of the outlawry muſt be certain: It muſt ſhew where the county court was held, and in what county; and muſt return the day and year of the king to every *exactus*. 2 H. H. 203.

And alſo the ſheriff's name and office muſt be ſubſcribed to the return of the exigent. 2 *H. H.* 204.

It is ſaid, that the juſtices in ſeſſions cannot iſſue a *capias utlagatum*, but muſt return the record of the outlawry into the king's bench, and there proceſs of *capias utlagatum* ſhall iſſue. 2 *H. H.* 52.

But in *T.* 10 *J.* The opinion of all the court of common pleas was, that if one be outlawed before the juſtices of the peace on an indictment of felony, they may award a *capias utlagatum*; and ſo was the opinion of Perim chief baron, and all the court of the exchequer: For they that have power to award proceſs of outlawry, have alſo power to award a *capias utlagatum*, as incident to their authority and juriſdiction. 12 *Co.* 103.

If a perſon be outlawed at the ſuit of one man, all men ſhall take advantage of this perſonal diſability. 1 *Inſt.* 128.

But ſuch diſability abateth not the writ, but only diſableth the plaintiff, until he obtain a charter of pardon. *id.*

Upon outlawry in treaſon or felony, the offender ſhall loſe and forfeit as much as if he had appeared, and judgment had been given againſt him, as long as the outlawry is in force. 2 *Haw.* 446.

But the outlawry for a miſdemeanor, doth not inure as a conviction for the offence, as it doth in caſes of treaſon and felony; but as a conviction of the contempt for not anſwering which contempt is therefore puniſhed, not by fine as a conviction for the offence, but by forfeiture of goods and chattels for the contempt. *K.* and *Tippin.* 1 *W.* 2 *Salk.* 494

The very iſſuing of the exigent, in caſe of treaſon or felony, gives to the king the forfeiture of the goods of the party, from the time of the teſte of the writ of exigent; and the forfeiture by the exigent awarded ſtands, although the indictment be quaſhed, until there be a judgment of reverſal on a writ of error; becauſe the king's title being of record, muſt be avoided by a record. 2 *H. H.* 204. 205.

And as the award of the exigent gives the forfeiture of the goods, ſo the outlawry gives the forfeiture or loſs of the lands of the party outlawed, to wit in caſe of outlawry of treaſon, his lands are forfeited to the king, of whomſoever they are held; and in caſe of outlawry of felony, to the lord by eſcheat, of whom they are immediately holden. 2 *H. H.* 206.

But it muſt be remembered, that the bare judgment of outlawry by the coroner, without the return thereof of record, is no attainder, nor gives any eſcheat; but it muſt be returned by the ſheriff, with the writ of *exigi facias*, and the return indorſed. 2 *H. H.* 206 Or elſe it muſt be removed by *certiorari*: for the judgment given by the coroner in the county court is no matter of record, that court not being a court of record. 1 *Inſt.* 288.

And

And by the outlawry all perſonal chattels are veſted in the king by forfeiture; but real chattels, or freehold eſtates are not veſted in the king, till after inquiſition found. 3 *Salk.* 262.

In ancient times no man could have been outlawed but for felony; the puniſhment whereof was death; and upon this account an outlawed man was called wolfeſhead, becauſe he might be put to death by any man, as a wolf, that hateful beaſt might. But in the beginning of the reign of K. *Ed.* 3 it was reſolved by the judges, for avoiding of inhumanity, and of effuſion of chriſtian blood, that it ſhould not be lawful for any man but the ſheriff, having lawful warrant, to put to death any man outlawed, though it were for felony; and if he did he ſhould undergo ſuch pain of death, as if he had killed any other man: and ſo the law continueth to this day. 1 *Inſt* 28.

If a man be indicted before juſtices of the peace, and thereupon outlawed, and is taken and committed to priſon, the juſtices of gaol delivery may award execution of this priſoner; for they are conſtituted to deliver the gaol. 4 *Inſt.* 169 *Hale's Pl.* 158. 2 *H. H* 5.

Where clergy is allowable, it ſhall be as much allowed to one who is outlawed, as to one who is convicted by verdict or confeſſion. 2 *Haw* 343.

But a ſtatute taking the benefit of clergy from thoſe who ſhall be found guilty, does not thereby take it from thoſe who are outlawed. 2 *Haw.* 343.

But by the 3 & 4 *W. c.* 9. *ſ.* 2. 'If any perſon be indicted of 'any offence, for which, by any former ſtatute, he is excluded from 'clergy, upon conviction; if he ſhall be outlawed thereupon, he 'ſhall not have his clergy.'

By any former ſtatute] Hereby it appears, that this extends not to offences made felonies by ſtatutes ſubſequent to this ſtatute. 2 *Haw* 348.

Where a perſon is outlawed, the defendant may ſhew all the matter and outlawry returned of record, and demand judgment if he ſhall be anſwered, becauſe he is out of the law, to ſue an action during the time that he is outlawed. 1 *Inſt* 128.

It ſeems to be a good challenge of a juror, that he is outlawed, either for a criminal matter, or as ſome ſay, in a perſonal action; but not a principal challenge, but only to the favour, unleſs the record of the outlawry be produced. 2 *Haw* 215, 417.

But it ſeems clear, that outlawry in a *perſonal* action is not a good exception againſt a witneſs, as it is againſt a juror. 2 *Haw.* 443.

An outlawed perſon may make a will, and have executors or adminiſtrators. *Cro. El.* 575.

And an executor may reverſe the outlawry of the teſtator, where he was not lawfully outlawed. 1 *Leon.* 325.

Outlawry may be reverſed ſeveral ways; as by procuring a *ſuperſedeas* and delivering it to the ſheriff before the *quinto exactus*, or by ſhewing

ſhewing any matter apparent on record which makes the outlawry erroneous, as the want of an original, or the omiſſion of proceſs, or want of form in a writ of proclamation, or a return by a perſon appearing not to be ſheriff, or a variance between the original and exigent or other proceſs, or by a miſnomer, or want of addition. 2 *Haw. c.* 50.

And upon a writ of error upon an outlawry in felony, the party outlawed muſt render himſelf in cuſtody, and pray the allowance of the writ of error in perſon: and if the outlawry be reverſed, he ſhall be put to anſwer the indictment. 2 *H. H.* 209.

But by the 4 & 5 *W. c.* 18. one outlawed, except for treaſon or felony, need not appear in perſon to reverſe an outlawry, but by an attorney. 2 *Salk.* 496.

There is another kind of proceſs out of a court record, againſt offenders, called *attachment*, which is generally for contempt; which belongs to the title ATTACHMENT.

The proceſs againſt *jurors*, may be ſeen in the title JURY.

And the proceſs againſt *witneſſes*, in title EVIDENCE.

Forms of proceſs; *and firſt of a* Venire.

THE people of the ſtate of New-York, by the grace of God, free and independent. To the ſheriff of the county of , greeting. We command you, that you omit not, by reaſon of any liberty in your bailiwick, but that you cauſe A. O. of in your ſaid county, yeoman, to come before our juſtices aſſigned to keep our peace, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in the ſaid county committed, at in your ſaid county, on the day of next enſuing, to anſwer unto us upon certain articles preſented againſt him the ſaid A. O. And have you there then this precpt. Witneſs J. P. and K. P. at the day of in the year of

And upon this *venire*, if the defendant be returned ſufficient, and maketh default, then a *diſtringas* ſhall be awarded, and ſo the ſame proceſs infinite, until he come in: But if a *nihil habit* be returned at the firſt, then after the *venire*, there ſhall go out a *capias*, *alias*, *pluries*, and *exigent*. *Dalt. Sher.* 160.

Form of a Diſtringas.

THE people of the ſtate of New-York, by the grace of God, free and independent. To the ſheriff of the county of , greeting. We command you, that you omit not, by reaſon of any liberty in your bailiwick, but that you enter the ſame, and diſtrain A. O. of in your county, yeoman, by all his lands and tenements, &c. and that you anſwer for the iſſues thereof, &c. and that you have his body before our juſtices aſſigned [and ſo on, as before in the venire]

But if a *nihil* (as hath been ſaid) be returned at firſt upon the *venire facias*; then a *capias* ſhall iſſue thus:

THE people of the ſtate of New-York, by the grace of God, free and independent. To the ſheriff of the county of , greeting. We

We command you, that you omit not, by reaſon of any liberty in your bailiwick, but that you enter the ſame, and take A. O. of in your county, yeoman, if he ſhall be found in your bailiwick, and him cauſe to be ſafely kept; ſo that you have his body before our juſtices aſſigned to keep our peace, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors in the ſaid county committed, at in your county, on the day of next enſuing, to anſwer unto us concerning divers treſpaſſes, contempts, and offences, of which he is indicted. And have you there then this writ. Witneſs J. P. and R. P. at the day of in the year of

At which day A. S. eſquire, ſheriff of the county aforeſaid, returned that he is not found in his bailiwick, and he did not come. Therefore it is commanded as before.

Note: The cauſe why the entry is made, *and he did not come*, is, becauſe the party may appear voluntarily, and ſo avoid the attachment or arreſting of his body.

The Alias Capias.

THE people of the ſtate of New-York, by the grace of God, free and independent. To the ſheriff . We command you, as we before commanded you, that you omit not (as before.)

At which day (as before) and he did not come. Therefore it is commanded to the ſheriff as it hath been often commanded, &c.

The Pluries Capias.

THE people of the ſtate of New-York, by the grace of God, free and independent. To the ſheriff, &c. We command you, as we have often commanded you, that you omit not (as before)

At which day A. S. eſquire, the ſheriff aforeſaid, returned, that the aforeſaid A. O. is not found in his bailiwick, and he did not come. Therefore it is commanded, that you cauſe to be demanded, &c.

The Exigent.

THE people of the ſtate of New-York, by the grace of God, free and independent. To the ſheriff, &c. greeting. We command you, that you cauſe A. O. of in your county, yeoman, to be demanded, until, by the law and cuſtom of our ſtate of New-York, he be outlawed, if he ſhall not appear; and if he ſhall appear, that then you take him, and cauſe him to be ſafely kept, ſo that you have his body before our juſtices aſſigned to keep our peace, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors in your ſaid county committed, at the general quarter ſeſſions of the peace in your county next enſuing to be held, whereſoever in the ſame county it ſhall happen to be holden, to anſwer unto us of divers treſpaſſes, contempts and offences, of which he is indicted. And have you there then this writ. Witneſs J. P. eſquire at in the ſaid county, the day of in the year of

At which day A. S. eſquire, ſheriff of the county aforeſaid returned, that at the county holden at the day of in the year of and ſo at four other counties then next following, there holden, the aforeſaid A. O. was demanded, and did not appear. Therefore

fore by the judgment of our coroner, in the county aforesaid he was outlawed.

The Capias Utlagatum.

THE people of the state of New-York, by the grace of God, free and independent. To the sheriff, &c. greeting. We command you, that you omit not, by reason of any liberty in your county, but that you take A. O. late of in your county, labourer, if he shall be found within your county, and him cause safely to be kept, so that you have his body before the keepers of our peace and our justices assigned to hear and determine divers felonies, trespasses and other misdemeanors in your county committed, at the day of to stand right in our court before our justices aforesaid, upon a certain outlawry, against him the said A. O. promulged, at our suit, for certain felonies (or trespasses) whereof he was convicted the day of . And have you then there this writ. Witness, &c.

Profaneſs. See BLASPHEMY.

RAPE.

I. What it is.
II. Evidence on an indictment of rape.
III. Punishment of rape.
IV. Principal and accessary.

I. What it it.

RAPE is, when a man hath carnal knowledge of a woman, by force, and against her will. 2 *Inst.* 180. 1 *Haw* 108

Also, if any person shall unlawfully and carnally know and abuse any woman child, under the age of ten years, whether with her consent or against it, he shall be guilty of felony without benefit of clergy. 18 *El.* c. 7.

The offence of rape is no way mitigated by shewing that a woman at last yielded to the violence, if such her consent was forced by fear of death or of dureſs. 1 *Haw.* 108.

Also, it is not a sufficient excuse in the ravisher, to prove that the woman is a common strumpet: for she is still under the protection of the law, and may not be forced. 1 *Haw.* 108.

Nor is it any excuse, that she consented after the fact 1 *Haw.* 108.

And by the *6 R.* 2. c. 6. When any woman is ravished, and afterwards doth consent to the ravisher; they shall both of them be disabled to have any inheritance, dower or joint feoffment, but the next of blood shall enter. And the next of kin to the woman ravished may have an appeal against the ravisher, notwithstanding such consent: and the defendant shall not be received to wage battel.

It is said by Mr. Dalton, that if a woman at the time of the supposed rape do conceive with child by the ravisher, this is no rape; for (he says) a woman cannot conceive except she doth consent.

ſent. And this he hath from Stamford and Britton, and Finch.—*Dalt.* c 60.

But Mr. Hawkins obſerves, that this opinion ſeems very queſtionable: not only becauſe the previous violence is no way extenuated by ſuch a ſubſequent conſent; but alſo becauſe it were neceſſary to ſhew that the woman did not conceive, the offender could not be tried till ſuch time as it might appear whether ſhe did or not: and likewiſe becauſe the philoſophy of this notion may be well doubted of. 1 *Haw.* c.

And L. Hale ſays, this opinion of Dalton ſeems to be no law.—1 H. H. 73.

II. *Evidence on an indictment of rape.*

The party raviſhed may give evidence on oath, and is in law a competent witneſs; but the credibility of her teſtimony, and how far forth ſhe is to be believed muſt be left to the jury, and is more or leſs credible, according to the circumſtances of fact that concur in that teſtimony 1 *H. H.* 633.

For inſtance, if the witneſs be of good fame; if ſhe preſently diſcovered the offence, and made purſuit after the offender; ſhewed circumſtances and ſigns of the injury, whereof many are of that nature, that only women are the moſt proper examiners and inſpectors; if the place, wherein the fact was done, was remote from people, inhabitants, or paſſengers, if the offender fled for it: theſe, and the like, are concurring evidences to give greater probability to her teſtimony, when proved by others as well as herſelf. 1 *H. H.* 633.

But on the other ſide, if ſhe concealed the injury for any conſiderable time, after ſhe had opportunity to complain; if the place, where the fact was ſuppoſed to be committed, were near to inhabitants or common recourſe or paſſage of paſſengers, and ſhe made no outcry when the fact was ſuppoſed to be done, when and where it is propable ſhe might be heard by others; or if a man prove himſelf to be in another place, or in other company, at the time ſhe charges him with the fact, or if ſhe is wrong in the deſcription of the place, or ſwears the fact to be done in a place where it was impoſſible the man could have acceſs to her at that time as if the room was locked up, and the key in the cuſtody of another perſon: theſe and the like circumſtances carry a ſtrong preſumption, that her teſtimony is falſe or feigned. 1 *H. H.* 33 *Read Rape.*

Upon the whole; rape, it is true, is a moſt deteſtable crime, and therefore ought ſeverely and impartially to be puniſhed with death: but it muſt be remembered, that it is an accuſation eaſily to be made, and hard to be proved, and harder to be defended by the party accuſed, tho' never ſo innocent. Therefore a wiſe jury will be cautious upon trials of offences of this nature, that they be not ſo much tranſported with indignation at the heinouſneſs of the offence, as to be over haſtily carried to the conviction of the perſon accuſed thereof,

thereof, by the confident teſtimony, ſometimes of malicious and falſe witneſs. 1 *H. H.* 635, 636.

III. Puniſhment of rape.

Of old time rape was felony, for which the offender was to ſuffer death: afterwards the offence was made leſſer, and the puniſhment changed from death to the loſs of thoſe members whereby he offended; that is to ſay, it was changed to caſtration and loſs of his eyes, unleſs ſhe that was raviſhed, before judgment demanded him for her huſband. 2 *Inſt.* 180.

Then, by the ſtatute of the 3 *Ed.* 1. *c.* 13 it was made treſpaſs, ſubjecting the offender to two years impriſonment, and a fine at the king's will; and it was again made felony by the 13 *Ed.* 1. *c.* 34. and at laſt by the 18 *El. c.* 7. was excluded from the benefit of clergy.

And no charter of pardon ſhall be allowed for rape, unleſs the rape be ſpecified therein. 13 *R.* 2. *ſt.* 2. *c.* 1.

And all rapes are excepted out of the general pardon, of the 20 *G.* 2. *c.* 52.

IV. Principal and acceſſary.

Mr. Hawkins ſays, all who are preſent, and actually aſſiſt a man to commit a rape, may be indicted as principal offenders, whether they be men or women. 1 *Haw.* 108.

And ſo, one woman may be a principal to the raviſhment of another.

And L. Hale ſays, that by the 18 *El. c.* 7. the principals in rape are ouſted of clergy, whether they be principals in the firſt degree, to wit, he that committed the fact; or principals in the ſecond degree, to wit, preſent aiding and abetting: but acceſſaries, before and after, have their clergy. 1 *H. H.* 633.

Indictment of a rape.

New-Jerſey, Eſſex County. THE jurors for the people of the ſtate of New-Jerſey upon their oath preſent, That A. O. late of in the county of yeoman, not having God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day of in the year with force and arms, at in the county aforeſaid, in and upon one A. I. ſpinſter, in the peace of God and of the people of our ſaid ſtate then and there being, violently and feloniouſly did make an aſſault, and her the ſaid A. I. againſt the will of her the ſaid A. I. then and there feloniouſly did raviſh and carnally know: againſt the peace of the people of our ſaid ſtate, and againſt the form of the ſtatute in ſuch caſe made and provided.

RECOGNIZANCE.

A Recognizance is a bond of record, teſtifying the recognizor to owe a certain ſum of money to ſome other; and the acknowledging of the ſame is to remain of record; and none can take it but only a judge or officer of record. *Dalt. c.* 168.

An

And these recognizances, in some cases the justices of the peace are enabled to take by the express words of certain statutes: But in other cases (as for the peace, and good behaviour, and the like) it is rather in congruity, and by reasonable intendment of law, than by an express authority given them, either by their commission, or by the statute law. *Crom.* 125. *Dalt. c.* 168

But wheresoever any statute giveth them power to take a bond of any man, or to bind over any man to appear at the assizes or sessions, or to take sureties for any matter or cause they may take a recognizance. Yea, wheresoever they have authority given them to cause a man to do a thing, there it seemeth they have in congruity power given them to bind the party by recognizance to do it: and if the party shall refuse to be bound, the justice may send him to gaol. *Dalt. c.* 168.

But he can take no recognizance but only of such matters as concern his office; and if he doth, it seemeth to be void. *Dalt. c.* 168.

Every obligation and recognizance, taken by justices of the peace, must be made to *our lord the king*; on pain of imprisonment of any person that shall take it otherwise. *id.*

It must also contain the name, place of abode, and trade or calling, both of principal and sureties, and the sums in which they are bound. *Burl.* Recog.

And it is most commonly subject to a condition, which is either indorsed, or under written, or contained within the body of it; upon the performance of which the recognizance shall be void. *id.*

When the parties are to enter into recognizance, call them by their names, thus: 'You A. B. acknowledge to owe to our sovereign lord the king, the sum of—— ——And you C. D. acknowledge to owe to our sovereign lord the king the sum of——To be levied of your respective goods and chattels, lands and tenements, for the use of our said lord the king, his heirs and successors, if default shall be made in the condition following: That is to say, if you the said A. B. shall make default in appearing, &c.' But the parties need not sign it. *id.*

And it is usual for the justices to mark at the foot of the examination, A. B. in 40*l.* to appear, &c. And from such short note to make out a record afterwards. *id.*

Yet the recognizance is a matter of record presently, so soon as it is taken and acknowledged, although it be not made up. *Dalt. c.* 168.

Lord Coke (1 *Inst.* 260) says, that a record is a memorial or remembrance in rolls of parchment, &c. From whence it seemeth that a recognizance ought to be ingrossed on parchment, perhaps, for this reason, because the parchment is more durable than paper; but since there is no law which prohibits it to be ingrossed on paper, it seemeth that if it shall be on paper only, and not on parchment, it is good in law.

And when it is made up, if the juſtice ſhall only ſubſcribe his name, without his ſeal to it, this is well enough; and that may be in either of theſe ſorts, Acknowledged before me J. P. or only to ſubſcribe his name thus, J. P. *Dalt. c.* 176.

The manner of acknowleaging recognizances.

King's County,	W. O. of, &c. in	10 0 0
14th of June,	H. O. of, &c. in	10 0 0
1787.	T. W. of, &c. in	10 0 0

YOU W. O. H. O. and T. W. do ſeverally acknowledge to owe to the people of the ſtate of New-York Ten Pounds a piece, to be levied on your reſpective goods and chattels, lands and tenements, for the uſe of the people of ſaid ſtate, if default ſhall be made in the condition under written.

The condition of this recognizance is ſuch, That if W. O. ſhall perſonally appear before the juſtices of the peace at the next general quarter ſeſſions of the peace, to be held for, &c. and ſhall then and there anſwer unto ſuch miſdemeanors which ſhall be objected againſt him, and that he doth not depart without leave of the court: Then this recognizance to be void.

Recognizance ſingle.

King's County, ſſ. BE it remembered, that on the twentieth day of April, in the year of the independence of J. S. of H. in the county aforeſaid, carpenter, came before me, O. T. eſq; one of the juſtices of the peace for the ſaid county, and acknowledged himſelf to be indebted to the people of the ſtate of New-York, in twenty pounds, of good and lawful money of ſaid ſtate, to be levied on his goods and chattels, lands and tenements, to the uſe of ſaid ſtate, in caſe default ſhall be made in the condition following.

THE condition of this recognizance is ſuch, That if the above bounden J. S. ſhall perſonally appear at the next general quarter ſeſſions of the peace to be holden in and for the county of King's, to anſwer what ſhall be then and there objected againſt him by S. T. on behalf of the people, and ſhall in the mean time, keep the peace towards the ſaid S. T. and other liege people; then this recognizance to be void, or elſe to remain in full force.

It is expedient for the juſtice to keep a book, in which he ought to enter his recognizances, thus:

A. B. of the townſhip of C. in the county of D. E. to appear at the next aſſizes (or ſeſſions of the peace, as the caſe is) to anſwer C. D.

Sureties { R. N. of B. / B. W. of L. } 10l.

The number and ſufficiency of the ſureties is diſcretionary in the juſtice before whom the recognizance is acknowledged; and when once taken, if he is deceived in the ability of the ſureties, he may compel the party to put in more; but this is when the recognizance is taken *ex officio*, and not by virtue of a *ſupplicavit*.

The juſtices ſhall certify their recognizances for keeping the peace, to the next ſeſſions, that the party may be called; and if he mak-

make default, the default ſhall be recorded, and the recognizance, with the record of the default, ſhall be ſent and certified into the chancery, king's bench, or exchequer. 3 *H.* 7. *c.* 1.

But in caſes of felony, the recognizances are to be certified to the general goal delivery. 1 & 2 *P.* & *M. c.* 13.

The *conditions* of recognizances, in all the variety of caſes, are interſperſed under their proper titles.

RESCUE.

RESCOUS is an ancient French word, coming from *reſcourrer*, that is, *recuperare*, to recover; and ſignifies a forcible ſetting at liberty againſt law, a perſon arreſted by the proceſs or courſe of law. 1 *Inſt.* 160.

It ſeems that it is neceſſary, that the reſcuer, ſhould have knowledge that the perſon is under arreſt for a criminal offence, if he be in the cuſtody of a private perſon; but if he be in the cuſtody of an officer, there at his peril he is to take notice of it. 2 *H. H.* 606.

But it is ſaid, that to reſcue a felon taken on a general warrant, to anſwer what ſhall be objected againſt him, no cauſe being expreſſed in the warrant, is no felony. 1 H. H. 578.

Nor unleſs a felony hath been really done. *Hale's Pl.* 116.

Altho' a *priſon breaker* may be arraigned for that offence, before he be arraigned of the crime for which he was impriſoned; yet he, who *reſcues* one impriſoned for felony, cannot, according to the better opinion, be arraigned for ſuch offence as for a felony, till the principal offender be attainted; but he may be immediately proceeded againſt for a miſpriſion, if the king pleaſes. 2 *Haw.* 140.

And therefore if the principal die before the attainder, he ſhall be fined and impriſoned. *Hale's Pl.* 116.

Alſo if the principal be found not guilty, or guilty of a crime not capital, the reſcuer ought to be diſcharged of felony, but he may be fined for the miſdemeanor. 1 H. H. 598, 599.

An indictment of *reſcous*, may ſet forth the nature and cauſe of the impriſonment, and the ſpecial circumſtances of the fact in queſtion. 2 *Haw.* 140.

A hindrance of a perſon to be arreſted, that has committed felony, is a miſdemeanor, but no felony. But if the party be arreſted, and then reſcued, if the arreſt was for felony, the reſcuer is a felon: if for treaſon, a traitor; if for treſpaſs, fineable. *Hale's Pl.* 116. 2 *Haw.* 140.

There are alſo ſpecial penalties enacted for reſcuing offenders againſt particular ſtatutes, which belong not to this general title.

Altho' the felony for which a man is arreſted, be not within clergy, yet the reſcuing him is within clergy. 1 H. H. 599, 607.

Upon the return of a *reſcous*, proceſs of outlawry ſhall iſſue. 2 *Haw.* 302.

Reſtitution

Reſtitution of ſtolen Goods.

THERE are three means of reſtitution of goods, for the party from whom they were ſtolen: 1. By appeal of robbery or larceny. 2. By the ſtatute of the 21 *H.* 8. *c.* 11. And, 3. By courſe of the common law. 1 H. H. 538.

Upon an appeal of robbery or larceny. If the party were convicted thereupon reſtitution of the goods contained in the appeal. was to be made to the appellant: for it is one of the ends of that ſuit. 1 H. H. 538

And hence it is, that if in appeal of felony or robbery, the appellant omit any of the goods ſtolen from him, they are forfeit and confiſcate to the king. *id.*

And this appeal muſt be upon a freſh ſuit: and tho' anciently the law was ſtrict herein as to the time and manner of the purſuit and apprehending of the felon, yet the law is now more liberal. 1 H H. 540.

For if the felon be taken by any others, as by the ſheriff, yet if the party robbed come within a year after, and give notice of the felony, and enter his appeal. this is a freſh ſuit, if he uſed his diligence ſhortly after the felony to have taken him. *id.*

If a felon waive the goods ſtolen, without any purſuit after him, thoſe goods are not in law waived, nor forfeit to the king or lord of a franchiſe; but if he waive them upon a purſuit of him, then they are waived in law, and forfeit to the king or lord of the liberty. *id.* 541.

And this forfeiture is not like a ſtray, where tho' the lord may ſeize, yet the party who is the owner may retake them within the year and day; but here the true owner cannot ſeize his own goods, tho' upon freſh ſuit within the year and day. *id.*

But yet this is not an abſolute loſs of the owner's goods, but rather an expedient, ſettled by law, to drive the owner to convict the felon by proſecuting his appeal: and therefore if he make freſh ſuit. and proſecute his appeal, and the felon be thereupon convicted or attainted, and the freſh ſuit be inquired and found, by verdict or inqueſt of office, he ſhall have reſtitution of the goods ſo waived. 1 H. H. 541.

By the ſtatute of 21 H 8. c. 11. Which ſtatute introduced a new law for reſtitution; for before this ſtatute there was no reſtitution upon an indictment, but only upon an appeal: Which ſaid ſtatute enacteth as follows:

'If any felon do rob or take away any man's money or goods, 'and thereof be indicted, and arraigned, and found guilty, or other-'wiſe attainted, by reaſon of evidence given by the party robbed, 'or owner of the money or goods, or by any other by their pro-'curement; then the party robbed, or owner of the goods, ſhall 'be reſtored to ſuch his money or goods: and as well the juſtices 'of gaol delivery, as other juſtices before whom the felon ſhall be 'found

'found guilty, or otherwise attainted, may award a writ of restitution in like manner as if the felon were attainted on appeal.'

Found guilty or otherwise attainted] By this it seems questionable whether the party be intitled to restitution, upon the defendant's standing mute; in which case he is neither found guilty, nor otherwise attainted. 2 *Haw* 332.

Or otherwise attainted] If the owner prefers a bill of indictment, which is found, and the felon flies, and is outlawed, the owner shall have restitution, for he gave evidence upon the indictment, which though it be not a conviction, is the ground of the outlawry, which is an attainder. 1 H. H 545

The party robbed, or owner] Therefore if the servant be robbed of the master's money, or his servant by his procurement, give evidence, and convict the felon, the master shall have a writ of restitution, if it appear upon the indictment and evidence, that it was the master's money, for the statute gives restitution to the party robbed or owner. 1 H. H 542.

Or owner] If the testator is robbed, and the thief is convicted upon the procurement of the executor; such executor shall have restitution; for this being a beneficial law, ought to be construed beneficially, so as to extend to executors and administrators.——3 *Inst.* 242.

Shall be restored] If goods be stolen, and not waived in flight, nor seized by the king's officers or lord of the manor, nor sold in open market, the owner may take them again without any writ of restitution, or may bring his action for them; and this, although he doth not prosecute the offender. 2 *Haw.* 168. *Kely* 48.

And by the 31 *El* c. 12. Where horses are stolen and sold in open market, and the owner claims them again within six months, and pays the buyer as much as they cost him, he shall have them again, without prosecution.

But otherwise, if the goods be waived by the felon in his flight, or in case they be not waived, yet if they be seized by the king's officers, or lord of the manor as suspecting them to be stolen, there the party shall not have restitution, unless the felon be convicted at his prosecution. 2 *Haw* 168. *Kely* 49.

And in such case, he shall have no more than what is mentioned in the indictment, though other goods were stolen at the same time, and the reason is, because by such omission, the offender might have escaped. *Kely* 49. 1 H. H 545.

To such his money or goods] A man stole cattle, and sold them in open market: the sheriff seized the thief and the money, and he was convicted and hanged at the prosecution of the owner of the cattle, and he had restitution of the money: for though the statute gives power to the justices to award restitution of the money or goods stolen, and though the money in this case was not stolen, yet because it did arise by stealing, it shall be within the equity, though not in the very words of the statute. *Noy* 128.

But

But it hath been a great queſtion, if goods be ſtolen and by the thief ſold in a market overt, whether the thief being convicted upon the evidence of the party robbed, he ſhall have reſtitution upon this ſtatute of the thing ſold or not, the buyer not being privy to the felony: But lord Hale argues ſtrongly, that he ſhall have reſtitution, notwithſtanding the ſale in market overt of the goods ſtolen. 1. Becauſe this act was made to encourage perſons robbed, to purſue malefactors, and therefore they have an aſſurance of reſtitution; and it would be ſmall encouragement if a thief by ſale in a market overt, which is every day almoſt in every ſhop in London, ſhall elude it. 2. Becauſe the man that is robbed, is robbed againſt his will, and cannot help it; but the buyer of ſtolen goods may chuſe whether he will buy, or if he buy, may yet refuſe to buy, unleſs well ſecured of the property of the goods, or knowing the owner. 1 H. H. 542, 3, 4. 2 *Haw.* 170. *Kely* 48.

In like manner as if the felon were attainted on appeal] And yet, upon this ſtatute, if the offender be convicted upon the evidence of the party robbed, or owner, he ſhall have reſtitution, though there were no freſh ſuit, or any inquiry by inqueſt touching the ſame, and this is conſtant practice, though in caſe of an appeal it be otherwiſe. 1 H. H 545.

Yet if it ſhall appear to the court, that the party hath been guilty of groſs neglect in proſecution; it ſeemeth that in ſuch caſe he ſhall not be intitled to reſtitution. 2 *Haw.* 171.

By courſe of the common law.] If the owner takes his goods again of the offender, to the intent to favour him, or maintain him, this is unlawful, and puniſhable by fine and impriſonment: but if he take them again without any ſuch intent, it is no offence —— 1 H. H. 546.

But after the felon is convicted, it can be no colour of crime to take his goods again where he finds them: becauſe he hath purſued the law upon him, and may have his writ of reſtitution, if he pleaſe. 1 H. H. 546.

RIOT, ROUT, AND UNLAWFUL ASSEMBLY.

I. What is a riot, rout, or unlawful aſſembly.
II. How the ſame may be reſtrained by a private perſon.
III. How by a conſtable, or other peace officer.
IV. How by one juſtice.
V. How by two juſtices.
VI. How by proceſs out of chancery.

I. What

I. *What is a riot, rout, or unlawful assembly.*

'WHEN three persons or more shall assemble themselves together, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprise of a private nature, with force or violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful:' If they only meet to such a purpose or intent, although they shall after depart of their own accord, without doing any thing, this is an unlawful assembly:

If after their first meeting, they shall move forwards towards the execution of any such act, whether they put their intended purpose in execution or not; this, according to the general opinion, is a *rout*:

And if they execute such a thing in deed, then it is a *riot*. 1 *Haw.* 155. *Dalt. c.* 136.

Three persons or more] And therefore if the jury do acquit all but two, and find them guilty, the verdict is void, unless they be indicted *together with either rioters unknown*, because it finds them guilty of an offence, whereof it is impossible that they should be guilty: for there can be no riot where there are not more persons than two. 2 *Haw.* 441.

And infants under the age of discretion are not persons within this description, punishable as rioters. 1 *Haw.* 159.

Note: In 1 *Haw.* 156, 157, 158, the words *more than three persons* are three times over inserted instead of *three persons or more*: which is marked as an instance, that in a variety of matter, it is impossible for the mind of man to be always equally attentive.

Assemble themselves together] It seems agreed, that if a number of persons being met together at a fair, or market, or church ale, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it: Yet it is said, that if persons innocently assembled together, do afterwards upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot; because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. 1 *Haw.* 156.

In the execution of some enterprize of a private nature] It seems agreed, that the injury or grievance complained of, and intended to be revenged or remedied by such an assembly, must relate to some private quarrel only: as the inclosing of lands, in which the inhabitants

of

of a town claim right of common, or gaining the poſſeſſion of tenements the title whereof is in diſpute, or ſuch like matters relating to the intereſt or diſputes of particular perſons, and no way concerning the public; for wherever the intention of ſuch an aſſembly is to redreſs public grievances, as to pull down all incloſure, in general, or reform religion, and the like, it is high treaſons 1 *Haw.* 157.

Againſt the peace, or to the terror of the people.] It ſeems to be clearly agreed, that in every riot there muſt be ſome ſuch circumſtances, either of actual force or violence, or at leaſt of an apparent tendency thereto, as are naturally apt to ſtrike a terror into the people as the ſhew of armour, threatening ſpeeches, or turbulent geſtures; for every ſuch offence muſt be laid to be done *to the terror of the people:* And from hence it clearly follows, that aſſemblies at wakes, or other feſtival times, or meetings for exerciſe of common ſports or diverſions, as bull baiting, wreſtling, and ſuch like, are not riotous. *id.*

And from the ſame ground it alſo ſeems to follow, that it is poſſible for three perſons or more to aſſemble together with an intention to execute a wrongful act, and alſo actually to perform their intended enterprize, without being rioters; as if a man aſſemble a meet company, to carry away a piece of timber or other thing, whereto he pretends a right, that cannot be carried without a great number, if the number be not more than are needful for ſuch purpoſe, altho' another man hath better right to the thing ſo carried away, and that this act be wrong and unlawful; yet it is of itſelf no riot, except there be withal threatening words uſed, or other diſturbance of the peace. *Dalt. c.* 137. 1 *Haw.* 157.

Much more may any perſon, in a peaceable manner, aſſemble a meet company, to do any lawful thing, or to remove or caſt down any common nuiſance: Thus every private man, to whoſe houſe or land any nuiſance ſhall be erected, made, or done, may in peaceable manner aſſemble a meet company, with neceſſary tools, and may remove, pull, or caſt down ſuch nuiſance, and that, before any prejudice received thereby: and for that purpoſe, if need be, may alſo enter into the other man's ground. Thus a man erected a wear croſs a common river, where people have common paſſage with their boats, and divers did aſſemble, with ſpades, crows of iron, and other things neceſſary to remove the ſaid wear and make a trench in his land that did erect the wear, to turn the water, ſo as they might the better take up the ſaid wear, and they did remove the ſame nuiſance: this was holden neither any forcible entry, nor yet any riot. *Dalt. c.* 137.

But in the caſes aforeſaid, if in removing any ſuch nuiſance, the perſons ſo aſſembled ſhall uſe any threatening words, (as to ſay, they will do it tho' they die for it, or ſuch like words) or ſhall uſe any other behaviour, in apparent diſturbance of the peace, then it ſeemeth to be a riot: and therefore where there is cauſe to remove

any

any such nuisance, or to do any like act, it is safest not to assemble any multitude of people, but only to send one or two persons or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only, without disturbance of the peace, or threatning speeches. *Dalt. c.* 137.

Whether the act intended were of itself lawful or unlawful] It hath been generally holden, that it is no way material, whether the act intended to be done by such an assembly, be of itself lawful or unlawful; from whence it follows, that if three or more persons assist a man to make a forcible entry into lands, to which one of them has a good right of entry, or if the like in number in a violent and tumultuous manner join together in removing a nuisance, or other thing which may lawfully be done in a peaceful manner, they are as properly rioters, as if the act intended to be done by them were never so unlawful. 1 *Haw.* 158.

II. How the same may be restrained by a private person.

By the common law, any private person may lawfully endeavour to suppress a riot, by staying those whom he shall see engaged therein, from executing their purpose, and also by stopping others whom he shall see coming to join them. 1 *Haw.* 159.

III. How by a constable or other peace officer.

By the common law the sheriff, constable, or other peace officers, may and ought to do all that in them lies, towards the suppressing of a riot, and may command all other persons to assist therein. 1 *Haw.* 159.

IV. How by one justice.

By the 34 *Ed. c.* 1. 'The justices of the peace shall have power to 'restrain rioters, and to arrest and chastise them according to their 'offence: and cause them to be imprisoned and duly punished, according to the law and custom of the realm, and according to that 'which to them shall seem best to do, by their discretions and good 'advisement.'

And this statute hath been liberally construed for the advancement of justice; for it hath been resolved, that if a justice find persons riotously assembled, he alone, without staying for his companions, hath not only power to arrest the offenders, and bind them to their good behaviour, or imprison them if they do not offer good bail; but that he may also authorise others to arrest them, by a bare verbal command, without other warrant; and that by force thereof, the persons so commanded may pursue and arrest the offenders in his absence, as well as presence. Also it is said, that after a riot is over, any one justice may send his warrant, to arrest any person who was concerned in it, and also that he may send him to gaol, till he shall find surcties for his good behaviour. 1 *Haw.* 160.

But it seems to be agreed, that no one justice hath any power by force of this statute, either to record a riot upon his own view, or to take an inquisition thereof after it is over: Also if one justice, proceeding upon this statute, shall arrest an innocent person as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing himself, because no single justice is by this statute made a judge of the said offence. But if a riot shall be committed by persons armed in an unusual manner, contrary to the statute of Northampton, *2 Ed* 3. *c.* 3. and any one justice acting *ex officio*, in pursuance of the said statute, seize the armour, and imprison the offender, and make a record of the whole matter, such a record cannot be traversed, because it is made by one acting in a judicial capacity. And for the same reason, if a justice proceeding on the statute of the 15 *R.* 2. against forcible entries and detainers, shall upon his own view record a riot, which shall be committed in the making of any such forcible entry or detainer, a riot so recorded cannot be traversed. Also if a justice acting as a judge, by any statute whatsoever empowering him so to do, make a record upon his view of a riot committed in his presence, such record shall not be traversed; for the law gives such an uncontroulable credit to all matters of record made by any judge of record as such, that it will never admit of an averment against the truth thereof. 3 *Haw.* 160.

But if the rioters are above the number of twelve, the offence is greatly inhanced, and the power of one justice very much inlarged by the act commonly called the riot act, 1 *G. st.* 2. *c.* 5. which is required to be read at every quarter sessions and leet: By which it is enacted, That every justice, sheriff, and under sheriff, and mayor, shall on notice or knowledge of any unlawful, riotous and tumultuous assembly of persons to the number of twelve or more, together with such help as he shall command, resort to the place. *s.* 2, 3.

Whereupon he shall, among the rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be, while proclamation is making; and after that, shall openly and with loud voice make or cause to be made proclamation in these words, or like in effect:

"Our sovereign lord the king chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of king George for preventing tumults and riotous assemblies: God save the king." *s.* 2.

And if any person shall with force and arms, wilfully oppose, hinder or hurt any person that shall begin or go to make the proclamation, whereby the same shall not be made, he shall be guilty of felony without benefit of clergy. *s.* 5.

And if any twelve or more of them shall continue together by the space of one hour after such proclamation made, or after such hindrance (having knowledge thereof) they shall be guilty of felony without benefit of clergy. *s.* 1, 5.

And

And every juſtice, ſheriff. under ſheriff, mayor, high and petty conſtable, and other peace officer, and every other perſon of age and ability commanded by them to aſſiſt ſhall apprehend the offenders, and carry them before a juſtice, to be proceeded againſt according to law. And if any rioters be killed or hurt by any the ſaid perſons in diſperſing or apprehending them, by reaſon of their reſiſtance, ſuch perſons ſhall be indemnified. *ſ.* 3.

Alſo, if any rioters (although under the number of twelve, and whether any proclamation be made or not) ſhall unlawfully and with force demoliſh or pull down any church or chapel, or any building for religious worſhip certified and regiſtered according to the act of toleration, or any dwelling-houſe, barn, ſtable, or other out houſe, they ſhall be guilty of felony without benefit of clergy. *ſ.* 4. And any one juſtice may proceed againſt them, as againſt other felons.

And the hundred, city, or town, ſhall anſwer the damages thereof, as in caſes of robbery. *ſ.* 6.

Proſecutions on this act, to be within twelve months after the offence. *ſ.* 8.

V. How by two juſtices.

'If any riot, aſſembly, or rout of people, againſt the law, be 'made; the juſtices, three, or two of them at leaſt, and the ſheriff, 'ſhall come with the power of the county, if need be.' 13 *H.* 4. *c.* 7. *ſ.* 1.

'And the king's liege people being ſufficient to travel, ſhall be 'aſſiſtant to them, upon reaſonable warning, to ride with them in 'aid to reſiſt ſuch riots, routs, and aſſemblies: on pain of impri-'ſonment, and to make fine and ranſon to the king.' 2 *H.* 5. c. 8. *ſ.* 2.

If any riot, aſſembly, or rout of people againſt the law be made] It is ſaid, that the juſtices are not only impowered hereby to raiſe the power of the county to aſſiſt them, in ſuppreſſing a riot which ſhall happen within their own view or hearing, but alſo that they may ſafely do it upon a credible information given them of a notorious riot happening at a diſtance, whether there were any ſuch riot in truth or not; for it may be dangerous for them to ſtay till they can get certain information of the fact: But they ſeem to be puniſhable for alarming the county in this manner, without ſome ſuch probable ground of their proceeding, as would induce a reaſonable man to think it neceſſary and convenient. 1 *Haw.* 161.

Aſſembly] It ſeems clear from hence, that if the juſtices in going towards the place where they have heard that there is a riot, ſhall meet perſons coming from thence riotouſly arrayed, they may arreſt them for being aſſembled together in ſuch an unlawful manner, and alſo make a record thereof; for the ſtatute extends to all other unlawful aſſemblies whatſoever as well as to riots. 1 *Haw.* 161.

The

The king's liege subjects] Except women, clergymen, persons decrepit, and infants under the age of fifteen. *id.*

To resist such riots] And also to arrest the rioters, and conduct them to prison. 1 *Haw.* 161.

And shall arrest them. 13 H. 4. c. 7. f. 1.

And if they shall escape, they may take them on a fresh pursuit; but they cannot at another time award any process against them on the record, but ought to send the record into the king's bench, that process may issue thereon from thence: Yet there seems to be no doubt but that they may arrest them for their trespass, on the aforesaid statute of the 34 *Ed.* 3. in order to compel them to find sureties for their good behaviour. 1 *Haw.* 162.

'And the same justices and sheriff, or under sheriff, shall have 'power to record that which they shall find so done in their pre-'sence against the law: by which record the offenders shall be 'convicted in the same manner and form as is contained in the statute 'of forcible entries.' 13 *H.* 4. *c.* 7. *f.* 1.

Shall have power to record.] And this they may do, whether the offenders be in custody at the same time, or have escaped. 1 *Haw.* 161.

Shall be convict] And it seemeth to be certain, that the record of a riot, expressly mentioned to have happened within the view of the justices by whom it is recorded, is a conviction of so great authority, that it can no way be traversed, however little ground of truth there might be to affirm, that any riot at all was committed, or however innocent the parties may be of the fact recorded against them. 1 *Haw.* 162.

However it seemeth clear, that if in such a record of a riot it be contained, that the party was guilty therein of a felony, or maim, or rescous, the party shall be concluded thereby as to the riot only, and not as to any of the other matters; because the justices have by this statute a judicial authority over no other offences, except riots, routs, and unlawful assemblies. *id.*

And inasmuch as such a record is a final conviction of the parties, as to all such matters as are properly contained in it, it ought to be certain both as to the time and place of the offence, and the number of persons concerned therein, and the several kinds of weapons made use of by them, and all other circumstances of the fact; for since the parties are concluded from denying the truth of such a record, and have no other remedy to defend themselves against it, but only by advantage of the insufficiency of what is contained in it, they may justly demand the benefit of excepting to it, if it do not expressly shew, both that they are guilty within the meaning of the statute, and also how far they are guilty, and that the justices have pursued the power given them by the said statutes: and from the same ground it seems also to follow, that such a record may be excepted against, if it do not appear to have been made by the sheriff or under sheriff in concurrence with the justices. *id.*

And this record ought to remain with one of the justices, and shall

ſhall not be left amongſt the records of the ſeſſions, it being made out of ſeſſions, and not appointed to be certified thither. *Dalt. c.* 82.

In the ſame manner and form as is contained in the ſtatute of forcible entries] That is, the ſtatute of the 15 *R.* 2. *c.* 2. And hereupon it is ſaid, that the offenders being under the arreſt of the juſtices, and alſo convicted by a record of their offence, ought immediately to be committed to gaol by the ſame juſtices, till they ſhall make fine and ranſom to the king; which can be aſſeſſed by no other juſtices of peace, except thoſe by whom the record of the offence was made. 1 *Haw.* 162.

And this fine Mr. Dalton ſays, the juſtices ſhall cauſe to be eſtreated into the exchequer, that ſo it may be levied to the king's uſe; and then they are to deliver the offenders again. *Dalt. c.* 82.

But Mr. Hawkins ſays, that it hath been queſtioned, whether the juſtices can ſafely diſmiſs the offenders upon their paying ſuch a fine as ſhall be impoſed upon them, without ſome judgment for their impriſonment as well as fine: becauſe it is enacted by the 2 *H.* 5. *c.* 8. that ſuch rioters attainted of great and heinous riots, ſhall have one whole year's impriſonment at the leaſt, without being let out of priſon by bail or mainprize; and that the rioters attainted of petty riots, ſhall have impriſonment, as beſt ſhall ſeem to the king or to his council. 1 *Haw.* 164.

And 'if the offenders be departed before the coming of the ſaid 'juſtices and ſheriff or under ſheriff, the ſame juſtices, three, or two 'of them, ſhall diligently inquire within a month after ſuch riot, 'aſſembly, or rout of people ſo made, and thereof ſhall hear and 'determine according to the law of the land. 13 *H.* 4. *c.* 7. *ſ.* 1.

The ſame juſtices] It is generally ſaid, that any juſtices of the county may take ſuch an inquiry, whether they dwell near the place where the riot happened, or at a diſtance, or whether they went to view the riot or not; for the ſtatute ought to be conſtrued as largely as the words will bear, in favor of the juſtices power in the ſuppreſſing of ſuch riots; and therefore thoſe words in the ſtatute that *the ſame juſtices ſhall inquire*, ought to be thus expounded, that the ſame juſtices who were before impowered to raiſe the poſſe, ſhall inquire, and that is, any juſtices in the county. 1 *Haw.* 163.

Shall diligently inquire] That is, by jury: In order to which, it is enacted by the 19 *H.* 7. *c.* 13. that the ſheriff, on their precept directed to him, ſhall, on pain of 20*l.* return 24 perſons, whereof every of them ſhall have lands and tenments within the ſhire, to the yearly value of 20*s.* of charter land or freehold, or 26*s.* 8*d.* of copyhold, or of both, over and above all charges: And he ſhall return upon every juror in iſſues, at the firſt day 20*s.* and at the ſecond 40*s.*

Note: *Charter land* had its name from a particular form in the charter or deed, which ever ſince the reign of *H.* 8. hath been diſuſed. 1 *Inſt.* 6.

Within a month] That is, if they do not make inquiry within a month

month, they are punishable for the neglect; yet they may inquire after the month; for the lapse of a month doth not determine their authority, but only subjects them to a penalty. 2 *Salk.* 593.

Shall hear and determine according to the law of the land] And therefore they may award process under their own teste, against those who shall be indicted before them of any of the offences abovementioned, according to the form of this statute; and also may award the like process for the trial of a traverse of such an inquisition; and do all other things in relation thereunto, which are of course incident to all courts of record. 1 *Haw.* 165.

And the riot being so found by inquisition, the justices must make a record thereof in writing of such their inquiry or presentment found before them; which record also is to remain with one of the justices. *Dalt.* c. 82.

'And if the truth cannot be found in the manner as is aforesaid, 'then within a month then next following, the justices, three or 'two of them, and the sheriff or under sheriff, shall certify before 'the king and his council, all the deed and circumstances thereof, 'which certificate shall be of like force as the presentment of twelve 'men; upon which certificate the offenders shall be put to answer, 'and shall be punished according to the discretion of the king and 'his council. 13 *H.* 4. c. 7 *s.* 2.

'And if they do traverse the matter so certified, the certificate 'and traverse shall be sent into the king's bench to be tried—*id.* 's. 3.

'And if the offence be not found, by reason of any maintenance 'or embracery of the jurors, then the same justices and sheriff or 'under sheriff shall in the same certificate certify the names of the 'maintainers and embracers, with their misdemeanors.—19 *H.* 7. 'c. 13.

Shall certify] And it seemeth certain, that such certificate, being in nature of an indictment at the common law, ought to comprehend the certainty of time, place and persons, and other material circumstances, both of the riot and maintenance. 1 *Haw.* 165.

Before the king and his council] It seems clear, by the council being here distinguished both from the chancery and king's bench, that the certificate ought to be made to the privy council board, and not to either of those courts, which in some statutes relating to judicial proceedings are taken for the king's council. 1 *Haw.* 165.

'And the said justices and other officers shall execute their offices 'aforesaid at the king's costs, in going and continuing in doing their 'said offices, by payment thereof to be made by the sheriff by in'dentures betwixt the said sheriff and justices, and other officers 'aforesaid, whereof the sheriff upon his account in the exchequer 'shall have due allowance. 2 *H.* 5. c. 8.'

In order to the defraying of which, the said statute direct the fines

fines of the offenders to be enlarged, and thereout the sheriff may pay the charges of the said justices: and of the jury, that is, for their diet: and the sheriff's fees, and the like. *Dalt. c.* 82.

And 'the justices dwelling nigheſt in the county, where such 'riot, assembly, or rout shall be, together with the sheriff or under 'sheriff, shall do execution of the said statute of the 13 H. 4. every 'one upon pain of 10*cl.* to the king.' *ſ.* 4.

The justices dwelling nigheſt] Altho' these only are liable to this penalty, yet if any others on notice shall neglect to supply their default, they are fineable at discretion. 1 *How.* 166.

But if any justices, who do not dwell nearest to the place, do actually execute the statute, they excuse all the rest. *id.* 165.

Dwelling nigheſt in the county] Therefore if they dwell nigheſt, but in another county, they are not in danger of this penalty. 1 *How.* 165.

Shall do execution of the said statute] That is, in the whole, and not in part only: as by recording a riot, and not committing the parties. *id.* 166.

VI. How by proceſs out of chancery.

By the 2 H. 5. c. 8. 'If default be found in the two justices, 'sheriff, or under sheriff, then at the instance of the party grieved, 'a commission shall be issued under the great seal, to inquire as 'well of the truth of the case for the complainant, as of such de-'fault.'

And by the 2 H. 5. c. 9. and 8 H. 6. c. 14. 'Rioters shall be 'taken by writ and proclamation out of chancery, on suggestion 'of two justices and the sheriff, of the common fame of such riot.'

Record of a riot on view.

New York, King's County. BE it remembred, that on the day of in the year of . We J. P. and K. P. esquires, two of the justices assigned to keep the peace in the said county, and A. S. esquire, sheriff of the said county, at the complaint and request of A. I. of in the county aforesaid, yeoman, in our proper persons have come to the mansion house of him the said A. I. in aforesaid, and then and there do find A. O. of yeoman, B. O. of yeoman, C. O. of yeoman, and other malefactors and disturbers of the peace of the people of the state of New-York to us unknown, to the number of eleven persons, in a warlike manner arrayed, to wit, with clubs, swords, and guns unlawfully, riotously, and routously assembled, and the same house besetting, many evils against him the said A. I. threatening, to the great disturbance of the peace of the people of the state of New-York, and terror of the said people, and against the form of the statute in that case made and provided. And therefore we the aforesaid J. P. K. P. and A. S. the aforesaid A. O. B. O. and C. O. do then and there cause to be arrested and to the next gaol in the county aforesaid to be conveyed, by our view and record of the unlawful assembly, riot, and rout aforesaid convicted, there to remain and every and each of them respectively, until they shall severally and respectively have paid to the people of the state of New-York, the several

ral ſum of 10l. each, which we do impoſe upon them and every of them ſeparately for their ſaid offence. In teſtimony whereof, to this our preſent record we do put our ſeals. Dated at aforeſaid, the day and year aforeſaid.

Commitment of the rioters upon view.

New-York, } J. P. and K. P. eſquires, two of the juſtices aſſigned to King's County. } keep the peace within the ſaid county, and A. S. eſquire, ſheriff of the ſaid county: To the keeper of the gaol at in the ſaid county, and to his deputy and deputies there, and to every of them, greeting.

Whereas upon complaint made unto us by A. I. of yeoman, we did this preſent day of go to the houſe of the ſaid A. I. at aforeſaid, and there did ſee A. O. of yeoman, B. O. of yeoman, C. O. of yeoman, and other malefactors to us unknown, aſſembled together in an unlawful, rouſeus, and riotous manner, to the terror of the people, and againſt the peace of the people of the ſtate of New-York, and againſt the form of the ſtatute in that caſe made and provided: We do therefore ſend you, by the bringers hereof, the bodies of the ſaid A. O. B. O. and C. O. convicted of the ſaid riot, rout, and unlawful aſſembly, by our own view, teſtimony, and record; commanding you in the name of the people of the ſtate of New-York, to receive them into the ſaid gaol, and them and every of them reſpectively there ſafely to keep, until they and every of them, ſhall reſpectively pay to the people of the ſtate of New-York, the ſeveral and reſpective ſum of 10l. each, which we have ſet and impoſed upon them, and each and every of them ſeparately for the ſaid offence. Given under our hands and ſeals at aforeſaid, in the county aforeſaid, the day and year aforeſaid.

ROBBERY.

I. What it is.
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I. What

I. What it is.

THERE are two kinds of robbery; from the *perſon*, and from the *houſe*: It is the former of theſe that is treated of under this title: the latter, viz. robbery from the houſe, belongeth to the titles LARCENY and BURGLARY.

Robbery, lord Coke ſays, is derived from the French *de la robe*, both becauſe they bereave the true man of his *robes*, and alſo that his money is taken by them from ſome part of his garment, or robes about his perſon. But in truth the word ſeemeth to be much ancienter than the introduction of the French into our language; and probably was deduced unto us through the channel of Saxony or Denmark. Robber, in the Saxon is *reofere*; in the Low Dutch, *roever*; in the Daniſh, *rofvere*; by a tranſmutation of the letters *b*, *f*, and *v*, frequent in all kindred languages. The Gothic tranſlation of the goſpels uſeth *birauboded un* to ſignify *they robbed*, from *birauban*, *to rob*: which being ſtripped of the prefix argumentative is *rauban*. The Saxons expreſſed the ſame by *bereafodon*, which we ſtill preſerve when we ſay *they bereaved*: and in the northern parts of England, the words *robbing* and *reaving* are ſtill uſed promiſcuouſly to ſignify rapine and plunder; and when the violent winds do ſtrip a houſe of its thatch or covering, it is called *reoving*.

'*Robbery* is a felony by the common law, committed by a violent 'aſſault upon the perſon of another, by putting him in fear, and 'taking from his perſon, his money or other goods, of any value 'whatſoever.' 3 *Inſt.* 68.

From his perſon] Taking a thing in a man's preſence, is in law a taking from the perſon. *Hale's Pl.* 73. *Str.* 1015. *K.* againſt *Francis* and others.

Thus, if one take or drive my cattle out of my paſture, in my preſence, this is robbery, if he make an aſſault upon me, or put me in fear. *Hale's Pl.* 73.

II. Widening of highways to prevent robberies.

Highways leading from one market town to another, ſhall be enlarged, ſo that there be neither dyke, tree, or buſh, except aſhes or great trees, whereby a man may lurk to do hurt, within 200 feet of each ſide. And if by default of the lord, that will not avoid the dyke, underwood, or bruſhes, any robberies be done, the lord ſhall be anſwerable for the felony; and if murder be done, the lord ſhall make a fine at the king's pleaſure. And if a park be taken from the highway, it ſhall be ſet at 200 foot diſtance; or elſe a fence ſhall be made, ſo as offenders may not paſs nor return to do evil. 13 *Ed.* 1. *ſt.* 2. *c.* 5.

It is obſervable, that when this act was made, the country was fuller of wood than it is at preſent.

III. Aſſaulting with intent to rob.

If any perſon ſhall with any offenſive weapon aſſault, or by menaces, or in a forcible or violent manner, demand any money or goods, with a felonious intent to rob him, he ſhall be guilty of felony, and be tranſported for 7 years. 7 *G.* 2. *c.* 21.

If any perſon be indicted or appealed, for killing any perſon attempting to rob, he ſhall be acquitted. 24 *H.* 8. *c.* 5.

IV. Levying hue and cry on a robbery committed.

Immediately upon robberies committed, freſh ſuit ſhall be made from town to town, and from county to county. 13 *Ed.* 1 *ſt.* 2 *c.* 1.

V. Hundred when liable to anſwer damages.

The hundred where the offence was committed, ſhall be anſwerable for the robberies, and for the damages, if the offender be not taken. 13 *Ed.* 1. *ſt.* 2. *c.* 2. 28 *Ed.* 3. *c.* 11.

But ſuch hundred may recover back half the damages, from any other hundred where freſh ſuit after hue and cry ſhall not be made. 27 *El. c.* 13. *ſ.* 2.

If any man be robbed in his houſe, the hundred ſhall not be charged therewith, whether it were done by day or night; becauſe every man's houſe is his caſtle, which he ought to defend; and if any one is robbed in his houſe, it ſhall be eſteemed his own fault. *Dalt. c.* 84.

Alſo, a robbery done in the night, ſhall not charge the hundred; but yet if it be in the day time, or there be ſo much day light as that one may ſee a man's face, ſo that the robber may be known, tho' it be before the ſun riſing, or after the ſun ſetting, the hundred ſhall anſwer for it. *Dalt. c.* 84.

VI. Manner of bringing the action againſt the hundred.

In order to make the hundred liable, theſe things following muſt be done:

The perſon robbed ſhall with as much convenient ſpeed as may be, give notice thereof, unto ſome of the inhabitants near the place. 27 *El. c.* 13. *ſ.* 11.

And tho' that place where notice is given, be in another hundred or county, yet it is good enough; for a ſtranger may not know the confines of the hundred or county: and that hundred where notice is given muſt make hue and cry, and by that means the hundred where the robbery was committed, will ſoon know thereof. *Cro. Ca.* 41, 379. 3 *Salk.* 184.

He ſhall alſo give notice, with as much convenient ſpeed as may be, to a conſtable of the hundred, that is, the high conſtable, or to a conſtable of ſome place near; or leave notice in writing at his houſe, deſcribing therein the felon, and the time and place of the robbery. 8 *G.* 2 *c.* 16. *ſ.* 1.

And

And every conſtable, to whom ſuch notice ſhall be given, and every high and petty conſtable within the hundred, as ſoon as the ſame ſhall come to his knowledge, by the party robbed, or by any to whom ſuch notice hath been given, ſhall with the utmoſt expedition make and cauſe to be made freſh ſuit, and hue and cry after the felons, on pain of 5l. with coſts, half to the king and half to him who ſhall ſue. 8 *G.* 2. *c.* 16. *ſ* 11, 12. Note, the penalty here is but ſmall; but as the not purſuing hue and cry was alſo an offence at the common law, the offender may be indicted at the common law, and thereupon fined and impriſoned.

'He ſhall alſo be examined on oath within twenty days next before the action brought, before a juſtice in or near the hundred, whether he knows any of the robbers: and if he confeſſes that he does, he ſhall before the action brought, be bound over by the ſaid juſtices to proſecute.' 27 *El. c.* 1. *ſ.* 11.

He ſhall alſo be examined] That is, the party robbed, who is to bring the action, ſhall be examined. But here note a diverſity. *T.* 2 *Car. Raymond* and hundred of *Oking*. The ſervant was robbed of his maſter's goods, and the ſervant made oath before a juſtice, and the maſter brought the action againſt the hundred. By the court; the action well lies for the maſter and the ſervant's oath is ſufficient, for it was properly in his notice, that he was robbed, and did not know any of the robbers, and the maſter knows it not that he was robbed, or who were the perſons, but by report of his ſervant; and it would be inconvenient if the maſter ſhould not bring the action, but the ſervant only; for the ſervant might releaſe, or compound, or diſcontinue the ſuit, and ſo the maſter ſhould have the loſs by his falſhood: therefore the maſter ſhall bring the action, and have his ſervant who was robbed, to be his witneſs. *Cro. Car.* 37.

Within twenty days next before] And the time of making ſuch oath muſt be laid in the declaration, for that is traverſable. 3 *Salk.* 184.

Before a juſtice] And if the juſtice ſhall refuſe upon his requeſt, to examine him an action will lie againſt the juſtice; becauſe he doth not act therein as judge of record, but as a miniſter appointed for the examination by the ſtatute. *Cro. Car* 21[illegible].

Whether he knows any of the robbers] *H.* 19 *G.* 2 *William King* againſt the hundred of *Biſhop's Sutton*. In an action brought againſt the hundred, the oath proved was, that he had *good reaſon to ſuſpect* the fact was done by R. Gibbs and W. Langford, both of ſuch a pariſh, and a doubt ariſing at the aſſizes, whether this was ſufficient or not a caſe was made and argued twice at the bar. And upon the ſecond argument, the court were of opinion, that the examination did not maintain the action. The oath required is a condition precedent, and for the ſake of the hundred, and to prevent ſcreening the offenders. There is a great deal of difference between ſuſpecting and knowing: a man who knows the offender, may purpoſely ſtop at the word ſuſpect, to avoid being bound to proſecute, and though it would be equivocating, yet

yet it would hardly be perjury aſſignable; it being only a ſuppreſſion of part of the truth. He ſhould have ſaid, I ſuſpect them to be the men, but I do not know it. It will be dangerous to let them go out of the words of the act; and therefore the plaintiff failed in the action, and paid the coſts of a nonſuit. *Str.* 1247.

VII. Damages how to be levied and applied.

If the plaintiff recover, the ſheriff ſhall ſhew the writ of execution to two juſtices (1 Q) in or near the hundred. 27 *El. c.* 13. *ſ.* 5. 8 *G.* 2. *c.* 16. *ſ.* 4.

The ſaid two juſtices ſhall thereupon cauſe a taxation to be made and levied in thirty days, upon every diviſion within the hundred, by the conſtables, by diſtreſs and ſale. 8 *G.* 2 *c.* 16. *ſ.* 4, 5.

VIII. Reward for apprehending a robber.

Any perſon or perſons apprehending a felon, whereby the hundred becomes indemnified, ſhall have ten pounds reward, paid by the hundred; the ſame to be aſcertained, levied and paid, by two juſtices (1 Q) in or near the hundred, in ſuch proportions as they ſhall think reaſonable, within the hundred. 1 *G.* 2. *c.* 16. *ſ.* 89.

And moreover every perſon who ſhall apprehend a highwayman, and proſecute him till he be convicted of any robbery committed in or upon any highway, paſſage, field, or open place, ſhall have from the ſheriff of the county where the robbery and conviction was made and done, without paying any fee for the ſame, the ſum of 40l. within one month after the conviction and demand thereof made, by tendering a certificate to the ſheriff, under the hand of the judge, certifying the conviction of ſuch felon for a robbery done within the county of the ſaid ſheriff, and alſo that ſuch felon was taken by the perſon claiming the reward. 4 *W. c.* 8. *ſ.* 2.

For which certificate ſhall be paid, for writing and drawing thereof, 5s and no more. 6 *G. c.* 23. *ſ.* 8.

And if any diſpute ſhall ariſe between the perſons apprehending, touching their right to the reward, the judge ſhall by the ſaid certificate direct to be paid unto and amongſt the parties claiming, in ſuch proportions as to him ſhall ſeem juſt and reaſonable. And if the ſheriff ſhall make default of payment, he ſhall forfeit double, with treble coſts. 4 *W. c.* 8. *ſ.* 2.

And as a further reward, ſuch perſon ſhall have moreover the horſe, furniture and arms, money or other goods of the robber, that ſhall be taken with him, notwithſtanding the right of the king, or lord of the manor, or of the perſon lending or letting the ſame to hire—but ſaving the right of them from whom they may have been feloniouſly taken. 4 *W.* c. 8. *ſ.* 6.

And if any perſon is killed in endeavouring to apprehend ſuch highwayman, the ſheriff ſhall pay the like ſum of 40l. without fee, under the like penalty, to the executors or adminiſtrators of the

the perſon killed : immediately upon certificate delivered to him under the hand and ſeal of the judge of aſſize for the county where the fact was done, or the two next juſtices of ſuch perſon being ſo killed : Which certificate, the ſaid judge or juſtices, upon proof before them made, ſhall give immediately without fee. 4 *W.* c. 8. *ſ.* 3.

And the ſheriff ſhall have the ſaid rewards allowed to him in his accounts. 4 *W.* c. 8. *ſ.* 4.

IX. Pardon for diſcovering accomplices.

If any perſon, being out of priſon, ſhall commit any robbery, and afterwards diſcover two or more perſons who ſhall commit any robbery, ſo as two or more be convicted ; he ſhall have the king's pardon for all robberies he ſhall have committed before ſuch diſcovery : which pardon ſhall be likewiſe a bar againſt any appeal for ſuch robbery. 1 *W.* c. 8. *ſ.* 7.

X. Principal and acceſſary in robbery.

All that come in company to rob are principals though one only actually do it. *Hale's Pl.* 72.

XI. Puniſhment of robbery.

Robbery is generally excluded from the benefit of clergy. 3 *Inſt.* 68. 2 *Haw.* 351—357. 2 H. H. c. 48.

And by the 20 *G.* 2. c. 52. Robbery is excepted out of the general pardon.

XII. What ſhall be done with the goods of which a perſon is robbed.

If the perſon robbed doth not proſecute the robber : if his goods are waived in flight, or ſeized by the king's officers, or lord of the manor, he ſhall not have them reſtored. *Kely.* 49.

But if they are not waived in flight or ſeized by the king's officers or lord of the manor, he may take his goods again wherever he finds them, without the formality of reſtitution being awarded if they be not ſold in open market : and this alſo although he doth not proſecute the robber. *Kely* 48.

But if he ſhall proſecute the robber to conviction : he ſhall have reſtitution, although they have been waived, and ſeized, and even ſold in open market. *Kely* 48.

Examination of the perſon robbed, before the action brought.

New-Jerſey, Eſſex County. THE examination of A. I. of in the county aforeſaid, yeoman, taken on oath before me, J. P. eſquire, one of the juſtices of the peace for the ſaid county, dwelling in [or, near to] the townſhip of within the ſaid county, the

day

day of in the year of the independence of
Who ſaith, that on Monday the day of this preſent month of between the hours of two and three in the afternoon of the ſame day, at or near a place called he was aſſaulted in the highway there leading from to by two horſemen, whereof one was a tall luſty man, wearing a black wig, and a blue grey coat, mounted on a bay gelding about fifteen hands high, with a black mane and tail, and ſtar in his forehead; and the other a middle ſize man, of a ſwarthy complexion, having a large ſcar on his left cheek, having on a dark brown riding coat, and mounted on a black gelding, and by them robbed in the highway aforeſaid of the ſum of in money, one ſilver watch of the value of 4 l. and one pocket book: And that he the ſaid A. I. at the time of the ſaid robbery committed, did not know, nor yet doth know, either of the ſaid perſons who committed the ſame: And that he is ſince informed, that the ſaid highway and place where he was ſo robbed as aforeſaid, are in the townſhip of and within the ſaid county.

A. I.

Taken, made and ſigned the day and year above written,

Before me J. P.

Note, the form of a warrant for apprehending a robber upon freſh ſuit, is inſerted under the title of HUE and CRY.

SEARCH WARRANT.

ALTHO' it is not unuſual for the juſtices to grant general warrants, to ſearch all ſuſpected places for ſtolen goods, and there is a precedent in Dalton, requiring the conſtable to ſearch all ſuch ſuſpected places as he and the party complaining ſhall think convenient: yet ſuch practice is generally condemned by the beſt authorities.

Thus lord Hale, in his pleas of the crown, ſays, a general warrant to ſearch for felons or ſtolen goods, is not good. *H. Pl.* 93.

Mr. Hawkins ſays, I do not find any good authority, that a juſtice can juſtify ſending a general warrant, to ſearch all ſuſpected houſes in general for ſtolen goods: becauſe ſuch warrant ſeems to be illegal in the very face of it; for it would be extremely hard, to leave it to the diſcretion of a common officer, to arreſt what perſons, and ſearch what houſes he thinks fit; and if a juſtice cannot legally grant a blank warrant for the arreſt of a ſingle perſon, leaving it to the party to fill it up, ſurely he cannot grant ſuch a general warrant, which might have the effect of an hundred blank warrants. 2 *Haw.* 82, 84.

Again, lord Hale, in his hiſtory of the pleas of the crown, expreſſeth himſelf thus; I do take it, that a general warrant to ſearch in all ſuſpected places is not good; but only to ſearch in ſuch particular places, where the party aſſigns before the juſtice his ſuſpicion, and the probable cauſe thereof; for theſe warrants are judicial acts, and muſt be granted upon examination of the fact. 2 *H. H.* 150.

And therefore, he says, he takes it that those general warrants, dormant, which are many times made before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretence of such general warrants, give no more power to the officer or party, than what they may do by law without them. 2 *H. H.* 150.

Likewise, upon a bare surmise, a justice cannot make a warrant to break any man's house, to search for a felon, or for stolen goods; for the justices being created by act of parliament, have no such authority granted them by any act of parliament; and it would be full of inconvenience, that it should be in the power of any justice of the peace, being a judge of record, upon a bare suggestion to break the house of any person, of what state, quality, or degree soever, either in the day or night, upon such surmises. 4 *Inst.* 177.

But in case of a complaint, and oath made, of goods stolen, and that the party suspects the goods are in such a house, and shews the cause of his suspicion; the justice may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods, and the party in whose custody they are found, and bring them before him, or some other justice, to give an account how he came by them, and further to abide such order as to law shall appertain. 2 *H. H.* 113, 150.

But in that case, lord Hale says, it is convenient, that such warrant do require the search to be made in the day time; and tho' I will not affirm (says he) that they are unlawful without such restriction, yet they are very inconvenient without it; for many times under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance. 2 *H. H.* 150.

But in case not of probable suspicion only, but of positive proof, it is right to execute the warrant in the night time, lest the offenders and goods also be gone before morning. *Barl. Search. War.*

Furthermore, such warrant ought to be directed to the constable, or other public officer, and not to any private person; tho' it is fit the party complaining should be present and assistant, because he knows his goods. 2 *H. H.* 150.

So much for granting a search warrant; Next touching the execution of it.

Whether the stolen goods are in the suspected house or not, the officer and his assistants in the day time may enter, the doors being open, to make search, and it is justifiable by this warrant. 2 *H. H.* 151.

If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door. 2 *H. H.* 151.

If the goods be not in the house, yet it seems the officer is excused, that breaks open the door to search, because he searched by warrant, and could not know whether the goods were there, till search

ſearch made: but it ſeems the party that made the ſuggeſtion is puniſhable in ſuch caſe; for as to him the breaking of the door is *in eventu* lawful or unlawful, to wit, lawful if the goods are there, unlawful if not there. *id.*

On the return of the warrant executed, the juſtice hath theſe things to do;

As touching the goods brought before him, if it appear they were not ſtolen, they are to be reſtored to the poſſeſſor: if it appear they were ſtolen, they are not to be delivered to the proprietor, but depoſited in the hand of the ſheriff or conſtable, to the end the party robbed may proceed, by indicting and convicting the offender to have reſtitution. *id.*

As touching the party that had the cuſtody of the goods: if they were not ſtolen, then he is to be diſcharged: if ſtolen, but not by him, but by another that ſold or delivered them to him, if it appear that he was ignorant that they were ſtolen, he may be diſcharged as an offender, and bound over to give evidence as a witneſs againſt him that ſold them: if it appear he was knowing they were ſtolen, he muſt be committed or bound over to anſwer the felony. *id.* 152.

Form of a ſearch warrant.

New-Jerſey, } *To any conſtable of ſaid county.*
Eſſex County. }

WHEREAS it appears to me J. P. eſquire, one of the juſtices aſſigned to keep the peace in the ſaid county, by the information on oath of A. I. of in the county aforeſaid, yeoman, that the following goods, to wit, have within two days laſt paſt, by ſome perſon or perſons unknown, been feloniouſly taken, ſtolen, and carried away, out of the houſe of the ſaid A. I. at aforeſaid, in the county aforeſaid; and that the ſaid A. I. hath probable cauſe to ſuſpect, and doth ſuſpect, that the ſaid goods, or part thereof, are concealed in the dwelling houſe of A. O. of in the ſaid county, yeoman: Theſe are therefore, in the name of the people of the ſtate of New-Jerſey, to authorize and require you, with neceſſary and proper aſſiſtants, to enter in the day time into the ſaid houſe of the ſaid A. O. at aforeſaid, in the county aforeſaid, and there diligently to ſearch for the ſaid goods; and if the ſame, or any part thereof, ſhall be found upon ſuch ſearch, that you bring the goods ſo found, and alſo the body of the ſaid A. O. before me, or ſome other of the juſticies aſſigned to keep the peace in the county aforeſaid, to be diſpoſed of and dealt withal according to law. Given under my hand and ſeal at in the ſaid county, the day of in the year

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SESSIONS.

THE ſeſſions of the peace is a court of record, holden before two or more juſtices, whereof one is of the *quorum*, for execution of the authority given them by the commiſſion of the peace, and certain ſtatutes and acts of parliament. *Dalt. c.* 185.

It

It seems that the *general* sessions, and *quarter* sessions, are not synonimous; but the quarter sessions are a species only of the general sessions, and that such sessions only are properly called general quarter sessions, which are holden in the four quarters of the year, in pursuance of the statute of the 2 *H.* 5. and that any other sessions holden at any other time for the general execution of the justices authority, which by the said statute they are authorised to hold oftener than at the times therein specified, if need be, may properly be called *general* sessions, and that those holden on a special occasion for the execution of some particular branch of their authority, may properly be called *special* sessions. 2 *Haw.* 43.

By the 12 *R* 2. *c.* 10. The justices shall keep their sessions in every quarter of the year at least, and by three days, if need be, on pain of being punished according to the discretion of the king's council, at the suit of every man that will complain.

There is no determination by any statute, of any place for the sessions to be kept, so it be within the county. And if a place within the county be incorporated, and have justices of its own, yet the same remains part of the county, and the justices of the county may notwithstanding hold their sessions there, although it may be that they shall not intermeddle with matters arising there, save only such as happen in their sessions, or with relation thereunto. *Dalt. c.* 115.

The persons who ought to appear at these sessions are as follows:

1. The *justices of the peace*; these without doubt are compellable to appear at the sessions, for without their appearance the sessions cannot be holden. *Dalt. c.* 185.

But a justice ought not to join in an order at sessions wherein himself is concerned, nor ought his name to be in the caption. An order was quashed for that reason. 2 *Salk* 607

2. The *custos rotulorum*, who hath custody of the rolls of sessions, ought (by the commission) to be there by himself, or by his deputy, who is the clerk of the peace. *Dalt. c.* 185.

3. The *sheriff* also, by virtue of the commission, by himself or his deputy, to receive the fines, to return jurors, to execute process, and what else to his office doth appertain. *id.*

4. All *coroners*. *id.*

5. The *constables of hundreds* (that is, high constables) and all other officers to whom any warrant hath been directed, in order to make return thereof. *id.*

6. All *bailiffs of hundreds and liberties*, in respect they are bound to give an account of all sessions process. *id.*

7. The *gaoler*; to bring thither his prisoners, and to receive such as may be committed. *Dalt. c.* 185.

8. The *keeper of the house of correction*, to give in a kalendar and account of persons in his custody. *id.*

9. All jurors returned by the sheriff, by virtue of the aforesaid precept. And the jurors not appearing according to their summons,

are punishable by loss of issues, which usually make part of the estreats of sessions *id*

10. All persons bound by *recognizance* to answer, or to prosecute and give evidence *id.*

And all persons may freely attend at the sessions for the advancement of public justice, and for the service of the king. And to this end they are (as it were) invited thither by a certain freedom of access, and by protection from common arrest; a thing that is incident to every court of record, and without which, justice would be greatly hindred. So that if a man come voluntarily to the sessions, either to prefer a bill of indictment, or to give information against another, or to tender a fine upon an indictment touching himself or do come compelled to make appearance of saving his recognizance, and be arrested by the sheriff upon common and original process, in his coming thither, or during his tarrying there; it seemeth (Mr. Lambard says) that (upon examination of the matter under his oath) he shall be discharged thereof by the privilege of this court, even as it is used in the higher courts at Westminster. *Lamb.* 402.

But Mr. Hawkins puts it more doubtfully, saying, it is questioned whether the sessions, as also all courts of record, may not discharge any persons arrested, during his journeying to or from such courts, or necessary attendance there, by process from any other court: However it seems to be agreed, that any such court may discharge a person who shall be so arrested in the face of it. 2 *Haw.* 5.

Where authority is given to two justices to do any act, the sessions may do it, in all cases, except where appeal is directed to the sessions. L. 426.

Justices may issue their warrants for apprehending persons charged of crimes within the cognizance of the sessions, and bind them over to appear there, although the offender may be not yet indicted. 1 *H. H.* 579.

If jurisdiction be given to the sessions, to hear and determine, and doth not say by information, this shall be by indictment, and not upon information. *Dalt c.* 191.

The sessions are not obliged to give any reason of their judgment in the orders they make, no more than any other of the courts of law. 2 *Salk.* 607.

By Holt Ch J. The sessions is all as one day, and the justices may alter their judgments, at any time whilst it continues. 2 *Salk.* 606.

A judge of *nisi prius* by consent of parties may make a rule to refer a cause; but the sessions cannot do so, though by consent.—They may refer a thing to another to examine, and make report to them for their determination, but cannot refer a thing to be determined by the other. 2 *Salk.* 277

It seemeth certain, that the sessions hath no authority to amerce any justice, for his non-attendance at the sessions, as the judges of assize may for the absence of any such justice at the gaol delivery: for

for it is a general rule, that *inter pares, non eſt pœteſtas*, it being reaſonable rather to refer the puniſhment of perſons in a judicial office, in relation to their behaviour in ſuch office, to other judges of a ſuperior ſtation, than to thoſe of the ſame rank with themſelves. And therefore it ſeems to have been holden, that if a juſtice at the ſeſſions who is not of the *quorum*, ſhall uſe ſuch expreſſions towards another who is of the *quorum*, for which if he were a private perſon he might be committed or bound to his good behaviour, yet the ſeſſions hath no authority to commit him, or to bind him to his good behaviour: And yet it ſeems to be agreed that if a juſtice give juſt cauſe to any perſon to demand the ſurety of the peace againſt him, he may be compelled by any other juſtice to find ſuch ſecurity; for the public peace requires an immediate remedy in all ſuch caſes. 2 *Haw.* 41. 42

The ſeſſions may proceed to outlawry in caſes of indictments found before them; and that by the common law: In caſes of popular actions, by the ſtatute of the 21 *J. c* 4 But they cannot iſſue a *capias utlagatum*, but muſt return the record of the outlawry into the king's bench, and there proceſs of *capias utlagatum* ſhall iſſue. 2 *H. H.* 52. *Lamb.* 521.

But by the 12 *Co.* 103. They that have power to award proceſs of outlawry, have alſo a power to award a *capias utlagatum*, as incident to their authority and juriſdiction.

Generally, the ſeſſions cannot award an attachment for contempt in not complying with their orders; but the ordinary and proper method is by indictment. *H* 8. *G.* 2 *K.* and *Burtlett. Seſſ C. V.* 2. 176.

The juſtices are not puniſhable for what they do in ſeſſions. *Stam.* 173.

The manner of proceeding at the ſeſſions is as follows: Firſt, the juſtices being met, the uſual courſe is with three oyes to proclaim the ſeſſions, and then read the commiſſion of the peace. *Dalt. c.* 185.

Then the grand jury are called and ſworn, and the charge given to them *id.*

If there be any who are to take the oaths, in order to qualify them for offices, this muſt be done between the hours of nine and twelve in the forenoon, and not otherwiſe. 5 *C.* 2 *c.* 2. *ſ* 2.

Then the recognizances may be called eſpecially ſuch as are to proſecute and give evidence, that ſo bills may be drawn and prepared. *Dalt c.* 185.

Although it is in many places uſed, to try a man for felony the ſame ſeſſions in which the indictment is found yet it ſeems highly reaſonable, if the priſoner deſire it to be deferred, and ſhew cauſe probable, to defer it. For that, 1. The ſeſſions are holden oftener than the aſſizes. 2. The ſpeedy trials ſeem to be in favour of the priſoner, and *volanti non fit injuria*. 3. If a traverſe upon an indictment of nuiſance be not triable the ſame ſeſſions that it is joined,

but

but a man shall have time to provide for it; much more in matter of life, where usually the party is in prison, and may well be supposed less able to provide for it, and in the nature of it requires greater consideration. *id.*

And, in another place, it is said, that it is made a doubt, whether a trial can be had of a felon the same sessions that he pleads, unless he consents to it. *id.*

The bills being ready, the parties bound over for that purpose, are sworn to give evidence upon the bills; and the course is, to bid the evidence go with the grand jury, where they consider of the bill, and either find it or not find it, and then return it. *id.*

Whilst the jury is gone out of the court, the usual way is, to proceed upon motions and orders touching settlements, bastardy, nuisances, and the like; and to call persons bound over to the peace or good behaviour, but it may not be best to discharge them till the end of the sessions, because bills may be preferred against them. *id.*

Upon appeals to be made to the sessions against judgments or orders, the justices shall cause any defect of form in such original judgments or orders to be rectified or amended, and then shall proceed upon the merits. 5 *G.* 2 *c.* 19. *s.* 1.

Mr. Shaw (Tit. *Sessions*) says, no indictment for a nuisance shall be quashed or discharged, unless two justices do certify to the court upon their own view, either by certificate under their hands or in person that the nuisance is removed; and for this he quotes 3 *Cro.* 584. Layton's case. But that case only mentions a certificate in general, and the certificate in that case was not a certificate of two justices, but of several inhabitants adjoining; and it should seem that the sessions may be well satisfied of such removal of a nuisance, by other evidence, as well as by that of two justices.

Then may be called the persons bound by recognizance at the last sessions, to prosecute their traverses at the present sessions. For if a person indicted or a trespass or other misdemeanor, do appear and shall plead not guilty, and traverse the indictment, he shall enter into recognizance to prosecute his traverse at the next quarter sessions. For in Bumstead's case, 15 *C.* The whole court was of opinion, that justices of the peace may not inquire, try, and determine civil offences, in one and the same day; for the party ought to have a convenient time to provide for the trial. *Cro. Car.* 448.

And on a trial of a traverse, the defendant must appear in the court, at the bar, in his proper person; and then the indictment is read to the jury; and the prosecutor and his witnesses are called to give evidence, and are heard; and if the defendant is found guilty, the court sets a fine upon him adequate to the offence, or other punishment as the law directs. *Crown Cir.* 50, 51.

In case of trespass and assault, the court frequently recommends the defendant to talk with the prosecutor, that is, to make him amends for the injury done him; and if the prosecutor comes and acknowledges a satisfaction received, the court will set a small fine on the defendant, as 3*d.* 4*d.* or 12*d.* *Cro. Cir.* 52.

Sometimes

Sometimes the profecutor and defendant agree before the defendant pleads to the indictment; and then the defendant comes into court in his proper perfon, and pleads guilty to the indictment; and upon proving, by a fubfcribing witnefs, a general releafe executed by the profecutor, the defendant fubmits to a fmall fine, fuch as the court is pleafed to impofe. *Cro. Cir.* 52.

There are frequent profecutions at the feffions for trifling affaults, in which cafes it is adviseable for a defendant not to put himfelf to the expence of trying the indictment; but to give notice to the profecutor that he intends to plead guilty to the indictment; in which cafe the profecutor attends the court with his witneffes, and gives evidence of the nature of the offence; and then the court proceeds to fine the defendant for his mifbehaviour towards the profecutor: But before that is done, the court will admit the defendant to call fuch witneffes as he defires, and will examine them by way of mitigation. *Cro. Cir.* 54.

And becaufe the arraignment and trial of prifoners, is a great part of the bufinefs of the feffions, I will take notice of fome parts thereof, and proceedings thereupon:

Towards the end of the feffions, when it appears what bills are come in againft the prifoners, the gaoler being called to fet his prifoners to the bar, and the crier being called to make a bar, that is, to difpofe of the company, that a way be made open from the court to the prifoners, that the court, jury, and prifoners may fee each other, one of the prifoners is called to; A. B. Hold up thy hand. *Dalt. c.* 186.

Yet it is not neceffary that he hold up his hand at the bar, or be commanded fo to do; for this is only a ceremony, for making known the perfon of the prifoner to the court, and if he anfwers that he is the fame perfon, it is all one. 2 *Haw.* 308.

Then he is acquainted with the effect of the charge laid againft him, Thou A. B. ftandeft indicted, by the name of A. B. for that thou——— (and fo recite the indictment) How fayeft thou, A. B. Art thou guilty of this felony and petit larceny whereof thou ftandeft indicted, or not guilty? *Dalt. c.* 185.

If he make no anfwer at all, and will not plead, it is beft to afk him three or more times, and to tell him the danger of ftanding mute, and the grievoufnefs of the judgment of the *peine fort & dure*; and yet if he will ftand mute, nothing more can be done concerning him till judgment, but to record it. *id.*

But if it be for petit larceny only, he fhall not be put to his *peine fort & dure*, as in cafe of grand larceny, but he fhall have the like judgment as if he had confeffed the indictment. 2 *Haw.* 329.

If he pleads privilege, it hath been adjudged, that where proceedings are merely at the fuit of the king, as upon indictment, or upon information brought by the attorney general, no privilege fhall be allowed; but where the proceedings are at the fuit of the king and of the party, as in cafe of a common informer, there the defendant may have his privilege. 1 *Lutw.* 62.

If

If he anſwer that he is guilty, then the confeſſion is recorded, and no more done till judgment *Dalt* c. 185.

But if he ſay, not guilty, he is then aſked, *culprit*, how wilt thou be tried? *Dalt* c. 185.

Which was formerly a very ſignificant queſtion, though it is not ſo now; becauſe anciently trial by battel, and trial by ordeal was uſed, as well as by the country or a jury

Therefore it is now uſually anſwered, By God and the country. *Dalt.* c. 185.

Mr. Hawkins obſerves, that every perſon at the time of his arraignment, ought to be uſed with all the humanity and gentleneſs which is conſiſtent with the nature of the thing, and under no other terror or uneaſineſs than what proceeds from a ſenſe of his guilt, and the misfortune of his preſent circumſtances: and therefore ought not to be brought to the bar in a contumelious manner, as with his hands tied together, or any other mark of ignominy and reproach; nor even with fetters on his feet, unleſs there be ſome danger of a reſcous or eſcape. 2 *Haw.* 308.

And the court ought to exhort him to anſwer without fear, and to acquaint him that he ſhall have juſtice done to him.——2 *Inſt.* 316.

Next, the priſoner having put himſelf upon his country, the proſecutors are called on their recognizances, to give evidence. *Dalt. c.* 185.

Then the jury are called on their panel, thus. You good men that are returned and impanelled, to try this iſſue joined between our ſovereign lord the king and the priſoner at the bar, anſwer to your names. *id.*

Which done, and they appearing a full jury, a proclamation is made: If any can inform the king's attorney or this court, of any treaſons, murders, felonies, or other miſdemeanors againſt A. B. the priſoner at the bar, let them come forth, for the priſoner ſtands upon his deliverance. *id.*

Then it is ſaid to the priſoner, You priſoner at the bar, the perſons that you ſhall now hear called, are to paſs upon your trial (upon your life and death, if it is a capital offence) if you will challenge them, or any of them, you muſt challenge them as they come to the book to be ſworn, and before they be ſworn *id.*

Then call the foreman of the jury, and ſay unto him, Lay your hand on the book, and look upon the priſoner: You ſhall well and truly try, and true deliverance make, between our ſovereign lord the king, and the priſoner at the bar, whom you ſhall have in charge, and a true verdict give according to evidence: So help you God.

Then call the ſecond, and ſo ſwear him in like manner, and ſo on to 12, and neither more nor leſs 2 *H. H* 293.

Then count them 12, and ſay, You good men that are ſworn, you ſhall underſtand, that A. B. now priſoner at the bar, ſtands indicted,

indicted, for that he ——— (and ſo recite the indictment): To which indictment he hath pleaded not guilty, and for his trial hath put himſelf upon God and the country, which country you are: ſo that your charge is, to inquire whether he be guilty of the felony or petit larceny, whereof he ſtands indicted, or not guilty: If you find him guilty, you ſhall ſay ſo, and inquire what goods and chattels he had at the time of the ſaid felony and petit larceny committed, or at any time ſince: (Or, if it be for felony above petit larceny, — then, what goods and chattels, lands and tenements he had at the time of the ſaid felony committed, or at any time ſince:) If you find him not guilty, you ſhall inquire, whether he did fly for it, and if you find that he fled for it, you ſhall inquire what goods and chattels he had at the time of ſuch flight. If you find him not guilty, and that he did not fly for it, you ſhall ſay ſo, and no more: and ſo hear your evidence. 2 *H. H.* 293, 294. *Dalt. c.* 185.

Then call the witneſſes and ſwear them, one by one, thus: 'The 'evidence that you ſhall give on the behalf of our ſovereign lord the 'king, againſt A. B. priſoner at the bar, ſhall be the truth, the 'whole truth, and nothing but the truth: So help you God.' *Dalt. c.* 185.

When the witneſſes for the king have been examined, if the priſoner deſires that any witneſſes ſhould be examined for him, they ſhould be examined alſo upon oath.

On trials of this nature, the priſoner ſhall not have counſel allowed to him, unleſs a point of law ariſe, properly to be debated; nor a copy of the indictment. 2 *Hawk.* 400, 402.

But in offences under felony, a defendant may be heard by his counſel. *Wood. b.* 4. *c.* 5.

Otherwiſe, the court is to be of counſel with the priſoner, and ought to adviſe him for his good, and not take advantages too ſtrictly againſt him *Dalt. c.* 185.

When the priſoner hath done, and hath been heard all he hath to ſay in his defence, the evidence is ſummed up by the court to the jury. And if they cannot agree on their verdict at the bar, a bailiff muſt be ſworn to keep the jury, thus, 'You ſhall ſwear that 'you ſhall keep this jury without meat, drink, fire, or candle: you 'ſhall ſuffer none to ſpeak to them, neither ſhall you ſpeak to them 'yourſelf, but only to aſk them whether they are agreed: So help 'you God.' *id.*

The jury coming back, the priſoner is brought to the bar; then the jury is called; they appearing, ſay, Set A. B. to the bar; who being there, ſay, Look upon the priſoner; how ſay you, is A. B. guilty of the felony (or as the caſe is) whereof he ſtands indicted, or not guilty? If they ſay, not guilty, bid him down upon his knees. If they ſay guilty, record it, and bid him be taken away. Then ſay, hearken to the verdict as the court hath recorded it: You ſay, A. B. is guilty [or, is not guilty] of the felony whereof he ſtands indicted. *id.*

The

Then make a proclamation and say, All manner of persons keep silence, whilst judgment is giving against the prisoner at the bar, upon pain of imprisonment. Then set the prisoner to the bar, and give the sentence. *id.*

The fees in sessions for traversing trying, or discharging indictments, discharging recognizances for the peace and good behaviour, and the like, do vary according to the custom of the country; and in that place the custom of the place is to be observed. *Dalt. c.* 41.

SHERIFF.

SHERIFF (*Shirewe*) in Saxon is *scirgereſa*, from *ſciran* to *ſhare* or divide, for that the whole realm is parted and divided into *ſhires*; and *gereſa*, the *comes*, earl or governor, in the *Belgick* called *graaf* or *grave*. The word *comes*, or *count*, came first into *Europe* out of the eastern countries, probably from the *Hebrew cone or cune*, which denoteth strength, firmness, or stability; and the word *county*, in Latin *comitatus*, seemeth to be nothing else but the division or allotment over which the *comes* or *count* had jurisdiction. And when the counts or earls left the custody of the counties, then was the custody thereof committed to the viscounts, or *vicecomites*, (which is the Latin name for the sheriffs) so called, because they supply the place of the comes or earl. The earl was otherwise called by the Saxons *eorl*, *ealder*, *alderman* (elder or alderman) because they were usually men of age and experience, by alike derivation as that of senators among the Romans.

The sheriff (except in Wales and Chester) at the entering upon his office shall take the following oath (to be administered in pursuance of a writ of *dedimus poteſtatem*)

I *A. B.* do swear, that I will well and truly serve the king's majesty in the office of sheriff, in the county of——— and promote his majesty's profit in all things that belong to my office, as far as I legally can or may: I will truly preserve the king's rights, and all that belongeth to the crown: I will not assent to decrease, lessen or conceal the king's right, or the rights of his franchises: And whensoever I shall have knowledge that the rights of the crown are concealed or withdrawn, be it in lands, rents, franchises, suits or services, or in any other matter or thing, I will do my utmost to make them be restored to the crown again, and if I may not do it myself, I will certify and inform the king thereof or some of his judges: I will not respite or delay to levy the king's debts, for any gift, promise, reward or favour, where I may raise the same without great grievance to the debtors: I will do right, as well to poor as rich, in all things belonging to my office; I will do no wrong to any man, for any gift, reward or promise, nor for favour or hatred: I will disturb no man's right, and will truly and faithfully acquit at the

the exchequer, all thoſe of whom I ſhall receive any debts or duties belonging to the crown; I will take nothing whereby the king may loſe, or whereby his right may be diſturbed, injured, or delayed; I will truly return and truly ſerve all the king's writs, according to the beſt of my ſkill and knowledge; I will take no bailiffs into my ſervice, but ſuch as I will anſwer for, and will cauſe each of them to take ſuch oaths as I do, in what belongeth to their buſineſs and occupation, I will truly ſet and return reaſonable and due iſſues of them that be within my bailiwick, according to their eſtates and circumſtances, and make due panels of perſons able and ſufficient, and not ſuſpected, or procured, as is appointed by the ſtatutes of this realm: I have not ſold or let to farm, nor contracted for, nor have I granted or promiſed for reward or benefit, nor will I ſell or let to farm, nor contract for, or grant for reward or benefit, by myſelf or any other perſon for me, or for my uſe, directly or indirectly, my ſheriffwick, or any bailiwick thereof, or any office belonging thereunto, or the profits of the ſame, to any perſon or perſons whatſoever; I will truly and diligently execute the good laws and ſtatutes of this realm; and in all thing well and truly behave myſelf in my office, for the honor of the king and the good of his ſubjects, and diſcharge the ſame according to the beſt of my ſkill and power: So help me God. 3 *G. c.* 15. *ſ.* 18, 19.

By the 4 *H.* 4. *c.* 5. The ſheriff in perſon ſhall continue within his bailiwick, and ſhall not let it to farm.

By the 1 *H.* 5. *c.* 4. Sheriff's officers ſhall not be attornies.

And the ſheriff ſhall return none of his officers upon inqueſts, on pain of 40*l.* half to the king and half to him that ſhall ſue in the ſeſſions, or elſewhere. 23 *H.* 6 *c.* 10.

The under ſheriff ſhall be appointed by the high ſheriff, becauſe he ſhall anſwer for him; and he ſhall take the like oath as the high ſheriff, *mutatis mutandis.* 3 *G. c.* 15. *ſ.* 19.

The new ſheriff being appointed and ſworn, he ought at or before the next county court, to deliver a writ of diſcharge to the old ſheriff, who is to ſet over all the priſoners in the gaol, ſeverally by their names (together with all his writs) preciſely, by view and indenture, between the two ſheriffs; wherein muſt be comprehended all the actions which the old ſheriff hath againſt every priſoner, tho' the executions are of record. And till the delivery of the priſoners to the new ſheriff, they remain in the cuſtody of the old ſheriff, notwithſtanding the letters patents of appointment, the writ of diſcharge, and the writ of delivery. Neither is the new ſheriff obliged to receive the priſoners but at the gaol only. But the office of the old ſheriff ceaſes, when the writ of diſcharge cometh to him. *Wood. b.* 1. *c* 7.

And by the 20 *G.* 2. *c.* 32. The old ſheriff ſhall turn over to his ſucceſſor, by indenture and ſchedule, all ſuch writs and proceſs as ſhall remain unexecuted; and the new ſheriff ſhall execute and return the ſame.

The ſheriff having a juſtice of the peace his warrant directed to him, ſhall execute the ſame. but he need not go in perſon to execute it, but may authoriſe another to do it. 2 *Haw.* 86.

And it is no excuſe to the ſheriff to return that he could not execute a precept becauſe of reſiſtance; for he may take with him the power of the county. 1 *Ed.* 1 *ſt.* 1 c. 30.

Alſo the ſheriff on ſummons, is bound to attend the ſeſſions of the peace, there to return his precepts, to take the charge of the priſoners, to receive fines for the king, and the like. 2 *Haw.* 41.

And it ſeems clear from the general reaſon of the law, which gives all courts of record a kind of diſcretionary power over all abuſes by their own officers, that the ſheriff is puniſhable by the juſtices in ſeſſions, for defaults in executing their writs and precepts. 2 *Haw.* 142 143.

Every ſheriff is a principal conſervator of the peace, by the common law, and may *ex officio* award proceſs of the peace, and take ſurety for it, and it ſeems to be the better opinion, that the ſecurity ſo taken by him is by the common law looked on as a recognizance or matter of record, and not as a common obligation. 2 *Haw.* 33.

But no ſheriff ſhall exerciſe the office of a juſtice of the peace, in any county, wherein he is ſheriff: and in ſuch caſe his acts as a juſtice ſhall be void. 1 *Mar. ſeſſ* 2 c. 8.

By the 14 *Ed.* 3 c. 10. and 19 *H.* 7. c. 10. The ſheriff ſhall have the keeping of gaols.

And in all civil cauſes, as in caſes of impriſonment for debt, the ſheriff or gaoler (at the election of the party) ſhall be anſwerable for eſcapes ſuffered by the gaoler; but if the gaoler ſuffer a felon voluntarily to eſcape, this inaſmuch as it reacheth to life, is felony only in the gaoler, but the ſheriff may be indicted, fined, and impriſoned. 1 *H. H.* 597.

If the ſheriff ſhall die before his office ſhall be expired, the under ſheriff ſhall execute the ſame in the deceaſed ſheriff's name, till a new ſheriff be ſworn, and be anſwerable for the execution thereof, as the deceaſed ſheriff would have been. 3 *G.* c. 15. *ſ.* 8.

[For for further particulars, ſee the office of ſheriff, in the ſecond part of this book.]

SLANDER.

I DO not find it any where clearly ſettled, how far ſlander, or ſcandalous words are cognizable before juſtices of the peace, by reaſon of the different circumſtances in matters of ſo indeterminate a nature; for the ſame words, when ſpoken of different perſons, and even of the ſame perſon with a different emphaſis and manner of delivering them may receive a very different interpretation.

In general, it ſeemeth that words which directly tend to a breach of

of the peace, as if one man challenge another, are cognizable before justices of the peace, for which the party may be bound to the good behaviour, and even indicted. 2 *Salk.* 698. *Keb.* 931.

But if they do not tend directly to a breach of the peace, but are matters only of private slander between party and party, which no way affect the public administration of justice, as in cases where the common people are wont to call one another knaves, and rogues, and whores and thieves; I do not find it asserted by any good authority, that justices of the peace have any jurisdiction at all in such matters; but the proper remedy seems to be in one of these two ways, either by a prosecution in the spiritual court, or by an action upon the case at the common law.

SURETY for the PEACE.

OUT of the Latin word *pax*, the Normans formed their *paix*, and we (out of that) our peace. *Lamb* 5.

Surety for the peace is the acknowledging a recognizance, or bond to the king, taken by a competent judge of record, for the keeping the peace. *Dalt* c. 116.

And this surety of the peace, every justice of the peace may take and command, by a twofold authority: 1. As a minister, commanded thereto by a higher authority; as when a writ of *supplicavit*, directed out of the chancery or king's bench, is delivered to him. 2. As a judge, and by virtue of his office, derived from his commission. *Dalt.* c. 116.

Concerning which I will shew,

I. For what cause surety of the peace shall be granted.
II. At whose request it shall be granted.
III. Against whom it shall be granted.
IV. In what manner it shall be granted.
V. How the peace warrant may be superseded.
VI. How the peace warrant shall be executed.
VII. What ought to be the form of a recognizance for the peace.
VIII. How such recognizance shall be certified.
IX. How such recognizance may be forfeited.
X. How the recognizance being forfeited shall be proceeded on.
XI. How such recognizance may be discharged.

I. For what cause surety of the peace shall be granted.

By the commission of the peace, one or more justices have power

er "to cauſe to come before them, all thoſe who to any of the king's people concerning their bodies, or the firing of their houſes, have uſed threats, to find ſufficient ſecurity for the peace or their good behaviour towards the king and his people; and if they ſhall refuſe to find ſuch ſecurity to cauſe them in the king's priſons to be ſafely kept, until they ſhall find ſuch ſecurity."

Upon which Mr. Hawkins obſerves, that it ſeemeth clear, that wherever a perſon has juſt cauſe to fear, that another will burn his houſe, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him ſuch miſchief, he may demand the ſurety of the peace againſt ſuch perſon, and that every juſtice of the peace is bound to grant it, upon the party's giving him ſatisfaction upon oath, that he is actually under ſuch fear, and that he has juſt cauſe to be ſo, by reaſon of the other's having threatened to beat him, or lain in wait for that purpoſe; and that he doth not require it out of malice, or for vexation. 1 *Haw.* 127.

Alſo it ſeems the better opinion that he who is threatened to be impriſoned by another, has a right to demand the ſurety of the peace; for every unlawful impriſonment is an aſſault and wrong to the perſon of a man. And the objection, that one wrongfully impriſoned may recover damages in an action, and therefore needs not the ſurety of the peace, is as ſtrong in the caſe of battery as impriſonment; and yet there is no doubt, but that one threatened to be beaten may demand the ſurety of the peace. *id.*

But if the juſtice ſhall perceive that ſurety is demanded merely of malice, or for vexation only, without any juſt cauſe of fear, it ſeemeth he may ſafely deny it. As in common experience we find it, that where a perſon upon a juſt cauſe come and crave the peace againſt another, and hath it granted to him; when ſuch other perſon ſhall come before the juſtice, he likewiſe will crave the peace againſt the former, and will perhaps ſurmiſe ſome cauſe; but yet will nevertheleſs be content to forebeare his ſuit and demand, ſo as the other will relinquiſh to have the peace againſt him: Here the juſtice ſhall do well not to be too forward in granting the peace, thus required by the latter, but to perſuade him, and ſhew him the danger of his oath which he is to take: but yet if he will not be perſuaded, but will take his oath that he is in fear, where indeed he neither doth fear, nor hath cauſe to fear, this oath ſhall diſcharge the juſtice, and the fault ſhall remain on ſuch complainant. *Dalt. c.* 116.

Alſo, if a man will require the peace, becauſe he is at variance, or in ſuit with his neighbour, it ſhall not be granted *id.*

Alſo, Mr. Lambard ſays, he takes it to be ſomewhat clear, that a juſtice may not by the commiſſion award a precept for the peace, in behalf of a man that will require it becauſe he feareth that he will do harm to his ſervants or cattle. *Lamb.* 83.

And Mr Dalton ſays, where a man is in fear that another will hurt his ſervants, or his cattle, or other goods, this ſurety of the peace ſhall not be granted by the juſtice. But in this caſe Fitzherbert

bert faith, the party may have a ſpecial writ out of the chancery, directed to the ſheriff, that he ſhall cauſe ſuch perſon to find ſurety, that he ſhall do no hurt or damage to the other man in his body, or to his ſervants or goods, and if he will not find ſurety, that then he ſhall arreſt and detain him in priſon until he ſhall find ſurety. *Dalt. c.* 116.

And the reaſon why a man may not have ſureties of the peace againſt another, for that he feareth he will do harm to his ſervants, ſeemeth to be, becauſe it ſhould be the ſervant's fear in ſuch caſe, and not the maſter's; and the ſervant's own oath before the juſtice is neceſſary. And as to his goods it ſeemeth clear, that no ſureties of the peace ought to be granted in that caſe: for the recognizance of the peace when taken, is only that the party ſhall keep the peace towards the king and all his liege people.

But Mr. Dalton ſays, that if a man ſhall threaten to hurt his wife, or child, he thinks he may crave the peace at the juſtice's hands, by the words of the commiſſion, and that the juſtice ought to grant it. *Dalt. c.* 116.

Note alſo, the ſurety of the peace ſhall not be granted, but where there is a fear of ſome preſent or future danger, and not merely for a battery or treſpaſs that is paſt, or for any breach of the peace that is paſt; for this ſurety of the peace is only for the ſecurity of ſuch as are in fear: But the party wronged may puniſh the offender by indictment: and the juſtice, if he ſee cauſe, may bind over the affrayer. *Dalt. c.* 116. That is, he may bind him over to anſwer unto the indictment.

II. At whoſe requeſt it ſhall be granted.

As to this, Mr. Hawkins ſays, It ſeems to be agreed at this day, that all perſons whatſoever, under the king's protection, being of ſane memory, whether they be natural and good ſubjects, or aliens, or excommunicate, or attainted of treaſon, have a right to demand ſurety of the peace. And it is certain, a wife may demand it againſt her huſband threatning to beat her outrageouſly, and that a huſband alſo may have it againſt his wife. 1 *Haw.* 126. *Crom.* 118.

Upon which Maſter Crompton obſerveth, that if the wife in ſuch caſe cannot find ſureties, ſhe ſhall be committed; and ſo, ſays he, a man may be rid of a ſhrew. *Crom.* 118.

And Mr. Dalton ſays, an infant under the age of 14 years, may demand this ſurety, and it ſhall be granted him. *Dalt. c.* 117.

But as to a perſon of *non ſane memory*, Mr. Dalton ſays, this ſurety ſhall neither be granted againſt him nor to him upon his own requeſt; but yet if there ſhall be cauſe, the juſtice ought to provide for his ſafety. *id.*

III. Againſt whom it ſhall be granted.

There ſeems to be no doubt, but that it ought, upon a juſt cauſe of complaint, to be granted by a juſtice of the peace, againſt any perſon

perſon whatſoever, under the degree of nobility, being of ſane memory, whether he be a magiſtrate or private perſon, and whether he be of full age, or under age. But infants and femes covert ought to find ſecurity by their friends, and not to be bound themſelves. And the ſafeſt way of proceeding againſt a peer, is by complaint to the court of chancery or king's bench. 1 *Haw.* 127.

IV. In what manner it ſhall be granted.

It ſeemeth certain, that if the perſon to be bound be in the preſence of the juſtice, he may be immediately committed, unleſs he offers ſureties: and from hence it follows *a fortiori*, that he may be commanded by word of mouth to find ſureties, and committed for his diſobedience: But it is ſaid, that if he be abſent, he cannot be committed without a warrant from ſome juſtice in order to find ſureties, and that ſuch warrant ought to be under ſeal, and to ſhew the cauſe for which it is granted, and at whoſe ſuit (that the party may provide his ſureties) and that it may be directed to any indifferent perſon. 1 *Haw* 128.

The juſtice may make the warrant, to bring the party before himſelf or ſome other juſtice, or he may make it to bring the party before himſelf only: for he that maketh the warrant for the moſt part hath the beſt knowledge of the matter, and therefore he is the fitteſt to do juſtice in the caſe. 5 *Co.* 59.

As to the granting proceſs of the peace or good behaviour, out of the chancery or king's bench, it is enacted by the 21 *J. c.* 8. that it ſhall not be granted but upon motion in open court, and declaration in writing and upon oath, to be exhibited by the party deſiring ſuch proceſs, of the cauſes for which ſuch proceſs ſhall be granted; the motion and declaration to be mentioned on the back of the writ. And if it ſhall afterwards appear, that the cauſes are untrue, the court may order coſts to the party grieved, and commit the offender till paid.

V. How the peace warrant may be ſuperſeded.

It is ſaid, that if one who fears that the ſurety of the peace will be demanded againſt him, find ſureties before any juſtice of the ſame county, either before or after a warrant is iſſued againſt him, he may have a *ſuperſedeas* from ſuch juſtice, which ſhall diſcharge him from arreſt from any other juſtice, at the ſuit of the ſame party, for whoſe ſecurity he has given ſuch ſurety. 1 *Haw.* 129.

In which *ſuperſedeas* it is not neceſſary to name either the ſureties, or the ſums in which they are bound: but yet it is the better form to expreſs them both. *Dalt. c.* 118.

Alſo, it is ſaid, that an appearance upon a recognizance for the peace may be ſuperſeded, by finding ſureties in the chancery or king's bench, and purchaſing a writ teſtifying the ſame: but this practice having been often abuſed, it is enacted by the 21 *J. c.* 8. that

that no writs of *superſedeas*, ſhall be granted out of the chancery or king's bench; but upon motion in open court, and on ſufficient ſureties, as ſhall appear on oath to the court, to be aſſeſſed in the ſubſidy book, at 5l. lands, or 10l. goods; and unleſs it ſhall alſo firſt appear to the court, that the proceſs of the peace or good behaviour is proſecuted againſt him, deſiring ſuch *ſuperſedeas bona fide* by ſome party grieved in that court, out of which the *ſuperſedeas* is deſired to be awarded. 1 *Haw.* 120.

VI. How the peace warrant ſhall be executed.

It can be executed only by the perſons to whom it is directed, or ſome of them unleſs it be directed to the ſheriff, who may either by parol, or by precept in writing, authoriſe an officer ſworn and known, to ſerve it, but cannot impower any other perſon without a precept in writing. 1 *Haw.* 128.

It ſeems generally agreed, that where a perſon authoriſed by warrant of a juſtice of the peace, to compel a man who is ſheltered in an houſe, to find ſureties for the peace or good behaviour, is denied quietly to enter into it, he may juſtify breaking open the doors in order to take him; but he muſt firſt ſignify to thoſe in the houſe the cauſe of his coming, and requeſt them to give him admittance. 2 *Haw.* 85.

If the warrant ſpecially direct that the party ſhall be brought before the juſtice who made it, the officer ought not to carry him before any other: but if the warrant be general, to bring him before any juſtice of the peace, the officer has the election to bring him before what juſtice he pleaſeth, and may carry him to priſon for refuſing to find ſurety before ſuch juſtice. 1 *Haw* 128.

And if the party is carried before another juſtice, and not before him who iſſued the warrant, ſuch other juſtice muſt take the ſurety, and bind him by recognizance in all points as the form of the precept doth require. And thereupon ſuch other juſtice, having ſo taken ſurety of the peace, may and ought upon requeſt, to make his *ſuperſedeas* to all officers, and to all other juſtices of the ſame county; and thereby the ſaid party ſhall be diſcharged from finding other ſurety, and from any other arreſt for the ſame cauſe. But by ſuch *ſuperſedeas*, the other juſtice cannot diſcharge the warrant of the firſt juſtice, until the party be bound indeed, nor give any other day to the party to appear. *Dalt. c.* 118.

If the warrant be in the common form, requiring the officer to cauſe the party complained of to come before the juſtice to find ſufficient ſurety, and if he ſhall refuſe ſo to do, to convey him immediately to priſon, without expecting any further warrant, until he ſhall willingly do the ſame, the officer who ſerves it, before he makes any arreſt, ought firſt to require the party to go with him, and find ſureties according to the purport of the warrant; but upon refuſal to do either, that is, either to go before the juſtice, or to find ſureties, he may carry him to the gaol by force of the ſame warrant, without more. 1 *Haw.* 128. *Dalt. c.* 118.

And

And yet the conſtable, or officer, may bring him in that caſe before the juſtice; and if he refuſes there to give ſureties, he may commit him without any further warrant or *mittimus*. 2 *H. H.* 112.

Nevertheleſs, notwithſtanding theſe great authorities, it may not be convenient for the juſtice, to leave ſo much to the conſtable's judgment, as to determine what ſhall or ſhall not be deemed a refuſal to find ſuch ſureties: for that the conſtable is conſtituted a judge in ſuch caſe by no law. And much leſs doth it ſeem adviſeable, to require in the warrant, as is uſual, that the conſtable ſhall carry the party to gaol, if he ſhall refuſe to find ſufficient ſureties: for it doth not appear, how the conſtable can any way be deemed a competent judge of that; for it is certain, that he cannot adminiſter an oath to ſuch ſureties, or others, whereby to inform himſelf of ſuch ſufficiency.

If the officer do arreſt the party, and do not carry him before the juſtice to find ſureties; or upon the refuſal of the party, if the officer ſhall arreſt him, and do not carry him to the gaol, in both theſe caſes the officer is puniſhable by the juſtices for his neglect, by indictment and fine at their ſeſſions: And alſo the party arreſted may have his action of falſe impriſonment for the arreſt; for where the officer doth not purſue the effect of his warrant, his warrant will not excuſe him of that which he hath done. *Dalt. c.* 118.

When the party cometh before the juſtice, he muſt offer ſureties, or elſe the juſtice may commit him: for the juſtice needeth not to demand ſurety of him. *Dalt. c.* 118, 169.

If the juſtice was deceived in the ſufficiency of the ſureties, he or any other juſtice, may afterwards compel the party to find and put in other ſufficient ſureties, and may take a new recognizance for the ſame. *Dalt. c.* 110, 119.

But if the ſureties die, the party principal ſhall not be compelled to find new ſureties. *Dalt. c.* 119. Becauſe their executors or adminiſtrators are liable.

Alſo if a man, that was bound to keep the peace, hath broken his bond, the juſtices ought of diſcretion to bind him anew. *Lamb.* 78.

But not until he be thereof convicted by due courſe of law: for before conviction, he ſtandeth indifferent, whether he hath forfeited his recognizance or not. *Crom* 125.

VII. What ought to be the form of a recognizance for the peace.

The recognizance which the juſtice takes for the keeping of the peace, is rather of congruity, than by any expreſs authority given either by the common law, or by ſtatute. *Dalt. c.* 168.

If it is taken in purſuance of a writ of *ſupplicavit*, it muſt be wholly governed by direction of ſuch writ: but if it be taken before a juſtice, upon a complaint below, it ſeems that it may be regulated

lated by the diſcretion of ſuch juſtice, both as to the number and ſufficiency of the ſureties, and the largeneſs of the ſum, and the continuance of the time for which the party ſhall be bound. And it hath been ſaid, that a recognizance to keep the peace, as to any perſon, for a year, or for life, or without expreſſing any certain time (in which caſe it ſhall be intended for life) or without fixing any time or place for the party's appearance, or without binding him to keep the peace againſt all the king's people in general, is good. 1 *Haw.* 129.

However it ſeems to be the ſafeſt way, to bind the party to appear at the next ſeſſions of the peace, and in the mean time to keep the peace as to the king and all his liege people, eſpecially as to the party, according to the common form of precedents. 1 *Haw.* 129.

VIII. How ſuch recognizance ſhall be certified.

If it be taken by a writ of *ſupplicavit*, it needs not be certified till the juſtice receive a writ of certiorari to that purpoſe. But if it be taken upon a complaint below, it muſt be certified, ſent, or brought to the next ſeſſions, by force of the ſtatute of the 3 *H.* 7. *c.* 1, that the party ſo bound may be called. 1 *Haw.* 130.

IX. How ſuch recognizance may be forfeited.

There are divers things which may be done againſt the peace, and divers offences for which an indictment againſt the peace will lie; and yet the committing or doing ſuch offence or act ſhall be no forfeiture of the recognizance for the peace: for that the act that ſhall cauſe a forfeiture of ſuch recognizance muſt be done or intended unto the perſon as is aforeſaid, or in terror of the people. Therefore to enter into lands, where he ought to bring his action: or to diſſeize another of his lands: or to enter into lands or tenements with force, being without offer of violence to any man's perſon, and without public terror; or to do a treſpaſs in another man's corn or graſs: or to take away another man's goods wrongfully, ſo it be not from his perſon: or to ſteal another man's horſe, or other goods felonioufly, being not from his perſon: All theſe, and the like, are breaches of the peace, and yet theſe will make no breach of this recognizance, nor breach of the peace within the meaning of the commiſſion of the peace. *Dalt. c.* 121.

More particularly: The recognizance is forfeited, if the party make default of appearance, and the ſame default ſhall be recorded. 3 *H.* 7. *c.* 1.

If the party have any excuſe, for his not appearing, it ſeems that the ſeſſions is not bound peremptorily to record his default, but may equitably conſider of the reaſonableneſs of ſuch excuſe. 1 *Haw.* 130.

And Mr. Dalton ſays, in caſe of the ſickneſs of the party, ſo

that he cannot appear, he has known that the juſtices upon due proof thereof have forborn to certify or record ſuch forfeiture or default; and that they have taken ſureties for the peace of ſome friends of his preſent in court, until the next ſeſſions; for that the principal intent of the recognizance was but the preſervation of the peace. But he queries how this is warrantable by their oath. *Dalt. c.* 120.

Alſo, there is no doubt, but that it may be forfeited by any actual violence to the perſon of another, whether it be done by the party himſelf or by others thro' his procurement: as manſlaughter, rape, robbery, unlawful impriſonment, and the like. 1 *Haw.* 130.

Alſo it hath been holden, that it may be forfeited by any treaſon againſt the king's perſon, and alſo by any unlawful aſſembly in terror of the people, and even by words directly tending to a breach of the peace, as challenging one to fight, or in his preſence threatning to beat him. *id.*

Otherwiſe it is if the party be abſent; and yet if the party ſo bound ſhall threaten to kill or beat a perſon who is abſent, and after ſhall lie in wait for him to kill or beat him, this is a forfeiture of the recognizance. *Dalt. c.* 121.

However, it ſeems that it ſhall not be forfeited by bare words of heat and choler, as the calling a man knave, teller of lies, raſcal, or drunkard; for tho' ſuch words may provoke a choleric man to break the peace, yet they do not directly challenge him to it, nor does it appear that the ſpeaker deſigned to carry his reſentment any farther: And it hath been ſaid, that even a recognizance for the good behaviour ſhall not be forfeited for ſuch words; from whence it follows *a fortiori*, that a recognizance for the peace ſhall not. 1 *Haw.* 130.

Alſo, there are ſome actual aſſaults on the perſon of another, which do not amount to a forfeiture of ſuch recognizance; as if an officer, having a warrant againſt one who will not ſuffer himſelf to be arreſted, beat or wound him in the attempt to take him; or if a parent in a reaſonable manner chaſtiſe his child; or a maſter his ſervant, being actually in his ſervice at the time; or a ſchoolmaſter his ſcholar; or a gaoler his priſoner; or even a huſband his wife, as ſome ſay; or if one confine a friend who is mad, and bind and beat him, in ſuch a manner as is proper in his circumſtances; or if a man force a ſword from one who offers to kill another therewith; or if man gently lay his hands upon another, and thereby ſtay him from inciting a dog againſt a third perſon; or if a man beat another (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to diſpoſſeſs him of his lands or goods, or the goods of another delivered to him to be kept, and will not deſiſt upon laying his hands gently on him, and diſturbing him; or if a man beat, or as ſome ſay, wound, or maim one who makes an aſſault upon his perſon, or that of his wife,

wife, parent, child, or master, especially if it appears that he did all he could to avoid fighting before he gave the wound: or if a man fight with, or beat one who attempts to kill any stranger: or if a man even threaten to kill one, who puts him in fear of death, in such a place where he cannot safely fly from him; or if one imprison those whom he sees fighting, till the heat is over. 1 *Haw.* 130, 131.

X. *How the recognizance being forfeited shall be proceeded on.*

It is said, that the justices cannot in any case proceed against the party, for a forfeiture of his recognizance, either in respect of his not appearing, or breaking the peace: but that the recognizance itself, with the record of default of appearance, ought to be removed into some of the courts at *Westminster*, who shall proceed by *scire facias* upon such recognizance: And so it ought to be, if it be presented by the jury, or great inquest, that the party hath forfeited his recognizance, by breach of the peace. 1 *Haw.* 130. *Dalt. Old Ed.* c. 70.

XI. *How such recognizance may be discharged.*

He who is bound to the peace, and to appear at a certain day, must appear at that day, and record his appearance, altho' he who craved the peace cometh not to desire that it may be continued: otherwise the recognizance cannot be discharged. *Dalt. c.* 120.

If the recognizance be made to keep the peace generally, without any time or day limited, it shall be construed to be during the party's life, and this the justice may do upon reasonable cause, but if such surety be so taken, during the offender's life, neither the king nor the justice, nor the party, can release or discharge it. And therefore the justice must be well advised how he granteth such surety. *Dalt. c.* 119. 120.

But it seems to be agreed, that it may be discharged by the death or demise of the king in whose reign it was taken, or of the principal party who was bound thereby, if it were not forfeited before. 1 *Haw.* 129.

Also, it hath been holden, that it may be discharged by the release of the party at whose complaint it was taken, being certified together with it; but this may justly be questioned, because the recognizance is not to the subject but to the king: and consequently cannot be discharged by the subject, who is not a party to it, however, such a release will be a good inducement to the court, to which such a recognizance shall be certified, to discharge it. 1 *Haw.* 129.

And if a man be bound to keep the peace towards the king and all his people, but not towards any person certain, and to appear at such a sessions, the court at that sessions may make proclamation, that if any man can shew cause, why the peace granted against such

a one

a one shall be continued, he shall speak: and if no person cometh to demand the peace against him, or to shew cause why it should be continued, then the court may discharge him. But if a man be bound as aforesaid, and *especially to keep the peace towards a certain person*, though such person cometh not to desire the peace may be continued, yet the court by their discretion may bind him over till the next sessions, and that may be to keep the peace against that person only if they shall think good; for it may be that the person who first craved the peace is sick, or otherwise letted, so as he cannot come to that sessions to demand the continuance of the peace further. *Dalt. c.* 120.

Also it is certain, that such a recognizance cannot be pardoned or released by the king, before it is broken; because the subject hath a kind of interest in it, but being forfeited, then the king, and no other, may release and pardon the forfeiture. 1 *Haw.* 129.

And it is said, that the sureties are not discharged by their death, but that their executors or administrators (as hath been said) do continue bound. 1 *Haw.* 129. *Dalt. c.* 120.

Likewise, if the party be imprisoned for default of sureties, and after, he that demanded the peace against him happen to die, it seemeth the justice may make his liberate or warrant for the delivery of such prisoner, for after such death, there seemeth no cause to continue the other in prison. Also, any justice may, upon the offer of such prisoner, take surety of him for the peace, and may thereupon deliver him. *Dalt. c.* 118.

SURETY for the GOOD BEHAVIOUR.

A MAN may be compelled to find sureties, both for the good behaviour and for the peace; and yet the good behaviour includeth the peace: and he that is bound to the good behaviour, is therein also bound to the peace. *Dalt. c.* 122.

This surety for the good behaviour being of near affinity to surety for the peace, both as to the manner in which it is to be taken, superseded, and discharged, it seemeth not to require a particular consideration, save only as to these two points:

I. For what misbehaviour it is to be required.
II. For what it shall be forfeited.

I. For what misbehaviour it is to be required.

It doth not appear that the conservators of the peace at common law had any power as touching the good behaviour, further than as it hath a relation to the peace; and not as it is contra-distinguished from it. And it seemeth, that the power which the justices of the peace do exercise at this day, in relation thereunto, doth solely depend upon the commission of the peace, and the statute of the 34

Ed.

Ed. 3. *c.* 1. (except in some special instances wherein the power of binding to the good behaviour, is given to them by particular statutes, which pertain not to this general title)

The words in the commission are these: 'We have assigned you, 'jointly and severally, and every one of you, our justices to keep 'our peace; and to cause to come before you, or any of you, all 'those who to any one or more of our people, concerning their 'bodies, or the firing their houses, have used threats, to find sufficient security for the peace, or their good behaviour towards us 'and our people; and if they shall refuse to find such security, 'then them in our prisons, until they shall find such security, to 'cause to be safely kept.'

The statute of the 34 *Ed.* 3. c. 1. as to this matter runs thus: 'In every county shall be assigned for the keeping of the peace, 'one lord, and with him three or four of the most worthy in the 'county, with some learned in the law; and they shall have power to restrain the offenders, rioters, and all other barrators, and 'to pursue, arrest, take and chastise them according to their trespass or offence; and to cause them to be imprisoned and duly punished, according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; and also to inform them, and to 'inquire of all those that have been pillors and robbers in the parts 'beyond the sea, and be now come again, and go wandring, and will 'not labour as they were wont in times past; and to take and arrest all those that they may find by indictment or by suspicion, and 'to put them in prison; and to take of all them that be not of 'good fame, where they shall be found, sufficient surety and mainprize of their good behaviour towards the king and his people, and the other duly to punish, to the intent that the people 'be not by such rioters or rebels troubled nor endamaged, nor the 'peace blemished, nor merchants nor other passing by the highways 'of the realm disturbed, nor put in the peril which may happen of 'such offenders.'

This statute seems to have had in view chiefly the disorders to which the country was then liable, from great numbers of disbanded soldiers, who having served abroad in the wars of that victorious king, were grown strangers to industry, and were rather inclined to live upon rapine and spoil. *Barl.* 524.

But whatever the natural and obvious sense of it may be, when compared with the history and circumstances of those times, it is certain it hath been carried much farther by construction, and the purport of it hath been extended by degrees, until at length there is scarcely any other statute, which hath received such a largeness of interpretation.

And that I may proceed with clearness in a matter so essential to the office of a justice of the peace, I will set down the several expositions which have been given of this statute from time to time, by

by learned men, and then raiſe ſuch obſervations thereupon, as the ſubject will naturally ſuggeſt.

The firſt unfolding of the ſenſe of this ſtatute which hath occurred, was in the caſe of Sir Richard Croftes, and Sir Richard Corbet, in the ſecond year of the reign of king Hen. 7. wherein it was reſolved by all the judges for that purpoſe aſſembled, that he who is bound to the good behaviour, ought not do any thing which ſhall be the cauſe of breach of the peace or to put the people in fear, dread, or trouble; and ſo ſhall be intended of all things which concern the peace: But not in miſdoing of other things, which touch not the peace. Yet a diverſity was obſerved, between a breach of the peace, and a breach of the good behaviour; for the peace is not broken without an affray or battery, but the good behaviour may be forfeited by the number of people a man has, and by their harneſs, or weapons, and the like, altho' they break not the peace. 2 *H* 7. 2.

The ſecond inſtance, and upon which much ſtreſs hath been laid, was in the 13th year of the ſame king In treſpaſs of aſſault, battery, and impriſonment, at D. the defendant ſaith that one Alice B. had a houſe in the ſame town, and kept there ſuſpicious people, to wit, of common bawdry, and that the plaintiff oftentimes reſorted to the ſame houſe ſuſpiciouſly, with women of bad fame and name, whereby the conſtable of the ſame town, required the defendant to aid him to arreſt the plaintiff to find ſurety of his good behaviour: whereby the defendant came with the ſaid conſtable at the hour of 12 in the night, and him found ſuſpiciouſly in the ſame place; whereupon he took him, and put him in ward: And it was holden by all the juſtices to be a good juſtification; for they ſaid, that it is lawful for every conſtable to take ſuſpected perſons, which wake in the night, and ſleep in the day, or that keep ſuſpicious company. 13 *H.* 7. 80.

In the next place, Sir Anthony Fitzherbert. who lived in the reign of K. Hen. 8. ſaith, that it ſeemeth that one juſtice may, by the commiſſion, iſſue a warrant againſt a perſon to find ſurety of the good behaviour, by his diſcretion. as well as two juſtices may and the words of the ſtatute of the 34 *Ed.* 3. are to the ſame effect: Otherwiſe, he ſays, damage may happen to ſome of the king's ſubjects, if the party be not attached before that two juſtices have made the precept; yet, he ſays, the common uſage is, to make ſuch precept of the good behaviour in the name of two juſtices, and it is good to obſerve this direction. *Fitzh.* 7. *Crom* 122

In the next place, it is proper to take notice of a caſe adjudged in a court of king's bench. in the 30th of Q. Eliz. reported by lord Coke, 4 *Inſt.* 181. which was thus: At a ſeſſions at Bridgewater, in the county of Somerſet, one W. King with ſureties was bound by recognizance to appear at the next general ſeſſions of the peace in the ſame county, and in the mean time to be of the good behaviour towards the queen and all her people. And after at the next

ſeſſions,

ſeſſions, W King appeared, and was indicted for ſlanderous words ſpoken ſince his binding, to wit, for ſaying at one time, to Edward Kyrton eſquire, 'Thou art a pelter, thou art a liar, and haſt told my lord lies' And he was further indicted, that ſince the ſaid recognizance, 'the cloſe of one John Wich with force and arms he broke and entered, and the cattle of the ſaid John depaſturing in the ſaid cloſe unlawfully vexed and chaſed.' And afterwards at another time he ſaid to the ſaid Kyrton, 'thou art a drunken knave.' Which indictment was removed into the king's bench. And hereupon it was debated divers times both at the bar and the bench, whether admitting all that was contained in the indictment to be true, any thing therein was in judgment of law a breach of the ſaid recognizance And it was reſolved, that neither any of the words, nor the treſpaſs, were any breach of the good behaviour, for that none of them did tend immediately to the breach of the peace: for tho' the ſaid words 'thou art a liar, thou art a drunken knave,' are provocations, yet they tend not immediately to the breach of the peace; as if William King had challenged Kyrton to fight with him, or had threatened to beat or wound him, or the like, theſe tend immediately to the breach of the peace, and therefore are breaches of the recognizance of the good behaviour. And this diverſity (lord Coke ſays) was juſtly collected upon the coherence and context of the ſtatute of the 33 *Ed.* 3. whereby juſtices are aſſigned for keeping of the peace, and to reſtrain the offenders, riotters and all other barrators and to chaſtiſe them according to their treſpaſs and offences and to inquire of pillors and robbers in the parts beyond the ſeas, and be now come again, and go wandering and will not labour: And thus much for the puniſhment of offences againſt the peace after they be done. Then followeth an expreſs authority given to the juſtices, for prevention of ſuch offences before they be done, namely, 'and to take of all them that be not 'of good fame (that is, that be defamed and juſtly ſuſpected and in-'tend to break the peace) where they ſhall be found, ſufficient 'ſurety and mainprize of their good behaviour towards the king 'and his people (which muſt concern the king's peace, as is alſo 'provided by the words ſubſequent) to the intent that the people 'be not by ſuch rioters troubled or endamaged, nor the peace 'blemiſhed, nor merchants nor others paſſing by the highways diſ-'turbed, nor put in the peril that may happen of ſuch offenders.' And as for the the treſpaſs; altho' every wrongful treſpaſs is by force and arms, and againſt the peace, yet theſe are not taken to be ſuch as ſhall make a breach of the good behaviour.

After this Mr. Lambard, who wrote towards the beginning of the reign of K. James I. ſaith thus: Surety of the good abearing is of great affinity with that of the peace, as being provided for preſervation of the peace, as that other is: for in the commiſſion of the peace, they are both conveyed under one tract of ſpeech, againſt ſuch as threaten to hurt men's bodies, or fire their houſes: which things

things (he says) are now commonly prevented by surety of the peace only.

And in the 2 *H.* 7. 2. (above recited) the surety of the good abearing is set forth to rest in this point chiefly, that a man do nothing that may be cause of a breach of the peace: and that it doth not consist in the observation of things that concern not the peace: and that it should differ from surety of the peace in this, that where the peace is not broken without an affray, or battery, or such like, this surety may be broken by the number of a man's company, or by his or their weapons or harness.

And herewithal (he says) do also agree certain precedents in the king's bench.

But all this notwithstanding, he thinks that a man may reasonably affirm, that the surety of the good abearing should not be restrained to so narrow bounds.

In proof of which, he proceeds to comment on the abovementioned statute of the 34 *Ed.* 3. enabling the keepers of the peace, to 'take all of them that be not of good fame, where they shall be 'found sufficient surety and mainprize of their good abearing, to-'wards the king and his people:' So that if a man be defamed, he may by virtue hereof be bound to his good behaviour at the discretion of the justices. Now the doubt resteth in this, to understand concerning what matters this defamation must be: and this (he thinks) may be partly gathered out of the said statute: for after it hath first given power to the wardens of the peace to arrest and chastise offenders (that is to say, against the peace, rioters and barators) then it willeth them to 'inquire of such as having been robbers 'beyond the sea, were come over hither, and would not labour as 'they were wont:' and lastly, it authorizeth them, 'to take surety 'of the good behaviour of such as be defamed,' namely, for any of those former offences; for so it standeth well together, that they shall both punish such as have already so offended, and shall also provide, that others shall not likewise offend.

But he says, the further this bond of the good abearing doth extend, the more regard there ought to be taken in the awarding of it; and therefore (says he) altho' the justices have power to grant it, either by their own discretion or upon the complaint of others, even as they may that of the peace, yet I wish rather, that they do not command it but only upon sufficient cause seen to themselves, or upon the complaint of other very honest and credible persons.

And then being about to set forth the form of a warrant, and of a recognizance for the good behaviour, he says, ——And here, forasmuch as one justice alone, and out of sessions, may both by the first clause of the commission, and also by the opinion of Fitzherbert, grant this surety of the good abearing (altho' the common practice be, that two such justices do join in that doing, whereof also Fitzherbert hath very good liking) I will not stick to set forth the common forms as well of the precept as of the recognizance of the same,

wherein

wherein if I shall use the names of two justices, you must take that to be done according to the common fashion, and not of any necessity in law. For as I would more gladly use the assistance of a fellow justice in this behalf, if I may conveniently have it: so if that may not be gotten, I would not greatly fear, when good cause shall require, to undertake the thing myself alone.

And besides this, he says, you may see admitted by the opinion of the court, 13 *H.* 7. that if a man in the night season, haunt a house that is suspected for bawdry, or use suspicious company, then may the constable arrest him to find surety for his good abearing; for bawdry is not merely a spiritual offence, but mixed, and founding somewhat against the peace of the land.

And therefore (says he) it shall not be amiss at this day, in my slender opinion, to grant surety of the good abearing, against him that is suspected to have begotten a bastard child, to the end that he may be forthcoming when it shall be born: for otherwise there will be no putative father found, when the justices shall after the birth come to take order for his punishment. *Lamb.* 115—119.

In the next place, Mr Pulton, who lived about the same time with Mr. Lambard, writeth thus: The surety of the good abearing is ordained for the preservation of the peace, and it doth differ in nothing from that of the peace, but that there is more difficulty in the performance of it, and the party bound may sooner slide into the peril and danger of it. The surety of good abearing is most commonly granted in open sessions, or by two or three justices, or upon a *supplicavit*, and great cause shewed and proved, it is granted in the chancery or king's bench. And though one justice alone may grant it if he will; yet it is seldom done so, unless it be to prevent some great, sudden, and imminent enormity or danger. The surety of the peace is most times taken at the request of one for the preservation of the peace chiefly against one. But the surety of the good abearing is oftentimes granted at the suit of divers, and those must be men of credit, and to provide for the safety of many; for the effect and purport thereof is, that the party bound shall demean himself well in his port, behaviour, and company, and do nothing that may be the cause of breach of the peace, or in putting the people in fear or trouble: And it is chiefly granted against common barators, common rioters, common quarrellers, common peace breakers, and persons greatly defamed for resorting to houses suspected to maintain incontinency or adultery, and against those that be generally feared to be robbers or spoilers of the king's people, or which do endamage, disturb, trouble, or put in peril passengers by the way. *Pult.* 18.

Afterwards Mr. Dalton, who wrote towards the latter end of king James the first his reign, says, The surety of the good behaviour is of great affinity with that of the peace, and is provided chiefly for the preservation of the peace, and that it is most commonly granted either in the open sessions, or by two or three jus-

tices out of ſeſſions. Yet by the words of the commiſſion, as alſo by the common opinion of the learned, one juſtice alone, out of ſeſſions, may grant this ſurety of the good behaviour. But this is not uſual, unleſs it be to prevent ſome great and ſudden danger; eſpecially againſt a man that is of any good eſtate, carriage or report. And it ſhall be good diſcretion in the juſtices, that they do not grant it, but either upon ſufficient cauſe ſeen to themſelves, or upon the ſuit or complaint of others, and the ſame very honeſt and credible perſons. *Datt. c.* 123.

In the next place, Mr. Hawkins, who wrote in the reign of K. George the firſt, ſaith thus: There ſeem to have been ſome opinions, that the ſtatute, ſpeaking of thoſe that be not of good fame, means only ſuch as are defamed, and juſtly ſuſpected, that they intend to break the peace, and that it doth not any way extend to thoſe who are guilty of other miſbehaviours not relating to the peace. But this ſeems much too narrow a conſtruction; ſince the abovementioned expreſſion of perſons of evil fame, in common underſtanding, as properly includes perſons of ſcandalous behaviour in other reſpects, as thoſe who by their quarrelſome behaviour give juſt ſuſpicion of their readineſs to break the peace: and accordingly it ſeems always to have been the better opinion, that a man may be bound to his good behaviour for many cauſes of ſcandal, which give him a bad fame, as being contrary to good manners only; as for haunting bawdy houſes with women of bad fame; or for keeping bad women in his own houſe; or for ſpeaking words of contempt of a ſuperior magiſtrate, as a juſtice of the peace, or mayor, though he be not then in the actual execution of his office; or of an inferior officer of juſtice, as a conſtable, and ſuch like, being in the actual execution of his office.

However it ſeems the better opinion, that no one ought to be bound to the good behaviour, for any raſh, quarrelſome, or unmannerly words, unleſs they either directly tend to a breach of the peace, or to ſcandalize the government, by abuſing thoſe who are intruſted by it with the adminiſtration of juſtice, or to deter an officer from doing his duty: and therefore it ſeems, that he who barely calls another rogue, or raſcal, or teller of lies, or drunkard, ought not for ſuch cauſe to be bound to the good behaviour.

However, ſays he, I cannot find any certain preciſe rules for the direction of the magiſtrate in this reſpect, and therefore am inclined to think, that he has a diſcretionary power to take ſuch ſurety of all thoſe whom he ſhall have juſt cauſe to ſuſpect to be dangerous, quarrelſome, or ſcandalous; as of thoſe who ſleep in the day, and go abroad in the night, and of ſuch as keep ſuſpicious company, and of ſuch as are generally ſuſpected to be robbers, and the like; and of eves droppers, and common drunkards, and all other perſons whoſe miſbehaviour may reaſonably be intended to bring them within the meaning of the ſtatute, as perſons of evil fame, who being deſcribed by an expreſſion of ſo great latitude, ſeem in a great

meaſure

meaſure to be left to the judgment of the magiſtrate. But if he commit one for want of ſureties, he muſt ſhew the cauſe with convenient certainty. 1 *Haw* 132.

And thus the ſenſe of the ſtatute hath been extended, not only to offences immediately relating to the peace, but to divers miſbehaviours not directly tending to a breach of the peace; inſomuch as it is difficult to define how far it ſhall extend, and where it ſhall ſtop.

Mr. Dalton in order to determine the ſame with ſome kind of certainty, hath (notwithſtanding his opinion as abovementioned) inſerted a number of inſtances, wherein ſureties of the good behaviour may be granted, and they are theſe that follow:

1. Againſt rioters.
2. Barators.
3. Common quarrellers, and common breakers of the peace.
4. Such as lie in wait to rob, or ſhall be ſuſpected to lie in wait to rob, or ſhall aſſault or attempt to rob another, or ſhall put paſſengers in fear or peril; or ſhall be generally ſuſpected to be robbers by the highway.
5. Such as are like to commit murder, homicide or other grievances to any of the king's ſubjects in their bodies.
6. Such as ſhall practiſe to poiſon another: one inſtance of which may be the poiſoning their food, thus Mr. Dalton granted the good behaviour againſt one who had bought ratſbane, and mingled it with corn, and then caſt it amongſt his neighbours fowls, whereby moſt of them died.
7. Such as in the preſence or hearing of the juſtice, ſhall miſbehave himſelf in ſome outrageous manner of force or fraud.
8. Such as are greatly defamed for reſorting to houſes ſuſpected to maintain adultery, or incontinency.
9. Maintainers of houſes commonly ſuſpected to be houſes of common bawdry.
10. Common whoremongers and common whores; for bawdry is an offence temporal as well as ſpiritual, and is againſt the peace of the land.
11. Night walkers, that ſhall eves-drop men's houſes, or ſhall caſt men's gates, carts, or the like, into ponds, or commit other outrages and miſdemeanors in the night, or ſhall be ſuſpected to be pilferers, or otherwiſe like to diſturb the peace, or that the perſons are of ill behaviour, or of evil fame or report generally, or that ſhall keep company with any ſuch, or with any other ſuſpicious perſon in the night.
12. Suſpected perſons who live idly, and yet fare well, or are well apparelled, having nothing whereon to live; unleſs upon examination they ſhall give a good account of ſuch their living.
13. Common gameſters, eſpecially if they have not whereupon to live.
14. Such as raiſe hue and cry without cauſe.

15. Libellers.

15. Libellers.

16. Putative father of a baſtard child.

17. Such as perſuade or procure the putative father to run away, or the mother, to be conveyed away, whereby ſhe leaveth her child to the charge of the town.

18. Such as abuſe a juſtice's warrant, or ſhall abuſe him or the conſtable in executing their office. Nay, it ſeemeth (he ſays) that he who ſhall uſe words of contempt, or contrary to good manners, againſt a juſtice of the peace, though it be not at ſuch a time as he is executing his office, yet he ſhall be bound to his good behaviour.

19. Such as charge another before a juſtice with felony, riot, or forcible entry, and yet will not proſecute or give evidence.

20. In general, whatſoever act or thing is of itſelf a miſbehaviour, is cauſe ſufficient to bind ſuch an offender to the good behaviour. *Dalt c.* 124.

To which others have added other inſtances: As,

21. Forcible entry. 1 *Haw.* 124.

22. Mr. Hawkins ſays, that he hath heard it agreed in the court of king's bench, that a writing full of obſcene ribaldry, without any kind of reflection upon any one, is not puniſhable at all by any proſecution at common law; yet it ſeems, he ſays, that the author may be bound to his good behaviour, as a ſcandalous perſon of evil fame. *id.* 125.

23. A man did beat a woman in Weſtminſterhall, and he was bound to the good behaviour; and ſo (ſays Mr. Crompton) he may be bound to the peace or good behaviour, where he ſtriketh a perſon in the preſence of the juſtices in ſeſſions. *Crom.* 124.

24. A man was bound to the good behaviour by the court of king's bench, for aſſaulting and threatning a perſon ſo, that he could not attend a court in a ſuit there, without great coſt. And ſo it ſeemeth that it may be done, where one cometh to the ſeſſions, about a traverſe to be tried there, or to prefer a bill of indictment, if he be aſſaulted or threatned, *id.* 125

I have omitted to make any remarks in the progreſs of theſe authorities, being willing to exhibit them together in one view; I proceed now to take notice of ſuch obſervations as do occur upon the whole,

Firſt, it appears from hence, that the univerſal practice of one juſtice binding to the good behaviour, is but of a modern date; altho' the law for it is the ſame now, that it was near 400 years ago: and that it was a long time doubted, whether one juſtice alone could require ſureties of the good behaviour. But here a diſtinction ought to be made, between the power given by the commiſſion of the peace, and the power given by the abovementioned ſtatute: As to the commiſſion, there ſeemeth to be no foundation for any doubt, but that thereby one juſtice alone may require ſuch ſureties: for the words are expreſs, 'we have aſſigned you, jointly and ſeverally, and every

one

one of you :' but then that extends only to two inſtances, namely, to ' the threatening of a perſon concerning his body, or the firing of his houſe.' As to the ſtatute, the doubt ſeems to have ariſen upon this, in that having appointed who ſhall be aſſigned for juſtices, it then directeth, that ' they ſhall have power to reſtrain offenders :' and it is holden, as Mr. Lambard hath obſerved, that if no power be expreſsly given by any ſtatute to any one juſtice alone, he cannot otherwiſe compel the obſervation thereof, than by the help of his fellow juſtices. And Mr. Hawkins ſpeaking hereof in the caſe of riots, ſays, that if one juſtice alone, proceeding upon this ſtatute, ſhall arreſt an innocent perſon as a rioter, it ſeemeth that he is liable to an action of treſpaſs, and the party arreſted may juſtify the reſcuing of himſelf, becauſe no one ſingle juſtice is by this ſtatute made a judge of the ſaid offence : Yet, nevertheleſs, he ſays, by a favourable conſtruction which this ſtatute hath received for the advancement of juſtice, it hath been reſolved, that any one juſtice, upon this ſtatute, ' if he finds the perſons riotouſly aſſembled,' may, without ſtaying for his companions, arreſt the offenders, and bind them to their good behaviour.

Secondly, It ſeemeth from what hath been rehearſed, that the words, *not of good fame*, were generally underſtood for a long time, to refer to ſuch offences only as have a relation to the peace, and not to other things which concern not the peace.

Thirdly, That one great in-let to the larger, and at length almoſt unlimited interpretation of the words, was the caſe abovementioned 13 *H.* 7. wherein it was adjudged to be lawful to arreſt a man for the good behaviour, for frequenting a ſuſpected bawdy houſe, with women of bad fame. And this is the reaſon which Mr. Dalton gives for many of his inſtances above ſpecified, namely, that they are more properly againſt the peace, than this ſame caſe of avowtry.

Fourthly, That when once the gap was opened for the admiſſion of other offences not immediately relating to the peace, they flowed in and multiplied. Thus, in the caſe of baſtardy, having ſome affinity with the other of frequenting bawdy houſes, Mr. Lambard thought, that with equal reaſon the reputed father of a baſtard child might be bound to the good behaviour ; and in a few years after, Mr. Dalton delivers it abſolutely, that he may be ſo bound.

Fifthly, That therefore the natural and received ſenſe of any ſtatute ought not to be departed from without extreme neceſſity ; for that one conceſſion will make way for another, and the latter will plead for the ſame right of admiſſion as the former.

Sixthly, That notwithſtanding the aforeſaid inſtances given by Mr. Dalton and others, it may not be ſafe in all caſes to rely upon every one of them without diſtinction : not only becauſe it is almoſt impoſſible for any two caſes to be exactly alike in all their circumſtances, but alſo becauſe in fact divers of them at different times have been adjudged otherwiſe, and others have not prevailed without

out much difficulty and contradiction in the courts above, and perhaps were at length admitted rather from the conveniency and reasonableness of the thing itself, and from an indulgence usually allowed those gentlemen who serve their county without gain, and oftentimes with much trouble, than from any clear, positive, and express power given to them by the commission, or by the said statute.

Seventhly, That notwithstanding all which hath been said, perhaps the case before recited concerning the frequenting of a suspected bawdy house, will not wholly support the weight which so many authors have laid upon it For the question, whether a justice of the peace had cognizance of the offence, by virtue of the commission of the peace, or of the statute of the 34 *Ed.* 3 was no part of the dispute; for it was an arrest by the constable *ex officio*, as a conservator of the peace at common law, and without any warrant from a magistrate: And the question was not, whether the constable might require sureties for the good behaviour, as a thing different from sureties for the peace, but whether in that case he could arrest all or not.

And if the authority of this case shall be abated, several of the abovementioned instances will abate in proportion.

Eighthly, It is to be observed, that others of the abovesaid instances, were established upon matters originally determined in court of king's bench, and Mr. Crompton himself doth refer to the authority and practice of that court in several instances *Crom* 120. But it doth by no means follow from what the justices of the court of king's bench may do, that justices of the peace may do the like: for their authority is circumscribed and limited by their commission and the statute law.

Ninthly, That it will perhaps abate some other of the foregoing instances, if we attend to this consideration that there is a great difference between what the justices in sessions may do, after conviction by a jury, for an offence committed, and what a single justice out of the sessions may do, before an offence is committed, and to prevent the same from being committed; or what a single justice may do, upon a summary conviction before him, for an offence, as directed by some special act of parliament. The truth is, binding to the good behaviour was a discretionary judgment at the common law, given by a court of record, for an offence at the suit of the king, after a comman law conviction by verdict of twelve men. Trial by his peers is the Englishman's birthright by the great charter, and cannot be taken away but by an authority equal to that which established it, that is, by act of parliament: and therefore where an act gives a summary conviction before a justice of the peace and inflicts a punishment upon such conviction such statute must be pursued both as to the conviction and punishment. And it seemeth incongruous, that a justice of the peace shall have power to bind a man to the good behaviour, for an offence which he himself hath

no

no power to hear and determine; for that is, in effect, giving judgment, and awarding execution, when it doth not, and cannot legally appear to him, that the perſon is guilty.

Tenthly, That therefore upon the whole it may be proper to conclude, that the magiſtrate in this article of the good behaviour, cannot exerciſe too much caution and good adviſement; that in matters which the law hath left indefinite, it is better to fall ſhort of, than to exceed his commiſſion and authority: that to bind a man to the good behaviour upon the ſtatute of *evil fame* in general, may not always be with ſafety; not only becauſe upon an action brought it may be hard to prove ſuch evil fame, but alſo becauſe in fact it is not always true, for many a good man hath been evil ſpoken of: That although in ſome caſes, a juſtice of the peace may have a diſcretionary power (as Mr. Hawkins expreſſeth it) yet he muſt remember withal, that it is a legal diſcretion, as Mr. Barlow terms it, in which in favour of liberty great tenderneſs is to be uſed; or as lord Coke hath defined it, diſcretion is a knowledge or underſtanding to diſcern between truth and falſhood, between right and wrong, between ſhadows and ſubſtance, between equity and colourable gloſſes and pretences, and not to do according to our wills and private affections; and ſuch diſcretion ought to be limited and bounded with the rules of reaſon, law, and juſtice. 5 *Co.* 100. 10 *Co.* 140.

II. For what it ſhall be forfeited.

This hath been handled in part as it fell in with the former ſection: And agreeable to the doctrine there laid down, Mr. Dalton ſays that he who is bound to the good behaviour, ought to demean himſelf well in his carriage and in his company, not doing any thing which ſhall be a cauſe of breach of the peace, or to put the people in fear, dread, or trouble, and ſo ſhall be intended of all things which concern the peace, but not in miſdoing of other things which touch not the peace. *Dalt. c.* 122.

And Mr. Hawkins ſaith, it hath been laid down as a general rule that whatever will be a good cauſe to bind a man to his good behaviour, will forfeit a recognizance for it; but this hath ſince been denied, and indeed ſeems by no means to be maintainable, becauſe the ſtatute in ordering perſons of evil fame to be bound in this manner, ſeems in many places chiefly to regard the prevention of that miſchief which they may be juſtly ſuſpected to be likely to do; and in that reſpect requires them to ſecure the public from that danger which may probably be apprehended from their future behaviour, whether any actual crime can be proved upon them or not; and it would be extremely hard in ſuch caſes to make perſons forfeit their recognizance, who yet may juſtly be compellable to give one, as thoſe who keep ſuſpicious company, or thoſe who ſpend much money idly, without having any viſible means of getting it honeſtly, or thoſe who lie under a general ſuſpicion of being rogues, and the like. 1 *Haw.* 132, 132.

However

However it seems that such a recognizance shall not only be forfeited for such actual breaches of the peace, for which a recognizance for the peace may be forfeited, but also for some others for which such a recognizance cannot be forfeited: as for going armed with great numbers, to the terror of the people, or speaking words tending to sedition; and also for all such actual misbehaviours which are intended to be prevented by such a recognizance, but not for barely giving cause of suspicion of what perhaps may never actually happen. 1 *Haw.* 133.

The justice, at the instance of the party, before he grants his warrant, is to administer an oath to the person who requires the same, which oath is to the following effect:

'You swear, that you are in fear of your life, or some personal 'injury to be done to you by, &c. and that you do not demand the 'peace of him for any malice or revenge, but for your own safety 'and the causes aforesaid.'

This oath being administered, the justice may grant his warrant to bring the party offending before him: which warrant being directed to a sworn officer, he need not shew it to the party, but he ought to inform him of the contents, and then he may justify breaking open doors to take him. *Dalt.* 578.

Warrant for the peace, or good behaviour, in the name of the people.

New-York, } THE people of the state of New-York, by the grace
Suffolk County, } of God, free and independent. To our sheriff of the county of Suffolk, to the constable of Southold, in the said county, and to all and singular our bailiffs and other ministers in the said county, as well within liberties as without, greeting:

Forasmuch as A. I. of in the said county, yeoman, hath personally come before William Nicoll, esq; one of our justices assigned to keep the peace within the said county, and hath taken a corporal oath that he the said A. I. is afraid that A. O. of in the said county, yeoman, will beat (wound, maim, or kill) him the said A. I. and hath therewithal prayed surety of the peace against him the said A. O. [Or, if for the good behaviour, hath taken a corporal oath, that A. O. of in the said county, yeoman, hath threatened to beat him him the said A. I. or, to burn the house of him the said A. I. and hath therewithal prayed surety of the good behaviour against him the said A. O.] Therefore we command and charge you, jointly and severally, that immediately upon the receipt thereof, you bring the said A. O. before the said William Nicoll, to find sufficient surety and mainprise, as well for his personal appearance at the next general quarter sessions of our peace, to be holden at Southold, or elsewhere, in and for the said county, as also for our peace in the mean time, to be kept towards us and all the people of the state, and chiefly towards the said A. I. that is to say, that he the said A. O. shall not do, nor by any means procure or cause to be done any of the said evils, to any of the said people, and especially to the said A. I. [Or, if for the good behaviour, as also for his good behaviour in the mean time, towards us and all the people of the state, and especially towards him the said A. I.]

Witness

Witneſs the ſaid William Nicoll, at Brookhaven, in the ſaid county, the day of in the year of

If the juſtice ſhall think fit that he ſhall be immediately carried to gaol, for default of ſureties, without being brought before him, or any other juſtice, this clauſe may be inſerted, viz.———and eſpecially towards him the ſaid A. I. And if he the ſaid A. O. ſhall refuſe ſo to do, that then immediately, without expecting any further warrant, you him ſafely convey, or cauſe to be ſafely conveyed to our common gaol in the ſaid county, (or, to the houſe of correction at———in the ſaid county) there to remain until he ſhall willingly do the ſame: So that he may be before our ſaid juſtices at the ſaid next general quarter ſeſſions of our peace, then and there to anſwer unto us for his contempt in this behalf. And ſee that you certify your doings in the premiſes, to our ſaid juſtices at the ſaid ſeſſions, bringing then thither this precept with you.

Warrant for the peace or good behaviour, in the name of the juſtice himſelf.

Eſſex, *ſſ.* To the conſtable of, &c. and to the keeper of, &c.

WHEREAS A. B. of, &c. hath this day made oath before me, That he hath been grievouſly threatned by C. D. of, &c. and is afraid that the ſaid C. D. will beat or wound him, he being in fear of his life, whereupon he hath prayed ſurety of the peace againſt him: Theſe are therefore in the people's name, to command you to apprehend the ſaid C. D. and bring him before me, or ſome other juſtice of the peace of the county, to find ſufficient ſecurity for his perſonal appearance at the next general quarter ſeſſions of the peace to be holden for the county aforeſaid, then and there to abide and do what ſhall be enjoined by the ſaid court; and alſo in the mean time to keep the peace, and eſpecially towards the ſaid A. B. And if the ſaid C. D. ſhall refuſe ſo to do, then you are hereby required to convey him to the gaol of, &c. aforeſaid, and to deliver him ſafely to the keeper thereof, commanding alſo you the ſaid keeper, to take the ſaid A. B. into your cuſtody, and him there to keep, until he ſhall find ſecurity for the peace as aforeſaid.—Given, &c.

Another warrant for the peace, or good behaviour.

New-Jerſey, } To any of the conſtables of Woodbridge, in the
Middleſex County. } ſaid county.

FORASMUCH as A. I. of Woodbridge aforeſaid, in the county aforeſaid, yeoman, hath perſonally come before me J. P. eſquire, one of the juſtices of the people aſſigned to keep the peace within the ſaid county; and hath taken his corporal oath, that A. O. of Woodbridge aforeſaid, in the county aforeſaid, yeoman, hath aſſaulted, beaten, and wounded him the ſaid A. I. and further hath threatned him concerning his body, inſomuch that he the ſaid A. I. is afraid that the ſaid A. O. will beat, wound, maim or kill him the ſaid A. I. or do him ſome other bodily harm, and thereupon he the ſaid A. I. hath prayed ſecurity of the peace [or of the good behaviour] to be had or granted to him the ſaid A. O. Theſe are therefore to require you in the name of the people of the ſtate of New-Jerſey, immediately upon the ſight hereof, to bring the ſaid A. O. before me, to find ſufficient ſureties for his perſonal appearance at the next general quarter ſeſſions of the peace to be holden in and for the ſaid county,

county, then and there to anſwer the premiſes, and in the mean time that he the ſaid A. O. keep the peace, [or ſhall be of the good behaviour] towards the people of the ſaid ſtate, and eſpecially towards the ſaid A. I. Given under my hand and ſeal at Woodbridge in the ſaid county, the——day of——in the——year of

Note: The warrants above ſet forth, ſo far as they concern the good behaviour, are framed upon the clauſe in the commiſſion, impowering one juſtice to bind to good behaviour certain offenders therein mentioned. The following warrant for the good behaviour ſimply, as contradiſtinguiſhed from the peace, is formed on the ſtatute of the 34 *Ed.* 3. ſo often abovementioned.

Warrant for the good behaviour, on the 34 Ed. 3. c. 1. from Lambard and Dalton.

New-Jerſey, Eſſex County. WILLIAM WINDER, eſquire, and Richard Honeywood, eſquire, juſtices of the people aſſigned to keep the peace within the ſaid county. To the ſheriff of the ſaid county, to the conſtables of the township of Newark, in the ſaid county, and to all and ſingular bailiffs, conſtables and other officers of the people of the ſtate of New-Jerſey, as well within liberties as without, in the ſame county greeting.

Forasmuch as we are given to underſtand, by the information, teſtimony, and complaint of many credible perſons, that A. O. of Newark, in the county aforeſaid, gentleman, and B. O. of the ſame, yeoman, are not of good name and fame, nor of honeſt converſation, but evil doers, rioters, barrators, and diſturbers of the peace of the people of ſaid ſtate, ſo that murder, homicide, ſtrifes, diſcords, and other grievances and damages amongſt the people concerning their bodies are likely to enſue thereby: Therefore on the behalf of the people of ſaid ſtate, we command you and every of you, that you omit not by reaſon of any liberty within the county aforeſaid, but that you attach, or one of you do attach the aforeſaid A. O. and B. O. ſo that you have them before us or others our fellows, juſtices aſſigned to keep the peace within the county aforeſaid, as ſoon as they can be taken [or before the juſtices aſſigned to keep the peace within the county aforeſaid, and alſo to hear and determine divers felonies, treſpaſſes and other miſdemeanors in the ſaid county committed, at the next general quarter ſeſſions of the peace to be holden in and for the ſaid county] to find them before us (or the ſaid juſtices) ſufficient ſurety and mainprize for their good behaviour towards the people of ſaid ſtate, according to the form of the ſtatute in ſuch caſe made and provided. And this you ſhall in no wiſe omit, on the peril that ſhall enſue thereon. And have you before us, or before the ſaid juſtices [or the ſeſſions aforeſaid] this precept. Given under our ſeals at Newark, in the county aforeſaid, the of in the year of

Recognizance for the peace or good behaviour.

Pennſylvania, } BE it remembered, that on the day of in Chester County. } the year of A. O. of in the county aforeſaid, yeoman, A. S. of the ſame place, yeoman, and B. S. of the ſame place, yeoman, came before me Thomas Charleton, eſquire, one of the juſtices aſſigned to keep the peace within the ſaid county, and acknowledged themſelves to owe to the people of the ſtate of Pennſylvania,

fylvania, to wit, the faid A. O. the fum of 20l. the faid A. S. the fum of 10l. and the faid B. S. the fum of 10l. of good and lawful money of Pennfylvania, to be refpectively made and levied of their feveral goods and chattels, lands and tenements, to the ufe of the people of the aforefaid ftate of Pennfylvania, if faid A. O. fhall fail in performing the condition indorfed (or underwritten.)

Acknowledged before me.

Thomas Carleton.

The condition of this recognizance is fuch, that if the within bounden (or, above bounden) A. O. fhall perfonally appear at the next general quarter feffions of the peace, to be holden in and for the county aforefaid, to do and receive what fhall then and there be injoined him by the court, and in the mean time fhall keep the peace (or, be of the good behaviour, or fhall keep the peace and be of the good behaviour) towards all the people of the ftate of Pennfylvania, and efpecially towards A. I. of in the faid county, yeoman; then the faid recognizance fhall be void, or elfe remain in its force.

[For taking recognizances. *See title* RECOGNIZANCE.]

Mittimus for want of fureties.

Pennfylvania, } To the conftable of Cheſter, and to the keeper
Bucks County, } of the gaol in the faid county.

WHEREAS A. O. of in the faid county, yeoman, is now brought before me Thomas Carleton, efquire, one of the juſtices aſſigned to keep the peace in and for the faid county, requiring him to find ſufficient ſureties to be bound with him in a recognizance for his perſonal appearance at the next general quarter ſeſſions of the peace, to be holden in and for the ſaid county, and in the mean time to keep the peace (or, be of the good behaviour) towards all the people of the ſaid ſtate of Pennſylvania, and eſpecially towards A. I. of in the ſaid county, yeoman; and whereas he the ſaid A. O. hath refuſed and doth now refuſe before me to find ſuch ſureties: Theſe are therefore in the name of the people of the ſtate of Pennſylvania, to command you the ſaid conſtable, forthwith to convey the ſaid A. O. to the common gaol, at in the ſaid county, and to deliver him, to the keeper thereof there, together with this precept: And I do in the name of the people of the ſtate of Pennſylvania, hereby command you the ſaid keeper, to receive the ſaid A. O. into your cuſtody, in the ſaid gaol, and him there ſafely to keep, until he ſhall find ſuch ſureties as aforeſaid. Given under my hand and ſeal, at Chicheſter, in the ſaid county, the day of in the year

The form of a ſuperſedeas.

New-York, } ROGER WILSON, eſquire, one of the juſtices aſ-
Ulſter-County. } ſigned to keep the peace within the county aforeſaid, to the ſheriff, bailiff, conſtables, and other the faithful miniſters of the people within the ſaid county of Ulſter, and to every of them, greeting:

Foraſmuch as A. O. of in the ſaid county, yeoman, hath perſonally come before me at Kingſton in the ſaid county, and hath found ſufficient ſurety, that is to ſay, A. S. of yeoman, and B. S. of yeoman, either of the which hath undertaken for the ſaid A. O. under the pain of 20l. and he the ſaid A. O. hath undertaken for himſelf under the pain of 40l. that he the ſaid A. O. ſhall perſonally appear

pear at the next general quarter seſſions of the peace to be holden in and for the ſaid county, then and there to do and receive what ſhall be injoined him by the ſaid court, and in the mean time ſhall well and truly keep the peace (or, be of good behaviour) towards all the people of the ſaid ſtate, and eſpecially towards A. I. of yeoman; Therefore on behalf of the people of ſaid ſtate, I do command you, and every one of you, that you utterly forbear and forceaſe to arreſt, take, impriſon, or otherwiſe by any means for the ſaid cauſe, to moleſt the ſaid A. O. and if you have for the ſaid occaſion, and for none other, taken or impriſoned him the ſaid A. O. that then him you deliver, or cauſe to be delivered and ſet at liberty, without further delay. Given at Kingſton aforeſaid, in the county aforeſaid, under my ſeal, this day of in the year of

This ſuperſedeas may be alſo in the name of the people, under the teſte of the juſtice, thus,

THE people of the ſtate of New-York, by the grace of God, free and independent. To the ſheriff, &c. greeting: Foraſmuch as A. O. hath come before Edward Wilſon, eſquire, one of our juſtices aſſigned to keep the peace within our ſaid county, and hath found, &c. We therefore command you, and every of you, that ye forbear, &c. Witneſs the ſaid Edward Wilſon,, at Kingſton in the county aforeſaid, the day of in the year of

Releaſe of the ſurety for the peace, or good behaviour.

New-York, BE it remembered, that on the day of
Ulſter County. in the year of the aforeſaid A. I. hath come before me the ſaid Edward Wilſon, eſquire, and freely remiſed and releaſed, as much as in him lieth, the aforeſaid ſecurity of the peace [or, of the good behaviour] by him prayed before me againſt the above named A. O. In witneſs whereof, I the ſaid Edward Wilſon have hereunto ſet my ſeal. Given, &c.

This is to be written under the recognizance; and if the juſtice only ſign, without ſealing it, it is well enough, eſpecially where the recognizance is without ſeal.

Or, the releaſe may be by itſelf, thus:

New-York, BE it remembered, that A. I. of in the ſaid
Ulſter County. county, yeoman, on the day of in the year of the independence of came before me William Tatham, Eſquire, one of the juſtices aſſigned to keep the peace within the ſaid county, at Kingſton in the ſaid county, and there remiſed and freely releaſed to A. O. of in the ſaid county, yeoman, the ſurety of the peace [or, good behaviour] by him the ſaid A. I. before me prayed againſt the ſaid A. O. Given, &c.

Or, if it is before another juſtice, then ſay,-----the ſurety of the peace [or, good behaviour] which he has againſt A. O. of in the ſaid county, yeoman. Given, &c.

But note, that none of theſe releaſes will diſcharge the recognizance, or the appearance of the party bound thereby; but that he muſt appear according to the condition of the recognizance, for the ſafeguardof his recognizance.

Liberate

Liberate *to discharge one committed for want of sureties.*

New-York, } JOSEPH Gale, esquire, one of the justices assigned to
Orange County. } keep the peace in the county aforesaid, To the keeper of the gaol at in the said county, greeting.

Forasmuch as A. O. in the prison of in your custody, now being, at the suit of A. I. of in the said county, yeoman, for the want of his finding sufficient sureties for his personal appearance at the next general quarter sessions of the peace, to be holden in and for the said county, and his keeping the peace [or, being of the good behaviour] in the mean time, towards the people, and especially towards the said A. I. hath found before me sufficient sureties, to wit, A. S. of yeoman, and B. S. of yeoman, either which have undertaken for the said A. O. under the pain of 20l. and he the said A. O. hath undertaken for himself under the pain of 40l. that he the said A. O. shall and will personally appear at the next general quarter sessions of the peace to be holden in and for the said county, and shall well and truly keep the peace [or be of the good behaviour] in the mean time, towards the people, and especially towards the said A. I. Therefore on the behalf of the people of the state of New-York I do command you, that if the said A. C. do remain in the said gaol, for the said cause, and for none other, then you forbear to grieve or detain him any longer, but that you deliver him thence, and suffer him to go at large, and that, upon the pain that will fall thereon. Given under my seal at Goshen in the said county, the day of in the year of

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SWEARING.

BY the canons of the church, If any offend their brethren by swearing, the churchwardens shall present them; and such notorious offenders shall not be admitted to the holy communion, till they be reformed. *Can.* 109

And by the statute of the 19 *G.* 2. *c.* 21. It is enacted as follows:

If any person shall profanely curse or swear, and be thereof convicted on confession, or oath of one witness, before one justice (or mayor) he shall forfeit as follows: That is to say,

Every day labourer, common soldier, or common seaman, 1s.

Every other person, under the degree of a gentleman, 2s.

And every person of or above the degree of a gentleman, 5s.

And for a second offence after conviction, double; and for every other offence after a second conviction, treble. *s.* 1.

Which said penalties shall go to the poor of the parish where the offence was committed. *s.* 10.

If such person shall curse or swear in the presence and hearing of a justice (or mayor); he shall convict him without other proof. *s.* 2.

If in the presence and hearing of a constable, if he is unknown to such constable, the said constable shall seize and carry him forthwith before the *next* justice (or mayor of a town corporate) who shall convict him upon the oath of such constable.

If

If he is known to such constable, he shall speedily make information before some justice (or mayor) in order that he may be convicted. *s.* 3.

So that the constable, if it is in his hearing, is required to prosecute; but any other person also may prosecute if he pleases

And such justice (or mayor) shall immediately on such information on the oath of the constable, or of any other person, cause the offender to appear before him; and on proof of such information, convict him: and if he shall not immediately pay down the penalty or give security to the satisfaction of such justice (or mayor) he may commit him to the house of correction, to be kept to hard labour for ten days. *s.* 4.

Also the charges of the information and conviction, shall be paid by the offender, if able, over and above the penalties; which charges shall be ascertained by such justice (or mayor.) *s* 1.

But for the information, summons, and conviction, no more shall be paid to the justice's clerk, than 1s. *s.* 15.

And if he shall not immediately pay such charges, or give security to the satisfaction of such justice (or mayor) he may commit him to the house of correction, to be kept to hard labour for six days, over and above such time for which he may be committed for nonpayment of the penalties; and in such case, no charges of information and conviction shall be paid by any person. *s.* 11.

The conviction shall be in the words and form following:

BE it remembered, that on the ——— day of ——— in the ——— year of ——— A. B. was convicted before me (one of the people's justices of the peace for the county aforesaid, or before me mayor of the city or town of within the county of) of swearing one or more profane oath or oaths. Given under my hand and seal the day and year aforesaid. s. 8.

[In several of the United States, there are particular laws about swearing, which must be the justices guide in those states.]

Information.

New-Jersey, Morris County. THE information of A. I. of in the county aforesaid, yeoman, made on oath this day of in the year before me J. P. esquire, one of the justices of the peace for the said county: Who saith,

That on the day of now last past, at in the township of in the county aforesaid, he heard A. O. of in the said county, yeoman, swear one profane oath, in these words, to wit. &c.

Summons.

New-Jersey, Morris County. } To the constable of ———

WHEREAS information hath this day been made before me J. P. esquire, one of the justices of the peace for the said county, upon the oath of A. I. of yeoman, that on the day of this present month of he heard A. O. of in the said county, yeoman, at in the township of in the said county, swear one

one profane oath. Thefe are therefore to command you to cauſe the ſaid A. O. forthwith to appear before me to anſwer the premiſes, and be further dealt with according to law. Given under my hand and ſeal at in the ſaid county, the day of in the year of

Commitment.

New York, Queen's County. } To the conſtable of Fluſhing in the ſaid county, and to the keeper of the houſe of corection at in the ſaid county.

WHEREAS A. O. of in the ſaid county, day labourer, is and ſtands convicted this day before me C. L. one of the juſtices of the peace for the ſaid county, of ſwearing one profane oath, on the day of this preſent month of at Fluſhing in the ſaid county, whereby he hath forfeited the ſum of 1s. to the poor of the ſaid townſhip of Fluſhing, and whereas the ſaid A. O. hath refuſed and doth refuſe to pay down the ſaid ſum of 1s. for the uſe of the poor aforeſaid, and alſo hath refuſed and doth refuſe to give ſatisfactory ſecurity to pay the ſame: Theſe are therefore to require you the ſaid conſtable to convey the ſaid A. O. to the houſe of correction at aforeſaid, and to deliver him to the keeper thereof, together with this warrant: And I do hereby command you the ſaid keeper to receive him the ſaid A. O. into your cuſtody in the ſaid houſe of correction, and there to detain and keep him to hard labour for the ſpace of ten days. And for ſo doing this ſhall be your ſufficient warrant. Given under my hand and ſeal at in the ſaid county, the day of in the year

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TRAVERSE.

TRAVERSE took its name from the French *de traverſe*, which is no other than *de tranſverſo* in Latin, ſignifying, *on the other ſide*; becauſe as the indictment on the one ſide chargeth the party, ſo he on the other ſide cometh in to diſcharge himſelf. *Lamb.* 540.

To traverſe an indictment then, is to take iſſue upon the chief matter thereof, which is the ſame as if one ſhall ſay, *to make contradiction*, or *to deny the point of the indictment*: As in a preſentment againſt a perſon for a highway overflowed with water, for default of ſcouring a ditch, which he and they whoſe eſtate he hath in certain lands there, have uſed to ſcour or cleanſe: ſuch perſon may traverſe either the matter, to wit, that there is no highway there, or that the ditch is ſufficiently ſcoured, or otherwiſe, he may traverſe the cauſe, to wit, that he hath not that land, or that he and they whoſe eſtate he hath, have not uſed to ſcour the ditch. *Lamb.* 541.

And foraſmuch as in the record of one traverſe, there is at once diſcovered, the ſtyle of ſeſſions, the indictment, the proceſs to anſwer, the traverſe itſelf, the verdict, and judgment thereupon, the proceſs of execution, the yielding of the parties, and the aſſeſſment of

of their fines, fo that it alone may ferve inftead of all, it is judged requifite to infert the fame as follows :

Somerfet County. HERETOFORE, to wit, at the feffions of the peace held at Bridgewater, in the county aforefaid, on the firft Tuefday in April, in the year of before J. P. and K. P. efquires, and others their affociates, juftices affigned to keep the peace in the county aforefaid, as alfo to hear and determine divers felonies, trefpaffes, and other mifdemeanors in the fame county committed, by the oath of twelve jurors it is prefented, that John Long, of R. M. of and T. L. of with divers others unknown, evil doers and diftiurbers of the peace of the people of the ftate of New-Jerfey, in a warlike manner arrayed, joined and aflembled, on the day of in the night of the fame day, in the year aforefaid, with force and arms, to wit, with fwords, ftaves, clubs, guns and other arms, as well offenfive as defenfive, at Bedminfter, in the field of one Charles Graham, unlawfully, riotoufly, and routoufly broke and entered, and eight waggon loads of hay, to the value of then and there being, of the goods and chattels of the faid C. G. then and there unjuftly and unlawfully took and carried away, againft the peace of the people of the ftate of New-Jerfey, and againft the form of the ftatute in that cafe made and provided : Whereupon it was commanded to the fheriff, that he fhould not omit, &c. but caufe them to come to anfwer. And afterwards, to wit, on the Tuefday aforefaid, in the year aforefaid, before the aforefaid juftices came the aforefaid J. L. R. M. and T. L. in their proper perfons, and having had the hearing of the indictment aforefaid, feverally fay, that they are thereof not guilty, and of this they put themfelves upon the country ; and Adam Martin, who for the people of the ftate of New-Jerfey in this behalf profecutes, in like manner, &c. Therefore let there come thereupon a jury before the juftices aftigned to keep the peace in the county aforefaid, and alfo to hear and determine, &c. at the feffions of the peace at Bridgewater, &c. on the fecond Tuefday in July, then next to be holden. And who, &c. To recognize, &c. Becaufe as well, &c. The fame day is given as well to the aforefaid A. M. who profecutes, &c. as to the aforefaid J. L. R. M. and T. L. &c. To which feffions of the peace holden at B. aforefaid, in the county aforefaid, on the aforefaid day, &c. before and their affociates, juftices affigned to keep the peace in the county aforefaid, and alfo to hear and determine divers felonies, trefpaffes and other mifdemeanors in the fame county committed, came as well the aforefaid A. M. who profecutes, &c. as the aforefaid J. L. R. M. and T. L. in their proper perfons. And the jurors aforefaid by the fheriff for the county aforefaid for this impanelled, and demanded to wit, A. B. C. D. &c. likewife did come, who fay the truth concerning the premifes being tried and fworn, fay upon their oath, that the aforefaid J. L. R. M. and T. L. are guilty, and every one of them is guilty of the trefpafs, contempt, and riot aforefaid, in the indictment above fpecified, in manner and form as againft them is above fuppofed.

Therefore it is confidered by the court, that the aforefaid J. L. R. M. and T. L. be taken to fatisfy the people of the ftate of New-Jerfey of their fines, by occafion of the trefpafs, contempt and riot aforefaid, Which J. L. R. M. and T. L. then and there prefent in court, prayed that they to a fine with the people of the ftate of New-Jerfey, by the occafion aforefaid, may be admitted ; and thereof they put themfelves feverally upon the mercy of the people of the ftate of New-Jerfey. And the fine of the fame J. L. by the juftice aforefaid is affeffed, at 3l. 6s. 8d. and the fine of the fame R. M. is affeffed at 20s. and the fine of the fame

ſame T. L. is aſſeſſed at 5l. of good and lawful money of New-Jerſey, to the uſe and behoof of the people of ſaid ſtate.

Every defendent indicted for a miſdemeanor, ſhould give full eight days notice of trial to the proſecutor, before the aſſizes, if the trial is to be there; if at the ſeſſions, it is uſual to give two or three days notice. *Cr. Circ.* 20, 48.

TREASON.

TREASON, according to lord Coke, is derived from *trahir*, to betray; and *trahiſon* by contraction *treaſon*, is the betraying itſelf. 3 *Inſt.* 4.

Treaſon, generally ſpoken, is intended, not of petit treaſon, but of high treaſon only. 1 *H. H.* 316.

Notwithſtanding that treaſon and miſpriſion of treaſon are not within the letter of the commiſſion of the peace, yet inaſmuch as they are againſt the peace of the king, and of the realm, any juſtice of the peace may, either upon his own knowledge, or the complaint of others, cauſe any perſon to be apprehended for any ſuch offence. And ſuch juſtice may take the examination of the perſon ſo apprehended, and the information of all thoſe who can give any material evidence againſt him, and put the ſame in writing; and alſo bind over ſuch who are able to give any ſuch evidence, to the king's bench, or gaol delivery, and certify his proceedings to ſuch court. 2 *Haw.* 39. *Hal. Pl.* 168. 1 *H. H.* 372.

And having committed the offender (for he is by no means bailable by juſtices of the peace, 3 *Ed.* 1 *c.* 15. 2 *Haw.* 99.) it may be adviſeable for him to ſend an account immediately, of all the particulars, to a ſecretary of ſtate.

By the ſtatute of the 25 *Ed.* 3. *ſt.* 5 *c.* 2. (which lord Hale calls a ſacred act; and lord Coke an excellent act, and the king who made it a bleſſed king, and the parliament a bleſſed parliament:) All treaſons which had been uncertain before, were ſettled. Which act, by the 1 *Mar. ſeſſ.* 1. *c.* 1. is reinforced, and again made the only ſtandard of treaſon; and all ſtatutes, between the ſaid ſtatutes of the 25 *Ed.* 3. and 1 *Mar.* which made any offences high or petit treaſon, or miſpriſion of treaſon, are abrogated; ſo that no offence is at this day to be eſteemed high treaſon, unleſs it be either declared to be ſuch by the ſaid ſtatute of the 25 *Ed.* 3. or made ſuch by ſome ſtatute ſince the 1 *Mar.*

And therefore I ſhall firſt conſider ſuch offences as are high treaſon within the ſaid ſtatute of the 25 *Ed.* 3. and then ſuch as are made treaſon by ſtatutes ſubſequent to the ſaid ſtatute of the 1 *Mar.*

The words of the ſtatute of the 25 *Ed.* 3. as to this matter, are as follows:

'Whereas divers opinions have been before this time, in what 'caſe treaſon ſhall be laid, and in what not; the king, at the re-

'queſt of the lords and commons, hath made a declaration in the 'manner as hereafter followeth; that is to ſay, When a man doth 'compaſs or imagine the death of our lord the king, or of our lady 'his queen, or of their eldeſt ſon and heir; or if a man do violate 'the king's companion (that is his wife, 2 *Inſt.* 9.) or the king's 'eldeſt daughter unmarried, or the wife of the king's eldeſt ſon and 'heir: or if a man do levy war againſt our lord the king in his 'realm, or be adherent to the king's enemies in his realm, giving 'to them aid and comfort in the realm, or elſewhere: and thereof be 'probably *(provеablement, proveably)* attainted of open deed, by the 'people of their condition. And if a man counterfeit the king's 'great or privy ſeal, or his money: and if a man bring falſe money 'into the realm, counterfeit to the money of England, knowing the 'money to be falſe; and if a man ſlay the chancellor, treaſurer, or 'the king's juſtices of the one bench or the other, juſtices in eyre, 'or juſtices of aſſize, and all other juſtices aſſigned to hear and de-'termine, being in their places, doing their offices.'

And by the ſtatute of the 1 *Mar. ſeſſ.* 1. *c.* 1. (which lord Hale calls another excellent law) 'No act, deed or offence being by act 'of parliament made treaſon, by words, writing, cyphering, deeds, 'otherwiſe whatſoever, ſhall be adjudged to be treaſon, but only 'ſuch as be declared by the ſaid ſtatute of the 25 *Ed.* 3.' And this, he ſays, at one blow laid flat all the numerous treaſons at any time enacted ſince the 25 *Ed.* 3. 1 *H. H.* 308.

Of one deed] Lord Coke (3 *Inſt.* 14, 140.) ſeems to be of opinion, upon the ſaid act of the 25 Ed. 3 that bare words are not a ſufficient overt act, or open deed, whereby to convict a perſon of treaſon: but that they are miſpriſion of treaſon only. So alſo lord Hale (1 *H. H.* 111, 118. and elſewhere throughout) ſeemeth to think, that words, unleſs put into writing, are not regularly an overt act. But Mr. Hawkins (1 *Haw.* 39) argues the contrary, and amongſt other reaſons for his opinion, he obſerves, that to charge a man with ſpeaking treaſon is unqueſtionably actionable, which could not be, if no words could amount to treaſon: alſo, that as in caſe of felony, he who by command or perſuaſion, induceth another to commit felony, is an acceſſary in felony, ſo he who does the ſame in treaſon, is a principal traitor (there being no acceſſaries in treaſon, but all being principals) and yet ſuch perſon doth no act but by words.

And it has been the conſtant practice, ever ſince the revolution, at leaſt where a perſon by treaſonable diſcourſes hath manifeſted a deſign to murder or depoſe the king, to convict him upon ſuch evidence. And in Lowick's caſe Holt Ch. J. declared, that expreſs words were not neceſſary to convict a man of high treaſon; but if from the tenor of his diſcourſe the jury is ſatisfied he was engaged in a deſign againſt the king's life, this is ſufficient to convict the priſoner *Read. Treaſ.* 156.

In high treaſon, as hath been ſaid before there are no acceſſaries, but all are principals: and therefore whatſoever act or conſent will

make

make a man acceſſary to a felony before the act done, the ſame will make him a principal in caſe of high treaſon. 3 *Inſt.* 9. 21.

By the 7 *W. c.* 3. No perſon ſhall be proſecuted for high treaſon, but within three years after the offence committed: except in the caſe of deſigning to aſſaſſinate the king's perſon.

And by the 31 *C.* 2 *c.* 2. Perſons committed for high treaſon, ſhall be indicted the next term, or next aſſize: otherwiſe they ſhall be let to bail, unleſs it appear to the court, upon oath, that the witneſſes for the king could not be produced in that time; and in ſuch caſe, they ſhall be indicted the ſecond term or aſſize, or elſe diſcharged.

Perſons indicted for high treaſon whereby corruption of blood ſhall be made, or for miſpriſion of ſuch treaſon (except for counterfeiting the coin, the great ſeal, privy ſeal, privy ſignet, or ſign manual) ſhall have a copy of the indictment (but not the names of the witneſſes) delivered to them five days before trial. 7 *W. c.* 3.

And they ſhall have copies of the panel of the jurors delivered to them, two days before trial. 7 *W. c.* 3.

And ſhall have proceſs of court to compel their witneſſes to appear. 7 *W. c.* 3.

And moreover, after the death of the perſon pretending to be king of England by the name of James the third, when a perſon is indicted for high treaſon, or miſpriſion of treaſon, both a copy of the indictment, and liſts of the jurors, and alſo of the witneſſes ſhall be delivered to the party indicted, ten days before trial. 7 *An. c.* 21. *ſ.* 11.

And ſuch perſons ſhall have two ſuch counſels as they ſhall deſire aſſigned them by the court, who ſhall have acceſs to them at reaſonable times. 7 *W c.* 3.

And they ſhall be allowed to make their defence by witneſs on oath. 7 *W. c* 3.

And they ſhall not be attainted but on the oath of two witneſſes, either both of them to the ſame over act, or one of them to one, and the other of them to another over act of the ſame treaſon; unleſs they ſhall confeſs, or ſtand mute, or refuſe to plead, or challenge peremptorily above 35 of the jury. 7 *W c.* 3.

The judgment for high treaſon (not relating to the coin) is, That he ſhall be carried back to the place from whence he came, and from thence to be drawn to the place of execution, and be there hanged by the neck, and cut down alive, and that his entrails be taken out, and burnt before his face, and his head cut off, and his body divided into four quarters, and his head and quarters diſpoſed at the king's pleaſure. 2 *Haw.* 443.

The judgment of a woman for high treaſon, is to be drawn and burnt 3 *Inſt.* 211.

In the ſaid judgment is implied forfeiture of lands and goods to the king, loſs of dower, and corruption of blood. 3 *Inſt.* 211.

Petit

Petit treason.

'Moreover there is another manner of treason, when a servant 'slayeth his master, or a wife her husband; or when a man secular, 'or religious slayeth his prelate to whom he oweth faith and obedi-'ence. 25 *Ed.* 3. *st.* 5. *c.* 2.

High treason is against the king, petit treason against the subjects. 3 *Inst.* 20.

No person shall be convicted of petit treason, but on the oath of two witnesses, or confession. 1 *Ed.* 6. *c.* 11. *f.* 22.

The judgment against a man for petit treason is, that he shall be drawn to the place of execution, and there hanged by the neck till he be dead: The judgment against a woman is, that she shall be drawn to the place of execution, and there burnt. 2 *Haw.* 444.

The consequence of attainder, is, forfeiture of lands (to the lord of the fee) and of goods; less of dower; and corruption of blood. 2 *Haw. c.* 49.

Altho' there can be no accessaries in high treason, yet in petit treason there may be accessaries both before and after. 3 *Inst.* 21.

And accessaries before the fact are ousted of clergy, by several statutes; but accessaries after the fact have their clergy in all cases of petit treason, for no statute takes it from them. 2 *H. H.* 342.

Misprision of treason.

Misprision cometh from the French word *mepris*, which properly signifieth neglect or contempt: And misprision of treason, in legal understanding, signifieth, when one knoweth of any treason, tho' no party or consenter to it, yet conceals it, and doth not reveal it in convenient time. 3 *Inst.* 36. 1 *H. H.* 371.

The judgment of misprision of treason is, to be imprisoned during life, to forfeit all his goods forever, and the profits of his lands during life. 3 *Inst.* 36.

Every man therefore that knoweth a treason, ought with all speed to reveal it to the king, his privy council, or other magistrate. *H Pl.* 127.

But it seemeth that misprision of petit treason is not subject to the judgment of misprision of high treason, but only is punishable by fine and imprisonment, as in the case of misprision of felony. 1 *H. H.* 375.

TREASURE FOUND.

TREASURE trove, or treasure found, is 'where any gold or 'silver, in coin, plate, or bullion, hath been of ancient time 'hidden, wheresoever it be found, whereof no person can prove any 'property, it doth belong to the king, or to some other by the 'king's grant, or prescription. 3 *Inst.* 132.

Gold

Gold or silver] For if it be of any other metal, it is no treasure; and if it be no treasure, it belongs not to the king, for it must be treasure trove. *id.*

Whersoever it be found] Whether it be of ancient time hidden in the ground, or in the roof or walls, or other part of a castle, house, building, ruins, or elsewhere, so as the owner cannot be known. *id.*

Belong to the king] The reason whereof is a rule of the common law, that such goods whereof no person can claim any property, belong to the king: as wrecks, strays, and the like. *id.*

Larceny cannot be committed of such things whereof no man hath any determinate property, tho' the things themselves are capable of property, as of treasure trove, or wreck till seized: tho' he that hath them in point of franchise, may have a special action against him that takes them. 1 *H. H.* 510.

The punishment for concealment of treasure trove, is by fine and imprisonment. 3 *Inst* 133

And it belongeth to the coroner to inquire thereof. *id.*

Concerning which it is enacted by the 4 *Ed.* 1. *st.* 2. that 'a coroner being certified by the king's bailiffs, or other honest men of 'the country, shall go to the places where treasure is said to be found'. And it is further enacted in the same statute, that 'the coroner 'ought to inquire of treasure that is found, who were the finders, 'and likewise who is suspected thereof: and that may be well perceived, where one liveth riotously, haunting taverns, and hath 'done so of long time; hereupon he may be attached for his suspicion, by 4, or 6, or more pledges, if he may be found'.

Also it seems to be agreed, that all seisures of treasure trove, belonging to the king, may be inquired of in the sheriff's torn: But it seems questionable, whether a prescription in a court leet to inquire of such seizure belonging to the lord of it, being a subject, be good or not, since it is against the general rule of the law, for the leet to take cognizance of trespasses done to the private damage of the lord, because that would make him his own judge. 2 *Haw.* 67.

VAGRANTS.

THIS title consisteth chiefly of the statute of the 17 *G.* 2. *c.* 5. commonly called the vagrant act: but in the progress thereof, the other statutes relating to vagrants are inserted in the places where they properly fall in.

I. Idle and disorderly persons.
II. Rogues and vagabonds.
III. Incorrigible rogues.

IV. Penalty

IV. Penalty for not apprehending.
V. Examination.
VI. Whipping or imprisonment.
VII. Further punishment.
VIII. Conveying.
IX. What to be done with at the place to which they are sent.
X. Lunatic vagrants.
XI. Penalty of lodging vagrants.
XII. Children born in vagrancy.
XIII. Appeal.

I. Idle and disorderly persons.

By the 7 *J. c.* 4. Idle and disorderly persons shall be sent to the house of correction; and by the 17 *G.* 2 *c.* 6. idle and disorderly persons are thus described: 1. All persons who threaten to run away, and leave their wives or children to the parish. 2 All persons who shall unlawfully return to the parish or place from whence they have been legally removed by order of two justices, without bringing a certificate from the parish or place whereunto they belong. 3. All persons who not having wherewith to maintain themselves, live idle without employment, and refuse to work for the usual and common wages given to other labourers in the like work, in the parish or places where they are. 4. All persons going about from door to door, or placing themselves in streets, highways, or passages, to beg or gather alms in the parishes or places where they dwell. All these shall be deemed idle and disorderly persons And it shall be lawful for one justice to commit such offenders (being thereof convicted before him, by his own view, or confession, or oath of one witness) to the house of correction, to be kept to hard labour not exceeding one month. And any person may apprehend and carry before a justice, any such person going about from door to door, or placing themselves in streets, highways, or passages, to beg alms in the parishes or places where they dwell; and if they shall resist, or escape from the person apprehending them, they shall be punished as rogues and vagabonds. And the said justice, by warrant under his hand and seal, may order any overseer where such offender shall be apprehended, to pay five shillings to any person in such parish or place so apprehending them, for every offender so apprehended; to be allowed in his accounts, on producing the justice's order, and the person's receipt to whom it was paid: And if the overseer shall refuse or neglect to pay the same, the said justice on oath thereof, may by his warrant order the same to be levied by distress and sale of his goods: and in such case he shall not be allowed the same in his accounts. *s.* 1.

Note:

Note: This is another, and a quite different reward, from that which was given afterwards for apprehending rogues and vagabonds; the latter being 10s and this but 5s the latter paid by the county, but this paid by the parish, as a punishment for suffering their poor to beg, although within their own parish; for if they beg out of their parish, they incur a further degree of guilt, becoming thereby rogues and vagabonds.

II. *Rogues and vagabonds.*

An infant under the age of 7 years, shall not be said to be a rogue and vagabond; but shall be removed to its place of settlement, as other poor persons not vagrants. *Black* 276.

But persons who shall be deemed rogues and vagabonds, are by the 17 *G.* 2 *c* 5. these that follow:

1 All persons going about as patent gatherers, or gatherers of alms under pretences of loss by fire, or other casualty

2. Persons going about as collectors for prisons, gaols, or hospitals

3 Fencers.

4. Bearwards.

5. Common players of interludes, and all persons who shall for hire, gain, or reward, act, represent, or perform, or cause to be acted, represented, or performed, any interlude. tragedy, comedy, opera, play, farce, or other entertainment of the stage, or any part therein, not being authorized by law.

6. Minstrels.

7. Juglers.

8. All persons pretending to be gypsies, or wandering in the habit or form of Egyptians.

9. Or pretending to have skill in physiognomy, palmestry, or like crafty science, or to tell fortunes.

10. Or using any subtil craft to deceive and impose on any of the people.

11. Or playing or betting at any unlawful games or plays.

12. All persons who run away, and leave their wives or children, whereby they become chargeable to any parish or place.

13. All petty chapmen and pedlars, wandring abroad, not being duly licensed, or otherwise authorised by law

14. All persons wandring abroad, and lodging in ale-houses, barns, outhouses, or in the open air, not giving a good account of themselves.

15. All persons wandring abroad and begging, pretending to be soldiers, mariners or seafaring men.

But this shall not extend to soldiers wanting subsistence, having lawful certificates from their officers, or the secretary at war, or to mariners or seafaring men licensed by some testimonial or writing under the hand and seal of some justice of the peace, setting down the time and place of their landing or discharge, and the place to which

which they are to pass, and the names of the chief towns or places through which they are to pass, and limiting the time of their passage, while they continue in the direct way to the place to which they are to pass, and during the time so limited.

Which exception hath a reference to the statute of the 39 *El.* c. 17.

And the justices of assize, and justices of the peace in sessions, may hear and determine all such offences, and execute the offenders convicted before them, as in cases of felony is accustomed; except some honest person valued at the last subsidy to 10l. in goods, or 40s. in lands, or else some honest freeholder, as by the said justices shall be allowed, will be contented before such justices to take such offender into his service for one whole year, and then before the said justices will be bound by recognizance of 10l. if he keep not the said person for one whole year, and bring him to the next sessions for the peace and gaol delivery next ensuing after the said year, and if any such person retained depart within the year, without the licence of him that so retained him, he shall be guilty of felony without benefit of clergy. *S.* 4.

Lord Coke, upon this statute, speaking of the preventing of persons from wandring without passes, or with the same counterfeited, observes thereupon, that this excellent work (as he calls it) of preventing them from wandring abroad without lawful licences, is without question feasible; for upon the making of the said statute, and a good space after, whilst the justices and other officers were diligent and industrious, there was not a rogue to be seen in any part of England; but when the justices and others became remiss, rogues swarmed again. 2 *Inst.* 729.

But in truth, the great mischief seemeth to be the suffering these persons to wander at all: Such persons, above all others, ought to be conveyed immediately from their place of landing or discharge, to their place of settlement, at the public charge, for three reasons: 1. Because, if they be sailors, they may be useful at the ports where they belong. 2. Because otherwise, whether they be soldiers or sailors, they become initiated into the trade of begging, which they are never willing to leave. 3. Because being for the most part able and lusty, they are most likely to do mischief in the country.

16. And all other persons, wandring abroad and begging, shall be deemed rogues and vagabonds.

III. Incorrigible rogues.

By the 17 *G.* 2 c. 5. Incorrigible rogues are thus described:

1. All persons apprehended as rogues and vagabonds, and escaped from the persons apprehending them, or refusing to go before a justice, or to be examined on oath before such justice, or refusing to be conveyed by such pass as is herein after directed, or knowingly giving

ing a falſe account of themſelves on ſuch examination, after warning given them of their puniſhment.

2. All rogues or vagabonds who ſhall break or eſcape out of any houſe of correction, before the expiration of the term for which they were committed or ordered to be confined by this act.

3. All perſons who after having been puniſhed as rogues and vagabonds, and diſcharged, ſhall again commit any of the ſaid offences: ——— All theſe ſhall be deemed incorrigible rogues. *ſ.* 4.

IV. Penalty for not apprehending.

If the conſtable ſhall refuſe or neglect, to uſe his beſt endeavours to apprehend or convey to ſome juſtice ſuch offender; or if any other perſon, being charged by any juſtice ſo to do, ſhall refuſe or neglect to uſe his beſt endeavours to apprehend and deliver to the conſtable, or to carry ſuch offender before ſome juſtice, where no conſtable can be found; he ſhall, being convicted thereof on view, or oath of one witneſs, before one juſtice, forfeit 10s. to the poor, by diſtreſs. 17 *G.* 2. c. 5. *ſ.* 5.

V. Examination.

Where any rogues or vagabonds, apprehended by any conſtable, or ſuch other perſon as aforeſaid, ſhall be brought before a juſtice, he ſhall inform himſelf by the examination upon oath of the perſon apprehended, or of any other perſon, of the condition and circumſtances of the perſon ſo apprehended, and of the pariſh or place where he was laſt legally ſettled; the ſubſtance of which ſhall be put into writing, and be ſigned by the perſon or perſons ſo examined; and the juſtice ſhall likewiſe ſign the ſame, and tranſmit it to the next ſeſſions, there to be filed and kept on record. 17 *G.* 2. c. 5. *ſ.* 7.

VI. Whipping or impriſonment.

And ſuch juſtice ſhall order ſuch perſon ſo apprehended, to be publicly whipt by the conſtable, petty conſtable, or ſome other perſon, to be appointed by ſuch conſtable or petty conſtable, of the pariſh or place, where ſuch perſon was apprehended; or ſhall order him to be ſent to the houſe of correction till the next ſeſſions, or for any leſs time, as ſuch juſtice ſhall think proper. 17 *G.* 2. c. 5. *ſ.* 7.

VII. Farther puniſhment.

And where any offender againſt this act ſhall be committed to the houſe of correction till the next ſeſſions, and the juſtices at ſuch ſeſſions ſhall on examination of the circumſtances of the caſe adjudge ſuch perſon a rogue or vagabond, or an incorrigible rogue; they may order ſuch rogue or vagabond to be detained in the houſe of correction, to hard labour for any further time not exceeding ſix months, and ſuch incorrigible rogue for any further term not ex-

ceeding two years, nor less than six months; and during his confinement, to be whipped in such manner and at such times and places as they shall think fit; and such person may, if the sessions think convenient, afterwards be sent away by a pass: and if such person, being a male, is above the age of 12 years, the court may, before he is discharged from the house of correction, send him to be employed in his majesty's service by sea or land; and if such incorrigible rogue, so ordered by the sessions to be detained in the house of correction, shall break out or make his escape, or shall offend again in like manner, he shall be guilty of felony, and be transported for seven years. 17 *G.* 2 c. 5. *s.* 9.

And by the 13 & 14. *C.* 2. c. 12. The justices in sessions may transport such rogues, vagabonds, and sturdy beggars as shall be duly convicted, and adjudged to be incorrigible. *s.* 23.

And by the 17 *G.* 2. c 5. If the child of any vagrant, above the age of seven years shall be committed to the house of correction, the justices in sessions, if they see convenient, at any time before such child be discharged, may order such child to be placed out as a servant or apprentice, to any person who is willing to take such child, till such child shall be of the age of 21 years, or for a less time. And if any offender, who was found wandring with such child, shall be again found with the same child which was so placed out, he shall be deemed an incorrigible rogue. *s.* 24

And where any vagrants have been committed to the house of correction till the next sessions, if on examination of such persons, no place can be found, to which they may be conveyed, the sessions shall order them to be detained and employed in the house of correction, until they can provide for themselves, or until the justices in sessions can place them in some lawful calling, as servants, apprentices, soldiers, mariners, or otherwise, either within this realm, or in the plantations in America. *s.* 28.

VIII. Conveying.

After such whipping or confinement, the justice may, if he thinks convenient, by a pass under hand and seal, cause him to be conveyed to the place of his last legal settlement; but if it cannot be found, then to the place of his birth; or if he be under the age of 14 years, and have any father or mother living, then to the place of the abode of such father or mother, there to be delivered to some churchwarden or overseer. 17 *G.* 2. *c.* 5. *s* 7.

And the justice shall make a duplicate of the pass and examination, and sign the same, and shall afterwards transmit the duplicate of the pass, annexed to the examination, to the next sessions, there to be filed and kept on record: and shall annex the duplicate of the examination to the pass, and send it with the same; and the said pass, examination, and duplicate thereof, shall and may be read in any court of record as evidence. *s.* 8.

And the justice who shall make the pass, shall with the pass cause likewise

likewiſe to be delivered to the conſtable a note or certificate aſcertaining how they are to be conveyed, horſe, cart, or on foot, and what allowance ſuch conſtable is to have for conveying them. *ſ.* 10.

And the conſtable who ſhall receive ſuch paſs and certificate, ſhall convey the perſon according to the direction of the paſs, the next direct way to the place where he is ordered to be ſent, if it be in the county, riding, diviſion, corporation, or franchiſe; if not, he ſhall deliver the ſaid perſon to the conſtable of the firſt town, pariſh, or place, in the next county, riding, diviſion, corporation, or franchiſe, in the direct way to the place whither he is to be conveyed, together with the paſs and duplicate of the examination, taking his receipt for the ſame. And ſuch conſtable ſhall without delay apply to ſome juſtice in the ſame county or diviſion, who ſhall make the like certificate, and deliver it to ſuch conſtable, who ſhall with all ſpeed convey ſuch perſon unto the firſt pariſh, town, or place in the next county or diviſion, in the direct way to the place to which he is to be conveyed. And ſo from one county or diviſion to another, till they come to the place to which ſuch perſon is ſent. And the conſtable, who ſhall deliver ſuch perſon to the church warden or other perſon ordered to receive him, ſhall at the ſame time deliver the ſaid paſs, with the duplicate of examination, taking their receipt for the ſame. *ſ.* 11.

And any juſtice before whom a vagrant ſhall be carried, may order him to be ſearched, and his bundles to be inſpected by the conſtable or other officer in his preſence; and if it ſhall appear that ſuch vagrant ſhall be found to have wherewithal to pay for his paſſage, either in whole or in part, the juſtice ſhall order ſo much of the money to be paid, or other effects found upon ſuch vagrant to be ſold, and employed towards the expence of taking up and paſſing ſuch vagrant, returning the overplus, after deducting the charges of ſuch ſale. *ſ.* 12.

And the juſtices in ſeſſions ſhall limit what rates and allowances, by the mile, or otherwiſe ſhall be made, for conveying or maintaining rogues, vagabonds, or incorrigible rogues; and make ſuch other orders for the more regular proceedings therein, as they ſhall think proper. *ſ.* 16.

And if any petty conſtable, or governor of any houſe of correction, ſhall counterfeit any certificate or receipt, or knowingly permit any alteration to be made therein, he ſhall forfeit 5ol. And if he ſhall not convey, or cauſe to be conveyed ſuch vagrants, or not deliver them to the proper perſon: or if any conſtable ſhall refuſe to receive any ſuch perſon, or to give ſuch receipt, he ſhall forfeit 20l. by diſtreſs and ſale by warrant of the juſtices in ſeſſions, where the offence ſhall be committed, half to the informer, and half to the treaſurer, to be applied by him as part of the public ſtock: returning the overplus upon demand, charges of diſtreſs being firſt ſatisfied. 17 *G.* 2. *c.* 5. *ſ.* 18.

What

IX What to be done with at the place to which he is ſent.

The pariſh or place to which any rogue, vagabond, or incorrigible rogue ſhall be conveyed, ſhall employ in work, or place in ſome workhouſe or alm-houſe, the perſon ſo conveyed, until he ſhall betake himſelf to ſome ſervice or other employment: And if he ſhall refuſe to work, or not betake himſelf to ſome ſervice or other employment, the overſeers may cauſe him to be carried to ſome juſtice, to be ſent to the houſe of correction, there to be kept to hard labour. 17 *G.* 2. *c.* 5 *ſ.* 19.

But if the churchwarden or other perſon who ſhall receive any perſon ſo ſent, ſhall think the examination to be falſe, he may carry the perſon ſo ſent before a juſtice, who if he ſee cauſe, may commit ſuch perſon to the houſe of correction till the next ſeſſions, and the juſtices there, if they ſee cauſe, may deal with ſuch perſon as an incorrigible rogue: But the perſon ſo ſent, ſhall not be removed from the place to which ſent, but by order of two juſtices, in the ſame manner as other poor perſons are removed to the place of their ſettlement. *ſ.* 11.

X. Lunatic vagrants.

Whereas there are ſometimes perſons, who by lunacy or otherwiſe, are furiouſly mad, or ſo far diſordered in their ſenſes, that they may be dangerous to be permitted to go abroad, it ſhall be lawful for two juſtices, where ſuch perſon ſhall be found, by their warrant directed to the conſtables, churchwardens, and overſeers, or ſome of them, to cauſe ſuch perſon to be apprehended, and kept ſafely locked up in ſome ſecure place, within the county, or precinct, as ſuch juſtices ſhall appoint; and, if ſuch juſtices find it neceſſary, to be there chained, if the ſettlement of ſuch perſon be within ſuch county or precinct; and if not, then to be ſent to the place of his laſt legal ſettlement by a paſs, *mutatis mutandis*, and ſhall be locked up or chained, by warrant of two juſtices of the place to which he is ſent: And the reaſonable charges of removing, and of keeping, maintaining and of curing ſuch perſon, during ſuch reſtraint (which ſhall be during ſuch time only as ſuch lunacy or madneſs ſhall continue) ſhall be paid, ſuch charges being firſt proved upon oath by order of two juſtices, directing the churchwardens, or overſeers where any goods, chattels, lands, or tenements of ſuch perſon ſhall be to ſeize and ſell ſo much of the goods and chattels, or receive ſo much of the annual rents of the lands and tenements, as is neceſſary to pay the ſame, and to account for what is ſo ſeized, ſold, or received to the next ſeſſions: But if ſuch perſon hath not an eſtate to pay the ſame, over and above what ſhall be ſufficient to maintain his family, then ſuch charges ſhall be paid by the pariſh, town, or place to which ſuch perſon belongs, by order of two juſtices, directed to the churchwardens and overſeers for that purpoſe. 17 *G.* 2. *c.* 5. *ſ.* 20.

XI. Penalty

XI. Penalty of lodging vagrants.

If any perſon ſhall knowingly permit any rogue, vagabond, or incorrigible rogue, to lodge or take ſhelter in his houſe, barn, or other outhouſe or building, and ſhall not apprehend and carry him before a juſtice, or give notice to the conſtable ſo to do; and ſhall be convicted thereof by confeſſion, or oath of one witneſs, before one juſtice: he ſhall forfeit not exceeding 40s. nor leſs than 10s. half to the informer, and half to the poor, by diſtreſs and ſale. And if any charge ſhall be brought on any pariſh or place, by means of ſuch offence, the ſame ſhall be anſwered to the ſaid pariſh or place by ſuch offender, and be levied by diſtreſs and ſale of his goods as aforeſaid: and if ſufficient diſtreſs cannot be found, ſuch offender ſhall be committed to the houſe of correction by the juſtice, for any time not exceeding one month. 17 *G.* 2. *c* 5. *ſ.* 23.

XII. Children born in vagrancy.

Whereas women wandering and begging are often delivered of children, in pariſhes and places to which they do not belong, whereby they become chargeable to the ſame, it is enacted, that where any ſuch woman ſhall be ſo delivered, and become chargeable, the churchwardens or overſeers may detain ſuch woman in their cuſtody, until they can ſafely convey her to a juſtice, who ſhall examine her, and commit her to the houſe of correction until the next ſeſſions, who may, if they ſee convenient, order her to be publicly whipped, and detained in the houſe of correction for any further time not exceeding ſix months. And upon application by the churchwardens, and overſeers of the place where ſhe was ſo delivered, the juſtices at ſuch ſeſſions ſhall order the treaſurer to pay them ſuch a ſum, as ſhall be adjudged a reaſonable ſatisfaction for the charges ſuch place has been put to on ſuch woman's account. And if ſuch woman ſhall be detained and conveyed to a juſtice as aforeſaid, the child of which ſhe is delivered if a baſtard, ſhall not be ſettled in the place where ſo born, nor be ſent thither for want of other ſettlement, by a paſs, by virtue of this act; but the ſettlement of ſuch woman ſhall be deemed the ſettlement of ſuch child. 17 *G.* 2. *c.* 5. *ſ.* 25.

And that it may appear, that the overſeers have done what was incumbent upon them, in order to avoid ſuch ſettlement, it is requiſite for the juſtice (as he ought to do in all other caſes wherein he acteth as judge) to make a record of the whole proceedings before him; which record (as it ſeemeth) will be the proper evidence in ſuch caſe, if the ſettlement ſhall afterwards be conteſted.

XIII. Appeal.

Any perſon aggrieved by any act of any juſtice out of ſeſſions, in or concerning the execution of this act, may appeal to the next general or quarter ſeſſions of the county, riding, liberty, or diviſion, giving

giving reaſonable notice thereof; whoſe order thereupon ſhall be final. 17 *G.* 2 *c.* 5. *ſ.* 26.

[In moſt of theſe States, there are particular laws about vagrants, which muſt be the guide to juſtices in thoſe ſtates, tho' where there are no laws about them, the laws of England take place in general.]

Examination of a vagrant.

New-Jerſey, Salem County. } THE examination of A. O. a rogue and vagabond, taken on oath before me one of the juſtices of the peace in and for the ſaid county, the day of in the year of

Who on his oath ſaith, that he was born at [and ſo trace out the hiſtory of his life, ſo far forth as to aſcertain his legal place of ſettlement.]

Taken and ſigned the day and year above written, before me the aboveſaid J. P.

A. O. ⋈ his mark.

Warrant to the conſtable for whipping a vagrant.

New-Jerſey, Salem County. } To the conſtable of ——

FORASMUCH as A. O. a rogue and vagabond, was this day found wandering and begging, in the townſhip of in the ſaid county, not having obtained any legal ſettlement there, and was thereupon apprehended, and is now brought before me John Bard, eſquire, one of the juſtices aſſigned to keep the peace within the ſaid county, that he may be puniſhed and dealt withal according to law: Theſe are therefore to command you to ſtrip, or cauſe to be ſtripped, the ſaid A. O. naked from his middle upwards, and to whip him or cauſe him to be publicly whipped at the common wipping poſt in your ſaid townſhip; and afterwards to remove and convey the ſaid A. O. according to the directions of the paſs herewith delivered to you. Given under my hand and ſeal at Salem in the ſame county, the day of in the year of

Commitment of a vagrant to the houſe of correction.

Pennſylvania, Bucks County. } To the conſtable of Briſtol in the ſaid county, and to the keeper of the houſe of correction at Newtown in the ſaid county.

FORASMUCH as A. O. a rogue and vagabond, was this day found wandring and begging in the townſhip of in the ſaid county, not having obtained any legal ſettlement there, and was thereupon apprehended, and is now brought before me David Pinkerton, eſq. one of the juſtices aſſigned to keep the peace within the ſaid county, that he may be puniſhed and dealt withal according to law: Theſe are therefore to command you the ſaid conſtable, to carry the ſaid A. O. to the ſaid houſe of correction, and to deliver him to the ſaid keeper thereof, together with this warrant: And I do hereby command you the ſaid keeper to receive the ſaid A. O. into your cuſtody in the ſaid houſe of correction, and him there ſafely to keep until the next general quarter ſeſſions of the peace to be holden for the ſaid county: And have you him then there, together with this precept. Given under my hand and ſeal at Briſtol in the ſaid county, the day of in the year of

Vagrant paſs within the ſame juriſdiction.

Pennſylvania, Bucks County. } To the conſtable of in the ſaid county, to receive and convey; and to the overſeers of the poor of the townſhip of in the ſaid county, or either of them, to receive and obey.

WHEREAS A. O. was apprehended within the conſtablewick of aforeſaid, in the county aforeſaid, as a rogue and vagabond, viz. and upon examination of the ſaid A. O. taken before me J. P. eſquire, one of the juſtices of the peace in and for the ſaid county (which examination is hereunto annexed) it doth appear that Theſe are therefore to require you the ſaid conſtable to convey the ſaid A. O. in the next direct way to the ſaid townſhip of within the ſaid county, and there to deliver him to ſome overſeer of the poor of the ſame townſhip of to be there provided for according to law. And you the ſaid overſeers of the poor, are hereby required to receive the ſaid perſon, and provide for him as aforeſaid. Given under my hand and ſeal the day of in the year of

Vagrant paſs from county to county.

New-Jerſey, Morris County. } To the conſtable of —— in the ſaid county of M. and alſo to all conſtables and other officers whom it may concern, to receive and convey; and to the overſeers of the poor of the pariſh of —— in the county of —— or either of them to receive and obey.

WHEREAS A. O. was apprehended in the townſhip of aforeſaid, in the county of M. aforeſaid, as a rogue and vagabond, viz. and upon examination of the ſaid A. O. taken before me J. P. eſquire, one of the juſtices of the peace in and for the ſaid county of M. upon oath (which examination is hereunto annexed) it doth appear that Theſe are therefore to require you the ſaid conſtable, to convey the ſaid A. O. to the town of in the county of that being the firſt town in the next precinct through which he ought to paſs in the direct way to the ſaid townſhip of in the county of to which he is to be ſent, and to deliver him to the conſtable or other officer of ſuch firſt town in ſuch next precinct, together with this paſs, and the duplicate of the examination of the ſaid A. O. taking his receipt for the ſame. And the ſaid A. O. is to be thence conveyed on in like manner to the ſaid townſhip of in the county of there to be delivered to ſome of the overſeers of the poor of the ſame townſhip of to be there provided for according to law. And you the ſaid overſeers of the poor are hereby required to receive the ſaid perſon, and to provide for him as aforeſaid. Given under my hand and ſeal the day of in the year of

The certificate, according to the directions of the ſtatute, ſhall be in the form, or to the effect following.

WHEREAS by a paſs (reciting the ſubſtance or effect of the ſaid paſs) I (or we) do hereby order and direct the ſaid perſon (or perſons) to be conveyed on foot (or, in a cart, or by horſe, &c.) to the ſaid town (or pariſh) of in (or other place, deſcribing it) in the way to ſuch pariſh (town or place as the caſe ſhall be) in

days

days time; for which the said constable [&c.] is to be allowed the sum of and no more. Given under my hand [or our hands] this day &c.

Warrant to secure a lunatic.

New-Jersey, } To the constables, and overseers of the poor
Essex County. } of ---------.

WHEREAS it hath been proved before us two of the justices assigned to keep the peace within the said county, upon the oaths of A. W. and B. W. both of the township of in the county aforesaid gentlemen, that A. L. late of frequently goeth at large in the said township of and that he the said A. L. is by lunacy so far disordered in his senses, that he is dangerous to be permitted to go abroad, and that his legal settlement is in the parish of . These are therefore to authorize and require you, and every of you, to cause the said A. L. to be apprehended and kept safely locked up in the house of A. K. at in the said county, the said A. K. being willing to keep and entertain him the said A. L. for a reasonable allowance in that behalf, and the said house being a secure place: And the said A. L. is to be kept so locked up only so long as such lunacy or disorder shall continue and no longer. Given under our hands and seals at in the said county, the day of .

Order to charge the lunatic's estate, with his keeping, maintenance and cure.

New-Jersey, } To the overseers of the poor of the township of
Suffex County. } in the said county.

WHEREAS A. L. late of in the said county, being a person lunatic, and so far disordered in his senses, that he was and is dangerous to be permitted to go abroad, hath by warrant under the hands and seals of us two of the justices of the peace for the said county, been apprehended and safely locked up in the house of A. K. at in the said county, the said house being a secure place for that purpose: And whereas it appears to us, on the oaths of C. W. and O. P. overseers of the poor of the township of that they the said overseers have reasonably expended the sum of in removing the said A. L. to the said house of the said A. K. and in keeping, maintaining, and curing him there: These are therefore to authorise and command you to seize and sell so much of the goods and chattels, and to receive so much of the annual rents of the lands and tenements of him the said A. L. within your said township as shall be necessary to pay the same; And for what shall be so seized, sold or received by you, you are to account at the next quarter sessions of the peace to be holden for the said county. Given under our hands and seals, at in the said county, the day of

WARRANT.

FOR a warrant to search for stolen goods, see SEARCH WARRANT.

If a justice see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon; and so he may by word command any person to apprehend him, and such command

command is a good warrant without writing: But if the same be done in his absence, then he must issue his warrant in writing. 2 *H. H.* 86.

Concerning which we will shew.

I. For what causes it may be granted.
II. What is to be done previous to the granting of it.
III. How far it is grantable on suspicion.
IV. The form of it.

I. For what causes it may be granted.

There seems to be no doubt, but that a warrant may be lawfully granted by any justice for treason, felony, or præmunire, or any other offence against the peace: Also it seems clear, that wherever a statute gives to any one justice a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do the thing ordained by such statute; for it cannot but be intended that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts, of compelling the party to come before him. 2 *Haw.* 84.

But in cases where the king is no party, or where no corporal punishment is appointed, as in cases for servants wages, and the like, it seemeth that a summons is the more proper process; and for default of appearance the justice may proceed; and so indeed oftentimes it is directed by special statutes.

II. What is to be done previous to the granting of it.

It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put into writing. 1 *H. H.* 582. 2 *H. H.* 111.

Or at least it is safe to bind him over to give evidence; lest afterwards when the offender shall be apprehended, or shall surrender himself, the party that procured the warrant be gone. *Dalt.* c. 169.

III. How far it is grantable on suspicion.

Lord Hale proves at large, contrary to the opinion of lord Coke [4 *Inst.* 177] that a justice hath power to issue a warrant to apprehend a person suspected of felony, before he is indicted; and that though the original suspicion be not in himself, but in the party that prays his warrant. 2 *H. H.* 107—110

For the justices are judges of the reasonableness of the suspicion, and when they have examined the party accusing, touching the rea-

fons of his ſuſpicion, if they find the cauſes of ſuſpicion to be reaſonable, it is now become the juſtices ſuſpicion as well as theirs. 2 *H. H.* 80.

And in another place, ſpeaking of this opinion of lord Coke, he delivers himſelf ſeemingly with a kind of warmth not uſual to him: I think, ſays he, the law is not ſo, and the conſtant practice in all caſes hath obtained againſt it, and it would be pernicious to the kingdom if it ſhould be as lord Coke delivers it; for malefactors would eſcape unexamined and undiſcovered, for a man may have a probable and ſtrong preſumption of the guilt of a perſon whom yet he cannot poſitively ſwear to be guilty. 1 *H. H.* 579.

Mr. Hawkins likewiſe ſeems to be of the ſame opinion againſt lord Coke, but delivereth himſelf with his wonted caution and candour: It ſeems probable, he ſays, that the practice of juſtices of the peace in relation to this matter, is now become a law, and that a juſtice may juſtify the granting of a warrant for the arreſt of any perſon, upon ſtrong grounds of ſuſpicion, for a felony or other miſdemeanor, before any indictment hath been found againſt him; yet inaſmuch as juſtices claim this power rather by connivance than any expreſs warrant of law, and ſince the undue execution of it may prove ſo highly prejudicial to the reputation as well as the liberty of the party, a juſtice cannot well be too tender in his proceedings of this kind, and ſeems to be puniſhable not only at the ſuit of the king, but alſo of the party grieved, if he grant any ſuch warrant groundleſsly and maliciouſly, without ſuch a probable cauſe as might induce a candid and impartial man to ſuſpect the party to be guilty. 2 *Haw.* 85.

But a general warrant, upon a complaint of a robbery, to apprehend *all perſons ſuſpected*, and to bring them before a juſtice, hath been ruled void; and falſe impriſonment lies againſt him that iſſues ſuch a warrant. 1 *H. H.* 580. 2 *H. H.* 112.

IV. The form of it.

Mr. Dalton ſays the warrant is the better, if it bear date of the place where it was made. *Dalt. c.* 169.

And lord Hale ſays, the place, though it muſt be alledged in pleading, need not be expreſſed in the warrant. 2 *H. H.* 111.

And Mr. Hawkins ſays, it is ſafe, but perhaps not neceſſary, in the body of the warrant to ſhew the place where it was made; yet it ſeems neceſſary to ſet forth the county in the margin at leaſt, if it be not ſet forth in the body. 2 *Haw.* 85.

It may be directed to the ſheriff, bailiff, conſtable, or to any indifferent perſon by name, who is no officer; for the juſtice may authoriſe any one to be his officer, whom he pleaſes to make ſuch; yet it is moſt adviſeable to direct it to the conſtable of the precinct wherein it is to be executed, for that no other conſtable, and *a fortiori* no private perſon is compellable to ſerve it. 2 *Haw.* 85. *Dalt. c.* 169. 2 *H. H.* 110.

But

But in the case of an act of parliament, it is said, that if the act directeth that a justice shall grant a warrant, and doth not say to whom it shall be directed, by consequence of law it must be directed to the constable, and it cannot be directed to the sheriff, unless such power is given in the act. L. *Raym.* 1192. 2 *Salk.* 381.

The warrant may be stiled in divers manners: As 1. In the name of the king; and yet the teste must be under the name of the justice that grants it out. Or, 2. It may be stiled and made only in the name of the justice. Or, 3. It may be made without any such stile, and only under the teste of the justice, or only subscribed by him. As followeth:

In the name of the people.

New-York, Suffolk County. THE people of the state of New-York, by the grace of God, free and independent; To our sheriff of the county of Suffolk, and to the petty constables of the town of Southold, in the said county, and to all and sigular our bailiffs and ministers in the same county, as well within liberties as without, greeting:

Forasmuch as A. I. of hath come before J. P. esquire, one of our justices assigned to keep our peace within the said county, and hath, and so forth.

(Concluding it in the justice's name, as thus) Witness the said J. P. at the day of and

Note: That wheresoever the warant is made in the name of the people, there it ought to be directed to all ministers as well within liberties as without; for that the people is made a party: and so it may be done in all other warrants, especially for felony, or for the peace or good behaviour, because it is the service of the people.

Or thus, in the name of the justice himself.

New-York, Ulster County. J. P. esquire, one of the justices assigned to keep the peace within the said county; to the sheriff of the said county, to the constables of the town of within the said county, and to all other the ministers and officers of the people of the state of New-York, within the said county, and to every of them, greeting:

Forasmuch as, &c. Given under my hand and seal the day of &c.

Regularly, the warrant, especially if it be for the peace or good behaviour, or the like, where sureties are to be found or required, ought to contain the special cause and matter, whereupon it is granted, to the intent that the party upon whom it is to be served, may provide his sureties ready, and take them with him to the justice to be bound for him; but if the warrant be for treason, murder, or felony, or other capital offence, or for great conspiracies, rebellious assemblies, or the like, it needs not contain any special cause, but there the warrant of the justice may be to bring the party before him, to make answer to such things or matters generally, as shall be objected against him on the king's behalf. *Dalt.* c. 169. 2 *Haw.* 85. 2 *H. H.* 111.

But

But Mr. Lambard fays, every warrant made by a juſtice of the peace ought to comprehend the ſpecial matter upon which it proceedeth: even as all the king's writs do bear their proper cauſe in their mouth with them: And as for the form that is commonly uſed, 'to anſwer to ſuch things as ſhall be objected,' and ſuch like, they were not fetched out of the old learned precedents, but lately brought in by ſuch as knew not, or cared not, what they writ. *Lamb.* 87.

The warrant ought regularly to mention the name of the party to be attached, and muſt not be left in generals, or with blanks to to be filled up by the party afterwards. 2 *H. H.* 114. *Dalt. c.* 169.

The warrant may iſſue to bring the party before the juſtice who granted the warrant ſpecially, and then the officer is bound to bring him before the ſame juſtice; but if the warrant be to bring him before any juſtice, then it is in the election of the officer to bring him before what juſtice of the county he thinks fit, and not in the election of the priſoner. 1 *H. H.* 582. 2 *H. H.* 112.

It ought to ſet forth the year and day wherein it is made, that in an action brought upon an arreſt by virtue of it, it may appear to have been prior to ſuch arreſt: and alſo in caſe where a ſtatute directeth the proſecution to be within ſuch a time, that it may appear, that the proſecution was commenced within ſuch time limited: Likewiſe, where a penalty is given to the poor of the pariſh where the offence ſhall be committed, or the like, it ought to ſpecify the place where the offence was committed. 2 *Haw.* 85.

Finally, it ought to be under the hand and ſeal of the juſtice who makes it out. *id.*

A warrant for defaulters not working upon the highways.

Eſſex, ſſ. To the Conſtable, &c.

WHEREAS A. B. one of the overſeers of highways of E. T. hath made complaint, that C. D. E. F. and G. H. being duly warned, have made default in appearing to work in repairing the highway as directed, with a team, &c. Theſe are therefore in the name of the people of the ſtate of New-Jerſey, to require you to give notice to the abovemaid C. D. E. F. and G. H. to appear before me to-morrow by 3 o'clock afternoon, to anſwer the above complaint, &c. Given under my hand this of J. R.

A warrant of diſtreſs for not working as required by overſeers of highways.

Eſſex, ſſ. To the Conſtable, &c.

WHEREAS A. B. one of the overſeers of highways for E. T. hath by his oath, made it appear, That C. D. E. F. and G. H. were duly warned, and made default in working upon the highway in ſaid town, the ſaid C. D. with a team, not having juſt excuſe for ſuch neglect, whereby the ſaid E. F. and G. H. have forfeited each the ſum of 4s. 6d. procl. and the ſaid C. D. double that ſum, in not bringing his team when required: Theſe are therefore, in the name of the people of the ſtate of New-Jerſey, to require you to make diſtreſs on the goods and chattels of each of the above defaulters, and make ſale thereof at public

public vendue (returning the overplus if any be) and pay the said fines and costs according to the act of assembly in such case made and provided. Given under my hand and seal, this day of J. R.

A warrant to levy the forfeiture on an overseer for neglecting his duty, in repairing the highways, &c.

Essex, ss. To the Constables, &c.

WHEREAS A. B. one of the overseers of highways of E. T. hath neglected repairing the highway in said E. T. having no just excuse for such his neglect, whereby he hath forfeited the sum of forty shillings proc. These are therefore, in the name of the people of the state of New-Jersey, to require you to levy the said sum of forty shillings on the goods and chattels of the said A. B. and make sale thereof at public vendue (returning the overplus if any be) and apply the same as the law in such case made and provided directs. Given under my hand and seal, this day of J. R.

A general warrant.

Somerset, ss. To the Constables, &c.

WHEREAS complaint upon oath, hath been made before me, by A. B. that C. D. did assault and beat him: These are, in the name of the people of the state of New-Jersey, to require you to bring the said C. D. (of whom you shall have notice) before me, or some other justice of the peace, to be examined and dealt with according to law. Hereof you are not to fail. Given under my hand and seal, &c.

A warrant to search for a lost child.

Essex, ss. To the constable, &c.

WHEREAS S. R. has given information, that G. R. his infirm child, hath the last night, about eight o'clock, wandered away from his house, and is in danger of being lost in the wilderness, to the great grief of his parents: These are therefore in the name of the people, to require you, and every of you, upon sight hereof, to make an alarm in your several precincts, and to inform the inhabitants the most likely method in finding the above-said child, and to return him to his parents, for which this shall be your sufficient warrant. Given, &c.

WEIGHTS and MEASURES.

WHAT is treated of here, is touching weights and measures in general.

I. Of the different kinds of weights and measures.

II. Standard of weights and measures to be kept in market towns.

III. Mayors and other officers to seal and regulate measures.

IV. Punishment of mayors and other officers for omitting their duty.

I. Of

I. Of the different kinds of weights and meaſures.

Notwithſtanding the many ſtatutes which have enacted, that there ſhall be but one weight and one meaſure, throughout the realm, there always have been and ſtill are two kinds of weights uſed in England, and both warrantable: the one by law, and the other by cuſtom; but they are for ſeveral ſorts of wares or commodities; for there is *troy* weight and *averdupois*. *Dalt. c.* 112.

Troy weight is by law: and thereby are weighed ſilk, gold, ſilver, pearl, and precious ſtones. And this hath to the pound 12 ounces. *id.*

Averdupois (which in French is as much as to ſay, to have full weight) is by cuſtom, yet confirmed by ſtatute; and thereby are weighed all kind of grocery wares, drugs, butter, cheeſe, fleſh, wax, pitch, tar, tallow, wool, hemp, flax, iron, ſteel, lead, and all other commodities which bear the name of garble, and whereof iſſueth a refuſe or waſte; (and alſo bread, by the 8 *An. c.* 18.) And this hath to the pound 16 ounces; and 12 pounds over are allowed to every hundred. *id.*

And no leſs do the meaſures alſo differ in different places. Thus Mr. Dalton obſerves, that the buſhel of corn in one place is greater than in another; and it ſeems he ſays, that the cuſtom of the place is to be obſerved: Yet he makes a *query* upon it, becauſe it is contrary to the great charter, and divers other ſtatutes; and cuſtom or preſcription againſt a ſtatute ſeemeth not good. *Dalt. c.* 112.

II. Standard of weights and meaſures to be kept in market towns.

In every city, borough, and market town, a common balance ſhall be, with common weights ſealed, and according to the ſtandard of the exchequer, upon the common coſts of ſuch city, borough, or market town, in the keeping of the mayor, or conſtable, on pain of 10l. for ſuch city making default, borough, 5l. and market town 40s.

At which balance all the inhabitants may freely weigh without any thing paying; taking nevertheleſs of foreigners, for every draught within the weight of 40lb. a farthing, and for every draught betwixt 40lb. and 100lb. an half penny, and for every draught betwixt 100lb. and 1000lb. a penny.

And juſtices of the peace, mayors, bailiffs, and ſtewards of franchiſes, may inquire of offenders againſt this ordinance, and do execution of them that be found faulty. 8 H. 6. c. 5. 11 H. 7. c. 4.

III. Mayors and other officers to ſeal and regulate meaſures.

The clerk of the market, and where there is none, the mayor, or

or head officer, or other perſon having benefit of the market, ſhall cauſe to be ſealed all meaſures duly guaged, by the ſtandard which he ſhall have out of the exchequer, 22 & 23 *C.* 2. *c.* 12. *ſ.* 4.

IV. Puniſhment of mayors and other officers for omitting their duty.

If any mayor, lord of the liberty, or other perſon authoriſed to mark or ſeal meaſures, ſhall neglect or refuſe, being required, to ſeal or mark any buſhel, half buſhel, or peck duly guaged; he ſhall forfeit for the firſt offence 5l. and for every other offence 10l. on conviction by preſentment or indictment at the county ſeſſions; half to the proſecutor, and half to the poor; to be levied by diſtreſs; and for default of diſtreſs, to be impriſoned by warrant of the ſaid juſtices till payment be made. 22 *C.* 2. *c.* 8. *ſ.* 3. 4.

And if any mayor or other head officer, ſhall ſuffer any other meaſure to be uſed than according to the ſtandard, and ſealed; he ſhall forfeit 5l. half to the proſecutor, and half to the poor, on conviction by preſentment or indictment at the county ſeſſions, by diſtreſs; for default of diſtreſs, to be impriſoned by warrant of the juſtices till paid. 22 *C.* 2. *c.* 8. *ſ.* 3.

But after all, notwithſtanding the puniſhments aforeſaid, appointed by ſtatute, for ſelling by falſe weights and meaſures; yet the ſame is alſo an offence at the common law, and conſequently may be puniſhed by indictment, fine and impriſonment.

WIFE.

T. 2 *G.* 2. King and his wife againſt Jones. The plaintiff Jones declared againſt Judith Parnell, upon ſeveral promiſes. She by the name of Judith King appears by attorney, and pleads *non aſſumpſit.* And after a verdict for the plaintiff, ſhe and Edward King bring a writ of error, and aſſign for error, that ſhe has appeared and pleaded as a feme ſole, whereas at the time of her appearance and plea ſhe was married to the ſaid Edward King. But by the court, This is to abate the plaintiff's writ by the act of the defendant, which was never allowed; we muſt take it, that at the time of bringing the action the defendant was a feme ſole, becauſe they pretend to carry it back no farther than the appearance. And plaintiffs would be in a fine condition, if after they have arreſted a woman, ſhe ſhall be allowed to overthrow their proceedings by a ſubſequent marriage. And the judgment was affirmed. *Str.* 811.

A wife, or feme covert, is ſo much favoured in reſpect of that power and authority which her huſband has over her, that ſhe ſhall not ſuffer any puniſhment for committing a bare theft, in company with, or by coercion of her huſband. 1 *Haw.* 2.

But

But if she commit a theft of her own voluntary act, or by the bare command of her husband; or be guilty of treason, murder, or robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole, because of the odiousness and dangerous consequence of these crimes. 1 *Haw.* 2. 1 *H. H.* 47. *Dalt.* c. 147.

And the coercion of the husband is only a presumption till the contrary appear; for upon the evidence it can clearly appear, that the wife was not drawn to it by the husband, but that she was the principal actor and inciter of it, she seems to be guilty as well as the husband. 1 *H. H.* 516.

A wife shall not be deemed accessary to a felony for receiving her husband who has been guilty of it; as her husband shall be for receiving her: because she is under the power of her husband, and she is bound to receive him. 1 *Haw.* 2. 1 *H. H.* 47.

But a wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house; for this is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. 1 *Haw.* 2.

And generally, a married woman shall answer as much as if she were sole, for any offence not capital, against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband, by way of indictment; which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for an offence to which he is no way privy. But if a wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same (as he may generally to any suit for a cause of action given by his wife) and shall be liable to answer what shall be recovered thereupon. 1 *Haw.* 2.

If a wife willingly leave her husband, and go away, and continue with her adulterer, she shall be barred for ever of action to demand her dower. 13 *Ed.* 1. *st.* 1. *c.* 34.

M. 12 *G.* Morris and Martin. Action for meat and other things provided for the defendant's wife. The defendant proved she went away from him with an adulterer. Raymond Ch. J. held, that the husband should not be charged for necessaries for her, though the plaintiff who provided for her had no notice; and he said Ch. J. Holt always ruled it so. *Str.* 647.

T. 12 *G.* Mainwaring and Sands. In an action against the husband for a laced head sold to the wife, it was proved, that the wife lived from her husband in adultery, and that she told the plaintiff she had a husband, but that signified nothing, for she would pay him herself. Raymond, Ch. J. held, the defendant not chargeable, and said he should have ruled it so, if there had been no actual notice, which only strengthened the case. *Str.* 706.

T. 4 *G. Child* and *Hardyman.* Action for linen ſold to the defendant's wife. Upon *non aſſumpſit*, the delivery was proved. And the defendant proved that ſhe had lived in a very lewd manner; one Mr. Nott frequently coming to her at her huſband's houſe, and they were locked up together in a bed chamber; and other indecencies paſſed between them. And it was alſo proved, that ſhe ſeveral times went to the houſe of this Nott, a gentleman in Wiltſhire, who lived within three miles of the defendant's houſe. It did not appear farther than that he diſliked her going and ſtaying at Mr. Nott's. But under theſe circumſtances, the huſband and wife continued to live together. Afterwards ſhe went away from him, and went to Marlborough, where ſhe reſided for ſome time; but after the leaving her huſband's houſe, it did not appear that ſhe ever ſaw Mr. Nott, or lived in a lewd manner. After ſome time, ſhe ſent Lucas an attorney, to her huſband, to deſire that he would receive her again; the huſband told him, that if ſhe came again, ſhe ſhould never ſit at the upper end of his table, nor have the government of the children, but ſhould live in a garret. Then Lucas propoſed to him, to make her an allowance, and propoſed about 80 or 100l. a year, he being worth about 5 or 600l. a year. But that was not complied with: and afterwards ſhe came to London, and bought the linen to the amount of 53l. By Raymond Ch. J. If a woman elopes from her huſband, tho' ſhe does not go away with an adulterer, or in an adulterous manner the tradeſman truſts her at his peril, and the huſband is not bound. And this hath been ſo adjudged in 2 or 3 caſes. Indeed if he refuſe to receive her again, from that time it may be an anſwer to the elopement. In this caſe he doth not abſolutely refuſe to receive her again: but that ſhe ſhould neither ſit at his table, nor have any government of the children, but ſhould be kept in a garret: and ſhe deſerved no better uſage. And the plaintiff was nonſuited. *Str.* 875.

M. 18 *G.* 2. *Bolton* and *Prentice.* In *aſſumpſit* for goods ſold and delivered to the defendant's wife, the caſe appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's houſe, and the plaintiff furniſhed her with goods; and the defendant finding the plaintiff had helped her to pawn her watch and ſuſpecting he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever truſting her again. After this the defendant and his wife cohabited together for a year; when, without any cauſe appearing, he left her, locked up her cloaths, and upon her finding him out, refuſed to admit her, and ſtruck her, and declared he would not maintain her, or pay any body that did. In this diſtreſs, ſhe borrowed cloaths of her friends, and applied to the plaintiff, who furniſhed her with neceſſaries according to the defendant's degree: which the defendant refuſing to pay for, this action was brought: and upon trial the jury found for the plaintiff. Upon motion for a new trial, the court held the verdict was right: for whilſt they were at the plaintiff's, there was a particular

reaſon for the particular prohibition: yet the cauſeleſs turning her away deſtitute afterwards, gave her the general credit again: and if a huſband ſhould be allowed, under the notion of a particular prohibition, to deſtroy her obtaining credit in one place, he may in the ſame manner prevent it with all people ſhe is acquainted with. He appears to be a wrong doer, and therefore has no right to prohibit any body. They diſtinguiſhed this caſe from the caſe of Manby and Scot 1 Sid. 109. for there the wife was guilty of the firſt wrong in eloping. *Str.* 1214.

Of women carried away (viz. violently, or againſt their wills, 2 Inſt. 435.) with the goods of their huſbands, the king ſhall have the ſuit for the goods ſo taken away, 13 Ed. 1. ſt. 1 c. 34. That is, it ſhall be felony. And ſo, if any man takes another man's wife, with her huſband's goods, againſt the huſband's will, this is alſo felony. *Dalt. c.* 157.

But a wife herſelf cannot feloniouſly take her huſband's goods, and tho' ſhe ſo takes her huſband's goods, and delivers them to a ſtranger, yet it is no felony in the ſtranger. *H. Pl.* 65. *Haw.* 93.

A married woman, by her own act (but not in reſpect of what is done by others at her command, becauſe all ſuch commands of hers are void) may commit a forcible entry or detainer; and upon the juſtice's view of the force, ſhe ſhall be impriſoned therefor, and ſhe may be fined in ſuch caſe: but ſuch fine ſet upon the wife, ſhall not be levied upon the huſband; for the huſband ſhall never be charged for the act or default of his wife, but when he is made a party to the action, and judgment given againſt him and his wife. *Dalt. c.* 126. 9 *Co.* 72. 11 *Co.* 61.

Likewiſe if ſhe ſhall commit any riot, or do any treſpaſs or other wrong, ſhe is puniſhable for it: and for a treſpaſs done by the wife, or for a ſcandal publiſhed by her, the action lieth againſt both the huſband and wife, and there the huſband is chargeable to the damages or fine, becauſe he is party to the action and judgment: but if a wife without her huſband be indicted of a treſpaſs, riot, or any other wrong, there the wife ſhall anſwer, and be party to the judgment only; and in ſuch caſe, the fine ſet upon the wife ſhall not be levied upon the huſband; yet after the huſband's death, ſuch damages or fines ſhall then be levied of the wife herſelf; and as for impriſonment, or other corporal pain, it ſhall be inflicted upon the wife only, and not upon the huſband for his wife's act or default. *Dalt. c.* 139.

M. 19 *G.* 2. *Finch* and his wife againſt *Duddin* and his wife. In an action for a battery of the plaintiff's wife by the defendant's wife, there was judgment for the plaintiffs, and the wife of the defendant was only taken in execution. She moved to be diſcharged, but upon affidavits of endeavours to take the huſband, and it not appearing there was any deſign to ſcreen him, the court refuſed it, on the authority of Pitt and Meller. *Str.* 1237.

Which caſe of Pitt and Meller, T. 15 G. 2. was thus: In trover ag ainſt

againſt both, and judgment and execution againſt both; the wife petitioned to be diſcharged out of cuſtody; which the court refuſed, unleſs it could be ſhewn, that there was fraud and colluſion between the plaintiff and the huſband, to keep her there. *Str.* 1167.

M. 10 *G. Tarrant* and *Mawr.* The wife libelled in the ſpiritual court for calling her whore, and there being proceedings likewiſe for defamation againſt her by the other, the two huſbands enter into an agreement to ſtay proceedings on both ſides; and upon one of the wives going on, the huſband moved for a prohibition: but it was denied: for by the court, the ſuit is by the wife, to recover her fame, and it is not in the power of the huſband to reſtrain her. *Str.* 576.

If a woman receive ſtolen goods into her houſe, knowing them ſo to be: or ſhall lock them up in her cheſt or chamber, her huſband not knowing thereof: if her huſband, ſo ſoon as he knoweth thereof, do forthwith forſake his houſe, and her company, and make his abode elſewhere, he ſhall not be charged for her offence: whereas otherwiſe, the law will impute the fault to him, and not to her. *Dalt. c.* 157.

A proſecution for conſpiracy is not maintainable againſt a huſband and wife only: becauſe they are eſteemed but as one perſon in law, and are preſumed to have but one will. 1 *Haw.* 192.

If a woman who is a ſervant, ſhall marry, yet ſhe muſt ſerve out her time, and the huſband cannot take her out of her maſter's ſervice. *Dalt. c.* 58.

Alſo if a married man and his wife do bind themſelves to ſerve, they ſhall be compelled to ſerve according to their covenant or agreement. *id.*

If the wife malicioufly kill her huſband, it is petty treaſon; but if the huſband malicioufly kill his wife, it is but murder. *Dalt. c.* 142.

Huſband and wife cannot be witneſſes for one another, nor regularly againſt one another. 2 *Haw.* 431.

But a wife may demand ſurety of the peace againſt her huſband threatning to beat her outrageouſly, and a huſband alſo may have it againſt his wife. 1 *Haw.* 127.

And in other criminal caſes, the wife may be a witneſs againſt her huſband where ſhe is the party grieved; but not in civil caſes. *Dalt. c.* 164.

A wife cannot be bound herſelf by recognizance, but her ſureties only. *Dalt. c.* 117.

She may ſurrender a leaſe in the court of chancery or exchequer, in order to renew the ſame. 29 *G.* 2. *c.* 31.

WITCHCRAFT.

BY the 9 *G.* 2. *c.* 5. No profecution, fuit, or proceeding, fhall be commenced or carried on againſt any perſon for witchcraft, forcery, inchantment, or conjuration, or for charging another with any ſuch offence, in any court whatſoever. *ſ.* 3.

But if any perſon ſhall pretend to exercife or uſe any kind of witchcraft, forcery, inchantment or conjuration; or undertake to tell fortunes, or pretend from his ſkill or knowledge in any occult or crafty ſcience, to diſcover where or in what manner any goods or chattels, ſuppoſed to have been ſtolen or loſt, may be found; every perſon ſo offending, being convicted on indictment or information ſhall ſuffer impriſonment for a year without bail or mainprize, and once in every quarter of the ſaid year, in ſome market town of the proper county, upon the market day there, ſtand openly on the pillory for one hour, and alſo ſhall (if the court by which ſuch judgment ſhall be given ſhall think fit, be obliged to give ſureties for his good behaviour, in ſuch ſum and for ſuch time, as the ſaid court ſhall judge proper, according to the circumſtances of the offence, and in ſuch caſe ſhall be further impriſoned, until ſuch ſureties be given. *ſ.* 4.

WOMEN.

Concerning women conſidered as wives, or *femes covert*, ſee title WIFE.

Concerning women having two huſbands, or men two wives; ſee title POLYGAMY.

Concerning the raviſhment of women, ſee title RAPE.

IF any perſon ſhall unlawfully and carnally know and abuſe any woman child under the age of ten years, he ſhall be guilty of felony without benefit of clergy. 18. *El. c.* 7.

None ſhall take by force any maiden within age (that is, the age of 12 years, being the age of conſent to marriage, 2 *Inſt.* 182.) by her own conſent nor without; nor any wife or maiden of full age, nor any other woman againſt her will, on pain of impriſonment for two years, and after, fine at the king's will. 3 *Ed.* 1, *c.* 13.

If any perſon take by force, or otherwiſe, any woman ſole, having any ſubſtance of lands, tenements, or moveable goods, and inforce her before ſhe be ſet at liberty, to bind herſelf to him by ſtatute or obligation; ſuch bond ſhall be void. 21 *H.* 6. *c.* 9

Whereas women, as well maidens as widows and wives, having ſubſtances, ſome in goods moveable, and ſome in lands and tenements, and ſome being heirs apparent unto their anceſtors, for the lucre of ſuch ſubſtances, are oftentimes taken by miſdoers, contrary to their will, and after married to ſuch miſdoers, or to other by their aſſent, or defiled— it is enacted, that what perſon that taketh any woman

to

ſo againſt her will unlawfully, that is to ſay, maid, widow, or wife, that ſuch taking, procuring, and abetting to the ſame, and alſo receiving wittingly the ſame woman ſo taken againſt her will, and knowing the ſame, be felony; and that ſuch miſdoers, takers and procurators to the ſame, and receitors, knowing the ſaid offence, ſhall be adjudged as principal felons. 3 *H.* 7 *c.* 2. And by the 31 *El. c.* 9. benefit of clergy is taken away from the principals, procurers and acceſſaries before.

Upon the face of which ſaid ſtatute of the 3 *H.* 7. theſe things are required to make the offence felony, 1. That the maid, wife, or widow, have lands, or tenements, or moveable goods, or be an heir apparent. 2. That ſhe be taken away againſt her will. 3. That the taking was for lucre. And 4. That ſhe be married to the miſdoer, or to ſome other by his conſent; or be defiled (that is carnally known.) For if theſe concur not, and be ſo laid in the indictment, the miſdoer is not a felon within this ſtatute, but otherwiſe to be puniſhed. 3 *Inſt.* 61. 1 *Haw.* 110.

The ſaid act makes not only the takers, but the procurers and abettors of the felony, and receivers of the woman wittingly; knowing the ſame, to be all principal felons; the like whereof lord Coke ſays he hath not found in any other ſtatute that he remembers. But by a conſtruction of the common law, they that receive the miſdoers, and not the woman, are acceſſaries only. 3 *Inſt.* 61, 62.

But thoſe who are only privy to the marriage, but no way parties to the forcible taking away, or conſenting thereto, are not within the ſtatute. 1 *Haw.* 110.

It is no manner of excuſe, that the woman at firſt was taken away with her own conſent, becauſe if ſhe afterwards refuſe to continue with the offender, and be forced againſt her will, ſhe may from that time as properly be ſaid to be taken againſt her will, as if ſhe had never given any conſent at all: for till the force was put upon her, ſhe was in her own power. 1 *Haw.* 110.

Alſo, it is not material, whether a woman ſo taken contrary to her will, be at laſt married or defiled with her own conſent, or not, if ſhe were under the force at the time. 1 *Haw.* 110.

In Fullwood's caſe, *M.* 13 *C.* it was reſolved, that the woman taken away and married, may be ſworn and give evidence againſt the offender, who ſo took and married her, though ſhe be his wife *de facto.* 1 *H. H.* 661.

If any perſon above the age of 14 years, ſhall unlawfully take or convey, or cauſe to be taken or conveyed, any maid or woman child unmarried, being within the age of 16 years, out of the poſſeſſion and againſt the will of her father, or mother, or guardian, he ſhall ſuffer two years impriſonment, or pay ſuch fine as ſhall be aſſeſſed by the court, half to the king and half to the parties grieved. 4 & 5 *P. & M.* c. 8. *ſ.* 3.

H. 15 *G.* 2 *K.* againſt Cornforth and others. The court granted an information againſt the defendants, for taking away a natural daughter

daughter under 16, under the care of her putative father: being of opinion it was within this ſtatute. *Str.* 1162.

And if any perſon ſhall ſo take away, or cauſe to be taken away, *and deflour*, any ſuch maid or woman child: or ſhall againſt the will or knowledge of the father, or if he is dead, of the mother having tuition of ſuch child, contract matrimony with her by letters, meſſages or otherwiſe: he ſhall be impriſoned for five years, or pay ſuch fine as ſhall be aſſeſſed by the court, half to the king, and half to the parties grieved. *ſ.* 3.

And if any woman child or maiden, being above the age of 12 years, and under 16, ſhall conſent or agree to ſuch perſon ſo making ſuch contract of matrimony; the next of kin to her ſhall have, hold and enjoy her lands during the life of the perſon ſo contracting. *ſ.* 6.

But by the 26 *G.* 2 c. 33. No ſuit ſhall be had in any eccleſiaſtical court in order to compel a celebration of marriage *in facie eccleſiæ*, by reaſon of any contract of matrimony whatſoever, whether *per verba de præſenti*, or *per verba de futuro*. And the marriage of any perſon under the age of 21, without conſent of parents or guardians, ſhall be null and void.

In an appeal by a woman, the appellee cannot wage battel, but muſt put himſelf upon his country. 2 *Haw.* 427.

Peereſſes ſhall be tried as peers for treaſon or felony. 20 *H.* 6. *c.* 9.

Women upon ſtanding mute, are liable to *pain fort & dure*, as men are. 2 *Haw.* 331.

A woman being convicted of an offence for which a man may have his clergy, ſhall ſuffer the ſame puniſhment as a man ſhould ſuffer, that has the benefit of his clergy allowed; that is, ſhall be burnt in the hand, and further kept in priſon as the court ſhall think fit, not exceeding one year. 3 *W.* c. 9.

But ſhe ſhall have the benefit of the ſaid ſtatute but once. 4 & 5 *W.* c. 24. *ſ.* 13.

The judgment againſt a woman, in caſe of high treaſon, is not the ſame as againſt a man traitor, to be hanged, cut down alive, have the bowels taken out, and the body quartered; but to be drawn to the place of execution, and there burned.

And this alſo is the judgment againſt a woman, in caſe of petit treaſon, whereas the judgment againſt a man for petit treaſon is, that he ſhall be hanged.

But in caſe of felony, the judgment is the ſame againſt both man and woman, to be hanged by the neck till dead. 2 *Haw.* 444.

It is clear, that if a woman quick with child be condemned either for treaſon or felony, ſhe may alledge her being with child in order to get the execution reſpited, and thereupon the ſheriff ſhall be commanded to take her into a private room, and to impannel a jury of matrons, to try and examine whether ſhe be quick with child or not; and if they find her quick with child the execution ſhall be

be reſpited till her delivery. But it is agreed, that a woman cannot demand ſuch reſpite of execution, by reaſon of her being quick with child, more than once. 2 *Haw.* 464.

Women are not obliged to appear at the torn or leet. 2 *Haw.* 57.

Mr. Hawkins ſeems to be of opinion, that a cuſtom of the inhabitants ſerving the office of conſtable by turns, is good; and that when it comes to the turn of a woman inhabitant, ſhe muſt procure one to ſerve for her. 2 *Haw.* 63.

WRECK.

WRECK of the ſea, in legal underſtanding, is applied to ſuch goods, as after ſhipwreck at ſea, are by the ſea caſt upon the land: and therefore the juriſdiction thereof pertaineth not to the lord admiral, but to the common law. 2 *Inſt.* 167.

None of thoſe goods which are called *jetſam* (from being caſt into the ſea while the ſhip is in danger, and after periſheth) or thoſe called *flotſam* (from floating upon the ſea after ſhipwreck) or thoſe called *lagan* or *ligan* (goods thrown overboard before the ſhipwreck, which ſink to the bottom of the ſea) are to be eſteemed wreck ſo long as they remain upon the ſea, and are not caſt upon the land by the ſea: but if any of them are caſt upon the land by the ſea, they are wreck. *Wood. b.* 2. *c.* 2.

Alſo, by the 3 *Ed* 1 c. 4. 'Where a man, a dog, or a cat eſcape 'quick out of the ſhip, the ſhip or any thing therein ſhall not be 'adjudged wreck of the ſea.'

A man, a dog, or a cat] Which ſtatute being but declaratory of the common law, theſe three inſtances are only put for examples; for beſides theſe two kinds of beaſts, all other beaſts, fowls, and other living things are underſtood, whereby the property of the goods may be known. 2 *Inſt.* 167, 168.

Eſcape quick out of the ſhip] If a ſhip be ready to periſh, and all the men therein (for the ſafeguard of their lives) leave the ſhip, and after the forſaken ſhip periſheth; if any of the men be ſaved and come to land, the goods are not loſt. 2 *Inſt.* 167.

By the 17 *Ed.* 2. 'The king ſhall have wreck of the ſea throughout the realm.'

And the cauſe wherefore originally wreck was given to the crown, ſtood upon two main maxims of the common law. 1. That the property of all goods whatſoever muſt be in ſome perſon. 2. That ſuch goods as no ſubject can claim any property in, do belong to the king by his prerogative. 2 *Inſt.* 167.

The taking of goods whereof no one had a property at the time, is not felony; and therefore he who taketh away a wreck, before it is ſeized by the perſon who has a right thereto, is not guilty of felony, and ſhall only be puniſhed by fine, or the like. 1 *Haw.* 92, 93. That

94. That is to say, he is not guilty of felony by the common law; but it is otherwise by the ſtatutes here following:

To preſerve ſhips ſtranded, or in diſtreſs, from being plundered by the country people, it is enacted by the 12 *An. ſt.* 2 c. 1. 8. and the 26 *G.* 2 c. 19. as follows: (Which ſaid act of the 12 An. is required to be read in the church four times a-year, in all ſea port towns, and on the coaſt.)

The juſtice of the peace, mayor, bailiff, collector of the cuſtoms, or chief conſtable, who ſhall be neareſt to where any ſhip ſhall be ſtranded or caſt away, ſhall forthwith give public notice for a meeting to be held as ſoon as poſſible, of the ſheriff or his deputy, the juſtices of the peace, mayors, coroners, and commiſſioners of the land tax, or any five of them, who ſhall employ proper perſons for ſaving the ſame; and ſhall command the conſtables neareſt to the ſea coaſts, to call together as many men as ſhall be thought neceſſary to aſſiſt.

And any juſtice of the peace, in the abſence of the high ſheriff, may take ſufficient power of the county.

And they may command all ſhips at anchor near, to aſſiſt; and if the officer of ſuch ſhip ſhall refuſe or neglect, he ſhall forfeit 100l. with coſts, to the officer of the ſhip in diſtreſs.

And to prevent confuſion, and contradictory orders, the perſons aſſembled to ſave any veſſel or goods as aforeſaid, ſhall conform in the firſt place to the orders of the maſter or other officer or owner, or perſons employed by them; and for want of their preſence or directions, then to the orders of the officers of the cuſtoms, next to thoſe of the officers of excife, then of the ſheriff or his deputy, then of a juſtice of the peace, then of a mayor, then of the coroner, then of a commiſſioner of land tax, then of a chief conſtable, then of a petty conſtable: and any perſon acting contrary to ſuch orders, ſhall forfeit not exceeding 5l. to be levied by warrant of one juſtice, and in caſe of non payment, to be committed to the houſe of correction, not exceeding three months.

And every ſuch ſheriff, juſtice, mayor, coroner, lord of the manor, under ſheriff, or commiſſioner of land tax, ſhall have 4s. a day during his attendance, out of the goods ſaved.

And if any perſon, not empowered as above, ſhall endeavour to enter on board ſuch veſſel, or ſhall deface the marks of the goods, he ſhall within 20 days make double ſatisfaction to the party grieved, at the diſcretion of the two next juſtices; or in default thereof, ſhall be ſent by them to the next houſe of correction, to be kept to hard labour for 12 months.

And if any perſon not employed by the maſter or owner, ſhall in the abſence of perſons employed by them, ſave any veſſel or goods, and cauſe them to be carried for the benefit of the owners into port, or any near adjoining cuſtom houſe, or place of ſafe cuſtody, immediately giving notice thereof to a juſtice, magiſtrate, cuſtom houſe or excife officer, they ſhall be entitled to a reaſonable reward for the

ſame,

ſame, to be adjuſted by three neighbouring juſtices, which may be recovered by action at law: Or the ſame may be adjuſted by the officers abovementioned. And if the ſaid ſalvage (and the charges of 4s. a day as abovementioned) ſhall not be paid in 40 days after the ſervices performed, the officer of the cuſtoms concerned in the ſalvage, may borrow or raiſe ſo much money as ſhall pay the ſame, upon a bill or bills of ſale, under his hand and ſeal, of the veſſel, or cargo, or part thereof: redeemable nevertheleſs on payment of the principal, and intereſt at 4 per cent.

And more generally, by another clauſe it is enacted, that all perſons who ſhall act or be employed in preſerving any ſuch veſſel or cargo, ſhall be paid a reaſonable ſalvage, to be adjuſted by three neighbouring juſtices as abovementioned.

And if any perſon ſhall plunder, ſteal, take away, or deſtroy any goods belonging to ſuch ſhip in diſtreſs, or which ſhall be wrecked or ſtranded (whether living creature be on board or not) or any tackle, proviſion, or part of ſuch ſhip; or ſhall beat or wound, with intent to kill, or otherwiſe wilfully obſtruct the eſcape of any perſon endeavouring to ſave his life from ſuch ſhip, or wreck thereof; or ſhall put out any falſe light, with intent to bring any veſſel into danger, he ſhall be guilty of felony without benefit of clergy.—— Provided that when goods of ſmall value ſhall be ſtranded or caſt on ſhore, and ſtolen without circumſtances of cruelty, outrage, or violence, the offenders may be proſecuted for petit larceny only.

And if any perſon ſhall make any hole in any ſuch ſhip in diſtreſs, or ſteal any pump belonging thereto, or wilfully do any thing tending to the immediate loſs of ſuch ſhip, he ſhall be guilty of felony without benefit of clergy.

And if oath be made before a magiſtrate, of any ſuch plunder or theft, or of the breaking of any ſuch ſhip, and the examination in writing thereupon taken be delivered to the clerk of the peace, he ſhall cauſe the offender to be forthwith proſecuted for the ſame, either in the county where the fact ſhall be committed, or in any county next adjoining, in which adjoining county any indictment may be laid by any other proſecutor: And the neceſſary charges of ſuch proſecution ſhall be paid by the treaſurer of the county where the fact ſhall be committed, as the juſtices in ſeſſions ſhall order: and if the clerk of the peace ſhall neglect his duty herein, he ſhall forfeit 100l. to him who ſhall ſue.

And one juſtice, upon information on oath, of any part of the cargo or effects of any veſſel loſt or ſtranded near the coaſts, being unlawfully conveyed or concealed, or of ſome reaſonable cauſe of ſuſpicion thereof, may iſſue his warrant for ſearching as in other caſes for ſtolen goods: And if the ſame be found in any houſe or other place, or in poſſeſſion of any perſon not legally authorized to have the ſame: and the owner or occupier, or perſon in whoſe poſſeſſion the ſame ſhall be found, ſhall not immediately upon demand deliver the ſame: ſuch juſtice, on proof of ſuch refuſal, ſhall com-

mit him to the common gaol for six months, or till he shall have paid treble value thereof.

And if any person shall offer to sale any such goods unlawfully taken away, or reasonably suspected so to have been, the person to whom they are offered, or any officer of the customs or excise, or constable, may seize the same: and shall with all convenient speed, carry the same, or give notice thereof, to one justice: and if such person shall not in ten days make out his property therein, to the satisfaction of the justice, they shall be delivered over to the rightful owner, on payment of reasonable reward (to be ascertained by the justice) to the seizor: and the justice may commit such offender to the common gaol for six months, or till he shall have paid treble value. And if any person shall discover to any justice, magistrate, custom house or excise officer, where such goods are wrongfully bought, sold, or concealed, he shall be intitled to a reasonable reward, to be adjusted as the salvage.

But this shall not prejudice the right of any lords of manors, or others, lawfully claiming wreck, or goods *flotsman*, *jetsam*, or *lagan*.

ADDENDA.

[In several of these United States there are laws made by their respective legislatures, impowering justices of the peace to hold courts for the trial of small causes, under certain sums therein specified:----The methods of proceedings are various in the several states: But many justices are often at a loss for forms in those cases, especially at their first entrance into the office: I have thought it would not be unacceptable to many of them, to give them the following forms of a Summons, Subpœna, Warrant, Execution, and Venire for summoning a jury of six men, where the law impowers such a proceeding, being such forms as I have used myself; tho' I entirely leave it to their own discretion to alter, amend or vary, as they shall think proper.]

I. A Summons for a Debtor.

New-Jersey, } To any constable of the Township of Woodbridge.
Middlesex County. }

THESE are to require you, pursuant to a law of this state, to summon A. B. to appear before me at my dwelling-house, in Woodbridge, on Tuesday the fifth day of March next, at four o'clock in the afternoon, then and there to answer C. D. in a plea of debt and damage, under the value of Six Pounds proclamation money: And hereof fail not. Given under my hand, the day of in the year of

J. P.

II. A Subpoena for an Evidence.

New-Jersey, } To any Constable of the township of Woodbridge.
Middlesex County. }

THESE are to require and command you, to subpœna A. B. of the township aforesaid, in the penalty of Five Pounds, proclamation money, to appear before me at my dwelling-house in Woodbridge, on the at o'clock in the afternoon, to give evidence

evidence in a cafe depending between C. D. plaintiff, and E. F. defendant, in behalf of the purfuant to a law of this ftate; and hereof fail not at your peril. Given under my hand, the day of in the year of J. P.

III. A warrant for a debtor.

New-Jerfey, } To any conftable of the townfhip of Wood-
Middlefex County. } bridge.

YOU are hereby required and commanded to apprehend the body of A. B. if to be found within your diftrict, and bring him forthwith before me, or fome other juftice of the peace for the faid county, together with this precept, to anfwer C. D. in a plea of debt, in an action on the cafe, under fix pounds proclamation money, purfuant to a law of this ftate. And hereof fail not. Given under my hand and feal the day of J. P.

IV. An execution after judgment.

New-Jerefey, } To any conftable of the townfhip of Wood-
Middlefex County. } bridge.

WHEREAS judgment againft A. B. for the fum of Three Pounds Five Shillings, proclamation money, was had the day of laft, before me, at the fuit of C. D. Thefe are therefore to command you immediately to levy diftrefs on the goods and chattels of the faid A. B. if any to be found within your diftrict, and make fale thereof, according to a law of this ftate in that cafe made and provided, to the amount of the faid fum; and the fame, together with this precept, or what fhall be done thereon, to return to me in twenty days from the date hereof:---And for want of fuch goods and chattels whereon to levy, you are to convey the faid A. B. to the keeper of the common gaol of the faid county, who is alfo hereby commanded to receive the faid A. B. and him in fafe cuftody to keep, until the faid fum, and coffs accrued, be paid, or till he be thence delivered by due courfe of law. Hereof fail not at your peril. Given under my hand and feal the day of in the year of J. P.

V. A venire for fummoning a jury of fix men.

New Jerfey, } To any conftable of the faid county.
Middlefex County. }

THESE are in the name of the people of the ftate of New-Jerfey, to command you immediately to fummon fix good and lawful freeholders of the county aforefaid, to appear at my dwelling-houfe in Woodbridge, this day, being the of at one o'clock in the afternoon, to pafs on a trial to be then and there had between T. T. plaintiff, and R. W. defendant, and to return their names to me, together with this precept, without delay, and hereof fail not at your peril. Given under my hand and feal this day of in the year of J. P.

VI. Form of another execution in the name of the people.

New-York, } The people of the ftate of New-York, by the grace
Ulfter County: } of God, free and independent, To all and each of the conftables of our townfhip of Kingfton.---- greeting:

WE command you, that of the goods and chattels of A. B. in your diftrict, you cauſe to be made and levied the fum of which

C. D.

C. D. lately recovered againſt him, before E. F. one of our juſtices of our ſaid county; as alſo the ſum of of coſts, thereupon accrued and adjudged: And after ſale of the ſame, purſuant to the directions of an act of our general aſſembly of our ſtate of New-York, in ſuch caſe made and provided, forthwith to pay the ſum aforeſaid unto the ſaid C. D. or in his abſence unto the ſaid E. F. and the overplus, if any be, after deducting the coſts aforeſaid, together with legal and reaſonable charges of execution, return unto the ſaid A. B. and for want of goods and chattels thereon to levy, take the body of the ſaid A. B. and him convey and deliver unto the keeper of our common gaol of our ſaid county, who is hereby commanded to keep the ſaid A. B. in his ſafe cuſtody, in our ſaid common gaol, until the ſaid ſum and coſts aforeſaid, ſhall be fully paid, or he be thence delivered by due courſe of law.--- Witneſs the ſaid E. F. Eſq; at Kingſton, in our ſaid county, this day of in the year of

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PART II.

THE OFFICE AND DUTY OF SHERIFFS.

AS to the time when and by whom the realm of England was divided into counties, authors ſeem to differ. The word county or ſhire are certain circuits or parts of the kingdom into which the whole realm was divided, for the more convenient government thereof, and is governed by an officer which we call SHERIFF, ſignifying *præpoſitus* or governor. And it appears by hiſtory, that earls of counties had the guard of the counties long before the conqueſt, and which was derived from the Romans: and the ſheriff was deputy of the earl, and the Romans called him vice-conſul. 1 *Inſt.* 168. By the ſtatute 14 *Ed.* 3 *cap.* 7. The judges are to nominate three perſons of every county to be preſented to the king, that he may pick one of them for ſheriff or governor of the county. But the ſtat. of 9 *Ed.* 2. reſtrains not the king's power, but he may conſtitute a ſheriff without election, or grant it in fee; for all the acts of grace flow from him, and the ſtat. of 14 *Ed.* 3. was made to eaſe the ſovereign of labour, and not to deprive him of power: the election being merely in the king, and the office miniſterial only.

The ſheriff takes place of every nobleman in the county during the time that he is ſheriff: and though the ſheriff be not a juſtice of the peace, yet he is a conſervator of the peace, and may impriſon perſons upon good cauſe, as breach of the peace, ſuſpicion of treaſon, felony, freſh ſuit, or hue and cry. Upon foreign invaſion he may raiſe the county, ſo upon rebellions and inſurrections, and may command any number he thinks fit to aid him. But by his own authority he ſhall not arreſt a man upon ſuſpicion of felony, except there be a felony committed in fact, and he himſelf have ſuſ-

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picion of him. But by the ſtat. 17 Ric. 2. c. 8 The ſheriff may raiſe the *poſſe commitatus* to ſuppreſs rioters, and commit them to priſon. 13 *H.* 4. *cap.* 7. And if the rioters reſiſt, the ſheriff and his aſſiſtance may juſtify the killing of them, and may arreſt and impriſon all ſuch offenders. If the ſheriff ſee a perſon carry weapons in the high way, *in terrorem populi*, he may commit him, tho' he doth not break the peace in his preſence. And tho' the king conſtitute a ſheriff *durante bene placito*, and may determine it at will, yet he cannot determine it in part, nor abridge him in any thing incident to his office during the time that he is ſheriff.

The ſheriff is an officer of that eminence, that he ought to have all right pertaining to his office, and be favoured in law before any private perſon. And therefore though eſcapes are ſo penal to officers, the judges have always made as benign a conſtruction as the law will permit in favour of them; and to the intent every one may bear his own burthen, they will never judge an eſcape by ſtrict conſtruction. If a ſheriff be ſlain in doing his duty, it is murder in him who kills him, although no former malice was between them; and if there was error in awarding proceſs, or in the miſtake of one proceſs for another, and the officer be ſlain in the execution thereof, the offender ſhall not have the advantage of ſuch error, no more than a ſheriff who ſuffers a priſoner to eſcape, ſhall take any advantage thereby. Nor is an officer, if he be reſiſted, bound to fly to the wall, as a private man is. Every man is bound by the common law to aſſiſt the ſheriff, or his deputy, in the execution of the king's writs, according to law, (for the deputy hath the ſame power as his maſter.)

Every ſheriff is to be reſident in his own perſon within his county during the time he is ſheriff, except he be licenced by the king. 4 *H.* 4 *cap* 5. A ſheriff of one county hath no power within another county; yet the ſheriff by force of the king's writ, may carry the priſoner through ſeveral counties. And yet tho' the ſheriff be much favoured and reſpected in the law, and in the execution of criminals, yet he ſhall be guilty of murder for not obſerving the order of law in putting a condemned man to death. 7 *Rap.* 13. 1 *Jac.*

[For the oath of ſheriff ſee page 392.]

The old ſheriff is ſheriff of the county until the new ſheriff be ſworn, for it is the taking of his oath that doth compleat him in his office. And the arreſt is good by the old ſheriff till a new commiſſion is ſhewed him, or other ſufficient notice, or a writ *de exoneratione officii* come to his hand. And upon his receipt of ſuch writ, if a new ſheriff be not commiſſioned, the coroner of the county ſupplies the vacancy.

When the new ſheriff is compleat in the office, he muſt take over from his predeceſſor all his priſoners and writs preciſely by view, and by indenture to be made between them, wherein all the cauſes that he has againſt every priſoner, muſt be ſet forth and delivered, or elſe the new ſheriff is not chargeable with them. But if the old ſheriff

die,

die, the new sheriff in such case shall at his peril take notice of all executions which are against any that he finds in gaol, and of all writs. *Dalt.* 17. *Moore* 688. *Pop.* 85. *Mesme Case.* Nor is the sheriff obliged to receive prisoners from his predecessor but in the common gaol of the county. And if upon the new sheriff's refusing to receive such prisoners as are not in gaol, the prisoner escape, an action will lie against the old sheriff. And if the old sheriff die, the party who sued execution may help himself, viz. By a remanding the body by a *corpus cum causa*, whereby he may be brought to be duly in execution.

The form of an indenture for setting over prisoners and writs, &c.

New-Jersey, Salem County. THIS indenture made, &c. between A. B. esq. late sheriff of the aforesaid county, of the one part, and C. D. esq. now sheriff of the said county, of the other part, witnesseth: that the said A. B. by virtue of a writ of discharge (of his late office) to him directed, hath delivered and set over unto the said C. D. these following writs: This is to say, A capias against W. H. returnable at the supreme court, &c. to answer J. S. &c. together with the bodies of J. N. in execution, at the suit of G. H. for the debt of twenty two pounds; and J. H. at the suit of E. F. in execution for twelve pounds; and R. G. in execution as well at the suit of L. M. for a debt of fifty pounds, as also at the suit of N. K. for a debt of forty pounds, &c. In witness, &c.

All the writs which are set over in the indenture between the sheriffs, if they have been executed by the old sheriff, then they must be returned by him, or in his name, and endorsed under by the new sheriff, thus:

'This writ as endorsed, was delivered to me by A. B. esq. late 'sheriff, my predecessor, at his going off his office. *per C. D. Vice 'com'.*

Process in some cases may be to the old sheriff, to bring the body of a prisoner, and that is, where before he hath made a return of *cepi corpus & paratus habeo*, and afterwards he is removed, and a new sheriff made; on non-appearance of the prisoner, process shall go to the old sheriff, as *distringas*, &c. The difference is, if the sheriff, at the day, return *cepi corpus*, and have not the body ready, he shall be amerced, and a *distringas* shall be awarded to the coroners. But if the old sheriff, at the day, return *cepi corpus*, and before the day of return he is removed, and a new one is made, the *distringas* here shall be awarded to the new sheriff, if it appear on record that he has taken the body.

A sheriff on a *fieri facias*, seized goods in his hands to the value of the debt, and paid part of the debt, and the goods not being sold, nor the writ returned, the sheriff was discharged; and afterwards sold the residue of the goods without any *venditione exponas*; and *per curia*, the sale is good; for the writ *fieri facias* gave him authority to sell without any other writ. *Cro.* 73. *Ayer & Aden.*

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If money be paid to the old sheriff, and he is discharged before the return of the writ, the party shall not be compelled to pay it again, and the plaintiff may have his remedy against the old sheriff. *Cro. El.* 209 *Rook & Wilmot.*

If an attachment may be granted against a sheriff for contempt, after he is removed out of his office, the justices said they could not do it; for now he is no officer, and cannot now be fined, and without fine they do not use to imprison. 2 *Browl.* 144.

A writ of assistance for a sheriff.

The people of the state of New York, by the grace of God free and independent. To all persons in the county of B. Greeting:

WHEREAS we have granted to our well beloved A. B. esquire, the office of Sheriff of our county, aforesaid, with the appurtenances, to enjoy the same during our pleasure, as in our letters patent made to him thereof is more fully expressed: We command you, that you be assisting, and give your advice to the said A. B. as sheriff of our county aforesaid, in all things which belong to that office. In witness, &c.

Of UNDER-SHERIFFS.

AS in former times, the earls had the jurisdiction of the counties, and the sheriff was their deputy, so now the high sheriff comes in the place of the earl, and has his deputy or under-sheriff, if he see cause to depute one, and may discharge such deputy, and appoint another when, and as often as he sees cause.

Every under sheriff, before he meddles with his office, shall, before one of the justices of assize, or two of the justices of the peace of the county *(quorum unus)* take the oaths appointed by law, and sign the test, on pain to forfeit treble damages to the parties grieved, if he commit any act contrary to the said oaths, or either of them.

The high sheriff in making an under sheriff doth implicitly give him power to execute all the ordinary offices of the sheriff himself, that can be transferred by law, as serving process, execution and the like. But in cases where the words of the writ are, That the sheriff shall go in his own person, as on a writ of partition, waste, *rediffeisin accedas ad curiam*, there the under-sheriff cannot do it, that is, if exception be taken at the bar before the return be received; but if the sheriff return that he was there in proper person, and this return be received, and the writ filed, then the court cannot examine it, and the party can have no averment against the return, nor can have any error. *Cro. El. Clay's Case.—Hob. p.* 13.

And though the high-sheriff may make an under-sheriff, or not appoint one; or when made remove him at pleasure; yet during the time he is under-sheriff, he cannot abridge his power, no more than the king can in case of the high-sheriff himself. If the sheriff will make an under-sheriff, provided he shall not serve executions

above

above twenty pounds, without special warrant, this proviso is void. Nor can the under-sheriff restrain himself by covenant.

If the under-sheriff make a return amerciable, there the high sheriff shall be amerced; for the return is made expressly in his name: but if it be a false return, whereupon an action of debt lies, in that case it may be brought against the under-sheriff. *Dr.* and *Stud. cap.* 42.

As to serving writs, it is said, a known sheriff need not shew his warrant at first, although it be demanded, nor a special under-sheriff without demand: but when he has peaceably submitted to the arrests he ought to read the writ, or tell him the contents, that he may know at whose suit the process is, out of what court, for what, and of what return, that the party may know what to do. 6 *Rep.* 52. The sheriff must not dispute the authority of the court, tho' the process be erroneous.

If the officer come to arrest a man and he flieth, the officer may pursue him, and take him in another county, but he cannot beat him because he was not arrested.

If a special sheriff, by force of a warrant, on a *capias* in process, enters into the house of J. D. the door being open, and there takes J. E. against whom the writ is, the process is as well served as to J. E. and all strangers. And if any strangers rescue him, he at whose suit he is arrested shall have action against him. 2 *R. Ab.* 272.

A *capias* was returnable on All souls day, which is *non dies juridicus*, which the sheriff returned, and so let the party go; it is a bad return: The writ was good, and the detaining of the party lawful, and he was commanded to bring him into court. *Pop.* 205.

If a sheriff arrest a man before a writ be delivered to him, it is a trespass. If a *latitat* returnable the 10th of *July*, come to the sheriff to arrest J. S. he may arrest him on the said 10th of *July*, but upon a *capias* in process, he may not arrest the party after the day of return.

An arrest in the house, the door being open, at six o'clock at night, is good enough.

By a late act of parliament, none can be arrested on a *Sunday*, except for treason, felony, or breach of peace.

As to the arresting one person for another; the sheriff had process against one Adderly, and he took one Adderby; if he was known by one name or the other, it is good, otherwise not. *Moore* 407. *N.* 548.

If a sheriff executes a *capias*, and there is no original to warrant it, he is excusable; but he must take notice, at his peril, of the person and goods that he arrests; for he is not to examine whether the original be sued out or not. But if he arrests J. S. instead of J. N. he does it without warrant.

An under sheriff who had two warrants against one at the suit of J. S. laid his hands on him, and said, *I arrest you by force of a writ that I have*, but did not shew it him, nor had it in his hands, nor told him at whose suit, yet the court resolved, 1.

1. This arreſt, without ſhewing the warrant and telling at whoſe ſuit till the other demanded it, was good and legal.

2. This arreſt, without having the warrant in his hand, and having both warrants about him, is well enough, although he did not ſhew by which of them he arreſted him.

If the ſheriff, bailiff, or other officer, ſay to the perſon againſt whom he has a *capias* or warrant, *I arreſt you in the king's name*, tho' he lay no hands on him, it ſeems this is a good arreſt, eſpecially if it be a known ſworn officer, and the party at his peril ought to obey him; and if the officer hath no lawful warrant, the party may have an action of falſe impriſonment againſt him *Co.* 5. 66, 69

An arreſt in the night is lawful, be it at the king's or another's ſuit. *Co.* 9. 66. *Shep. Abr. part* 2. *p.* 302.

Where ſheriff, bailiff, conſtable, or other ſuch like officer or miniſters of juſtice, in the doing of their offices, as in the execution of writs, warrants of the juſtices of the peace, keeping the peace, apprehending of felons, or the like, do require or command others that are no officers, to aſſiſt them in that work or ſervice, ſuch perſons muſt aid and aſſiſt ſuch officer; and then what they do is lawful and juſtifiable therein, as if the officer or officers had done it. 11 *H.* 7. c. 15. *Weſtm.* 1. c. 9. *Winton.* 3 *H.* 7. *Co.* 8. 96.

The ſheriff or bailiff is bound at his peril to arreſt the right perſon againſt whom the warrant is, otherwiſe he is liable to an action of falſe impriſonment. *Shep part* 2. *p.* 308. *Mine caſe.* 600, 602. *Brow falſe imprif.* 38 *Law.* 49.

High ſheriff may be fined, but not impriſoned for the act of under-ſheriff.

Of B A I L.

BAIL is ſo called, becauſe the party bailed is delivered by law into the cuſtody of thoſe who are his bail, and who are to anſwer the party, if they do not produce the principal to do it.

At common law, if the ſheriff had taken any man by the king's writ, he muſt not be delivered but by *breve de homine replegiando*, and was not compellable to take bail. But by the ſtatute of 23 *H.* 6. he is compelled to take bail, and the deſign of the ſtatute is to prevent the extortion of ſheriffs, who uſed to extort great ſums for granting bail. And this ſtatute preſcribes the form of the bail bond, and enacts, 'That no ſheriff nor any of his officers, ſhall take or cauſe 'to be taken, or make any obligation for any cauſe aforeſaid, or 'by colour of their office, but only to themſelves, of any perſon, 'nor by any perſon which ſhall be in their ward, by the courſe of 'the law, but by the name of their office, and upon condition 'written, That the ſaid priſoners ſhall appear at the day contained 'in the writ or warrant, in ſuch places as the ſaid writ ſhall re-'quire: And any other obligation taken by them in any other form 'ſhall be void.'

The sheriff is judge of the sufficiency of the sureties, and he may take one or two.

A condition was, that if he appeared at Westminster such a day to answer, &c. The defendant pleads, that before the day of the return of the writ, the term was adjourned to Hartford, and that there he appeared, The plaintiff demurs *Per cur'* he ought to conclude his plea, *prout patet per accordum*; for though he appeareth, yet if his appearance be not entered of record, he forfeits his obligation, and he ought to conclude his plea so, otherwise the plaintiff cannot answer thereunto, as to say, *nul tiel record*. *Cro. El.* 466. *Corbit and Cook.*

After the statute 23 H. 6. the sheriff cannot make a special return in a *capias*, but only a *cepi corpus* or *non est inventus*. And though the statute compels him to take bail, yet it does not alter the return.

The return of a *paratum habeo*, is, in effect, no more than he hath the body ready to bring into court when the court shall command him. And for such return he is amerciable to the court till he bring in the body.

If a sheriff refuse to take reasonable bail, an action of the case lies against him: or if a sheriff refuse to take bail, he is liable to an action of false imprisonment. But if he take insufficient bail, no action lies against him by the party, for he is judge of the bail.

An action of the case against the sheriff for not taking reasonable sureties, not having sufficient estates in the county, and returning *cepi corpus*, and yet not having the bodies ready by the day, lies not: for he is compellable to let to bail; and if he have not the body, he shall be amerced. And because he shall be amerced, the statute gives him advice to take sufficient sureties for his own indemnity. 2 *Sand.* 59. *Postern & Hansen.*

By these words in the statute, that 'if the sheriff return a *cepi* 'corpus, he shall be chargeable to have the body by the day of the 'return, &c.' it is intended only, that he may be amerced to the king for not having the body at a day. 2 *Sand.* 60.

If the defendant appears not to the sheriff's bond, according to the condition thereof, the plaintiff may, by leave of the sheriff, sue the bond in the sheriff's name: but it's in the plaintiff's election to sue the sheriff; and the sheriff shall be amerced, till he assign the obligation to the plaintiff. But by the statute 4 & 5 of *Q. Anne*, the plaintiff upon the sheriff's assignments may sue the bail bond in his own name, if he see cause so to do.

A bond given to be a true prisoner (as by law he ought) is good, and not within the statute of 23 H. 6. But a bond of one in execution, to be a true prisoner, is within the statute and void. So also a bond or covenant for fees is void. And so is a bond for chamber-rent. 3 *Keb.* 132.

But by the statute of 13 *Car.* 2. *cap.* 2. Persons arrested by process out of the king's bench or common pleas, not expressing the cause

cauſe of action in the writ, bill or proceſs, and which are bailable by the ſtatute of 23 *H.* 6. ſhall give bail bond not exceeding the ſum of forty pounds. If the ſheriff take bond for more, the party ſhall have an action upon the ſtatute againſt the ſheriff; but the body is not void. And upon the defendant's appearance at the return, he ſhall diſcharge ſuch bail bonds. But this ſtatute extends not to arreſts upon *capias utlagat' reſcous, contempt* or *privilege*; nor to popular action, or action on any penal law, indictment or information. See more, under title BAIL. Page 43.

Of Return of WRITS.

A Return is but a certificate made by the ſheriff to the court from whence the writ iſſued, of that which he hath done touching the execution of the ſame writ.

There is a difference between the *teſte*, and the return of writs. A return may be on the eſſoyn day. A writ ſhall not abate if the return be *quarto die poſt.* If a man be bound to appear the firſt day of the term in court, if he appear the firſt day of the eſſoyn, and then have his appearance recorded; this is good. 2 *Bulſt. Bedo & Piper.*

Deputies are allowed in all miniſterial offices; but all returns made by them, are to be made in the name of the principal officer. And the ſheriff is to put his name to every return made by him, or the return is to be void. 3 *Bulſt.* 78. None can make a return of a writ but ſuch a perſon who at the time of the return remains an officer to the court.

Againſt the return of a ſheriff, there is not any traverſe, averment or anſwer.

Generally all writs of execution, (except *elegit*) as *capias ad ſatisfaciend. Habere fac' ſeiſinam, habere fac' poſſeſſionem, fieri fac', liberate*, &c. which are the final proceſs, and after which no judgment is given, nor no further proceſs, and when matters *en fait* are only to be done, as, land to be delivered, ſeiſin had, goods ſold, &c. are good, though the writs be not returned, or filed, if the execution be duly made.

But in caſe of an *elegit* otherwiſe, becauſe the extent is to be made by inquiſition, to the intent that the court may be judge of the ſufficiency of it, and every inquiſition ought to be of record.

If a writ directed to the ſheriff be executed, and after a new ſheriff is choſen, the new ſheriff ought to return the writ in this manner, *viz. Recepi hoc breve prædeceſſori meo directum, ſic indorſatum*; i. e. 'I received this writ directed to my predeceſſor, ſo endorſed.' But if a writ be not executed, by the old ſheriff, before he is removed, the writ muſt be removed to the new ſheriff, and by him executed and returned without any mention of his predeceſſor.

If a *capias* comes to the ſheriff to take a man, its no return that he was not found within his bailiwick after the delivery of the writ

writ, *prout sibi constare poterit.* This is not good, but he ought to return expressly, *Quod non est inventus.* 9 *H.* 6. 57.

The sheriff returned a resistance on *Habere fac' seisinam*, and he was amerced 20 marks, because he did not take the *posse commitatus*; and an *alias awarded.* *Hill.* 19 *Ed.* 2. *Execu.* 147.

It is no good return for the sheriff to say, the party will not pay his fees, and therefore he would not serve his writ, 34 *H.* 6.— because he may recover his fees by action, when he has done his duty.

The Sheriff of Yorkshire returned a protection on arrest. It was set aside *per cur'* in regard the sheriff can return nothing else but *non est inventus*, or *cepi corpus*, at his own peril. and the sheriff was ordered to return his writ on pain. 2 *Keb.* 168.

Where the sheriff takes bail, according to the statute of 23 *H.* 6. and returns *cepi corpus*, though the party do not appear at the day, yet the sheriff shall not be charged in an action on the case for a false return. *Sid. Jon. p.* 22.

Note, A *venire* ought to be delivered to the sheriff four days before the return of it, if the jury dwell forty miles off, and eight days if they dwell further from the place where the trial is to be. *Pract. reg.* 87, 323.

The name of the sheriff ought to be to the *distringas* and *tales* are of necessity, and to the return of the *habeas corpora.* 12 *E.* 2. c. 5.

Tales not returned by the sheriff or his deputy, but by a clerk of the court by general appointment of the sheriff, it is well enough, and the sheriff is answerable for it. 1 *Keb* 357.

Of Juries, and their returns.

JURORS are of two sorts, juries to enquire are grand juries at the assizes or quarter sessions. So juries returned before justices of the peace, to enquire of 'riots, forcible entries,' the sheriff is to summons them.

If it be conceived an indifferent jury will not be returned, the court, on motion, will order the sheriff to attend the secondary of his office with his book of the freeholders, to have an indifferent one returned. *Pract. reg.* 163.

When trial is to be for a thing which concerns the under-sheriff, there the high sheriff shall return the jury; but if the trial concern the high sheriff, the coroner shall return the jury. *Pract. reg.* 164.

The sheriff ought not to return privilege to be exempt from juries, but to return them summoned, and the party claiming privilege ought to appear in person to claim the same, and not the sheriff for him.

But peers in parliament are not to be impanneled, nor tenants in ancient demesn.

By statute 11 *H.* 7. No indictment shall be found by any persons named to the justices, without due return of the sheriff, and by inquest of lawful liege people returned by the sheriff.

The

The juſtices of gaol delivery, or juſtices of the peace, *(quorum unus)* in open court, may alter the pannel returned by the ſheriff, to inquire of the king only, by addition or ſubtraction of any of the jurors ſo returned; and they have power to command the ſheriff to put another in the pannel, according to their diſcretion. And the ſheriff ought to return the pannel ſo reformed, upon penalty of the ſaid act. *Coke 12 Rep,*

If any one or more of the jury be returned at the denomination of the party, plaintiff or defendant, the whole array ſhall be quaſhed.

If the plaintiff or defendant have an action of battery or debt againſt the ſheriff, or if the ſheriff have a parcel of land depending on the ſame title; or if the ſheriff or his deputy be either of counſel or attorney, or ſervant, or goſſip of either party, all the array ſhall be quaſhed.

Conſanguinity or affinity are the principal cauſes, but its no challenge to the array, if all the jurors be of affinity.

Malice between the ſheriff and one of the parties, or that one of the parties has brought an action of debt againſt the ſheriff, is good cauſe of challenge,

Challenge to polls, *i. e.* to the particular jurors, are of four ſorts, 1, Peremptory, without ſhewing any cauſe, and this for treaſon is, thirty five, felony twenty. 2. Principal challenge to the polls; ſo called, becauſe it ſtands of itſelf, without leaving any thing to the conſcience or diſcretion of the triers. 3. Challenger to the poll muſt ſhew cauſe preſently. After one hath taken challenge to the poll, he cannot challenge array. 4. If the plaintiff alledge a cauſe of challenge againſt the ſheriff, the proceſs ſhall be directed to the coroner: and if any cauſe againſt the coroner, then the court ſhall appoint eliſors. Sometimes the court appoints two of them that be impanneled.

All challenges muſt be taken before the jurors are ſworn. No challenges ſhall be admitted againſt the triers appointed by the court.

[Much more relating to juries. See title JURORS.]

Of a writ of inquiry of damages.

IF upon the executing of a 'writ of inquiry of damages, the ſheriff refuſeth to ſwear and examine ſome of the witneſſes produced on either part, and yet doth execute the writ, the court will grant a new writ to the party grieved, for the old writ was not well executed. *Pract. Regiſt.* 348.

A writ of inquiry of damages, cannot be executed by a deputy, or bailiff, but by an under-ſheriff it may.

If a writ of inquiry of damages be returnable the 29th Sep. the ſheriff may take the inqueſt and inquire the damages the day of the return, and after he returns it the ſame day; this writ is well executed.

cuted. If the inqueſt be impannelled the eſſoyn day, and hear their evidence two or three days after; yet this writ is well executed. *Mich.* 11 *Car.* 1.

The jury cannot find that no treſpaſs is done, neither may the ſheriff make ſuch return; but if the jury will find no damages, the ſheriff muſt make his return accordingly.

A return of a writ of inquiry of damages.

THIS inquiſition indented, taken at C. in the county of W. (ſuch a day and year) before A. B. eſquire, ſheriff of the ſaid county, by virtue of a certain writ of the people of the ſtate of New-York, to the ſaid ſheriff directed, and to this inquiſition annexed by the oath of R. S. T. G. &c. (to the number of twelve jurors) who ſay upon their oaths, that A. P. in the writ to this inquiſition annexed, named, hath ſuſtained damage by occaſion (of the within named treſpaſs) by H. in the aforeſaid writ named, as in the ſame writ is mentioned, to forty ſhillings, and for the coſts and damages of the ſame A. P. about his ſuit in that behalf expended, to forty ſhillings. In teſtimony whereof, &c.

N. B. The ſheriff and all the jurors muſt ſign and ſeal this inquiſition.

Of returns of a Devaſtavit.

THE defendant pleads *plene adminiſtravit*, and the verdict is for the plaintiff; this eſtops the ſheriff of the county where the trial was to return *nulla bona*; for he is concluded by the verdict to make any return contrary to it; but the ſheriff of another county ſhall not be ſo concluded. But the ſheriff of the county where the writ is brought ought to return a *devaſtavit*, and thereupon the plaintiff ſhall have proceſs into another county. 2 *Leon. N.* 90. *p.* 67.

Of PRISONS. See GAOLS.

Of FIERI FACIAS.

FIERI FACIAS is a judicial writ lying for him who hath recovered debt or damage, directed to the ſheriff, commanding him to levy the ſame of the defendant's goods. As it lies within a year and a day; but after a year and a day there muſt be a *ſcire facias*.

This writ of *fieri facias*, is only againſt the goods and chattels of a man, *viz.* leaſes for years, corn growing or ſown upon the land, or moveable goods, as corn in the barn, houſhold goods, money, plate and apparel. *Co.* 1 *Inſt.* 296. 6

Goods pawned, ſhall not be taken in execution for the debt of him which pawned them, during the time they are pawned. *Kitchen* 226.

The ſheriff upon a writ of execution, may not ſeize and ſell to the party a furnace annexed to the freehold, for this would be waſte in the leſſee. 37 *El. B. C. Day & Auſtin.*

If one ſell any goods to another in the time of action depending againſt him, theſe goods ſhall not afterwards be taken in execution; for they were lawfully bought (if done *bona fide*, and for valuable conſideration.)

consideration.) But if a *fieri facias* be directed to make execution of goods, and after the teste of the writ, and before the sheriff executes it, the party sells his goods *bona fide*, they may nevertheless be taken in execution (*aliter* now by the statute of frauds and perjuries) *Cro El.* 174.

If the party dies after the writ of execution awarded, and before it be served the sheriff may serve it on the goods in the hands of the executors; for by the execution awarded, the goods are bound, and the sheriff needs not take notice of his death. *Cro. El.* 181. *Parker & Moss*

The plaintiff (being sheriff) seizeth the goods in execution by force of a *fieri facias*, and after, before the sale of them, the defendant takes an opportunity to remove them, and converts them to his own use; and the plaintiff (being sheriff) brings his action of trover; and adjudged the action lies well. For by the seizure of the goods in execution, the sheriff hath a property in them, so that he may re-seize them and sell them, as well when he is out of his office, as before. *Mod. Rop.* 2. *Sand.* 47. *Willbraham & Snow.*

After the debt levied, the sheriff is debtor to the plaintiff, and capable of a release from him, the action ceasing against the defendant, is *ipso facto*, by the law transferred to the sheriff, having both the judgment to make it a debt, and the levy to make him answerable; and though the action of account will properly lie in this case yet the same will many times bear both actions, though the money be received by *auter manis*, or the like. *Hob.* 206, 207. *Speak & Richards.*

If the sheriff in executing a *fieri facias*, doth not misbehave himself, he shall not be charged in debt, or *scire facias*; but if upon the *fieri facias*, the sheriff return, that he hath levied the money, and doth not pay it to the plaintiff at the return of the writ, the plaintiff may have a *scire facias* against the sheriff, to shew cause wherefore the money should not be levied of the goods of the sheriff. 2 *Sand.* 344, 345.

So if in *fieri facias*, to levy two hundred pounds debt, the sheriff returns, that he had made his warrant to his bailiff, who had seized divers goods to the value of one hundred and sixty pounds, and that they were rescued out of his custody, *ita quod*, he could not levy the debt, and that *R. nulla alia habuit bona*. The plaintiff may bring a *scire facias* to have execution against the sheriff for the monies, according to the value returned, and the sheriff shall pay it out of his own proper goods 1 *Anders.* 247.

On *fieri facias*, the sheriff seized several goods, which were mercery ware, and returned *fieri facias ad valentiam*; which return was filed. The sheriff appears and prays to amend the return, because some of the goods were impaired by lying, and he could not get buyers. *per curia.* 1. Such return may not be altered, after it is returned and filed. 2. Where the sheriff returns *fieri facias ad valentiam*,

valentiam, this shall be no excuse of his payment of the money, because he might have returned, he had seized the goods, and that they remain *pro defectu emptorum*, and then he may be excused, if *bona peritura*, they perish. *Siderfin. p.* 40. *Needham & Bennet.*

As to amendment of returns, matter of form in a return is amendable, but not matter of fact; which goes to justification of imprisonment. 2 *Bulst.* 259.

If the sheriff have a *fieri facias* against a man's goods and before execution he pay him the money: in this case he cannot do execution after, and if he do, an act of trespass or false imprisonment lies against him. *B. R. p.* 12. *Jac.* 1.

The sheriff upon a *sciri facias* cannot deliver the defendant's goods to the plaintiff in satisfaction of the debt, but must return the execution in court. *Cro. El.* 504.

On *fieri facias* against J. M. who has the goods of A. in his possession, if the sheriff sells his goods, trover or trespass will lie against him; and to prevent this, all sheriffs in England take security. *Keb.* 693. *Sanders's Case.*

Therefore in this case, the safest course is for the sheriff to inquire by a jury, in whom the property of the goods is, or else not to meddle with such goods which do not plainly appear to him to be the defendant's; and it being found by a jury that excuseth the sheriff.

If goods remain in a sheriff's hands for want of buyers, and there perish, the sheriff shall not be chargeable; but if the sheriff refuse a buyer, action on the case lies. 2 *Keb.* 464.

There is a difference between the sale of a term on a *fieri facias*, and extent on an *elegit*; for the *elegit* is, that they appraise the goods and chattels of the debtor, and extend his lands: and therefore if they are not appraised by the jurors, he cannot sell them (*vid. Dyer, fol.* 100. and so in 5 *Rep. Palmer's case.*) Execution by *elegit* ought to be *per Inquisitionem per Stat W.* 2. *c.* 18. which saith, (*per rationable pretium*) which extendeth to chattels, and *per extentum*, which refers to lands. In *elegit* the goods are to be delivered to the party *per rationable pretium*, but in *fieri facias* the sheriff must sell the goods. 1 *Keb.* 566. *Gleswel & Morgan.*

In *elegit* the term may not be extended without shewing the certainty of the commencement; for after the debt satisfied, the party is to have his term and remainder. But upon *fieri facias* the sheriff may sell, and his return is general, *quod fieri feci de bonis & catallis.* 5 *Rep. Pal. case*

Now the sheriff is to be careful in the sale of a term in *elegit*, if he make particular recital, that there be no mistake. But a general recital is better. As

In *ejectment*, it was found by special verdict, that the sheriff upon an *elegit* impannelled by a jury, who found that the defendant was possessed of a lease for a hundred years, which began *Mic. & P. ubi revera*; it was found it begun *Mic.* 3 & 4 *P. & M. cujus quidem H. statum interesse & terminum in tenementis prædictis predict. Juratores appre-*

appretiarunt ad 80l. and the sheriff sold it to the lessor of the plaintiff for 80l.

Now the inquest found one thing, and he sells another (as this case was) and the sale not being warranted by the inquest is void. But had the inquest found he had been possessed of such land generally for the term of divers years to come, and they had appraised it for so much, without shewing the certain beginning or determination, it had been well enough; for they shall not be compelled to find a certainty, not having means to be informed thereof. Or if the sheriff sells all such interest which the defendant had in the same term, the sale had been good. 5 *Rep. Palmer's case.*

So in Dr. Sidenham's case in B. R. the inquest on *fieri facias* found that the defendant was possessed of such a term, and mistook the date, and the sheriff sold it; the sale was not good. And on the new *fieri facias* the court directed that it should be found, that he was possessed of a lease for years generally, and yet continuing, and that he sold it. *Cro El.* 584.

W. had execution out of the king's bench by *scire facias*, of a term, which was sold by a bailiff of a liberty. After upon another judgment, the bailiff delivers this term to another, pretending that the first judgment and execution was fraudulent. But *per curia*, it is not well done; for he is not a judge of fraud, and the court will not allow such pretence to sheriffs and officers. *Latch. p.* 53. *Warrington's case.*

Of writs of possession.

IN all cases where the execution of a judgment, in which the demand is of a thing certain, if the sheriff do this thing, he is not any dissesor. But where the execution is in the generality, without mentioning of any thing in particular, there the sheriff ought to make execution of the right thing, at his own peril, otherwise he shall be a dissesor; for he is bound to take notice of it. As if a man recover in assize divers houses, and after the tenant reverseth it in a writ of error, and a writ of execution issues to the sheriff, to put him in possession of the houses, which he had lost by the judgment, although the tenants are strangers to the recovery; and for this they ought not to be ousted without *scire facias* against them: yet if they do execution by putting them in possession by force of this writ, he shall not be any dissesor, for that he hath the direct authority of the court to do it. *Pasch.* 15. *Jac. Lloyd & Bethel.*

So in judgment for the casual ejector for seven houses, and an *habere facias possessionem* turns out these seven tenants, and eight other tenants, without any process or plea against them, *per curia*, we will not grant any writ to supersede the execution against the eight tenants; for if it should be, it ought to be *quia erronice*, and there was not any error in the proceeding against them, because there was not any proceedings. But they did advise, that every one should

bring trespass against the sheriff, 2 *Siderfin.* 155. So trespass lies against the sheriff, if he does not execute on the right places.

If the sheriff do deliver more acres than are in a writ, this makes not the writ erroneous, but in such case, action on the case lies against the sheriff for doing it; or an assize against him that hath the possession delivered to him for the surplusage of the land. But if the writ of *habere facias possess.* to deliver possession to the plaintiff, of lands recovered by him in ejectment, contains more acres of land than were in the declaration, the writ is erroneous. *Pract. Regist.* 131, 132.

If a man brings *ejectione firmæ* of forty acres of land, and recovers thirty, and not the residue, upon the writ of execution the sheriff may deliver to him any three or more, in the name of all, without setting out the land in metes and bounds, although the plaintiff had not recovered all the acres, whereof he had brought his action, and whereof he had supposed the defendant tenant.

But if a man be to be put in possession of divers messuages upon a writ of execution, and the houses are in possession of several men, he ought to go to every house particularly, and to deliver seisin of it; for the delivery of seisin of one, in the name of all is not sufficient; for he ought to deliver *plenarium seisinam, trin.* 15 *Jac. Floyd & Bethel's case.*

In *Formedon* on non tenure of three messuages, the jury found he was tenant of one of the messuages, and not of the other, the plaintiff may have judgment, and a writ to the sheriff to deliver seisin; and the plaintiff at his peril is to shew to the sheriff what messuage it was the jury did intend; for the jury is not tied to set bounds to it. *Cro. El.* 256. *Scriven & Prince.*

Upon *habere facias possessionem* the sheriff returned, That in execution of the said writ he came to the house recovered, and removed out all the persons he could find, and delivered to the plaintiff possession, and departed; and soon after three persons secretly lodged in the house, expelled the plaintiff: On notice whereof he returned again to the house, to put the plaintiff in full possession, but the others resisted him, so that without peril of his life he could not do it. 1 *Leon p.* 145. *Uptom & Wells.* On this return the court awarded a new execution.

A writ of *habere facias possessionem* was directed to the sheriff; a *writ of error* was brought, and a *supersedeas* granted, directed to the sheriff to stay execution: and the *supersedeas* was shewed to the sheriff as he was going to do execution; yet he refused to obey it, and did execution notwithstanding. This is a great contempt in a sheriff, and the court ordered a writ of *restitution* to be granted. 2 *Bulst.* 194. *Thomas & Owen.*

N B. The sheriff in cases where land is recovered, is to put the party in possession and seisin by a twig, clod, &c. or an house by a key, &c of rent by corn or grass growing on the land, out of which the rent issues. 6 *Rep.* 52.

It

It is no good return, that another is tenant of the land by right, or that he has nothing in the land.

Seisin of the land in one vill, in the name of all the land in three vills, is good.

A return of a fieri facias.

BY virtue of the within writ, I have caused to be made of the goods and chattels of the within named A. B. the within named two hundred pounds, the which two hundred pounds, I have ready at the time and place within contained, to render unto the within named C. D. as within I am commanded. J. S. Vice Com'.

A return of a scire facias.

BY virtue of the within writ to me directed, by A. B. and C. D. good and lawful men of my bailiwick, I have made known unto J. S. That he be before the justices, &c. at the time and place within written, to, &c. as within I am commanded. J. S. Vice Com.'

A return of a habere facias possessionem.

BY virtue of the within writ to me directed (such a day and year within written) I have caused the within named A. B. to have possession of his within written term of, and in, the tenements within written, with the appurtenances, as I am within commanded.

J. S. Vice Com'.

A return of a habere facias seisinam.

BY virtue of the within writ to me directed, I do hereby make known unto the within justices, That (such a day and year within written) I have caused the within named A. B. to have full seisin of one messuage with the appurtenances in M. within named, in all things as by the said writ I am commanded. J. S. Vice Com'.

The sheriff makes his warrant to a bailiff, to take the body of, &c. upon a *capias satisfaciend*, and before the warrant executed, the sheriff receives a *supersedeas*, and the bailiff having notice, proceeds; yet the arrest is not lawful, but the bailiff is excusable in trespass. *Moore, p.* 677. *Prince & Allington.*

Of E L E G I T S.

ELEGIT is a judicial writ, given by the statute *W.* 2. *cap.* 18. either upon a recovery for debt or damage, or upon a recognizance in any court. By this writ the sheriff shall deliver to the plaintiff: *omnia catalla debitoris (exceptis bobus & aratris caruca) mediatatem terrarum*, and this must be done by inquest taken by the sheriff, for the valuation of the goods and lands ought to be first found by the inquisition of a jury. *W.* 2. *cap.* 18. gives the *elegit*: so that in *elegit* the sheriff may take in execution the money of the lands of the conisee, &c. and all his goods and chattels, (except as aforesaid) and was to deliver them to the conisee, or he who recovers, upon a reasonable extent or price, until the debt be satisfied; and the sheriff shall deliver him the seisin of the land, and he is called tenant by *elegit*, and shall do no waste. 4 *Rep.* 47.

The

The *elegit*, as to goods, is in effect but a *fieri facias*; and therefore if there be no lands, and execution be upon goods, and they are not sufficient, he may have a *capias aliter* if lands be extended.

As to what things may be extended, or not, you must know, that all goods and chattels, in which are included leases for years, shall be extended (except oxen and beasts of the plough) the moiety of the lands.

Rent seck, where there is not any reversion, cannot be delivered *ut liberum tenementum*.

Annuity certain is extendable by *elegit*. *Cro. Jac.* 78.

Lands in ancient demesne may be delivered in execution by the sheriff, by force of an *elegit* out of the king's court.

If lands descend to an infant, the sheriff may cease to extend.

A lessee had a lease to the value of one hundred pounds, and after the teste of the *elegit*, and before the sheriff had executed the *elegit*, assigns his term to one, who assigns over to the plaintiff in the *scire facias*; and afterwards the sheriff executes the *elegit*, and delivers lease to the plaintiff *tenend &c.* for the satisfaction of the debt, which came to but 43*l*. *Per cur.* The sheriff could not deliver the lease at another value than what the jury had found it at. And the sale made by the sheriff is as strong as if it had been made in open market, and all the goods and chattels are bound after the teste of the *elegit*, and cannot be sold by the owner after. 1 *Brownlow* 38. *Connyers & Brandling.*

Upon *elegit* there needs no liberate. *Aliter* upon a statute.

In every *elegit* the sheriff must return, and set out the monies distinctly, unless they be tenants in common, and in that case he must return the special matter.

On inquisition of a lease, which is but a chattel, the sheriff may sell it as goods; but if he extends it, there shall be no other benefit than as of a common extent.

Two persons recovered severally against one in debt; he who had the first judgment sued first an *elegit*, and had the moiety of the land delivered in execution; afterwards the other sued the *elegit*, and the sheriff prayed the advice of the court. *Per. Cur.* He shall deliver the moiety of that money which he had at the time of the writ awarded. *Cro. Eliz.* 48*2*. *Huit & Cogan.*

Actual possession ought not to be delivered on *elegit*, the sheriff ought only to deliver seizure, to enable the plaintiff to maintain an ejectment, and the tenant may plead on the ejectment; else the tenant would be turned out unheard, and be remediless: yet if actual possession be delivered, it is remediless. 3 *Keb* 243. *Jefferson & Dawson.*

In *elegit* the sheriff ought to deliver the moiety by metes and bounds. *Hutton. p.* 16.

Upon *elegit* the sheriff ought to return the extent, and also that he hath delivered the lands.

Elegit needs not to be returned: Therefore if the sheriff by force

of

of an *elegit*, delivers to the party the moiety of the lands of the defendant, and does not return the writ; if now the plaintiff will bring action of debt, *de Novo*, the defendant may plead in bar the execution aforesaid, though the writ of execution was not returned *Earl of Liecester's case*, 1 *Leon. p.* 280.

The sheriff returns upon *elegit*, that the party had not any lands, but only within the liberty of St Alban's, and that J. R. bailiff, there hath the execution and return of all writs, who inquired and returned an extent by inquisition, and that the bailiff delivered the moiety to the party, and the plaintiff by virtue of the extent entered. *Per. cur.* 1. The bailiff may make such inquisition by warrant from the sheriff. 2. When a jury by the inquisition find the seisin and value of the land, the jury shall extend all the land; and the bailiff in a franchise, and the sheriff where there is none, shall deliver the moieties, and not the jury. *Cro. Car.* 317. *Sparrow* and *Matterfoch.*

On an *elegit*, averring no goods were seized, it hath been held, no *scire facias* lieth; but upon a *fieri facias*, bare seizure is an execution 2 *Keb.* 789. 821. *Smith* and *Mildmay.*

An extent upon a statute merchant. The plaintiff put the conisee in possession of parcel of a house and lands, and suffered the conisor to continue in the rest of the house, by reason whereof the conisor kept the possession of the whole and held the conisee out The conisee, to the intent he might have a full and perfect possession of the whole, caused the sheriff that he did not return the writ of extent, on which it is entered on the roll. *Quod Vicecomes nihil inde fecit nec misit breve:* An *alias breve extendi facias* may well be awarded. And the sheriff cannot return, that the land was formerly extended by the old sheriff, because by the entry upon the roll it appears that no execution was done; but if the entry be not, the same is an execution for the party, though it be not returned. 2 *Leon.* 12. *N.* 20. *Coleshill* and *Hastings.*

If more than a moiety be delivered upon the *elegit*, it is for the whole. *Siderf. p.* 91.

The sheriff may extend or sell a lease, and this sale shall bind the king, because but a chattel, and no coven in case. 8 *Rep. Sir George Fleetwood's case.*

Where the sheriff extends a manor by the name of acres, land, meadow, woods no advowson passeth.

If one extends a statute staple at the suit of A. the sheriff extends the lands, and takes the goods, and seizeth them into the hands of the king, but does not make livery; and after a writ of prerogative of the king, issues out of the exchequer, and commands the sheriff to levy the king's debt of B. *viz.* one hundred pounds, of the goods of the debtor, and if he had not sufficient, then to extend the lands; and this is delivered to the sheriff after the first writ of extent, but that was not returned. The sheriff ought in this case to execute the extent for the king's debt, because the property of the goods

and

and lands were not in A before they were delivered to him by *liberate*, and the goods being seized into the hands of the king for the use of the party, were privileged from all other executions but that of the king. 2 *Roll. Ab.* 158. *Dyer* 67.

Where the officer without any warrant or authority, shall levy any duty for the king, and after shall account for the same in the exchequer, or otherwise pay the same to the king's use, there the officer seemeth chargeable but as a trespasser; but if he shall convert the same to his own proper use, it is felony.

N. B. When lands are extended and the debtor in prison, the creditor out of the profits of the lands is to find the debtor bread and water in prison.

By virtue of the writ on the statute merchant, the sheriff may deliver the lands and goods presently, upon the extent, to the party. But by the writ on the statute staple, or recognizance in the nature of it, he is to extend the lands and goods, and to seize them into the hands of the king; but not to deliver them to the party without a *liberate*.

The proceedings in a statute merchant, is a *capias*, and if the sheriff thereupon return a *cepi corpus* then he shall remain in prison a quarter of a year, within which time he may sell his goods and lands to pay his debts, and this by the express words of the statute of 15 H. 7. c. 16. But if the sheriff return, *non est inventus*, execution shall be granted of his lands and goods.

But in a statute staple and recognizance, the first process is to take his body, lands and goods, all in one writ, which is a more speedy remedy than the statute merchant.

Now on a statute staple and recognizance, the writ of execution upon the return of the conisor dead, is to extend the lands, *nec non catalla* which were of the conisor at the time of his death: And this is the constant course, as appears by the records of extents, which are in the rolls.

On extent of a statute merchant, the sheriff returns, That the body cannot be found, and that he had extended the lands, and delivered them to the plaintiff. *Reg.* 146.

Extent on a statute merchant issued out against R. the conisor, the sheriff returned, That the conisor, was possest of divers goods, and seized of lands, which he delivered to the conisee, and that the conisee accepted the land. But because the sheriff did not return, That he had not any other lands, goods or chattels, it was adjudged insufficient, and a new writ awarded; though some held it was well enough in the case of a conisor, but not in the case of a purchaser. 1 *Brownl.* 37. *Fleecher & Robinson.* If the conisor be returned dead, execution shall be granted against the executor, without *scire facias* to have execution of his goods, so against the heir and tertenants.

If the sheriff does not return the *capias* or return *tarde*, or that he directed it to a bailiff of a franchise, he shall be punished, and yield

yield damages to the party grieved, according to the *ſtatute de Mercatoribus. W.* 2. *c.* 39.

Two Inquiſitions taken at ſeveral days by ſeveral juries, upon one ſtatute merchant, were adjudged naught. One was taken of the lands, the other for the lands and goods. 1 *Brownl.* 38.

If another had thoſe lands in execution by *Elegit* or is in by deſcent; in ſuch caſes the ſheriff ſhall return the ſpecial matter, i. e. In the firſt caſe. That he hath extended the land of the defendant, but he cannot deliver the ſame to the plaintiff, for that another had the ſame in extent before.

The ſheriff having an extent upon a ſtatute, may gather the goods all into one place, to be viewed and appriſed by the jurors, and he is not a treſpaſſer. *Mo.* 563.

Of returns on Scire Facias.

SCIRE FACIAS is a judicial writ directed to the ſheriff, &c. and is uſually to warn a man to come and ſhew cauſe to the court, why execution of a judgment ſhall not be done.

Coniſor in a recognizance dies, *ſcire facias* goes againſt his executors and heirs of his land, &c. The ſheriff returns, That he had no executor, *& ſcire feci W. H. Filio & Hæredi prediƈ. M. (le coniſor)* This return agrees not with the writ, yet it may be good. 3 *Rep.* 15 *Sir William Herbert's caſe.*

Scire Facias on a recognizance in chancery againſt D. who was returned dead: Then a ſecond *ſcire facias*, iſſued againſt the heir of D. and againſt the tenants of the land of D. which he had *tempore recognitionis, vel poſtea.* The ſheriff returned D. tertenant, and omitted to return any thing againſt the heir. This is a non return of the ſheriff, and not a miſ-return, and is not aided by any of the ſtatutes.

The tenant without the heir ought not to be charged: Therefore the heir ought to be ſummoned; for the heir may have a releaſe to plead, or other matter to bar the execution. Or if the heir be within age, the parol ſhall demur, and the tertenant ſhall have the advantage thereof: And a new *ſcire facias* iſſued *ad informand. Curiam*, and the return was, That he had not any lands in his bailiwick that deſcended to his heir, nor any heir within his bailiwick, and good enough; though it had been better if he had returned who was heir, and that he was warned, or that there was not any heir within the ſaid county. *Cro. Car* 295. *Eyer & Taunton.*

The writ commands the ſheriff to give notice to the tenants of the land in fee-ſimple, and the ſheriff returns not, 'That thoſe which 'he had returned were tenants of the land in fee-ſimple:' and ſo the words of the writ are not anſwered. 1 *Brownl. Rep.* 145, 146.

The ſheriff may return twenty four tertenants of the whole, and every tenant may plead in diſcharge of himſelf, or he may return, That each is tertenant of ſo many acres.

Of

Of Rescous, *and in what case action lies against the sheriff for a* Rescous.

IF in the arresting, the party is rescued being on an execution or mean process, no action for this lies against the sheriff. And if the prisoner be arrested on mean process, and as he is bringing to the gaol is rescued, no action lies against the sheriff, for the sheriff cannot be supposed to have the *posse commitatus* upon every mean process; *aliter* if it be upon execution, there *caveat vicecomes*. But if he be arrested upon mean process and brought to the gaol, then its no good return for him to say, 'The gaol was broken, and he was taken away from him'

The rescuer shall be doubly punished, by the king, and by the party, or sheriff; he shall be fined to the king, and attachment shall issue out against him, and the party shall have a writ of *rescous* against him, and so shall the sheriff too 2 *Keb* 340. *Hopping's case. Cro. Car.* 109. *Myn* and *Coughton's case.*

No *rescous* can be on a *scire facias* for goods, but in such case the party shall have action on the case And a rescous lies only on a *capias*, which lies against the person, for which *Vide Cro Car. Sly & Finch's* case, which is as follows:

Scire facias was brought against Finch, sheriff of Glocester, for that the plaintiff having brought a *fieri facias* directed to Finch, he returned, That he had taken goods into his hands to the value of seventy two pounds, and had sold as much of them as amounted to eleven pounds, and the residue remained *pro defectu emptorum*, till such a day, at which time he putting them to sale, they were rescued from him. Upon which return the *scire facias* was brought to shew cause why the remaining debt shall not be levied on his goods. To this the defendant demurs All agreed that the return is not good. And *per Curiam* he is chargeable by this return. If he had returned only *quod remanent pro defectu emptorum*, therein he had done his office; and in such case, on the election of a new sheriff, a writ shall issue to sell the goods, and deliver the money to the new sheriff. But when he saith further, That they were rescued out of his hands, therein he hath misdemeaned himself. And by Dodderige, the sheriff hath charged himself by this return, as well in regard of his misdemeanor, as also that he hath his remedy against the rescousers; nor can the court award a writ of *venditioni exponas*, because it is against his own return.

By Hutton, upon mean process the sheriff never had remedy for the rescous, but he shall return the rescous And upon execution he shall not return the rescous, but have an action, and the party is not prejudiced; for he shall have an action against the sheriff, though in point of law the party is liable.

Of ESCAPES.

ESCAPE is, where one man that is arrested, or imprisoned on the arrest, comes to his liberty before he is delivered by order of law. If

If a man in execution be suffered to go at large out of the county, or within the county, or within the town where the prison is, and though it be upon bail it is an escape, for he ought to be kept in *arcta custodia*. *Plowd.* 36. *b. Plat's case.*

If a sheriff remove prisoners without command, for ease, delight, or benefit of them, it is an escape. To suffer a prisoner to walk in the town, though with a keeper, it is an escape, unless it be by a *habeas corpus* from a court of justice.

Upon this point of the prisoners going at large, there is a diversity to be well heeded, viz. Between one in *execution*, and one only taken by a *capias*; for when the sheriff is commanded by writ to have the body at Westminster such a day, he may be keeper of him in another county, or in what place he pleases

But if one in execution at the suit of the king, or of a common person, and by the licence of the lord chancellor or treasurer, be suffered to go into the country with a keeper, to gather money, the sooner to pay the king, this is an escape; for the king himself cannot licence a man in execution to go so at large. *Dyer* 12 & 13 *Eliz.* 297.

If one be in execution at the suit of the king in the Fleet, the warden may suffer him to go to his counsel with his keeper, but not so in the case of a common person.

A man is in execution for debt, and a woman being warden of the Fleet, marries the prisoner: This is an escape, for that he cannot be his own prisoner, nor a prisoner to his wife.

It was referred by the king to the judges. *Trin.* 12 *Car.* 1. Whether in regard to the plague, *habeas corpora* may be granted for the prisoners in execution, in the prisons of the king's bench and fleet, upon judgment in the king's bench and exchequer? And it was certified by them to the lord keeper, that if upon *habeas corpus* granted, the gaoler suffers the prisoners to go at large, that this is an escape, and that no *habeas corpus* ought to be by law for that purpose: Which the king well approved of.

The sheriff delivers a prisoner upon a void *audita querila*. This is no escape, and there the prisoner may be taken again in execution. But if a *scire facias* had in it the words of *audita querila* it is against law, and is an escape. *Mo.* 344. *N.* 479. *Collin's case.* 1 *Roll. Rep.* 383.

If a man recover against *baron* and *feme*, and take both in execution, and the wife is suffered to escape, though the husband continues in prison, yet debt lies in this escape against the sheriff; in which all the debt shall be recovered, 2 *Bulst.* 220. 1 *Roll Abr.* 810.

But if the sheriff takes a man in execution, as on a *capias ad satisfaciend.* and he is rescued before he brings him into prison, tho' he returns the rescous, yet this shall not excuse him, for that he is to take the *posse commitatus*, and the party cannot have a new execution. *Proby* and *Lumly.*

If the prison be broken by the king's enemies, this shall excuse

the ſheriff from eſcape, for the gaoler could not reſiſt them; and he can have no remedy over. But if a priſon be broken by rebels and traitors within the realm, ſo as the priſoners eſcape, this ſhall not excuſe the eſcape; for the gaoler may have his remedy over.

But if priſoners eſcape by ſudden fire, this ſhall excuſe the ſheriff, for it is the act of God. *Dyer Pl.* 66.

If a man upon a *capias ad ſatisfaciend.* be taken in execution, and after reſcues himſelf from the ſheriff, and eſcapes, the plaintiff may have a new *capias* againſt him, and take him again, the firſt writ not being returned or filed, nor any record made of the award; and this on a *ſcire facias* after a year; becauſe he ſhall not take advantage of his own wrong. 1 *Roll. Abr.* 904. *Mounſon & Clayton.*

So if one in execution eſcape, and the ſheriff makes freſh purſuit after him, and takes him again, although it be a long time after and in another county, yet he ſhall be in execution, becauſe he ſhall not take advantage of his own wrong.

A priſoner eſcapes, the gaoler makes freſh purſuit, and before he hath taken him the priſoner dies: This is the act of God; and yet becauſe it was once an eſcape, the action of eſcape lies againſt the gaoler. *Poph. p.* 186.

Upon eſcape, the ſheriff may not in freſh purſuit, enter into the houſe of J. N. and break the cheſt of J. D. to ſearch for the priſoner. 2 *Roll Abridg.* 564

All priſoners are ſuch, either by matter of record or matter of fact.

By matter of record, when one preſent in court is committed to priſon by the court. There, if the gaoler have him not ready, its an eſcape without more inquiry (unleſs he has reaſonable excuſe) and the judges will ſet the fines preſently.

By matter of fact a man is a priſoner when he is arreſted by the ſheriff, bailiff, conſtable, &c and eſcapes, there the jury ought to find it, and preſent it before the juſtices, and then the juſtices aſſeſs the fine.

Upon a *capias* for felony, the ſheriff returns *capi corpus*, and hath not the body at the day, the ſheriff was amerced fifty pounds for the eſcape.

By ſome it is felony in the ſheriff to ſuffer a priſoner to eſcape, *Vid. ſtat. de frang. priſonam.* If the gaoler ſuffer the eſcape, it is felony in him, and a forfeiture of his office. 6 *H.* 7. 11. 10 *H* 7.

If a priſoner in the gaol attempts to eſcape, and having broke his irons, ſtrike the gaoler (coming in the night to his priſoner) and the gaoler ſlayeth him, it is no felony. 22 *Aſſ.* 35.

The ſtat. 4 *Ed.* 1. *de frange, priſonam*, mitigates the rigour of the common law; for before that ſtatute, the breaking of priſon was felony in every caſe: but now it is not felony, but where the party was committed to priſon for felony. 2 *Leon. p.* 191 *Hoberd's caſe.*

What

What acts of the sheriff shall amount to false imprisonment.

IF a bailiff arrest one after the writ is returned, false imprisonment lies.

A precept to arrest from an illegal court, will not save an officer from an action of false imprisonment. *Hob. p.* 61.

Trespass, &c. will not lie against the sheriff for executing process, though it was erroneous.

Sheriff asks another if his name be J. H. ? He says, yes; On which he arrests him by a warrant which he had to arrest J. H. yet false imprisonment lies, if he be not the right person. *Mo.* 457.

One had a *capias ad satisfaciend*, delivered to the sheriff, who made a warrant to his bailiff to do execution. Afterwards a *super-sedeas* was awarded, and delivered by the sheriff, the defendant being his bailiff, who escaped, and the defendant re-took him, and detained him in execution. The second is a false imprisonment: For although the first imprisonment was legal (he having taken him by virtue of a warrant made before the *supersedeas* awarded and delivered) he not having notice of a *supersedeas*, was excusable. But the detainment in prison was afterwards a wrong. For he being the sheriff's servant, and by intendment having time given him sufficient to have notice from his master, ought at his peril to take notice thereof. *Cro. El.* 918.

If a man be in the hands of the under-sheriff in execution for debt, and the debtee tells the sheriff, That the prisoner has satisfied him: If the sheriff release not the prisoner, its false imprisonment, as in the case reported in *Bulst.* 3. 96 97. *viz.*

A. in execution at the suit of B. afterwards B. comes to the sheriff, and tells him, He had made and sealed a release of the debt to the prisoner, and that therefore he should deliver him out of execution. The sheriff does not so, but keeps him still in prison. B. brings action of false imprisonment. It lies.

By Coke, detenure after this by the space of one hour, is false imprisonment.

Remedy against SHERIFFS, &c.

IF the sheriff in his court quash an *essoyn* erroneously, without the consent of the suitors, action on the case lies against him. 26 *Assize* 45.

If a *distringas* issues to the sheriff to distrain the defendant in the action, by all his lands and chattels, &c. and the sheriff returns 'Too small issues,' although an averment lies by the stat. *W.* 2. *c.* 44, yet the plaintiff may well have his action on the case against the sheriff, because it appears by the words of the statute, that this is a false return. The statute ordains, that the King shall have the issues, but restrains not any remedy that the plaintiff had at common law. 3. *Car.* 1,

If

If the ſheriff embezzle an exigent delivered to him at my ſuit, action on the caſe lies *tem pro Dem. Rege, quam pro meipſo*, 14 *aſſize*. 12.

Action on the caſe lies againſt the ſheriff, for that he levied ſuch a ſum of money in a *fieri facias*, at the ſuit of the plaintiff, and brought not money into the court at the day of the return.

It may not be improper here to inſert a bail-bond, and an aſſignment of it by the ſheriff to the plaintiff, purſuant to the ſtatute 4 & 5 *Ann.*

The form of a BAIL-BOND to the Sheriff.

KNOW all men by theſe preſents, that we C. D. of, &c. E. F. of, &c. and J. D. are held and firmly bound to G. H. Eſq; ſheriff of the county aforeſaid, in Forty Pounds of good and lawful money of the ſtate of New-York, to be paid to the ſaid ſheriff, or to his certain attorney, his executors, adminiſtrators or aſſigns; for which payment to be well and truly made, we bind ourſelves, and every of us by himſelf for and in the whole, our heirs, executors and adminiſtrators, and every of us, firmly by theſe preſents, ſealed with our ſeals. Dated the day, &c. and in the year of our Lord 1788.

THE condition of this obligation is ſuch, that if the above-bound C. D. do appear before the juſtices of the people of the ſtate of New-York, at the City-Hall, on the day, &c. to anſwer unto A. B. gentleman, of a plea of treſpaſs, and alſo in a plea of debt for twenty pounds upon demand, then this preſent obligation to be void and of none effect, or elſe to ſtand and remain in full force and virtue.

Form of a Sheriff's Aſſignment thereon.

KNOW all men by theſe preſents, that I. G. H. Eſq; the ſheriff within named, do hereby for myſelf, my executors and adminiſtrators, aſſign and ſet over unto A. B. (the plaintiff named in the condition of the within written bond) his executors and adminiſtrators, the within mentioned bond, purſuant to the law of this ſtate. In witneſs whereof I have hereunto ſet my hand and ſeal, this day of, &c. in the year of our Lord 1788.

The ſheriff's office about partition.

TO execute a writ of partition, the high ſheriff muſt be upon the land in perſon; and if exception be taken at the bar before the writ be returned and filed, a new writ ſhall be awarded; but if the ſheriff in ſuch caſe returneth, "that he was there in proper perſon," and this return be received, and the writ filed, the party cannot aver againſt the return, nor ſhall have error. *Cro. El.* 9. *Clay's caſe.*

The office of a gaoler, and concerning eſcapes.

HAVING here before in this treatiſe upon ſeveral emergencies, occaſion to mention the gaolers and keepers of priſons, and houſes of correction, which as they be neceſſary officers in the commonwealth, ſo is their office full of danger and trouble: for the keepers of gaols give great ſecurity to the ſheriff for his indemnity, for that he is in law charged with all ſuch priſoners committed to his

his charge. To the end therefore that ſuch as are of a mild and gentle nature may not be abuſed, and may know what they may lawfully do: and that ſuch as are of a more rigid and cruel nature may likewiſe know what they ought not to do, I think it convenient to ſay ſomewhat more concerning their duty and office: which is,

FIRST, that they muſt receive all offenders ſent unto them by *mittimus*, or other warrant from any of the juſtices of the peace of the county, or brought unto them by any conſtable or other known officer, but from any other they are not bound to receive them, nor take them in charge.

But when they have any perſon in actual poſſeſſion, they ſhall be anſwerable for their eſcapes, according to the quality of the offence.

And Mr. Dalton tells us, that the lord chief juſtice Popham did cauſe one Staver (a gaoler at Cambridge) to be indicted, arraigned, and hanged, for an eſcape of a felon ſuffered by him.

But we muſt preſume that this was ſome notorious felon, and that the offence was very capital, and that the eſcape was voluntary, otherwiſe the judgment had been over ſevere, for let a gaoler do what he can, and uſe all poſſible induſtry that can be required or imagined; yet ſuch art may be uſed by a priſoner, and ſuch helps and aſſiſtances may be given him, that he may make an eſcape tho' he be laden with irons, which may be taken off by devices.

This difference therefore is made, viz. If the eſcape were by default (which we call a negligent eſcape) the judges and juſtices, &c. may charge the gaoler, if they will, or the ſheriff upon the ſtatute 14 *Ed.* 3. *cap.* 9. and the judges do in theſe caſes make as favourable an expoſition as with conveniency and ſafety they may.

Or elſe voluntary, which two ſorts of eſcapes are thus differenced and defined.

A negligent eſcape, according to Mr. Stamford, in his pleas of the Crown, fol. 33. is when the party arreſted or impriſoned doth eſcape againſt the will of him that arreſted or impriſoned him, and is not freſhly purſued and taken again before he hath loſt ſight of him which eſcaped, the penalty whereof ſeemeth to be only a fine at the diſcretion of the judges or juſtices.

And the ſame learned man makes this difference, that if the eſcape be of a priſoner attainted, the fine ſhall be one hundred pounds; but if only indicted, one hundred ſhillings, and where taken upon ſuſpicion only, ſeems diſpenſable.

A voluntary eſcape is where one doth arreſt, or hath impriſoned another for felony or other offence, and afterwards voluntarily let him go at liberty where he will.

And if the eſcape be wilful in the gaoler (which is felony in him) the ſheriff ſhall not be bound to anſwer to the felony, but may be fined to the value of his good. *Stamf. pl. Coron.*

And in caſe of voluntary eſcape, if the arreſt or impriſonment were for treaſon, it ſhall be adjudged treaſon in him which did voluntarily

luntarily ſuffer the priſoner to eſcape, and if it were felony, then it ſhall be adjudged felony; and if for treſpaſs, it ſhall be adjudged treſpaſs.

In caſe of treſpaſs or other offences whatſoever (being under treaſon or felony) there is no difference whether the eſcape ſuffered by the officer be voluntary or negligent, but that the officer in both caſes ſhall be fined for the eſcape according to the default, by the diſcretion of thoſe that be judges thereof.

Queen Elizabeth pardoned one who killed another; the wife of the man ſlain ſuing an appeal, was detained in priſon at her ſuit: the gaoler after ſuffers the manſlayer voluntarily to go at large, and he made an eſcape, which in Mr. Plowden that famous lawyer, his opinion was felony in the gaoler, though he was no felon as to the queen, in regard of his pardon from the queen.

This I believe is a caſe known to few gaolers, in regard whereof I thought good to ſet it down, that knowing it they may be the more circumſpect when ſuch a caſe ſhall happen. *Plowd.* 147.

If a man be wounded, and the ſtriker is voluntarily let go at large by the gaoler, and after death enſueth to the perſon hurt, yet this is no felonious eſcape in the gaoler. 11 *H* 4. *ca.* 12.

The voluntary ſuffering him to eſcape who hath killed another, *ſe defendendo*, or by miſadventure, or of him that hath committed petty larceny, ſeemeth to be no felony; for that theſe offences are not felony of death, but he that ſuffereth the eſcape ſhall be fined. *Cromp.* 39. yet there is a quere for they that ſuffered, are not a judge whether it be felony or not.

If a juſtice of peace ſhall ſend for a felon out of the gaol, and ſhall deliver him without bail, this ſeemeth to be a voluntary eſcape, and ſo felony in the juſtice.

If the juſtice of peace or ſheriff ſhall bail one who is not bailable, this is an eſcape in law.

And if one be brought before a juſtice of peace for ſuſpicion of felony, and confeſs it, and yet he ſhall ſuffer the priſoner to go at large without bail, this is a voluntary eſcape in the juſtice.

If a gaoler by *dures* of impriſonment and pain, enforce his priſoner to become an *Approver* (that is an accuſer of others as helpers with him in the felony) this is felony in the gaoler, although the Apellee or party accuſed, be acquit, or ſhall die before he be arreſted upon the appeal.

If a gaoler ſhall only procure his priſoner to accuſe another of felony, this is felony, 18 *Ed.* 2. yet the ſtatute *Ed.* 2. ſeemeth to extend only where the gaoler ſhall do this by great *dures*, or pain.

And if a priſoner by *dures* of the gaoler, cometh to an untimely death, this is murder in the gaoler; and the law implieth malice in reſpect of the cruelty: and for this cauſe if any man dieth in priſon, the coroner ought to ſit upon his body, to inquire whether his death came by the *dures* of the gaoler. *Briton, Ca.* 11. *de Priſons, fol.* 18.

If

If it shall be further demanded, how prisoners for treason or any other offence, ought to be used in prison, the learned Bracton will tell you: That laying men in chains, was against the law; for that a prison was a place to keep, not to punish prisoners. *Lib.* 3. *fol.* 154.

And in another place he saith when a prisoner is to be brought before a judge, he ought not to be brought manacled, though sometimes for fear of escaping, they be shackled. And Briton saith, If felons come in judgment to answer, they shall be out of irons, and all manner of bonds, so that their pains shall not take away any manner of reason, nor them constrain to answer, but at their free will. *Cap.* 5. *fol.* 14.

And Fleta saith, That albeit it be lawful for the sheriff to keep offenders in prison, yet not to punish them, but to keep them.

And the Mirror saith, It is an abuse that prisoners be charged with irons, or put to any pain before they be attainted. *Ca.* 8. *sect.* 1.

And whereas in the eighth year of the reign of *Ed* 2. a precedent is brought, that a priest was arraigned and put himself upon his country, and stood at the bar in irons, but by command of the judge, he was freed from his irons. Sir Ed. Coke, who voucheth it, saith, There is no difference in law between a priest and a layman, as to irons, and thereupon concludes,

That where the law requires that a prisoner should be kept in *salvâ & arctâ custodia*, yet that that must be without pain or torment to the prisoner.

And Sir Ed. Coke (who cites these opinions to the conclusion of his discourse of petty treason) saith, That it is against *Magna charta ca.* 29.

And that all the ancient authors are against pain or torment to be inflicted upon the prisoner before his attainder, nor after, but according to the judgment, and that there is no opinion in the law books, or any judicial record, for the maintenance of tortures or torments.

But how these opinions will secure a gaoler against his prisoners (who will venture hard for their liberty rather than lie in strait prison) because I cannot determine, must be left to their discretion, who must answer for their escapes.

The Office and Duty of the Clerk of the Assize and Clerk of the Peace:

SHEWING,

The Manner and Form of Proceedings at the Assizes and General Gaol-Delivery, and at the Court of General Quarter Sessions of the Peace.

WHEN the judges set out for any county, to hold the assize, the sheriff sends his bailiff to the edge of the county, to bring them the best way to the place where the assize is to be held; and before they

they come there, the sheriff with his under-sheriff and bailiffs, with their white staves, and his livery-men with their halberts in their hands, and attended with the chief of the gentry of the county, do wait upon the judges at the usual places, and conduct them to their lodgings at the town where the assizes are appointed to be held. When the judges have reposed themselves at their lodgings, the sheriffs and bailiffs with their white staves, and livery-men with their halberts, two by two, wait on the judges to church, where the minister reads prayers, &c. and from thence to the usual place, where the assizes or general gaol-delivery are held.

When the court is set, the clerk of assize must make three proclamations, and cause the cryer to say as follows, viz.

"O yes, O yes, O yes, the people of the state of New-York do strictly charge and command all manner of persons to keep silence, and hear the people's commission of assize and *nisi prius*, openly read, upon pain of imprisonment."

Which being read, the clerk must say, 'God save the people,' and the cryer with a loud voice repeat it after the clerk.

Then the clerk delivers a roll of all the justices of the peace to the judge, and then causes the cryer to make proclamation and say, "All justices of the peace for this county of H. answer to your names at the first call, and save your fines."

Then the clerk must name them as they are returned in the calender.

When the justices are all called, the clerk shall cause the cryer to make proclamation and say, "All sheriffs and coroners of the people within this county of H. answer to your names as you shall be called, every man at the first call, and save your fines."

Then the clerk shall cause the cryer to call the chief constables, petty constables, &c. which being done, the clerk must cause the cryer to make proclamation and say, "All justices of the peace, sheriffs, coroners and others officers, that have taken any inquisition or recognizance, whereby you have let any man to bail, put in your records thereof forthwith, that the justices of the people may proceed thereon."

Then the gaoler must give the clerk of assize an account what prisoners have been bailed by any justices of the peace after they were committed, that the clerk may call the justices that bailed them for their recognizance.

Then must the clerk cause the cryer to make another proclamation, and say,

"You good men that be returned to inquire for the people of the state of New-York, and the body of this county of H. answer to your names, every man at the first call, and save your fines."

If there do not appear enough to make up a jury, then must the clerk call them over again, A. B. gent. (the cryer repeating the same after him) and if he do not appear, the sheriff or his bailiff certifying the court upon oath, that he was summoned, and no reasonable excuse appearing to the court, he must be fined. But if any reasonable excuse appear to the court, the clerk shall mark him spared.

If it so happen, that a full jury do not appear at the second call, the sheriff must return some of the freeholders of the same county, that are present, or such as he shall meet with.

Note, There ought to be at least thirteen upon a grand jury, that there may be a casting vote, and there is commonly fifteen, seventeen, nineteen, and so from that number to twenty-three.

Then the grand jury must be called in order, every man by his name and

and addition, as they are returned. When the jury is full, the clerk shall swear them after this manner: The foreman by himself must lay his right hand on the book, and the clerk shall give him the oath, as followeth, viz.

"You, as foreman of this inquest, for the body of this county of H. shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge. The counsel of the people your fellows and your own you shall keep secret; you shall present no man for hatred, envy or malice, neither shall you leave any man unpresented for love, fear, favour or affection, or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding. So help you God.

The rest of the grand jury, by three at a time, in order, are sworn as followeth:

"The same oath which your foreman hath promised to observe and keep on his part, you and every one of you do promise to observe and keep on your parts. So help you God."

When the grand jury are all thus sworn, then the clerk doth say to the cryer, count these. And as the clerk doth name them, the cryer shall count them. Which being done, the clerk shall say, "Good men and true, stand together and hear your charge."

Then the clerk shall direct the cryer to make proclamation and say, The justices of the people do straitly charge and command all manner of persons to keep silence whilst the charge is in giving to the grand jury upon pain of imprisonment.

Then the chief justice gives the charge to the jury.

Whilst the charge is giving, the clerk shall file the recognizances and figure them in order to prosecute, and those to answer upon another file, and the informations and examinations upon another file.

When the charge is given, two constables are ordered to attend upon the grand jury.

Then the clerk shall order the cryer to make another proclamation, and say, "All manner of persons that are bound by recognizance to prosecute and prefer any bills of indictment against any prisoners, or others, let them come forth and prosecute, or else they shall forfeit their recognizances."

When any persons are to give evidence to the grand jury, the clerk shall swear them after this manner.

"The evidence which you shall give to the grand inquest, shall be the truth, the whole truth, and nothing but the truth." So help you God.

And if upon the evidence given the grand jury have cause to find an indictment, they write on the back side thereof, "a true bill;" but if they have not sufficient evidence to find the indictment, they write on the back side thereof, "Ignoramus."

When the court rises, the clerk directs the cryer to make three proclamations, and say, "All manner of persons that have appeared here this day before the justices of the people of New-York, at these assizes and general gaol delivery, may take their ease at present, and attend here again at two o'clock in the afternoon (or to-morrow in the forenoon.") And then he says, God save the people.

When the court sits in the afternoon (or the next morning) the clerk shall cause the cryer to make three proclamations, and call the court after this manner.

"All manner of persons who are adjourned over to this hour, and have any thing here to do before the justices of assize and general

gaol delivery, let them now draw near and give their attendance, and they shall be heard."

Then (if the court see cause) they send for the grand jury, and when they appear, the clerk shall call them by their names, and then ask them if they be agreed of any bills of indictments, or presentments? If they say yea, the clerk shall bid them present them to the court, and upon the delivery of them, the clerk shall say, "These indictments or presentments, you do find, and are content the court shall put the presentments into form, altering no matter of substance?" Then the grand jury shall say "yea:" And so they shall go together again. Then the clerk out of respect to them, shall bid the constables to "make way for the gentlemen of the grand inquest."

Then the cryer makes proclamation again, and shall say, "The justices of the people of the state of New-York do straitly charge and command all persons to keep silence, for now they will proceed to the pleas of the people, and the arraignment of prisoners upon life and death. And all persons that are bound by recognizance to give evidence against any prisoners that shall be at the bar, draw near and give your evidence, upon pain of forfeiting your recognizances."

If any prisoners be let to bail, and not in prison, then the clerk shall cause the cryer to call him in this manner.

"A. B. of the parish of C. labourer, come forth, save thee and thy bail, or else thou forfeitest thy recognizance." If he appears not, then call the sureties in this manner; "D. E. and E. F. bring forth A. B. whom you undertook to have here this day or else you forfeit your recognizance."

If he appears not, then the clerk passeth by that indictment, and calleth to the gaoler to set forth the prisoner named in the next indictment. And when he is at the bar, the clerk saith unto him,

"A. B. hold up thy hand." Which done he then shall say, "Thou standest here indicted by the name of A. B. of, &c. for that thou, &c." (And so read all the indictment) and then ask him, "What savest thou? Art thou guilty of this felony whereof thou standest indicted, or not guilty?" if he saith "Not guilty," the clerk shall say, "Culprit," and then shall ask him, "How wilt thou be tried?" If he say, "By God and the country," the clerk shall say, "God send thee a good deliverance;" and shall write in the indictment, *po se.*

If the prisoner upon his arraignment shall confess his fact, the clerk shall write over his head in the indictment (cogn.) and so he is set by till the time of giving judgment.

And if the prisoner upon his arraignment will not confess the felony whereof he stands indicted, nor plead not guilty thereunto, but stand mute; or otherwise will plead such matter as shall be no direct answer to the offence: in these cases he shall be put to his penance for contemning of the law, and refusing the ordinary trial devised by the law, and the clerk shall write over his head in the indictment "stat mutas," and he must be set by till judgment be given, unless he will plead in the mean time guilty, or else put himself upon his country.

Upon the prisoners pleading not guilty, and putting himself upon the country, the cryer, by direction of the clerk, shall call the petty jury thus:

"You good men that are returned to inquire between the people of the state of New-York, and the prisoner at the bar, answer to your names, every man at the first call, upon pain and peril that shall fall thereon."

And then he shall call every one of them in order by his name.

The jury appearing, the clerk says, "You the prisoner at the bar, hear

hear what is said unto you: these good men that were last called and do now appear, are those that shall pass between the people of the state of New-York, and you, upon your life and death. If therefore thou wilt challenge them, or any of them, thou mayst challenge them as they come to the book to be sworn, before they are sworn, and thou shalt be heard."

If the prisoner be arraigned for high treason, he may challenge peremptorily, in favour of his life, thirty-five, without shewing cause; but if he be arraigned for petit treason, murder, or felony, he cannot challenge peremptorily above twenty; but if he shall challenge above twenty, and under thirty-six he shall not forfeit his goods and chattels.

Then the clerk shall direct the cryer to make proclamation, and say,

"If any man can inform the justices of the people of the state of New-York, or the attorney-general, or this inquest now to be taken, between the people of the state of New-York and the prisoner at the bar, of any treason, murder, felony or other misdemeanor, committed or done by the prisoner at the bar, let them come forth and they shall be heard; for the prisoner stands now at the bar upon his deliverance. And all others that are bound by recognizances to give any evidence against the prisoner at the bar, let them come forth and give their evidence, or else they forfeit their recognizances.

Then must the clerk call the jury to be sworn, every man severally, and bid every one look upon the prisoner and swear them severally on this manner:

"You shall well and truly try, and true deliverence make, between the people of the state of New-York, and the prisoner at the bar, whom you have in charge, and a true verdict shall give according to your evidence." So help you God.

When all are sworn, the clerk shall say to the cryer, count these; and then he calls every one of the jury over by their names, and the cryer counts them. That done, the clerk must ask them, "If they be all sworn?" If they say, yea; then he must call to the prisoner, and bid him hold up his hand; and then say to the jury, 'look upon the prisoner, you that be sworn, and hearken to his cause. You shall understand, that he stands indicted by the name of A. B. &c. (as in the indictment) for that he, &c. (and reads the indictment) That done, the clerk shall say, 'Upon this indictment he hath been arraigned, and upon his arraignment he hath pleaded not guilty, and upon his trial he hath put himself upon God and the country, which country you are: So that your charge is to inquire whether he be guilty of this felony whereof he stands indicted, or not guilty. If you find him guilty, you shall inquire what lands, tenements, goods or chattels he had at the time of the felony committed, or at any time since. If you find him not guilty, then you shall inquire if he did fly for it, or not: If you find that he did fly for it, then you shall inquire what goods and chattels he had at the time that he did so fly for it, or at any time since. If you find him not guilty, nor that he did fly for it, you shall say so, and no more. And hear your evidence."

Then must the clerk direct the cryer to call the witnesses. That being done, and the witnesses for the people do appear, the clerk shall bid them lay their right hands upon the book, and give them this oath, viz.

"The evidence that you, and every of you, shall give to this inquest

queſt againſt A, B. the priſoner at the bar, ſhall be the truth, the whole truth, and nothing but the truth." So help you God.

When all the witneſſes for the people have been heard, then if the priſoner deſires, that any witneſſes ſhall be heard for him, they muſt be called alſo, but they ſhall ſpeak without oath, unleſs the fact be under felony, or that ſome ſtatute direct the ſame.

After the jury have heard their evidence, and the judge has ſummed up the ſame to them, the clerk ſhall ſwear a conſtable in this manner:

"You ſhall well and truly keep every perſon ſworn of this jury together, in ſome convenient room, without meat, drink, fire, candle or lodging; and you ſhall not ſuffer any perſon whatſoever to ſpeak to them or any of them; neither ſhall you your ſelf ſpeak to them, until ſuch time as they be agreed of their verdict, unleſs it be to aſk them, if they be agreed of their verdict." So help you God.

Then the conſtable attends the jury to ſome convenient place, where they may conſult of their verdict, and continue at the door till they be all agreed.

When they have agreed on their verdict, they return to the court, and the clerk calls them over by their names, and aſks them, 'if they be all agreed of their verdict?' If they ſay, Yea; he aſks, 'Who ſhall ſay for them?' they ſay the foreman. Then he calls the priſoner to the bar, and bids him hold up his hand. Then he ſays to the jury, look upon the priſoner, you that be ſworn; what ſay you, is he guilty of the felony whereof he now ſtands indicted, or not guilty? If they ſay guilty, then the clerk aſks them, what lands or tenements, goods or chattels, he had at the time of the felony committed, or at any time ſince: If the jury find any, then the goods muſt be recorded. But their common anſwer is, 'none to our knowledge.' Then the clerk ſaith, 'look to him, gaoler.'

If the jury ſay, not guilty, then the clerk muſt ſay to the priſoner, 'down upon your knees, and ſay God ſave the people and this honourable bench.'

When the clerk has entered their verdict, he muſt ſay to the jury, 'Gentlemen, hearken to your verdict as the court has recorded it.' And then reads it to them in this manner: 'You ſay that A. B. is guilty of the felony whereof he ſtands indicted. And ſo you ſay all.'

When the judge is ready to give judgment, the clerk of aſſize cauſeth the gaoler to ſet the priſoner found guilty at the bar, and ſaith unto him——

'A. B. Thou may'ſt remember, that before this thou haſt been indicted for this felony by thee done and committed: thou haſt been arraigned, and pleaded not guilty; and for thy trial thou haſt put thy ſelf upon God and thy country, which country hath found thee guilty; what canſt thou ſay for thy ſelf, why, according to the verdict paſſed againſt thee, thou ſhouldeſt not have judgment to ſuffer death? What ſayeſt thou A. B.'

Then if he prays his clergy, and may have it by law, the ordinary muſt be called to ſhew him the book, and when he has ſhewed it to him, the clerk muſt ſay, *Legit ut clericus, vel non.* If the ordinary ſays, *Legit*, then the form of the entry muſt be, *et tradito ei libro, legit ut clericus*; and then muſt the priſoner be burned in the hand. But if the ordinary ſaith, *non legit ut clericus*, the priſoner muſt be executed.

The court are the proper judges of the criminal's reading. Shaw. Vol. 1. 191.

Memorand. That all indictments upon riots, treſpaſſes and othe
miſdemeanors,

misdemeanors, under the degree of felony, must be tried after the felons. And those that are found guilty, the judge imposeth a fine upon them, or other punishment, as he findeth the nature of the offence.

If a woman be indicted and arraigned of felony, it is no plea for her to say, she is with child; but she must plead to the indictment, guilty or not guilty. And if she be found guilty, then she may alledge that she is with child. And then the clerk of assize may order the sheriff to return an inquest of twelve women before the justices. And when the sheriff hath returned them, the clerk shall call over their names, and when they all appear, he shall swear them severally after this manner:

'You, as Fore-Matron of this jury, shall swear, that you will search 'and try the prisoner at the bar, whether she be quick with child, of a 'quick child, and thereof a true verdict shall return, according to the 'best of your judgment'. So help you God.

Then shall he give to the rest of them (every one by herself) this oath:

'The same oath that your fore-matron hath taken on her part, you 'shall also take and observe on your part'. So help you God.

When they are all sworn, the constable shall convey the jury and prisoner to a chamber, where they shall search and try if she be quick with child, &c.

When they have agreed upon their verdict, they shall return to the court, and deliver in their verdict in the same manner as is before related.

If they find that the prisoner is quick with child of a quick child, then execution shall be stayed till she be delivered; but if they find that she is not quick with child of a quick child, she shall be hanged presently, for it will not avail her to be young with child.

Then the clerk shall direct the gaoler to set those prisoners only to the bar who are to die; that done he shall cause the cryer to make proclamation, and say,

'The justices of the people of the state of New-York, do straitly 'charge and command all manner of persons to keep silence, while they 'proceed to give judgment against the prisoner at the bar'.

Judgment being given, and other trials over, and the judge having heard such grievances as are complained of unto him, concerning misdemeanors and the like, the cryer maketh three proclamations to adjourn the assizes, and saith,

'All manner of persons, that have here appeared before the justices of 'the people at these assizes and general gaol delivery for this county of 'H. may depart at present, and attend at, &c'. God save the people.

Note, The proceedings on the *nisi prius* are the same with the proceedings at the court of assize, only the words *nisi prius* must be added: as for example, in calling the jury, 'You good men of the *nisi prius*, 'summoned to appear here this day, &c'.

The court of General Quarter Sessions *of the* Peace *is held after the same manner as the* Assizes. *only altering the term.*

THE justices of the said court of quarter-sessions of the peace are to hear and determine by jury or otherwise, according to their power, of causes within their commission, and the statutes referred to their charge.

The court being set, the clerk shall cause the cryer to make proclamation, and say,

'The justices of the peace do straitly charge and command all man-'ner of persons to keep silence, and hear the people's commission of the 'peace openly read, upon pain of imprisonment'.

Then

Then the clerk ſhall cauſe proclamation to be made three times, viz.

' All manner of perſons that will ſue or complain, or have any thing ' here to do at this court of general quarter-ſeſſions, holden here this ' day, before the juſtices of the peace for this county of *H.* draw near ' and give your attendance, and you ſhall be heard'.

Then he ſhall cauſe another proclamation to be made, viz.

" A. B. high-ſheriff of the county of H. return the precepts and other proceſs to you directed and delivered, returnable here this day, that the juſtices of the peace may proceed thereon".

Then he ſhall make another proclamation, and call the conſtables by their names, to anſwer at the firſt call, and ſave their fines.

Then the clerk ſhall cauſe another proclamation to be made, and ſay,

" All juſtices of peace, and other officers, who have any inquiſitions, or recognizances, whereby you have let any perſons to bail, or taken any examinations, or other things, ſince the laſt ſeſſions, put in your records thereof; that the juſtices of the peace may proceed thereon".

Then he ſhall make another proclamation, viz.

" You good men that be returned to enquire for the people of the ſtate of New-York, and the body of this county of *H.* anſwer to your names, every man at the firſt call, and ſave your fines".

When the grand jury is full, he ſhall cauſe the foreman to lay his right hand on the book, and take the oath as in p. 489.

When the jury is ſworn, the clerk ſhall cauſe proclamation to be made, and ſay,

" The juſtices of the peace do ſtraitly charge and command all manner of perſons to keep ſilence whilſt the charge is giving, upon pain of impriſonment".

The charge given by the judge of the court many times varies, according to the circumſtance of the county where the court is held.

Then muſt the clerk direct the cryer to make proclamation, and ſay,

" All manner of perſons that be bound over by recognizance to proſecute or prefer any bill of indictment againſt any perſon or perſons, before the juſtices of the peace, let them come forth and proſecute, or elſe they ſhall forfeit their recognizances".

When any evidence appears, he ſhall in preſence of the court lay his hand on the bible, and the clerk ſhall ſwear him in this manner:

" The evidence which you ſhall give to the grand inqueſt, ſhall be the truth, the whole truth, and nothing but the truth." So help you God.

Then ſhall the clerk proceed in the ſame manner as is directed in page 489.

When any perſons are diſcharged upon their appearances upon proceſs, the clerk of the peace ſhall forthwith put ſuch perſons out of proceſs and enter their names in his book, and ſhew the ſame to the court before another proceſs ſhall be called.

When all proceſſes be diſcharged, then the traverſes ſhall follow next in courſe.

When the parties do appear who ſtand indicted of treſpaſſes, mayhems, batteries, riots, routs, converſions, and the like offences, the party indicted ſhall not hold up his hand at the bar, but the clerk ſhall call the perſon indicted, and when he appears, ſhall ſay unto him.

" Thou ſtandeſt here indicted by the name of F. E. in the pariſh of *G.* in this county, labourer, for that thou, &c." (and ſo read the indictment.) And then ſhall aſk him, " What ſayeſt thou? art thou guilty of this treſpaſs whereof thou ſtandeſt indicted, or not guilty?"

If

If he ſhall ſay not guilty, and ſhall traverſe the indictment, then he ſhall enter into recognizance to proſecute his traverſe at the next quarter ſeſſions; which recognizance ſhall be taken after this manner:

"F. E. Thou doſt acknowledge thyſelf indebted unto the people of the ſtate of New-York, in the ſum of, &c. to be levied of thy lands and tenements, of thy goods and chattels, and this upon condition, that thou ſhalt appear at the next general quarter ſeſſions of the peace, to be holden before the juſtices of the peace for this county, and ſhalt then and there proſecute thy traverſe, which is taken, with effect; and ſhall not depart the court without licence."

But if the party will not confeſs the offence whereof he ſtands indicted, or will not plead, guilty, or will plead ſuch matters as ſhall be no anſwer to the indictment, judgment ſhall be entered againſt him, according to the uſual courſe uſed in actions at common law.

Note, That the party indicted may, by his counſel, before plea pleaded, take exceptions to the inſufficiency of his indictment; and if the court ſhall quaſh the ſame for error, the clerk of the peace ought forthwith to indorſe the cauſe of the error, wherefore the indictments was quaſhed, on the back ſide thereof; but if the court ſhall ſee cauſe when the indictment is quaſhed, they may give order that a new indictment be drawn againſt the offender.

Then the clerk ſhall call the parties bound by recognizance to proſecute their traverſe: and if any of them do not appear, then the cryer ſhall call him thrice, and ſay,

"A. B. come forth and proſecute thy traverſe with effect, or elſe thou forfeiteſt thy recognizance."

Then the clerk ſhall cauſe the cryer to call the proſecutor three times, in this manner:

"D. L. come forth and proſecute thy indictment againſt A. M. and thou ſhalt be heard."

If the proſecutor do not appear to proſecute his indictment, and affidavit be made in court that he had timely notice of the tryal, the jury ſhall be ſworn, and the clerk ſhall charge them with the indictment, concluding thus:

"That to this indictment he hath pleaded not guilty, and for his trial has put himſelf upon his country, which country you are: And none appearing to prove the fact againſt him, unleſs you do know upon your own knowledge, that A. B. is guilty of the matter of fact charged in the indictment, you ſhall find him not guilty."

And upon ſuch verdict the court ſhall diſcharge him. But if the proſecutor do appear, the clerk ſhall cauſe the cryer to call the jury in this wiſe:

"You good men that be returned to inquire and try this iſſue of traverſe between the people of the ſtate of New-York, and A. M. anſwer to your names at the firſt call, upon pain and peril that ſhall fall thereon."

When the jury is full, the clerk ſhall ſay, "A. M. look to your challenges."

Then he ſhall ſwear the jury, every man ſingly by himſelf, laying his right hand on the book, thus:

"You ſhall well and truly try the iſſue of traverſe between the people of the ſtate of New-York, and A. M. for a treſpaſs whereof he ſtands indicted, according to your evidence." So help you God.

When all the jury is ſworn, the clerk ſhall read their names, and the cryer ſhall count them. Then he ſhall aſk them, "If they be all ſworn; if they ſay yea, he ſhall bid them "ſtand together and hear their charge" Then

Then the clerk cauſes the cryer to make proclamation in this manner:

"If any perſon can inform the juſtices of the peace, the attorney general, or this inqueſt now to be taken, of any treſpaſs or other miſdemeanor acted or committed by A. M. come forth and give your evidence, or elſe he ſhall be diſcharged."

Then the clerk ſhall read the indictment, and charge the jury as the indictment is, what they are to inquire. Then ſhall the indictment be opened by counſel, and the witneſſes called to prove the matter of fact, which witneſſes ſhall be ſworn by the clerk, after this manner:

"The evidence which you ſhall give to this inqueſt, againſt A. M. ſhall be the truth, the whole truth, and nothing but the truth." So help you God.

In all trials the counſel of the proſecutor ſhall conclude the evidence, and the judge of the court ſhall give the directions to the jury. Then ſhall the jury depart to ſome convenient place to agree upon their verdict, with a conſtable, to whom the clerk ſhall adminiſter this oath, viz.

"You ſhall well and truly keep every perſon ſworn of this inqueſt, together in ſome private room, without meat, drink, candle or lodging; and you ſhall not ſuffer any perſon whatſoever to ſpeak to them, or any of them; neither ſhall you yourſelf ſpeak to them, until they have agreed on their verdict, unleſs it be to aſk them, whether they have agreed of their verdict." So help you God.

When they have agreed on their verdict, and returned into court to deliver the ſame, the clerk ſhall call them ſeverally by their names, and aſk them, 'If they have agreed on their verdict?' if they ſay, yea, then he ſhall ſay, 'who ſhall ſay for you?' if they anſwer 'our foreman,' then he ſhall ſay to the jury,

"What ſay you? is A. M. guilty of the treſpaſs, or riot, or rout, &c. whereof he ſtands indicted, or not-guilty?"

If they ſay, 'guilty,' or if they ſay 'not-guilty,' then the clerk ſhall record the verdict, and then ſay to the jury, 'hearken to the verdict as the court has recorded it.'

And then he ſhall repeat it in this manner: 'you ſay that A. M. is guilty of the riot, treſpaſs, &c. whereof he ſtands indicted: and ſo you ſay all.'

When a perſon has entered into recognizance for the appearance of another, if the delinquent do not appear, the clerk ſhall cauſe the cryer to call them in this wiſe:

"A. M. of the parish of ——— cordwainer, come forth, ſave thee and thy bail, or elſe thou forfeiteſt thy recognizance."

But if the delinquent do appear upon the recognizance, then the clerk ſhall enter a *exoneretur*, and then call the proſecutor thus:

"D. E. come forth and proſecute the peace againſt A. M. or elſe he ſhall be diſcharged."

And if the proſecutor doth not appear after he hath been thrice called, the delinquent ſhall be diſcharged of courſe.

If a perſon be bound to appear, or bound to his good behaviour for a certain time, and during that time do keep the peace towards the people of the ſtate of New-York, then proclamation ſhall be made in open court in this manner;

"If any perſon can ſhew any lawful cauſe why the peace granted againſt J. S. ſhall be continued, let him come forth, and he ſhall be heard, for he ſtands upon his diſcharge."

And if none come to proſecute, he ſhall be diſcharged.

When the juſtices proceed to give judgment upon offenders, the clerk ſhall cauſe proclamation to be made, and ſay,

"The

"The justices of the peace do straitly charge and command all manner of persons to keep silence while they proceed to give judgment against the prisoners at the bar."

Note, That every judgment which shall be given, and every fine which shall be assessed, ought to be openly pronounced and declared by the court, to the end it may advance the more good to the state in profit, to the justices in credit, and to the people in example.

When the justices have heard all such grievances as are complained of unto them concerning misdemeanors, and adjourn the sessions, saying,

"All manner of persons that have any thing more to do at this quarter-sessions of the peace, holden before the justices of the peace for the county of H. may depart hence at this time, and keep their day again here at ———

GOD save the PEOPLE.

A GUIDE to JURIES.

To all honest JURY-MEN.

GENTLEMEN,

IT is one of the miserable follies of depraved human nature, that it commonly slights present enjoyments, and rarely rates the good things it possesses at their true value, till 'tis depriv'd of them: This grand privilege of trials *per pais*, by our country, that is, by JURIES, as it seems to have been as ancient as the Government, or first form of policy in Great-Britain; for it was not unknown to the ancient Britons (as appears by their books and monuments of antiquity) practis'd by the Saxons [See king Ethelred's laws in Lambert, p. 218. and Coke, 2 part Inst. fol. 155.] and confirmed since the invasion of the Normans, by magna charta, and continual usage; so it is a thing of the highest moment, and an essential felicity to all English subjects. For, look abroad in France, Spain, Italy, or indeed, almost where you will, and observe the miserable condition of the inhabitants, either entirely subjected to the arbitrary lusts of tyrants, who plunder, dismember, or slay them, according as the humour takes them, and many times without the least provocation, meerly for sport, and to gratify a savage cruelty; or at best, you will behold them under such laws, as render their lives, liberties and estates, liable to be disposed of, at the discretion of strangers appointed their judges, most times mercenary, and creatures of prerogative; sometimes malicious and oppressive, and too often partial and corrupt. Or suppose them never so just and upright, yet still has the subject no security against subornations, and the attacks of malicious, false, and unconscionable witnesses, yea, where there is no sufficient evidence, on meer suspicions they are obnoxious to the tortures of the rack, which often make an innocent man confess himself guilty, meerly to get out of present pain: Or if he do with invincible courage endure the question, as they call those torments, he is many times so spoiled in his limbs, as he scarce ever is his own man again.

Whereas such has been the goodness of God, and prudent care of our ancestors, that to our inestimable happiness, we were born, and live under a mild and righteous constitution, where all these mischiefs may be prevented; where none can be legally condemned, either by

the power of superior enemies, or the rashness or ill-will of any judge, nor by the bold affirmations of profligate evidence.

Of what date juries be, is the same to say, as when was England first inhabited, altogether uncertain. But that their antiquity in England runs to and beyond the Norman conquest, among the Danes, the Saxons, and the Britons, is most certain.

The Saxons conquering the Britons, mixed their customs with the British, so the Danes those British and Saxon ones with theirs, and the Normans all these with theirs; every conqueror making some alteration. Yet this law was, and from time to time hath been preserved and continued an inheritance indisputable and sacred unto us through all revolutions, without any interruption.

None but must acknowledge this of all others, the best and most effectual way to find out truth. There is no other way or art in the whole world, says Fortescue, so remote from all danger of subornation and corruption. p. 75.

Aaron had, its true, in plain letters of gold, Urim and Thummim, wrote on his breast, signifying what he either had, or ought to have had, viz "ability in parts, and integrity in practice". But have always all other judges since had such parts and practices? Their interests, ambition, pleasures, or other passions and frailties influenced them too much, rather sufficient enough to render them, as the prophet Isaiah, c. 33. v. 19. says, "Idols with eyes, ears and mouths", viz. "Such as would neither hear the people's complaints, regard the oppressed, nor pronounce a just judgment". Judges having places and preferments so extraordinary honourable and profitable: And what's their tenure? Even during pleasure, a term for so long as they do nothing but what and as pleases, &c. and do every thing which and as does please, &c. And whose pleasure must it be? Truly every ones too, that any-how has or can make any interest, &c. Thus a short syllogism proclaims them little other than bond slaves to such men's pleasures, and menaces the people with the worst of all miseries, law-oppression, oppression under colour of law; unless it be conceivable men's pleasures were to have the judges give sentence against them. Judges also were all lawyers we know, used just before to take fee's, its the more therefore to forget it now. Judges are concerned in so many causes, they are subject to be tempted the oftner, and every temptation is the greater, because they know, if they would yield, their gain might be so often. Judges are so few, it's plain they may the easier be corrupted. Judges cannot want courage, they think themselves liable to no action, &c. in any case, do what they will, but are absolutely dispunishable. Co. 12. 24, 25. Hutton. Whereas a jury on the other side, if it err, in many cases its liable to an attaint, the greatest punishment they know on this side death. A jury consists of many persons. Those which be jury-men in one case, yet may be in few more. They be men of other professions, used never in any case to take fees, &c. They are not prejudiced with fear of losing their offices, &c.

And to further manifest the difference of tryal by judges, and of this by juries, jury-men all are, and must be free of, and from all manner of bondage, obligations, affections, relations, passions, interests, and other prejudices whatsoever, (as indeed it is ill fishing in muddy and troubled waters: *legales*, one's peers or equals. Mag. Ch. c. 29. West. 1. . . 6. Of full twenty-one years old, not outlawed, never attainted or convicted of treason, felony, false-verdict, perjury, and conspiracy at king's suit, nor ever adjudged to the pillory, tumbrel, &c. whereby rendered infamous; nor any alien (unless an alien be tried, &c.)

&c.) But such others as be most nigh, most sufficient, and least suspicious. 28. E. 1. c. 9. F. B. N. 165. Dy. 59. 34. E. 3. c. 4. Regist. 177, 8. E. 3. 30.

They must be every one sworn every several trial, by a particular oath. If any of the grand jury be as aforesaid, any wise amiss, what they do is quashed and made void on bare motion to the court. If any of the petty jury happen so, the party by challenging of them, as they appear to be sworn, either sets aside the *pannel*, viz. all of them, or may any of them, by taking exception to the poll, viz. to them severally, as the case falls out; and peremptorily, without shewing any cause, may challenge and set aside as many as he will, under thirty-six, in case of high-treason, or misprision of high-treason; or under twenty-one, in case of any felony. And shewing any such cause as aforesaid, as many as he will, in any case whatsoever. Co. L. 156. Now they are such elect and choice men, because of the great trust reposed in them: and must be equals, that the defendant may the better speak to, and expostulate with, or reflect upon them, if they do amiss. And that they may not be over-awed, by his being greater than them; whereas greater things confound and astonish us, and things above us dazzle our eyes. Nor be careless or perfunctory for his being much less than them. We are apt to slight things beneath us, as small and contemptible, or inconsiderable. And must be of the neighbourhood, that coming from nigh where the question arises, the defendent, in all probability, may have the better knowlege of them, to except against, or to approve of them; and such may also the more likely know somewhat themselves of the party, of the matter, of the credit of the witnesses, and all circumstances. Co. L. 78. Thus if the place happen disputable, whence the jury shall come, they shall come from whence the matter is like best to be known, 21. E. 4. 8. Besides, in this way of or by jury, where life or member is concerned, or in any danger, and in all other criminal causes, is required two trials of the party before he can be said guilty, or any judgment can be given against him: and the party must also be found to be guilty on both these trials, else all is nothing. The grand jury must first examine the matter, and the petty-jury after examine all again, to prevent and secure against all surprizes of the party, and mistakes or errors in the jury. And any thing now which any jury can be said to do, must have the joint consent of twelve, West. 2. c. 13. else it's in construction of law, not the doing of the jury, but of private persons, and void. 6 H. 4. 2. 21 E. 3. The grand-jury consists of more persons commonly than twelve, but as aforesaid twelve agreeing, its enough, and so many of them must. So that by the law of juries twenty-four men in all, first and last, find one guilty, &c. before the judgment can be given, or one can be punished for the fault one's accused of. And besides, every man of the latter jury, even all the whole twelve, must all and every of them agree, and be of that one and only mind; (much to suspect, unless one be certainly and plainly guilty. Its more for all twelve, than for twenty-nine out of thirty to agree.) Any of the grand-jury giving in a presentment or indictment, without eleven more of the same mind, and agreeing with him, ought to be imprisoned, 40. Ass. 10, which also for any one of the petit-jury to do none will deny but to be worse. A judge was hanged for giving judgment on the verdict of eleven jury-men, Mir. 296. But on the other side, the judges are not so many at a trial scarce ever, the major part of them agreeing, its enough; their trial would be but one, or once only; they are never sworn at the trial, nor ever at all, but only once, and that exceeding generally; they cannot any of them

be

be excepted againſt, or challenged (though anciently might) be they never ſo great ſtrangers profeſſed enemies and otherwiſe ill qualified, and though the king be party, yet he chuſes them himſelf againſt one.

Beſides, if judges had power of both determining the matter of fact, and alſo the matter of law, as muſt, if there were no juries, their latitude of erring, &c. muſt then be the greater, and their doing wrong or miſchief might be the more, inaſmuch as they might wrong one then in both the fact and law; and their encouragement ſo to do, would be improved, ſince then it muſt be harder to detect them, as whether erred in the fact, or in the law, or partly in both; like as its eaſier ſeeking a buſh than a wood: And as its ſaid, opportunity makes many a whore. But were judges preſumed ſaints, and never ſo upright, &c. yet who can imagine but at a trial, when witneſſes are all examined, and evidence all given, the jury being ſo many perſons, and probably knowing ſomething of the matter before, they may all aſſiſting one another, better obſerve, remember, and judge upon the whole matter, than any one or two, &c. others, though called judges? Certainly one may do more with help than without. So the proverb is, two to one is odds at foot-ball: And, the fewer may the more eaſily deceive, or be deceived. Its natural for man to err. None's without fault, and the ſureſt foot may ſlip.

Viſc. St. Albans, Aph. 8. ſays, That's the beſt law, which leaves the leaſt to the arbitrarineſs of a judge; and Bract. 119. ſays, judges repreſent the king's perſon, they are his officers, and act in his ſtead (and hence concludes) they ought not at all be concerned in cauſes of life or member, &c. (where the king is party) for ſays he, The king is thus judge as it were in his own cauſe.

Thus appears what is the difference of judges and juries, and ſomething of the reaſon why the parliament has all along been ſo zealous for trials by juries, as no fewer than fifty-eight ſeveral times ſince the Norman conqueſt, hath eſtabliſhed and confirmed the trial by juries; no one privilege elſe nigh ſo often remembered in parliament.

Now, for the power and authority of juries, and how the wiſdom of the law hath entruſted and enabled them in this trial. The law ſays, in trials, whether any complaints are made, or any matter is alledged to be true or not, the judges ought not, nor can ſay, nor have any thing at all to do therewith, but the jury only. All the whole, or moſt they can do, or at leaſt ought, is only after and upon what the jury, or the parties themſelves agree firſt to be true. What the jury does, is called, The telling only of what is the law. Thus it is, that every finding of the jury as their verdict, &c. muſt be poſitive, what the fact and party's intent &c. was, and not ſaying only what their evidence is, that it was; for the judges can't even ſo far meddle with, or take conſiance of the matter of fact, as but to ſay, then the fact, caſe, &c. is ſo and ſo, if you agree your evidence to be ſo and ſo, and accordingly give judgment. Co. 9. Downham's c. Co. 10. As A. delivers B. goods, and after demands them again of B. but he refuſes to deliver them again; if A. ſues B. for finding theſe goods, and converting them to his own uſe; the judges will tell the jury, ſince B. refuſes to re-deliver them, this is evidence enough to find him guilty of converting them to his own uſe, &c. and is in law a converſion.

But if the jury gave their verdict, &c. ſpecially, as that A. delivered B. the goods, and after re-demanded them, but B. refuſed the delivering of them back, without ſaying poſitively B. converted them to his own uſe, or not ſaying generally, we find for the plaintiff, which is tantamount, the judges cannot ſay and judge B. guilty, &c. but muſt diſcharge

charge him. So where in a trial, fraud is pretended by one party done, &c. by the other, the judges will tell the jury such and such parts of the evidence prove the fraud, or in construction of law are fraud. But if the jury give their verdict specially, that such and such things are true (which the judges said prove the fraud) and not saying positively there was fraud, the judges cannot say or judge fraud, nor take the least notice of any thing as such. In the case of Roger Mortimer, in parliament, Anno. E. 3. it was adjudged there, 28 E. 3. p. 10. that the matters he was accused of, though they were notorious, and known to them all in parliament, and all people else, yet they could not give judgment upon this, nor any time ought they to proceed on any knowledge of their own. One condemned of trespass in the common pleas, the judges seeing him in court, and knowing him never so well, yet it was adjudged, if he deny himself to be the same person, they cannot say he is, and so cause him to be apprehended; because they cannot judge of any thing, nor take any notice, but only of what is upon record before them, 33 H. 6 55. Thus if A. be indicted of stealing 5s.* the jury may give a verdict that he is guilty of stealing the five shillings, but only to the value ten-pence; and the judges here cannot say the five shillings were more worth or less, though never so apparent. King Henry the fourth asking judge Gascoyn, what if he saw A. kill D. and the jury will find not that A. killed D. but that E. did? He answered, I can only reprieve E. and then intercede with your majesty for his pardon. Pl. 83. The infamous Empson and Dudley, proceeding to judge as judges, of matters upon information by witnesses, &c. otherwise than by juries; this was one indelible blot in their escutcheon, though they had an act of parliament, 11 H. 7. c. 3. to warrant them in so doing: Ander. l. 1. 156. When a prisoner is arraigned, he says, he puts himself on God and his country (neither of which are the judges) for his trial; which country is the jury. So it is manifest, juries have the sole power and conusance of the matter of fact, as whether a thing be true or not, &c. and the judges have at most only to do with matters of law.

Jury-men have also the determination of law, but with this difference from that of fact, that it is necessary they determine the matter of fact. But they may either refuse to meddle with any thing of law, and leave it to the judges, or at their election, may take upon them knowledge of the law, and determine both fact and law themselves, Litt. § 368, and so is every day's experience, whereof see more anon, speaking of general verdicts and special verdicts. Only if a jury give a verdict, setting forth specially or particularly how the matter was, and then draw an ill conclusion as to the matter of law thereupon, the judges will judge against, and so make the judgment of the jury in the matter of law void. Hob. 53. As suppose A. be indicted of murdering D. the 10th of Feb. &c. and the jury give their verdict, that A. gave the wound at E. the 5th of Feb. and that D. died at F. the 10th of Feb. and conclude that A. murdered D. at E. or on the 5th of Feb. Now the law saying the murder was on and at the place and time, when and where the party died, the judges will judge against the judgment of the jury, Co. 4, 42. So Anno 1654. in B. R. between the protector and Somber, the court said, the jury had concluded contrary to their premises, finding he had killed

* In Henry the third's time, one shilling was as much as forty shillings now, and before then, more; yet the law was then, one must steal above the value of one shilling, to be guilty of felony: So that merciful juries now value by the ancient shilling, and save many not guilty of above the value of forty shillings present money.

killed two men on the road, but calling it manſlaughter *ſe defendendo*, and ſo the judges ordered him to be tried again.

Thus we ſee, judges are uneſſential and needleſs in a trial by a jury, further than to aſſiſt it, by anſwering and informing what the law is, where difficulties ariſe, or at leaſt the primitive conſtitution might be thus. Like as alſo yet they be in the houſe of lords, or when any trial is by the lords, but aſſiſtants only, when conſulted, and no parties of or at the trial, &c. The very form of ſpecial verdicts to this day, looks as if it were ſo. As in murder, the jury find and give their verdict (firſt) how and in what manner particularly the fact was committed, and then ſay, but whether upon the whole matter aforeſaid, the killing aforeſaid, of J. S. be murder (in conſtruction of law) the jury is ignorant, and therefore aſk the advice of the court; and (further ſaying) if upon the whole matter aforeſaid, it ſeem to the judges and court, that it is murder, then the jury on their oath, ſay, the ſaid J. N. is guilty in manner and form as by the indictment againſt him is ſuppoſed. And if upon the whole matter, &c. it ſeem, &c. that it is not murder, then, &c. J. N. is not guilty in manner, &c. Co. 9. 64. So all the judges do is but advice, tho' in matter of law; and it is the jury only that judges one guilty or not guilty of murder, &c. and whether it be murder, or what one is guilty of, by the advice and aſſiſtance only of the judges, without their being any wiſe any parties of or in giving ſuch judgment. And the reaſon, and only reaſon, why it ever ſeems otherwiſe, may riſe hence, that the judges of Weſtminſter-Hall keep the ſaid inferior courts to their due bounds, methods and order. And the lords keep the judges to theirs, when amongſt them; but there's no body does in Weſtminſter-Hall.

It perhaps may be pardonable in counſellors, becauſe for their fees, and not pretending authority: But why judges, though apt to indulge, improve, and extend their own power and juriſdiction, ſhould offer to brow-beat, threaten, order, impoſe upon, or wheedle, flatter, tempt, inſinuate with, or any wiſe lead, perſuade, direct, incline or diſpoſe juries, how to find their verdict, unleſs only directing them ſo far as juries require of them, it is hard to ſay. People daily rob, and ſo have done, on Salisbury-Plain, but it is ne'er the more lawful. Thus are judges trumpets, and juries the echoe, let who will blow. Thus are juries but an empty name, thus is turned topſy-turvy all the whole thing of juries. Thus might the judges draw and ingroſs to themſelves the whole power in the trial, and be in effect judges and juries too. Thus is the trial by juries a colour, a ſham, and really no trial at all by jury. Was this allowable by law we ſhould never have had any; the having them would thus be only an unneceſſary trouble, &c. whereas the law never ſets up or requires any thing ſo vain or fruitleſs.

But ſome will ſay, the jury can do nothing, but on the evidence given in court, which the judges hear as well as the jury, and ſo may ſee the truth, and know how the verdict ought to be, as well as the jury, and conſequently they may inſtruct and aſſiſt the jury. It is true, they may be helpful, and they may aſſiſt, but however, it is no matter for their being as aforeſaid, too officious. And beſides, as aforeſaid, that the jury is neighbours of the fact, of the party, of the witneſſes, &c. but the judges ſtrangers; and the jury be more perſons and the judges fewer, &c. The jury alſo is not bound up to the evidence only given in court, or that the judges hear, but may go upon their own private knowledge.—— Suppoſe A. ſues B. on a bond for ten pounds, and B. pleads payment, but a trial proves nothing: the judges themſelves ſay to the jury, you muſt find for A. unleſs you know the money is paid yourſelves: which ſhews the jury may find for B. if they know the money is paid, though the

the judges knew nothing of it, 4 H. 7. 29. So Hob. So if one be arraigned, and no witneſſes produced againſt him, the court ſays the like, as was ſeen one Michaelmas term, 81. in B. R. Bradley's caſe, and by daily practice. They uſe their own knowledge beſides, and often againſt the evidence in court. Cro. El. 616. Grove's and Short's caſe. So in Plowd. 410, 411. So a great caſe adjudged in B. R. Hill, 21 C. 1. And another there, 21 C. 1. And ſo ſays Stanf. If a jury know any thing themſelves, it's as much as by evidence, 130. So Plowden ſays, a petty jury is ſometimes bound to give their verdict, though they have no evidence. f. 12. Hence in all caſes at common law, one witneſs is accepted of as ſufficient; and doubtleſs any verdict is good, though in ſuch caſes, without any evidence given in court, becauſe the jury is preſumed to know ſomewhat of themſelves. Whereas in all other countries in the world, where juries are not uſed, and here when the trial is without a jury, there muſt be at leaſt two, as hereafter ſhall be ſaid more at large. Moor ſays, a juryman delivered his companions a certain paper concerning the queſtion out of court, yet the verdict was adjudged good. caſe 656. Beſides if it happen they have no other evidence but what the judges know as well as they, yet they ought by, and according to the true purport and meaning of their oaths, to proceed on it in their own ſenſe, and as they apprehend or underſtand it themſelves, and no otherwiſe, though the judges differ with them; elſe how can they diſcharge their conſcience? And it often falls out they may differ. No two lawyers, nay, judges, reading or hearing the very ſame cauſe, but preſently make different inferences, deductions, collections, concluſions and arguments, yea, the ſame perſons at different times; like as the philoſophers hold our ſenſes and ſentiments as different as phyſiognomies. And why ſhould A. impoſe his opinion on B. rather than B. on A. ſo of judges and juries. One cannot ſee by another's eyes. And this is certain, every thing any jury does, as a jury, is on oath, and they ſwear to be true by virtue of the oath firſt adminiſtred them. So that upon the whole, one may ſee a judge ought not to meddle at all with the jury; if he differ not with them, its needleſs and troubleſome; if he differ, they are not to mind him: take it which way one will.

But perhaps it will be urged, that this muſt be underſtood only as to trying matter of fact, and that however as to matter of law, the jury ought always to be adviſed and governed by the judges, though not as to matter of fact: No, no further than a mannerly deference is payable to the judges, as more learned in the laws, for if the judges ſay, or any witneſſes ſwear the law to be ſo and ſo, no jury is by law bound, or any wiſe obliged beyond their own reaſon, &c. at leaſt to believe them in it, 9 H. 6. 38. Finch 58. If an attaint be brought againſt a jury, its no excuſe, that the verdict is according to the judge's directions. Cro. El. 309. 18.

Now ſays a timerous ignorant juror, Oh! but whether the law be thus or not, the judges will puniſh the jury if they do not comply with them. This ſure would be pretty! A jury, perhaps forſworn, and liable to an attaint, if they do comply, and puniſhable if they do not: no no, the law (which is nothing but improved and refined reaſon) was never ſo unreaſonable as to ſuffer this. A. levied a fine of lands to D. and D. paid A. the purchaſe money: but after, A. ſaid he was then at levying the fine under the age of one and twenty years old, and therefore the fine was void. The law ſays, the judges ſhall determine by looking on the party, whether he were of full age or not, and the jury ſhall not; (the true reaſon being, that if the party ſeem of full age, though he be not, he ſhall not avoid the fine to prevent cheating, &c. Whereas, if the

the jury were to try it, they muſt not go according to the ſeeming, but real true age, and ſo if he want but a day of one and twenty years, he muſt thus be adjudged under age, as much as if he wanted twenty years and D. ſhall be cheated.) This fine was after reverſed by king's-bench, becauſe A. did appear, and was alſo proved by four witneſſes to be under age; but the validity of the fine coming afterward, to be diſputed in common pleas, on a trial by jury, though the court told the jury, that notwithſtanding ſome witneſſes prove to you that A. was of full age at levying the fine, yet you ought not to heed them, for the judges have the ſole and only power of determining whether of full age or not, and the judges of the king's bench have already determined it; nevertheleſs, the jury being ſomewhat extraordinary, and not ſo very leadable men, gave their verdict contrary to the direction of the court, and as if A. were then of full age; and an attaint being after brought againſt the jury, the jury was acquitted and commended, Dy. 201 and 301. And the jury is the more juſtifiable in it, ſince the judges firſt altered the law, in trying by witneſſes, and not only by inſpection, as juries alſo do, which in trials by witneſſes are, as aforeſaid, the more competent, &c. Of this nature is a memorable caſe of Buſhel, reported by lord chief juſtice Vaughan, where Meade and Penn, two quakers, were indicted at the Old Bailey for their meetings; and the jury, whereof Buſhel was the foreman, would not find them guilty: the court being mighty angry, fined and committed the jury, alledging for cauſe, that they (the jurors) againſt the law of the realm, againſt full and manifeſt evidence, and againſt the direction of the court in matter of law, to them in court openly given and declared, had acquitted the ſaid Meade and Penn; but upon long and ſerious debate, it was after judged, the commitment, fining, &c. was unlawful, and accordingly the jury were diſcharged, &c. Another time alſo a jury man diſſenting from all the reſt, and that no leſs than two days, the judges aſked him "what he would do?" ſays he, "Rather ſtarve and die in priſon than conſent;" the court fined and committed him; but on better conſideration, diſcharged him—— all the court can do, being only to (carry them in carts, if in the circuit, along with them and) keep them without meat, drink, &c. till they agree, 41 Aſſ. ſays, Mir. "Jurors ought not to be threatened, but to be free, differing in opinion, &c." 273. And it was reſolved in parliament, anno 1677. "That the precedents and practice of fining, &c. juries is or for giving their verdicts, are illegal." And Keeling, chief juſtice of B. R. was called to queſtion in parliament for ſuch practices.

Coke upon Lit. f. 369. ſays, "If any labour a jury, inſtruct them, or put them in fear, or the like, it's puniſhable, as maintenance or embracery, either at the king's ſuit, or the parties;" and perhaps, it would puzzle one to ſhew, why a judge is not within this law; for how can he be ſaid to do this as a judge, when to do ſo is no part of his office? And why ſhould any judge alter the caſe here, any more than in other caſes of breaking the laws? Its much too, any judge ſhould offer ſuch a thing, conſidering he that judges without a jury certainly judges without authority; and he that judges with a jury, but governed or led by him, judges only by colour of a jury, and by colour of authority; and thus makes himſelf forſworn in and by the oath taken at his being created judge; makes all the jury forſworn; violates the greateſt privilege of the ſubject; infringes the moſt often confirmed law of the kingdom; and alſo does particulary the party offended, the greateſt wrong imaginable; in as much as by colour of law, he makes all the jury acceſſaries to the whole.

Hence it's improbable any judge ſhould offer the contrary; but however

ever, a jury in any indictment, preſentment, or information, ought, and may give their verdict, &c. according to their own conſcience, without any fear of puniſhment one way or other.

And in any other caſe, as where the king is no party, but an attaint happens to lie, they may be puniſhed no other way. Alſo no puniſhment whatever lies for or againſt a jury, which conſiſts of above twelve men, 14 H. 7. 13. Nor does attaint ever lie where the witneſſes are not on oath, or for going againſt what any ſuch witneſs ſays; nor in any appeal of maim, murder, or felony, F. N. B. 107. Nor does ever any action lie againſt any jury for going againſt their evidence: and where an attaint is brought it muſt be tried by a jury of twenty-four men.

The only caſes the judges have any power over juries in, are, where in their behaviours they become guilty of any ſuch thing as the judges may juſtly call an unlawful contempt, 4 E. 4. 27. 36. H. 6. 27. Or be guilty of embracery, 5 E. 3. c. 10. as receiving bribes, promiſes, &c. before or at the trial, &c. "Or in caſe of concealment, the juſtices of the peace of every ſhire, &c. may take by their diſcretion an inqueſt, &c. to inquire of the concealments of other inqueſts taken before them and before others, of ſuch matters and offences as are to be inquired and preſented before juſtices of peace, whereof complaint ſhall be made by bill or bills, &c. And if any ſuch concealment be found of any inqueſt, &c. had or made within one year, &c. The juſtices may amerce or fine them at diſcretion."

The grand jury may not diſcover evidence given them, Inſt. 3. 107. Mich. 15 Jac. in B. R. Smith and Hill's caſe, 27 Aſſ. 63. Lamb. 402. Chron. 207, 272. Finch 29. So the petty jury, if without licence of court, depart any whither upon any occaſion whatſoever, after ſworn, before verdict given; or that while, but eſpecially after evidence given, eat or drink: or out of court receive any evidence from either ſide, may expect fine and impriſonment.

Thus much for what a jury may do: now ſomething more how, and what it ought to do. The oath itſelf, but that its ſo general, would elſe be inſtruction as well as obligation ſufficient.

The ſcripture teaches one his duty upon an oath; it ſays, "One muſt ſwear in truth, in juſtice and judgment," Jer. c. 4. Deut. c. 16. Exod. c. 20. Dan. c. 5. Levit. c. 14. Zac. c. 13. Acts. c. 5. and the Proverbs in ſeveral places. "In truth," with one's eyes, neither in a teleſcope or microſcope: not proceeding by appearance or ſeemingneſs of things, not by adding or diminiſhing, not by aggravating or palliating, not by equivocation or reſervation, not by repreſenting or accepting the matter otherwiſe than really and truly it is; not preſenting, &c. things, &c. doubtful, or not certainly true, as true; not omitting any thing certainly true, but always as the naked truth is, ſo and ſo. In "judgment" not at a venture by caſting dice, &c. not as matter of form, not raſhly perfunctorily, or negligently paſſing or running over things; not by implicit faith, or in complimental obedience, &c. not upon truſt or belief, further than with and upon good and great deliberation, conſideratenеſs, reaſoning, and ſatisfaction according to one's own conſcience, and becauſe one's mature and ſettled judgment is ſo and ſo. In "juſtice," proceeding fairly, impartially, and according to the merits of the cauſe, without charging one with murder that's guilty but of manſlaughter; and without malice, fear, hope, pity, favor, affection, paſſion, corruption, or private or ſiniſter end or deſign: but all throughout purely, becauſe it is ſo and ſo more than otherwiſe. And conſonant to ſcripture, as well as generally in all other things, ſo alſo in this

are even morals and politics. The wife men (fo called) of Greece, were called fo from their living prudently, juftly, and honeftly, fuch alfo are they Ariftotle calls fo, 1 Metaph. &c. The Stoicks fay, " He's the wife man that fticks to truth, and abhors and banifhes every thing elfe, not fo much as admitting of any ftories, fictions, &c. whatfoever." Machiavel fays, " judges muft not be moved for the power of any one, nor for any one's fake, one way or other, nor with pity or ill will, but always go according to law, truly and without biafs." Juftinian fpeaking of judges, fays, " they muft be inoffenfive to God, the king, and the law. No acclamations of the people, no honours of the king, neither of thefe move them. Againft the common good or an oath, no man will ftir an inch, if honeft, though it be for a friend's fake. Judge Hales is a friend as Hales, but none as a judge. What a judge does at the requeft of his friend, is really and truly no friendfhip, but is making himfelf and friend both guilty of a crime." The Areopagites were judges that heard caufes only in the dark, that they might take notice what was faid, and not who fpoke. And what is faid of judges by thefe authors, muft by us in like manner be applied to juries. The book whereon fwearing one lays one's hand, is God's everlafting truth, and moft holy word ; fo that if one forfwears one's felf, one virtually in fo doing utterly forfakes God, and his mercy and truth. Says a learned man, part of the oath is, " So help me God," viz. I pray God he will never help me, if I fhall not fincerely and faithfully keep this my oath. Cajetanus, fays, " 2 Qu. 78. Perjury is of its nature a contempt of God." And as the proverb fays, " its ill jefting with edg'd tools."

By the oath of the grand jury, one's bound to obferve as well the charge that fhall be given by the court, as the form of the oath itfelf. But this its plain muft be underftood, fo far as the charge is according to law, and not contrary or repugnant to the oath itfelf, and no further or otherwife.

Anciently the charge was given in writing to the Jurors, Brit. 9. Bract. l. 3. c. 1. Dalton p. that the jury might eafier remember it, their minds be refrefhed, and perhaps themfelves edified, &c.

What the grand jury does, is by way either of prefentment or indictment. By prefentment, when they know of a crime or fault themfelves and give a fhort note of the party's name, place of abode, and fault, without form, referring it to the court to put it into form. By indictment, when the party and fault are ready brought them in parchment, drawn up in form : and indeed, the moft true difference is only, that the one is in form, and the other not.

In an indictment, firft they muft confider and underftand it well and thoroughly. They muft confider, if the fault, as alledged, with the circumftances and aggravations, amount to and be a real fact or not, and alfo worth complaining of, for " the law minds not every little thing, and this is daily experienced in indictments and actions of cafe. If it be no fault, or one not worth complaining of, which in law, as aforefaid, is all one, they reject the bill, and meddle no more with it. If they find it a fault and confiderable as aforefaid, then they confider, if they know it true fo of themfelves : which if they do, or other evidence fatisfy them it is, they indorfe, or write on the back fide of it, *billa vera*, this bill is true ; but if they do not know it themfelves, nor be fatisfied by the evidence, then inftead of *billa vera*, they write *ignoramus*, we know not : and afterwards thus deliver all the indictments into court.

The clerks of the court, to get fees, and perhaps, fome others for one finifter end or other, will be apt to fay, that the grand-jury ought to find

find an indictment, or make a presentment against any supposed offence or offender, tho' they have but colour of evidence, or a probability of the thing being true, and that what they do is but matter of course, and a ceremony; matter of form, barely an accusation, &c. But that this is not so indeed, is apparent; for what end then is a grand-jury? only for show. The law would certainly then have never required one to be at all. We see they are obliged to be sworn and they are as much on their oath, as any other jury, which then should be the contrary. The very form of the oath teaches us better. The oath is, "diligently enquire" &c. not negligently, &c. "True presentment make," not probable, &c. Nothing for lucre, &c. not excepting the clerks, &c. According to evidence not presumption: "the whole truth, and nothing else but the truth," which how can be at such a rate as the clerks speak of.

But then they object, that these words, "according to the best of one's knowledge," are added. If they be, its against the law, Mir. 304. Brit. 12, 135. And altering an oath, is imposing a new one, which cannot be without an act of parliament, Inst. 2, 479, 638, 719. But however, many jurors in such case wink, &c. that they may know, &c. These words are best of, &c. and not worst; they are knowledge, not ignorance: they imply the best one can know or find out; and not only what one already does know, for then what need the word best? And besides they relate to the word enquire, as well as any other word, &c. So the more one considers them, the less one shall find they really alter the oath.

They say they, all the grand-jury does, is but presenting in form, and not in form as aforesaid, and is only suppositions as it were, and nothing positive or certain, grounding themselves only on this, that the form of the indictment is "the jury upon their oath present," instead of "the jury upon their oath say;" and so infer, that if any thing in the presentment or indictment be false, yet its no perjury. Alas! to see men in extremity, what hold they'll catch at! could Argus himself have seen this exception? no, unless blind. Present and say are undoubtedly here, and in such like cases, synonimous terms. To present an oath, is to give the court to understand on oath: and to say on oath, is to tell the court on oath; and an infinite of indictments be say instead of present. Rast. 163. Kitch. 100. Co. 9, 114. And Fleta goes so far, as to call an indictment a verdict. f. 113. The words also of the oath, are "to truly present," and not say. And Lord Coke plainly calls the grand-jurymen all wilfully forsworn and perjured, if they wrongfully find an indictment, Inst. 3. 33.

Then say they, "this is no trial, but in order to bring to trial, and the party is at no prejudice if the bill be found." Its true, its no determinative trial that finally concludes either party, because its but one of two, which every one accused of a crime must have as aforesaid. But its so much a trial, as learned Fleta, f. 113. looks upon it no less one than any other. The form of their indictment is the same as that of a verdict. All things are, or ought to be alike in the whole proceedings, and to differ nothing but the one to be before the other, and the latter to be final, the other not. The stat. of 23 H. 8. c. 23. enacts, "one shall be indicted of high treason in what county the king pleases." And the stat. 1. 2. P. M. c. 10. says, "that trials for treason shall be according to common law:" This act repeals the other, though it speaks only of trials, and the other of indictments, Anders. 1. 104. 105. Inst. 3, 27. which shews an indictment is a trial. One of the grand-jury can't be afterwards on the other; and why? says the law; for he has once already found the party guilty, and if he should not again, he

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muſt perjure himſelf, Brit. 12, 25 E. 3. c. E. 4. 4. Stanf. 158. It puts the defendant to diſgrace, trouble, damage, danger of life, &c. It makes him liable to an outlawry, to impriſonment, &c. and to every thing but very death, &c. the final judgment itſelf. It gains credit, and gives authority to another jury to find one guilty. It produces this effect, that if the other jury find one guilty never ſo wrongfully, no attaint lies againſt them, nor other puniſhment; and what's the reaſon? The law ſays, "becauſe he is found guilty not by theſe other twelve only, but in all, by twenty four or more, this latter and the other jury too." Attaint. 64. 60. H. 4. 23. b. 14. H. 7. 13. So if one be indicted, any one may bring an appeal, tho' never ſo wrongfully, &c. againſt him, whereas he that brings one againſt any one that was never indicted of the ſame offence, may be liable to great puniſhment, if wrongfully brought, Stanf. 172. b. 40 E. 3. 42.

Suppoſe one ſhould aſk any honeſt man this queſtion: were he not on his oath, yet would he find an indictment of courſe, &c. to expoſe one, and put him to ſuch inconveniences as aforeſaid? Certainly, ſays he, no. And the monſter that would, does it wrongfully, becauſe he is not certain he does otherwiſe. And being on his oath as aforeſaid, it is not only doing wrong, but tainting himſelf crimſon red in perjury too; ſure a malicious way of doing wrong. It is doing wrong alſo by colour of law and pretended authority, the greateſt miſchief and injuſtice, ſays the lord Coke, of all others, inſt 2. 48. The damage, &c. too in all theſe caſes is the greater yet, that the party can very ſcarcely, if at all, expect any reparation or amends; whereas in all other caſes he may eaſily. For againſt the grand jury, or any of them, no action lies, inaſmuch as doing what they do on their oaths, the law will not preſume, &c. any malice, &c. in them. And though one be indicted at the inſtance, or upon the endeavours of another perſon (all the jury, as aforeſaid, being ſworn to ſecrecy) can one eaſily diſcover, and prove who this perſon is, what he did, and prove it at a trial: which yet one muſt do fully, if they expect any thing but making bad worſe. And might one recover damage, &c. yet it is damage to be put to the trouble and hazard of the recovery. Well therefore, ſays Fleta, l. 52. "It is an exceeding neceſſary thing, that the grand jury ſhould make diligent examination, before they preſume any thing, either in caſe of life or limb." And juſtice Dalton ſays, "no leſs care or concern at all lies on the grand jury, than does on the petty jury."

The law (to ſee its nature, how it inclines generally, that one may the better gueſs in this manner) it is not with us like thoſe of Draco, it is as tender of the lives, liberties and credits of the people (none can deny in all caſes elſe) as a mother of her child, and why then not in this alſo? It will preſume nothing diſhoneſt, &c. in any one, or any time, but it will and always does preſume all perſons and things honeſt, true, innocent, &c. till the contrary be proved, C. L. 71. b. As Lamb. ſays, "Laws cry often clemency and forgiveneſs as well as juſtice." And ſays Coke, inſt. 2. 315 "Like the laws of ſcripture, whence it was firſt derived, which ſhews mercy is not oppoſite to, but part of juſtice." 1. John 1. 9, Pſal, lxxi. 1, 2. The laws of England, the laws of mercy. And ſays a great man, "Juſtice leans that way which is the milder." One brings an appeal, if the jury be doubtful, the defendant ſhall be acquit, and the appellor impriſoned, Fleta, 52. Mir. 224. 273. So a jury being doubtful if one were a villain or not, was therefore free, Fleta 238. Says Cicero, "They do well that forbid one doing a thing when dubious, whether right or wrong; for where it is right, the thing is neceſſarily as clear as the ſun: But any doubt ſpeaks the thing not to

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be ſo. As if a phyſician give ſome phyſic, he muſt give one that he is ſure will do one good, or no harm, and not what he doubts may do one harm. It is alſo plain, if I doubt, I muſt not ſay I am certain (as *billa vera*) but I know not certainly (as *ignoramus*) elſe I tell a lie. It is very remarkable too about all indictments, the jury only ſays, either "it is true," or "we know not," and never that "it is not true;" which ſhews, if they be doubtful, or not ſatisfied, the indictment muſt be indorſed not *billa vera*, we know it is true, but *ignoramus*, we do not know it is true. And the law does not put it upon the grand jury, to ſay the bill is not true, if they do not find it, though it does put it upon them to ſay poſitively, the bill is true, if they find it, and ſo encourages the finding indictments *ignoramus*. Forteſc. ſays, 'its better twenty ill men were unjuſtly ſaved, than one unjuſtly condemned, 62. For mercy and pity is on the one ſide, but on the other injuſtice and cruelty.——Says Bract. 'Its ſafer giving an account of one's being merciful than otherwiſe.' The Saxons in doubtful caſes only appealed to God for diſcovery, and left all only to him, viz. Where the caſe was doubtful, if guilty or not, or clear and manifeſt proofs wanted, they had four ſorts of trial. Spec. Sax. l. 1. Firſt, Camp-Fight, or by Battel. Secondly, Fire Ordeal, by holding red-hot iron in his hands, or walking bare foot over it. Thirdly, hot water-ordeal, by putting one's arms up to the elbows, in ſeething hot water. Or, fourthly, cold water ordeal, by caſting one into the water with a rope under his arms. Whereof the three laſt were uſed, one or other of them where the party was moſt vehemently ſuſpected; Verſteganus and others. But pope Stephen the 2d, by his decree, utterly aboliſhed them all, and afterwards ſo did the parliament, 3 H. 3. Memb. 5. Judging it more fit the party ſhould be acquitted than proſecuted, where the caſe was doubtful. So that one muſt know beyond all doubt, before they ſay, *Billa vera*, elſe ſay, *Ignoramus*, which is in Engliſh, we doubt, we do not know, we are not certain if it be true, Inſt. 4. 64. And ſays Brit. 'If a jury doubt at any time, they muſt find for the defendant,' 245, 130, 136, 219, 213.——Judge Frebern was hanged for judging one to death, where the jury were doubtful in their verdict, Mir. 298. Antiently if a jury indicted an innocent man, another might be impanelled to go upon this jury, as offenders, &c. Mir. 101. Jurors that falſely indict any one, be guilty of wilfully killing men, Mir. 34, 36. They ſhall be reputed and adjudged infamous, and ſuffer corporal puniſhment, that find an indictment againſt an innocent perſon, ibid. 251, 252. Or, if an innocent perſon be adjudged to death, &c. if they could have holpen it, ibid. 256. An appeal lay againſt a jury in ſuch caſes, ibid. 136. Brit. 14, 137, 237. If they any wiſe offend ſo, ignorantly, yet this excuſes not at all, unleſs they could not poſſibly know better, ibid. 257. And negligence in, or of knowing better, makes their fault the worſe, ibid. And the greateſt oracle of our laws, Co. L. 115, 391, 45, 94, 113, has it, 'That whatever was law, is yet, unleſs altered by act of parliament, which this never was.' Whereas on the other ſide, if a grand jury do not find the bill againſt any one, there can be no harm then to any body, but another indictment may ſome time be brought when there's better evidence, or a worſe jury. For though one's life, &c. ſhall come but once in danger, or on trial, before the petty-jury, it may yet a thouſand times before the grand jury, for they never ſay the party is not guilty, but at moſt ſay, *Ignoramus*, as afore ſaid.

Any thing any jury does, ought to be *Quoddam Evangelium*, like what they laid their hands on, taking their oath. When they write *Billa vera* on an indictment, they undeniably compare the truth of the contents therein,

therein, to the truth of the gospel, and this upon oath. Thus one would admire how it comes to pass, that they of the grand-jury should often hear but one side: Their oath, its apparent, is against this: It says, Present the whole truth, not concealing or omitting any part of it; which implies as well all one side can inform them as the other. And so appears by less strong cases far, an attaint lies against a jury (swearing 'to well and truly try the issue between the parties') when every word of the verdict may yet be true, only it not being the whole truth. It proceeds, and says, 'And nothing else but the truth,' which how can possibly, or any jury-man be satisfied in, unless they hear both parties? It says 'You shall diligently inquire, &c.' not by halves, or but hearing one side only. Its a maxim, 'He that judges or determines any thing, when but one side only is heard, does unjustly:' And the judgment, or determination, though in itself be never so just or right, yet shall he no wise be accounted a just judge, &c. It is a common saying, 'One tale is good, till another is told?' One at this rate, might be indicted for a cut purse, when but an honest glover; so might chyrurgions, sheriffs, bailiffs, jailors, hangmen, attornies, &c. for but doing what belongs to their several and respective professions, as the matter may be managed, and yet saying nothing but the truth neither, only not the whole truth. Is there not in all determinations else, the hearer and defendant as well as complainant? Thus erred Judah the son of Jacob, in judging Thamar to be burnt, upon report, when she was unheard, Gen. 38, 24, 25, 26. So was Joseph falsly accused of lying with his mistress, and cast into prison, Gen. 39, 19, 20. So was Mephibosheth falsly accused by Ziba, and deprived of all he had, 2 Sam. 16. Which being all precedents, and damned in scripture, must, or shall any one be so hardy as to embrace and follow them now? Either one's guilty or not; if he be, let him yet have fair play for his life, &c. If not, why should he then be indicted? So that, why should he not be heard? Else one's condemned first, and heard after: or indeed hanged first, and tried after, or little less. The true intent of the law herein seems, as if men were to be handled not thus, but that the defendant should be heard at first, and if he then could give satisfaction, &c. he might be at no further trouble, &c. And if he could not, that he should have such trouble, &c. and having notice thus, might prepare himself the better, and so not be surprized at the final and concluding trial, or have any colour of pretence that he was surprised, or any wise unprepared at this trial. This method being most honorable for the king and the law, as also most safe for the people. And the reason why it was ever otherwise, seems barely a result of some artifice of the clerks, to get themselves money, imposing on the juries; or from this, that presentments being made without the party heard; therefore the jury thought they might find an indictment likewise. Whereas, they ought always to distinguish; for a presentment is on their own knowledge, when they know all the whole matter, even what the defendant can say for himself; but an indictment is found upon witnesses, which tell their tale to a hair's breadth, &c. as makes the most for the side they are produced of. And at length after some few precedents, it has now grown into practice: All that can be pretended why it should be so now, is but practice and precedent. And when its against justice, against truth, and against any one's judgment, sure one ought rather to correct than approve of, or follow such practice or precedent. At least a wise grand jury ought to hear both parties, if present, or easily, or conveniently to be heard.

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It would likewiſe amaze one, to ſee how the clerks, for their gain, or others for other ends, have often prevailed with jurors to find a bill true, &c. when in all the circumſtances of aggravation, or moſt of them falſe, if not in the fact itſelf; and thoſe circumſtances too altering the very fact, as alledged about, as much as white feathers would a black crow.

Conſidering how true preſentments, indictments and verdicts ought to be, and that the whole truth, and nothing but the truth muſt, or may be in them: That the jury undertake the bill is altogether true, not only as to the ſubſtance, &c. or in general, but even in every particular, all the circumſtances, aggravations, and every individual word (for if it be not true in the leaſt word, its not true, but falſe, and perjury.) Stanf. ſays well, f. 96. b. "To perform the duty of one on the grand jury, its neceſſary to learn and know what's called treaſon, what felony, &c. and what not:" Hence alſo one learns, one muſt not in an indictment, call, or ſuffer felony to be called treaſon; manſlaughter, murder; nor one crime by the name of another: Or mention, or ſuffer to be mentioned, words ſpoke, or things done, other or after another manner than really or truly were ſaid or done; and therefore the judges give the grand-jury to this day, their charge ſo diſtinguiſhing, particular, and directive of all, and all manner of crimes, their natures, and how to call them, &c.

When the clerks draw an indictment, information, &c. they will not only alledge and infert in it the very fact, &c. one is accuſed of, but craftily, and full of art, ſtuff and load it into the bargain with ſeveral fictitious and ſlight allegations of their own, to ſwell up and aggravate the matter, as circumſtances of malice, or deſign, &c. in the party when they did the fact, ſpoke the words, &c. ſo that ſometimes from a mouſe, a mountain; from nothing, or what is inconſiderable, it will in ſuch a dreſs ſhew and ſtrut out like a giant, a monſter, &c. And all this forſooth, they'll call matter of form, and then endeavour to perſuade a jury, if they find the chief matter, or that part which they'll call the matter of ſubſtance, true, they muſt of courſe find all the reſt, which they pleaſe to call matter of form, true alſo. This uſual way of wording indictments is ſo notorious, dangerous, hurtful und grievous, that ſeveral times, and in all ages, has been complained of by all perſons whatſoever, except the clerks and proſecutors themſelves, whilſt clerks and proſecutors. It has been a complaint in and of parliament, by king, lords and commons. See 4 H. 4 c. 37 H. 8. c. 8. This is that whereof may be ſaid, as was in Courtin Hertſey's caſe; "It is the part of the devil himſelf to make a ſmall fault be or ſeem a great one." But no complaint, no argument will, or can prevail with a covetous clerk, getting fees, or a malicious proſecutor, troubling whom he has envy or malice againſt, to reſiſt their advantage. And as the true circumſtances of any crime do always or moſtly aggravate or alleviate it, and all thoſe ſuggeſted thus by the clerk, if the bill, &c. be found by the jury (though pretended only matter of form) becauſe thus as true, and the judges muſt adjudge a puniſhment accordingly, as if all were really true. Thus is a trap ſet to catch the jury and defendant; the jury to perjure themſelves, and wrong the defendant, and the defendant to be adjudged of a crime, when perhaps guilty of none, or at leaſt of a worſe crime than truly he is. A jury therefore ought firſt to conſider, as aforeſaid, if the matter of ſubſtance, or chief matter, be criminal at all; and if it be, then if conſiderable: And if it be not criminal, or conſiderably criminal in itſelf; then if the circumſtances, as alledged, make it ſo: and if not, then to reject it. If it be conſiderably criminal, with or without the circumſtances

ſtances, then conſider if you know it of yourſelves, or by evidence be ſatisfied it is true, both itſelf and the circumſtances; if the matter itſelf be not true, you reject the bill (for where is no body, is certainly no ſhadow:) If the matter be true, but the difficulty be about the circumſtances, then conſider if they be material; if not, you find the bill; if they be, then conſider if they be conſiſtent, or the matter will bear them; if not, then reject the bill, &c. or at leaſt ſtrike them out of the bill, &c. If they be, then conſider if they be true on your own knowledge, or by the evidence given you; if they be, then find the bill, &c. if not, they muſt be ſtruck out, or the bill returned, *Ignoramus*. Every jury muſt go by *probata*, what is proved, as well as *allegata*, what is only alledged. Where one is accuſed of knowingly keeping a dog wont to worry ſheep, &c the knowledge muſt be proved as well as the reſt, Cockram and Davies, c. B. R. 17 C. 1. So the lord Shafteſbury, when he ſued lord Digby, for maliciouſly ſpeaking ſuch and ſuch words, he proved the malice as well as the words. If one pleads a feoffment by deed, and the other denies it, it muſt be proved to be by deed, Co. L. 281. b. So if one be indicted of murder, as that he with malice fore-thought, killed ſuch a one, the malice fore-thought muſt be proved; for in theſe caſes the killing might be either by chance, as the glance of an arrow, &c. by giving phyſic, by a champion in trial of battle, by a hangman doing his office, or by one *non compos mentis*, &c. In which caſes is no malice, and therefore the indictment not to be found. So the words might be ſpoke in a jeſt, or a thouſand ways, and not maliciouſly. So one might keep ſuch a dog, and not know he was ſuch, and the fault would then be none at all in him. The law alſo may ſeveral times be broke in the letter, yet without any fault; if the intent of the law be not broke: As when things are done to avoid a great inconveniency, or by compoſition, or for neceſſity, or by involuntary ignorance, &c. And in theſe, and ſuch like caſes, the party ought not to be indicted, though the matter be true in itſelf. The Romans had a law, "He ſhall die that climbs over the wall in the night;" yet one doing ſo to diſcover their enemies, was by the ſenate adjudged innocent, and rewarded. So its lawful with us, to pull down another's houſe when a fire happens, or in time of war, to prevent a greater miſchief. So one being to appear to a writ, but hindred by floods, ſickneſs, &c. does not, he is excuſed. One forces and uſes one's hand to kill a third perſon, he is only guilty: So an infant, or one *non ſanae memoriae*, kills another, its excuſable. So that where any fact or words in an indictment might be as well under any of theſe circumſtances, as what other the clerk or proſecutor is pleaſed to alledge; theſe alledged muſt be proved, for its plain they are not neceſſarily implied. And yet if a man ſhould do any wiſe thus, the clerks will draw up the indictment or information, as if none of theſe circumſtances were in the caſe, but that it was maliciouſly, in contempt of the laws, &c. So it ſeems hard a man ſhould be hanged for ſtealing under a neceſſity, where the taking is upon abſolute neceſſity indeed; and its not the party's fault, but misfortune, he fell into ſuch neceſſity: and eſpecially if the party whom the taking is from, have not the like neceſſity for the thing, or the perſon that takes be very ſerviceable or profitable to the kingdom or common good, &c. yet he muſt be, though the thing ſo taken be not of the value of thirteen pence, if the jury agree he did it feloniouſly; whereas one guilty of perjury, though he does one a thouſand times more harm, ſhall only ſuffer an inconſiderable rebuke. And why ſhould a jury in this caſe find it done feloniouſly? This was done under force and neceſſity, to preſerve a man's life, &c. inſtead of an houſe, &c. and what's ſaid felonious, muſt be *felleo animo*, with an

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ill affected mind, with a mind not barely to do the thing, but an itching alſo to do michief (only this itching indeed ſhall be preſumed, unleſs cauſe appear to the contrary.) As if one takes a thing out of another's poſſeſſion, claiming it with ſome colour as his own, &c. this is adjudged no felony: Why? for not being done with any felonious intent, as appears by his claiming, &c. So the like ſtealing, as aforeſaid, was not for miſchief's ſake at all, but for neceſſity &c. Thus David, againſt the law, took and eat that bread which was provided for the table of God only, Exod. c. 29. 1 Kings 21. Our Saviour and his apoſtles plucked off, and eat the ears of another's corn, Mat 12. And he, becauſe he had need of an aſs, took that which was none of his, but another's; and had Lazarus, ready to periſh, taken Dives's crumbs againſt his will, &c. yet it ſeems he had no more ſinned than he miſbehaves himſelf, that he does what the lord bids, and the ſteward forbids, under the rules aforeſaid. A jury therefore, not obſerving the rules aforeſaid, gives a verdict not only againſt the preſent and immediate defendant, but alſo in him even againſt David, Chriſt, &c. repreſented thus in his caſe. In the civil law (that of the admiralty particularly) if a diſtreſſed ſhip takes water by force, of another where is plenty, it is no theft; becauſe of the neceſſity, ſo adjudged ſeveral times.

If an indictment mention one ſeditiouſly, and deſigning to diſturb the government, and to withdraw from the king the love of his ſubjects, and ſaid of him ſuch and ſuch words; here the words might, perhaps, be ſpoken within the privilege of diſcourſe in parliament, or in a jocular way, or ironically, when one means the contrary; or by way of ſuppoſition, in argument, or when one meant a contrary thing, or no harm at all; and this perhaps too explained at the ſame time in other words accordingly, or the words in the indictment be but part of the ſentence, &c. or tranſpoſed, or ſome how elſe altered. So if a complaint be, that one falſly and maliciouſly, and without deſigning to break his credit and ruin his trade, called ſuch a one a bankrupt; here, perhaps, he was a bankrupt then, or no tradeſman at all; therefore in theſe and ſuch caſes the circumſtances alledged not being implied neceſſarily, tho' the fact or words were ſpoke, they muſt be proved. But to inſtance ſome caſes adjudged by the judges themſelves: If A. bring an appeal againſt B. and B. is after acquitted; now, ſhould B. indict A. for maliciouſly, &c. bringing the appeal, the indictment ought not to be found, if B. were indicted before of the ſame fault he was afterwards appealed againſt for, becauſe his being before indicted, proves there was at leaſt colourable reaſon why the appeal was brought, and not malice only, Coron. 178. 40. E. 3. 42. A Chyrurgion was indicted, for that he by negligence in curing one's hand maimed it, the negligence muſt be proved, 48. E. 3. 6. 1 H. 6. 18. So in actions for words, which holds the ſame law as in indictments, &c. A. ſues B. for falſly and maliciouſly calling him, being an heir, a baſtard; action will not lie, if B. pretend himſelf heir, for then it was not maliciouſly, but only as it were in order to get or claim the land, &c. And it is lawful thus to ſlander another, juſtifying one's own title, Co. 4. 10. So Molton ſues Clapham, for that a ſuit depending between them, upon reading certain affidavits in court, Clapham openly then and there, falſly and maliciouſly ſaid, there is not a word true in the affidavits, and that we would prove it by forty witneſſes; here the words, though they were agreed falſe, yet not being ſpoken maliciouſly, but out of another deſign, as in his defence, &c. as aforeſaid, action does not lie, B. R. 14 C. 1. Rot. 459. So a counſellor calling one a thief at a trial, the like; for it is not malicious, &c. if material for the cauſe he manages. Montagues c. So where A. ſays to

his friend B. that C. hath the French pox, therefore adviſing him not to keep him company; for he ſpoke as advice to a friend, and not maliciouſly, James and Rudley's C. 40, 41. El. in B. And thus has further been the cauſe or occaſion of ſpeaking words, or doing any thing, muſt be conſidered as well as the words or fact: And ſays Coke, this is a general rule, Co. 4. 14. Alſo it is another rule. All offences in fact or word, ought in conſtruction to be made the leaſt of poſſible. Where an indictment, &c. is grounded upon a ſtatute, then every little word muſt be proved that is alſo in the ſtatute, though ſeeming implied, or little more than immaterial; this all agree. For want of theſe, and ſuch like obſervations, one Thomas Burdett, eſq; was condemned, hanged, and beheaded at Tyburn, in Edward the fourth's time, when the matter proved was only, that he being abſent, the king hunted in his park, and killed a white buck, which Mr. Burdett fancied above the reſt of his deer, and that Mr. Burdett hearing of this, wiſhed the buck's horns in his belly that adviſed the king ſo to do, Speed's hiſt. 700. Much like was it alſo with one Walter Walker, who was beheaded in Smithfield, anno 1476, when all proved againſt him, was only that he (living at the ſign of the crown in Cheapſide, London) ſaid to his child, to pacify him when he cried, 'Peace, peace, child, thou ſhalt be heir of the crown." But who can open ſome jury men's eyes, to ſee how like an ox led to the ſlaughter they be impoſed upon and cheated, to cheat others of their lives, fortunes, and all that's dear to them; though by their example too of acting thus, they make precedents, and give countenance to after juries to be like themſelves, and conſequently expoſe and render themſelves, they know not how ſoon, in the ſame predicament, and to be puniſhed as the criminal was they puniſhed. Or by the evidence given you. Evidence is only ſuch a teſtimony that makes ſomewhat relating to the iſſue or matter in queſtion clear, manifeſt and plain to the jury. And thus is it, all the witneſſes or teſtimony in the world of things impoſſible, repugnant, inconſiſtent, &c. can be no more than bare teſtimony, and cannot any wiſe amount to, or be called evidence. Herein the jury may conſider the credit and authority of the evidence, and the matter or extent of what is evidenced. Firſt, if the matter proved amount to ſuch plain and full proof as is required. An indictment laid againſt three perſons, may not be found againſt all three, when the evidence is only againſt one or two of them, nor if laid againſt one perſon for three faults, may it be found againſt that one for all the three matters, when but one or two of them are proved; nor when the evidence is but to part of a matter or fault, may the indictment be found for the whole; but, as aforeſaid, all found muſt be proved: Indictments, &c. as aforeſaid, brought upon, or referred to any ſtatute, the words of the ſtatute mentioned in ſuch indictment, &c. muſt be proved very ſtrictly, even to a tittle; the proof muſt hit the bird in the eye. As one indicted on the ſtatute, for maliciouſly diſturbing a miniſter at divine ſervice, every one of theſe words muſt be proved; ſo for wilfully and corruptly forſwearing one's ſelf; ſo for one's gain keeping a gaming houſe. But in other caſes, as at common law, if the proof and words in the indictment, &c. differ either in the matter of the form, or manner, inconſiderably, or ſo as the difference be not ſomewhat conſiderable or material, as aforeſaid; ſuch is indeed no difference in law, nor by the jury to be taken as any. In the matter, as in a complaint for theſe words, "B. is a maintainer of thieves, and a ſtrong thief himſelf:" here the word ſtrong ſignifying little or nothing, need not be proved ſpoken, Dy. 21. 75. But if the allegation and proof materially differ otherwiſe; as for theſe words, "If B. might have his will, he would kill all the true ſubjects

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in England, and the king too." Now, the proof being that the defendant said, "I think in my conscience, that if B. &c." the best opinions in this case are, that this is not sufficient proof; for the words alledged are more positive and absolute, and move credit more in one's ears than those proved, and so are not in effect the same, but materially differ. So of these words: "B. procured eight or ten witnesses of his neighbours to perjure themselves;" the proof being only that the defendant said, "B. had caused eight or ten, &c." This is no proof, for one may be a cause, and yet not a procurer, there being remote causes, as well as others so nigh, as that of procuring. Such a cause as this B. might be, though only plaintiff or defendant in a suit, for had there been no suit, there could be no perjury. And the most favourable and innocent sense of words is to be taken, and no other. As for the manner, an indictment being for murder by poison; if the proof be, it was not by poison, but a weapon, burning, or drowning, &c. this will not do; for the matter proved, is of another nature proved than alledged; but if the difference were only thus, that the poison alleged was of one sort and that proved, of another; this being immaterial (both agreeing it was by poison) the proof may serve. So murder alledged to have been committed by a dagger, the proof being it was by a sword the bill may serve; but proof by poisoning will not do.

If an assault and battery be alledged to have been at A. the proof being it was not at A. but B. may serve, provided the offence be neither greater or lesser, whether committed at A. or B. But if the place alledged aggravate the fault, its otherwise; or if both places be not in the same county. So of the like difference in time alledged and proved. Now, as to the credit and authority of what is witnessed: Is no proof or evidence to a jury, which is against their own knowledge, nor any other but that only, which confirms them in what they did know, or acquaints them with what they did not know. The only reason, said my lord high steward, at lord Cornwallis's trial, why a prisoner is allowed no council in matter of fact, or in any thing but matter in law, when life or member is concerned, is this: "The evidence whereby he shall be condemned, ought to be so plain and evident, that all the council in the world may be presumed able to say nothing against it, or in his defence." Nothing ought so much as raise a suspicion, says Horne, but what comes from grave and good people, those which be credible, and heed what they say, Mir. 200. And not from others, as ill-tongued, ill-disposed, &c. Bract. Brit. Stanf." The great lord Coke, says, "Of old time (as yet, says he, indeed it ought to be) any indictment was not to be found but on credible witnesses, and plain and direct proof; and never upon probabilities or inferences, &c. Inst. 2. 384." And he likewise says, Inst. 3. 25. "Its most necessary as many hold, there should be two good witnesses produced to the grand jury to prove every indictment:" And the proof, says he, ought to be more clear than light. Every jury must always remember, they may presume nothing but innocency; and innocency, &c. they ought, until the contrary be proved. Of presumption and argumentive verdicts, &c. finding one guilty, there be several very sad examples. One the lord Coke tells of, is, "There being two brothers, one dies, leaving an estate, and an only child; the other educates it; and one night correcting it, it cried, good uncle, do not kill me, and next morning it was gone no body knew whither. This brother is accused of its death upon evidence of the matter aforesaid, that he beat it; it was young, about nine years old; it cried as aforesaid; it was never heard of since, and that the uncle enjoys an estate by this. The jury found him guilty, and he was hanged; but about a year after,

it returned safe and well," Inst. 3. 232. The scripture enjoins the use always of two witnesses at least, when yet the punishment then and there was so much less than now with us, for the crimes to be punished, Deut. 17. 6. 16. 19. 25. In some cases there must be more than two witnesses but never fewer. The general rule is, two or three witnesses be enough, if liable to no exception: Any one person may invent or contrive any story for malice or envy, or other end, to take away another's life, &c. And who can disprove or detect him? But is not so easy for two to do it; yet two may possibly also agree and contrive an evidence together, and so form it, and frame circumstances, all agreed of be-forehand between them, that being false, it may yet seem very plausible; "The children of this world be wiser than the children of light." Jezebel had two witnesses against Naboth; and two witnesses were against chaste Susanna, to prove her adultery, yet both had false evidence against them. Susanna was acquitted, only because the witnesses differed what tree it was under. In all trials whatsoever in England, either at civil law, or common law, where is no jury, there all will confess, there must be two witnesses at least, Co. L. 6 b. And always that witnesses are to be joined to the jury, they must be two at least, ibid. And in any law any where, must be always two witnesses at least, and no place can be pretended of otherwise, except only England. And that it should be so here, even when there is a jury too, see 48 Ass. 5. 48. E. 3. 30. And so is expressly, Mir. c. 3. &c. Co. L. 6. b. Inst. 3 26. And so it was agreed in B. C. Trin. 9. El. And the only reason why it should be otherwise, is as aforesaid, that the jury be presumed to know themselves, to the value of one witness more. But if it so fall out that really they know nothing themselves; then should they find one guilty upon a single testimony, they make that law, which otherwise could not be law, and find one guilty the law would have acquitted; and thus a trial by a jury would be less safe and more destructive than any other in all the whole world again. The jury thus make one witness as good as a thousand; for had a thousand witnessed, the jury could have done no more. This would occasion great mischiefs, perjuries, and other inconveniencies. A. then being sufficiently malicious or interested, and so designing B's death; an Italian would poison, Spaniard stab, French-man pistol him; but being an English-man, and expecting such a credulous officious jury, as aforesaid, to help him, will sure choose to swear him to death; for A. has his malice better answer'd. B. thus not only loses his life, but also his credit, estate, and what not? Besides attainting his blood, and utterly disgracing all his relations; and at last, how shall A. be discovered in it? He is infinitely more safe this way than any other. Or suppose one should come out of the moon and by chance should discover him, he knows he is safe of his life, he shall not die by our law: If any body happen too that will be at the trouble, charges, hazard and danger, to prosecute him never so severely. But by the statute, he shall forfeit forty pounds, or at his election, stand a while in the pillory, and half a year to be in prison; this is all. Likewise a cunning rogue, suppose he robs one &c. and no witness by; if one offer to prosecute him, let him prosecute first, and he hangs one thus into the bargain, and saves himself honourably. Or were there one or two witnesses by, but he first prosecutes, and swears against all; it will go hard with them all.

Its said of the Egyptians, they had no punishment for lying, and so had no measure in it: But thus our law tempts, as well as scarce at all punishes perjury. A jury, tho' they have two or more witnesses, ought also to consider and examine their circumstances. Amongst the Turks,

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only ſuch may be witneſſes as are free-men, can ſay their prayers, have ſome knowledge in law, and be known of civil life and converſation, &c. Boſchmer Academ. 19. By the laws of Scotland (for moſt part always like ours) none ſhall be witneſs under fourteen years old; furious people, officers of the ſame court, women, adulterous perſons, thieves, poor, whipt for any offence, infamous, convict and ranſomed from juſtice, kinſfolks, companions or parties of the ſame crime, clergy againſt laity; nor any one's tenant, bailiff, ſervant, or any other of his robe, council, retinue, &c. nor any known adverſary, nor any perſon excommunicate, or impriſoned for, or accuſed of a crime. St. 2. Rob. 1. By our laws none ought to be a witneſs that is indicted of treaſon or felony, and not acquitted; perſons excommunicate, outlawed, or otherwiſe defamed, nor judges in any caſe where they ſhall be concerned as judges, Brit. 39. Perſons outlawed or otherwiſe infamous, 11 H. 7, 41. A huſband or wife cannot be witneſs for or againſt one another. Co. L. 6. b. nor againſt any other in the ſame cauſe, Staf. 26. b. Except in criminal caſes, where he or ſhe is the party offended, and ſwears only for the king, and no other evidence can be expected. The confeſſion of a criminal gotten by fright, or any other artifice uſed upon him, or made before he comes to his trial, is no evidence againſt him. The common law was ſo ſtrong in this point, that till 2, 3, P. & M. c. 10. no juſtice of peace could examine a criminal; in ſhort,

"Aſk his eſtate, fame, and religion,
"Quality, ſex, age and diſcretion."

But the judges uſed to determine who ſhall be ſworn, and what ſhall be produced as evidence to the jury, and the jury what credit or authority the ſame's worthy of, Co. L. 6. b. One that's burnt in the hand for felony is by ſome held to be a witneſs in law; for, the crime, ſay they, is purged, ſo if pardoned by the king. And ſome hold many of thoſe aforeſaid, are in law good witneſſes, as poor men; but the jury may conſider, ſuch may eaſier be biaſſed or corrupted, as he had not ſo much to loſe or forfeit for a crime, and therefore lies under ſeveral neceſſities and temptations a rich man does not, &c. In Solomon's proverbs, c. 30. praying againſt poverty, the reaſons alledged are, "Leſt being poor, one ſteal, and take the name of the Lord in vain."

As for ſervants, &c. they are under the ſame circumſtances commonly of poor men, and worſe, for they are more apt to do any thing in obedience, or favour, or elſe out of malice, &c. againſt or for their lord, &c. Before the conqueſt, the oath of a Thane (one of like degree then, as a yeoman is now) was in law equivalent to the oath of ſix villains, pagans, &c. (ſervants that were bound) Lamb. 56. 200. as for perſons any wiſe infamous, ſuch will not value or ſtand upon their credit, or but the leſs, ſince they have little or none to loſe, and over ſhoes over boots. As for criminal perſons, its a maxim, he that has been once wicked, or in one thing, may be ſuſpected again, or in another thing; hence where a defendant is ſuppoſed in law guilty but of a contempt, treſpaſs, deceit or injury: he ſhall not wage his law, for the law will not believe him, though they would believe another againſt whom is an action of debt, detinue or account, Co. L. 295. As for one under 14 years old, ſuch are, as our law ſays, not arrived at diſcretion; ſuch may miſtake, be influenced, &c. and ſo all the reſt. But it were not amiſs, if juries heard all perſons, weighing their teſtimony as they ought. A jury ſhould miſlike any witneſs alſo, that in his evidence varies, delivers himſelf in any paſſion, ſpeaks at random, or not cautiouſly, or ſeems to ſide with or againſt either party, or to argue, or to offer proving negatives. None can ſwear a negative, nor may be admitted to

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give teſtimony directly againſt an affirmative, 48 E. 3, 30. A jury may take notice of particular ſtatutes, patents, judgments, and other records given in evidence, and may go againſt eſtoples, concluſions, &c. ſo it be according to the very truth, for they muſt ſpeak the truth in all caſes, Co. 4. 53. Its much the jury does not always examine witneſſes themſelves. If he that examines them be corrupted, or any wiſe ill affected, he may eaſily miſlead the whole courſe of evidence, he may countenance which ſide he will pleaſedly, hearing the one ſide on one ſort, but the other not without brow-beating and uneaſineſs; he may frighten, diſcountenance, divert, puzzle, diſtract, or otherwiſe abuſe a witneſs; he may flatter, wheedle, prompt, aſk leading queſtions, direct &c. and thus darken and perplex the truth.

How does a jury diſcharge its conſcience thus? The jury is the only judges alſo of what is ſaid, and how the verdict ſhall be given, and they whoſe conſciences are to be ſatisfied, and certainly know beſt what they want to know, &c. unleſs they walk by implicit faith, therefore be the moſt proper to aſk the queſtions.

All that is aforeſaid, ſhall alſo the rather be as propoſed, conſidering how the law is now altered, as to accuſers, judges, witneſſes, counſellors, ſolicitors, &c. Anciently, All perſons that indicted any other, were to be ſufficient, reſponſible, &c. Co. 5, 120. Accuſers gave ſecurity to anſwer damages, if the accuſation proved falſe, Mir. 19.---- Fines were ſet on appellors, 11 R. 2. Fines 2. 15 E. 3. If A. brought an appeal in any caſe, and was either barred, or non-ſuited, or his writ abated, he was fined and impriſoned immediately, without the defendant's trouble. 8 H. 4 17. 20. Brit. 245. 32. Appellee acquit, the appellor was by the ſame judgment, without more trouble, impriſoned a year and a day, and was to repair the damages of credit, trouble, charges, &c. of the appellee, beſides undergo a grievous ranſom or fine to the king; and ſo was it of abettors or encouragers of the proſecution, Fleta 52. It was death to impeach innocent perſons of any mortal crime, till H. 1. brought it to corporal puniſhment, and ſatisfying the party grieved his damages, Mir. 250. 251. So that lawyers were puniſhed for aſſizing the accuſer, and a year and a days impriſonment inflicted on a ſerjeant, lawyer, attorney, or clerk, to uſe deceit or coluſion in a court, or conſent to it, either in favour of the court, or any perſon elſe, Fleta, 87. Councellors were to be ſuſpended practice, if they tendered falſe delays, falſe witneſſes knowingly, uſed deceits, fictions, or untruths to the court: And were to ſwear not to maintain or defend any wrong or falſity, Mir. 121. 122. And its by a kind conſtruction they be not yet liable in ſeveral caſes to be puniſhed, as barretors, maintainers, &c. An aſſize did lie againſt councellors, attornies, &c. by whoſe ill practice or means any one loſt but a freehold in land, Mir. 154, 209. So witneſſes have formerly been puniſhed ſeverely. In the ſcripture, by Moſes's law, it was eye for eye and tooth for tooth, life for life, &c. againſt falſe witneſſes, Deut. 19. 21. By the law Cornelia amongſt the Romans, a witneſs that occaſioned another's death by falſe teſtimony, loſt his head, if one of the greater quality, elſe he was hanged on the croſs, or given to wild beaſts. Simler. Before the conqueſt, that of Moſes, was moſtly ſo with us, only ſometimes it was baniſhment, Ll. Ed. c. 3, Falſe judges and falſe witneſſes are guilty of willfully killing men. Mir. 34, 36.---- After it came to the cutting out of tongues, Mir. c. 4. As for judges they were accounted diſſeiſors, if they wronged any one in his title, Brit. 147. In Scotland, "a judge convicted of having thrice ill judged, loſes

loſes his office, and is adjudged infamous," Stat.Rob. 1. c. 28. "Whoſoever gives a falſe judgment, ſhall forfeit his were, (what's life is worth) unleſs he can prove on oath he could judge no better." Lamb. 162, 164. Judges if condemned one to death againſt their knowledge, or by ignorance of, or in what they ought not as judges, be ignorant of, they are murderers, &c. and to die as ſuch, Mir. 256. King Alfred's law was, 'That falſe judges, becauſe they diſhonour God, whoſe vicars they be, (the ſcripture calls them gods) and the king, which raiſes them to ſuch an honourable ſeat, as the chair of God; they ſhall (firſt) make ſatisfaction to the party grieved, forfeit what elſe they have, and ſuffer further puniſhment at the king's will and pleaſure. And if they falſly put to death any, then to die themſelves: and always at leaſt to ſuffer like for like,' Mir. 265. 1301. Appeal of one's death lay againſt a judge, for judging one falſly or wrongfully to death, Mir. 136.---- Preſentments were made againſt chancellors, judges, &c. for breaking their oath, Mir. 144. There were forty four judges hanged in one year for wrongful judgments, Mir. 296, &c. And ſays the ſame book, 'Its an abuſe, that all things are not ſo now.' 296. What became of Treſilian and Belknap, of later years? But now the law ſeems clear otherwiſe, as we have little or no puniſhment againſt chancellors, judges, councellors, attornies, clerks, witneſſes, &c. yet were juries then ſo cautious, as aforeſaid, with and againſt them, where now therefore how many times more jealous and cautious, have they reaſon, and ſhould they be.

The law conſidering the great burthen that lies upon the conſciences of jury men, has favoured them with this liberty. They may as aforeſaid, take upon them the knowledge of what the law is in the matter, or upon the truth of the fact, as well as the knowledge of the fact, and ſo give in a verdict generally, that the defendant is guilty or not. Or they may give in only the matter of fact, particularly how they find it to be, and then leave it to the judges to determine. Or, they may acquaint the judges how the matter of fact ſtands, and then aſk the judges their opinion, as to the matter of law, and then determine the whole matter themſelves. The grand jury ſtrikes out of the indictment what they are not certain is true; or may any wiſe alter it to what they be certain is true: Or, if any thing be in it they be doubtful of, they may ſuperſcribe it *ignoramus*, at their election in all theſe caſes. Thus if a jury find the words not ſpoke, or the fact not done with, and according to the aggravations and circumſtances in an indictment, &c. mentioned: They ought either not find the indictment (for one not being guilty as the indictment mentions, is conſequently not guilty of that indictment, but rather ſeems if guilty at all, guilty of ſome other matter than which he ſtands indicted of, and ſo of ſome other indictment only; and then let the proſecutor, if ſo fond to trouble his neighbours, bring ſuch other) or ſtrike out what they have not ſufficient evidence of, as they do often in indictments of murder (which ſay the defendant of "his malice forethought feloniouſly killed and murdered" ſuch a one) ſtrike out the words "of his malice forethought and murdered," having no evidence of the malice, but ſufficient of the reſt, and then indorſe it, *billa vera*, and ſo find the bill manſlaughter inſtead of murder. So was it of an indictment againſt lord Chandois and count Arundel his ſecond, in a duel. In like manner, when the evidence proves a fact done only by miſchance, defending one's ſelf, in time and place of war; when a defendant was not *compos mentis*; an officer doing his duty, &c. the grand jury alter the indictment accordingly. So of the petit jury, only it does not alter the indictment, &c. but inſtead of altering murder

to

to manſlaughter, &c. as aforeſaid, in the indictment, they only ſay, guilty of manſlaughter, and not of murder; or guilty of chance-medly, *Se defendendo*, &c. Or they may tell the court particularly and plainly, how they find the truth in and of the whole matter to be, ſo far as concerns the fact, or what was done or ſaid.

As in caſes of words, what were ſpoke, where, to what intent, &c. and ſo leave it to the court to judge on it according to law, and to tell what the law is thereupon, and ſo be diſcharged themſelves, which is called giving a ſpecial verdict. Suppoſe A. bring an action of debt on a bond againſt D. as heir of C. and D. pleads he hath nothing from C. to pay any thing with; and A. replies, that he has, &c. and ſo the iſſue is joined (or what the jury be to try is) whether D. has any thing, as aforeſaid, or not, A. proves that D. had before the action, brought ſomething ſo, but aliened by fraud or ill practice, to deceive A. of his debt. Now, they finding the matter or caſe to be thus indeed, and the law being (for there is a ſtatute 13 El.) that ſuch aliening ſhall be void-----and conſequent, the heir chargeable nevertheleſs :——— They may, if they will, aforeſaid, either take upon them to know the law, and in this, or any caſe, ſay generally, they find for A. or not take notice of the law, but only of the matter, and ſo tell the court how, and what they find the matter to be; and thus leave it to the court to judge in law, whether they ought to be found for, and this is their moſt ſafe way. To this end was the ſtat. of Weſt. 2. c. 3. that if the jury doubt on the evidence what the law is, and therefore what to do, they might leave it to the judges to determine. But, ſays Coke, "This ſtatute is only in affirmance of the common law," Inſt. 2. 425. 13 E. 1. 39. See a ſpecial verdict in caſe of murder, Co. 4. 44. So in a caſe about murder, the jury tells the court, they find the killing itſelf to be true, but not the killing feloniouſly, as mentioned in the indictment, and ſo aſk the opinion of court, if it be murder, Co. 9 69. So the jury found the parties indicted for riotouſly tearing the petition, guilty of tearing the petition, but not of the riot, &c. It is true, it is doubted in Moor. c. 1002. whether in a writ of right a jury may give a ſpecial verdict. But as there is no reaſon, that if the cauſe be indifferently plain, as to the law, the jury themſelves ſhall not put an end to it, giving a general verdict, as guilty or not-guilty, &c. without ſo much further charge, loſs of time, increaſe of trouble, as otherwiſe muſt needs follow; yet on the other hand, there is a little why, if there be difficulty in law upon the caſe, that they being moſtly unlearned in law, ſhould be bound to find generally guilty or not, &c. and ſo find and ſay on a ſudden what is the very law, as well as fact, when ſome ſuch caſes have ſeveral years puzzled all the judges to reſolve. And it is againſt all reaſon, that the election of giving a ſpecial verdict, or general verdict, ſhould be in the judges too: for the jury beſt knowing themſelves, their own capacities and ſtrength, do therefore beſt know when they meet with difficulties to them in law, and ſo when to give the one or other. And accordingly are the beſt opinions that the jury may chuſe, be the action, &c. real perſonal, or mixed, civil, criminal, public or private; and be the iſſue general or ſpecial, or in any caſe whatſoever: And that the judges muſt accept of, and cannot refuſe ſuch verdict. 13 E. 1. 30.

Either the jury may at any time alter their opinion or verdict, &c. before recorded in court, Fitz. J. of P. 114. Co. L. 227.

All ſaid any where above of grand-juries, may be applied to the other juries; and nobody will offer to deny, but other juries ought to be as ſtrict, circumſpect, and careful, &c. as aforeſaid, though they would pretend otherwiſe of grand-juries.

A petit jury may abridge a fault a grand-jury finds one guilty of, but cannot enlarge it: As one indicted of murder may, by the petit jury, be found guilty of manſlaughter, chance-medley, &c. inſtead thereof; but one being indicted of manſlaughter, cannot by the petty jury be found guilty of murder, or any greater crime than manſlaughter.

A petit jury cannot give any verdict againſt any one, where life or member is in queſtion or danger, but only in the court, whilſt alſo its ſitting, &c. though in other caſes it may.

To the immortal honor of a great judge in the law, in a trial in London, in Feb. 1764, the jury was told from the bench, "that if they pleaſed to take it upon themſelves they were judges as well of law as fact---And that they were not anſwerable to any power whatſoever for the verdict they might bring in, but God and their own conſcience."

Of Maxims and General Rules from JACOB's LAW GRAMMAR.

A MAXIM in law is ſaid to be a propoſition, of all men confeſſed and granted, without any argument or diſcourſe. And maxims are generally certain rules or poſitions, that are the concluſions of reaſon, and therefore ought not to be denied or impeached. They are alſo principle and authorities, and part of the common law of the land. *Terms de Ley.* Sir Edward Coke in his Inſtitutes, gives the Latin etymology of this word, and ſays that they are called maxims. Of maxims and general rules the books of law are full; but the chief of the Latin maxims, affecting life, liberty or property, with uſeful obſervations thereon, are ſuch as follow.

1. *Actus Dei nemini facit injuriam*: The act of God does injury to no man. The reaſon of our law is ſo much ruled by religion, that it will not permit the act of God to prejudice any. Therefore if an Houſe is blown down by tempeſt, the tenant is excuſed in waſte; but if he expreſsly covenant to repair, there an action lies. *Noy.* If a defendant dies in execution for debt, the plaintiff in the action ſhall have a new writ of execution, becauſe the defendant's death is the act of God. And otherwiſe the plaintiff would loſe his debt without any default in him.

2. *Actus legis nulli facit injuriam*: The act of the law doth injury to none. For if land, out of which a rent-charge is granted, be recovered by elder title, and thereby the rent-charge becomes avoided; yet the grantee ſhall have a writ of annuity. Dyer. This is becauſe the rent-charge is made void by courſe of law.

3. *Actus me invito factus, non eſt meus actus*: An act done againſt my will is not my act. As where a perſon is compelled for fear of imprisonment, to make a bond, deed, or other writing; the compulſion will render the ſame void, as if it had never been made. 1 Inſt. And not only a deed, but a marriage procured by dureſs, is likewiſe voidable: for all acts ought to be voluntary, and the law hath a ſpecial regard to the ſafety and liberty of perſons. If one obliges another to ſurrender his eſtate, it amounts to a deſſeiſin of him. 14 Aſſiſ.

4. *Actio perſonalis moritur cum perſona*: A perſonal action dies with the perſon. In caſe one commit a treſpaſs, or a battery be done to a man, and he that did it or the other die, the action is gone. *Noy max.* A leſſee for years makes deſtruction on the lands let, and then dies, no action will lie againſt his executor or adminiſtrator for waſte done before their time. Alſo an action of debt lies not againſt executors upon a

ſimple contract, for the eating and drinking of the teſtator; for that action dies with him. And becauſe the executors cannot wage their law or deny it, as the teſtator might have done. 9 Rep.

5. *Accuſare nemo ſe debet niſi coram Deo*: No man ought to accuſe himſelf, unleſs it be before God. An oath is not lawful whereby any perſon may be compelled to confeſs, or accuſe himſelf, &c. Likewiſe a perſon may not ſwear for himſelf, but only where he has particular power by ſome ſtatute. 4 Rep. The law will not enforce any one to ſhew or ſay what is againſt him: for which reaſon an offender, tho' ever ſo culpable, may plead not guilty.

6. *Aliquis non debeat eſſe judex in propria cauſa*: No perſon ought to be a judge in his own cauſe. It is unreaſonable for perſons to be at the ſame time judges to give ſentence, miniſters to make ſummons, and parties to have ſhare in debts, &c. to be recovered. Dyer. And therefore a lord of a manor having cognizance of all kinds of pleas, cannot hold plea to what himſelf is a party; nor may juſtices of peace act in any matter relating to themſelves: except in certain parith buſineſs, by a late ſtatute. 16 Geo. 2. But an inn-keeper in his own caſe, may detain a gueſt's horſe until ſatisfaction be made for ſtanding and other charges: And a perſon may retake his own goods, of which he is diſpoſſeſſed, &c. One cannot generally be witneſs in his own cauſe; for it is preſumed by the law that he will be partial in ſpeaking for his advantage. 1 Inſt.

7. *Ambiguum pactum contra venditorum interpretandum eſt*: An ambiguous deed or contract is to be expounded againſt the ſeller or grantor. So that if a man having a warren in his lands, grants the ſame land for life, without mentioning the warren, yet the grantee ſhall have it with the land. For otherwiſe the grantor ſhould have excepted ſuch warren out of the deed or grant. Bacon. But the words ſhall be taken in the moſt favourable ſenſe for the ſpeaker; as in an action againſt a man for ſaying of the plaintiff that he hath forſworn himſelf, it may be conſtrued to be in common converſation. And the action is only maintainable where it is ſaid he hath forſworn himſelf in a court of record. 4 Rep.

8. *A verbis legis non eſt recedendum*: We ought not to go from the words of the law. The judges may not make any interpretation of a ſtatute, againſt the expreſs words thereof; for nothing can ſo well declare the intent of the makers of an act of parliament, as their direct words in it themſelves. 5 Co. Rep. All acts of parliament and letters patent muſt be conſtrued one part with another, and all the parts of them together; and the words are to be taken in a lawful and rightful ſenſe, and applied to the advancement of the remedy, &c. 1 Inſt. But caſes out of the letter of a ſtatute, yet being within the ſame miſchief, ſhall be within the remedy the ſtatute provides.

9. *Baſtardus, nullius eſt filius; aut filius populi*: A baſtard is the ſon of none, or the ſon of the people. As a baſtard is born out of marriage, his father is not known by the law; therefore he ſhall not inherit or be heir to any perſon, and for that he is in the law as no man's iſſue; and he can have no heir but of his own body, becauſe of the uncertainty who is related to him. 1 Inſt. The baſtard of a woman is ſaid to be no child, where the mother gives lands to him as ſuch; but having by time gained a name of reputation, he may take a remainder, as a reputed ſon; and may himſelf purchaſe by his reputed name, &c. Dyer. In caſe a child is born only a day after marriage, between parties of full age, it is no baſtard, but ſuppoſed to be the huſband's: So if a man takes a wife big with child by another, who was not her huſband. Roll. Abr. And if the huſband be within the four ſeas, that by intendment

of

of law, he may converſe with his wife, and ſhe hath iſſue, the child cannot be proved a baſtard. Theſe caſes are, unleſs there be an apparent impoſſibility, that the huſband ſhould be the father of it; as if he has loſt his genitals, &c. 1 Co. Inſt.

10. *Caveat actor*: Let the actor take care what he does. If a landlord gives his acquittance to his tenant for the laſt rent due, all rent in arrear is preſumed to be ſatisfied. And in caſe a perſon bound by bond pays a leſſer ſum before the day appointed, or at another place than is limited, and the obligee or lender of the money then and there receiveth it, that is a good ſatisfaction. 1 Inſt. Acceptance of rent affirms, and makes a voidable leaſe to have continuance, and if where a tenant or leſſee aſſigns over his term, the landlord accepts the rent of the aſſignee, knowing of the aſſignment, he cannot afterwards ſue the leſſee for rent. 3 Rep. An executor paying debts on ſimple contract, before thoſe of a higher nature on judgments, &c. is liable to the payment of all. Plowden. And taking any of the goods of the deceaſed makes a man executor in his own wrong, and anſwerable.

11. *Cauſa & origo eſt materia negotii*: The cauſe and beginning is the matter of the buſineſs. Although the law gives power to a perſon to enter a tavern; the lord to diſtrain his tenants beaſts; him in reverſion to view if waſte be done; a commoner to enter into the land to ſee his cattle, &c. yet if he that enters a tavern commits a treſpaſs, or the lord that diſtrains for rent, &c. kills the diſtreſs, or if he who enters to view waſte breaks the houſe, or the commoner cut down trees; in theſe and like caſes, the law will judge that they entered for that purpoſe, and they ſhall be treſpaſſers from the beginning. 8 Rep.

12. *Ceſſante cauſa, ceſſat effectus*: The cauſe ceaſing, the effect alſo ceaſeth. Where a woman married is divorced from her huſband, ſhe ſhall have her goods given in marriage, not being ſpent, for they were given in advancement to the woman, and the cauſe and conſideration of that gift is defeated. Dyer. In an action where a debt is the cauſe of execution, on lands or goods, if the plaintiff releaſes to the defendant all debts, the diſcharge of the debt diſcharges the execution which is the effect of that cauſe. If an office be granted to a perſon, to perform certain buſineſs, and he fails in his duty, the office ſhall ceaſe and determine. Plowd.

13. *Conjunctio maris & faeminae eſt de jure naturae*: The conjunction of man and wife is of the law of nature. The bodies and minds of perſons are both joined in matrimony; in contracting which, the conſent of the mind is chiefly regarded: wherefore it is ſaid, that the parties conſent, and not the compulation makes the marriage. 1 Inſt. All perſons may lawfully marry, that are not near of kin and prohibited by the Levitical degrees; and the age of conſenting thereto is fourteen years in the man, and twelve in the woman: if they marry before, at thoſe ages they may diſagree to it. Danv. abr. A huſband and a wife are accounted in law but as one perſon; and by marriage the man is intitled to all his wife's real and perſonal eſtate: as the huſband is the woman's head, all ſhe hath is her huſband's; but then he is liable to the payment of her debts. Finch. An action of debt lies againſt the huſband for goods ſold to the wife; the law preſumes they comes to his uſe. But a wife may not make any contract without the huſband's conſent, except it be for neceſſary things for her family, &c. if the do otherwiſe, it will not be binding to him. 2 Inſt. The wife is *ſub poteſtate viri*, and therefore her acts ſhall not bind herſelf, unleſs ſhe levy a fine of lands, &c.

14. *Conſuetudo manerii & loci eſt obſervanda*: The cuſtom of the manor and

and place is to be obſerved. It is the cuſtom of manors muſt direct what a copyholder ought to do, or ought not to do; but copyhold eſtates ſhall not have the collateral qualities that eſtates of the common law have without a ſpecial cuſtom. 1 Co. Inſt. According to the general cuſtom, if a copyholder commit waſte, either permiſſive or voluntary, or do not pay his rent to the lord, being demanded on the land; or if he refuſe to do ſuit of court: Or in caſe he make a leaſe of his eſtate for longer term than a year, without licence from the lord, &c. either of theſe will be forfeitures of copyhold eſtates.

15. *Cuicumque aliquis quid concedit, concedere videtur et id ſine quo res ipſa eſſe non poteſt*: To whomſoever any one ſhall grant any thing, he grants that without which it cannot be. If lands are granted to a man, he has an implied covenant for peaceable enjoying the ſame, and the law allows him a way thereto, without being expreſsly mentioned. 1 Inſt. And where a perſon grants all the timber trees growing in his woods, the grantee may come upon the ground, and cut them down, and carry them through all his land, though the graſs receive injury by the carriage. For trees are proper to be carried by carts, and when a man has title to the principal thing, he ſhall always juſtify the neceſſary circumſtances. Plowden. A tenant at will ſowing corn on the ground, if he be ouſted by the leſſor, ſhall have free entry, egreſs and regreſs, for cutting and carrying away the ſame. And in caſe he be diſturbed therein, he may bring an action and recover damages.

16. *Cui licet quod majus, non debet quod minus eſt non licere*: To whom it is lawful to be the greater, to him it is not unlawful to do the leſſer thing. Where there is a cuſtom that lands may be granted to any one in feeſimple; here the grant to a perſon and the heirs of his body, or for life, is within that cuſtom. 5 Rap. A perſon who has an office to him and his heirs, may make an aſſignee, and conſequently a deputy.

17. *Dilationes in lege ſunt odioſæ*: Delays are odious in the law: The delaying of juſtice is an obſtruction to and a kind of denial of it, and pleas that are dilatory ſhall not be received, unleſs ſufficient probable matter is ſhewn for it, or the truth of them be proved by affidavit. If a plaintiff forbear to bring his cauſe to trial, the defendant is not to be delayed, but may take out a writ of venire facias, directed to the jury to try the cauſe, by what is termed Proviſo. Old nat. brev. In criminal caſes, where perſons are committed to priſon for capital offences, as treaſon, felony, &c. expreſſed in the warrant, on prayer in open court the firſt week of the term, or day of ſeſſions, they are to be brought to trial. If they are not indicted the next term or ſeſſions, upon motion made the laſt day of ſuch term, &c. they ſhall be admitted to bail, unleſs the king's witneſſes are not ready. And in caſe they are not tried the ſecond term, &c. they may be diſcharged. Hab. corp. act. 31 Car 2.

18. *Dormit aliquando jus, moritur nunquam*: A right ſometimes ſleeps, but never dies. In the eye of our law, right is of ſuch a high eſtimation, that the law preſerves it from death and deſtruction; for though trodden down it may be, 'tis never trodden out. Coke. A right to land it is held cannot die; indeed a releaſe of a perſon's right tenures by way of extinguiſhment, but then its ſo underſtood in reſpect of him that makes a releaſe, &c.

19. *Dominium a poſſeſſione cæpiſſe dicitur*: Right and dominion is ſaid to have its beginning from poſſeſſion. According to this maxim, a long and quiet poſſeſſion eſtabliſhes a right; but then it muſt exceed the memory of man; and if there be no proof of record, or in writing to the contrary, though it exceeds the knowledge or memory of any one living, yet it is judged within memory. 1 Co. Inſt. The reaſon why a peaceable poſſeſſion,

poſſeſſion, without contradiction, makes a right in law, is that thereby there may be certainty to titles of eſtates. In a writ of right the limitation of time is made ſixty years, by 32 H. 8.

20. *Expreſſum facit ceſſare tacitum*: A matter expreſſed cauſes that to ceaſe, which by intendment of law was implied and not expreſſed. A man makes a leaſe rendring rent, and the words of reſervation are expreſs to the leſſor only, the heir ſhall not have it; but if no perſon be ſaid to whom the rent ſhall be paid, this by implication ſhall be to the leſſor and his heir. Dyer. An expreſs covenant qualifies the generality of a covenant in law, and reſtrains it by the aſſent of the parties, ſo that it ſhall extend no farther than it is expreſſed in the covenant. But a warranty in law is not deſtroyed by an expreſs warranty; as if one grants a leaſe, reſerving a certain rent, in which he binds himſelf and his heirs to warranty of the land, &c. There the warranty expreſſed ſhall not make that in law ceaſe, or be of no effect, but the leſſee may chuſe which he pleaſes. 4 Rep.

21. *Fortior & potentior eſt diſpoſitio legis, quam hominis*: the diſpoſition of the law, is of greater force than the diſpoſition of man: This is explained in ſurrenders of eſtates. As if a perſon having granted a leaſe of lands for years, to begin at Lady-day next, he cannot make a ſurrender of his future intereſt, becauſe there is no reverſion wherein it may be drowned. Though in caſe the leſſee, before Lady-day, take a new leaſe of the ſame lands, &c. for years, either to begin preſently or at Lady day, this is a ſurrender in law of the former leaſe and intereſt. 10 Co. Rep.

22. *Furioſus furore ſuo, punitur*: A madman or lunatic is puniſhed by his madneſs. If a madman kill another, he hath not broken the law although he hath broken the word of it; becauſe he had not any memory or underſtanding, but mere ignorance which comes from the hands of God. Plowden. And therefore ſuch madman has favour ſhewn him by reaſon of his diſability; he ſhall not ſuffer for any felonious act: nor can the puniſhment of a lunatic without his mind and diſcretion, be an example to others. 1 Inſt. A madman, in a civil cauſe, cannot promiſe or contract for any thing, or do any buſineſs; and this is becauſe he underſtands not what he does: All his acts may be avoided, either by the king, who has the care of the eſtates of lunaties, or by his heirs. But if a man *non compos mentis* levy a fine, or ſuffer a recovery of lands, &c. theſe being matters of record, ſhall bind himſelf, his heirs and executors. 4 Rep.

23. *Hæres legitimus eſt quem nuptiæ demonſtrant*: He is lawful heir whom marriage demonſtrates ſo to be. A child born within marriage, though ever ſo ſoon after, is in law legitimate, and heir to the huſband; but an alien may not be heir though born in lawful wedlock. In caſe a child be born in ſecond marriage, within nine months after the firſt huſband's death, he may be heir either to the firſt or ſecond huſband. Bracton. A baſtard is excluded from being heir; and a monſter without human ſhape, cannot be heir to a perſon: but an hermaphrodite, if there be any ſuch, may take lands, &c. as heir according to that ſex which is moſt prevalent. 1 Co. Inſt. The eldeſt ſon, after the death of his father, is heir: And if there be grand father, father and ſon, and the father dies before the grand father, the grandſon ſhall be heir; who is termed *hæres jure repræſentationes*, becauſe he repreſents his father's perſon. Broke abr. Till the death of the anceſtor one is called heir apparent; and by the common law, a perſon cannot be heir to goods and chattels. There is an *ultimus hæres*, on the eſcheat of lands, for want of lawful heirs; which is the lord of whom held.

24. *Ig-*

24. *Ignorntia juris non excusat:* The ignorance of the law doth not excuse one. Ignorance of the law, even in infants being of the years of discretion, shall be no excuse, if they commit crimes; and although it be invincible, as where a person affirms that he has done all that in him lies to know the law. Doctor and Stud. For every man is bound at his peril to take notice what the law of the realm is. If any person takes upon him to know the law, and through ignorance openly affirm that a void lease, &c. is good, to the prejudice of another's title; he may have an action against him, and recover damages. 1 Rep.

25. *Ignorantia facti excusat:* Ignorance of the fact excuseth. A person buys a horse in a fair or market, of one that hath no property in him: if this were unknown to the buyer, he has good right to the horse, and his ignorance shall excuse him. But here, if he had known the seller had no right, the buying in open market would not have excused. Where an illiterate ignorant man seals a deed, and it is read to him false, that makes the same void. 2 Co. Rep.

26. *Impotentia excusat legem:* The law excuses impotency. This maxim regards the infirmities of persons, where the law excuseth their not doing certain acts; as of men in prison, out of the realm, idiots and lunatics, persons blind and dumb, &c. 1 Inst. Legal imprisonment, without any covin, shall be a good excuse for a person's non-residency, by reason of his impotency. If a disseisee be an infant, feme covert, or in prison, &c. and the disseisor dies seised of the land, it shall be no discent to take away an entry, because of impotency in such persons. Finch. And their right of action is saved, till their impediments are removed, where others are bound by the statutes of limitation.

27. *Injuria illata in corpus non potest remitti:* Injuries to the body cannot be remitted or forgiven. Our law carefully provides for punishing forcible injuries, between person and person, because they are most contrary to the repose of the kingdom, on which the public felicity depends. And the life and member of every subject are under the king's protection, to the intent they may serve him and their country when occasion requires. Coke. So tender is this part of our law, that if one do but menace another, with a weapon or staff, or in case he stretch forth his arm, or give any other token, whereby his intention of striking appears; it is actionable: They are in legal construction deemed an assault, though no stroke be given.

28. *In omnibus quidam, maxime tamen in jure æquitas est:* In all things but especially in the law, there is equity. The laws themselves desire to be ruled by equity; which is said to be a correction of the law, wherein it is any way wanting by reason of the generality of it. Pl. The stat. of Gloucester gives an action of waste against tenants for life or years; and by the equity of it, this action lies against him that holds lands for one year only, or twenty weeks, &c. And if a lessor come upon the ground of a lessee, it shall be intended that he came to see whether waste were done. For equity turns all to the best, and makes every act lawful, when it is indifferent if it be so or not. Finch. If a person does make a feoffment to a future use, the feoffee shall be seised of the lands, &c. to the use of the feoffer and his heirs in the mean time; and this is by equity.

29. *In omnibus fere minori ætati succurritur:* In all cases generally there is favour shewed to persons within age. No man or woman before the age of twenty-one years can alien or sell any lands, goods, or chattels, or bind themselves by deed, so careful is the law of their interest; unless it be for eating, drinking, schooling, physic, and other necessaries. 1 Inst. An infant is permitted to do any thing for his own

advantage

advantage, but not to his prejudice; he may make a purchase, which is intended for his benefit, though at full age he may either agree to or wave it. Infants may buy things, but cannot borrow money even to buy cloaths; for the law will not trust them with money, but at the peril of the lender, who must see the same thus laid out. 1 Salk. A presentation to a benefice is to be made by an infant within the six months, being a thing of necessity, otherwise lapse shall incur against him; and he must perform a condition annexed to an estate by his ancestor, or shall be barred of the right to the lands. In some cases also an infant is impleadable at law, and for his contempt shall receive the same punishment as a man of full age. Dyer.

30. *Jus sanguinis, quod in ligitimis successionibus spectatur ipso nativitatis tempore quaesitum est:* The right of blood, which is regarded in lawful successions or inheritances, is found in the very time of nativity. It is therefore *jus primogeniturae* or right of elder brothership, is principally respected: And it is a maxim, that the next of the worthiest blood shall ever inherit: As the male and all descents from him, before the female; and the female, of the part of the father, before the male or female of the mother's part, &c. 1 Inst. Among the males, the eldest brother and his posterity, inherits lands in fee simple before any younger brother.

31. *Lex neminem cojit ad impossibilia:* The law compelleth no man to impossibilities. If the condition of a bond be possible at the time of making it, and before it can be performed, becomes impossible by the act either of God, or the law, or of the obligee, &c. the obligation is not forfeited. But where a condition for payment of money is made impossible in respect of time; as if it be to pay the same on the thirtieth of February, and there is no such day, it is due and payable presently. 1 Co. Inst. Where a man is bound by a recognizance or bond with condition for his appearance the next term in such a court, and before the day the cognizor or obligor dies, the obligation will be saved; because it is impossible the condition should be performed. So in case a lease be granted for twenty years, upon condition that the lessee dwells upon the lands the whole term, and he lives but ten years, the executors shall enjoy the lands; for the condition is become impossible. Doderige. A condition of a bond to go to Rome in a few hours, is void and impossible; but it is said the obligation may be good.

32. *Legis constructio non facit injuriam:* The interpretative construction of law shall wrong no person. In case an executor of a will grants all his goods and chattels, the goods which he hath as executor shall not pass, for that would be a wrong to the testator's estate. 10 Edw. 4. And where tenant in tail, or for life, makes a lease generally, it shall be taken for the life of the lessor or grantor, or else it would be wrongful to him in reversion. Though if a person seised in fee, make any lease for life, without mentioning for whose life, it shall be construed for the life of the lessee. 1 Inst.

33. *Lubricum linguae non facile in paenam est trahendum:* The rashness of the tongue is not easily punished. This is where words are spoken in a passion; for in all cases words of heat, as to call a man rogue, villain, knave, &c. unless it be said in such an affair, or to a certain person, will bear no action at law. 4 Rep. But if one reproaches another with some heinous crime; calls a person thief, a merchant bankrupt, says of an attorney he deals corruptly, or calls any one a perjured man; an action of the case lies for damages, because these slanders are of great import, and concern a man's life, estate and condition. To call a person bastard, that is heir to an estate; or say a man has the French

French diſeaſe, &c. when he is courting a woman, are held actionable. Danvers's Abr.

34. *Mutata forma prope interimitur ſubſtantia rei* : The form being changed, the ſubſtance of the thing is deſtroyed. In caſe a perſon cuts down another's timber trees, and ſquares them to make beams for a houſe, he may ſeize the ſame before they are thus uſed. Though if they are laid in the building, they may not be ſeized by the owner, for their nature is then altered, and they are become part of the houſe ; yet the party ſhall have his action for the damage. Doderige. And where a man gets the barley of another, and makes it into malt, it cannot be taken again by the former owner, though its form is not loſt ; becauſe it is become a thing of another nature and uſe.

35. *Neceſſitas non habet legem* : Neceſſity hath no law. Where the fire happens in the ſtreet of a town, any perſon may juſtify the pulling down the wall, or houſe of another, to prevent the ſpreading thereof, as it is a caſe of neceſſity. And if ſeveral perſons are in danger of drowning by the caſting away of a ſhip, or boat, one to ſave his life may thruſt another from a plank, or a boat's ſide, &c. though ſuch other be thereby drowned. Bacon. According to our antient books if a man ſteals victuals meerly to ſatisfy his preſent hunger, it is neither felony nor larceny, being for the neceſſity of preſerving life. Stanford. But this having encouraged theits, 'tis now adjudged otherwiſe ; and the privilege of neceſſity ſhall not prevail againſt the commonwealth. The great lord Coke ſays, *Neceſſitas eſt lex temporis*. 8 Rep.

36. *Nihil magis conſentaneum eſt, quam ut iiſdem modis res diſſolvatur quibus conſtituitur* : Nothing is more agreeable to equity, than that every thing ſhould be diſſolv'd by the ſame means it was firſt conſtituted. Every contract and agreement muſt be releaſed by a matter of as high a nature as that was ; ſo that a deed in writing under hand and ſeal, can only be releaſed by ſome other writing, ſigned and ſealed, &c. 5 Rep. And therefore an obligation or matter in writing, cannot be diſcharged by an agreement by word. Where an eſtate is veſted in the king by matter of record, it may not be diveſted out of him but by the like matter : And an act of parliament ſhall not be avoided but by parliament. Plowden.

37. *Nullus commodum capere poteſt de injuria ſua propria* : No man ſhall take advantage of his own wrong. If a man be bound in a bond to appear at a day before juſtices, on which day the obligee caſts him in priſon, ſo as he cannot come ; no benefit ſhall be had of this bond. Noy. In caſe a leſſor and leſſee of lands for years, join in cutting down of timber, the leſſor ſhall not puniſh the leſſee for ſuch waſte ; and take advantage of his own wrong by joining therein. An appeal of an infant may not ſtay for his full age, which would be taking advantage of his own wrong. 27 H. 8.

37. *Nullum iniquum in jure præſumendum eſt* ; No injurious thing is to be preſumed in the law. All things are taken to be lawfully done, till proof is made to the contrary ; and fraud ſhall never be intended or preſumed by the law, unleſs it be expreſsly averred. Where no fraud is found by the jurors in a feoffment, the judges ſhall not adjudge the ſame fraudulent ; and altho' jurors have found circumſtances and preſumptions to imitate the finding of fraud, it is but evidence, and not any matter upon which the court may judge thereof. 10 Rep. For the office of the jurors is to adjudge upon the evidence concerning matters of fact, and thereupon to give their verdict ; and not leave things to the judgment of the court, which do not appear to them.

39. *Omne*

39. *Omne actum ab agentis intentione eſt judicandum*: Every act is to be judged from the intention of the agent. 'Tis held in contracts and obligations, the intention of the parties is the chief thing that the law regards; for ſuch words as ſhew the aſſent of parties, and have ſubſtance in them are ſufficient. A bond run thus; Know all men by theſe preſents, that A. I. am held and bound to B. in twenty pounds, to be paid to the ſaid A. &c. This obligation was adjudged good, for the parties intention appears. Plowden. The law will likewiſe take one word for another in deeds, to ſupply the intention of perſons; as where a man has a remainder of lands, if he grants it to another, by the name of a reverſion, the grant is good, notwithſtanding the miſ-terming of the thing. 1 Inſt. In wills, the intent of the teſtator ſhall generally be obſerved.

40. *Poſſeſſio fratris de feodo ſimplici facit ſororem eſſe haeredem*: The poſſeſſion of the brother, of a fee ſimple, makes the ſiſter to be heir. A man has iſſue a ſon and a daughter by one woman or venter, and a ſon by another, then dies ſeized of lands in fee ſimple, and the eldeſt ſon enters into the lands, after which he dies without having any iſſue. Here the ſiſter ſhall have the land, and not the younger ſon or brother, tho' he be heir to the father; but there muſt be an actual entry upon the land, otherwiſe it goes to the younger brother. 1 Co. Inſt. The poſſeſſion of a brother of an eſtate-tail, ſhall not make the ſiſter heir: for the younger ſon of the half venter it deſcends to, who ought to have it *per formam doni*. Plowden.

41. *Prohibetur ne quis faciat in ſuo, quod nocere poſſit in alieno*; *& ſic utere tuo ut alienum non laedas*: It is forbidden that any one ſhould do that in his own, which may injure another; and ſo uſe your own, that you do not hurt others. Where a man doth any thing upon his own ground to the particular damage of his neighbour, 'tis accounted a nuiſance; and an action lies for it, or the ſame be abated or removed by the perſons that are prejudiced thereby. Wood. If a man has an houſe that has good lights, and a ſtranger having lands adjoining, builds a new houſe on his lands ſo near, that the windows of the other are darkned by it; 'tis an offence actionable. As is alſo the ſetting up or making a houſe of office, dye-houſe, lime-pit, &c. ſo near to another's houſe, that the ſmell thereof annoys him, or is infectious; or if the corruption of the water of the pits, hurts his water, or graſs, or deſtroys fiſh in a river, &c. 3 Inſt.

42. *Proximus ſum egomet mihi*: Every one is next to himſelf. In caſe of wills, where an executor is appointed, he may pay himſelf a legacy before any other; and among debts of equal degree, the executor may pay his own debt firſt. Noy. Executors are nearer to the teſtator, and do more repreſent his perſon, than the heir does the anceſtor; this is held becauſe if an executor be not named in a mortgage, yet the law appoints him to receive the money. But the heir ſhall not receive it, unleſs he be named. 1 Inſt.

43 *Publicum bonum privato eſt praeferendum*: The public good is to be preferred before private intereſt. A woman intitled to dower ſhall not be indowed of a caſtle of defence, for that is *pro bono publico*: but as to caſtles for private uſe and habitation, 'tis otherwiſe. The inhabitants of a village may make by-laws for repairing a church, or highway, or any ſuch thing as is for the public good generally; and the greater part ſhall bind all of them, without cuſtom. 5 Rep. And corporations have power to make ordinances, for the government of their bodies politic, and better execution of the laws of the realm: But they may not

not do so, without a custom or charter, unless it be for things concerning the public good.

44. *Quaelibet concessio fortissime contra donatorem interpretanda est*: Every man's grant shall be taken most strongly against himself. Whenever a deed is uncertain, and the words of it are ambigious, it shall be construed most strongly against the grantor therein; as if a man grants an annuity out of land, and he hath no land at the time of the grant, it shall nevertheless charge his person. And where any deed made to a person, is good for part, and for some part thereof not good, that which is for the benefit and advantage of the grantee, shall stand good in law. 1 Co. Inst. But although grants are taken strongly against the makers, yet no wrong must be done by it; and a man may not be obliged by his own act and deed to do some things which are against law. For if a husbandman be bound not to till or sow his land, the obligation is contrary to the common law, and void. 11 Rep.

45. *Quid facit per alium facit per se*: What one does by another he does by himself. If a man impowers another by letter of attorney to sell and alien his land, and he doth so, it is his alienation by him; and where a person gives authority to his bailiff to sell cattle, and he doth it, this will be his sale by the bailiff. Plow. Where any person has a bailiff or servant, who is known to be such, and he sends him to market to buy goods, his master shall be chargeable with the payment, if the things come to his use. In case he sells his master's cloth, and warrants it to be good, or of a certain length, it is not so, an action lies against the master only, and not the servant. Noy. And if a person commands one to do a trespass, or to beat another, he shall be himself a trespasser.

46. *Qui sentit onus, sentire debet & commodum*: He who bears the burden, ought to receive the profit. A man seized of lands in fee hath issue a daughter and dies, his wife being with child of a son; the daughter enters and sows the lands, and then the son is born, and his next friend enters, here the daughter shall have the corn growing on the ground. Perkins. Also a tenant for life, or in dower, having sown corn upon the land, may devise the same growing at the time of their deaths; and their devisees shall have it. 7 Assiz.

47. *Qui sentit commodum sentire debet et onus*: He that reaps the profit ought to bear the burthen. If a person grant a rent charge for life out of his land, and afterwards conveys the land to others, in every one of whose time the rent is behind, and then the grantee dies, his executor may bring action of debt against all of them for rent due in their time; as they all have the profit of the land. 4 Rep. And an assignment on a lease, the lessee who hath covenanted to repair, may have an action of covenant against the assignee, for suffering a house to decay; because he that enjoys the profit, must bear the burthen and charges. Where persons enjoy benefit by making banks of a river, they are to contribute to the repairs thereof. 5 Rep.

48. *Quod initio vitiosum est, tractu temporis non convalescet*: That which in the beginning is vicious, cannot by tract of time be made good. In case a bishop makes a lease of church lands for four lives, which is contrary to the statute, though one dies in his life time, so as now there are but three, and afterwards the bishop dieth, yet it shall not bind his successor. For here the lease so made had a bad unlawful beginning, it being for more lives than the act allows, and therefore cannot be brought to a good end. 10 Co. Rep. If an infant or feme covert, that is a married woman, make a will and publishes the same, and afterwards dieth, being of full age or sole, both these wills notwithstanding will be void

and

and of no effect. And this is because the foundation, viz. the making and publishing are void. Plowden.

49. *Quod est inconveniens, et contra rationem non est permissum in lege*: Whatever is inconvenient, and contrary to reason, is not permitted in the law. It is likewise a maxim, that what is contrary to reason, is unlawful: and hence it is said that all positive laws which are contrary to the laws of nature, and of reason, are no laws at all. Therefore if a town hath customs, which are against law and reason, and those customs are confirmed by act of parliament; such confirmation shall not make them to be good and binding. 1 Inst. But no person ought, out of his own private opinion, to be wiser than the law.

50. *Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum est*: What otherwise is good and just, if it be acquired by force or fraud is evil and unjust. And if it be mixed therewith, it is the same thing; for where a man by will devised tenements to superstitious uses, and also to good and charitable uses; it was adjudged that the commixture of the evil use with the good, infected the good use, and destroyed it. 3 Rep. At the common law forcible entry into houses or lands, &c. was no crime, where a person had title, and entry was lawful. But by statute, none shall enter into lands or tenements, but in a peaceable manner, though they have title of entry, upon pain of imprisonment, &c. 5 Richard 2. In this case, justices of peace have authority to commit offenders till they pay a fine, and to restore the possession; or an action of trespass may be brought, and treble costs recovered. 2 Inst.

51. *Rex est vicarius & minister Dei in terra, omnis quidem sub eo, & ipse sub nullo nisi tantum sub Deo*: The king is the minister of God upon earth; every one is under him, and he under none, but only God. Bracton.---- All the lands in England are said to be holden either immediately or immediately of the king; and all estates for want of heirs, or by forfeiture on committing crimes, escheat to the king, as lord paramount. 1 Co. Inst. Lands in the king's possession are free from tenure; for a tenant is he who holds of some lord by service, and the king cannot be a tenant, because he hath no superior but God: Neither may the king be joint tenant with any, for none can be equal with him. 8 Rep. The king's grant is taken strongly against a stranger, and more favourable for the king; contrary to the grants of a common person: And if the king grants land in fee simple, upon condition that the grantee do not alien or sell the same, it is good; though void in others. Plow. Where the right or title of the king and the subject concur and meet together, his title shall be preferred: and the king's title is not to be tried, without warrant from the king, or assent of his attorney general. 2 Inst. No distress can be made upon the king's possession; but he may distrain out of his fee in other lands, &c. and may take distresses in the highway: The king may also distrain for the whole debt or rent due of one tenant, where the estate is let to several. In whose hand soever the goods of the king come, their lands are chargeable, and may be seized for the same: and the king is not bound by the sale of his goods in open market. The debts of the king shall be satisfied, before those of a subject, for which there is a prerogative writ, and until his debts be paid, he may, by writ protect his debtor from the arrest of others: but although the king's debt is to be first paid, that must be when it is in equal degree with the subject's. Croke Car. No prescription of time runs against the king; he is not within the statutes of limitation; an entry shall not bar him; nor will any judgment be final against him, but with *a salvo jure regis*. The king cannot be nonsuit, as he is supplied

posed to be present in all his courts; and he may have such process in his suit, as no other person but himself can have: And an action lies not against the king, but a petition instead of it, to him in the chancery. Finch. Our king is the fountain of honour and justice: all statutes are to have his royal assent, and in calling or dissolving parliaments, declaring war and peace, &c. his proclamation has the effect of a law. Also acts of parliament are not binding to the king, unless they concern the commonwealth, or be specially named. 1 Eliz. But notwithstanding the king's prerogative is so large, as we find that to be law almost in every case of the king, that is law in no case of the subject: Yet the king may not by petition or bill, &c. dispose of any man's lands or goods. Nor shall he take that he hath a right to, which is in the possession of another, but by due course of law. He may not command a man to prison, against the writs and processes of law, *Nihil potest rex quam quod de jure potest.* Fortesc. For the law is the rule of the king's prerogative, which does not extend to any thing injurious to others. 12 Rep. And as the subject owes to the king his true and lawful obedience; so the king is to defend the laws, and protect the bodies and goods of his subjects.

52. *Salus populi suprema est lex*: The health and welfare of the people is the chiefest law. According to this maxim, there is a sovereign power in the people, or states of the kingdom, to examine into and reinstitute the regal estate, where kings act arbitrarily, and against the rights and liberties of the people. Britannic constit. The main end of government is the common good of the subject; and by the same law which ordains our kings, the meanest of the people enjoy the liberty of their persons and property in their estates, which it is every man's concern to preserve to the utmost. Fortescue. In cases that are for the general good of the people, a man can justify doing of a wrong; as in time of war, a person may erect bulwarks on another man's lands: And hence it is, one may at any time raze an house that is burning, for the safeguard of neighbouring houses. Plowden. Trade being for the benefit and good of the people, bonds to restrain the exercise of it, are held void; and the instruments of a man's trade or profession may not be distrained, as the books of a scholar, ax of a carpenter, &c. But this is understood when other things may be taken as a distress. 1 Inst.

53. *Semel malus semper praesumitur esse malus*: Those who once are evil, are always presumed to be so. This has been understood, *in eodem genere mali*, in the same kind of evil; as perjured persons, who have once forsworn themselves, and therefore are convicted, will not be afterwards admitted to give evidence in any cause, because they have once so offended. And no infamous person or one attainted of false verdict or conspiracy, or convicted of forgery, or felony, or that has stood in the pillory, &c. shall be allowed to be a witness. 1 Co. Inst. But if a man convicted of felony, or who hath stood in the pillory, be afterwards pardoned, it restores him to his credit as a new man, and he may be a good evidence, 2 Haw.

54. *Substantia prior et dignior est accidente*: The substance is more worthy, and before the accident. No declaration or count in a suit of law shall abate, so long as the matter of action is fully shewed in substance in the declaration; and the writ, as is provided by the statute 36 Ed. 3. And no judgment shall at any time be arrested or stayed in any court of record for want of any matter of form, in the declaration, plea, &c. or for any defect whatsoever, except only matter of substance, which shall be shewed publicly to the judges of the said courts. 18 Eliz.---After verdict is given in an action, in the courts at Westminster, the judgment

judgment shall not be reversed by writ of error, for any faults either in form or substance, in any bill, or writ, &c. or for variance therein from the declaration or other proceedings, by 5 Geo. 1.

55. *Ubi major pars est, ibi est totum* : Where the major part is, there by the law is the whole. The only way of determining the acts of many, is by the major part, or a majority ; as the major part of members of parliament enact laws, and the majority of the electors chuse the members of parliament ; and the act of the major part of any corporation, is accounted the act of the corporation. 19 Hen. 7.

56. *Veritis nihil veretur nisi abscondi* : Truth fears nothing but to be concealed. And truth is nothing else but an affection of our speech, and actions agreeing with the mind ; but is properly called *veracitas*, that is speaking of truth : Of which 'tis to be understood, that it is afraid of nothing more than to be obscured. Plowden. Fraud and covin are so mixed with truth, as they often deceive and put a false gloss upon the worst things ; though the law will never permit them to suppress the truth, where it can be discovered. And in all cases it labours to make a discovery, and censure corruptions.

57. *Vigilentibus non dormientibus leges subveniunt* : The law helps those that are watchful, and not those that are sleepy and negligent. For want of being watchful, and by negligence a right may be lost ; as where an action is not brought within the times appointed by the statute of limitation, 20 Jac. 1. which ordains, that writs or actions of ejectment, to recover lands, &c. are to be sued within twenty years after the title did arise, or the parties will be barred. All actions of debt, upon the case, (except for words) actions of accounts (other than concerning merchandize) of detinue, trover and trespass, must be commenced within six years after the cause of action ; and all actions of assault and battery, wounding and imprisonment, must be brought within four years ; and for slander within two years, after cause of action, and not afterwards.

Of ACTIONS and REMEDIES.

ACTION of debt, is a suit given by law where a man oweth another a certain sum of money by obligation, or bargain, for a thing sold, or by contract, &c. and the debtor will not pay the debt, at the day agreed ; then the creditor shall have this action against him for the same.

If money be due upon any specialty, action of debt only lieth ; for no other action may be brought for it : And where a man contracts to pay money for things which he hath bought, and the seller takes bond for the money, the contract is discharged ; so that he shall not have action of debt upon the contract, but on the bond. Nat. Br. 268.

The usual action of debt, which consists of divers particular branches, lies in all these cases. 1. For money due on bond or bill. 2. For rent due from tenants. 3. For goods or money delivered. 4. For an attorney's expences. 5. For permitting a prisoner to escape. 6. Upon a judgment or arbitrament.

1. In a bond where several are bound severally, the obligee may have action of debt against all the obligors together, or all of them apart, and have several judgments and executions ; though he shall have satisfaction but once : But when the bond is joint, and not several, all the obligors must be sued that are bound ; and one is not obliged to answer without the rest. Also if a bond is made to three, to pay money to one of them, they must also join in the action, for they are but as one obligee. Dyer 19, 310. Yel. 177. If

If there be several days mentioned for payment of money on a bond, the obligation is not forfeited, nor can be sued, until all the days are past: Yet in some cases the obligee may bring action of debt for the money due presently, though it be not forfeited; and by special wording the condition, an obligee may be able to sue the penalty on the first default. A man is bound to pay 20l. in manner following, that is to say, 10l. on one day and 10l. on another, after the first day action of debt lies for 10l. it being a several duty. 1 Co. Inst. 192. 2 Danv. Abr. 501.

Action of debt is generally prosecuted on a bill, bond or lease, &c. And in debt on single bill, a defendant may plead payment before the action brought in bar thereof; and on bond, he may bring in the principal, interest and costs, pending the action, and thereupon be discharged. 4 & 5 Ann.

2. An action of debt lies for rent in arrear, upon a lease for life or years; at common law it lay not on leases for life, but now by statute it may be had. 8 Ann. c. 17. If tenant in fee simple, or fee tail die, his executor may have action of debt by the stat. 32. H. 8. for arrears of rent incurred in the life-time of such tenants, or he may distrain for the same; but before this act the executor had no remedy. 1 Cro. 471.

If a rent or lease for years is reserved and made payable at four quarter days, the lessor may have action of debt after the first day of failure; for every quarters rent is a several debt, and distinct actions may be brought for each quarter. 5 Rep. 81. 2 Ventr. 129. An assignee of rent, upon a lease for years, shall have debt for it: And action of debt will lie against a lessee, for rent due after the assignment of the lease; for the personal privity of contract continues, though the privity of estate is gone: But it is otherwise if a landlord once accepts the rent of the assignee, knowing of the assignment. 1 Lev. 22.

When a lease is ended, the duty in respect of the rent remains, and debt lieth by reason of privity of contract between lessor and lessee. 2 Cro. 227.

3. Action of debt lieth upon a parol contract by word only, and so doth action on the case; And in some cases, debt will lie, although there be no contract betwixt the party that brings the action, and him against whom brought; for there may be a duty created by law. But action of debt lieth not against executors, upon a simple contract made by the testator: Though it lies for the arrearages of an account against executors, of receipts by the testator. 2 Saund. 343. 9. Rep. 87.

If goods or money are delivered to a third person for my use, I may have action of debt, or account on them. And where money is delivered to a person, to be re-delivered again, the property is altered, and debt lies: But where a horse, or any goods are thus delivered, there action of detinue lieth. Action of debt lies against the husband, for goods which were delivered or sold to the wife, if they come to the husband's use; And if one delivers meat, drink or cloaths to an infant, and he promises to pay for them, action of debt or on the case will lie against the infant; but what is delivered, must be averred to be for the necessary use of the infant. 2 Danv. Abr.

A man agrees with a taylor to make him a suit of cloaths, for a certain price; the taylor may bring a general action of debt against him for the money; but if the price is not agreed on, action of the case only lies, or special action of debt on the special contract. Wood's Inst. 544.

4. An attorney shall have an action of debt against his client, for money which he hath paid to any person for such client, for costs of suit, or to his counsel, &c. And an action of debt, or case, lies for an attorney

attorney for his fees, againſt him that retained him in his cauſe: But attornies are not to demand more than their juſt fees nor to be allowed any extraordinary fees to counſel, without tickets ſigned by them, &c. And it is ſaid to be a good plea to an action brought by an attorney for his fees, that the plaintiff did not give the defendant any bill of charges, according to the ſtat. Mich. 22 Car. B. R. ſtat. 3. Jac. 1. c. 7.

If a client, when his buſineſs in court is diſpatched, refuſeth to pay the officer his court fees; the court on motion will grant an attachment againſt him, on which he ſhall be committed until the fees are paid. 1 Lill. Abr. 598.

But officers guilty of extortion ſhall render treble value: And an action may be brought againſt attornies for extortion, and the party grieved ſhall have treble damages and coſts. 3 Ed. 1, &c.

5. Action of debt lies againſt a gaoler permitting a priſoner committed in execution to eſcape, for thereupon the law makes the gaoler debtor: And where the party is not in execution, there action on the caſe lieth for damages ſuffered by the eſcape. 1 Saund. 218.

If a priſoner eſcape who was in execution, his creditor may re-take him by *capias ad ſatisfaciendum*; or bring action of debt on the judgment, or a *ſcire facias* againſt him, &c. for he hath ſtill an intereſt in the body, as a pledge for the debt. If the priſoner makes a tortious eſcape, the perſon at whoſe ſuit he was taken in execution, may have an *alias cap.* to take him again; or action of the caſe againſt the ſheriff: But if the ſheriff voluntarily permit the eſcape, debt may be brought againſt the ſheriff. 1 Ventr. 269.

Debt lieth againſt a ſheriff, for money levied in execution: And if a defendant in execution is reſcued, the ſheriff is liable for the whole debt, and is to have his remedy againſt the reſcuer. Dy. 241.

6. A perſon may have action of debt upon an arbitrament; but not for debt referred to arbitration, which muſt be action on the caſe. Action of debt ſhall be brought for money adjudged to be paid by arbitrators, declaring on the award; and alſo upon the bond for not performing it. Brownl. 55.

2. The *action upon the caſe*, is a general action that is given for redreſs of wrongs and injuries, done without force, and which by law are not provided againſt. It is ſaid to have its name, on account of the whole cauſe or caſe being ſet forth in the writ; and there is no other action lies in the caſe. By ſtatute 'tis ordained, that this action ſhall be had, rather than any perſons ſhall depart the king's courts remedileſs; wherein there may be the like proceſs, as in actions of debt or treſpaſs. 13 Ed. 1. In general, action of the caſe lies for *nonfeaſance*, where a perſon omits that which he ought to do, according to promiſe, to the damage of another; and for *maleſeaſance*, when one does ſomething, which ought not to be done; and *miſfeaſance*, where a thing is undertaken or the law requires a perſon to do it, and he doth it otherwiſe than he ſhould. Croke Car. The actions are as various under theſe heads, as the torts and injuries upon which they are founded. For deceits in contracts, bargains and ſales; as where one ſells another adulterated wine, corn full of ſand or gravel, wares by falſe weights or meaſures, &c. warrants a horſe to be ſound, or clothes to be of ſuch a length, and they are not ſo, action upon the caſe will lie. 1 Danvers abr. So for any private nuiſance or annoyance to a perſon's houſe, water, way, light or air, building, diverting, ſtopping, &c. whereby he is endamaged. 2 Roll.

3. The *action of account*, is an action that lies againſt a perſon, who by reaſon of his office or buſineſs undertaken, is to render an account to another,

another, but refuſes to do it; as a bailiff or receiver to a lord and others. This action is now not ſo much uſed as formerly, there being no damages given by it.

4. The *action of covenant*, is ſuch as is brought where a man is bound by covenant in a deed, entered into by him and other perſons to do, or not to do ſome act or thing agreed between them, when he hath broke the ſame. In caſe it be agreed, that one perſon ſhall pay 100l. to another for certain lands, this is a mutual real covenant; and action of covenant lies, if the other party refuſeth to convey, &c. 2 Mod. On a bond action of covenant lies, for it proves an agreement; though when only a hand is to writing, and no ſeal thereto, covenant does not lie: but action of the caſe upon breach of agreement. 2 Danvers.

5. The *action of detinue*, is an action that lies againſt one who has got goods or other things delivered to him to keep, and he afterwards refuſeth to deliver them. For any thing certain and valuable, wherein one may have property, detinue will lie; in which action the thing detained is generally recovered, and not damages; tho' if a man cannot recover the thing itſelf, he ſhall recover the damages for it, and alſo for the detainer. 1 Inſt. If on the delivery of goods, the perſon to whom they are delivered dies, action of detinue may be brought againſt his executors, or any one to whoſe hands they come: And where the goods are delivered over to another, this action ſhall be immediately had againſt the ſecond perſon. And notwithſtanding the party deliver the things to a perſon that has right to the ſame, yet 'tis ſaid he is chargeable. 2 Danv.

6. The *action of trover and converſion*, which comes from the French *trouver*, *invenire*, is a ſpecial action of the caſe that lies againſt a perſon, who having found another's goods, refuſes to deliver them upon demand. Or it is where a man has in his poſſeſſion the goods of another by delivery to him, or otherwiſe, and the perſon ſo poſſeſſed ſells or makes uſe of them without the owner's conſent. And this action lies for the recovery of damages to the value of the goods, &c. 2 Lilly. It is called trover and converſion becauſe the plaintiff in the action ſurmiſes, that he loſt ſuch and ſuch goods, and that the defendant found them, and at ſuch a place converted them to his own uſe. But here the loſing is only a meer ſuggeſtion, and in no reſpect material. If a perſon find goods, and doth refuſe to deliver them to the owner on demand, this is a converſion in law; yet he may anſwer, that he does not know whether the perſon demanding is the right owner or not, and then it is held to be no converſion. 1 Danvers abr. Although a defendant tenders the goods or things, after a demand and refuſal made, or even if they come into the plaintiff's poſſeſſion, neither of theſe will purge the wrong, or make ſatisfaction to the plaintiff for detaining of the goods. For they ſhall only go in mitigation of the damages, but not to the right of the action of trover, which the party is ſtill entitled to. Mod. cal.

7. The *action of ſlander*, is an action of the caſe brought for words, where a perſon is injured in his reputation. And for any words ſpoke of another, which affect his life or liberty, office, trade or tend to his loſs of preferment in marriage, or ſervice, or to his diſinheritance, or which occaſion any particular damage, this action lies. Dyer.

8. The *action of aſſault or battery*, is an action that lies for treſpaſs againſt a man's perſon, where an injury is done to another in a violent manner: And ſuch offence is alſo indictable, though it is uſual not to proſecute an indictment, but to bring this action only for damages.

Terms

Terms de Ley. But if a perſon be aſſaulted or beaten, and he hath no witneſſes to prove the fact, the party inſtead of his action for the battery, may bring an information in the crown office againſt the aggreſſor, and there he ſhall be fined to the king. It is held that the leaſt touching of another perſon in anger, is a battery, which may be committed either by puſhing, jolting, or filliping upon the noſe, &c. and ſpitting in a man's face is battery, if not done by accident. Dalton. The laying hands gently on one is not battery to found an action; the law will not preſume any damage in ſuch caſe, and the defendant may juſtify *molliter manus impoſuit.* If a perſon is beaten by another, he may likewiſe return it, and plead that the plaintiff's battery was occaſioned by his own firſt aſſault, whereupon the defendant ſhall go quit, and the plaintiff be amerced. 2 Inſt. For the battery of the perſons wife, child, or ſervant, the huſband, father and maſter, ſhall have this action.

9. The *action of treſpaſs*, is that action at generally lies for any wrong or damage, which is done with force and arms by one private man to another; and it is ſometimes againſt the perſon and ſometimes againſt his lands and goods. The action of treſpaſs lieth where any one makes an entry on another's lands, and there does damage: alſo treſpaſs *vi & armis* may be brought by a perſon who has the poſſeſſion of goods, or of a houſe or land, if he be diſturbed in his poſſeſſion. 2 Rolls abr. To enter into an houſe againſt the will of the owner, is treſpaſs for which action lies; but a man may lawfully come into the houſe of another, to demand money, &c. yet it has been held, that if a perſon has a horſe in another man's ground, and he enters therein to take it away without leave, action of treſpaſs lies againſt him. 4 Shep.

10. The *action of waſte*, is an action that is brought where any waſte or deſtruction is made either in houſes, lands, or woods, &c. by tenants for life or years, to the damage of the heir or him in reverſion or remainder. 2 Inſt.

11. The *action of ejectment*, is now the common action for trial of titles, and recovering of lands, &c. illegally held and kept from the right owner. For it is become an action in the place of many real actions, ſuch as writs of right, *formedons*, &c. which are very difficult as well as tedious and expenſive. There is no arreſt required in this action, as now generally proſecuted; but if there be not a tenant in poſſeſſion, as where a houſe or land is empty, and no perſon can be found to whom the declaration may be delivered: In that caſe the plaintiff muſt proceed by ſealing a leaſe upon the land, &c. And an original writ is to be ſued out againſt the perſon who ejected the leſſee, and then ouſter and ejectment, &c. 1 Lilly. The uſual courſe of proceeding in ejectment is to draw a declaration only, and feign therein a leaſe for three, five, or ſeven years, to him that would try the title, and alſo feign a caſual ejector or defendant, and then deliver the declaration to the ejector, who ſerves a copy of it on the tenant in poſſeſſion. And at the ſame time gives notice at the bottom, for him to appear and defend his title, or that he the feigned defendant will ſuffer judgment by default, whereby the true tenant will be turned out of poſſeſſion of the lands. To this declaration, the tenant is to appear the beginning of the next term by his attorney, and conſent to a rule to be made defendant inſtead of the caſual ejector, and take upon him the defence, wherein he muſt confeſs leaſe, entry, and ouſter, and at the trial ſtand upon the title only. But if the tenant in poſſeſſion does not appear, and enter into the ſaid rule in time, after the declaration ſerved, then on affidavit being made of the ſervice of the declaration, with the notice to appear as aforeſaid, the court will order judgment to be entered againſt the caſual ejector by de-

fault, and thereupon the tenant by writ is turned out of his poſſeſſion. In caſe ſuch tenant appears to the action, having by his attorney filed common bail, and entered into the rule aforementioned, he is made defendant in the declaration, and put into the place of the ejector. And then the defendant's attorney muſt plead not guilty, and the attorney for the plaintiff draws up the iſſue in the cauſe, a copy whereof and of the declaration is to be delivered to the attorney for the defendant, whereupon notice is given of trial. In order to which, the writ of *venire*, &c. is to be made out and returned, and the record made up by the plaintiff's attorney, beginning with the declaration; then the *breviate* of the cauſe, is to be prepared, in which, after a ſhort recital of the declaration and plea, the plaintiff's title is to be ſet forth from the perſon laſt ſeized in fee of the premiſes, under whom the leſſor claims down to the client, the plaintiff proving the deeds, &c. And after the trial the proceedings are as in other caſes. 1 Lilly's Abr. By a late ſtatute, thoſe tenants to whom declarations in ejectment are delivered for any lands, &c. are to give their landlord's notice therefore on pain of forfeiting three years rent. And the court where ſuch ejectment ſhall be brought, may ſuffer the landlord to make himſelf defendant, by joining with the tenant, if he appears: but if he does not, judgment ſhall be ſigned. Though in caſe the landlord deſires to appear by himſelf, and conſents to enter into the like rule as the tenant, if he had appeared, ought to have done; the court ſhall permit him ſo to do, and order a ſtay of execution, &c. 11 Geo. 2.

Wherever a defendant is barred in any real action concerning lands, either by judgment upon verdict, demurrer, or confeſſion, &c. he may bring an action of a higher nature, and try the ſame right again, as it concerns the inheritance. But in perſonal actions, a debt, &c. a bar is perpetual; for the plaintiff cannot have his action of a higher nature, but his only remedy is by error or attaint; and ſometimes in the chancery.

Of Fictions, Intendments, and Preſumptions.

1. A FICTION, or feigned conſtruction of the law, is when in a ſimilitudinary and colourable way the law conſtrueth a thing otherwiſe than it is in truth: and therefore fictions were formerly termed an abuſe of the law; but have been a long time thought neceſſary, and allowed of in ſeveral caſes. As a common recovery is *fictio juris*, or a formal device for the docking of an eſtate-tail, &c. that was contrived, when thoſe eſtates came to be inconvenient, and could not be altered for any good end or purpoſe. The ſeiſin of the conuſee in a fine, is alſo but a fiction of law, it being only an invented form of conveyance to paſs eſtates: And in the action of ejectment, there is both a fictitious leaſe to try the title, and a feigned caſual ejector; yet this is the moſt common real action. Likewiſe if a bond is made at a place beyond ſea, it may be pleaded to be done there in Iſlington in the county of Middleſex, by fiction of law, in order to try the ſame here, &c. 1 Co. Inſt. But the law ought not in caſes to allow of fictions, where it may be otherwiſe really ſatisfied; and there is to be equity and poſſibility in every legal fiction. And it is obſerved, that no fiction ſhould unlawfully work any damage, or injury to another. 10 Rep.

2. *Intendment*, in our law, ſignifies the underſtanding, intention and true meaning of a thing; which ſupplies what is not fully expreſſed or apparent. So that where a thing is doubtful, intendment may make it out;

out; likewise many things shall be intended after a verdict in a cause; but intendment cannot supply the want of certainty, in a charge laid in an indictment for any crime, &c. which must be expressly found. 2 Hawkins. A thing may be necessarily intended by something that goes before or follows it; and where in a suit an indifferent construction may bear two intendments, it is a rule in law to take it strongly against the plaintiff. In case a person be bound by bond to another, and it is not expressed to whom the money shall be paid, or even if said to the obligor, the law will intend it to be payable to the obligee, who lent it. And where no time of payment is limited, the law intends that the money is to be paid immediately. 2 Lilly. In deeds and contracts, the intents of parties is much regarded by the law; yet it shall not take place against the direct rules of law; and in conveyances of estates, our law does not admit them regularly to pass by intendment and implication. Though in devises of lands, they are allowed with due restrictions, that is to say, where the devisee must necessarily have the thing devised by will, and no other person whatsoever can have it. Vaughan. No intendment or implication shall be allowed against an estate limited by express words to drown the same.

3. *Presumption*, denotes in law an opinion or belief of things, so strong as to amount to proof and evidence thereof. Where all the witnesses to a deed of a feoffment or other conveyance of lands are dead, there violent presumption, which stands for a proof, is continual and quiet possession. If where a defendant pleads payment to a bond, the debt appears by the bond to have been of a very long standing, and no demand can be proved to have been made, nor interest paid for many years; it shall be presumed that the bond is paid, though the plaintiff has it in his custody, 1 Co. Inst. Also if rent be in arrear for twenty years or upwards, and the landlord does give a receipt for the last year's rent due, 'tis in our law presumed that all the rest is satisfied. And so in some other instances, tho' presumption is what may be doubted of, yet it shall be accounted true, if the contrary be not proved. In a criminal case, if a person is found killed in a house, and at the same time a man is seen to come out there with a bloody knife or sword, and no other person was then in the house; this is a violent presumption which will be admitted for evidence, that that man was the murderer. But here a precaution is given, that on such presumption or circumstantial evidence, without other proof by witnesses, the court ought not to judge hastily. 2 Inst.

F I N I S.